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' BRIEF REGARDING THE ELEMENTS OF THEIR CLAIMS

Introduction

In Count I plaintiffs are entitled to prevail when by a preponderance of the evidence they show that: (1) the defendants used partisan election data to create the 2011 Plan; and (2) defendants did so to serve their political interest. Put otherwise: plaintiffs should prevail if they show that the defendants used political criteria to create the 2011 Plan, without any necessity to do so. If so, defendants thereby engaged in an ultra vires act beyond their authority under the Elections Clause and deprived plaintiffs of their rights as federal citizens to be free of such state interference.

In Count II, plaintiffs should prevail if they show that the defendants used partisan criteria to assign plaintiffs and other citizens into Congressional districts based at least in part on their past and likely future political choices. The burden then shifts to defendants to show that they engaged in such viewpoint discrimination for a compelling state purpose.

To establish unlawful intent in Count I and viewpoint discrimination in Count II, plaintiffs have the burden of production of the evidence—and of course ultimately the burden of persuasion. However, should the plaintiffs make the prima facie case that partisan intent was a motivating factor, the burden shifts to the defendants or their staff to show affirmatively either

that they did not use partisan election data to create the map, or that they did not use it for any partisan purpose, or that they had a compelling state interest in doing so.

If the defendants present no affirmative evidence for these propositions, the plaintiffs are entitled to prevail. Furthermore, the fact that some Congressional districts in the 2011 Plan may be consistent with traditional districting criteria such as compactness is not sufficient to rebut the prima facie case that defendants had illegal partisan intent, and plaintiffs are still entitled to prevail.

I. Plaintiffs need only show that the use of partisan election data to construct a map favorable to Republicans was a motivating factor.

What distinguishes this case from most other challenges to gerrymandering is plaintiffs' reliance on the Elections Clause. That distinction should also affect the appropriate standard or level of proof of unlawful intent. In past cases, a plurality but not a majority of the U.S. Supreme Court has said that gerrymandering only becomes illegal when it imposes a severe burden on the right to vote. *See Davis v. Bandemer*, 478 U.S. 109 (1986). Or it becomes illegal when the attempt to gerrymander becomes the "predominant" factor. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004). In this case, plaintiffs contend that under the Elections Clause, any gerrymander of a federal election is unlawful when the state is seeking to affect the outcome of the federal elections to Congress. *See U.S. Term Limits v. Thornton*, 514 U.S. 779, 883-84 (1996). It deprives plaintiffs of their rights as federal citizens under the Privileges and Immunities Clause of the Fourteenth Amendment and their right to be free of inherently unlawful viewpoint discrimination under the First Amendment. This different type of claim affects both the burden of proof in establishing such an unlawful intent and the burden on defendants to justify their unlawful action.

The required level of intent should be just one motivating factor. In *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis.), the three-judge court found the map to be unlawful when partisan intent was just "one factor"—not controlling or predominant, but just a factor. *Whitford* was a challenge to state manipulation of a *state* legislative map, not a Congressional map. The focus of *Whitford* was both on discriminatory intent *and* effect. Significantly, however, the *Whitford* court had no difficulty finding partisan intent just from the use of partisan election data to draw the map. As the court stated, "the evidence establishes that *one of the purposes* of Act 43 was to secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade, in other words to entrench the Republican party in powers." *Id.* at 896. (emphasis added). Furthermore, the *Whitford* court said that there was such unlawful intent even if the plan otherwise complies with normal redistricting criteria. The court found that "although Act 43 complied with traditional redistricting principles, it nevertheless has as one of its objectives the entrenching of the Republicans' control of the assembly." *Id.* at 898.

Once plaintiffs show intent and effect, the *Whitford* court proposed the following burden shifting approach:

> In the absence of explicit guidance from the Supreme Court, we think that the most appropriate course in this context is to evaluate whether a plan's partisan effect is justifiable, i.e., whether it can be explained by the legitimate state prerogatives and neutral factors that are implicated in the districting process….[M]embers of the [Supreme] Court have applied this formulation at several points throughout its political gerrymandering case law.

Id. at 911 (quoting *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment)). The *Whitford* court also quotes Justice Souter writing that after the plaintiffs make a prima facie case, "I would then shift the burden to the defendants to justify their decision by reference to objectives other than naked partisan advantage." *Id.* (quoting *Vieth*, 541 U.S. at 351 (Souter, J., concurring in part and dissenting in part)).

While such a framework may be helpful, there are significant differences for the legal claim here. First, the focus here is on the inherently unlawful intent—an act beyond the authority of the state legislature. *Any* resulting burden on the right to vote, however slight, is unlawful when it results from a law enacted with the motive or intent of electing Republicans (or Democrats). If plaintiffs make a prima facie case, the burden shifts to the defendants to rebut it with some affirmative evidence that the defendants acted consistently with the Elections Clause.

That is the distinctive nature of this claim: it is independently illegal for the state legislature to use any approach that attempts to affect the outcome of a federal election on a partisan basis. It frustrates the Constitutional design: it gives an unlawful role to the state legislature—and diminishes the role of the plaintiffs as federal citizens in the selection of plaintiffs' representatives to the National Legislature. *See U.S. Term Limits, supra.* It is irrelevant whether plaintiffs as national citizens are pleased or displeased with the choices made for them by their state legislature: plaintiffs do not want the state to be making these choices. Allowing "some" gerrymandering—"some" but not "too much"—would render the Elections Clause less enforceable as a limit on state authority.

This may not be true with respect to a challenge to gerrymandering of state legislative districts—at least where the state constitution does not limit the authority of the legislature. But the Elections Clause does limit that authority in the context of federal elections. The very existence of the Elections Clause—and the strong constitutional interest in limiting the role of state legislatures in deciding the outcome of federal elections—is a reason in itself to adopt a judicially manageable standard of proof for determining a breach. Plaintiffs have brought this case both under the Elections Clause and the Supremacy Clause—under Article I and VI of the Constitution. There is no principle of federalism—no constitutional, statutory or policy reason—

to give the states a role in picking and choosing who can serve in Congress. In cases like *U.S Term Limits* and more recently in *Arizona State Legislature v. Arizona Redistricting Commission*, 135 S. Ct. 2652 (2015), the Supreme Court has turned to the statements made by the Framers and the authors of the Federalist Papers. 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." Madison stated: "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." *See Ariz. State Legis. v. Ariz. Redistricting Comm'n*, 135 S.Ct. 2652, 2672 (2015) (quoting 2 Records of the Federal Convention 241 (M. Farrand rev. 1966)). The Framers were so insistent on limiting state authority—and creating an area of autonomy for plaintiffs and others to be national citizens—that they gave Congress authority to override state regulations. *See* U.S. Const. art. I, § 4.

For that reason, it would be inconsistent to require a higher standard of proof than for other Constitutional violations. Accordingly a motivating factor should be sufficient to establish that the state enacted a law with an unlawful partisan intent.

Furthermore, other courts use a motivating factor standard. For example, In *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532 (M.D. Pa. 2002), the three-judge court in the three judge court did not require or refer to a standard of "predominant" intent. The court found that the allegations that the Republican legislators excluded the Democrats from Pennsylvania's redistricting process were enough to plead intent. In so doing, the court invoked the *Bandemer* plurality, which did not appear to require a higher standard than "motivating factor":

> Both parties appear to recognize that the intent requirement in this case has been met. As the *Bandemer* plurality pointed out, 'as long as redistricting is done by a legislature, it should not be very

> difficult to prove that the likely political consequences of the reapportionment were intended.'

Id. at 544 (quoting *Bandemer*, 478 U.S. at 128). The focus of *Bandemer* was not on discriminatory intent but discriminatory effect. Likewise in *Committee for a Fair and Balanced Map v. Illinois State Board of Elections*, 835 F.Supp. 2d 563 (N.D. Ill. 2011), the three-judge court found that the current Illinois plan was a gerrymander. That court—like others—simply held that a gerrymander did not violate the Constitution. In short, a review of federal and state court cases indicate there is no rule or preference requiring that partisan intent be a "predominant" factor.

But a showing of such intent here should shift the burden. Once the burden shifts, the defendants have to demonstrate that they did not use partisan election data or that the use of it served some compelling state interest consistent with the Elections Clause. Of course as the testimony will show, the defendants had a trove of such data. It is impossible to explain why the state legislature or its staff would ever be collecting detailed census block information or other election data to determine a districting plan. Nor can one imagine any legitimate state purpose that would override the limitations of the Election Clause as set out in *U.S. Term Limits* and *Cook v. Gralike*, 531 U.S. 510 (2001).

Finally, it should be noted that even in *Vieth* the four-Justice plurality noted that "predominant" intent was a standard that the Democratic appellants selected for themselves. Of course unlike plaintiffs here, the plurality did not believe that gerrymandering was illegal at all—with or without intent. At any rate, it is worth nothing that 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). In a sense, for the plurality, the claim was non-

justiciable only because the *Vieth* plaintiffs had made it so, in a attempt to save "limited" gerrymanders.

As noted by the plurality, "predominant intent" as used in that case was also "vague." *Id.* at 283. The plurality was unclear and stated: "Does it mean, for instance, that partisan intent must outweigh all other goals—contiguity, compactness, preservation of neighborhoods, etc. *statewide*?" *Id.* But in this case the claim arises from a simple legal duty. Plaintiffs are not stand-ins for the Democratic party nationally. Not interested in saving "limited" gerrymanders, plaintiffs should not have to show "predominant intent," because they do not have to struggle in determining a breach. For the duty as presented here, the only question is whether the legislature deliberately attempted a gerrymander—that it was a motivating factor, a reason for picking a map with political criteria when the state could have easily picked one with none. Determining the breach is judicially manageable.

It is true that in racial gerrymanders, the standard is predominant intent. But here, "predominant intent" may be a lower standard than it seems—or less convoluted than the one in *Vieth*. As the Court recently stated, it is not even necessary in a racial case to show that the state departed from neutral redistricting criteria. *See Bethune-Hill v. Virginia State Board of Elections* 137 S. Ct. 788 (2016). The Court reversed a decision by the district court that the boundaries were consistent with neutral criteria. The opinion by Justice Kennedy states:

> [T]he District Court misunderstood the relevant precedents when it required the challengers to establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles….
>
> * * *
>
> [In prior cases this Court has] rejected the view…that strict scrutiny does not apply where a State respects or complies with traditional districting principles. Race may predominate even when a reapportionment plan respects traditional principles…if race was

> the criterion that, in the State's view, could not be compromised, and race-neutral considerations came into play only after the race-based decision had been made.
>
> * * *
>
> The State contends further that race does not have a prohibited effect on a district's lines if the legislature could have drawn the same lines in accordance with traditional criteria….This is incorrect. The racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not post hoc justifications the legislature in theory could have used but in reality did not.
>
> Traditional redistricting principles, moreover, are numerous and malleable…By deploying [these principles] in various combinations and permutations, a State could construct a plethora of potential maps that look consistent with traditional, race-neutral principles. *But if race for its own sake is the overriding reason for choosing one map over others, race still may predominate.*

Id. at 798-99 (internal citations and marks omitted, emphasis supplied).

Of course unlike the plan in *Bethune-Hill*, the 2011 Plan tramples on neutral redistricting principles. But even if it were consistent with neutral criteria (and it is not), it would still be illegal under this standard because the defendants chose a plan with partisan criteria when they could have chosen a plan with none. As set out in *Bethune-Hill*, if race is a motivating factor in picking one plan over the millions of others using neutral criteria, then race *was* the predominant factor. So in this case as well—if partisan intent *was* the reason that the 2011 Plan was chosen over the millions of others that could have been generated with neutral criteria, then there is a breach of the legal duty.

Finally, it should be noted that a racial gerrymander of a minority population is inherently different from a partisan gerrymander—which in a sense is aimed at everyone. A minority racial voting bloc is typically in a contained area. It is an unnecessary hurdle to show racial intent on a statewide basis and in areas where minority voters do not even live. A partisan gerrymander is

necessarily on a statewide basis because statewide partisan data is being used. It is an unnecessary hurdle to show intent district by district when all the districts are being shaped by state wide election data.

II. In Count II it is sufficient to show that viewpoint discrimination was a motivating factor of the 2011 Plan.

As set out in the response to defendants' motion for clarification, plaintiffs again submit that the necessary intent for viewpoint discrimination need be only a purpose or motivating factor for the 2011 Plan. The reason is simple: viewpoint discrimination is "presumptively invalid under the First Amendment.' *Brown v. City of Pittsburgh*, 586 F.3d. 263, 286 (3rd Cir. 2009) (citing *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 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 (3rd Circ. 2008) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 62 (1983) (Brennan, J. dissenting)).

Of course the plan does not prevent plaintiffs from speaking—but it does limit with whom they may associate for the purpose of self-government based on the viewpoint they are likely to express. The First Amendment protects not only the right to speak but the right to vote, without that right being limited to only certain areas of the state because of the political viewpoints of the voters. As set out above, this is a burden on the right to vote—a restriction—that has no legal justification whatever unless it serves a compelling state interest. Again, once there is a prima facie case of viewpoint discrimination, the burden shifts to defendants to show that they did not use partisan but neutral criteria to develop the map or the partisan criteria served some compelling state interest.

Conclusion

For the reasons set forth above, plaintiffs respectfully request that the Court adopt the standard of motivating factor for proof of partisan intent and the burden shifting described in the introduction.

Dated: November 30, 2017

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

Lisa A. Mathewson
The Law Offices of Lisa A. Mathewson, LLC
123 South Broad Street, Suite 810
Philadelphia, PA 19109
(215) 399-9592 (phone)
(215) 600-2734 (e-fax)
lam@mathewson-law.com