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

_____)
RICHARD VIETH, *et al.*,)
))
Plaintiffs,)
))
v.)
))
COMMONWEALTH OF)
PENNSYLVANIA, *et al.*,)
))
Defendants.)
))
ROBERT J. MELLOW, Senator,)
22nd District,)
))
Proposed)
Intervenor.)
_____)

FILED
HARRISBURG, PA
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MARY L. ANDREA, CLERK
FBI

Civil No. 1:CV-01-2439

J. Rambo

**SENATOR ROBERT J. MELLOW'S
RESPONSE TO DEFENDANTS' STATUS REPORTS**

I. BACKGROUND

On April 8, 2002, this Court declared that Act 1, the congressional redistricting plan enacted by the General Assembly, violated the constitutional principle of "one person, one vote." On April 17, 2002, the General Assembly

passed Act 34, which repealed Act 1 and proposed a new redistricting plan. By virtue of a March 15, 2002 order of the Armstrong County Court of Common Pleas that changed election district boundaries in South Buffalo Township and thus shifted forty-nine voters from one congressional district to the other, Act 34 has a population deviation of 97 people, a larger deviation than the one this Court held unconstitutional in its April 8 order.

On April 22, 2002, Plaintiffs filed a Motion to Impose Remedial Districts based upon the unconstitutional population deviation in Act 34. The Defendants opposed this Motion. On May 8, 2002, this Court ordered the parties to file status reports addressing the effect of the Armstrong County Court's order on Act 34. In particular, this Court ordered the parties to answer the following questions:

- a) If the matter has been resolved, has the line separating the South Buffalo Township election district from the Eastern Buffalo Township election district been restored to its original configuration prior to the Armstrong County order?
- b) If the line has not been restored, did the Armstrong County order result in a movement of population between congressional districts?
- c) If the line drawn by the order resulted in a movement of population between congressional districts, how many people have been moved?
- d) If the Armstrong County order issue has not been resolved, are Defendants pursuing the matter through litigation?

On June 3, Defendants (the Presiding Officers and the Executive Officers) filed status reports pursuant to this Court's order. Senator Mellow here submits his responses to this Court's questions and to the Defendants' status reports.¹

II. RESPONSES TO THIS COURT'S QUESTIONS

A. The Election District Boundary Has Not Been Restored to Its Original Configuration

The March 15 order moving the election district boundary remains undisturbed. The order was not appealed, and became final on April 15, 2002. *See* Pa. R.A.P. 903. As set forth more fully below (at pp. 7-8), the General Assembly has attempted to overrule the March 15 order by passing legislation, but the legislation violates the Pennsylvania Constitution.

B. The Armstrong County Court's Order Resulted in a Movement of Population Between Congressional Districts

Under Act 34, the boundary between the Eastern and Western election districts in South Buffalo Township forms a part of the border between Congressional District 3 and Congressional District 12. Thus, by altering the boundary between the two election districts, the March 15 order moved people who had been in Congressional District 3 under Act 1 to Congressional District 12

¹ On May 6, 2002, Senator Mellow moved, on behalf of the Democrats in the Pennsylvania Senate, for leave to intervene in the remedial phase of this matter or, in the alternative, to participate as *amicus curiae*. In support of his motion, Senator Mellow demonstrated that he has satisfied all four of the criteria for mandatory intervention under Fed. R. Civ. P. 24(a), as well as the criteria for permissive intervention under Fed. R. Civ. P. 24(b) and for participation as *amicus curiae*. Senator Mellow's motion is still pending. Senator Mellow submits these objections as a proposed intervenor or, in the alternative, as *amicus curiae*.

under Act 34. *See* Brief of Senator Robert J. Mellow in Support of Senate Democrats' Proposed Redistricting Plan (filed May 6, 2002) at 6-7.

C. The Order Moved 49 People Between Congressional Districts

Forty-nine people were moved as a result of the March 15 order, which resulted in an unconstitutional population deviation of 97 people in Act 34. *Id.* at 7.

D. The Defendants Are Not Pursuing the Armstrong County Matter Through Litigation

Defendants have not pursued the Armstrong County matter through litigation; however, as set forth more fully below at pp. 7-8, the Defendants have pursued the Armstrong County matter through legislation, albeit unsuccessfully.

III. RESPONSES TO THE DEFENDANTS' STATUS REPORTS

A. Pennsylvania Law Expressly Authorizes the Armstrong County Court to Alter the Boundaries of Election Districts

1. 25 P.S. § 2702 Vests the Armstrong County Court With the Power to Move Precinct Boundaries

Defendants contend that the Armstrong County Court of Common Pleas lacked the authority to alter the boundary between the Eastern and Western Election Districts in South Buffalo Township. Defendants rely on 25 P.S. § 2702, which provides (in relevant part) as follows:

Subject to the provisions of section 501 of this act [which does not apply here], the court of common pleas of the county in which the same are located, may form or create new election districts by dividing or redividing any borough, township, ward or election district into two or more election districts of compact and contiguous territory, having boundaries with clearly visible physical features and wholly contained within any larger district from which any Federal, State, county,

municipal or school district officers are elected, or alter the bounds of any election district, or form an election district out of two or more adjacent districts or parts of districts, or consolidate adjoining election districts or form an election district out of two or more adjacent wards, so as to suit the convenience of the electors and to promote the public interests.

Defendants are simply wrong. By its very terms, 25 P.S. § 2702 makes clear that the Armstrong County Court did, in fact, have the authority to adjust the boundary between the two election districts. Under § 2702, the court may, among other things, either “[1] create new election districts” that must be “wholly contained within” existing Federal, State, or local districts; “*or* [2] alter the bounds of any election district” or [3] combine election districts or parts of election districts “so as to suit the convenience of the electors and to promote the public interests.” 25 P.S. § 2702 (emphasis added). *See also In re Petition for Redistricting Voting Districts of Ross Tp.*, 557 A.2d 59 (Pa. Cmwlth. 1998) (“The standard to be applied by the trial court in acting upon a petition for realignment is the promotion of ‘the convenience of electors and the public interest.’”). The Armstrong County Court’s March 15, 2002 order exercised the second of these three options by “alter[ing] the bounds” of the Eastern and Western Election Districts in South Buffalo Township.

The Presiding Officers claim that § 2702 prohibited the Armstrong County Court from moving the boundary of the South Buffalo Township election districts if doing so would move voters from one congressional district to another because § 2702 requires that election districts be “wholly contained within any larger district from which any Federal . . . officers are elected. . . .” *See Presiding Officers’ Status Report* at 4 (citing Presiding Officers’ Response in Opposition to

Plaintiffs' Motion to Impose Remedial Districts and, in the Alternative, to Reject Act 34 and Begin Remedial Hearings ("Presiding Officers" Response") (filed May 1, 2002) at 6. Section 2702 contains no such prohibition. The requirement to which the Presiding Officers refer is located in the clause of § 2702 that states the court's power to "create new election districts." The clause of § 2702 that concerns the Court's power to do what it did here – *i.e.*, to "alter the bounds" between two election districts – contains no such requirement. Thus, the March 15 order was a valid exercise of the court's power under § 2702.

2. 25 P.S. § 2746 Did Not Prohibit The Court from Altering Election District Boundaries

a. The Plain Language of § 2746 Allows the Court to Alter Election District Boundaries

The Defendants also argue that 25 P.S. § 2746 prohibited the Armstrong County Court from issuing its March 15 order. *See* Presiding Officers' Response at 7; Defendants Governor Schweiker, Secretary Weaver and Commissioner Filling's Joinder in the Presiding Officers' Opposition (filed May 1, 2002) at 3-7. The statute provides, in relevant part, as follows: "(a) Except as provided in subsection (b), there shall be no power to *establish, abolish, divide or consolidate* an election district during the period June 1, 2000, through April 30, 2002" (emphasis added). Thus, the language of § 2746 only prevented the court from "establish[ing], abolish[ing], divid[ing], or consolidat[ing]" an election district during the prescribed period. *See id.*

The Court of Common Pleas, however, did not "establish, abolish, divide, or consolidate" election districts. Rather, the March 15 order altered the boundaries

of existing election districts. The order neither created (“establish[ed]”) any new election districts, nor destroyed (“abolish[ed]”), split (“divide[d]”), or combined (“consolidate[d]”) any existing election districts. South Buffalo Township had the same number of election districts after the Armstrong County court’s March 15 order as it did before that order.

As demonstrated by the language of 25 P.S. § 2702, which similarly distinguishes among “creat[ing] new election districts,” “alter[ing] the bounds of any election district” and “consolidat[ing] adjoining election districts,” the difference between *altering* the boundaries of election districts and creating or abolishing them is not a mere semantic nicety. Rather, it reflects the General Assembly’s recognition of the different ways that election boundaries can be changed, and a conscious decision to place different restrictions on the making of different types of changes. Because the March 15 order did not establish or destroy any election districts, but rather altered the boundaries between them, it did not violate § 2746.

The Executive Officers argue that the title of § 2746, “Restrictions on Alterations,” demonstrates that § 2746 proscribes any form of alteration, including moving election district boundaries. *See* Defendants Schweiker et al.’s Joinder in the Presiding Officers’ Opposition at 6. The Executive Officers’ argument is flawed. The term “alteration” encompasses many different types of changes, including combining election districts, dividing them, increasing the number of districts, and altering (*i.e.*, moving) their boundaries. In setting forth its restrictions on alterations in § 2746, however, the General Assembly did not proscribe every

form of alteration. Rather, it restricted only the power to “establish, abolish, divide, or consolidate” election districts. The movement of district boundaries is indeed an alteration. But it is not an alteration that establishes, abolishes, divides, or consolidates an election district. Thus, it is not an alteration restricted by § 2746.

Nor does the restricting language in § 2746(c), which directs the county boards of elections to provide maps of “any new or altered district or districts” relate to the movement of district boundaries. Section 2746(c) refers only to the types of alterations enumerated in §§ 2746(a) and 2746(b), *i.e.*, only to those that establish, abolish, divide, or consolidate election districts. Thus, § 2746(c) is irrelevant here.

b. The Recent Amendment to 25 P.S. § 2746 Demonstrates That The Armstrong County Court Had Authority to Alter a Precinct Line on March, 15 2002

A recent amendment to 25 P.S. § 2746 – which Defendants never mention – further demonstrates that, on March 15, the Court of Common Pleas had the power to alter election district boundaries. Act 44 of 2002, which the Governor signed into law on May 16, 2002, added the language “or alter in any manner” to the list of prohibited actions in 25 P.S. § 2746. 2002 Pa. Legis. Serv. Act 2002-44 (S.B. 1240) (Purdon’s) (available on Westlaw). Thus, following this amendment, a court is now prohibited not only from establishing, abolishing, dividing, and consolidating districts but also from “alter[ing] them in any manner.” This amendment shows that the General Assembly knew how to prohibit any alteration of district boundaries when it intended to do so and that it had not done so when it

first passed § 2746. In other words, Section 2746, as in force on March 15, 2002, prohibited the establishment, abolishment, division, or consolidation of election districts. It did not address alteration of district boundaries. “It is a well established canon of interpretation that the mention of one thing in a statute implies the exclusion of others not expressed.” *Petition for Division into Wards of Scott Township*, 130 A.2d 695, 698 (Pa. 1957). If § 2746 had already prohibited alteration of districts as of March 15, the amendment would be meaningless.

B. Retroactive Application of the Amendment to § 2746 Would Violate the Pennsylvania Constitution

The amendment to § 2746 purports to apply retroactively. *See* 2002 Pa. Legis. Serv. Act 2002-44, § 5. However, retroactive application of this amendment to invalidate the Armstrong County Court of Common Pleas’ March 15 order would violate the Pennsylvania Constitution’s requirement of separation of powers. A line of cases originating in 1849 and continuing to the present makes clear that any attempt by the legislature to alter a final judgment of a Pennsylvania court is unconstitutional. The March 15 order disposed of all claims for all parties, and was thus a final order. *See* Pa. R.A.P. 341.

The Pennsylvania Supreme Court so held in *Greenough v. Greenough*, 11 Pa. 489 (1849). The trial court in *Greenough* had concluded that a will was not valid because the testator’s signature had not been properly witnessed. The legislature subsequently amended the statute regarding wills and purported to apply it retroactively to validate the will at issue. The Supreme Court concluded

that retroactive application of the statute violated the Pennsylvania Constitution by encroaching upon the judicial function. *See id.* at *5-6.

Pennsylvania courts have consistently applied the *Greenough* to invalidate legislative acts that purport to amend final judgments of the courts: “It is elementary that the legislature may not, under the guise of an act affecting remedies, destroy or impair final judgments obtained before the passage of the act, and this principle prohibits not only a statutory re-opening of cases previously decided by the court but also legislation affecting the inherent attributes of judgments.” *Commonwealth v. Sutley*, 378 A.2d 780, 783-84 (Pa. 1977) (invalidating as violative of separation of powers a statute that retroactively reduced sentences for marijuana possession). *See also Commonwealth v. Shaffer*, 734 A.2d 840, 843-44 (Pa. 1999) (the legislature lacked the authority to overrule a Pennsylvania Supreme Court decision that the Pennsylvania Corrupt Organizations Act did not apply to wholly illegitimate enterprises).

Here, because no appeal was taken from the March 15 order, it became a final judgment on April 15, 2002. *See* Pa. R.A.P. 903. If applied retroactively, the amendment to § 2746 would have the unconstitutional result of overturning an otherwise valid final judgment of the Court of Common Pleas. Therefore, the amendment may not be applied retroactively to invalidate the March 15 order.

C. The Constitutional Violation Contained in Act 34 Results from the Statute As Written, Not From its Application

The Presiding Officers argue that, even if the March 15 boundary change remains in force (as Senator Mellow has demonstrated), Act 34 is still valid. *See*

Presiding Officers' Status Report at 4. Yet the case upon which the Presiding Officers rely – *Ex Parte Bransford* – does not support their theory. Rather, *Bransford* held that where a bank challenged the validity of assessments under an Arizona taxation statute but did not challenge the statute itself, a three-judge court was not required to hear the bank's request for an injunction. *See* 310 U.S. 354, 357-58 (1940).

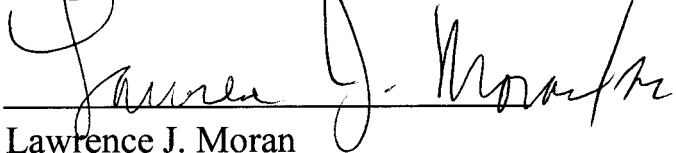
Even stretched beyond its narrow procedural holding, *Bransford* could at most stand for the unremarkable proposition that a facially neutral law should not be invalidated because of ministerial error or individual acts of discrimination in applying the law. As a practical matter, however, it would be impossible to consider the March 15 order as an “application” of Act 34, because the order predates Act 34's passage by over one month. In other words, *Bransford* is irrelevant, because the population deviation here does not result from *applying* Act 34, but rather from the fact that Act 34 was constructed from components – cities, counties, and election districts – that, when added together, produce an unconstitutional deviation of 97 people.

IV. CONCLUSION

For all of the reasons set forth above, the election district boundaries set by the order of March 15, 2002 are still in place, and Act 34 contains and unconstitutional deviation. Senator Mellow therefore respectfully requests that this Court reject Act 34 and impose a redistricting plan consistent with the United States Constitution.

Dated: June 18, 2002

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, MARK A. PACKMAN, co-counsel for Senator Robert J. Mellow, hereby certify that on June 18, 2002, I caused to be served a copy of Senator Robert J. Mellow's Response to Defendants' Status Reports by first-class mail upon the following:

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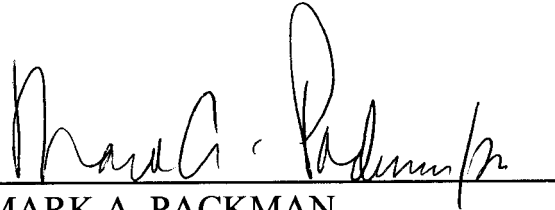
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A handwritten signature in black ink, appearing to read "Mark A. Packman". The signature is written in a cursive style and is positioned above a horizontal line.

MARK A. PACKMAN

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