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

RICHARD VIETH and NORMA JEAN VIETH, Plaintiffs	:	
v.	:	NO. 1:CV-01-2439
THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	(JUDGE RAMBO)
Defendants	:	

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS COMMONWEALTH OF PENNSYLVANIA, GOVERNOR SCHWEIKER, SECRETARY PIZZINGRILLI AND COMMISSIONER FILLING

Respectfully submitted,

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This action concerns a challenge to Act 2002-1 (Act 1), the legislation that drew the new congressional districts based upon the 2000 census. The Commonwealth of Pennsylvania, Governor Schweiker, Secretary Pizzingrilli, and Commissioner Filling (collectively the Executive Officers) have filed a motion to dismiss plaintiffs' amended complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). The Commonwealth and Executive Officers submitted a brief in support their motion to dismiss. Plaintiffs have now filed a response and the Commonwealth and Executive Officers file this reply brief.

I. PLAINTIFFS LACK STANDING TO BRING A PARTISAN GERRYMANDERING CLAIM.

It is axiomatic that in order to establish standing there must be more than a generalized injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). This axiom has been applied in the redistricting context. *United States v. Hays*, 515 U.S. 737, 743 (1995). In that case, plaintiffs challenged the redistricting plan in its entirety. The Court specifically rejected the assertion that anybody in the state had standing to challenge the plan as a whole. The resulting injury "accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." *Id.* at 743-744.

Plaintiffs in their brief do not refer to *Hays*. They cite to no authority challenge its holding that where a redistricting plan is challenged in its entirety, every voter in a state does not have standing to make such a challenge. "Only those citizens

treatment may bring such a challenge . . . ." *Hays, supra*, at 743 (quotations and internal citations omitted). *See also Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (plaintiffs must allege and produce evidence to establish that they were assigned to a specific district as a direct result of having personally been denied equal treatment).

Rather than referring to *Hays*, plaintiffs cite to *Davis v. Bandemer,* 478 U.S. 109 (1986), as well as the underlying district court action. *Bandemer v. Davis*, 603 F.Supp. 1479 (S.D. Ind. 1984). The three-judge panel in *Bandemer* did not address the issue of standing. The Supreme Court in its review and reversal of that three-judge panel decision did state that:

> . . . Appellees claim, as we understand it, is that Democratic voters over the State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination.

Davis v. Bandemer, supra, at 127. That was precisely the nature of the claim presented in *Hays*.

The Court in *Hays* understood:

> Appellees insist that they challenge Act 1 in its entirety, not District 4 in isolation. That is true. It is also irrelevant. The fact that Act 1 affects all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean — . . . — that every Louisiana voter has standing to challenge Act 1 as a racial classification. Only those citizens able to allege injury 'as a direct result of having personally been denied equal treatment,' may bring such a challenge, and citizens who do so carrying the burden of proving their standing as well as their case on the merits.

Hays, supra, at 746. These principles have been applied to voting dilution claims. In *Smith v. Boyle*, 959 F.Supp. 982 (C.D. Ill. 1997), the court was faced with a claim of voting "dilution under the equal protection clause." Applying *Hays* in that context,

the court held that the plaintiffs lack standing because "nowhere in their complaints do Ingemunson or Jourdan allege that they have suffered anything more than a generalized injury. . . ." *Id.* at 985.

Plaintiffs here assert the same type of generalized injury and for the same reasons lack standing.

II. PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION FOR PARTISAN GERRYMANDERING.

In order to state a cause of action for partisan gerrymandering, plaintiffs must allege actual discriminatory effects. *Davis v. Bandemer*, 478 U.S. 109, 127 (1986). There are two separate effects inquiries. The first is whether there is "a history (actual or projected)" of disproportionate election results. *Bandemer, supra*, at 139. *See also Badham v. March Fong Eu*, 694 F.Supp. 664, 670 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989) (quoting *Bandemer* and applying its principles to hold that the complaint at issue failed to state a cause of action for partisan gerrymandering). The second effects inquiry requires indicia, independent of disproportionate election results, of being shut out of a political process as a whole. *Bandemer, supra*, at 139 (we have found equal protection violations only where a history of disproportionate results appeared *in conjunction* with strong indicia of lack of political power and denial of fair representation. In those cases, the racial minorities asserting the successful equal protection claims had essentially been shut out of the political process.). *See also Badham, supra*, at 671.

As detailed in our opening brief, *Bandemer* makes very clear that this two-part effects test is a threshold requirement. ". . . [It] is appropriate to require *allegations* and proof that the challenged legislative plan has had or will have effects that are sufficiently serious to require intervention by federal courts. . . ." *Bandemer, supra*, at 134 and n.14 (emphasis added).

With respect to the first effects inquiry, a "history (actual or projected)" of disproportionate election results, plaintiffs argue that their allegations have met this threshold. Specifically, plaintiffs in their brief state that they have alleged that disproportionate results are projected to obtain under Act 1 and cite to their amended complaint at ¶28. (Plaintiff's Brf., p.18). Paragraph 28 of plaintiffs' amended complaint makes no such projection. Paragraph 28 does assert that " . . . — the new plan will likely result in a congressional delegation consisting of thirteen Republicans and six Democrats." This conclusory allegation is not a projection. Plaintiffs' amended complaint contains no inference generating facts upon which to base projections and plaintiffs have made none. They have simply asserted that Act 1 will likely reach a particular result. Such bald assertions do not satisfy the first effects inquiry outlined in *Bandemer*.

With respect to the second effect inquiry, independent indicia of being shut out of the political process as a whole, plaintiffs argue that this threshold is somehow met if district boundaries are drawn for partisan purposes and that they need not be shut out of the political process as a whole to satisfy it. (Plaintiffs' Brf. at pp. 19-20, note 5). Both arguments are incorrect.

Plaintiffs base their suggestion that the requirements of *Bandemer* are somehow met if district boundaries are drawn solely on a partisan basis by citing to *Shaw v. Reno*, 509 U.S. 630 (1993). *Shaw* was a racial gerrymandering case and the Court stated that:

> . . . A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.
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> * * *
>
> . . .[R]acial gerrymandering may exacerbate the very pattern of racial block voting. The majority/minority districting is sometimes said to counteract.
>
> The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interest of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.

Id. at 647-648. Because of this special danger, the court went on to hold that "race based districting, as a response to racially polarized voting, is constitutionally permissible only when the state employs sound districting principles." *Id.,* at 657 (internal quotations omitted).

The court in *Shaw* made clear that:

> . . . traditional districting principles such as compactness, congruity, and respect for political subdivisions . . . are important not because they are constitutionally required — they are not. But because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.

Id. at 647 (internal quotations omitted). After outlining this analysis, the Court stated "Classifying citizens by race, as we have said, threatens special harms that are not present in our vote dilution cases. It therefore warrants different analysis." *Id.* at 649-650.

Despite the Court's specific holding that its analysis in *Shaw* concerning redistricting principles is limited to race, plaintiffs, in their brief, after quoting *Shaw*, argue that "when district lines are drawn solely to maximize the number of voters likely to vote for a candidate of a particular party, the legislature sends an unmistakable message to the representative of that district that he or she need only respond to the concerns of that party's voters." (Plaintiffs' Brf., p.14). As we pointed out in more detail in our opening brief, in *Bandemer*, the Court specifically rejected such arguments. *Bandemer* makes clear that where race is not a factor:

> . . . [T]he power to influence the political process is not limited to winning elections. An individual or group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and has as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interest of those voters. This is true even in safe districts where the losing group loses election after election.

Bandemer, supra, at 132.

Plaintiffs also assert, again pursuant to *Shaw*, that *Bandemer's* threshold effects are somehow met if district boundaries are drawn solely for partisan purposes. (Plaintiffs' Brf., p.20). As above, the Court in *Bandemer* specifically rejected that view.

> [In] Justice Powell's analysis . . . — at least in some cases — the intentional drawing of district boundaries *for partisan ends and for no other reasons* violates the equal protection clause in and of itself. *We disagree*, however, with this conception of a constitutional violation.

Bandemer, supra, at 138-139 (emphasis added).

After determining that intentionally drawing district boundaries for partisan ends and for no other reason does not violate equal protection in and of itself, the court in *Bandemer* goes on to outline what could constitute such a violation. Plaintiffs suggest that such a violation does not require being shut out of the political process as a whole. They are incorrect.

Plaintiffs' quote footnote 9 from *Bandemer* to suggest that something less than being shut out of a political process as a whole is what *Bandemer* requires to establish a partisan gerrymandering claim. Footnote 9 concerns whether partisan gerrymandering is a justiciable or nonjusticiable claim. In addressing that issue the Court stated that the general preference for non-partisanship and proportionately rendered claims of partisan gerrymandering justiciable *Bandemer, supra* at 125. Having determined that partisan gerrymandering is justiciable, the elements necessary to state or prove such a claim are dealt with elsewhere in the decision.

In outlining those elements, the Court stated:

> Our cases, however, clearly foreclose any claim that the constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated state wide vote will be.

Bandemer, supra, at 130. In order to assert and establish a claim of partisan gerrymandering "the mere lack of proportional representation will not be sufficient

to prove unconstitutional discrimination. . . . Rather, unconstitutional discrimination only occurs when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voter's influence *on the political process as a whole*." *Bandemer* at 132 (emphasis added).

> [W]e have found equal protection violations only where history of disproportionate results appeared in conjunction with a strong indicia of lack of political power and the denial of fair representation. In those cases, the racial minorities asserting the successful equal protection claims had essentially been *shut out of the political process*. In the state wide political gerrymandering context, these prior cases lead to the analogous conclusion that equal protection violations may be found only where the history of (actual or projected) disproportionate results appears in conjunction with similar indicia.

Id. at 139-140 (emphasis added).

The second indicia effects test is independent of any claim of a lack of proportional representation and requires a being shut out of the political process as a whole.[1] Plaintiffs concede in their amended complaint that under Act 1, Democrats will retain six safe seats. (Plaintiffs' Amended Complaint, ¶32). Acknowledgment of the creation of such safe seats establishes that the plaintiffs have not been "shut out of the political process as a whole." *Pope v. Blue*, 809 F.Supp. 392, 397 (W.D.N.C. 1992).[2]

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[1]As they did in their amended complaint, plaintiffs suggest in their brief that Act 1 will make it more difficult to attract candidates raise money and encourage turnout. As discussed in more detail in our opening brief, such alleged indicia are merely different ways of repeating plaintiffs' cental allegations; that Act 1 causes disproportionate election results. *Badham, supra*, at 671.

[2]Plaintiffs conclude their brief by citing to a series of cases that concern restrictions on picketing or the disenfranchisement of voters. As discussed in more detail in our opening brief, nothing in Act 1 prohibits voting or the full participation

Only when both effects tests pursuant to *Bandemer* are sufficiently alleged is a viable cause of action for partisan gerrymandering stated. Plaintiffs have failed to make allegations which meet either test.

CONCLUSION

Based on our original brief and the foregoing, the Commonwealth of Pennsylvania and the Executive Officers respectfully request that plaintiffs' amended complaint be dismissed with prejudice.

Respectfully submitted,

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in the political process as a whole. *See Badham, supra* at 670; *Pope v. Blue*, at 398.

CERTIFICATE OF SERVICE

I, **J. BART DeLONE,** Senior Deputy Attorney General for the Commonwealth of Pennsylvania, hereby certify that on February 8, 2002, I caused to be served a copy of the foregoing document entitled **Reply Brief in Support of Motion to Dismiss of Defendants Commonwealth of Pennsylvania, Governor Schweiker, Secretary Pizzingrilli, and Commissioner Filling,** upon the following:

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