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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439 (Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

REPLY BRIEF FOR DEFENDANTS LIEUTENANT GOVERNOR JUBELIRER AND SPEAKER RYAN IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

On January 29, 2002, Defendants Lieutenant Governor Jubelirer & Speaker Ryan ("Presiding Officers") filed a motion to dismiss the Amended Complaint ("Am. Compl."), and a brief in support thereof. As per this Court's scheduling order of January 30, 2002, Plaintiffs filed their brief in opposition on February 5, 2002. Presiding Officers now file this reply.[1]

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[1] In the parallel *Erfer* case, under instruction from the Pa. Supreme Court (which has assumed jurisdiction over the *Erfer* Petitioners' state constitutional claims), the Commonwealth Court of Pennsylvania held an evidentiary hearing on the state constitutional claims on Friday, February 1, 2002. On February 5, 2002, both sides filed proposed finding of fact & conclusions of law and post-hearing briefs with Commonwealth Court, which must file its findings & conclusions with the Pa. Supreme Court by noon, February 8, 2002. A copy of Presiding Officers' proposed findings of fact & conclusions of law, supporting brief and appendix is attached at Tabs 1, 2 and 3.

Also on February 5, 2002, the *Erfer* Petitioners asked the Pa. Supreme Court to expand its jurisdiction to include Petitioners' federal partisan gerrymandering claim. *See* Motion, attached at Tab 4; *see also* Presiding Officers' response, attached at Tab 5 (note: the tabs referred to in Presiding Officers' response are not included here as they were mostly pleadings already before this Court). There is no pretense (to the extent there ever was one) of separation between the *Erfer* Petitioners and the Plaintiffs herein, as the *Erfer* Petitioners' most recent request to the Pa. Supreme Court makes very clear:

> [T]he federal defendants filed a Motion to Reconsider the order setting the expedited hearing date in that case [i.e., *Veith*]. After being informed of the expedited schedule set this case [i.e., Commonwealth Court's February 1st hearing date], the federal court in *Veith* moved the evidentiary hearing previously scheduled for February 11 back to March 11, 2002. As a result, the federal constitutional challenges to Act 1 will no longer be addressed in the *Veith* case in advance of the start of the 2002 election process. *In light of these changed circumstances*, Petitioners are now asking this Court [i.e., the Pa. Supreme Court] to enlarge its previous grant of expedited review to encompass Petitioners' federal constitutional claims of partisan gerrymandering ... .

Tab 4 ¶¶11-13 (emphasis added). Plaintiffs' counsel seek to vindicate the interests of the national Democrat party both here and in *Erfer* through the guise of individually-named voters. Notably, there was no evidence introduced at the hearing before Commonwealth Court as to the named *Erfer* Petitioners' existence or interests (and the extent to which they are consonant with other democrat voters in Pennsylvania). *See* Tab 1, ¶1; Tab 2 at 33. The *Erfer* Petitioners' ploy before the Pa. Supreme Court is to preserve the remainder of its federal constitutional challenges for resolution by this three-judge court should the national Democrat party be dissatisfied with the outcome in *Erfer*. This strategy is disrespectful of the interests of both courts in judicial economy and efficiency. On February 7, 2002, the Pa. Supreme Court denied the motion, ordering:

ARGUMENT

I. STANDING

A. Partisan Gerrymandering

The plurality opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986), cannot be understood as having decided that "[a] partisan gerrymandering challenge to a congressional redistricting plan is *necessarily* a statewide claim." Plaintiffs' Brief at 1 (emphasis added). The *Bandemer* plurality was agreeing with the district court's characterization of the claim brought by the *Bandemer* plaintiffs as a statewide challenge; its statements in that context are case-specific. *See* 478 U.S. at 127 (citing the complaint and using phrases such as "in this case," and "appellees' claim, as we understand it"). Notably, the plurality did not address the *Bandemer* plaintiffs' standing to represent the interests of a group. Whether individual members of a group have standing to assert harm to the interests of the group (i.e., some odd form of reverse associational standing) and/or to all "Democrat voters" in the Commonwealth of Pennsylvania (i.e., a stealth class action notable for the absence of any allegations that Democrats in Pennsylvania share a common interest) in a partisan gerrymandering challenge is an open issue. No case specifically addressing standing in a partisan gerrymandering context has been located.

Plaintiffs seek to distance themselves from federal precedent involving racial gerrymandering on the issue of standing (relied on by Presiding Officers in the absence of any guidance in the partisan gerrymandering context), yet rely on those

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> AND NOW, this 7th day of February, 2002, Petitioners' Motion to Assume Jurisdiction Over and Expedite Consideration of Federal Claims due to the federal district court's alteration of its hearing schedule in Veith v. Commonwealth of Pennsylvania, Civil No. 1:CV-01-2439 is DENIED.

Order 14 MM 2002 (Feb. 7, 2002).

same cases in their opposition to the substantive motion to dismiss. They cannot have it both ways. Petitioners' theory of harm, tied as it is to a group, would mean that Democrat voters in Ohio would have standing to challenge Pennsylvania's Act 1 since it allegedly deprives Democrat voters of their strength as a *group*. It would also mean that black voters in hypothetical district 1 would have standing to assert a gerrymandering claim against hypothetical district 14 (located across the state) because black voters are also a *group* whose interests are arguably violated when any congressional district is drawn exclusively or predominantly on the basis of race. The Supreme Court has rejected the latter notion in favor of an individualized showing of harm sufficient to meet established principles of standing, *see United States v. Hays*, 515 U.S. 737 (1995); *Sinkfield v. Kelley*, 531 U.S. 28 (2000) (*per curiam*), and would most likely employ the same reasoning to reject a theory permitting the former.

II. FAILURE TO STATE A CLAIM

A. Claim I (One-Person, One-Vote)

Research has disclosed no Supreme Court decision addressing the validity of a congressional redistricting plan under the one-person, one-vote principle where the population deviation is 0.00%. *Karcher v. Daggett*, 462 U.S. 725 (1983), does not set a standard of a no-person deviation among districts, as Plaintiffs contend. The Court in *Karcher* established a shifting burden standard to determine whether a challenged congressional plan met the standard set in *Wesberry v. Sanders,* 376 U.S. 1, 8 (1964), of districts with equal population "as nearly as is practicable." The challenger of the plan must prove "whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort." *Karcher*, 462 U.S. at 730. If, and only if, the challenger succeeds in proving that does the burden then shift to the state to prove "that each *significant* variance

between districts was necessary to achieve some legitimate goal." *Id.* (emphasis added). Moreover,

> [t]he showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.

Karcher, 462 U.S. at 742.

Presiding Officers did *not* argue in their main brief, as Plaintiffs contend, "that Plaintiffs were required to attach to their complaint a map showing less population deviation is possible." Plaintiffs' Brief at 4. Rather, Presiding Officers pointed out that Plaintiffs had failed to "allege that a plan with a smaller deviation could have been drawn or that the deviations were avoidable." Presiding Officers' Main Brief at 8-9. Attaching a map showing that a lesser population deviation is possible would not cure the defect. Plaintiffs have, quite simply, failed to plead the necessary facts, which if true, would establish that the alleged population difference between the districts put in place by Act 1 could have been reduced or eliminated altogether by a good-faith effort. Moreover, just proving that a plan with a lower deviation can be drawn does not meet the standard. Such lower deviation plan must also reflect the state goals achieved by the challenged plan. *See White v. Weiser*, 412 U.S. 783, 795 (1973) ("Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in ... the reapportionment plans proposed by the state legislature, ... we hold that a district court should similarly honor state policies in the context of congressional reapportionment.").

B. Claim II (Partisan Gerrymandering)

1. U.S. CONST. art. I, §4

The Supreme Court held in *Bandemer* that partisan gerrymander claims are justiciable under the Fourteenth Amendment. U.S. CONST. art. I, §4, which grants authority directly and exclusively to state legislatures to establish the time, place and manner for electing members of Congress, appears never to have been used as an independent or collaborative basis for invalidating a congressional reapportionment statute as a partisan gerrymander.[2] Any argument that this provision provides protection against partisan gerrymandering is essentially an argument for proportionality, a requirement that the Supreme Court roundly rejected in the redistricting context. *See Bandemer*, 478 U.S. at 132 ("a failure of proportional representation alone does not constitute impermissible discrimination"); *see also id.* at 158-159 (O'Connor, J., concurring in the judgment only) (explaining that there is no constitutional preference for proportionality).

2. U.S. CONST. amend XIV - standard

Bandemer was not only the Supreme Court's "first attempt" to define partisan gerrymandering, Plaintiffs' Brief at 13, it is also, to date, that Court's only attempt to define partisan gerrymandering. Contrary to Plaintiffs' contention, the Supreme Court in *Shaw v. Reno*, 509 U.S. 630 (1993), did not "further clarif[y] the boundary" as between constitutional and unconstitutional partisan gerrymandering. Plaintiffs' Brief at 13. *Shaw v. Reno* was merely the case that initiated the growing

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[2] This provision has been used recently for other purposes. *See U. S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (invalidating state constitutional amendment prohibiting the name of an otherwise eligible candidate for Congress from appearing on the general election ballot if that candidate has already served set number of terms); *Cook v. Gralike*, 531 U.S. 510 (2001) (invalidating state constitutional amendment providing that incumbents members of state's congressional delegation who failed to abide by an instruction, or candidates who refused to support, an attempt to amend the U.S. Constitution to include term limits would have a derogatory notation to that effect by their name on the ballot).

tension between equal protection claims of racial gerrymandering and partisan gerrymandering.

While the plurality in *Bandemer* derived the standard for showing a *prima facie* case of partisan gerrymandering in connection with redistricting from its racial gerrymandering cases, the partisan gerrymandering showing is different from that applied in other equal protection claims and from that applied in racial gerrymandering. The difference flows from the fact that redistricting is a legislative chore, not a judicial one, and the recognition that districting "'inevitably has and is intended to have substantial political consequences.'" *Bandemer*, 478 U.S. at 129 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). As a result, the plurality in *Bandemer*, explained that "it is [] appropriate to require allegations and proof that the challenged legislative plan has had or will have [discriminatory] effects that are sufficiently serious to require intervention by the federal courts in state reapportionment decisions." 478 U.S. at 134. In connection with this explanation, the plurality noted: "The requirement of a threshold showing is derived from the peculiar characteristics of these political gerrymandering claims. We do not contemplate that a similar requirement would apply to our Equal Protection cases outside of this particular context." *Id.* at n.14.

Subsequent decisions of the Supreme Court in connection with racial gerrymandering claims reveal tremendous tension between the concepts of racial gerrymandering and partisan gerrymandering. To establish a *prima facie* case of racial gerrymandering in connection with redistricting, the Supreme Court requires a plaintiff to show that:

> race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral

> considerations are the basis for redistricting legislation, and are not subordinated to race, a state can defeat a claim that a district has been gerrymandered on racial lines.

Miller v. Johnson, 515 U.S. 900, 916 (1995) (citation and internal quotation marks omitted; emphasis added). The tension arises because the U.S. Supreme Court has found "constitutional political gerrymandering" to be a "traditional race-neutral" principle. *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("*Hunt I*"). *See Hunt v. Cromatie*, 532 U.S. 234 (2001) ("*Hunt II*") (concluding that "politics" not race was the predominant reason for the challenged district being drawn in the fashion it was). In *Hunt I*, the U.S. Supreme Court concluded that summary judgment for those challenging the plan was improper because there was a material question of fact as to whether the legislature's predominant intent in drawing the challenged district was political or racial. In neither *Hunt I* nor *Hunt II* did the U.S. Supreme Court provide an exclusive list of permissible "political" intent. Among the political items mentioned as being asserted by the defenders of the plan were "the intent to make [the challenged district] a strong Democratic district" and "protect[ing] incumbents." In other words, it can be legitimate for politics to be a predominate reason for drawing districts but it is never legitimate for race to be predominate reason.

Another difference between racial and partisan gerrymandering is the level of scrutiny to be applied. In racial gerrymandering claims, once it is shown that race was the predominate reason for drawing a district, the *prima facie* case has been met and the burden shifts to the proponent of the plan to show a compelling state interest to justify the use of race, i.e., strict scrutiny applies. *Miller*, 515 U.S. at 920. The reason for strict scrutiny is that classification on the basis of race is suspect. *See Shaw,* 509 U.S. at 642 (1993) ("racial classifications immediately suspect"). Partisan gerrymandering, however, is different. Classification on the basis of major political party, party registration, or voter performance is not

suspect and is not, in and of itself, unconstitutional. Political gerrymandering is not subject to strict scrutiny. *See Bush v. Vera*, 517 U.S. 952, 964 (1996) ("We have not subjected political gerrymandering to strict scrutiny."). In other words, a rational basis is all that is required to support partisan gerrymandering. As the U.S. Supreme Court explained in *Shaw v. Reno*:

> This Court has held political gerrymanders to be justiciable under the Equal Protection Clause. But nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting –as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race would seem to compel the opposite conclusion.

509 U.S. at 650 (citations omitted). If strict scrutiny were applied every time partisan affiliation was used as a factor, even the predominant reason, for drawing district lines it would create a monumental problem. As the *Bandemer* plurality explained:

> [W]e reject the District Court's apparent holding that *any* interference with an opportunity to elect a representative of one's choice would be sufficient to allege or make out an equal protection violation, unless justified by some acceptable state interest that the State would be required to demonstrate. In addition to being contrary to the above-described conception of an unconstitutional political gerrymander, such a low threshold for legal action would invite attack on all or almost all reapportionment statutes. District-based elections hardly ever produce a perfect fit between votes and representation. The one person, one vote imperative often mandates departure from this result ... .

478 U.S. at 133 (emphasis original).

3. Plaintiffs' allegations

When closely read, it becomes apparent that Plaintiffs' allegations as to the strength of Democrat registration and Democrat votes are misleading. When all registered voters and all votes are taken into consideration, rather than just those who register Democrat or Republican and just those who vote for Republican and Democrat candidates (the way Plaintiffs present the data), the Democrat majority

percentages pleaded by Plaintiffs disappear. Democrats in Pennsylvania do not, as Plaintiffs assert, "constitute at least half of Pennsylvania's voters." Plaintiffs' Brief at 19.

Plaintiffs allege that there are 3,733,739 registered Democrats and 3,233,171 registered Republicans in Pennsylvania. Am. Compl. ¶25. However, Plaintiffs fail to allege the number of registered voters who are independent or registered with other parties. Plaintiffs' figures appear to come from an "unofficial" source. The figures can be found on the Pennsylvania Department of State website under the heading "Unofficial Voter Registration Data, November, 2001." *See* http://www.dos.state.pa.us/bcel/arc/nov01vr.htm.[3] This same document shows the unofficial total voter registration in Pennsylvania to be 7,773,541, with 3,266 registered "Green" and 803,365 registered "Other." *Id.* Using the unofficial total voter registration, rather than just that of Republicans and Democrats, Democrats constitute 48.0% of the registered voters and Republicans constitute 41.6% of the registered voters.[4] Democrats have a plurality, not a majority, of the registered voters.

Pennsylvania's current congressional delegation (elected in 2000, and a special election in 2001, under the 1992 court-ordered plan) has 11 Republicans and 10 Democrats. *See* THE PENNSYLVANIA MANUAL, *Federal Government* (115th

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[3] A copy of the unofficial numbers is at Tab 6 of the Appendix to this brief.

[4] The "unofficial" voter registration numbers for November 2001 are used because those are what Petitioners allege. Tab 3 (at Tab G) contains a certified copy of the official voter registration numbers for November 2001. This Court may take judicial notice of those numbers. *See* F.R.E. 201, 902. *See also Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, 998 F.2d 1192, 1196-97 (3d Cir. 1993) (court can consider indisputably authentic document attached to motion to dismiss if plaintiffs' claims are based on the information contained therein). The numbers, however, are not significantly different.

ed. 2001).[5] In the 2000 congressional races, a total of 4,552,010 votes were cast. *See* Official General Election November 7, 2000 Returns for U.S. Congress.[6] Collectively, the Republican candidates received 2,229,057 (49%) votes, the Democrats received 2,279,227 votes (50%), and other candidates received 43,726 (1%) votes. *Id.*, Am. Compl. ¶26. Plaintiffs ignore the votes received by candidates who were not Republican or Democrat, thereby achieving a faux-majority. *See* Am. Compl. ¶26.

In the five statewide races held in 2000, Plaintiffs allege that the Democrat candidates received 67,000 more votes than the Republican candidates out of the 22,923,739 votes cast for Republican and Democrat candidates. Am. Compl. ¶27. The official election results for those elections show that the total number of votes cast in the five elections was 23,612,214. *See* Official 2000 General Election Results.[7] Of the total votes cast, Republican candidates received 11,428,698 (48.4%) and Democrat candidates received 11,495,041 (48.7%), and candidates other than Republicans and Democrats received 688,475 (2.9%) of the votes cast. *See id.*; Am. Compl. ¶27. Plaintiffs ignore the votes received by candidates who were not Republican or Democrat. *See* Am. Compl. ¶27. Republicans won three of the five races. *See* Official 2000 General Election Results. The below chart summarizes the votes cast in the elections:

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[5] THE PENNSYLVANIA MANUAL (115th ed. 2001) is available through the Pa. Dept. of General Services website at www.dgs.state.pa.us/PAManual/home.htm. *See* Tab 3 (at Tab H).

[6] These results are publicly available on the Pennsylvania Department of State's website at http://web.dos.state.pa.us/elections/elec_results/cgi-bin/elec_menu.cgi, through a county search. For a certified copy of the results, see Tab 3 (at Tab I). This Court can take judicial notice of this self-authenticating document.

[7] These results are publicly available through the Pa. Dept. of State's website at http://web.dos.state.pa.us/elections/elec_results/cgi-bin/elec_menu.cgi through an office search. *See also* Tab 3 (at Tab I).

Election	Total Votes Cast	Republican Candidate	Democrat Candidate	Other Candidate
President	4,912,185	2,281,127 (46.4%)	2,485,967 (50.6%)	145,091 (3.0%)
U.S. Senator	4,735,116	2,481,962 (52.4%)	2,154,908 (45.5%)	98,246 (2.1%)
Attorney General	4,619,438	2,495,253 (54.0%)	1,991,144 (43.1%)	133,041 (2.9%)
Auditor General	4,664,541	1,862,934 (39.9%)	2,651,551 (56.9%)	150,056 (3.2%)
State Treasurer	4,680,934	2,307,422 (49.3%)	2,211,471 (47.2%)	162,041 (3.5%)

Contrary to Plaintiffs' assertion, the situation here does not "contrast[] dramatically with the facts present in *Bandemer.*" Plaintiffs' Brief at 19. *Bandemer* involved legislation that drew new state legislative districts. The three-judge decision in *Bandemer* (reversed by the U.S. Supreme Court) shows the following facts about the redistricting plan: (a) it contained multimember state House districts; (b) the state was a "swing" state (supported by Democrat candidates receiving 56% of the statewide vote in 1974, 1964 and 1958 and Republicans receiving 58% in 1989, 1972 and 1956); (c) in 1982 Democrat candidates for state House received 51.9% of the statewide votes but only won 43 of the 100 House seats (43%); (d) in 1982, Democrat candidates for state Senate received 53.1% of the vote and won 13 of the 25 seats up for election. *Bandemer v. Davis*, 603 F. Supp. 1479, 1484-86 (1984).

Comparison of the two situations is difficult. Act 1 is a congressional redistricting plan, not a state legislative redistricting plan, and has no multi-member districts. The most significant difference is that the 1982 election results in *Bandemer* occurred under a challenged plan, while no election has been held under Act 1. Plaintiffs' comparison to the facts in *Bandemer* is not particularly enlightening, especially given that the U.S. Supreme Court reversed the three-judge court's holding that the plan was invalid, and certainly adds nothing to their

argument that they have alleged facts that if true would establish a *prima facie* case of partisan gerrymandering.

Plaintiffs' allegations of partisan gerrymandering flow from their contention that "the predictable result of Act 1 is that Democrats will win less than one-third of the seats in Pennsylvania's congressional delegation." Plaintiffs' Brief at 19 (citing Am. Compl. ¶28). Such a contention is simply insufficient to establish partisan gerrymandering, no matter how many different iterations in which it appears. Plaintiffs fail to allege any facts that would meet the threshold requirement of showing "actual discriminatory effects" on Democrat voters, registered Democrats or the Democrat party (even assuming that Plaintiffs have standing to assert harm to these "groups" and that the "groups" are sufficiently cohesive to be considered "politically identifiable groups").

Plaintiffs fail to allege facts (1) "of an actual or projected history of disproportionate results" or (2) "that 'the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.'" *Terraszas v. Slagle*, 821 F. Supp. 1162, 1172 (W.D. Tex. 1993) (quoting *Bandemer*, 478 U.S. at 132). Plaintiffs just make the bald assertion that elections under Act 1 will result in a history of disproportionate results. Am. Compl. ¶28. Without the factual allegations of a history of disproportionate results and consistent degradation of influence on the political process as a whole, Plaintiffs' complaint does not state a claim upon which relief can be granted. *See* Presiding Officers' Main Brief at 16-19.

CONCLUSION

For the reasons set forth above, Presiding Officers request that the Am. Compl. be dismissed with prejudice.

Respectfully submitted,

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February 8, 2002

CERTIFICATE OF SERVICE

I certify that on February 8, 2002, I caused a copy of the foregoing Reply Brief in Support of Presiding Officers' Motion to Dismiss to be served on the following in the manner indicated:

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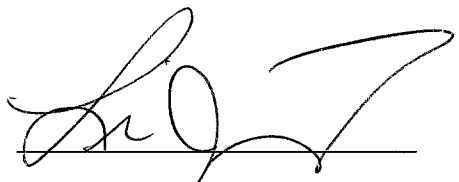

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