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

RICHARD VIETH, et al,
Plaintiffs,
v.
THE COMMONWEALTH OF
PENNSYLVANIA, et al.,
Defendants.

No. 1:CV-01-2439
(Judge Rambo)

**REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO ADD
NECESSARY PARTY**

INTRODUCTION

The Board of Elections of Armstrong County ("Board of Elections"), contrary to Plaintiffs' characterization, did act to alter precinct boundaries after the Pennsylvania General Assembly had adopted a congressional redistricting plan. This is not an abstract situation and the Board of Elections is a necessary party to this litigation.

DISCUSSION

The General Assembly, on January 4, 2002, adopted Senate Bill 1200, which contained a congressional redistricting plan. The basis for the plan was the database certified by the Legislative Data Processing Center and adopted by

Pennsylvania's Legislative Reapportionment Commission,¹ which used Census 2000 population figures and then-current election precinct boundaries. *See* Hearing Trans. Vol. 1 (March 11, 2002) at 12-13 (testimony of Plaintiffs' cartographer, Robert Priest, that precinct population data used for drawing congressional redistricting plans was that provided by the Legislative Data Processing Center and accepted by the Commission). Governor Schweiker signed SB 1200 into law on January 7, 2002 as Act No. 2002-1 ("Act 1"). Part of the boundary between the 3rd and 12th congressional districts was the boundary between the two election precincts in South Buffalo Township in Armstrong County. Plaintiffs, on January 11, 2002, filed an amended complaint in this Court that challenged the constitutionality of the Act 1 plan, contending, *inter alia*, that the Act 1 plan violated the one-person, one-vote principle because it had a 19-person population difference between the most and least populated congressional districts. This Court, on April 8, 2002, issued its opinion and order, concluding that the Act 1 plan was unconstitutional because it violated the one-person, one-vote principle.

While the highly-publicized litigation concerning the constitutional challenge to the Act 1 plan was ongoing, the local Board of Elections petitioned the Armstrong County Court of Common Pleas for a change in the boundary between the two election precincts in South Buffalo Township. The Armstrong County Court granted that petition on March 15, 2002. *See* March 15, 2002 order of the Armstrong County Court (attached as Exhibit B to Plaintiffs' April 22, 2002

¹ The time frame for legislative reapportionment turns on the date "the population data for the Commonwealth as determined by the Federal decennial census are available." PA. CONST. art. III, §17(c). The Pennsylvania Supreme Court, in a March 26, 1981 order, interpreted "available" as when the Commission received the census data in "usable" form, i.e. when the population of Pennsylvania determined by the federal census data was broken down by precinct and ward. *See* K.Gormley, THE PENNSYLVANIA LEGISLATIVE REAPPORTIONMENT OF 1991 (1994) at 23.

Motion to Impose Remedial Districts and, in the Alternative, to Reject Act 34 and Begin Remedial Hearings ("Remedial Motion")). The Board of Elections did not bring to the attention of the Armstrong County Court any issue about the increased population deviation between congressional districts that would result from the boundary change. The Board of Elections, although required by the Pennsylvania Election Code to do so, *see* 25 P.S. §2747(b), did not inform the Secretary of the Commonwealth, or the Legislative Data Processing Center, that a precinct boundary had been changed.²

Plaintiffs alleged in their Remedial Motion and re-emphasized in their Response to Defendants' Second Status Reports that it was reported in the local news, the LEADER TIMES, that "the altered boundaries were to further favor a sitting Member of Congress." *See* Plaintiffs' Response to Defendants' Second Status Reports at 1-2.

These facts suggest that the Board of Elections sought the precinct boundary change with the intent to alter a congressional district boundary established by the Pennsylvania General Assembly in Act 1. They also suggest that the alteration was sought and obtained in disregard of its impact on population deviation, even though such alteration would, as Plaintiffs allege, move 49 individuals from one congressional district to another.

Indeed, (1) if the intent of the Board of Elections was to change the boundary between the 3rd and 12th congressional districts, (2) if such change moved 49 individuals from one congressional district to another, and (3) if this Court accepts Plaintiffs' argument that the precinct boundary change is effective for purposes of congressional redistricting, then the Board of Elections can be

² Presiding Officers believe the action of the Board of Elections in seeking a boundary change in February 2002 was prohibited by statute. However, that state issue does not have to be decided for this Court to resolve this litigation.

considered to have acted in disregard for the constitutional right of the citizens of Pennsylvania to voting equality (i.e., one-person, one-vote). The Board of Elections is a state actor,³ who, it could be inferred, acted intentionally to violate constitutional rights. Accordingly, it could be the named defendant in a civil rights action under 42 U.S.C. §1983.

Plaintiffs' allegations also lead to the conclusion that the Board of Elections acted in such a way as to undermine the very findings of this Court with respect to Act 1. By the time this Court's decision was issued on April 8, 2002, the Board of Elections, acting under color of state law, had increased the population deviation above the 19 persons that this Court thought it was dealing with. The Board of Elections thus undermined the efforts not just of the General Assembly, but of this Court as well, and probably did so with full awareness of the ongoing federal litigation, given the intense media coverage of the case.

If Plaintiffs were truly aggrieved by the population deviation that the Board of Election's action has caused, they should be eager to focus on the quickest, easiest, least intrusive remedy available to the Court – namely, rectifying the boundary change in Armstrong County for future congressional elections. Joinder of the Board of Elections, as the state actor responsible for the deviation, would be necessary to the remedy.

Plaintiffs, however, do not appear to want a narrowly-tailored remedy. They contend that, if the Court determines Act 34 is unconstitutional, "an entirely new congressional map ... will govern the 2004 elections." Plaintiffs' Response to Defendants' Motion to Add Necessary Party at 1-2. Plaintiffs would have this

³ See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 n.5 (1978) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (involvement of state official provides state action essential to support Section 1983 action whether the action was officially authorized or unlawful); see also *Carlos v. Santos*, 123 F.3d 61 (2d Cir. 1997) (town board was state actor where its actions in hiring consultant and holding hearings were authorized by state law)

Court impose a drastic remedy (drawing an entirely new political map) on one set of state actors (the current state-wide defendants) as a consequence of the localized conduct of a completely different set of state actors (the Board of Elections). As stated by Plaintiffs, their goal is political rather than focused on precisely remedying the wrong that is alleged. Joinder of the Board of Elections would focus any remedy on the precise wrong that is alleged, which would be consistent with the cause of action asserted by Plaintiffs, although, perhaps, contrary to Plaintiffs' political goal. Adding the Board of Elections, as an additional state actor, would also make possible a resolution of the matter that would enable, by consent decree or otherwise, future congressional elections to be conducted in a manner that is constitutionally unobjectionable.⁴

If the Court accepts Plaintiffs' reasoning, the Court would be artificially precluding itself from even considering a remedy that is narrowly tailored to redress the precise wrong that is alleged. This would be inconsistent with the Court's duty, if it finds a constitutional violation, to tailor a remedy that is most consistent with the intent of the General Assembly. *See Upham v. Seamon*, 456 U.S. 37, 40-42 (1982).

The Board of Elections is a necessary party to this litigation. It, unlike its counterpart in the other 66 counties in Pennsylvania, took action apparently with the express intent to affect a congressional district boundary.

Ultimately, Plaintiffs concede that they do not oppose the addition of the Board of Elections as a party to this litigation. *See Plaintiffs' Response to Defendants' Motion to Add Necessary Party* at 3 ("plaintiffs do not believe they

⁴ The Board of Elections demonstrated its ability to administer dual congressional/state office ballots in this small election precinct during the primary election of 2002. One potential resolution would be to make this arrangement formal, by order of this Court, for future congressional elections. The precinct boundaries for state and local offices would continue to use the new boundary approved by the Armstrong County Court.

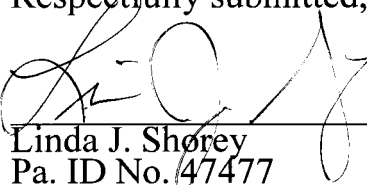
would suffer any significant prejudice by the addition of [the Board of Elections] as a party in this case"). The Court should therefore grant the motion.⁵

CONCLUSION

For the reasons set forth above and in Presiding Officers' memorandum in support of Defendants' motion to add a necessary party, the Court should grant the motion and direct that, upon service of the Court's order granting the motion, the Board of Elections shall become a party to this litigation.

Respectfully submitted,

September 13, 2002



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⁵ Nothing in Defendants' motion, supporting memorandum, or this reply should be construed as an admission that the alleged population deviation under Act 34 plan rises to the level of a constitutional infirmity. Act 34 is entitled to a presumption of constitutionality, which Plaintiffs bear the burden to overcome. However, if the Court proceeds to consider Plaintiffs' allegations, the entity responsible for the situation alleged to have rendered the Act 34 plan unconstitutional should be a party and should be heard.

CERTIFICATE OF SERVICE

I certify that on September 13, 2002, I caused a copy of the foregoing Reply to Plaintiffs' Response to Motion to Add Necessary Party to be served on the following in the manner indicated:

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