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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.	)	No. 1: CV 01-2439 Judge Rambo, Judge Yohn, Judge Nygaard
THE COMMONWEALTH OF PENNSYLVANIA; MARK S. SCHWEIKER, et al	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLARIFICATION AND/OR RECONSIDERATION

Plaintiffs submit this Brief in support of their Motion for Clarification and/or Reconsideration its Order of February 22, 2002 granting in part and denying in part the Defendants' Motion to Dismiss.

The February 22 Order granted the Motion with respect to Counts II (Equal Protection); III (Privileges and Immunities); IV (First Amendment); and V (42 U.S.C. §1983, to the extent Plaintiffs sought to use §1983 as an independent basis for recovery) of the Amended Complaint but denied the Motion as to Count I. In Count I, Plaintiffs claimed that the facts alleged "constitute a denial or abridgement of the plaintiffs' right to vote for their Representative to the United States Congress, in violation of Section 2

of Article I of the United States Constitution, as amended by Section 2 of the Fourteenth Amendment, and Section 4, Article I of the United States Constitution." *See* Amended Complaint, ¶42.

As discussed in the Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss ("Brief") (pertinent portions of which are attached hereto as Exhibit A), Plaintiffs have asserted at least two separate propositions with respect to Count I and Article I of the U.S. Constitution. First, Plaintiffs have argued that Act 1 violates Article I by violating the one-person, one-vote principle. *See* Brief at 3-5. The Court clearly denied Defendants' Motion to Dismiss on this ground. Second, and entirely distinct from the one-person, one-vote issue and from the partisan gerrymandering raised in other portions of the Amended Complaint, Plaintiffs argued that Article I's delegation of authority to state legislatures to draw congressional districts imposes a more stringent limitation on partisan gerrymandering than does the Equal Protection Clause. This argument is fully explained in Plaintiffs' Brief, at 7-12 (Exhibit A hereto).

Briefly as to that latter argument, Article I imposes important limits on congressional redistricting. Because the Framers intended that the House of Representatives be elected directly "by the People," U.S. Const. art. I, §2, *see also Wesberry v. Sanders*, 376 U.S. 1 (1964), they limited the states' involvement in congressional elections to the tightly circumscribed power to set "[t]he Times, Places and Manner of holding Elections for Senators and Representatives" under the Elections Clause, U.S. Const. art. I,

§4, cl. 1. The Supreme Court has made clear that this delegated authority includes only the power to set procedural regulations, not to dictate the composition of a State's congressional delegation. *See, e.g., U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). Just as Article I imposes a more exacting one-person, one-vote test on congressional districts than the Equal Protection Clause provides for state legislative districts, Article I imposes a more exacting review of partisan gerrymanders in congressional districts than the Equal Protection Clause offers for state legislative districts like those at issue in *Davis v. Bandemer*, 478 U.S. 109 (1986). Act 1 fails those exacting standards.

The Court's Opinion did not discuss this second aspect of Article I in its ruling. By the precise terms of the Court's Order, which denied the Motion to Dismiss "as to Count I," this aspect of Plaintiffs' claim remains in this case. Because the Court's Opinion did discuss Plaintiffs' partisan gerrymandering claim under the Equal Protection Clause (but not under Article I), Plaintiffs respectfully request that the Court issue an order clarifying and confirming that the issue of whether Act 1 satisfies Article 1's limits on partisan gerrymandering remains in the case.

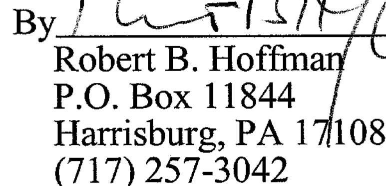
Alternatively, if the Court did intend to dismiss the partisan gerrymandering claim under Count I/Article I, Plaintiffs respectfully submit that the Court should reconsider that aspect of its holding because the Court never explicitly considered the argument summarized above (and discussed more fully in Plaintiffs' prior brief) in the context of that Count and claim.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Clarification and/or Reconsideration should be granted. For the reasons specified above and in Plaintiffs' Opposition to the Motion to Dismiss, the Court should make clear that Defendants' Motion to Dismiss is denied with respect to claims of partisan gerrymandering under Article I of the Constitution. Alternatively, this Court should reconsider that aspect of its Order to address Plaintiffs' Article I contentions as to partisan gerrymandering, as set forth in the in Exhibit A hereto, and, upon such reconsideration, should hold that the Motion to Dismiss is denied as to that claim.

Respectfully submitted,

REED SMITH LLP



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Dated: February 25, 2002

Exh A

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

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

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Pennsylvania, and that it interferes with their rights of speech and association by depriving them of the ability to cast a meaningful vote with other Democratic voters in congressional elections. These allegations satisfy the requirements for Article III standing.

Because standing is present for Plaintiffs' claims, Plaintiffs also have standing to assert the derivative § 1983 claim in Claim V.

II. PLAINTIFFS HAVE STATED A COGNIZABLE CLAIM THAT ACT 1 VIOLATES THE ONE-PERSON, ONE-VOTE PRINCIPLE.

Act 1 violates Article I, section 2 of the Constitution by deviating from equal population among congressional districts with no justification. Unlike state legislative districts, population in congressional districts must achieve "precise mathematical equality." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). As the Supreme Court emphasized in *Karcher v. Daggett*, 462 U.S. 725 (1983), "As between two standards – equality or something less than equality – only the former reflects the aspirations of Art. I, § 2." *Id.* at 732. Contrary to Defendants' assertion that the district populations established by Act 1 are equal as a matter of law, Def. Br. at 8, "there are no *de minimis* variations which could practically be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification," *id.* at 734. Because Act 1 creates a 19-person deviation between districts, the Commonwealth must justify its failure to follow the one-person, one-vote principle. *See Nerch v. Mitchell*, No. CV-92-0095, slip op. at 31 (M.D. Pa. Aug. 13, 1992) (per curiam); *see also Anne Arundel County Republican Cent. Comm.*, 781 F. Supp. 394, 395-96 (D. Md. 1991) (requiring state to justify congressional districting plan's 10-person total population deviation).

By alleging that Act 1 does not establish precise mathematical equality between districts, Plaintiffs have alleged facts sufficient to make out a claim of unconstitutionality and shift the burden to the Commonwealth. Defendants' formalistic assertion that Plaintiffs were required to attach to their complaint a map showing less population deviation is possible, Def. Br. at 8-9, misreads the caselaw. While Plaintiffs are fully prepared to submit a map at trial,[1] the 19-person deviation between districts itself establishes that a smaller deviation is possible, as it is routine for congressional district maps to be drawn with substantially smaller deviations – often deviations of just one person.

But Plaintiffs' complaint goes further. Plaintiffs allege that Defendants cannot put forward any legitimate justification for Act 1's failure to conform to the one-person, one-vote rule, because no traditional districting criteria support the deviations. In *Mellow v. Mitchell*, 607 A.2d 204, 207 (Pa. 1992), the Pennsylvania Supreme Court identified factors that could warrant "extremely small deviations in district populations": avoiding splitting political subdivisions, providing adequate representation to a minority group, and preserving communities of interest. Plaintiffs have alleged that Act 1 protects none of these.

In contrast to Pennsylvania's 1990s congressional districts, in which population deviations could have been reduced only by splitting more municipalities, *see Nerch*, slip op. at 33-34, Act 1 splits 84 local governments – or more than three times the number of splits in the 1990s plan – including 25

[1] To the extent this Court believes that Plaintiffs were required to submit a map with their complaint that has a reduced population variance, it should allow Plaintiffs to amend their complaint rather than dismissing this action.

counties and 59 cities, boroughs, and townships.[2] Act 1 also divides communities of interest, as in the "Greenwood Gash" of District 8. Traditional justifications such as incumbent protection and constituent retention offer no support either, as Act 1 pits multiple incumbents against each other and divides representatives from the constituents they have long represented. *See* Am. Compl. ¶ 23.

These allegations are more than sufficient to establish a claim of unconstitutionality under Article I, section 2.

III. PLAINTIFFS HAVE STATED A COGNIZABLE CLAIM THAT ACT 1 IS AN UNCONSTITUTIONAL PARTISAN GERRYMANDER.

The Supreme Court conclusively established in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan gerrymandering claims are justiciable. As the *Bandemer* Court recognized, the Court's long history of adjudicating cases of minority vote dilution compels such a conclusion; "that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability." *Id.* at 125. Accordingly, the *Bandemer* Court held that a plaintiff who alleges "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" states a claim of unconstitutional political gerrymandering. *Id.* at 127 (plurality opinion).

Contrary to Defendants' assertions, time and experience have not shown the standards for resolving partisan gerrymandering claims to be any less manageable

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[2] As this Court has recognized, "the avoidance of municipal splits [is] an important public policy of the Commonwealth." *Id.* at 33 (citing *Mellow*, 607 A.2d 204). The Pennsylvania Supreme Court in *Mellow* held the principle of avoiding municipal splits to be nearly on par with the one-person, one-vote principle, as the state court preferred a plan with minimal population deviation but 27 split local governments over a plan that achieved perfect population equality but split more local governments. See *Mellow*, 607 A.2d at 208.

than the standards for resolving racial gerrymandering cases. See id. at 125 (noting the absence of any indication that the standards laid out in *Bandemer* "are less manageable than the standards that have been developed for racial gerrymandering claims"). If anything, time and experience have served to sharpen *Bandemer*'s distinction between mere consideration of politics in redistricting – what Justice Powell called "gerrymandering in the 'loose' sense" – from "gerrymandering that amounts to unconstitutional discrimination." *Id.* at 165 (Powell, J., concurring in part and dissenting in part).

Since *Bandemer* was decided in 1986, the Supreme Court has issued two sets of decisions that help clarify the standard for identifying an unconstitutional partisan gerrymander. First, in the context of *congressional* redistricting, as opposed to state legislative redistricting, the Supreme Court's recent decisions describing the principles animating Article I of the U.S. Constitution clarified one limit to a state's authority to draw congressional districts: States may not use that authority to dictate electoral outcomes, to advantage one class of candidates over another, or otherwise to frustrate the will of the majority of voters in their state. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001). Second, in two racial gerrymandering cases decided in the 1990s, *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), the Court established principles that are equally applicable to political gerrymandering claims under the Equal Protection Clause. The Court held that a redistricting plan is unconstitutional where it is based predominantly on race to the exclusion of traditional, neutral districting criteria – even though race is otherwise a permissible consideration in redistricting. Similarly, although politics, like race,

is a permissible consideration in redistricting, state legislatures are not authorized to jettison neutral districting criteria with the predominant aim of drawing districts that advantage or disadvantage a particular group of voters. Where, as here, one political party has created a districting plan predominantly for the purpose of shutting out its opponents, with the effect of depriving a majority of the state's voters of the opportunity to elect candidates of their choice, that districting plan deprives voters of their constitutional right to "fair and effective representation." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

A. Act 1 Is Inconsistent with Article I's Limitation of the States' Authority to Regulate Congressional Elections

One fundamental flaw of Defendants' motion to dismiss is that it presumes that the only limitation on partisan gerrymandering is the Equal Protection Clause as interpreted in *Bandemer*. But there is an even more fundamental limit that applies to congressional redistricting. In Article I of the Constitution, the Framers vested the legislative power of the United States in two chambers: the Senate, which was intended to represent the states, and the House of Representatives, which was intended to represent the people, and whose members were accordingly to be chosen "by the People of the several States." U.S. Const. art. I, § 2. Under the Article I framework, the right to choose congressional representatives "belongs not to the States, but to the people," since "the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by the States, but by the people." *U.S. Term* Limits, 514 U.S. at 821.

The Supreme Court has held that the fundamental principle that the House of Representatives is to be chosen "by the People" forbids states from valuing one person's vote in a congressional election more than another's, *see Wesberry v. Sanders*, 376 U.S. 1 (1964); from excluding congressional candidates who have served more than two terms from appearing on state ballots, *see U.S. Term Limits*, 514 U.S. 779; and from noting on the ballots a congressional candidate's failure to support term limits, *see Cook v. Gralike*, 531 U.S. 510. Similarly, this principle forbids states from infringing the right of a majority of voters to choose whom they wish to represent them, by distorting district lines in order to favor the political party that happens to control the state legislature.

Because the power to elect representatives to Congress is a right that "aris[es] from the Constitution itself," any power states have to regulate congressional elections derives from, and is limited by, "the delegated powers of national sovereignty," *U.S. Terms Limits*, 514 U.S. at 805. Consistent with their vision of the House of Representatives as accountable to the people rather than to the states, the Framers limited the states' involvement in congressional elections to a tightly circumscribed power to set "[t]he Times, Places and Manner of holding Elections for Senators and Representatives" under the Elections Clause, U.S. Const. art. I, § 4, cl. 1. The Framers' limited delegation of authority to regulate the procedural decisions about the conduct of congressional elections reflects the Framers' "overriding concern" regarding "the potential for States' abuse of the power." *U.S. Term Limits*, 514 U.S. at 808-09. The Framers were particularly concerned about the possibility that factional control of state legislatures would

frustrate the will of the people in congressional elections. Discussing the Elections Clause at the Constitutional Convention, Madison noted:

> It was impossible to foresee all the abuses that might be made of the discretionary power. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter.

2 *Records of the Federal Convention* 239. Madison's fear that a faction in power in a state legislature might abuse its authority to override majority rule was echoed throughout the ratifying conventions. In Massachusetts, one delegate worried that state legislatures,

> when faction and party spirit run high, would introduce such regulations as would render the rights of the people insecure and of little value. They might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors.

2 *Elliot's Debates* 22-35 (Parsons). Another delegate noted that "the intention of the Convention was to set Congress on a different ground; that a part should proceed directly from the people, and not from their substitutes, the legislatures; therefore the legislature ought not to control the elections." He worried that, as in Great Britain and Rhode Island, "the [state] legislature may have a power to counteract the will of a majority of the people." 2 *id.* (Dana). In North Carolina, a delegate explained the necessity of reserving the ultimate power over congressional elections in the federal government, so as "to secure a

representation from every part, and prevent any improper regulations, calculated to answer party purposes only." 1 *Annals of Congress* 768-73 (Ames).

The Elections Clause was thus drafted as a limited delegation of authority to the states, not as a plenary grant of power, confined to matters such as "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns" – that is, "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 367 (1932). As the Court made clear in *U.S. Term Limits*, "[t]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." 514 U.S. at 833-34.

The Supreme Court has made clear that judicial review of state regulation of election procedure to determine whether it meets these principles is more searching in the context of congressional redistricting than is similar review of state legislative redistricting under the Equal Protection Clause. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Supreme Court held that Article I's command that the House of Representatives be elected "by the People" rather than by the states meant "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8; *see also Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983) While the Equal Protection Clause requires similar adherence to the one-person, one-vote principle in the context of state legislative redistricting, *see Reynolds v. Sims*, 377 U.S. 533 (1964), it affords more flexibility

to states to deviate from absolute population equality in pursuit of legitimate state policies. Accordingly, while the Supreme Court has held that the Equal Protection Clause will tolerate population deviations as large as ten percent in the context of state redistricting, *see Brown v. Thompson*, 462 U.S. 835 (1983), Article I will not tolerate even *de minimis* population deviations below one percent without adequate justification, *see Karcher*, 462 U.S. at 731-32.

Similarly, while the Constitution may tolerate somewhat larger departures from absolute neutrality in state legislative redistricting, Article I strictly constrains the legislature's authority to dictate the composition of Pennsylvania's congressional delegation at the expense of the right of "the people [to] choose whom they please to govern them." *U.S. Term Limits*, 514 U.S. at 793 (citation and internal quotation marks omitted). This constraint does not preclude a state legislature from considering politics in congressional redistricting. It does, however, preclude the political faction that happens to control the state legislature at the right moment in the ten-year congressional redistricting cycle from deliberately acting to ensure that it will continue to control the state's congressional delegation even if it fails to receive a majority of the votes.[3]

Act 1 exceeds those limits on a state's authority to regulate congressional elections. It is designed precisely to "dictate electoral outcomes" and to "disfavor a class of candidates" by drawing congressional districts that dispense with all

[3] It is, of course, rare that a political party will be able to act in such a manner. It can only occur when one political party controls both houses of the legislature and the governorship, and yet the state is evenly enough balanced politically in federal voting that the party in control at the state level must violate neutral redistricting criteria to ensure its control of the state's congressional delegation.

neutral, traditional districting criteria in favor of advancing a single goal: ensuring that the Republican Party wins at least 13 of 19 seats in Pennsylvania's congressional delegation, even if Republicans garner less than half the cast statewide. *See* Am. Compl. ¶ 28.

Act 1 is thus much more than a mere procedural regulation. In both purpose and effect, it disfavors Democratic candidates and voters, and virtually guarantees a minority party's victory. Indeed, it not only enshrines a minority party in control – it facilitates that party's control of a supermajority of seats, seats in more than two-thirds of Pennsylvania's congressional districts. As such, it is an abuse of the Pennsylvania Legislature's power under the Elections Clause, and must be struck down as unconstitutional.

B. Act 1 Violates Democratic Voters' Equal Protection Rights

Pennsylvania's current congressional districting plan also "evade[s] important constitutional restraints," *U.S. Term Limits*, 514 U.S. at 833-34, imposed by the Equal Protection Clause of the Fourteenth Amendment. Act 1 baldly classifies voters on the basis of party affiliation for the purpose of favoring one class and diluting the voting strength of another. Such gross distortions of federal election procedure are an impermissible abuse of Pennsylvania's authority to regulate elections.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

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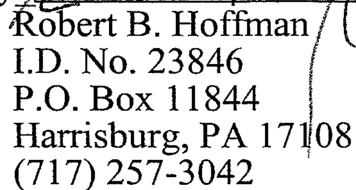
By 

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Dated: February 5, 2002

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2002, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record by fax transmission and first class mail, postage prepaid:

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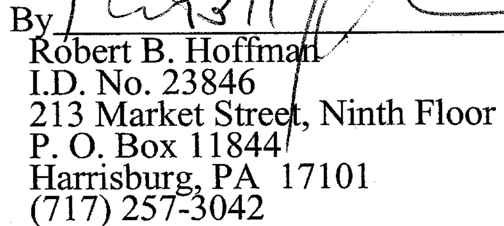

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