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.	)	The Honorable D. Brooks Smith
	)	The Honorable Patty Schwartz
Thomas W. Wolf, *et al.*,	)	The Honorable Michael M. Baylson
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION
TO INTERVENOR DEFENDANTS' MOTION FOR CLARIFICATION

On the technical point raised in this motion, defendants are wrong: the *complaint* itself does not have to plead the evidentiary standard of proof. Defendants are also wrong that plaintiffs have abandoned that "none means none," namely, that any gerrymander is beyond the authority of the state legislature under the Elections Clause. Unlike parties in other cases, like *Gill v. Whitford,* plaintiffs disagree that a gerrymander is illegal under the Elections Clause only when the gerrymander shuts out one political party altogether from the political process, or leads to a certain mathematical number of "wasted" votes. A deliberate attempt by the defendant intervenors "to dictate electoral outcomes" or to "favor or disfavor a class of candidates"—Democrats or Republicans—taints the act of redistricting. Since these defendants have unlawfully acted outside their authority, and since it unquestionably has some impact on a privilege and immunity of federal citizenship, the gerrymander is *ultra vires*, or illegal. Furthermore, for this gerrymander which is a map open for all to see, no trier of fact could or would find that in the absence of this gerrymander, this bizarre map with its wild shapes would look the same. Indeed, no map like this has ever been in effect before. Nor is there a burden on plaintiffs to show which particular boundary line is tainted and which is not. There is a violation of the Elections Clause, and plaintiffs are entitled to the remedy of a new map. As to the

evidence necessary to find such a deliberate attempt to do what *Thornton* and *Cook* prohibit, plaintiffs contend that the standard of proof is preponderance of the evidence to do what is an illegal act. Even if it is a higher standard—that is, committing an illegal act was the predominant motive—plaintiffs can meet that standard of proof. Plaintiffs further discuss the relevant standard below.

I. To prevail on a challenge under the Elections Clause, Plaintiffs have to show a deliberate attempt to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade constitutional restraints.

As set out in *Thornton* and *Cook*, "the Elections Clause [is] a grant of authority for procedural regulations, and not a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or evade important constitutional restraints." *Thornton v. U.S. Term Limits*, 514 U.S. 779, 833-34 (1996); *Cook v. Gralike*, 531 U.S. 510, 523 (2001). In Count I, the voters seek to enforce a principle of federalism—the limit placed on state power by the Elections Clause to influence the outcome of Congressional elections. As set out as long ago as in the Federalist Papers, and now in *Thornton* and *Cook*, there has to be a limit on state power to control elections to the lower house of Congress. Of course Plaintiffs have to show that the state of Pennsylvania has deliberately acted beyond its proper legal role to do what *Thornton* and *Cook* prohibit. But once it is determined that such a deliberate attempt was made, that establishes a violation of the Elections Clause. Plaintiffs do not have to make any additional showings, as in *Vieth* or *Davis v. Bandemer* or even *Gill v. Whitford*, that (1) Plaintiffs are entirely "shut out" of the political process, or (2) they are Democrats who are unable to elect Democrats, or even (3) as Democrats they have too many "wasted" votes. Rather Plaintiffs have to prove the existence of this attempt—a deliberate attempt by the state legislature to dictate or try to dictate election outcomes, or to favor or disfavor a class of candidates, or to evade constitutional restraints. It is enough to demonstrate that the state legislature is trying to substitute its own judgment for that of

the plaintiff voters, or even to guide it in a certain way, in frustration of the Constitution's design. That is the violation; in that respect, none means none.

While this case is not one for the jury, a verdict form to a jury in this case—or a statement of the material factual issues for resolution at trial—might read as follows:

Question one: By drawing up and adopting the particular map that became the 2011 Plan, do you find that the defendants sought to dictate or control Pennsylvania's electoral outcomes in a deliberate manner?

Question two: By drawing up and adopting the particular map that became the 2011 Plan, do you find that the state legislature sought to favor a class of candidates for Pennsylvania's Congressional delegation—namely, Republicans—and disfavor another class—namely, Democrats—in a deliberate manner?

Question three: By drawing up and adopting the particular map that became the 2011 Plan, do you find that the state legislature sought to control the districts in which Plaintiffs and others could vote based upon their party affiliation or likely political views?

If the answer to any of these three questions is yes—based on a preponderance of the evidence—the plaintiffs have demonstrated a violation of the Elections Clause. If the answer is yes to any of the first *two* questions, Plaintiffs have also demonstrated a deprivation of the privileges and immunities of citizenship, in violation of the Fourteenth Amendment, as explained by the concurring opinion of Justice Kennedy in *Thornton*, 514 U.S. at 844. The state legislature has unlawfully tried to control or interfere with their direct right to vote for Congress. Plaintiffs have a right as national citizens to vote without any deliberate attempt by the state to substitute its own judgment for their own.

If the answer is yes to the *third* question—again, based on a preponderance of the evidence—Plaintiffs have demonstrated a deprivation of their First Amendment rights. The Supreme Court has acknowledged that the Elections Clause, by allowing for neutral procedural regulations, necessarily allows state legislatures to place some burdens on First Amendment-protected speech. In order to evaluate whether these burdens are constitutional, the Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), set out what is sometimes referred to as a "sliding scale" of scrutiny, requiring a court to "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* at 433-34 (quoting *Anderson*, 460 U.S. at 788-89). But, viewpoint discrimination "presumptively invalid under the First Amendment." *Brown v. City of Pittsburgh*, 586 F.3d 263, 286 (3d Cir. 2009) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). It is "censorship in its purest form" and "threatens the continued vitality of 'free speech.'" *Startzell v. City of Philadelphia*, 533 F.3d 183, 193 (3d Cir. 2008) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting)). So, the "character and magnitude of the asserted injury" is severe. And, as set forth above, the Elections Clause only allows for procedural regulations. So, far from imposing a "necessary" or "justified" burden on Plaintiffs' First Amendment rights in order to serve legitimate state interests, the Pennsylvania legislature engaged in presumptively unconstitutional burdens on speech in pursuit of the illegitimate interests. There is no question that the 2011 Plan should

therefore be subjected to the strictest form of scrutiny on *Burdick*'s sliding scale, and that it cannot survive that scrutiny.

II. Plaintiffs are entitled to enforce the Elections Clause—and protect the privilege and immunities of federal citizenship.

In the violations of the Elections Clause found in *Thornton* and *Cook*, the Court did not try to define how much the right to vote must be burdened. Significantly, in *Cook*, the Missouri law struck down by the Court did not try to bar anyone's candidacy, or keep them from the ballot, or prevent the voters from disregarding the legislature's wishes. Indeed, in *Cook*, the legislature was only trying to nudge voters in a certain direction. Nonetheless, nudge or not, effect or no effect, the Court invalidated the law under the Elections Clause. The legislature was acting outside its sphere of authority—and the Court said no. In that sense, no means no, and none means none.

Nor is it a requirement to show partisan discrimination or discrimination against a "protected class"—that is another reason why the "predominant motive" standard in *Alabama Legislative Black Caucus*, 135 S. Ct. 1257 (2015), is not appropriate in a case to enforce the Elections Clause. After all, there was no partisan discrimination in *Cook* or *Thornton*. The term limit law applied equally to Republicans and Democrats. Nor is partisan discrimination the rationale behind the strict adherence to "one person, one vote" in Congressional elections. When a state tries to vary from a strict version of one person, one vote in Congressional maps, the Court does not inquire whether the state had a good reason for doing so or whether denial of one-person, one-vote was the "predominant" motive. Nor do Plaintiffs have to show that it had a devastating impact on the right to vote. In Congressional elections, one might say that the Court does not want the states to make mischief with the maps. By contrast, in redistricting of state legislative seats, the states have broader discretion to vary from one person, one vote—indeed,

variations of up to 10 percent are allowed, as they would never be allowed in federal elections. The different treatment of course is to protect the integrity of federal elections from state interference.

For that reason, requiring that a "partisan" gerrymander be the "predominant" motive would weaken the Elections Clause. Regardless of partisan intent, the Elections Clause prohibits any attempt to "dictate electoral outcomes" *or* to favor or disfavor a "class" of candidates, or "evade constitutional restraints" on the state legislature itself. If it applies to term limits it should apply with even more force to a corrupt politically corrupt act like a gerrymander. Indeed, the term limit law had a salutary purpose, namely, to ensure turnover in office; nonetheless, it was illegal as a deliberate attempt to "dictate electoral outcomes" or "to favor a class of candidates," namely, challengers over incumbents. If a state steps outside of its role, it should not be decisive what its predominant motive happened to be—as Justice Kennedy might say, the Constitutional design has been frustrated. *See Thornton*, 514 U.S. at 841.

In this case, the defendants may argue that they had a non-partisan motive—namely, to protect incumbents. There are two responses to this sham argument: First, it is not true. And second, even if it were true, a scheme to entrench incumbents in office would also be unlawful—indeed, it would be the *Thornton* case in reverse.

First, the 2011 plan does not seek to protect incumbents as such—but to favor Republican incumbents over Democratic ones. The Republicans in 2010 had just made a huge gain in Congress, and the purpose was to lock in such a gain. It was to favor a class of candidates—Republicans. Even more telling, the 2011 Plan had the purpose of removing two incumbent Democrats from Congress—namely Congressmen Jason Altmire and Mark Critz, who were placed against each other in the 12th District. The Democratic voters in the district

were then "cracked" to make it difficult for either Congressman to survive a general election, and the district has since been represented by a Republican.

Second, even a party-neutral scheme of incumbent protection—which in fact did not occur here—would be in conflict with Thornton *and beyond state authority under the Elections Clause*. Just as it is a violation of the Elections Clause to remove incumbents from power—it is necessarily just as illegal to try to keep them in. It would still be "favoring a class of candidates," namely, incumbents, and "disfavoring another class," those seeking to replace them. Indeed, the Constitution required reapportionment every ten years—and refuses to leave it to the discretion of Congress—to make sure that members of Congress in the original thirteen states would not entrench themselves in power. In that respect, the Constitution was an anti-gerrymandering document.

The Elections Clause exists to limit the state role in deciding who stays or leaves the Congress. In The Federalist Papers the authors express alarm that the states may interfere with the outcome of federal elections. As stated by Hamilton in Federalist Number 60, "...an uncontrollable power over elections to the federal government could not, without hazard, be committed to the state legislatures." There is nothing in the Constitution to authorize the states to keep incumbents in place. And a state attempt to keep incumbents in place and schemes to prevent turnover could be even more destructive to the democracy than a law to set term limits. In the last 104 elections for Congressional seats in which an incumbent ran for office in Pennsylvania, a state notorious for gerrymandering, a challenger prevailed only 11 times, or 10.6% of the time. And two of those 11 challengers were the Republicans who effectively unseated three Democratic incumbents following the 2011 gerrymander.

It is true that in dicta there are passing remarks—especially in the context of racial gerrymander claims—that incumbent protection is a neutral or legitimate redistricting principle. But these are dicta—not decisions under the Elections Clause. For example, even a partisan gerrymander might arguably be a defense to a racial gerrymander, which was the subject of *Alabama Legislative Black Caucus*. Nor do these scattered dicta mention the Elections Clause, or take account of the decisions in *Thornton* and *Cook*. Even as dicta, they make clear that such incumbent protection has to be non-partisan; and the 2011 plan targeted at least two Democratic incumbents. Accordingly, a standard of proof that is primarily used to determine racial or partisan intent under the Equal Protection Clause is an awkward way to enforce a limit on state power under the Elections Clause, which has an entirely different function that stopping race discrimination against a "discrete" and "insular" class. The Elections Clause exists in large part to constrain a state legislature from interfering with majority rule.

In the case of the First Amendment claim, the applicable standard of proof comes from *Burdick v. Takushi*, which requires the Court to ask if this is a regulation that serves in some precise way a legitimate state interest. A partisan gerrymander is not a legitimate state interest. If the restriction on the right to vote is in the service of a purpose that is illegal under the Elections Clause, it should be invalidated without requiring proof of a "predominant purpose" that might apply to a claim of race or partisan discrimination.

In deciding this case, Plaintiffs have to show deliberate attempt to dictate electoral outcomes, or favor or disfavor a class of candidates; and they must show it on the preponderance of the evidence. To go beyond that standard, to require that a partisan intent be the "predominant motive" —is out of place and confusing. Furthermore, the attempt itself is illegal—just like an state attempt to interference with a civil rights. Indeed, the civil rights statutes enacted at the time

of the Fourteenth Amendment were aimed even at attempts to interfere with the rights of federal citizenship. *See, e.g.,* 42 U.S.C. § 1985(3).

Conclusion

For all the above reasons, Plaintiffs respectfully request that the Court deny the Intervenor Defendants' motion to clarify and apply a standard of proof commensurate with the arguments above.

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Respectfully submitted

s/ Thomas H. Geoghegan
One of Plaintiffs' Attorneys

Thomas H. Geoghegan (*pro hac vice*)
Michael P. Persoon (*pro hac vice*)
Sean Morales-Doyle (*pro hac vice*)
Despres, Schwartz & Geoghegan, Ltd.
77 West Washington Street, Suite 711
Chicago, Illinois 60602
312-372-2511

Alice W. Ballard, Esquire
Law Office of Alice W. Ballard, P.C.
123 S. Broad Street, Suite 2135
Philadelphia, PA 19109
215-893-9708
Fax: 215-893-9997
Email: awballard@awballard.com
http://awballard.com

Brian A. Gordon
Gordon & Ashworth, P.C.
One Belmont Ave., Suite 519
Bala Cynwyd, PA 19004
610-667-4500