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' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT

Legislative Defendants hereby submit this Memorandum of Law in support of their Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6).

Dated: November 22, 2017

Respectfully submitted,

BLANK ROME LLP

/s/ Brian S. Paszamant
BRIAN S. PASZAMANT
JASON A. SNYDERMAN
JOHN P. WIXTED
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: 215-569-5791
Facsimile: 215-832-5791
Email: Paszamant@blankrome.com
Snyderman@blankrome.com
JWixted@blankrome.com

Attorneys for Legislative Defendant Senator Joseph Scarnati, III

CIPRIANI & WERNER PC

/s/ Kathleen Gallagher
KATHLEEN GALLAGHER
CAROLYN BATZ MCGEE
650 Washington Road, Suite 700
Pittsburgh, Pennsylvania 15228
Phone: 412-563-4978
Email: KGallagher@c-wlaw.com
CMcgee@c-wlaw.com

Attorneys for Legislative Defendant Representative Michael Turzai

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC

/s/ Jason Torchinsky
JASON TORCHINSKY (admitted *Pro Hac Vice*)
SHAWN SHEEHY (admitted *Pro Hac Vice*)
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Facsimile: 540-341-8809
Email: JTorchinsky@hvjt.law
ssheehy@hvjt.law

Attorneys for Legislative Defendants Senator Joseph Scarnati, III and Representative Michael Turzai

I. PRELIMINARY STATEMENT

Plaintiffs' Amended Complaint suffers from the same fundamental and fatal flaws as the original Complaint. The original Plaintiffs and each of the new 21 Plaintiffs still lack standing. Rather than alleging any particularized stake in this litigation, or any harm *at all* allegedly suffered as a result of the 2011 Plan, Plaintiffs advance only a general grievance about Pennsylvania's government—claiming some sort of harm to their alleged interest in the proper application of the Elections Clause. This simply does not establish Article III standing.

Plaintiffs' amended claims are also completely implausible. Plaintiffs did not follow the Court's instruction to clarify the relationship between the Elections Clause and the First Amendment. In fact, there is no relationship alleged; Plaintiffs allege only that both the Elections Clause and the First Amendment purportedly proscribe partisan gerrymandering. Specifically, the Amended Complaint advances two claims: (1) one titled "Violation of Privileges and [*sic*] Immunities Clause" (Count I); and (2) one titled "Violation of the First Amendment" (Count II). These claims are entirely redundant; both are merely efforts to rely upon the Elections Clause to vindicate some generalized harm allegedly resulting from the 2011 Plan. And, both claims are premised exclusively on an unfounded reading of three sentences from Justice Kennedy's concurring opinion in *Cook v. Gralike*, 531 U.S. 510, 527 (2010), from which they theorize that state legislatures enjoy only a "limited grant of authority" to issue "procedural regulations," and cannot "dictate electoral outcomes" or "favor or disfavor a class of candidates." Because Plaintiffs believe the 2011 Plan exceeds this theorized authority, they want the 2011 Plan tossed, and they want Executive Defendants to "submit for approval of the General Assembly" an alternative plan blessed by the Court.[1]

[1] In other words, Plaintiffs want this Court to completely bypass Pennsylvania's legislature (in direct contravention of the Election Clause's express grant of authority) and place the mapmaking process in the

Plaintiffs are pursuing an unprecedented "right" no court has ever recognized. To date, Supreme Court jurisprudence does not even recognize the justiciability of partisan gerrymandering claims. And Plaintiffs' Elections Clause theory enjoys no precedential support. Moreover, if accepted, Plaintiffs' theory would render any Congressional district map drawn by a state legislature in normal course—as that state's constitutionally-chosen method for redistricting (as opposed to one drawn by an advisory committee or other "neutral" body)—an unconstitutional *ultra vires* act notwithstanding the Election Clause's grant of mapdrawing power to state legislatures. Moreover, the ripple effect caused by a simple "concerned citizen" lawsuit like this would unleash electoral chaos, with political activists flocking to federal courts following each Congressional redistricting to undo every state's map if a state legislature had any involvement in creating that map. This Court should not open those floodgates. Plaintiffs' ever-evolving theories should be stopped now.

II. FACTUAL BACKGROUND

After argument on Legislative Defendants' initial Motion to Dismiss, the Court granted that motion in part, and denied it in part. (Doc. 74.) The Court dismissed Plaintiffs' Equal Protection Clause claim with prejudice, and dismissed Plaintiffs' First Amendment claim with leave to amend to include further details clarifying the relationship alleged, if any, between the Elections Clause and the First Amendment claims. (*Id.*) The Court also granted Plaintiffs leave to add one voter from each of Pennsylvania's 18 Congressional districts. Plaintiffs have since amended their pleading to: (1) add 21 plaintiffs; and (2) replace and alter the allegations in their First Amendment count (now Count II). Plaintiffs now advance two claims, both premised on an alleged violation of the Elections Clause.

---

hands of individuals/entities outside of those identified by Pennsylvania's Constitution. The Court simply lacks the authority to order the relief Plaintiffs' request.

III. ARGUMENT

A. Dismissal is Required Because Plaintiffs Lack Standing

A party may move to dismiss based of lack of standing pursuant to Fed.R.Civ.P. 12(b)(1). *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012). Plaintiffs here articulate no specific injury; instead they claim merely that Pennsylvania's General Assembly exceeded its authority granted by the Elections Clause by passing the 2011 Plan. (*See, e.g.* Am. Compl. at ¶¶ 56, 80.)

But "[s]tanding has been a consistent barrier to lower courts hearing generalized, undifferentiated claims by voters and citizens." *Berg v. Obama*, 574 F. Supp. 2d 509, 517 (E.D. Pa. 2008). And the Supreme Court has specifically clarified that the Elections Clause affords concerned voters and citizens no generalized standing. Specifically, in *Lance v. Coffman*, the Court found that four voters lacked standing (because they were not advancing claims on behalf of a state) to advance a claim that Colo. Const. art. V, § 44—which, as interpreted by Colorado's supreme court, limits redistricting, even if judicially-created, to once per census—violated their rights afforded by the Elections Clause, where those voters had asserted no particularized stake in the litigation, but only an undifferentiated, generalized grievance about the government's conduct. 549 US 437 (2007) (per curiam); *see id.* at 442 ("Because plaintiffs assert no particularized stake in the litigation, we hold that they lack standing to bring their Elections Clause claim."). In fact, the Supreme Court has

> consistently held that a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992). "These decisions include the

somewhat rare cases that have reached the Supreme Court where plaintiffs allege constitutional harms (other than taxpayer standing under the Establishment Clause of the First Amendment) that affect broadly-defined groups of citizens or voters." *Berg*, 574 F. Supp. 2d at 517 (citing *Lance*, 549 US 437, and other cases). Nor have Plaintiffs alleged harm sufficiently particular to give them standing under the First Amendment. *See, e.g.*, *Pope v. Blue*, 809 F. Supp. 392, 398 (W.D.N.C. 1992), *aff'd by* 506 U.S. 801 (1992) ("[P]laintiffs claim that the Plan violates the First Amendment by either creating a 'chilling effect' on their freedom of speech or limiting their freedom of association. Neither position states a cause of action."). In light of this binding jurisprudence, Plaintiffs' claims—admittedly based exclusively on a generalized grievance—must be dismissed.

Similarly, Plaintiffs here cannot prevail upon their claims unless they demonstrate some actual injury they personally sustained from the 2011 Plan. Plaintiffs, many of whom reside in districts in which registered Democrats outnumber registered Republicans, make no allegations or assertions with respect to how the 2011 Plan has harmed them.[2] Thus, the claims advanced by Plaintiffs residing in the First, Second, Third, Eighth, Twelfth, Thirteenth, Fourteenth, Fifteenth, Seventeenth, and Eighteenth Districts should be dismissed. (Am. Compl. at 10, 11, 15, 16, 24, 28, 29, 30, 31, 32, 33, 34, 35.) And, absent a Plaintiff with standing from each Congressional district, the remaining Plaintiffs (most of whom did not assert any particularized harm either) separately lack standing to bring their statewide challenge. (*See* 11/16/17 Op. (Doc. 83) at 4.) Moreover, although Plaintiffs now allege that they reside in each of Pennsylvania's 18 Congressional districts (*see* Am. Compl. at ¶¶ 10-35), Plaintiffs' counsel acknowledged on November 20, that three Plaintiffs' addresses remain unknown. *See* Nov. 20, 2017 email from B. Gordon, Esq. to T.

[2] *Compare Whitford v. Gill*, No. 16-1161 (U.S.) (injury claimed because of the legislature-wide caucus system).

Geoghegan, Esq. attached hereto as **Exhibit A**.[3] In other words, Plaintiffs cannot confirm that they live in all 18 of Pennsylvania's Congressional districts.

B. Dismissal is Required Because Plaintiffs Fail to State a Cognizable Claim

Federal district courts are required to dismiss a complaint when the allegations fail to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). In performing this assessment, a court must determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)).

1. Plaintiffs Cannot State a Cognizable Claim Under the Elections Clause

At present there is no judicially-manageable standard to evaluate partisan gerrymandering claims, and the Amended Complaint should therefore be dismissed as non-justiciable. *See generally Baker v. Carr*, 369 U.S. 186, 217 (1962); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Rodriquez v. 32nd Legislature of the V.I*, 859 F.3d 199, 202 (3d Cir. 2017). Plaintiffs previously described their desired standard for gerrymandering as "none means none[,]" explaining, "*any intentional gerrymandering* is an invidious act in violation of the Elections Clause, and is illegal." (Opp'n (Doc. 53) at 3 (emphasis added).) But in the Amended Complaint, Plaintiffs pivot again, now conceding that districting "necessarily has some political effect and in that respect is [*sic*] inherently political process[.]" (Am. Compl. at ¶ 79.) Nevertheless they allege that "plaintiffs are entitled to the use of a neutral *or least restrictive process* consistent with the limits on state authority under the Elections Clause to secure the rights of federal citizenship and the limits placed

[3] *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (A document integral to or explicitly relied upon in the complaint may be considered).

by the First Amendment to ensure the broadest possible freedom of choice without interference by any government[.]" (*Id.* at ¶ 71 (emphasis added).) Put differently, they appear to concede that partisan intent need not be removed from the redistricting process, but need only be coupled with some additional "neutral" or "least restrictive process" to be constitutional. This is not a judicially-manageable standard. In reality, Plaintiffs are just hedging again; they are simply advancing another new, and different, theory in the hope the Court will permit their claims to survive.

Regardless, state legislatures have always engaged in some degree of political gerrymandering. Indeed, the "Supreme Court has often recognized that redistricting is an inherently political process." *Pope*, 809 F. Supp. at 398; *see Gaffney v. Cummings*, 412 U.S. 735, (1973); *Davis v. Bandemer*. 478 U.S. 109 (1986); *Bush v. Vera*, 517 U.S. 952, 964 (1996). In evaluating a prior Pennsylvania Congressional map, the District Court for the Middle District of Pennsylvania stated:

> *We may not disapprove a plan simply because partisan politics had a role in its creation.* … Our role is not to insure that the Legislature has come up with the best plan -- only that the one enacted passes minimal constitutional scrutiny. . . . The remedy lies in the ballot box, not in a federal courthouse.

In re Pa. Cong. Dist. Reapport. Cases, 567 F. Supp. 1507, 1517 (M.D. Pa. 1982) (emphasis added).

Thus, besides being non-justiciable, Plaintiffs' claim that any non-neutral, partisan intent in the map drawing process violates the Elections Clause (either through the Privileges or Immunities Clause or First Amendment) is simply not plausible. Indeed, although partisan gerrymandering is as old as the Republic, Plaintiffs now argue that the Framers intended the states' power under the Elections Clause to apply to passing only "neutral procedural rules," rather than outcome determinative, regulations of congressional elections. (*See* Am. Compl. at ¶¶ 3, 58, 79.) And although Plaintiffs rely upon *Gralike*, 531 U.S. at 510, to support their strained theory, their *Gralike* based theory does not withstand scrutiny.

Plaintiffs' novel theory appears to have its origin in a misreading of the 1932 case of *Smiley v. Holm*, 285 U.S. 355, 52 S. Ct. 397, 399 (1932), a decision cited in *Gralike*. In *Smiley*, while discussing the text of the Elections Clause, the Court noted that the clause provided authority to "enact the numerous requirements *as to procedure* and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Id.* at 366 (emphasis added).

The Supreme Court later cited to this language, in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), and later in *Gralike*. In *Gralike*, the Court stated that the Elections Clause limits the power to regulate the times, places, and manner of holding congressional elections to what it called "procedural regulations." 531 U.S. at 523 (citing *Thornton*, 514 U.S. at 833). In his concurring opinion—the foundation of Plaintiffs' theory—Justice Kennedy stated, "[a] state is not permitted to interpose itself between the people and their National Government … [T]he Elections Clause is a grant of authority to issue procedural regulations, and not a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates…." *Id.* at 527-28 (citing *Thornton*, 514 U.S. at 833).

But a closer analysis of *Gralike* reveals why it is not supportive of Plaintiffs' claims. First, the use of the *Smiley* quote is a misapplication. It simply cannot be read to mean that there can be no "outcome" determinative rules; *Smiley* did not say state legislature could *only* pass "procedural," or "neutral" rules. Rather, it offered a non-exclusive list of the sort of requirements "*as to procedure* and safeguards" involved in elections, such as notice lists and registrations. Second, the case is inapposite. It did not involve redistricting, let alone a dispute over partisan redistricting. Third, subsequent partisan gerrymandering cases *have not* embraced the "standard" that Plaintiffs claim was announced in *Gralike*. For example, the *Vieth* plurality did not even mention *Gralike*. Rather, it cited to the Elections Clause to state that "the Constitution clearly

contemplates districting by political entities" because the Framers allowed states to draw the districts and anticipated that partisan considerations would play a role. 541 U.S. at 285. In fact, no Justice suggested that *Gralike* strictly forbids any partisan intent or attempts in connection with redistricting. And Justice Kennedy—having the opportunity to do so in this partisan gerrymandering case just a few years after *Gralike*—did not find that any partisan intent leads to a Constitutional violation. In fact, he stated the *opposite*, writing in his concurring opinion that "*[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied.*" *Id.* at 306-07 (Kennedy, J., concurring). Count I should be dismissed.

2. Plaintiffs Cannot State a Cognizable First Amendment Claim

Plaintiffs' First Amendment Claim (Count II) is completely redundant of their "Elections Clause" claim, and should be dismissed for that reason alone. Further, Plaintiffs do not "clarify" how their Elections Clause claim relates to the First Amendment, other than alleging that partisan gerrymandering violates both. (*See* Am. Compl. at ¶¶ 64-66, 72.)

The Amended Complaint provides no supporting allegations that the enforcement of the 2011 Plan violates Plaintiffs' First Amendment rights. This alone should serve to end further inquiry. But even setting that aside, courts reviewing First Amendment claims in partisan gerrymandering cases have clarified that there is no independent First Amendment violation absent a violation of the Equal Protection Clause. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016) (recognizing that elements to prove an unconstitutional partisan gerrymander under the First Amendment or the Equal Protection Clause are the same); *Legislative Redistricting Cases*, 629 A.2d 646, 660 (Md. 1993) ("There is no case holding that the First Amendment visits greater scrutiny upon a districting plan than the Fourteenth. Rather, the cases uniformly counsel the opposite.") (citing *Anne Arundel County Republican Cent. Comm. v. State Advisory Bd. of Election*

Laws, 781 F. Supp. 394, 401 (D. Md. 1991), *sum. aff'd,* 504 U.S. 938 (1992); *Badham*, 694 F. Supp. at 675, *sum. aff'd*, 488 U.S. 1024, (1989); *see also Republican Party v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992) ("This court has held that in voting rights cases no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim."). Because Plaintiffs' Equal Protection claim was dismissed, this claim must be as well.

Second, Justice Kennedy made clear in his *Vieth* concurrence that the mere allegation of a First Amendment violation is insufficient to plead and prove that political classifications were used; rather, a plaintiff must plead that political classifications were used *and the plaintiff's voting rights were burdened*. *See* 541 U.S. at 315 (Kennedy, J., concurring). Since Justice Kennedy's opinion in *Vieth*, one three-judge panel found that plaintiffs raising a First Amendment partisan gerrymandering claim survive a motion to dismiss by alleging that a legislature "purposefully" diluted "the weight of certain citizens" votes to make it more difficult for them to achieve electoral success because of the political views they have expressed through their voting histories and party affiliations." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 595 (D. Md. 2016).[4]

But, Plaintiffs' amended allegations do not come close to meeting this standard. In support of their First Amendment claim, Plaintiffs now allege that "[t]he Elections Clause is not a source of authority to dictate electoral outcomes, or favor or disfavor a class of candidates," (Am. Compl. at ¶ 66), and allege that "[t[his authority is further circumscribed by the First Amendment, which subjects to strict judicial scrutiny any content based regulation of speech or any law like the 2011 Plan which discriminates against citizens based on their political viewpoints." (*Id.* at ¶ 67.) But strict scrutiny is only available in the First Amendment context when the statute is facially content-based or targeted at particular speech. *See, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

[4] This case has been stayed pending the outcome of *Gill*, so there is no final judgment in that matter.

Plaintiffs do not allege either scenario. And the Supreme Court has made it clear that "[w]e have not subjected political gerrymandering to strict scrutiny." *Bush*, 517 U.S. at 964.

Plaintiffs merely suggest that the General Assembly considered partisan objectives when drafting the 2011 Plan. And because this conduct is contemplated and approved by the Elections Clause, it could not possibly violate Plaintiffs' First Amendment Rights. *See Shapiro*, 203 F. Supp. 3d at 595; *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 575 (N.D. Ill. 2011) (three-judge court) (rejecting First Amendment partisan gerrymandering claim because redistricting map did not prevent plaintiffs from speaking, endorsing political candidates of their choice, contributing for a candidate, or voting for the candidate and because the First Amendment "does not ensure that all points of view are equally likely to prevail"). Count II should therefore be dismissed.

3. This Court Cannot Provide the Relief Plaintiffs Seek

Plaintiffs ask this Court to do something it lacks the authority to do. Even assuming the Court allows Plaintiffs' novel theory to proceed, the Amended Complaint seeks an impermissible remedy. In Pennsylvania, Congressional lines are drawn by the General Assembly, as a regular statute, subject to gubernatorial veto. *See* Pa. Const. art. IV, § 15. And as a matter of state constitutional law, the legislative power of the Commonwealth is vested in the General Assembly. Pa. Const. art. II, § 1. Thus, by asking the Court to replace the 2011 Plan with one developed by the Executive Defendants with oversight by this Court, Plaintiffs are really seeking an order requiring the Commonwealth to amend its Constitution to provide for a *different* manner of drawing the electoral map. Supreme Court precedent expressly prohibits such an end-run. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 41-42 (1982); *Holder v. Hall*, 512 U.S. 874, 916 (1994) (Thomas, J., concurring). The Amended Complaint should be dismissed.

CERTIFICATE OF SERVICE

The undersigned certifies that on November 22, 2017, the foregoing was served upon the following Counsel of Record via the Court's ECF system:

Alice W. Ballard, Esquire
Law Office of Alice W. Ballard, PC
123 S. Broad Street, Suite 2135
Philadelphia, Pennsylvania 19109
Attorneys for Plaintiffs

Michael Persoon, Esquire
Sean Morales-Doyle, Esquire
Thomas H. Geoghegan, Esquire
Despres Schwartz & Geoghegan, Ltd.
77 W. Washington Street, Suite 711
Chicago, Illinois 60602
Attorneys for Plaintiffs

Brian A. Gordon, Esquire
Gordon & Ashworth PC
One Belmont Avenue, Suite 519
Bala Cynwyd, Pennsylvania 19004
Attorneys for Plaintiffs

Timothy E. Gates, Esquire
Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, Pennsylvania 17120
Attorneys for Defendant, Pedro Cortes, Secretary of State of Pennsylvania

Mark A. Aronchick, Esquire
Claudia DePalma, Esquire
Michele D. Hangley, Esquire
Hangley Aronchick Segal & Pudlin
One Logan Square, 27th Floor
Philadelphia, Pennsylvania 19103
Attorneys for Defendants, Thomas W. Wolf, Governor of Pennsylvania; Pedro A. Cortés, Secretary of State of Pennsylvania; and Jonathan M. Marks, Commissioner for the Bureau of Commissions, Elections, and Legislation, in their official capacities

Gregory George Schwab, Esquire
Governor's Office of General Counsel

333 Market Street, 17th Floor
Harrisburg, Pennsylvania 17101
Attorneys for Defendant, Governor Thomas Wolf

Dated: November 22, 2017

/s/ Brian S. Paszamant
BRIAN S. PASZAMANT