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.	:	
	:	
Thomas W. Wolf *et al*.,	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF LEGISLATIVE DEFENDANTS' MOTION FOR JUDGMENT PURSUANT TO RULE 50 OR RULE 52(c)

Legislative Defendants hereby submit this Motion for Judgment pursuant to Federal Rules of Civil Procedure 50 or 52(c). For the Statement of Undisputed Facts required by Rule 52(c), Legislative Defendants incorporate by reference the statement of Undisputed Facts (ECF No. 168-2), filed with the Legislative Defendants' Motion for Summary Judgment. This motion constitutes Legislative Defendants' proposed Conclusions of Law.

As this Court noted in its December 1, 2017 Order (ECF No. 169), *Gaffney v. Cummings*, 412 U.S. 735 (1973), and numerous other Supreme Court decisions have acknowledged and affirmed, political considerations are valid and traditionally used during the redistricting process. Additionally, and as explained in detail in Legislative Defendants Motion for Summary Judgment (ECF No. 168-1), the Plaintiffs have made no showing of standing. First, Plaintiffs have not established they are differently situated from the private citizens who were found to lack standing under the Elections Clause in *Lance v. Coffman*, 549 U.S. 437 (2007). Additionally, under the familiar standards of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), Plaintiffs failed to establish a personalized injury from the challenged government

action, a demonstration of something more than a generalized harm, and a harm redressable by a favorable ruling from the Court.

Plaintiffs' latest version of their elements (*see* ECF No. 173 (filed Dec. 3, 2017)), combined with the evidence presented to the Court during their case in chief, simply presents no constitutionally cognizable claim. This case can be dismissed on the law and on the facts.

I. STANDARD OF REVIEW

The applicable rule for disposition of this case as a matter of law is Rule 52(c), however, Legislative Defendants are entitled to prevail under both Rule 50 and 52(c). FED. R. CIV. P. 52(c) provides that "[i]f a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim … that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." This is a corollary to a judgment as a matter of law under Rule 50(a). *Ortloff v. U.S.*, 335 F.3d 652 (7th Cir. 2003). The key difference between the two rules is that a Rule 50(a) motion requires the court to "consider the evidence in the light most favorable to the plaintiff," while a Rule 52(c) motion "allows the district court to weigh the evidence to determine whether the plaintiff has proven his case." *Id*. at 660.

Under Rule 50(a), which is applicable only in jury trials, the Third Circuit has held that defendants are entitled to judgment as a matter of law "only if, viewing the evidence in the light most favorable to [the non-moving party] and giving [the non-moving party] the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability." *Wittekamp v. Gulf & Western, Inc.*, 991 F.2d 1137, 1141 (3d Cir. 1993), *cert. denied*, 510 U.S. 917, 114 S. Ct. 309 (1993).

By contrast, under Rule 52(c), "the court is not as limited in its evaluation of the nonmovant's case as it would be on a motion for a directed verdict. The trial judge is not to draw any special inferences in the nonmovant's favor nor concern itself with whether the nonmovant has made out a prima facie case. Instead the court's task is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies." *Gannon v. United States*, 571 F. Supp. 2d 615, 617 (E.D. Pa. 2017) (quoting *Giant Eagle, Inc. v. Fed. Ins. Co.*, 884 F. Supp. 979, 982 (W.D. Pa. 1995)). Rule 52(c) "authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence." *Gannon*, 571 F. Supp. 2d at 617 (quoting FED. R. CIV. P. 52(c) advisory committee's notes). Under this standard, the Court need not defer this ruling until the deposition designations are fully submitted or the record is formally closed.

II. ARGUMENT

A. Plaintiffs Lack Standing to Maintain This Claim.

Plaintiffs are 26 individual voters and Pennsylvania residents who purport to assert violations of rights possessed by all citizens of Pennsylvania and in their respective congressional districts. But only state entities, state legislatures, or state legislators have standing to bring claims under the Elections Clause. In *Lance*, the Supreme Court held that four private citizens lacked standing to assert claims that actions of the State of Colorado violated their rights as individuals under the Elections Clause. Noting that "[t]he only injury plaintiffs allege is that the law—specifically the Elections Clause—ha[d] not been followed," the Supreme Court held that such an injury "is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Lance*, 549

U.S. at 442. Plaintiffs have failed to show that they are any differently situated than the Plaintiffs in *Lance*.

Article III standing requirements prevent litigants from "raising another person's legal rights," and prohibit the adjudication of generalized grievances "more appropriately addressed in the representative branches." *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). Thus, a plaintiff bears the burden of demonstrating that he or she has suffered an injury to a legally protected interest that is both concrete and particularized to the plaintiff, and is an injury that the court can redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs failed at trial to establish standing when they raise only "generalized grievances about the conduct of government" and their alleged injuries are "predicated on the right, possessed by every citizen, to require that the Government be administered according to the law." *Common Cause v. Pennsylvania*, 558 F.3d 249, 259 (3rd Cir. 2009).

In the evidence presented at trial, Plaintiffs raised complaints ranging from the election of a President they appear to disagree with (under a federal election system that involves no decennial map drawing), to concerns about the environment, minority rights, unions, gun control, taxes, and healthcare. There was no centralized, unifying grievance, but all who testified were dissatisfied with some aspect of either their particular representative or their views on the federal government's ability to make progress on their particular issue or issues.

After failing to establish a personalized harm and more than a generalized grievance, Plaintiffs also failed to show that the Court could issue an order that redresses their complaints about the map drawing process. Plaintiffs' expert Daniel McGlone offered no suggestions at all on how a map could have been drawn, and offered no exemplar maps that would show how a map might meet the Plaintiffs' proposed tests. Plaintiffs' expert Anne Hanna offered a 5-step

plan of suggested "rules" for redistricting that failed to: (1) take into account the Voting Rights Act, (2) preserve cores of existing districts, or (3) avoid the pairing of incumbents. Ms. Hanna also did not produce any exemplar map and admitted that her "rules" have never been used to draw complete exemplar maps for Pennsylvania. Even if this court were to find Ms. Hanna's "rules" promising as a policy matter, the Supreme Court held repeatedly that the states' legislative processes are entitled to deference from the federal judiciary. *See, e.g., New York State Bd. of Elections v. Lopez-Torres*, 552 U.S. 196, 204-06 (2008) (reversing grant of injunction mandating New York offer direct primary elections for judicial candidates and finding that whether a primary system gives an individual a "fair shot" at winning an election is a legislative judgment and overruling that legislative judgment was error); *Upham v. Seamon*, 546 U.S. 37, 40-41 (1982) ("…a court must defer to the legislative judgments the plans reflect ….").

Plaintiffs' prayer for relief as stated in their First Amended Complaint contains two substantive requests. First, Plaintiffs ask that the Court to "[d]irect and order that prior to the 2018 Congressional elections the defendant State officers will submit for approval of the General Assembly one or more alternative districting plans within the authority of the General Assembly under the Elections Clause and is consistent with plaintiffs' rights of federal citizenship under the Privileges and Immunities Clause and the Supremacy Clause." (ECF No. 88 at 11). Second, they ask that this Court to "[d]irect and order that defendant State officers develop such plans through a process that has reasonable safeguards against partisan influence, including the consideration of voting preferences." (*Id.*).

The Supreme Court's rulings clearly prohibit a federal court from effectively amending the Commonwealth's Constitution and ordering the immediate implementation of an alternative

to the Commonwealth's traditional legislative process for Congressional districting. Plaintiffs plainly cannot obtain the relief they seek from this Court.

B. Plaintiffs' Intent Element Yields No Constitutionally Cognizable Claim.

Plaintiffs advance a standard for the first time in this litigation that involves something Plaintiffs call "the expected number of winning seats that would be determined by the voters if the districts were drawn using even-handed criteria." (ECF No. 173 at 1).

A Lexis search for the phrase "expected number of winning seats" turns up no cases in any federal or state reporter. At the first day of trial, Daniel McGlone, Plaintiffs' primary expert witness, was unable to articulate what the phrase "expected number of winning seats" means. On the first and second day of trial, Plaintiffs' expert witness Anne Hanna never used this phrase. None of Plaintiffs' evidence uses this phrase. This phrase appears in the Plaintiffs' elements brief twice, without any supporting case citation.

The phrase "even-handed criteria" similarly has never been used in the redistricting context. The phrase "even-handed criteria" is absent from Plaintiffs' testimonial and documentary evidence. Mr. McGlone and Ms. Hanna both testified regarding "traditional neutral redistricting criteria." "Traditional neutral redistricting criteria" appears in *Bush v. Vera*, 517 U.S. 952 (1996), and in two three-judge court cases both referring to cases involving allegations of racial gerrymandering. *See, e.g. Perez v. Abbott*, 253 F. Supp. 3d 864 (W.D. Tex. 2017) (a jurisdictional statement pending at the U.S. Supreme Court on a later order in this case), and *Quilter v. Voinovich*, 981 F. Supp. 1032 (E.D. Ohio 1997). A review of those opinions that use the phrase "traditional neutral redistricting criteria" all indicate such criteria are tied to the deliberate use of race in drawing the districts at issue. No case has used this phrase to refer to a

prohibition from considering political data, incumbent residences, or preserving the cores of existing districts.

To the extent this claim appears to call for proportional representation, a majority of justices rejected the notion *Davis v. Bandemer*, 478 U.S. 109 (1986). The four-justice plurality opinion held:

> The District Court held that because any apportionment scheme that purposely prevents proportional representation is unconstitutional, Democratic voters need only show that their proportionate voting influence has been adversely affected. Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be….[]Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of a proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.

Id. at 129-30, 132. Three other Justices, in the concurring opinion authored by Justice O'Connor, agreed, stating: "Nor do I believe that the proportional representation towards which the Court's expansion of equal protection doctrine will lead is consistent with our history, our traditions or our political institutions." *Id.* at 145 (O'Connor, J., concurring). Furthermore, in *City of Mobile v. Bolden*, the Supreme Court observed: "The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation." 478 U.S. 109 at 79 (1980).

C. <u>Plaintiffs' Standard for Level of Intent Contravenes Supreme Court Precedent.</u>

Plaintiffs now argue that something called a "substantial motivating factor" is the applicable standard. This is a far cry from the "none means none" standard they initially advanced. The only redistricting case to use this phrase was the lower court in *Shaw v. Hunt*,

861 F. Supp. 408 (E.D.N.C. 1994), in the racial gerrymandering context. That case was later reversed by the Supreme Court in *Shaw v. Hunt*, 517 U.S. 899 (1996).

Plaintiffs' elements statement (ECF No. 173) also fails to define "discriminatory intent." Precisely what is the discriminatory intent? And Plaintiffs fail to address the numerous Supreme Court decisions that have permitted political considerations to be a valid and complete defense to racial gerrymandering claims such as the Court's recent decisions. *See, e.g., Cooper v. Harris*, 137 S. Ct. 1455 (2017), and *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788 (2017).

Neither Mr. McGlone nor Ms. Hanna testified about the "degree" of intent used in drawing the 2011 Plan. Mr. McGlone, in fact, testified that he only examined how partisan data impacted the map. He also testified that he looked at no other explanations for the shape of the districts, thus he had no means of discerning the degree to which alleged partisan intent affected the shape of the Congressional districts independent of other factors. Similarly, Ms. Hanna testified that political data was possessed by the Legislature. Of course, she had no knowledge and could not testify regarding how such data was used.

Simply stated, Plaintiffs have presented no evidence to the Court regarding the degree of partisan intent—an element Plaintiffs themselves suggested was necessary to support their claim—and have certainly not presented any evidence that would permit the Court to conclude that "discriminatory intent" was a "substantial motivating factor."

D. <u>Plaintiffs Fail to Explain How a Map Results in Elected Officials That Cannot Be Voted Out of Office by a Majority.</u>

The notion that a "map itself" elects any official is simply incomprehensible. Maps do not vote. Voters vote for candidates in single member district elections for the United States Congress. As the Supreme Court noted in *Bandemer*:

> If all or most of the districts are competitive—defined by the District Court in this case as districts in which the anticipated split in the party vote is within the range of 45% to 55%—even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature. This consequence, however, is inherent in winner-take-all, district-based elections, and we cannot hold that such a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the statewide vote received by their party candidates. As we have said: "[W]e are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them." This is true of a racial as well as a political group. It is also true of a statewide claim as well as an individual district claim.

Bandemer, 478 U.S. at 130 (internal citations omitted).

Plaintiffs' proposed elements require a showing that "the map resulted in a Congressional delegation composition that even a majority of the people could not substantially change." (ECF No. 173 at 2). Plaintiffs never made this showing at trial.

E. <u>The Supreme Court Has Rejected Plaintiffs' Proportional Representation Requirement Express in The Plaintiffs' "Required Extent of the Effect."</u>

As outlined above, the Plaintiffs' new set of elements suggests that a proportional representation of some sort is required, and the absence of proportionality in the "composition of the State's Congressional delegation as a whole" violates that standard. The Supreme Court has repeatedly rejected a proportional representation requirement in *Gaffney v. Cummings*, 412 U.S. 735 (1973), *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and *Davis v. Bandemer*, 478 U.S. 109 (1986). Proportional representation arguments have been rejected by three-judge District Courts in both *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992), and *Badham v. March Fong Eu*, 568 F. Supp. 156 (N.D. Cal. 1983), *aff'd*, 470 U.S. 1084 (1985).

The Supreme Court's latest clear pronouncement disavowing the notion of proportional representation came in the plurality opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004):

> Deny it as appellants may (and do), this standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.
>
> …
>
> "Fairness" does not seem to us a judicially manageable standard. Fairness is compatible with noncontiguous districts, it is compatible with districts that straddle political subdivisions, and it is compatible with a party's not winning the number of seats that mirrors the proportion of its vote. Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.

Id. at 287-88, 291. On this point, the four-justice plurality was joined by Justice Stevens, who added: "The Constitution does not, of course, require proportional representation of racial, ethnic, or political groups. In that I agree with the plurality." *Vieth*, 541 U.S. at 338 (Stevens, J., dissenting). In a separate dissenting opinion, Justices Souter and Ginsberg also acknowledged that they "agree with this Court's earlier statements that the Constitution guarantees no right to proportional representation." *Id.* at 352 (Souter, J., dissenting). All told, seven of the Justices rejected the notion that the Constitution requires any proportionality in electing representatives.

III. CONCLUSION

In light of the foregoing, the Legislative Defendants respectfully submit that the Plaintiffs have again failed to put forward constitutionally based elements of their claim. In addition, even

if their claims were cognizable, Plaintiffs have failed to satisfy their proposed elements. The Court should enter judgment as a matter of law in favor of the Legislative Defendants and against the Plaintiffs.

Dated: December 6, 2017

Respectfully submitted,

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