IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Barbara Diamond, *et al.*,	:	
	:	
Plaintiffs,	:	**Civil Action No. 5:17-cv-5054**
	:	
v.	:	
	:	
Robert Torres, *et al.*,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

I. PRELIMINARY STATEMENT

Plaintiffs allege Equal Protection, First Amendment, and Election Clause violations in an attempt to invalidate Pennsylvania's Congressional districting plan ("2011 Plan") as an "impermissible" partisan gerrymander. However, Plaintiffs possess neither standing nor the legal support to do so. Collectively, Plaintiffs advance only generalized harm, and thus lack standing.

Even if Plaintiffs could cure their standing issues, their claims still fail as a matter of law because partisan gerrymander claims are not justiciable. For over 30 years, no court has devised a manageable standard to adjudicate such claims. Moreover, the U.S. Supreme Court has recognized that because the Elections Clause vests state legislatures—an inherently political branch—with drawing Congressional districts, substantial political considerations when districting are inevitable and have been accepted practice for over 200 years. Therefore, for the following reasons, the First Amended Complaint ("FAC") should be dismissed in its entirety.

II. ARGUMENT

A. Plaintiffs Lack Standing Pursuant to Fed. R. Civ. P. 12(b)(1)

A plaintiff bears the burden of demonstrating that she has suffered an injury to a legally

protected interest that is both concrete and particularized. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 & n.1 (1992). 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." *Id.* at 573-74.

Plaintiffs here fail to show that their alleged injuries are to a legally protected interest that is both concrete and particularized. (*See Agre* Op. dated 1/10/18 (Shwartz, J., concurring), 2:17-cv-04392-MMB, ECF No. 212 at 2 ("Plaintiffs lack standing to bring a statewide challenge to the map because they have not presented a plaintiff from each congressional district who has articulated a concrete and particularized injury in fact."). Their Equal Protection and First Amendment claims center on the effects of redistricting, which affects all Pennsylvania voters equally. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (taxpayer standing rejected because the alleged injury was a grievance suffered in common with people in general).

With respect to Count III, the Supreme Court, in *Lance v. Coffman*, 549 U.S. 437 (2007), squarely rejected generalized standing under the Elections Clause. In *Lance*, four Colorado citizen voters filed suit, alleging an Elections Clause violation where the redistricting plan was passed by a state court rather than the legislature. The voters argued that the legislature was deprived of its right to draw Congressional districts when a subsequent plan was enjoined due to a Colorado Constitutional provision limiting redistricting to once per census. *Id.* at 438. The Supreme Court dismissed the voters' claims as the kind of undifferentiated, generalized

grievance about government conduct that it has refused to tolerate.[1] *Id.* at 442.

B. The FAC Should Be Dismissed for Failure to State a Claim.

1. Applicable Legal Standard

Under Fed. R. Civ. P. 12(b)(6), courts "consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing and quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The purpose of this standard is to "enabl[e] the court to draw the reasonable inference that the defendant is liable for [the] misconduct alleged." *Warren Gen. Hosp. v. Amgen, Inc.*, 643 F.3d 77, 84 (3d Cir. 2011) (internal quotations omitted) (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009)). The courts "are not bound to accept as true ... legal conclusion[s] couched as ... factual allegation[s]." *Iqbal*, 556 U.S. at 678 (citing and quoting *Twombly*, 550 U.S. at 555).

2. The FAC's Claims Are Not Justiciable

Where manageable standards to adjudicate a claim are absent, or where the question is left to the political branches, the claim must be dismissed as non-justiciable. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004). Partisan gerrymandering claims defy any manageable standard. Therefore, the FAC should be dismissed.

a. A Brief History of Partisan Gerrymandering Claims

In 1986, the Supreme Court in *Davis v. Bandemer* considered, for the first time, whether

[1] The Court also distinguished two cases from the 1930s as inapposite because each of those cases were filed by a realtor acting on the state's behalf and not as a private citizen. *Lance*, 549 U.S. at 442.

a partisan gerrymandering claim under the Fourteenth Amendment's Equal Protection Clause was justiciable. 478 U.S. 109 (1986). While the *Bandemer* majority could not agree upon a single standard for adjudicating such claims, they were "not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided." *Id*. The splintered Court issued four opinions, with only a plurality proposing a standard to adjudicate partisan gerrymandering claims. *Bandemer*, 478 U.S. 109. Over the next 18 years, lower courts attempted in vain to apply some standard adopted by the *Bandemer* plurality.

In 2004, the Supreme Court rejected the *Bandemer* plurality's test. *See Vieth*, 541 U.S. at 283-84. The Justices in *Vieth* failed to identify any workable standard in five separate opinions. 541 U.S. 267. The four Justice plurality explained that any attempt to apply *Bandemer*'s plurality's opinion "has almost invariably produced the same result … [j]udicial intervention has been refused." *Id*. at 283-84. The plurality concluded that "eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims." *Id*. at 282, 306. Justice Kennedy concurred in judgment, acknowledging that he could not identify any viable judicially discernable standards, and concluded that arguments in favor of holding partisan gerrymandering claims non-justiciable are "weighty" and, in fact, "may prevail in the long run…." *Id*. at 306, 308. A majority of The Supreme Court has *never* been able to formulate a judicially manageable standard for adjudicating partisan gerrymandering claims. *See, e.g., League of United Latin Am. Citizens v. Perry,* 548 U.S. 399 (2006); *Shapiro v. McManus*, 203 F. Supp. 3d 579, 594 (D. Md. 2016). The question of justiciability is again firmly before the Court

in *Gill v. Whitford*.[2]

b. Count I Should Be Dismissed Because It Is Not Justiciable

Notwithstanding *Whitford*'s pendency, it is clear that the Supreme Court has failed to establish any workable standard for adjudicating whether an alleged gerrymandered plan violates the Equal Protection Clause. As the *Agre* Panel recently observed, "[a] majority of the Supreme Court has never … held that a particular instance of partisan gerrymandering violates the Equal Protection Clause. Nor has a majority of the Supreme Court agreed upon a standard for reviewing such a claim." *Agre v. Wolf*, Civil Action No. 17-4392 at 2 (E.D. Pa. Nov. 16, 2017) ("*Agre* MTD Opinion"). Thus, absent the emergence of any broadly applicable test, Supreme Court precedent dictates that challenges to partisan gerrymandering claims under the Equal Protection Clause are simply not justiciable. *See LULAC of Texas v. Tex. Democratic Party*, 651 F. Supp. 2d 700, 712 (W.D. Tex. 2009); *Meza v. Galvin*, 322 F. Supp. 2d 52, 58 (D. Mass. 2004).

Plaintiffs do not *propose any* test. Instead, they base their claim in part on legal conclusions disguised as factual allegations, *see Iqbal*, 556 U.S. at 678; that the 2011 Plan was drawn using partisan classifications and, based upon those classifications, voters were placed into districts to make it easier for Republicans to get elected. (FAC ¶¶ 69-70.) But, a Congressional map is not unconstitutional merely because it makes it more difficult for a party to

[2] On October 3, 2017, the Supreme Court heard oral arguments in *Gill v. Whitford*. In *Whitford*, the Supreme Court is considering, once again, whether partisan gerrymandering claims are justiciable, including whether a workable standard exists to evaluate such claims based on the First Amendment or the Equal Protection Clause and whether the Court even has jurisdiction. *See Gill v. Whitford*, No. 16-1161, *jurisdictional statement* at 40 (U.S. Mar. 24, 2017); *Gill v. Whitford*, 137 S. Ct. 2268 (2017) ("Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits."); *see also Benisek v. Lamone,* No. 17-333, 2017 U.S. LEXIS 7362 (U.S. Dec. 8, 2017) ("Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits."). If the U.S. Supreme Court concludes that partisan gerrymandering claims are non-justiciable, this entire action will be moot.

win elections or because it was created with partisan considerations. *Vieth*, 541 U.S. at 288 (plurality op.); *id*. at 308 (Kennedy, J., concurring); *id*. at 338 (Stevens, J., dissenting).[3]

c. Count II Should Be Dismissed Because It Is Not Justiciable

Plaintiffs claim the 2011 Plan "purposely burdens, penalizes, and retaliates against" Democrats by "cracking and packing these voters into districts where their votes will be asymmetrically wasted and their electoral influence will be severely diluted." Plaintiffs further contend that the 2011 Plan has "burdened the ability of these voters to influence the legislative process." (FAC ¶ 73.) These allegations do not state a cognizable First Amendment claim.

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. *Whitford,* 218 F. Supp. 3d at 884; *Pope v. Blue*, 809 F. Supp. 392, 398-399 (W.D.N.C. 1992), *aff'd by* 506 U.S. 801 (1992); *Legislative Redistricting Cases*, 629 A.2d 646, 660 (Md. 1993); *Badham v. Eu*, 694 F. Supp. 664. 675 (N.D. Cal. 1988), *sum. aff'd*, 488 U.S. 1024, (1989); *Republican Party v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992). Since Plaintiffs' Equal Protection claim requires dismissal, so too does Plaintiffs' First Amendment claim.

Moreover, no First Amendment rights have been infringed. Indeed, absent from the FAC is any allegation that Plaintiffs were silenced, prevented from speaking, endorsing, and/or campaigning for any candidate due to the 2011 Plan. *See, e.g.*, *League of Women Voters v. Quinn*, No. 1:11-cv-5569, 2011 U.S. Dist. LEXIS 125531 at *12-13 (N.D. Ill. Oct. 27, 2011); *Badham*, 694 F. Supp. at 675. Similarly, Plaintiffs' vague contention that the 2011 Plan burdens

[3] Plaintiffs advance each of their claims under 42 U.S.C. § 1983. But, "[s]ection 1983 provides remedies for deprivations of rights established in the Constitution or federal laws. It does not … create substantive rights." *Kaucher v. Cty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006) (footnote and citation omitted).

their right "to influence the legislative process" is not sufficient. The legislative process can be influenced in a myriad of ways other than merely voting for one's representative. Simply stated, the "First Amendment guarantees the right to participate in the political process; it does not guarantee political success." *Badham*, 694 F. Supp. at 675.

Furthermore, Plaintiffs' allegation that the 2011 Plan's "packing" and "cracking" of Democrat voters makes it easier for Republicans to win, merely suggests that the legislature considered partisan objectives when drafting the 2011 Plan. *Vieth*, 541 U.S. at 294; *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999). But, because the Elections Clause contemplates this exact conduct, it is impossible for such conduct to have violated Plaintiffs' First Amendment Rights. *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 supporting political candidates of their choice).

Finally, the FAC is devoid of any specific allegations of causation. As was recently recognized in *Benisek v. Lamone* (a case currently before the U.S. Supreme Court): "In determining whether a constitutional injury has occurred, the court invariably must reach the question of causation, for if election outcomes … arise not from political machinations at the statehouse but instead from neutral forces or the 'natural ebb and flow of politics,' … no injury has occurred and no remedy may issue." Civ. No. 13-cv-3233, p. 30a (D. Md. Aug. 24, 2017). Since other causes are present, Plaintiffs' claim cannot succeed.

d. Count III Should Be Dismissed Because It Is Not Justiciable

Count III alleges that the 2011 Plan exceeds the Pennsylvania legislature's authority under the Elections Clause because the Elections Clause "only allows legislatures to adopt

procedural rules for conduct of Congressional elections, and does not include the power to dictate or control the electoral outcomes of those elections or favor or disfavor a class of candidates." (FAC ¶ 78). As a threshold matter, the "Elections Clause claim raises a non-justiciable political question." (*Agre* Op. dated 1/10/18 (Smith, J.), 2:17-cv-04392-MMB, ECF No. 211 at 73). This Court, just yesterday, rejected the *Agre* Plaintiffs' Election Clause claim, warning that such a theory sought to chart a new path "that ignores the constitutional text, casts aside persuasive precedent, and brings with it inevitable problems that should counsel restraint before entering the political thicket of popular elections." (*Id.* at 4.) *See also Vieth*, 541 U.S. at 306 (plur.) (rejecting plaintiffs' attempt to invoke the Elections Clause as a basis to prohibit partisan gerrymandering). Regardless, Plaintiffs do not articulate their theory, and should, at the very minimum, be required to amend to provide sufficient specificity.[4]

Moreover, Plaintiffs' claim must be rejected because it: (a) is inconsistent with the plain meaning of the Elections Clause, and (b) ignores the Clause's purpose and history. The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed in each State by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators." U.S. CONST. art. I, sec. 4 (emphasis added). Thus, on its face, the Elections Clause quite clearly delegates broad authority to state legislatures (which are inherently political) with the only limitation being Congress's—and not the judiciary's—ability to create a statute limiting

[4] Plaintiffs are also misguided in their reliance on *Cook v. Gralike*, 531 U.S. 510 (2001) and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). Their supposed support in *Gralike* is found in a concurrence by Justice Kennedy alone. *U.S. Term Limits* is inapposite as the case is about a state's imposition of term limits on federal candidates. *See* 514 U.S. at 782-84. Neither case is applicable in the partisan gerrymandering context. To be sure, the *Agre* Court (Brooks, J.), just found that "Neither does the language of *Thornton* or *Gralike* provide a judicially manageable standard for partisan gerrymandering cases." (*Agre* Op. dated 1/10/18 (Smith, J.), 2:17-cv-04392-MMB, ECF No. 211 at 57.)

that authority. (*See, e.g.*, *Agre* Op. dated 1/10/18 (Smith, J.), 2:17-cv-04392-MMB, Doc. 211, at 53.)

As the *Vieth* plurality explained, acting under the Election Clause's broad authority, state legislatures have *always* considered politics in redistricting. 541 U.S. at 274-75. Indeed, since the Nation's founding, consideration of politics in redistricting has been expected, accepted, and legally permissible. *See, e.g.*, *Gaffney*, 412 U.S. at 753; *Vieth*, 541 U.S. at 285 (plurality op.); *see id*. at 358, 360 (Breyer, J., dissenting) (acknowledging "political considerations will likely play an important, and proper, role in the drawing of district boundaries."); *Cooper v. Harris*, 137 S. Ct. 1455, 1464, 1473 (2017) (noting that political considerations are a defense to racial gerrymandering claims). By assigning the duty to the state legislatures, the Elections Clause essentially makes redistricting a political process. In short, the plain language of the Elections Clause and a long line of judicial precedents (including the one issued just yesterday by this Court) make it abundantly clear that the Elections Clause cannot be invoked to prevent partisan gerrymandering. *See Vieth*, 541 U.S. at 306 (plur.); *Balderas v. Texas*, 2001 U.S. Dist. LEXIS 25740 *19-20 (E.D. Tex. Nov. 14, 2001); *In re Pennsylvania Cong. Dist. Reapportionment Cases*, 567 F. Supp. 1507, 1517 (M.D. Pa. 1982) (noting that "[w]e may not disapprove a plan simply because partisan politics had a role in its creation"). The 2011 Plan was passed by the General Assembly and signed by the Governor in the very manner that hundreds of legally sound redistricting plans have been passed throughout the country's history.

3. Legitimate State Interests Justify the 2011 Plan

Even if Plaintiffs' claims are justiciable, and a prima facie Equal Protection claim could be shown, Plaintiffs' claims cannot succeed because the 2011 Plan is justified by legitimate state interests. *Bandemer*, 478 U.S. at 141-142. Contrary to Plaintiffs' contention that strict scrutiny

applies, the Supreme Court has made it clear that "[w]e have not subjected political gerrymandering to strict scrutiny." *Bush v. Vera*, 517 U.S. 952, 964 (1996).

Courts have found many legitimate state interests which would justify some degree of partisanship. Examples include goals like "[c]ompactness, contiguity, respecting lines of political subdivision, preserving the core of prior districts, and avoiding contests between incumbents." *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1071 (D. Ariz. 2014) (three-judge court) *aff'd.* 136 S. Ct. 1301 (2016). Avoiding contests between incumbents not only furthers efficiency concerns; it also confers benefits to the state by having senior members in the House of Representatives.[5] Indeed, of the 17 sitting Pennsylvania Congressman, more than half have been in office since before Plan 2011 was enacted.[6] Moreover, two of the three longest-held seats (the most senior being held by Robert Brady of the 1st District, who has been in Congress for 20 years) are held by Democrats. Thus, given the Commonwealth's legitimate interests, Plaintiffs' claims cannot succeed. *See Harris*, 993 F. Supp. 2d at 1079 (plaintiffs failed to carry burden of showing that partisanship outweighed legitimate state interest of obtaining preclearance with the Voting Rights Act).

4. Plaintiffs' Claims Are Barred by Laches

Plaintiffs' claims are barred by laches due to their six-year delay in filing, and the prejudice that results therefrom. *Gruca v. United States Steel Corp.*, 495 F.2d 1252, 1258-59 (3d Cir. 1974).

[5] This exact point was recently conceded by counsel for plaintiffs in *Agre*: Transcript of Hr'g, pp. 46-47.

[6] *See* https://www.govtrack.us/congress/members/PA#representatives.

Date: January 11, 2018

Respectfully submitted,

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