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 D. Baylson
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE INTERVENOR DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

Introduction

By order of November 7, 2017, Court previously denied the defendants' motion to dismiss the complaint as to Count I which stated a claim under the Privileges and Immunities Clause. In the same order the Court gave plaintiffs leave to restate the First Amendment claim; and in the new Count II, plaintiffs have done so. On November 16, 2017, this Court gave its "Statement of Reasons for the Court's Decision on the Motion to Dismiss." The Court concluded that "the factual allegations as to Count I, based on the Elections Clause of the Constitution, were sufficiently detailed, and if true, could be found plausible." Nonetheless, defendants have filed a motion to dismiss Count I yet again, as well objections to factual allegations as to standing. Defendants give relatively little attention to the First Amendment claim—in particular, the relationship between the Elections Clause and the First Amendment, which the Court asked the plaintiffs to address. Plaintiffs submit that Count II explains the relationship between the First Amendment and the Elections Clause.

I. Plaintiffs have Article III standing to challenge their State's gerrymander of their Congressional districts.

A. This statewide scheme impairs the individual right to vote, and is not a generalized injury.

Plaintiffs have Article III standing to challenge a gerrymander that seeks to dictate who represents them in Congress. It impairs their right of federal citizenship to choose their Representatives to Congress without state interference in that choice. *See, e.g., U.S. Term Limits Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995). That is true even if they are registered Democrats represented by Democratic Congress members. It is no answer to the loss of this right of federal citizenship for the defendants to say to plaintiffs in some districts: "Didn't we give you what you wanted?" The plaintiffs do not want the defendants making that decision. Nor is such impairment ever just a "generalized" injury. The right to vote is an individual right—a personal right of each individual citizen. Each individual plaintiff has suffered a unique and individual injury from a statewide gerrymandering scheme that uses all of them as pawns to elect more Republicans. In *Reynolds v. Sims*, 377 U.S. 533 (1964), Chief Justice Warren emphasized this individual nature of the right to vote:

> As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Id. at 562.

In asserting the right to vote, plaintiffs "seek relief in order to protect or vindicate *an interest of their own.*" *See Baker v. Carr*, 369 U.S. 186, 207 (1962) (emphasis added). As set above and in cases since *Baker v. Carr*, voters have had the broadest possible Article III standing to challenge restrictions on the right to vote—indeed, in federal elections, they may challenge even tiny variations from one person, one vote. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 734

(1983). In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court states that every election regulation impairs the right to vote to some degree.

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends."

Id. at 433 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Burdick subjects that virtually every regulation is subject to some form of judicial review, up to strict scrutiny. In this case, on that sliding scale, plaintiffs submit that a gerrymander is subject to strict scrutiny, not only because it is viewpoint discrimination but because it is beyond the lawful authority of the State under the Elections Clause. None of the cases cited by defendants justify dismissal for lack of standing. In *Pope v. Blue*, 809 F. Supp. 392 (W.D. N.C. 1992) (three-judge court), the district court did not dismiss the case on Article III standing grounds, but just held that the First Amendment did not prohibit gerrymanders.

Lance v. Coffman, 549 U.S. 437 (2007), is just as far afield. The U.S. Supreme Court dismissed the case because the four litigants in *Lance*—unlike plaintiffs here—failed to claim any deprivation of their own right to vote. Distinguishing such an abstract claim from a right to vote case, the Court in *Lance* stated:

> The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing.

Id. at 442 (citing *Baker v. Carr*, 369 U.S. at 207-08).

Unlike *Lance*, plaintiffs are not suing as to which branch of state government responsible for redistricting. Rather, plaintiffs are alleging the specific way defendants have burdened their

own right to vote. As discussed below, the complaint is replete with allegations as to how this gerrymander has impaired the right to vote: individual rights under the Fourteenth and First Amendments. Paragraph 6 of the First Amended Complaint states:

> As set out in Count I, the 2011 Plan denies the rights of plaintiffs as federal citizens to be free of this intentional interference by the General Assembly in choosing the party affiliations of their Representatives in Congress...the 2011 Plan seeks to interfere with this free choice and right of federal citizenship by concentrating plaintiffs and other likely Democratic voters in the fewest possible Congressional districts. It also seeks to strategically place likely Republican voters in all other districts so as to constitute effective voting majorities for Republicans candidates for Congress.

Plaintiffs go on to allege in further detail how the techniques of packing and cracking isolate them from other citizens and impose the state legislature's choices on them—depriving them of a specific privilege and immunity of federal citizenship

In addition, as set out in Count II, the plaintiffs allege a substantial burden on their First Amendment rights. Paragraph 7 states:

> The 2011 Plan limits where an in what forum voters and candidates can speak based on the viewpoint they have express in past elections and that which they are likely to express in future elections. The 2011 Plan also attempt to stifle the effective of some voters' speech, namely Democrats, including many of the plaintiffs, based on their viewpoint.

B. In addition to suffering an impairment of the right to vote without state interference, plaintiffs particular and different types of injury.

The burden on the right to vote is not uniform but takes different forms with different voters, because gerrymanders place voters in different districts. *Some* plaintiffs are packed into "super-Democratic" districts. Yes, some of them are Democrats who have representatives who are Democrats, but they in effect had the state put its thumb on the scale. They have been deliberately isolated from as many Republican voters as possible, in order to dilute their voting strength statewide. In a sense, the Democratic plaintiffs in these districts have been placed in

political ghettos. Such isolating techniques impair their right to vote by making their own district-by-district elections less competitive—by design—and by making the state in which they live more politically polarized. Thanks to this gerrymander, they live in a more politically divided state and country, and have suffered a loss of effective representation with fewer Democrats in Congress. The argument that certain of these plaintiffs should be happy with the super-Democratic districts that the defendants made for them is condescending if not insulting—in effect telling these plaintiffs they should be satisfied with a form of "guided democracy."

Meanwhile, *other* plaintiffs—those outside the super-Democratic districts—are spread out to ensure that they are less likely to elect Democrats. The McGlone report uses the techniques of geographic information systems to show how the 2011 Plan manipulated boundaries to pull in or push out clusters of Democratic voters or Republican voters. This is a demonstrable fact—these movements of groups consistently fit the objective of increasing Republican success on a statewide basis.

Likewise, Republican voters—not just Democrats—have suffered particular burdens on their right to vote, even from discrimination meant to benefit them. Some are isolated in "super-Democratic" districts. Others find themselves in much "safer" Republican districts, but these tend to produce members of Congress who—because of such "safety"—are less directly accountable. Indeed, both Democrats and Republicans have suffered this kind of impairment, even if they have a Representative with the same party affiliation. All voters are more likely to have Representatives who feel an obligation to the state legislatures which control their chances of re-election and not simply to the voters. To carry out this illegal scheme, it is crucial that voters be in the particular places assigned to them. To quote *Burdick*, this particular form of

isolating voters by political belief "inevitably affects—at least to some degree—the individual's right to vote and his right of association with others for political ends." 504 U.S. at 433.

II. Both Counts I and II present judicially manageable claims against the gerrymander.

Though this Court has denied a motion to dismiss this case as non-justiciable, the defendants try yet again. Now defendants say that in the First Amended Complaint, plaintiffs are backing off their legal theory that the Elections Clause denies the state authority to engage in any intentional gerrymander. Plaintiffs did not back off; they changed not a single a word Count I, the claim under the Privileges and Immunities Clause. As to Count II, the First Amendment claim was re-pleaded by order of this Court; and the First Amendment claim is technically different. But plaintiffs did not change their legal theory as to the limit on state authority under the Elections Clause. Count II states that under the First Amendment plaintiffs are entitled to "a neutral or least restrictive process consistent with the limits on state authority under the Elections Clause...*and the limits placed by the First Amendment* to ensure the *broadest possible freedom of choice* without state interference." First Am. Compl. ¶ 71 (emphasis added). Such First Amendment language hardly backs off plaintiffs' claim that the Elections Clause prohibits *any* deliberate gerrymander. In terms of First Amendment case law plaintiffs were alleging only that the regulations—even neutral procedural regulations—should seek the broadest possible freedom in the exercise of the franchise, i.e., to regulate in general in the least restrictive manner. If anything, it is more sweeping language. Nor did plaintiffs back off their theory by acknowledging that to some degree any redistricting has a "political effect." After all, as Justice Kennedy noted in his concurring opinion in *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004), even *court-drawn* maps using neutral criteria have a "political effect." They determine where people vote. Nonetheless, such an unintended effect is a world away from a partisan gerrymander, intent on controlling election outcomes.

Plaintiffs have identified a legal duty to issue procedural regulations from the Supreme Court decisions in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S.779, 833-34 (1995) and *Cook v. Gralike*, 531 U.S. 510, 523 (2001). The defendants reply that *Cook*—and presumably *Thornton*—do not actually limit authority to procedural rules, though that is literally what the cases say. Defendants' claims rely on a much earlier Supreme Court case, *Smiley v. Holm*, 285 U.S. 355 (1932), which Defendants say allows what they delicately call "outcome determinative rules." Whatever *Smiley* says—and it does not say *that*—*Thornton* and *Cook* read the Elections Clause as precluding "outcome-determinative" rules, including rules to decide who will represent voters in the National Legislature. The concurring opinions of Justice Kennedy in these cases is even more emphatic. Furthermore, in a recent case, *Arizona State Leg. v. Ariz. Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), the Supreme Court has given strong support to this reading of the Elections Clause:

> The Clause was also intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate. As Madison urged, without the Elections Clause, "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." ... The problem Madison identified *has hardly lessened over time*. Conflict of interest is inherent when legislators draw district lines that they ultimately have to run in.

Id. at 2672 (emphasis added) (internal citations and marks omitted). This last sentence clearly refers to the scourge of partisan gerrymanders.

There is also a manageable standard for determining breach of the duty. The State defendants could have used neutral criteria to create a Congressional map—they could have created millions of maps that did *not* use partisan election data. Instead, rejecting literally millions of possible "neutral" maps, they chose instead to use one with political criteria to get

political outcomes. As the evidence will show, and with no necessity to do so, the defendants programmed in the voter data from the 2008 Presidential election—a so-called "wave" year for Democrats—so as to draw maps that would be safe for Republicans even in worst case Democratic years. In opposing this motion, plaintiffs rely on the allegations of this complaint for purpose of stating a claim. But in light of discovery so far, they expect to show that the 2008 Presidential election data shaped the contours of the map. In this case, where there is so much evidence of a systematic partisan gerrymander—and maps that are so askew—plaintiffs can meet any standard of proof to establish intent. That includes a standard of "predominant intent." However, as stated before, plaintiffs submit that it is enough to show—especially under the legal theory here—that intent to gerrymander is a motivating factor. The need for a "predominant intent" standard might arise only if the plaintiffs were to claim—like the Democrats in *Vieth*—that "some" gerrymandering is legitimate, or that gerrymandering itself is legal, but "too much" is not. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004). Not interested in saving "some" or "limited" gerrymanders, plaintiffs should not have to show "predominant intent," because they do not have to struggle in determining when a lawful gerrymander becomes unlawful.

This Court is also capable of giving relief. Indeed, this Court has broad authority to redress constitutional violations. *See, e.g., Swann v. Charlotte-Mecklenberg Bd. of Education*, 402 U.S. 1 (1971). Defendants claim that the relief sought here is beyond the authority of the court—relying on *Upham v. Seaman*, 456 U.S. 37 (1982). But in that case, the Court rejected a district court's attempt to put in a new districting plan when there had been no finding of a constitutional or statutory violation as to the existing plan. Furthermore plaintiffs do not ask that this Court redraw the map or pick which particular plan out of the millions of plans that could be

generated with neutral criteria. Provided that there is a process to ensure that the state is using neutral criteria, it is up to the state legislature to adopt which of those plans is appropriate.

III. Plaintiffs have stated a claim under the First Amendment.

Defendants claim that the First Amended Complaint does not allege how defendants have violated the First Amendment. But the complaint clearly does so. It states that the "2011 Plan is a content based regulation...and limits where and in what forum voters and candidates can speak based on the viewpoint they have expressed in past elections and that which they are likely to express in future elections." First Am. Compl. ¶ 7. Defendants next claim that in *Whitford v. Gill*, the court has said that there is no "independent" First Amendment violation if there is no violation of Equal Protection. But in *Whitford* the court does not say this—rather, it says that one element of both claims is a showing of discriminatory intent or purpose. *See Whiford v. Gill*, 218 F.Supp. 3d 837, 884 (W.D. Wis. 2016).

The First Amendment claim here takes up the suggested claim of Justice Kennedy in *Vieth*. As Justice Kennedy has explained,

> The inquiry [under the First Amendment] is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest.

541 U.S. at 315 (Kennedy, J., concurring).

Strict scrutiny applies with double force when the defendants not only engage in viewpoint discrimination but act outside their authority under the Elections Clause. Under the sliding scale in *Burdick*, an impairment of the right to vote cannot be justified if the defendants are independently engaged in an illegal act, or an act otherwise beyond their legal authority. Defendants cite *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), to deny that strict scrutiny

would apply in this situation. But *Reed* says the opposite—that even if a state law is viewpoint-neutral, and even if it is facially content-neutral, it is still subject to strict scrutiny if it is a "content-based regulation." *Reed*, 135 S. Ct. at 2227-30.

Conclusion

For these reasons, Plaintiffs respectfully request that the Court deny the Intervenor Defendants' motion to dismiss the First Amended Complaint.

Dated: November 27, 2017

Respectfully submitted,

s/ Thomas H. Geoghegan
One of Plaintiffs' Attorneys