

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

Louis Agre, William Ewing,)
Floyd Montgomery, Joy Montgomery,)
and Rayman Solomon,)
)
)
Plaintiffs,)
)
v.)
)
Thomas W. Wolf, Governor of Pennsylvania,)
Pedro Cortes, Secretary of State of)
Pennsylvania, and Jonathan Marks,)
Commissioner of the Bureau of Elections,)
in their official capacities,)
)
Defendants.)

Case No.

COMPLAINT – INJUNCTIVE RELIEF REQUESTED

Introduction

1. In violation of 42 U.S.C. § 1983, the defendant Pennsylvania Governor and other State officer defendants are engaged in implementing a Congressional districting plan (“2011 Plan”) which was beyond the authority of the General Assembly to adopt under the Elections Clause of the Constitution, Article I, Section 4. By continuing to implement the 2011 Plan, the State officer defendants have deprived the plaintiffs of their rights under the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment, and of their rights under the First Amendment of the Constitution. The 2011 Plan adopted by the General Assembly seeks to influence or control the party affiliations of those who will represent the people of Pennsylvania in the Congress. Because the Elections Clause is a source of only neutral procedural rules, it does not give the General Assembly the authority to draw Congressional

districts based on the likely voting preferences of plaintiffs and other citizens. By doing so, the 2011 Plan has deprived plaintiffs of their constitutional rights as set forth below.

2. As set out in Article I, section 4, the Elections Clause reads as follows:

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.

3. The Elections Clause is a limited grant of authority to enact neutral procedural rules. As Justice Kennedy stated in his concurring opinion in *Cook v. Gralike*, 531 U.S. 510, 527 (2010):

A State is not permitted to interpose itself between the people and their National Government. . . [T]he Elections Clause is a grant of authority to issue procedural regulations, and not a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates . . . [This] dispositive principle . . . is fundamental to the Constitution.

4. Under the Tenth Amendment the States cannot purport to have or “reserve” a power to intentionally influence the outcome of U.S. House elections, since no such “reserved” power could have logically existed before adoption of the Constitution. Nor did Congress confer a power upon state legislatures to engage in political gerrymandering of any kind when it enacted 2 U.S.C. § 2, requiring the states to create single member districts and precluding at-large elections.

5. Plaintiffs recognize that *Gill, et al. v. Whitford, et al.* (16-1161) is now pending before the United States Supreme Court. The present action raises a different type of legal claim not at issue in *Whitford*. While plaintiffs support the holding of the three-judge court in *Whitford*, that holding does not consider the effect of the Elections Clause on elections to the United States

Congress. None of the three counts set out below duplicates the particular issue pending before the Court in *Whitford*.

6. As set out in Count I, the 2011 Plan denies the rights of plaintiffs as federal citizens to be free of this intentional interference by the General Assembly in choosing the party affiliations of their Representatives in the Congress. The 2011 Plan thereby deprives plaintiffs of their rights of federal citizenship under the Privileges and Immunities Clause of the Fourteenth Amendment. The 2011 Plan seeks to interfere with this free choice and right of federal citizenship by concentrating plaintiffs and other likely Democratic voters in the fewest possible Congressional districts. It also seeks to strategically place likely Republican voters in all other districts so as to constitute effective voting majorities for Republican candidates for Congress. In violation of 42 U.S.C. § 1983, the defendant State officers are continuing to implement this 2011 Plan which unlawfully deprives or interferes with their decisions as federal citizens as to the party affiliation of their Representatives to Congress.

7. As set out in Count II, the 2011 Plan also unlawfully classifies, divides, and places plaintiffs and other citizens into 18 Congressional districts based at least in part upon the likely voting preferences of plaintiffs and other citizens in the districts with whom they are placed. In doing so, the 2011 Plan deprives plaintiffs of their rights under the Equal Protection Clause because (1) the 2011 Plan treats them in an intentionally discriminatory and unequal manner by classifying them because of their voting preferences, and (2) such classification does not serve a legitimate or even lawful purpose. The General Assembly has no lawful authority under the Elections Clause or 2 U.S.C. § 2 or the Supremacy Clause to classify plaintiffs in this discriminatory and unequal manner. Accordingly, in violation of 42 U.S.C. § 1983, the defendant

officers are unlawfully implementing this Plan which deprives plaintiffs of their rights under the Equal Protection Clause.

8. As set out in Count III, such classification of plaintiffs into Congressional districts because of their likely voting preferences and political views is an unlawful abridgment of plaintiffs' speech under the First Amendment. The 2011 Plan is intended to, and does, control or privilege the expression of certain points of view and the speech that citizens hear and receive in these Districts. The 2011 Plan concentrates as many Democratic voters as possible in the fewest possible Congressional districts and thereby denies opportunities of plaintiffs and others to speak and engage with likely Republican voters without the General Assembly screening voters based upon their likely political views. While any districting plan would affect speech in some manner, the 2011 Plan intentionally seeks to amplify speech for one party over another. Accordingly, in violation of 42 U.S.C. §1983, by continuing to implement the 2011 Plan, the defendant State officers have deprived plaintiffs of their rights under the First Amendment.

9. Plaintiffs seek injunctive relief, prior to the Congressional elections scheduled for 2018, to bar defendants from implementing the 2011 Plan.

10. Plaintiffs also seek an order requiring the State officer defendants to submit for review by this Court any proposed revision of the 2011 Plan designed to confine it to procedural regulations in compliance with the Elections Clause.

Parties

11. Plaintiff Louis Agre is a citizen of Pennsylvania and a resident of this judicial district.

12. Plaintiffs William Ewing, Floyd Montgomery, Joy Montgomery, and Rayman Solomonare citizens of Pennsylvania.

13. Defendant Thomas W. Wolf is the Governor of Pennsylvania and is charged with execution of its laws.

14. Defendant Pedro Cortes is the Secretary of State of Pennsylvania and is charged with administration of the election laws.

15. Defendant Jonathan Marks, is the Commissioner of the Bureau of Elections of Pennsylvania and is charged with administration of the election laws.

16. The Defendants are all sued in their official capacities.

Jurisdiction and Venue

17. The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 because plaintiffs' claims arise under the Constitution and laws of the United States, namely the First and Fourteenth Amendments to the Constitution, and 42 U.S.C. § 1983. The Court also has jurisdiction over the case pursuant to 28 U.S.C. § 1343 because plaintiffs seek relief from the deprivation of civil rights, including the right to vote, the right to equal protection of the laws, and the right to free speech. The Court has jurisdiction over this case pursuant to 28 U.S.C. § 2284 because it is a challenge to the constitutionality of the apportionment of congressional districts. Pursuant to 28 U.S.C. § 2284(a), plaintiffs request the appointment of a three-judge district court.

18. Venue is proper in this judicial district because some of the defendants reside in this district and many of the events and omissions giving rise to the claims occurred in this district.

Facts

19. There has been a long history of gerrymandering in Pennsylvania and as demonstrated by past legal court challenges. The practice has become part of the political culture of the state.

20. In 2011, following the 2010 National Census, the Republican National Committee sponsored and launched a nationwide project known as REDMAP, to be undertaken by national and state Republican party leaders and officials, including some or all of the defendants, to draw up and adopt Congressional districting plans that favored the election of Republicans over Democrats.

21. As explained on the home page of REDMAP, as a result of 2010 state legislative victories, Republican-dominated state legislatures had “an opportunity to create 2025 new Republican Congressional Districts through the redistricting process . . . solidifying a Republican majority [in the U.S. House].”

22. REDMAP employed election-related data and projected demographic trends likely to be more successful in ensuring Republican victories than previous such efforts, because digital or computer models available by 2011 that employ voter registration and other data indicating the political preferences of citizens were more sophisticated than previous models in projecting population growth and population movement of likely Democratic and likely Republican voters over a ten-year period.

23. REDMAP focused on states such as and including Pennsylvania where relatively even vote totals for Democratic and Republican state-wide candidates afforded the largest prospective partisan gains to be obtained from Congressional redistricting.

24. On information and belief, officials in the state Republican party in Pennsylvania and legislative leaders in the General Assembly in Pennsylvania, including the Republican defendants, actively participated in deploying and implementing REDMAP in Pennsylvania, employing the sophisticated digital or computer models that used voter registration and other data indicating the political preferences of citizens. Defendants' efforts resulted in the Congressional districting plan set out in Senate Bill 1249, adopted by the Pennsylvania General Assembly on December 14, 2011, that is the Plan which is the subject of this Complaint.

25. Based upon the use of such sophisticated digital or computer models that use voter registration and other data indicating the political preferences of citizens, the Plan divides Pennsylvania into 18 Congressional districts with the intent, purpose and effect of maximizing the number of Republican candidates elected to the U.S. House of Representatives from Pennsylvania.

26. A number of the 18 Congressional districts, such as the Sixth and Seventh Districts, have bizarre or crazy-quilt shapes that cannot be explained by districting criteria such as continuity, community of interest, historical division, or political or governmental boundaries, or by computer models employing criteria other than partisan data.

27. Based upon the use of such sophisticated digital or computer models that use voter registration and other data indicating the political preferences of citizens, a number of such 18 Congressional districts were drawn with the use of "packing" and "cracking" techniques, "packing" or concentrating likely Democratic voters in the smallest number of districts and "cracking" or spreading out likely Republican voters in the largest number of districts.

28. As found by various experts, such as Professor Sam Wang of Princeton University, no computer model using neutral or criteria other than partisan intent could have randomly produced the district boundaries in 2011 Plan.

29. The Plan was introduced—without notice by amendment to Senate Bill 1249, with no opportunity for review or comment by the citizens of the State or the Democratic members of the Assembly—on December 20, 2011, on which day the Plan was adopted.

30. Since then, the 2011 Plan has achieved its intended effect and made more likely the election of Republican candidates to Congress.

31. In both the 2014 and 2016 elections, the 2011 Plan secured the election of 13 Republican candidates to Congress in the 18 Congressional districts of the State, or 72% of the congressional seats.

32. At the same time, the votes for the Democratic and Republican candidates for Congress on a state wide basis were divided nearly equally, with Republicans winning just 55.5% of the statewide congressional vote in 2014, and 53.9% in 2016 .

Count I
Section 1983: Violation of Privileges and Immunities Clause

33. In violation of 42 U.S.C. § 1983, and by implementing the 2011 Plan which was beyond the authority of the General Assembly to adopt under the Elections Clause, the defendant State officers have deprived the plaintiffs and other citizens of their rights as federal citizens to be free of State interference in the election of their Representatives to the National Legislature. In so doing, the defendant State officers have denied plaintiffs their rights under the Privileges and Immunities Clause of the Fourteenth Amendment and the Supremacy Clause of Article VI, section 2

34. Neither Clause permits the State to interpose itself between the citizens of the State and their Representatives in the National Legislature or otherwise to act beyond its authority under the Elections Clause.

35. The Elections Clause itself is a source of only neutral procedural rules.

36. In violation of 42 U.S.C. § 1983, and by continuing to implement the State's 2011 Plan, which seeks to determine the party affiliation of Representatives in the National Legislature, the State officer defendants have deprived plaintiffs of their rights of federal citizenship to be free of such interference under the Privileges and Immunities Clause

37. Furthermore, the Supremacy Clause prohibits the States from encroaching on the sovereignty of the United States or interfering with the fundamental design of the Constitution..

38. Under the Tenth Amendment to the Constitution, the General Assembly had no reserved power to influence or control the party affiliation of the Representatives to the National Legislature.

39. No such "reserved" power could have existed prior to the adoption of the Constitution and no such power can be "reserved."

40. Nor does 2 U.S.C. § 2 which requires single member Congressional districts confer any authority upon the State of Pennsylvania or the defendant State officers to influence or control the political viewpoint of persons elected to the Congress.

WHEREFORE plaintiffs pray this Court to:

A. Declare and adjudge that in violation of 42 U.S.C. § 1983 by continuing to implement the 2011 Plan beyond the authority of the State to adopt under the Elections Clause, the defendant State officers have deprived plaintiffs of their rights as federal citizens to have Representatives of their own choosing without

the interference of the State and of their rights of federal citizenship under the Privileges and Immunities Clause of the Fourteenth Amendment

- B. Direct 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 the Privileges and Immunities Clause and the Supremacy Clause
- C. Direct 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.
- D. Retain continuing jurisdiction over the state defendants to comply with these requirements.
- E. Grant plaintiffs their legal fees and costs and such other relief as may be appropriate.

Count II
Section 1983: Violation of Equal Protection

41. In violation of 42 U.S.C. § 1983 and by implementing the 2011 Plan which was beyond the authority of the General Assembly to adopt under the Elections Clause, the defendant State officers have deprived plaintiffs of their rights to be free of discriminatory State interference in the election of their Representatives to the National Legislature. In doing so, the State officer defendants have denied plaintiffs their rights under the Equal Protection Clause of the Fourteenth Amendment.

42. As set forth above, the defendant State officers are continuing to implement the 2011 Plan which intentionally places the plaintiffs into Congressional districts based upon their own likely voting preferences and those of the other citizens with whom they have been placed.

43. In doing so, the 2011 Plan intentionally treats the plaintiffs and other citizens in a discriminatory and unequal manner.

44. The intentional discriminatory and unequal classification of plaintiffs in this manner serves no legitimate purpose and is illegal because it is beyond the authority of the General Assembly under the Elections Clause.

45. The Elections Clause is a source of only neutral procedural rules.

46. Accordingly, in violation of 42 U.S.C. § 1983, and by continuing to implement the 2011 Plan the defendant state officers are treating plaintiffs and other citizens in a discriminatory and unequal manner for no legitimate purpose but for an illegal purpose in conflict with the Elections Clause.

47. Accordingly, by classifying its citizens in this unequal manner and for an illegal purpose, the State officer defendants have deprived plaintiffs and other citizens of their rights under the Equal Protection Clause of the Fourteenth Amendment.

48. As set forth above, the defendant State officers may not implement a plan which interposes the State between the plaintiffs and their Representatives in “the National Legislature” or seeks to control or determine the political affiliation of these Representatives.

WHEREFORE plaintiffs pray this Court to:

A. Declare and adjudge that in violation of 42 U.S.C. § 1983 and by continuing to implement the 2011 Plan, the defendant State officers are treating plaintiffs and other citizens in a discriminatory or unequal manner for an objective that is

unlawful and in conflict with the Elections Clause and beyond the authority of the General Assembly to pursue under the Elections Clause.

- B. Declare and adjudge that in violation of 42 U.S.C. § 1983 and by continuing to implement the 2011 Plan the defendant State officers are depriving plaintiffs and other citizens of their rights under the Equal Protection Clause of the Fourteenth Amendment.
- C. Direct and order that prior to the 2018 Congressional elections the defendant State officers will submit for approval of the Court one or more alternative districting plans that are within the authority of the General Assembly to adopt under the Elections Clause.
- D. Direct and order that the defendant State officers shall develop such alternative plans through a process that has reasonable safeguards against use of voting preferences to create alternative plans, except as may be required in particular instances by federal law.
- E. Retain continuing jurisdiction of this case for purposes of approval of the process used by the state defendants for developing the plans and for approval of plans that are within the authority of the General Assembly to adopt.
- F. Grant plaintiffs their legal fees and costs and such other relief as may be appropriate.

Count III
Section 1983: Violation of the First Amendment

49. By classifying plaintiffs and other citizens into Congressional districts based upon their likely voting preferences, the 2011 Plan is a regulation of speech related conduct.

50. The 2011 Plan determines the location of where plaintiffs can engage in meaningful speech and speech related conduct related to the election of their Representatives in the National Legislature.

51. Such a content-based restriction on speech—determining the times and places and manner in which plaintiffs can speak and be heard based on their likely voting behavior—is not a necessary or reasonable restriction of speech because it is in conflict with or beyond the authority of the State under the Elections Clause.

52. Accordingly, in violation of 42 U.S.C. § 1983, by continuing to implement the 2011 Plan, the defendant State officers have denied the right of plaintiffs under the First Amendment to be free of any content based restriction on speech related conduct or other speech regulation that is not within the authority of the General Assembly to adopt under the Elections Clause.

WHEREFORE plaintiffs pray this Court to:

- A. Declare and adjudge that in violation of 42 U.S.C. § 1983 and by continuing to implement the 2011 Plan, the defendant State officers have deprived plaintiffs of their rights under the First Amendment.
- B. Direct and order that prior to the 2018 Congressional elections the State defendants will submit for approval of the General Assembly one or more alternative districting plans that will affect the time place and manner for political speech under neutral rules that are within the authority of the State to adopt under the Elections Clause.

- C. Direct and order that the defendant State officers develop such process for creating alternative plans with safeguards to ensure that they are within the authority of the State to adopt under the Elections Clause.
- D. Retain continuing jurisdiction of this case for purposes of approval of the process described above.
- E. Grant plaintiffs their legal fees and costs and such other relief as may be appropriate.

Dated: October 2, 2017

By: 
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