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.	:	
	:	

LEGISLATIVE DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Legislative Defendants[1] submit this Reply in support of their Motion to Dismiss.

I. PRELIMINARY STATEMENT

In their Response in Opposition to Legislative Defendants' Motion to Dismiss ("Opp."; ECF No. 78), Plaintiffs attempt to plug the holes in their claims by proposing several unwieldy "tests", cobbled from out-of-date, non-controlling, and inapposite case law. Plaintiffs' game plan, at this point, appears to be to ride primarily in the wake of *Benisek v. Lamone*, No. 13-cv-03233 (D. Md. Nov. 5, 2013), *Whitford v. Gill*, No. 15-cv-00421 (W.D. Wisc. July 8, 2015), and *Common Cause v. Rucho*, Nos. 1:16-cv-1026 (M.D.N.C. Aug. 5, 2016) – cases which have either been stayed by, or are awaiting the rulings of, the U.S. Supreme Court. Plaintiffs' claims, which are not justiciable and fail to allege an adequate factual foundation, should be dismissed.[2]

[1] Unless otherwise noted herein, capitalized terms shall have the meanings afforded such terms in Legislative Defendants' Memorandum of Law in Support of their Motion to Dismiss the FAC Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (ECF No. 68-1).

[2] Executive Defendants have also filed a brief opposing Legislative Defendants' Motion to Dismiss. ("ED Opp."; ECF No. 77). In doing so, Executive Defendants have created a bizarre situation where they are trying to stop a co-defendant from defeating claims which have also been filed against Executive Defendants – and which are not theirs to defend.

II. ARGUMENT

A. Plaintiffs Have Failed To Articulate Any Particularized Harm

"[T]o survive a motion to dismiss for lack of standing, a plaintiff 'must allege facts that affirmatively and plausibly suggest that it has standing to sue.'" *Finkelman v. Nat'l Football League*, 810 F.3d 187, 194 (3d Cir. 2016) (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011)).[3] In their Opposition, Plaintiffs argue that they have standing primarily because they are purportedly Democrats who were targeted. (Opp. at 2-3) ("The injury here is particular to Democratic voters whose party membership, voting history, and other political activities motivated the enactment of the 2011 Plan. As members of this politically salient, statewide group, Democratic voters in Pennsylvania were targeted for the harm inflicted by the redistricting plan.").

But, merely being an (allegedly) targeted Democrat is not enough. In *Agre*, Judge Shwartz correctly observed that the plaintiffs did not have statewide standing because one of the plaintiffs failed to articulate any particularized harm. *See Agre v. Wolf*, 2:17-cv-04392-MMB, at 22 (E.D. Pa. Jan. 10, 2018) (Shwartz, J., concurring). In other words, notwithstanding that the plaintiff without standing in *Agre* was a Democrat (and thus a member of the same exact "politically salient class" that the Plaintiffs propose here), Judge Shwartz found that such plaintiff's failure to assert "that her vote is diluted, that she experienced decreased choice, non-representative or non-

[3] Executive Defendants argue that the FAC should not be dismissed on standing grounds because "Legislative Defendants do not argue that Plaintiffs have failed to *allege* injuries." (ED Opp. at 2). While this statement is technically true, it cannot be the basis to deny the Motion. The issue here is not whether Plaintiffs' have alleged *any* injury; it is whether they have alleged an injury sufficient to satisfy Article III's standing requirements. They have not.

responsive congressmen, lack of access to the district's representative, or otherwise explained how the 2011 Plan impacted her" was fatal to the plaintiffs' statewide standing. *Id.* at 22-23. So, too, in the instant matter, being a Democrat, is insufficient to establish particularized harm.

Indeed, the FAC is completely devoid of allegations espousing the various types of injury that Judge Shwartz found to be sufficient in *Agre*. Significantly, Plaintiffs have failed to allege that "their options are restricted such that they cannot make meaningful electoral choices, they have reduced access to their congressman, their representatives are less responsive to them, and they have been placed in congressional districts that are not representative of their communities." *Agre*, at 17 (Shwartz, J., concurring). Instead, the FAC contains only vague allegations of vote "dilution", that their votes have been "wasted", and that "the 2011 Plan has also burdened the ability of these voters to influence the legislative process." (FAC, ¶ 73.) Such generalized allegations are insufficient to show particularized harm and requires that the FAC be dismissed.[4][5]

[4] Plaintiffs' statement that "a statewide challenge to a partisan gerrymander does not even require that a plaintiff reside in each challenged district" (Opp. Br. at 3) also directly contradicts Judge Shwartz's finding that "Plaintiffs have standing to bring their statewide challenge only if they can demonstrate an injury to at least one plaintiff in each of Pennsylvania's eighteen districts." *Agre*, at 22 (Shwartz, J., concurring). It is also a curious statement for Plaintiffs to make at this juncture, given that they amended their pleading for the apparent sole purpose of adding a plaintiff from each Congressional district.

[5] Plaintiffs' argument with respect to *Lance v. Coffman* is also misdirected. The plaintiffs in *Lance*, like Plaintiffs here, lacked standing because "[t]he only injury plaintiffs allege is that the law – specifically the Elections Clause – has not been followed." 549 U.S. 437, 441-442. Plaintiffs advance the same allegation here – that Plaintiffs have been injured because the General Assembly exceeded its authority under the Elections Clause, and thus the Elections Clause has not been followed. *Lance* is on all fours with the instant matter. Plaintiffs, like the plaintiffs in *Lance*, lack standing.

B. Plaintiffs Have Failed To Articulate Judicially Manageable Claims

1. Plaintiffs' Equal Protection Claim Should Be Dismissed As Nonjusticiable

In their Opposition, Plaintiffs insist that they have "alleged a clear, principled standard for the Court to judge partisan gerrymandering claims," and they proceed to set forth – for the first time – a three-part test to evaluate whether the 2011 Plan violates the Equal Protection Clause. This test purports to measure whether 2011 Plan "(1) was adopted with discriminatory intent, (2) has a large and durable discriminatory effect, and (3) that there are no valid justifications for the effect based upon neutral principles and legitimate state interests." This test must be rejected as unworkable and inconsistent with applicable law.

Plaintiffs' lone citation to the FAC for their "test" is to Paragraph 70 (Opp. at 5) but, curiously, the elements are nowhere to be found. *See* FAC, ¶ 70; *see also Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010) (recognizing that in assessing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), courts "consider only the complaint, matters of public record, as well as undisputedly authentic documents."). For instance, nothing in the FAC's Paragraph 70 speaks to the so-called "large and durable discriminatory effect", or indicates that this is a factor Plaintiffs must prove. Rather, while Paragraph 70 contains a hodgepodge of sweeping, generalized allegations and legal conclusions, it fails to offer any concrete guidance as to the elements Plaintiffs suggest they must satisfy to prove an Equal Protection claim for partisan gerrymandering. Thus, Plaintiffs' "clear, principled standard" is missing.

Further, a close examination of the case law cited by Plaintiffs in support of their newly-advanced "test" discloses that the source of their proposed discriminatory intent/effects "test" is,

in fact, the very test articulated by the plurality in *Davis v. Bandemer*, 478 U.S. 109, 133 (1986). (Opp. at 5-6, and n.5.). But, in *Vieth*, the Supreme Court unanimously rejected the *Bandemer* plurality's test as unworkable. 541 U.S. at 283-284. And Plaintiffs' attempt to resurrect the *Bandemer* plurality's test (and claim that it is something new) should be rejected here. In the end, no workable test has been advanced – and, as such, Plaintiffs' claim is not justiciable.[6]

But even assuming *arguendo* that such a test were applicable, Plaintiffs still fail to properly allege discriminatory intent. The FAC is replete with admissions that the primary purpose of the 2011 Plan was not perpetration of a plan to punish Democrats, but rather to maximize Republican seats in Congress. *See*, *e.g.,* FAC ¶ 44 ("While the Republican sponsors of the 2011 Plan were unsurprisingly circumspect in their public statements during the plan's adoption, statements made by observers at the time, only further demonstrate *that the 2011 Plan was intended to entrench the*

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[6] Executive Defendants argue that the FAC should not be dismissed because, "the Supreme Court has not ruled that partisan gerrymandering claims under the First Amendment and the Equal Protection Clause are non-justiciable under any possible standard." *See* (ED Opp. at 2). That may technically be true, but, once again, Executive Defendants miss the point. To date, the Supreme Court has been unable to identify a manageable and legally sufficient standard, and, in *Vieth*, the four-Justice plurality held that partisan gerrymandering claims are *not* justiciable. (Mot. at p. 3-5). Justice Kennedy, who concurred in *Vieth*, hoped that a judicially manageable standard might one day be identified, but effectively acknowledged that absent such a standard, partisan gerrymandering claims would be nonjusticiable. *Id*.

The justiciability of partisan gerrymandering claims has only been placed in further doubt by the Supreme Court's recent issuance of stays in *Gill v. Whitford*, No. 16-1161 (Order Jun. 19, 2017) and *Common Cause v. Rucho*, No. 17-745 (Order Jan. 18, 2018) (entering stay by 7-2 vote). In both *Gill* and *Rucho*, the district court panels ordered the creation of new Congressional districting plans for use in the upcoming 2018 elections. That the Supreme Court has issued stays in each of these actions suggests that a majority of the Supreme Court is inclined to reverse the panels' determinations. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2009) (holding that to qualify for a stay, applicant must show *inter alia* "a fair prospect that a majority of the Court will vote to reverse the judgment below" and irreparable harm).

Because Plaintiffs have not identified a legally sufficient and judicially manageable standard for adjudicating partisan gerrymandering claims, the FAC must be dismissed as nonjusticiable.

Republican Congressional delegation regardless of the degree of popular support enjoyed by the candidates of each party." (emphasis added)); ¶ 50 ("… [the] 2011 Plan packed and cracked voters who supported the Democratic Party in precisely this manner *to maximize Republican power*." (emphasis added)); ¶ 55 ("These outcomes are not only the obvious effect of the packing and cracking *used to maximize and entrench Republican power under the 2011 Plan, but they were the 2011 Plan's purpose*." (emphasis added)). Simply put, Plaintiffs' rhetoric regarding discriminatory intent is contradicted by their repeated allegations that political domination, not discrimination, was in fact the motivating intent. Thus, even under their own proposed standard, Plaintiffs cannot prove discriminatory intent.

Likewise, Plaintiffs have failed to set forth actionable allegations of discriminatory effect. Instead, Plaintiffs merely allege that the percentage of *statewide* vote for the Democrats and Republicans did not translate into the same percentage of Congressional seats by party. (FAC, ¶¶ 51-55). But the Supreme Court has long held that there is no constitutional right to proportional representation. *See, e.g., Vieth*, 541 U.S. at 288 (plurality op.) (recognizing that U.S. Constitution does not guarantee proportional representation). Indeed, using statewide voting results to evaluate the percentage of districts won is an apples-to-oranges comparison, and is not realistic given the fact that the majority of Democratic voters are concentrated in urban areas and not evenly distributed throughout the districts across the Pennsylvania. Thus, the FAC fails to set forth a cognizable basis for alleging discriminatory effect, and, even if the Court were to apply the Constitutionally deficient test proposed by Plaintiffs, Count I must be dismissed.

2. Plaintiffs Have Failed To State A First Amendment Claim Under Applicable Law

Courts have long recognized that a partisan gerrymander cannot constitute a First Amendment violation unless there is also an Equal Protection Violation. Plaintiffs attempt to circumvent this precedent by characterizing Justice Kennedy's concurrence in *Vieth* as a watershed moment in First Amendment/partisan gerrymandering jurisprudence and suggesting that any "pre-*Vieth*" cases are no longer good law. (Opp. at 9.). Plaintiffs are mistaken. Courts reviewing First Amendment claims in partisan gerrymandering cases – both before and after *Vieth* – are in accord that there exists no independent First Amendment violation absent a violation of the Equal Protection Clause. *See, e.g., 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); *Benisek v. Lamone*, 2017 U.S. Dist. LEXIS 136208, at *12 (D. Md. Aug. 24, 2017) (noting that Justice Kennedy's First Amendment theory "remains nothing more (or less) than a 'theory put forward by a Justice of th[e] Court and uncontradicted by the majority in any … cases'").

Plaintiffs seek to sidestep this authority by citing to the recent panel decision in *Common Cause v. Rucho*, Nos. 1:16-cv-1-26, 1:16-cv-1164, 2018 U.S. Dist. LEXIS 5191 (M.D.N.C. Jan. 9, 2018). But Plaintiffs' reliance on *Rucho* is, at best, premature. As noted above, on January 18, 2018, the Supreme Court entered an Order (with seven Justices voting in favor) staying the lower court's judgment in *Rucho* "pending the timely filing and disposition of an appeal in this Court." The Court's refusal to support the emergency redrawing of North Carolina's Congressional

districting plan that has been held to be unconstitutional – and on the eve of the North Carolina election cycle, no less – is a strong signal that it will overturn the panel's *Rucho* decision. *See Hollingsworth*, 558 U.S. at 190; *see also Benisek v. Lamone*, 2017 U.S. Dist. LEXIS 136208, at *12 (D. Md. Aug. 24, 2017) (noting that "the Supreme Court's decision to hold over the jurisdictional question for argument [in *Gill v. Whitford*] is a strong signal that the question remains unsettled in the minds of the Justices").[7] Thus, the legal basis for Plaintiffs' First Amendment partisan gerrymandering claim is lacking.

But even if Plaintiffs could maintain a First Amendment claim absent a viable Equal Protection claim, Plaintiffs have not identified a legally sufficient standard under which such claim could be considered. The test for whether a party has standing to wage a free-speech challenge is whether expressive conduct is "arguably prohibited," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 303 (1979), directing the inquiry to whether the challenged statute's language may reasonably be read to curtail the protected speech. *See, e.g.*, *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000).

Plaintiffs do not, because they cannot, allege that the 2011 Plan in any way prevented them from fully participating in the political process, or that their vote carries less weight than any other citizen of Pennsylvania. And, they do not, because they cannot, allege that they have been silenced, prevented from speaking, endorsing, and/or campaigning for any candidate due to the

[7] Plaintiffs' contention that strict scrutiny applies is also legally incorrect. 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). Plaintiffs' allegations do not support either scenario. And 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).

2011 Plan. At bottom, the 2011 Plan, like any districting legislation, is not directed to a voter's speech or conduct. Indeed, invalidating the 2011 Plan by applying First Amendment principles to the facts alleged in the FAC would constitute a remarkable departure from existing jurisprudence. *See Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 575 (N.D. Ill. 2011) (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.").

In fact, not one of the cases cited by Plaintiffs supports the broad reading of "viewpoint discrimination" Plaintiffs desire. In *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), the Supreme Court invalidated legislation aimed at curtailing individuals from protesting near schools. In *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015), the Court invalidated a municipal ordinance regulating the content of signage utilized by non-profit groups. And, in *Elrod v. Burns*, 427 U.S. 347, 362 (1976), the Court found that a sheriff could not terminate employees based on their political views. These cases all addressed attempts by government actors to prevent individuals from expressing their viewpoints.[8] They simply do not support the application of viewpoint discrimination to redistricting cases. For these reasons, the FAC fails to state a claim under the First Amendment.

[8] For political parties, this entails a showing of burden on associational rights, such as forced association, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577-82 (2000), or non-association. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214–17 (1986).

3. Plaintiffs' Elections Clause Test Is Unworkable

Plaintiffs propose an Elections Clause standard that requires, according to them, "more than a slight burden on [the plaintiffs'] preferred candidate or party." Specifically, Plaintiffs' proposed test is that "the districting plan must be 'plainly designed to favor' certain candidates or parties in an 'attempt to dictate election outcomes.'" (Opp. at 13 (citing *Cook v. Gralike*, 531 U.S. 510, 523-524 (2001)).). Under Plaintiffs' proffered standard, "Plaintiffs must show an intent to substantially favor or disfavor a class of candidates, which would then shift the burden to the State to prove that the plan was adopted for neutral, non-discriminatory reasons." (*Id.*). But, Plaintiffs' proffered test has no grounding in the law, and is unworkable because it raises the very same problems that have plagued partisan gerrymandering cases for over 30 years.

Plaintiffs' burden-shifting paradigm requiring the State to show neutral, non-discriminatory reasons" is, in reality, identical to the "none-means-none" test that was recently rejected in *Agre*. *See Agre*, at 3-4 (Smith, C.J.) ("Plaintiffs' partisan blindness theory was long ago rejected by the Supreme Court, and for good reason…"); *id.* at 26-30 (Shwartz, J., concurring); *see also* Order, ECF No. 40 (Nov. 22, 2017) (noting that Plaintiffs' Elections Clause claim was duplicative of the claim in *Agre*). Under Plaintiffs' test, political considerations are tolerable (if at all) only until a plaintiff makes a preliminary showing that a plan is "plainly designed to favor" certain candidates; in other words, that partisan intent was involved. Once this showing is made, then the State has to show that the plan was adopted for "neutral, non-discriminatory reasons" (Opp. Br. at 13); in other words, that *no* gerrymandering was involved. But such a test requiring politically-impartial purity cannot be squared with decades of well-established case law which

recognizes that partisan considerations are an inherent and inevitable part of the redistricting process. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., dissenting joined by Roberts, C.J., and Kennedy, J) ("it is well known that state legislative majorities very often attempt to gain an electoral advantage" through the districting and apportionment process) (citing *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *Bandemer*, 478 U.S. at 129; *Vieth*, 541 U.S. at 274-76; *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)); *League of United Latin Am. Citizens v. Perry ("LULAC")*, 548 U.S. 399, 414, 417 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (under the Elections Clause, states have the primary role in apportioning districts for their congressional colleagues and the state has acted constitutionally even where "the legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority"). Surely had the Framers intended to prohibit any partisan influence from impacting this process, they would never have ceded this power to inherently political bodies. *See Agre,* at 7 (Smith, C.J.) ("Because the [Elections] Clause's text explicitly assigns the power to prescribe election regulations to *political* bodies – specifically, state legislatures and the federal Congress – Plaintiffs must look outside of the constitutional text in order to support their theory. History, however, provides no support for Plaintiffs' theory.").

Indeed, no fewer than eight Justices in *Vieth* recognized that only *excessive* partisan gerrymandering might conceivably be unconstitutional. 541 U.S. at 326. And, as Justice Kennedy stated, a mere showing of political intent in partisan gerrymandering will *not*, by itself, prove to be a constitutional violation. Instead, "[a] determination that a gerrymander violates the law *must rest on something more than the conclusion that political classifications were applied*." *Id.* at 307

(Kennedy, J., concurring) (emphasis added); *see also Burns v. Richardson*, 384 U.S. 73, 89, n. 16, 16 L. Ed. 2d 376, 86 S. Ct. 1286 (1966) (finding nothing invidious in the practice of drawing district lines in a way that helps current incumbents by avoiding contests between them).[9]

Recognizing this, Plaintiffs attempt to hedge their bets by noting that "[i]t is the '*excessive* injection of politics' that is unlawful, and which Plaintiffs alleged dominated the legislature's creation of the 2011 Plan." (Opp. at 15.) But this begs the eternal question: how much partisan gerrymandering is too much? Neither the Supreme Court nor the lower courts have successfully devised a workable test – and Plaintiffs have not done so here. The Elections Clause claim must be dismissed. *See Agre*, at 4 (Smith, C.J.) (finding Elections Clause claim to not be justiciable, and noting the "inevitable problems that should counsel restraint before entering the political thicket of popular elections").[10]

[9] Plaintiffs' reliance upon *Gralike* and *Thornton* (from which their Elections Clause test is cobbled (Opp. at 12-13)) is misplaced, as both cases are inapposite. Neither involved redistricting, let alone a dispute over partisan redistricting. *Gralike*, 531 U.S. at 524-25; *United States Term Limits v. Thornton*, 514 U.S. 779, 831 (1995). *See also Agre*, at 57 (Smith, C.J.) (finding that the language of neither *Thornton* nor *Gralike* provides a judicially manageable standard for partisan gerrymandering cases).

[10] Executive Defendants state that "Legislative Defendants do not point to any Supreme Court precedent that has rejected an Elections Clause claim as non-justiciable – nor could they, as no such case has come before the Court." (ED Opp. at 2.) Again, while this is technically true, it ignores the reality that the *Agre* court very recently found an Elections Clause claim to be non-justiciable, and the Supreme Court only last week stayed the *Rucho* matter – which *did* find a violation of the Elections Clause by the North Carolina Congressional districting plan. *Rucho*, at *246-*248. As such, a finding by the Supreme Court that Elections Clause claims are not justiciable may be imminent.

III. CONCLUSION

For the reasons set forth herein and in the Motion to Dismiss, the Court should dismiss the First Amended Complaint in its entirety, with prejudice, pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6).

Date: January 22, 2018

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CERTIFICATE OF SERVICE

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