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' POST-TRIAL MEMORANDUM OF FACT AND LAW

Dated: December 15, 2017

Respectfully submitted,

s/ Thomas H. Geoghegan
One of Plaintiffs' Attorneys

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Plaintiffs sue under the Privileges and Immunities Clause—not as Democrats or Republicans seeking better partisan outcomes, but as citizens asserting right the right to direct election of members of Congress without state interference. Under the Elections Clause, the state legislature has only a limited grant of authority to issue *procedural* regulations. As Justice Kennedy has written, "A State is not permitted to interpose itself between the people and their National Government....[This] dispositive principle is fundamental to the Constitution[.]" *Cook v. Gralike*, 531 U.S. 510, 527 (2001). Since then, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court has been clear that this "fundamental" principle applies to partisan gerrymandering:

> The [Elections] 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.

135 S. Ct. 2652, 2672 (2015) (emphasis supplied). In other words, a majority of the Court has now rejected the view of the four-Justice plurality in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and said that the Elections Clause *does* apply to the scourge of partisan gerrymanders. Indeed, the Court approved the use of a neutral redistricting commission as a remedy.

In the words of *Arizona State*, the legislative defendants here also tried to "manipulate election rules" to "entrench themselves and place their interests over the electorate." 135 S. Ct. at 2672. In adopting the 2011 Congressional Districting Plan (2011 Plan), these defendants engaged in a one-sided partisan gerrymander to elect as many Republicans as possible (13 out of 18 seats) and eliminate two Democratic incumbents (Altmire and Critz, both placed in a district that was

refigured to elect a Republican). That gerrymander has been effective: producing the same 13-to-5 result in three consecutive election cycles.

I. Plaintiffs have shown by a preponderance of the evidence a one-sided partisan scheme to maximize the election of Republicans.

First there is the map itself: meandering lines, squiggles, necks, weird shapes. The districts—just to the eye—are not compact, and some like the 7th District are surreal. They are not compact, compared especially to maps introduced at trial for the period from 1943 through 1991. While the 2003 plan is highly irregular, the 2011 plan—just to the eye—is even worse.

Then there is the McGlone report. As Daniel McGlone testified, the shape of the boundaries—and the effectiveness of the gerrymander—comes from adherence to a formula. The formula is as follows: create Republican-leaning districts where Republicans will usually have 51 to 60 percent of the vote share, and create super Democratic districts with 75 percent or more. In other words: "crack" or spread out Democratic voters in more Republican areas of the state across districts so as to elect the maximum number of Republicans, and "pack" Democrats in the fewest possible districts. While there are mathematical measures of such cracking and packing as used in cases like *Gill v. Whitford*, McGlone used the principles and techniques of Geographic Information Systems to show visually how precincts and census blocks and even neighborhoods are sliced and diced and voters are in effect picked up and moved into reshaped districts. As McGlone went through the changes district by district the trier of fact could see how defendants were moving boundaries to get to the particular Republican and Democratic vote shares required by the formula. The rigor of this gerrymander—or rather, its ruthlessness—can be seen in how far the map goes to get to these particular shares. As both Mr. McGlone and Ms. Hanna testified, not only were counties and townships chopped up, even multiple times, but even more than in 2003, precincts and neighborhoods were split, and tendrils sent out to achieve the desired results.

Charts A and B on page 4 of the McGlone Report ("Partisan Gerrymander") are a measure of how the defendants "improved" the 2003 map, which itself was challenged as a Republican gerrymander. Start with Chart B, which describes the "old" 2003 plan. By party vote share, Chart B gives the number of Democratic and Republican leaning district as of 2010. Then Chart A gives the number under the 2011 Plan. In Chart B the number of Democratic leaning districts is *ten*—ten out of 19. In Chart A the number has dropped to *six.* And with one of the six now trending to majority Republican, the number by 2012 was *five.* But that's not all: the 2011 Plan makes the Republican leaning districts more safely Republican, with Republican vote shares based on historic data of 51 to 60 percent or more.[1]

The replication of this pattern explains the reshaping of boundaries in district after district. It explains why in the First District, the boundaries reach out to loop in the Democratic town of Swarthmore, and why in the Second, the boundaries pull in Lower Merion Township; such "loops" and "necks" not only go outside Philadelphia to pack more Democrats into the already "super-D districts" but now help keep suburban districts—the Sixth, the Seventh and even the Fifteenth—more reliably Republican. Nor is it just in the Philadelphia and Pittsburgh areas where the partisan intent is obvious. Throughout the state—as McGlone testified—the 2011 Plan breaks up large Democratic concentrations in Reading, Harrisburg, Lancaster, West Chester, Allentown and Erie. In the middle and northern part of the state, these large Democratic concentrations are moved into districts with more Republicans. The defendants never disputed the pattern: after all, it is simply a fact. And while defendants say there *might* be alternative explanations, they never tried to prove one. There is no alternative explanation to weigh.

[1] Tellingly, even Professor McCarty's flawed model demonstrates that the Democrats were more likely to win in 9 districts under the old map, but in just 6 districts under the 2011 Plan. Def. Ex. 12 at Table 1. McCarty obscured this result by using a statewide mean of the Democrats' chances, which is of course skewed by the packed districts where Democrats had a 100% chance of victory according to McCarty. McCarty essentially ignored the effects of packing and built them right back into his skewed system.

Finally there are the admissions of those who drew the maps: Mr. Arneson and Mr. Schaller, who did so for the State Senate Republican Caucus and State House Republican Caucus, respectively. As staffers in the "redistricting rooms," they had access to a trove of voter election and census data—from numerous elections, not just Congressional. They had a detailed picture of the partisan preferences of voters. And they were frequently using that voter election data to determine the effects of proposed changes to the 2003 map. Both men made clear that the Republican members of *Congress* and not just the Republican state legislators were involved in setting the new boundaries. Here is Mr. Arneson on feeding this voter data to the legislators:

> During the course of drawing the map we certainly made ourselves aware of that data. We often got questions from different people, some of whom we hoped would vote for a plan at the end, as to what districts, what the proposed districts had done in certain previous elections. And you know, we would looked like smacked ass if we didn't, pardon me. We would have look like, we would have looked we weren't dong doing our job if we didn't know the answer to those questions."

Day 3 Tr., P.M. Session, at 79:25-80:7.

Mr. Schaller is also clear that he was using this data and that any neutral criteria—of any kind—were subordinated to the purely partisan goals of those whom he calls "the stakeholders," including Republican members of Congress. His testimony is candid:

> Q. Is it fair for me to say that the information you got about Republican stakeholders [in the] legislative process was the most important fact that you used in drawing the map?
>
> A. Yes, I would say so.

Id. at 163:9-15 (corrected to match deposition transcript).

Of course there is more evidence of partisan intent, other than the map itself: Tables A and B, the datasets, the "formula," the slicing and dicing of districts, the "CD 18 Maximized" exhibit with partisan ranking, and the admissions of the two staffers. There is also the fact that

two Republican caucuses did the map making, outside of the legislative committees—like the Senate State Government Committee—which are officially tasked with drawing the maps. As Senator Dinnaman, a Democratic member of that same Committee testified, a shell bill was introduced on September 14, 2011, and he saw no map of any kind until the shell bill was amended a second time on December 14, 2011—and the map was at last presented. Then, rules were waived, and a map determining the GOP control of the Congressional delegation in the same 13 to 5 ratio for the next three elections was adopted around 11:00 p.m. of the same day—a stealth piece of legislating concealed from virtually every citizen of the state. This extraordinary deviation from normal legislative procedure is itself evidence of naked partisan intent.

II. The intended gerrymander has had a substantial effect on the elections of 2012, 2014 and 2016, and impaired the plaintiffs' right to vote.

Let us start with a self-evident effect. Creating more Republican leaning districts has made them *safer* for the election of Republicans. Likewise, creation of packed "super D" districts has made them *safer* for the election of Democrats. That kind of entrenchment is precisely what Madison castigates in the passage from *Arizona State* quoted above; and it is a concern running through Numbers 52, 59 and 60 of the Federalist Papers.

But this gerrymander also changed outcomes—or potential outcomes. In the elections of 2012, 2014 and 2016 in a large populous state—with roughly equal numbers of Democratic and Republican voters—the Republicans had the same 13-to-5 lock on the Congressional delegation. That lock was the same despite the swings in votes cast state wide for Democrats and Republicans. There was no such lock under the prior 2003 map. In Tables A and B, the intent for a 13-to-5 lock is clear, the partisan intent is clear, and the result is precisely what was intended.

To prove their claim—an impairment of the right to vote—plaintiffs are not arguing that this effect is 100 percent certain, only that the actual effect was a probable result of the intended

one. In the four elections under the 2003 plan, the results varied with changes in the popular vote. The Republicans had a majority of the Congressional delegation in 2004, then the Democrats did in 2006 and 2008, and then the Republicans took it back in 2010. By comparison to these toss-up years, not a single seat has changed party control in the last three elections. The effect is especially noticeable in 2012, a so called Democratic wave year, i.e., one where the Democrats outperform their usual historical performance. But instead the Democrats *lost* two seats, and Republicans picked up one, even as Republicans lost badly throughout the state.

The reply of defendants—and testimony of Professor Gimpel—is that all this just reflects instead where Republican and Democratic voters live. As stated by defendants' counsel in closing argument, Republican voters are more spread out over the state, and Democrats concentrated in Philadelphia and Pittsburgh. But that was true under the 2003 plan as well—and the Democrats in 2006 and 2008 had a majority of the seats. Furthermore, this "geographic" explanation only undercuts their denial—of counsel and Gimpel—that the geographical assignment of Republicans and Democrats as traced by McGlone has an outcome effect.

"People may choose where to live," McGlone said to defendants' counsel, "but it is the legislature that places them in districts." Let us assume—as defendants say—there is *some* outcome effect by the "natural" distribution of Republican voters throughout in the state and Democrats in cities. The legislative defendants drew a map to increase that effect: Republican voters are spread out more efficiently to cancel out Democratic voters in places like Erie County and Harrisburg—and Republican suburbs are made safer as the "bad" Democratic parts are pulled into Pittsburgh and Philadelphia. The defendants can hardly say that it matters where Republican and Democratic voters live—that it is outcome determinative—but then deny it matters when the mapmakers distributed them pea-like into the eighteen Congressional districts.

The experts put on by defendants, McCarty and Gimpel, scrupulously avoided giving any opinion denying it was a gerrymander—no doubt for the sake of their reputations. And neither witness meets the minimal standard for challenging the existence of a gerrymander when they failed to inquire of defendants whether there was a gerrymander or look at their now acknowledged use of voter data to develop the map. In plaintiffs' view, Professor Gimple demeaned himself when he said that the use of voter data and the intent to gerrymander might be "an important element" in deciding if it was a gerrymander. Neither McCarty nor Gimpel should have been testifying at all when they failed to see or even ask to see what defendants had in their possession or even what they did.

The final irony here is that the individual with the biggest role in drawing the map—John Memmi—was retained during this case as a "consultant" to defendants' counsel. The defendants did not dare to put him forward to give any alternative explanation for the map's shape.

III. The partisan gerrymander—beyond the authority of the state—has unlawfully impaired the plaintiffs' rights under the Privileges and Immunities Clause.

First, this partisan gerrymander is not a "procedural" regulation; and under *Thornton* and *Cook*, it is outside the authority of the defendants under the Elections Clause. *See, e.g., Cook*, 531 U.S. at 523-24. Nor is it a "reasonable, non-discriminatory" restriction on the right to vote, as would be subject to rational basis review. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1996); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Nor is it a "politically neutral" restriction—or one that serves any of the State's" important regulatory interests." *See Burdick*, 504 U.S. at at 435 & 438. As Anne Hanna testified, there is no need for the defendants to use partisan vote data to devise a Congressional map; and if ever appropriate such data may never be used under the Elections Clause to "dictate electoral outcomes" or "favor or disfavor a class of candidates." *See*

Cook, 531 U.S. at 523. It may never be used by a state legislature under the Elections Clause for "manipulation" of federal elections. *See Arizona State*, 135 S. Ct. at 2672.

Second, this partisan gerrymander is at odds with any legitimate goal of "incumbent protection." To date, the Supreme Court has upheld only a narrow form of incumbent protection—namely, the principle that two incumbents should not be placed in the same district. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *Bush v. Vera*, 517 U.S. 952, 964 (1996) (quoting *Karcher*) ("we have recognized incumbency protection at least in the limited form of 'avoiding contests between incumbent[s]' as a legitimate state goal"). In this case, legislative defendants moved two incumbent Democrats—Altmire and Critz—into the same district; then re-figured the district to be Republican-leaning so as to defeat *both incumbents* under the new map. At least one court has struck down struck down such a scheme of inconsistent or partisan-based incumbent protection. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1347-49 (N.D. Ga. 2004), *aff'd sub nom. Cox v. Larios*, 542 U.S. 947 (2004). Neutral districting criteria—such as those described by Ms. Hanna—might well foster incumbency. Consistently respecting county and other political boundaries—and seeking to keep districts compact—would stabilize districts over time; and in this natural way, neutral criteria help maintain or avoid disrupting relationships between incumbents and their constituents. In this respect, "procedurally neutral" rules foster incumbency. In such a legitimate form plaintiffs have no objection to it—indeed, applaud it. But it is quite another matter—and far beyond state authority—to use voting data to force incumbents on voters, or guard them from political challenge, or use partisan data to move in the "right" voters to ensure their election.

Third, plaintiffs have met any standard for unlawful partisan intent and effect. While the proper standard is "substantial motivating factor," the evidence certainly shows "predominant"

intent. Schaller testified that the political or partisan objective was *the* most important in shaping the districts. However, a standard developed for a racial gerrymander is not the appropriate standard here. Typically in those cases the defendants are claiming that the "racial" gerrymander is really a "partisan" gerrymander, and the Court often uses "predominant" intent to determine the real nature of the gerrymander. *See, e.g., Bush*, 517 U.S. at 968-69. But in this case, there is no need to disentangle the "racial" from the "partisan" gerrymander or decide which is "predominant." Defendants of course do not claim that this is a "racial" gerrymander—and unlike racial gerrymander cases, the defendants offer no explanation—none—as to why the boundaries are the way they are. They do not propose that this is a racial gerrymander and they put on no evidence that these districts are consistent with neutral criteria—as such a claim in the case of the Seventh and other districts would be preposterous.

Fourth, plaintiffs are entitled to invalidate the 2011 Plan as a whole or on a statewide basis, even if plaintiffs did not include voters from every district. On one point, the testimony of plaintiffs and defendants agree: reconfiguring any given number of districts would require reconfiguring all of them. Erik Arneson said so; and so did the defendants' purported experts, Professor McCarty and Professor Gimpel.

Finally, plaintiffs have demonstrated in this case an impairment of their right to vote—not just an abstract violation of the Elections Clause of no concern to them. As plaintiffs testified, it is irrelevant that the legislative defendants may have given them the "right" Congress member—from their own party or otherwise; plaintiffs do not want the defendants to be making that decision for them. Apart from their right to the Constitutional design, the reason is the one cited by the Supreme Court in *Arizona State Legislature*—indeed, the reason cited by the Framers. As the Court stated:

> The people of Arizona [sought]…to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have "an habitual recollection of their dependence on the people." In so acting, Arizona voters sought to restore "the core principle of republican government," namely, "that the voters should choose their representatives, not the other way around."

135 S. Ct. at 2677 (quoting The Federalist, No. 57 (Madison), and Berman, Managing Gerrymandering, 83 Texas L. Rev 781 (2005)).

Plaintiffs seek to restore that "core principle of republican government," and want their members of Congress, whether Democrat or Republican, to be accountable to them, and not to the defendants. The scheme to deny this "core principle of republican government" as demonstrated in this case impairs the right to vote, and entitles plaintiffs to a remedy.

Conclusion

For these reasons, the plaintiffs seek a declaratory judgment that the 2011 Plan is unconstitutional and an injunction against its use in the 2018 election. Plaintiffs also contend that the neutral criteria set forth by Ms. Hanna in her testimony provide a useful approach in creating a substitute plan. The use of any voter data—if appropriate at all—should be subordinated to neutral criteria. In the complaint, plaintiffs sought not to impose a particular plan but to require the defendants to devise a neutral process that will guard against the abuses that led to this unconstitutional map. If not as a final solution then as a temporary one, this Court might consider: (1) ordering the executive and legislative defendants to attempt to agree upon a plan, in consultation with plaintiffs; (2) if they are unable to agree, to submit competing proposals for a map to be selected by a neutral who will pick the plan that is most consistent with neutral redistricting principles such as those suggested by Hanna or used in the 1972 map; and (3) if they cannot agree on a neutral, submit that decision to a Court-appointed special master.