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6-20-02
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN
VIETH, and SUSAN FUREY,

Plaintiffs,

v.

THE COMMONWEALTH OF
PENNSYLVANIA; MARK S.
SCHWEIKER, et al.,

Defendants.

No. 1: CV 01-2439
✓ Judge Rambo, Judge
Yohn, Judge Nygaard

FILED
HARRISBURG, PA

JUN 18 2002

MARY E. D'ANDREA, CLERK
Per Deputy Clerk

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATUS
REPORT REGARDING ACT 34'S POPULATION DEVIATION

On April 8, 2002, this Court declared the act creating Pennsylvania's congressional districts (Act 1) unconstitutional as creating an unjustified 19-person deviation from the one-person, one-vote principle expressed in *Karcher v. Daggett*, 462 U.S. 725 (1983). The Court ordered the General Assembly to "enact and submit for review and final approval by this Court" a constitutional redistricting plan. *See Order*. On April 17, 2002, the General Assembly passed a bill (Act 34) purporting to conform to *Karcher's* equal population standard. As Plaintiffs' previously filed Motion to Impose Remedial Districts makes clear, however, Act 34 does not remedy the constitutional violation. To the contrary, Act 34 exacerbates it. Nothing that has occurred in the interim changes that conclusion and nothing that might happen in the future will.

Act 34 contains an unjustifiable population deviation of 97 persons.¹ In passing Act 34, the General Assembly ignored the fact that on March 15, 2002, a month before the General Assembly passed Act 34, the Armstrong County Court of Common Pleas adjusted the boundary between two precincts in South Buffalo Township. Because Act 34 (like Act 1) defines congressional districts in terms of the precincts that they contain, the legal description of Act 34 creates a 97-person deviation. On May 2, 2002, the Court requested that the Defendants file a status report on the Armstrong County issue by June 3, 2002. Plaintiffs respectfully submit this response to the Defendants' reports.

ARGUMENT

The Defendants suggest that the issue now before the Court is a question of how a valid statute (*i.e.*, Act 34) will be administered and that the Court's focus should therefore be on the actions of the Armstrong County Board of Elections rather than on Act 34. But Plaintiffs are not currently challenging the manner in which the Armstrong County Board of Elections administered the May 21, 2002 primary. Rather, the issue before the Court now is whether Act 34 itself remedies the previously found constitutional violation or is itself a constitutional violation. The pending issue is thus not a question of election administration but of statutory

¹ The Presiding Officer Defendants suggest in their status report that Act 34 involved a good faith effort to achieve equal population. As this Court's own opinion makes clear, however, *Karcher's* "good faith effort" requirement asks whether a plan with lower deviation is possible. See Opinion at 5 n.3 ("*Karcher* is wrought with references indicating that the least deviation *possible* is that which should govern the analysis."). A mistake about the population contained in particular precincts cannot justify a deviation from the constitutional requirement.

interpretation: Does Act 34 remedy the constitutional violation identified in the Court's April 8 Order?

Defendants' Status Reports concede that the order issued by the Armstrong County Court of Common Pleas changing the boundary lines remains in effect. They contend, however, that the Armstrong County order has no effect on the validity of Act 34. This argument is plainly wrong. Defendants further represent that Act 34 remedies the constitutional violation, a suggestion that is factually wrong.

**I. THE *ROOKER-FELDMAN* DOCTRINE
PROHIBITS THIS COURT FROM FINDING THAT
THE STATE COURT ORDER DOES NOT AFFECT ACT 34.**

As an initial matter, this Court must respect the order of the Armstrong County Court of Common Pleas as authoritative and reject Defendants' argument that the state court order is "irrelevant" because it was "prohibited by statute," and should therefore be ignored by this Court. Presiding Officers' Status Report at 4. Defendants' approach, in addition to being disrespectful to the state court, asks this Court to take actions barred by the *Rooker-Feldman* doctrine.²

² The notion that a party can treat a validly issued court order as ineffective based on the party's view that the Order is improper is remarkable. Even if that principle were correct, Defendants would still be wrong that the state court order was illegal. Although one state statute limits courts' powers to "establish, abolish, divide, or consolidate" precincts during certain dates, *see* 25 P.S. §2746, none of those powers was at issue here. Rather, the Court of Common Pleas acted pursuant to its broad power to "alter the bounds of any election district" under 25 P.S. §2702. The state court thus acted in accord with a straightforward reading of the state statute, and there is no reason for a federal court to question that decision.

The *Rooker-Feldman* doctrine prevents federal courts from hearing a matter whenever the federal court, in order to grant the requested relief, “must determine that the state court judgment was erroneously entered or must take action that would render that judgment ineffectual.” *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996).³ Where the issue is one that is primarily local, such as the boundaries of precincts, the federal court’s duty to abide by a state court ruling is even more stringent. *See, e.g., Old Colony Trust v. Omaha*, 230 U.S. 100, 116 (1913) (“We need not say more . . . than that, as the decisions relate to matters of local law, namely, the construction of the state Constitution and statutes and the powers of local municipal corporations, they must be regarded by us as controlling, when their application involves no infraction of any right granted or secured by the Constitution of the United States.”); *Krauss v. Greenbarg*, 137 F.2d 569, 571 (3d Cir. 1943) (“However, as this Court has said many times since *Erie Railroad v. Tompkins*, our duty is to apply state law as we find it in the state decisions irrespective of what we may regard as its merits.”).

For purposes of this Court’s consideration of the pending issues, the Armstrong Court Order is authoritative and must be provided the respect and force due any properly issued court order unless and until reversed or vacated.

³ Although the *Rooker-Feldman* doctrine by its own terms protects judgments of “a state’s highest court,” the Third Circuit has interpreted the doctrine “to encompass final decisions of lower state courts.” *In re General Motors Corp.*, 134 F.3d 133, 143 (3d Cir. 1998).

**II. ACT 34'S CONGRESSIONAL DISTRICTS
INCORPORATE THE VOTING DISTRICTS AS
THEY EXISTED AT THE TIME OF ITS ENACTMENT.**

Act 34 incorporates the precincts that existed on the date of its passage.⁴ The General Assembly could have incorporated the precincts as they existed on some different date, (e.g., stating that the congressional district legal definitions were incorporating the precincts as they were defined on some specific date), but it did not do so. There is no basis for the Court to assume that the legislature intended to incorporate some other, unspecified precincts than those that existed when it passed the bill, let alone subsequent changes a court of county pleas might make to a precinct's legal definition. Such subsequent changes, *i.e.*, a court order altering the legal definition of precincts, could thus have no effect on the legal definitions of the districts Act 34 created.

Defendants suggest that the scheduled July 15 hearing before the Armstrong County Court regarding the March 15 order might remedy the violation in Act 34. But contrary to Defendants' suggestions, the March 15 order did not alter the boundaries of the Act 34's congressional districts, which were not created until more than a month after the March 15 order. Rather, the state court order merely changed the legal definition of two precincts, an alteration that was completely within the court's power. *See* 25 Pa. Stat. §2702.

If changes like those apparently now being sought in the state court *could* alter existing congressional districts, then throughout the decade, state courts could

⁴ *Rooker-Feldman* does not, of course, prevent the Court from reviewing Act 34, the validity of which is within this Court's continuing jurisdiction.

indeed alter the congressional districts lawfully enacted by the General Assembly or imposed by this Court – which is exactly the result that Defendants correctly reject as absurd. *See* Presiding Officers’ Status Report at 5. The only sensible interpretation is that, absent affirmative evidence to the contrary, the legislature incorporated the precincts as they existed on the date of passage.

There is thus no reason for this Court to delay its review of Act 34 pending further hearings in state court. Even if the July 15 hearing moves precinct lines once again, those changes will have no effect on Act 34, because it incorporated the precincts as they existed on its date of passage and subsequent changes cannot alter the congressional districts that Act 34 created.

**III. BECAUSE ACT 34 FAILS TO REMEDY THE
CONSTITUTIONAL VIOLATION, THIS COURT SHOULD
IMPOSE REMEDIAL DISTRICTS OR BEGIN REMEDIAL HEARINGS.**

Because Act 34 creates an unjustifiable population deviation of 97 persons, and no subsequent state court adjustment of the precinct boundaries can alter Act 34’s congressional district boundaries after it has been enacted, this Court should grant the Plaintiffs’ Remedial Motion and either impose remedial districts itself or begin remedial hearings. Plaintiffs recognize that the Court has ordered that the 2002 general elections proceed under Act 1, and do not here contest the stay allowing the election to proceed. However, inasmuch as the State has now failed a second time to enact constitutional congressional districts, there is no reason to believe that a third attempt will be more fruitful. Pursuant to its authority under *Karcher v. Daggett*, 466 U.S. 910 (1984) (*Karcher II*) and *Karcher v. Daggett*, 467 U.S. 1222 (1984) (*Karcher III*), as explained in Plaintiffs’ Motion to Impose

Remedial Districts and, in the Alternative to Reject Act 34 and Begin Remedial Hearings, the Court should impose a new set of congressional districts that conform to the one-person, one-vote constitutional standard.

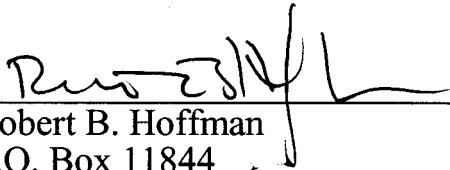
CONCLUSION

For the foregoing reasons, the Court should declare that Act 34 fails to remedy the constitutional violation and should impose remedial districts.

Respectfully submitted,

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Dated: June 18, 2002

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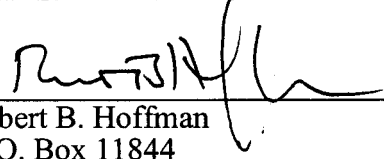
CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing
document to be served by first class mail, postage prepaid on June 18, 2002 as follows:

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