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

Louis Agre *et al.*,	:	
	:	
Plaintiffs,	:	**Civil Action No. 2:17-cv-4392**
	:	
v.	:	
	:	
Thomas W. Wolf *et al.*,	:	
	:	
Defendants.	:	
	:	

LEGISLATIVE DEFENDANTS' MOTION REQUESTING THAT PLAINTIFFS BE ORDERED TO IDENTIFY IN THEIR AMENDED COMPLAINT THE STANDARD OF PROOF APPLICABLE TO THEIR ELECTIONS CLAUSE CLAIM

Defendants Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his official capacity as Pennsylvania Senate President Pro Tempore (collectively, "Legislative Defendants"), by and through their undersigned counsel, respectfully submit this Motion Requesting that Plaintiffs be Ordered to Identify in their Amended Complaint the Standard of Proof Applicable to Their Elections Clause Claim (the "Motion") in light of the Court's November 7, 2017 Order permitting Plaintiffs to amend their Complaint ("November 7 Order"; ECF No. 74) and in light of Plaintiffs' November 9, 2017 non-record letter submitted to the Court (the "11/9 Letter"), attached hereto as **Exhibit 1**, and in support thereof, state the following:

I. INTRODUCTION & BACKGROUND

1. On November 7, 2017, this Court held oral argument on Legislative Defendants' Motion to Dismiss.

2. That same day, the Court granted in part and denied in part the Motion to Dismiss as follows: (A) Denied as to Count I of Plaintiffs' Complaint (the "Complaint"); (B) Count II of

the Complaint was dismissed, with prejudice; and (C) Count III of the Complaint was dismissed, without prejudice, affording plaintiffs "leave to amend by November 17, 2017, with further details clarifying the relationship alleged, if any, between the elections clause and the First Amendment"; and (D) Plaintiffs were given leave to amend "to add one voter from each Congressional district in the Commonwealth of Pennsylvania, also by November 17, 2017." (ECF No. 74).

3. Paragraph 34 of the Complaint alleges: "Neither Clause permits the State to interpose itself between the citizens of the States and their Representatives in the National Legislature or otherwise act beyond its authority under the Elections Clause." (ECF No. 1 at 9).

4. In their Opposition to the Motion to Dismiss (the "Opposition"), Plaintiffs boldly stated:

> [A]ny intentional gerrymandering is an invidious act in violation of the Election Clause, and is illegal. By contrast, *Vieth* and other cases try but fail to come up with a judicially manageable standard to distinguish between 'some' gerrymandering and 'too much.' *Because this case draws no such inchoate line between 'some' and 'too much,' it does present a judicially manageable standard: none means none, at least in federal elections.*

(*See* ECF No. 53 at 3) (emphasis added).

5. At the argument on November 7, 2017, Plaintiffs' counsel initially maintained that their position regarding the standard to be applied with respect to partisan gerrymandering was "none means none." This was highlighted in Plaintiffs' counsel's argument in opposition to the Motion to Intervene:

> MS. BALLARD: All right. So, as you know, our case is focused. It's straightforward. We're offering an easily manageable standard to evaluate gerrymandering, and that easily manageable standard is no more gerrymandering. If we win this case, the era of gerrymandering in federal elections is over. That's our case.

(Nov. 7, 2017 Argument Tr. at 14–15).[1]

6. Later in her argument Plaintiff's counsel again distinguished the standard and "level of intent" needed for Plaintiffs' theory, as compared with that of the Proposed Plaintiff-Intervenors, who sought a standard of review on all fours with *Gill v. Whitford*, Case No. 16-1161 (argued October 3, 2017):

> MS. BALLARD: … I think it's going to be confusing when [Proposed Plaintiff-Intervenors are] saying here's how we prove intent and they put on experts to talk about the efficiency gap, the seat to voter curve analysis, the mean to median district chair analysis, the computer simulations analysis, all of which are mentioned in their complaint. And they're saying this is how you prove intent. And we're saying oh, no, that's how you prove—that's how you prove the kind of intent you need, but that's not how you prove the kind of intent we need. *We don't need anywhere near that level of intent. We don't need an intent to entrench.*

(**Ex. 2** at 18–19) (emphasis added).

7. When the Court later noted the inherent conflict between the theories set forth in Plaintiffs' Complaint and Plaintiffs' Opposition with respect to Plaintiffs' Elections Clause claim (Count I), Plaintiffs' counsel pivoted again:

> JUDGE SHWARTZ: … one construction of your complaint is that if a map is drawn solely for partisan purposes, it violates the Election Clause. But I read your brief and your brief suggests if any consideration of partisanship factors into the decision on where to draw the line, it violates the Election Clause. Which theory are you pursuing?
>
> MR. GEOGHEGAN: *Well, a mixed motive*.

(**Ex. 2** at 42) (emphasis added).

[1] A copy of relevant portions of the transcript of the November 7, 2017 argument are attached hereto as **Exhibit 2**.

8. Later during the argument, the Court tried again to secure a clearer understanding of Plaintiffs' theory:

> JUDGE SHWARTZ: But you talked about *Gaffney*, and I do want to understand your pleading, which goes back to my original question to you. Your pleading suggests that if the line is motivated by partisan matters, it's bad, but your brief tells me if a partisan consideration is part of the design of the map, it's bad. I don't know which—and your answer to me was mixed motive, and I don't know where I'm supposed to surmise from reading the pleading, because this is a motion to dismiss. That's what I'm looking at.

(**Ex. 2** at 51).

9. Ultimately, Plaintiffs' counsel's repeated efforts during argument to clarify Plaintiffs' theory or burden of proof proved to be equally unenlightening:

> JUDGE SHWARTZ: I don't understand why, but I don't think—I don't think—
>
> JUDGE SMITH: I'm—
>
> JUDGE SHWARTZ: It must be me, so—
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> JUDGE SMITH: No, I remain unclear as well, but we do need to move on. Thank you very much.

(**Ex. 2** at 61).

10. On November 9, two days after the argument on the Motion to Dismiss, Plaintiffs submitted their 11/9 Letter to the Court's chambers.[2] In this Letter, Plaintiffs significantly retreat from the standards of proof they previously advanced in their Complaint and their Opposition, as well as within their counsel's statements during argument on the Motion to Dismiss, with regard to Count I of their Complaint.

[2] To date, Plaintiffs have not filed the 11/9 Letter, i.e. it is not part of the formal record.

11. Specifically, in their 11/9 Letter, Plaintiffs assert—for the first time—that the standard of proof applicable to their Elections Clause claim (Count I of the Complaint) should be "no greater" than the "predominant motivating factor" standard set forth in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015), and assert that they "can meet this standard at trial." *See* **Ex. 1** at 1.

12. In the 11/9 Letter's second paragraph, Plaintiffs state: "[P]laintiffs' position is that this standard is too high when the plaintiffs are challenging the authority of the state legislature under the Elections Clause. … If there was any such knowing or deliberate effort to influence the outcome of elections to Congress for such a partisan reason, then the state legislature was acting outside of its authority under the Elections Clause." *See id.* at 2.

13. In other words, Plaintiffs now contend that their Elections Clause claim (concerning partisan gerrymandering) should be governed by a standard more stringent than that applicable to racial gerrymandering notwithstanding that, *inter alia*, politics does not constitute a protected class.

II. ARGUMENT

14. Prior to Plaintiff's 11/9 Letter, Plaintiffs' precise theory of the standard to be applied to their Elections Clause claim was unclear, as manifested by the conflicting theories espoused in the Complaint, Plaintiffs' Opposition, and Plaintiffs' counsels' arguments on November 7.

15. Plaintiff's 11/9 Letter, served upon the Court and counsel just 15 business days prior to trial, further muddies the water regarding the standard of proof Plaintiffs contend should be applied to their Elections Clause claim. And the standard of proof applicable to Plaintiffs' will likely have a significant impact on the trial of this action, if any.

16. Indeed, if Plaintiffs are now contending that their Elections Clause claim should be governed by a standard of proof akin to the standard employed in *Alabama Legislative Black Caucus*, it is a far cry from the "none means none" standard that they previously trumpeted in their Complaint and Opposition, and during oral argument on the Motion to Dismiss (just four days ago).

17. Moreover, one of the challenges in applying the *Alabama Legislative Black Caucus* standard of proof in this political gerrymandering context is that the United States Supreme Court views political motivations as a valid defense to a racial gerrymandering claim. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Easley v. Cromartie*, 532 U.S. 234 (2001).

18. The Third Circuit stated in *Thomas v. Independence Township*, "our decision today recognizes that a lack of factual specificity in a complaint prevents a defendant from framing a fact-specific qualified immunity defense, which, in turn, precludes the district court from engaging in a meaningful qualified immunity analysis." 463 F.3d 285, 289 (3d Cir. 2006).

19. Additionally, this Court has noted that "a motion for a more definitive statement … is used to provide a remedy for an unintelligible pleading rather than as a correction for a lack of detail." *Premier Payments Online v. Payment Systems Worldwide*, 848 F.Supp.2d 513 (E.D. Pa. 2012) (Baylson, J.) (internal quotations and citations omitted) (concluding that a "more definite statement" was not required because the defendants could reasonably frame a response.).

20. Plaintiffs' continued vacillation with respect to the standard to be applied to their Elections Clause claim as trial quickly approaches necessitates that Legislative Defendants file this Motion.

21. Specifically, absent knowing the standard of proof Plaintiffs contend is applicable to their Elections Clause claim greatly prejudices Legislative Defendants' ability to fairly and

adequately prepare their defenses for trial or earlier dispositive motion practice. Further, the applicable standard would necessarily have a significant impact on the trial itself (if any).

22. For example, if the applicable standard of proof is that set forth in *Alabama Legislative Black Caucus*, trial and pretrial motion practice (if any) will be significantly fact-intensive. In *Alabama Legislative Black Caucus*, the lower court was required to assess and determine factual issues pertinent to the balancing of considerations of requirements, such as equal population rules, the considerations of race, and the application of "traditional race-neutral districting principles … including compactness, continuity, respect for political subdivisions or communities defined by shared interest … incumbency protection, and political affiliation." 136 S. Ct. at 1270 (*citing Bush v. Vera*, 517 U.S. 952, 964, 968 (1996)) (internal quotations omitted). The court was required to engage in this fact intensive assessment to determine if race predominated.

23. On the other hand, if the applicable standard is "none means none," the aforementioned fact finding and balancing is rendered virtually inapplicable. In fact, under Plaintiffs' "none means none" standard, this case could likely proceed promptly to summary judgment because the Court could take judicial notice (or a stipulation might be reached) that the 2011 Congressional Map incorporated various traditional districting principles without specifying or reaching a conclusion as to how these various factors balanced; what *a* motivating or *the motivating* factor was; or what *a* predominant or *the* predominant factor might have been.

24. Indeed, Plaintiffs, in emphasizing their that "none means none" standard would require minimal fact-finding or balancing of evidence, previously represented at the October 10, 2017 scheduling conference that no depositions were needed:

THE COURT: Good point. Good point. Does the plaintiff intend to take depositions?

MR. GEOGHEGAN: We don't have any intent at this time to take depositions. We really haven't given that a lot of thought, but, tentatively, our view is that we're not going to be taking oral

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depositions.

25. Under Plaintiff's "none means none" standard, the sole legal question for this Court would simply be whether considerations of "incumbency protection" or "political affiliation," to whatever degree they might have been incorporated into the 2011 Congressional Map, are, in fact, valid considerations under the Elections Clause. Consequently, there would be no need to develop a factual record with respect to the *degree* to which these factors might have been considered.[3]

26. Neither Legislative Defendants nor the Court should be required to guess at the standard Plaintiffs' contend is applicable to their Elections Clause claim, particularly just 14 business days before trial. Instead, when amending their Complaint, Plaintiffs should be ordered

[3] Plaintiffs' "none means none" standard serves as the basis for Plaintiffs' assessment that their Elections Clause claim is not a fact-bound, judicially challenging test like Justice Kennedy stated was needed in *Vieth v. Jubilier*, 541 U.S. 267 (2004). Furthermore, this "none means none" standard is how Plaintiffs have previously sought to distinguish their case from *Gill v. Whitford*, Case No. 16-1161 (argued October 3, 2017), as noted in the Opposition (ECF No. 57) and Plaintiffs' Response in Opposition to the Motion to Intervene. (ECF No 68).

to clarify whether the standard of proof they contend is applicable to their Elections Clause claim (Count I of the Amended Complaint) is that (a) consideration of any political concerns in Congressional map drawing is invalid because "none means none"; or (b) consideration of political concerns in Congressional map drawing is invalid only if it reaches the standard of "the predominant motivating factor" as outlined in Plaintiffs' 11/9 Letter.[4]

27. Requiring Plaintiffs to articulate their alleged standard of proof within their amended pleading is also particularly reasonable in that Plaintiffs have already been ordered to include in their amended complaint "further details clarifying the relationship alleged, if any, between the elections clause and the First Amendment." (ECF No. 74).

WHEREFORE, Legislative Defendants respectfully request that the Court grant their Motion, and order Plaintiffs to clarify in their amended complaint whether the standard of proof they contend is applicable to their Elections Clause claim (Count I of the Amended Complaint) is that (a) consideration of any political concerns in Congressional map drawing is invalid because "none means none"; or (b) consideration of political concerns in Congressional map drawing is invalid only if it reaches the standard of "the predominant motivating factor" as outlined in Plaintiffs' 11/9 Letter.

[4] Legislative Defendants specifically reserve the right to challenge any forthcoming amended complaint under Federal Rules of Civil Procedure 12(b)(6) and (b)(1).

Dated: November 11, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 11, 2017, the foregoing was served upon the following Counsel of Record via the Court's ECF system:

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