

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

JOE GARCIA; FERNANDO QUILES; and  
DALIA RIVERA MATIAS,

Plaintiffs,

v.

2011 LEGISLATIVE REAPPORTIONMENT  
COMMISSION; and CAROLE AICHELE, in  
her Capacity as Secretary of the  
Commonwealth of Pennsylvania and as Chief  
Election Officer of the Commonwealth of  
Pennsylvania,

Defendants.

Civil Action No. 12-0556 RBS

**BRIEF OF DEFENDANT AICHELE IN SUPPORT OF HER MOTION TO DISMISS  
AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY  
INJUNCTION**

Defendant Carol Aichele, the Secretary of the Commonwealth of Pennsylvania, presents this brief in support of her motion to dismiss the above-captioned action and in opposition to Plaintiffs' motion for a preliminary injunction.

**I. INTRODUCTION**

Plaintiffs are three citizens of the Commonwealth of Pennsylvania, of Latino descent, who bring suit in this Court under 42 U.S.C. § 1983, claiming that the Commonwealth of Pennsylvania, through the Secretary of the Commonwealth ("Secretary") as Pennsylvania's chief elections officer, is currently administering elections for members of the Pennsylvania General Assembly using a malapportioned districting plan that violates Plaintiffs' rights to equal protection under the 14<sup>th</sup> Amendment to the U.S. Constitution and their rights under section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. The 2012 legislative elections are being

administered unlawfully by the Secretary, Plaintiffs claim, because the Supreme Court of Pennsylvania has ordered the Secretary to use the 2001 Legislative Reapportionment Plan “until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved,” *Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711, 715 (Pa. 2012) (citing Pa. Const. art. II, § 17(e)), and because it is not possible at this time for a revised 2011 Legislative Reapportionment Plan having the force of law to be used for the 2012 legislative elections. Thus, Plaintiffs now ask this Court, *inter alia*: (1) to declare that use of the 2001 Legislative Reapportionment Plan for electing members of the General Assembly in 2012 violates their rights to equal protection under the 14<sup>th</sup> Amendment and their rights as Latinos under section 2 of the Voting Rights Act; and (2) as a remedy for the claimed violation, to order the Secretary to conduct “special elections” on May 21, 2013 – coincident with Pennsylvania’s scheduled municipal primary – for all 203 seats in the Pennsylvania House of Representatives and the 25 seats in the Senate of Pennsylvania that are scheduled for election on November 6, 2012.

The remedy that they seek, Plaintiffs acknowledge, would shorten the terms of the members who are elected in the November 2012 General Election under the 2001 Legislative Reapportionment Plan,<sup>1</sup> but they insist that the remedy is appropriate because it would allow the

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<sup>1</sup> Plaintiffs in their motion for a preliminary injunction state repeatedly – but erroneously – that their proposed remedy would have this Court “mandate a shortened **one-year** election term for those state legislators elected in 2012.” Plaintiffs’ Motion for a Preliminary Injunction, at 2-3 (emphasis added); *see also id.* at 1-2 (“Plaintiffs respectfully request that ... state legislators serve a shortened one-year term and that this Court mandate a special election be held in 2013 to properly elect legislators to these positions pursuant to an approved 2011 Legislative Reapportionment Plan.”); *id.* at 18 (“preliminary relief in the form of legislators serving a shortened one-year term to be followed by a special 2013 election held pursuant to an approved 2011 Legislative Reapportionment Plan is clearly in the public interest.”).

In reality, however, Plaintiffs’ proposed remedy – “that this Court shorten the term of service for those state legislators elected in 2012 and order [the Secretary] to hold a special 2013 election in connection with [the] 2013 statewide municipal **primary** elections [to be held on May 21, 2013,]

prompt election and seating of members for the 2013-14 legislative session using a constitutionally and statutorily sound redistricting plan at the first opportunity that is reasonably practicable for the Commonwealth to implement.

Because the Commonwealth's conduct of legislative elections in 2012 using the 2001 Legislative Reapportionment Plan as expressly directed by the Supreme Court of Pennsylvania does not, under the facts and circumstances presented here, violate Plaintiffs' constitutional rights to equal protection of the law or section 2 of the Voting Rights Act, this Court should deny Plaintiffs' motion for a preliminary injunction and dismiss their complaint for failure to state a claim.

As this Court said in denying Plaintiffs' earlier motion for a temporary restraining order, "judicial relief [in redistricting matters is] appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Pileggi v. Aichele*, C.A. Nos. 12-0588, 12-0556 and 12-0488, 2012 U.S. Dist. LEXIS 15227, at \*24-\*25 (E.D. Pa. Feb. 8, 2012) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). Inasmuch as Pennsylvania's process of legislative redistricting continues apace in accordance with the structure prescribed by the Constitution of Pennsylvania, *see infra*, and that structure is well-designed to achieve a timely redistricting plan that accords with the requirements of federal and state law, the Commonwealth is committing no violation of the U.S. Constitution or federal statute in conducting its regularly-scheduled 2012 legislative elections under a redistricting plan that was lawfully constructed and used in the previous decade while the decennial process of redistricting proceeds in due course. The expected and unavoidable

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using the yet-to-be approved 2011-12 Legislative Reapportionment Plan," *id.* at 2 (emphasis added); *see also id.* at 11 – would cause the terms of those elected on November 6, 2012, to be shortened to approximately **six months**, not one year.

transitional process of redistricting is of no constitutional consequence when the Commonwealth's redistricting authorities, including the Supreme Court of Pennsylvania, clearly are acting with diligence and vigilance in reconstructing legislative district lines in accordance with federal and state law. Thus, there is no cause for federal judicial intervention at this time; and this Court, therefore, should deny Plaintiffs' motion for a preliminary injunction and dismiss their complaint for failure to state a claim.

In the alternative, this Court should deny Plaintiffs' motion and dismiss their complaint based on principles of abstention as pronounced in *Grove v. Emison*, 507 U.S. 25 (1993), and *Scott v. Germano*, 381 U.S. 407 (1965); or, further in the alternative, this Court should deny Plaintiffs' motion and stay Plaintiffs' action pending final disposition of appeals currently pending in the Supreme Court of Pennsylvania in the consolidated matter captioned *In re: Petitions for Review Challenging the Final 2011 Reapportionment Plan Dated June 8, 2012*, Nos. 126-134 MM 2012, 39-42 WM 2012.

As reflected in an Order issued on July 10, 2012 – shortly after Plaintiffs filed their motion for a preliminary injunction – the Supreme Court of Pennsylvania *sua sponte* expedited its review of appeals taken from the revised 2011 Legislative Reapportionment Plan adopted June 8, 2012; and that court will hear oral argument on all of those appeals in Philadelphia on September 13, 2012. Based on the deference owed by federal courts to state redistricting procedures, including judicial review by the state courts, this Court at the very least should entertain no action for declaratory or equitable relief until after the Pennsylvania Supreme Court has fully considered and disposed of the many appeals before it from the revised 2011 Legislative Reapportionment Plan.

## II. FACTS

### A. State Proceedings

Following the release of the decennial census by the U.S. Government, the Commonwealth of Pennsylvania, through its constitutional body known as the Pennsylvania Legislative Reapportionment Commission (“LRC”), *see* Pa. Const. art. II, § 17(a), undertook to redistrict the two bodies of the General Assembly – the Senate and House of Representatives. The LRC adopted and published throughout the Commonwealth a preliminary reapportionment plan, considered public comment, and on November 19, 2011, adopted a final reapportionment plan. Appeals as of right were taken by aggrieved citizens to the Supreme Court of Pennsylvania. After full briefing and oral argument, the Supreme Court on January 25, 2012, held that the final plan was “contrary to law” and, consequently, directed the LRC “to reapportion the Commonwealth in a manner consistent with [the court’s o]pinion.” *Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711, 715-16 (Pa. 2012).

The Supreme Court’s explanatory opinion followed nine days later. *See Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 716 (Pa. 2012). As part of the opinion explaining its unprecedented action in declaring a reapportionment plan to be contrary to law, the Supreme Court described the process going forward based on its authoritative understanding of the Pennsylvania Constitution:

Where, as here, aggrieved citizens prove that a redistricting plan is contrary to law, the Constitution specifies that the remedy is a remand to the LRC and the Final Plan does not have force of law. **This Court’s *per curiam* order of January 25, 2012, rendered two days after argument, provided the only direction possible to candidates in light of our Constitution and our 2002 decision in *Albert* [*v. 2001 Legislative Reapportionment Comm’n*, 567 Pa. 670, 790 A.2d 989 (2002)], which upheld the 2001 Final Plan.** As we have noted earlier, we recognize that our constitutional duty to remand a plan found contrary to law has disrupted the 2012 primary election landscape....

We are not in a position to predict when the LRC will complete its task of developing a new final redistricting plan that complies with law, nor when such a new plan can become final and have force of law. **Any issues respecting deferring the state legislative primary, or scheduling special elections, etc., are, in the first instance, the concern and province of the political branches.** Such questions have not been briefed and presented to this Court.

38 A.3d at 761 (emphasis added; footnotes omitted).

The Supreme Court also noted that, “once the LRC approves a new preliminary plan, the Constitution affords persons aggrieved by the new plan a right to object, before the plan is finally approved by the LRC, and to a subsequent right to appeal to this Court.” *Id.* at 761 n.40. The Supreme Court also promised that, should appeals be filed, it would “decide them with alacrity.” *Id.*

Because the process for conducting the 2012 General Election for seats in the General Assembly and other offices had already begun when the Supreme Court made its decision to declare the 2011 Final Reapportionment Plan to be contrary to law and to direct the preparation of a new plan by the LRC, the court took necessary action to adjust the election procedures so that the 2012 elections scheduled by law could proceed. *See* 38 A.3d at 715. The court also stated explicitly that if the elections are to proceed (as is required by Pennsylvania law), the only redistricting plan having the force of law is the 2001 Final Reapportionment Plan – “until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved.” *Id.* (citing Pa. Const. art. II, § 17(e)).

**B. Proceedings in this Court**

On February 2, 2012, Plaintiffs commenced their civil rights action in this Court.<sup>2</sup> In their complaint (which they have not amended notwithstanding the change in circumstances that have occurred with the passage of time), Plaintiffs asked the Court to order that a new legislative redistricting plan be enacted for use in the 2012 legislative elections scheduled for April and November. Along with the plaintiffs in the two related cases, Plaintiffs filed a motion for a temporary restraining order and asked for the convening of a three-judge panel under 28 U.S.C. § 2284(b)(3).

After hearing held February 6, 2012, this Court on February 8, 2012, denied all three requests for a temporary restraining order, as well as the motions for the convening of a three-judge panel. *See Pileggi v. Aichele*, 2012 U.S. Dist. LEXIS 15227. In summary, this Court held as follows:

- “Federal courts must act cautiously when asked to interfere with state election matters....” *Id.* at \*24 (citing *Grove v. Emison*, 507 U.S. 25, 34 (1993)). “[J]udicial relief [in redistricting matters] becomes appropriate only when a legislature fails to apportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.” *Id.* at \*24-\*25 (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)).
- In light of the April primary (which was then already under way) to select candidates for the General Election in November, the Commonwealth’s plan to use the 2001 Final Reapportionment Plan, as had been ordered by the Supreme

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<sup>2</sup> Two related suits were commenced in this Court at around the same time. *Pileggi, et al. v. Aichele*, No. 12-0588; and *Smith v. Aichele*, No. 12-0556. Those suits, the former by two leaders of the General Assembly who serve on the LRC – Senator Pileggi and Rep. Turzai – and the latter by the Speaker of the House, have since been voluntarily dismissed without prejudice.

Court of Pennsylvania in *Holt*, is permissible under *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny.

- “There is no indication that the Commonwealth has adamantly refused to comply with constitutional mandates and court orders. To the contrary, the LRC has complied with the law, albeit slowly, and has indicated an intention to unveil a revised 2011 Plan, in compliance with the Pennsylvania Supreme Court’s Order.... In view of the immediacy [of the general primary on April 24], we are compelled to have the elections proceed under the 2001 Plan. In short, this is precisely a case ‘where an impending election is imminent and a State’s election machinery is already in progress,’ such that a court may withhold from granting relief, even if the existing apportionment scheme is found to be invalid. *Reynolds*, 377 U.S. at 585.” *Pileggi*, at \*30-\*31. *See also id.*, at \*31-\*32 (citing *Graves v. City of Montgomery*, 807 F.Supp. 2d 1096 (M.D. Ala. 2011)).
- “With election deadlines quickly approaching, and no existing alternative reapportionment plan, [the Secretary] needs certainty as to how to proceed. **There is no reasonable alternative at this point but to allow the elections to proceed under the 2001 Plan.**” *Pileggi*, at \*35 (emphasis added).
- “In sum, the Pennsylvania Supreme Court has directed that, in lieu of a constitutional revised reapportionment plan, the 2012 election should proceed using the 2001 Plan. At this time, there has been no action taken to change the date of the primary. We can only speculate as to whether or when there will be a constitutionally approved reapportionment plan based upon the 2010 census. Because there is presently no alternative plan, if we issue a temporary restraining

order and request a three-judge panel, the primary election certainly will not occur as required by statute. Depending on what happens with the LRC, Pennsylvania voters could be disenfranchised. *See Diaz v. Silver*, 932 F. Supp. 462, 468-69 (E.D.N.Y. 1996) (listing cases holding that, because there does not appear to be any alternative redistricting plan readily available, the harm to the public in delaying either the primary or the general election, or even changing the rules as they now stand, substantially outweighs the likely benefit to the plaintiffs of granting a preliminary injunction). A delayed election this year could deprive Pennsylvania voters of their right to choose delegates to the National Conventions and their candidate for the Presidency of the United States. *Cf. Graves* (noting deprivation of voters' right to replace public officials whose terms are soon to expire)." *Pileggi*, at \*36-\*37 (citation and footnote omitted).

- "No party ... denies that voters are entitled to a periodic reapportionment process. We understand Plaintiffs' concerns about the use of the 2001 Plan for the 2012 election. However, when the Pennsylvania Supreme Court determined that the LRC's final 2011 Plan was unconstitutional and remanded the matter so that the LRC could prepare a revised constitutional 2011 Plan, a situation that was fraught with uncertainty and was potentially disastrous was created. **The Supreme Court attempted to stabilize the situation when it directed that the 2001 Plan be used. Under these unique circumstances, we are compelled to conclude that the election should proceed under the only-existing plan, the 2001 Plan.**" *Pileggi*, at \*38 (emphasis added).

**C. Further State Proceedings**

Following the directions of the Supreme Court of Pennsylvania issued in *Holt*, the LRC proceeded to redistrict the General Assembly anew:

- On April 12, 2012, the LRC adopted a revised preliminary plan. *See* <http://www.redistricting.state.pa.us/>.
- The LRC held public hearings on May 2 and May 7, 2012, to consider public comment respecting the revised preliminary plan. *Id.*
- The LRC adopted a revised final plan on June 8, 2012. *Id.*; *see also* <http://www.redistricting.state.pa.us/Maps/index.cfm>.

As provided by Article II, section 17(d) of the Constitution of Pennsylvania, aggrieved persons were allowed to file appeals with the Supreme Court within 30 days. In fact, 13 appeals were filed by the deadline; and the Supreme Court has consolidated those appeals under caption *In Re: Petitions for Review Challenging the Final 2011 Reapportionment Plan Dated June 8, 2012*, Nos. 126-134 MM 2012 and 39-42 WM 2012. *See* <http://www.pacourts.us/OpPosting/Supreme/out/SchedulingOrderforReapportionment.pdf>. The court on July 11, 2012, issued an accelerated briefing schedule and, on August 6, 2012, scheduled oral argument for September 13, 2012, in Philadelphia. *See* <http://www.pacourts.us/OpPosting/Supreme/out/September2012SessionList.pdf>.

If and when the Supreme Court has finally decided the appeals in favor of the LRC, “the reapportionment plan shall have the force of law and the districts therein provided shall be used thereafter in elections to the General Assembly until the next reapportionment...” Pa. Const. art. II, § 17(e); *but see Fagan v. Smith*, 41 A.3d 816, 821 (Pa. 2012) (“The 2011 reapportionment ... mandated by our Constitution ... does not affect distribution of representatives for the 2010-2012

term of the House of Representatives, either by incumbent members or by specially elected members of that body.”).

In the event that the Supreme Court were again to find the reapportionment plan to be contrary to law, the consequent remedy is not entirely clear under Pennsylvania Constitution. The Supreme Court likely would again remand to the LRC, as it did in *Holt*, with instructions as to how the LRC should revise the plan. *See* Pa. Const. art. II, § 17(d). But it is conceivable that the Supreme Court could direct a different procedure so as to accelerate the adoption of a plan that complies with law.

In any event, the course of the appeals that are pending before the Supreme Court of Pennsylvania, and the decisions that might be made and directions that might be issued by that court, are entirely speculative at this point. Indeed, it is possible that the Supreme Court could consider, on its own initiative, whether the law requires or allows the conduct of interim elections for the General Assembly because of the delays experienced in reapportioning the Commonwealth in 2011-12.

#### **D. The Election**

As provided by federal and Pennsylvania law, the General Election for federal and state offices will occur on Tuesday, November 6, 2012. *See* 2 U.S.C. §§ 1, 7 (U.S. Congress); 3 U.S.C. § 1 (President); Pa. Const. art. VII, § 2 (General Election Day); 25 P.S. § 2751 (same). Under the Pennsylvania Constitution and the Pennsylvania Election Code, elections must be held in each general election for the offices of Senator and Representative in the General Assembly. *See* Pa. Const. art. II, § 2 (“Members of the General Assembly shall be chosen at the general election every second year.”); 25 P.S. § 2751 (“Senators and Representatives in the General Assembly shall be elected at the general election.”).

Nominees of the major political parties for the offices to be elected in the General Election were chosen by the registered electors of the Commonwealth in the General Primary that was held on April 24, 2012. *See* 25 P.S. § 2862. Nominations of minor political parties and political bodies were required to be made by August 1, 2012, through the filing of nomination papers. *See* 25 P.S. §§ 2872.2, 2911; *see also Baldwin v. Cortés*, 378 Fed. Appx. 135 (3d Cir. 2010) (discussing nomination procedures and deadlines for minor political parties and political bodies). Absentee balloting begins on August 28, 2012, and proceeds until Election Day. *See* 25 P.S. § 3146.5(a).

Under Pennsylvania law, “Senators shall be elected for the term of four years and Representatives for the term of two years.” Pa. Const. art. II, § 3. Therefore, those elected to the Senate on November 6, 2012, would serve a term that commences on December 1, 2012, and ends on November 30, 2016; and those elected to the House of Representatives would serve terms commencing on December 1, 2012, and concluding on November 30, 2014. *See* Pa. Const. art. II, § 2 (The term of service for a member of the General Assembly “shall begin on the first day of December next after their election.”). Special elections under the Pennsylvania Constitution are held for seats in the General Assembly only in the event of a vacancy. *See* Pa. Const. art. II, § 2 (“Whenever a vacancy shall occur in either House, the presiding officer thereof shall issue a writ of election to fill such vacancy for the remainder of the term.”).

### **III. ARGUMENT**

#### **A. Pennsylvania Is Not in Violation of Federal Law.**

As this Court emphasized in its February opinion denying temporary injunctive relief, “[f]ederal courts must act cautiously when asked to interfere with state election matters....” *Pileggi*, at \*24 (citing *Grove v. Emison*, 507 U.S. 25, 34 (1993)). “[J]udicial relief [in

redistricting matters] becomes appropriate only when a legislature fails to apportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.” *Id.* at \*24-\*25 (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). This directive from the U.S. Supreme Court is a corollary integral to the foundational principle that “the Constitution leaves with the States [the] primary responsibility for apportionment of ... legislative districts.” *Id.* (quoting *Grove*, at 34).

After a decennial census, federal law, especially the Equal Protection Clause, does require a representational governmental body to respond by revising its district lines commensurate with shifts in population. However, because “[r]edistricting is complex[,] obtaining new census data is merely the first step toward developing and approving a new map...” *Political Action Conference v. Daley*, 976 F.2d 335, 340 (7<sup>th</sup> Cir. 1992). The law does not require an immediate change in district lines. Rather, the question of constitutional consequence is whether the State “has a reasonably conceived plan for periodic readjustment of legislative representation.” *Reynolds*, at 583.

It is to be expected in any system of redistricting – especially one involving large and complex bodies such as the Pennsylvania Senate and House of Representatives – that a reasonable period of time must be accorded for the redistricting process to play out. To accommodate the complex process that faces the Commonwealth of Pennsylvania every ten years to redraw the district lines for 253 elected legislators, the Pennsylvania Constitution provides for a deliberative and open process, which includes a substantial period of time for public involvement and judicial review by the Commonwealth’s highest court:

- After the census data is readied for use in the process, the constitutional procedure begins with the empanelling of the LRC. This process alone can take some time

and (as it did in 2011) might involve the Pennsylvania Supreme Court. *See* Pa. Const. art. II, § 17(b).

- The LRC then devises a preliminary reapportionment plan, *see id.* § 17(c), which must be approved by “a majority of its entire membership.” *Id.* § 17(a). For this task, the Constitution accords the LRC a period of 90 days. *Id.*
- The preliminary plan is published in newspapers throughout the Commonwealth, *see id.* § 17(h), and the public has the opportunity within a period of 30 days to comment on the preliminary plan and to file exceptions. *Id.* § 17(c).
- Following this 30-day public comment period, the LRC has 30 days within which to consider the exceptions and issue a final plan. *Id.*
- The final plan, like the preliminary plan, is published in newspapers throughout the Commonwealth. *Id.* § 17(h).
- Within 30 days after the final plan is approved, any aggrieved person may file an appeal with the Pennsylvania Supreme Court. *Id.* § 17(d).
- After briefing and oral argument, if the Supreme Court finds that the reapportionment plan is “contrary to law,” it is required to “issue an order remanding the plan to the [LRC] and directing the [LRC] to reapportion the Commonwealth in a manner not inconsistent with [the court’s] order.” *Id.*
- When the Supreme Court finds (as it did this year, for the first time since this process was added to the Pennsylvania Constitution in 1969) that the LRC’s plan is “contrary to law” and remands to the LRC with direction to try again, the process is repeated – *i.e.*, the LRC has 90 days to adopt a preliminary plan; the preliminary plan is published in newspapers throughout the Commonwealth; a 30-

day opportunity for public comment and exceptions is required; the LRC has 30 days to consider the exceptions and adopt a final plan; the new final plan is published in newspapers across the Commonwealth; and judicial review is available as of right in the Supreme Court. *See Holt*, 38 A.2d at 141 n.40 (implicitly directing that the processes established by Pa. Const. art. II, § 17, be followed again).

This detailed process established in the Commonwealth's constitution is a reasonably conceived plan for periodic readjustment of legislative representation that satisfies the requirements of the Equal Protection Clause and other federal requirements, including the Voting Rights Act. Required review by the Supreme Court in particular provides high assurances that the Commonwealth's redistricting plan for its General Assembly will meet all legal requirements – under both federal and state law. That this elaborate process can take time – especially when, as a result of judicial review, the process must be repeated – necessitates precisely the kind of leeway that the U.S. Supreme Court in *Reynolds* had in mind when it cautioned federal courts to “act cautiously” when asked to interfere with state election matters, especially when redistricting is involved. *See Pileggi*, at \*24-\*25 (citing *Grove* and *Reynolds*).

The Pennsylvania Supreme Court, as promised in *Holt*, is proceeding to consider appeals from the LRC's latest redistricting plan “with alacrity.” 38 A.3d at 761 n.40. It is likely that the Commonwealth soon will have a redistricting plan that has “the force of law,” will meet all federal and state constitutional and statutory standards, and will be used in all elections going forward. As *Reynolds* and cases applying *Reynolds* make clear, that is all that is required by the U.S. Constitution and federal law.

As this Court recognized in *Pileggi*, federal courts applying *Reynolds* have found no constitutional violation or cause for judicial intervention when regularly scheduled elections occur under an old districting plan while state or local authorities diligently go about the business of the redistricting process. For example, in *Graves v. City of Montgomery*, 807 F.Supp. 2d 1096 (M.D. Ala. 2011) – a case cited and discussed extensively by this Court in *Pileggi*, at \*27, \*32 – the plaintiffs claimed that a city was violating their federal constitutional and statutory rights in conducting elections for members of city council to serve four-year terms using a malapportioned districting plan that was based on the 2000 Census when 2010 Census data was available to devise a redistricting plan that would properly conform to one person-one vote principles and section 2 of the Voting Rights Act. The district court correctly disagreed with the plaintiffs' contentions and dismissed their complaint.

Applying *Reynolds* and an opinion of the U.S. Court of Appeals for the Seventh Circuit in *Political Action Conference v. Daley*, 976 F.2d 335 (7<sup>th</sup> Cir. 1992), involving similar circumstances, the district court in *Graves* found that the city's system for redistricting following a decennial census was “a reasonably conceived plan for periodic readjustment of legislative representation.” 807 F.Supp. 2d at 1110-11. The court explained:

If [the City is] complying with a reasonably conceived plan that results in decennial reapportionment of the City's city council districts..., they satisfy “the minimal requirements for maintaining a reasonably current scheme of legislative representation,” under the Equal Protection Clause. *Reynolds*, 377 U.S. at 583-84. ***Reynolds* neither requires [the City] to complete the redistricting process in time for the [next scheduled] election, nor requires [a] court to enjoin the elections until the population asymmetries are cured. As recognized in *Daley*, nothing in *Reynolds* holds that only immediate redistricting after receipt of federal decennial census data satisfies constitutional mandates. See *Daley*, 976 F.2d at 340. Lag times in redistricting were not constitutionally shunned in *Reynolds*, but, to the contrary, expressly were “justified by the need for stability and continuity in the organization of the legislative system,” notwithstanding the resulting “imbalance in the population of districts toward the end of the decennial period.” 377 U.S. at 583; see also *Daley*, 976 F.2d at 340. The fact that the elections proceed with population**

**“imbalance” toward the end of a decennial period is of no constitutional consequence under *Reynolds*.**

*Graves*, at 1110-11 (emphasis added).

The same analysis applies here. The Commonwealth, through the LRC and its Supreme Court, is proceeding diligently through the process carefully prescribed by the Commonwealth’s constitution to achieve a redistricting plan for the Senate and House of Representatives that meets all federal and state legal requirements. The system within which the LRC and the Supreme Court are currently performing their responsibilities is “a reasonably conceived plan for periodic readjustment of legislative representation.” That the constitutional process has not concluded in time for use of a new plan to be used in the 2012 legislative elections is of no constitutional consequence – especially where the delay has been occasioned principally by the unprecedented decision of the Supreme Court to declare that the plan adopted by the LRC does not conform to the standards of the Pennsylvania Constitution and, therefore, must be redone in accord with constitutional standards and procedures.

As one federal court recently observed, “If a governing body has a plan for reapportionment every ten years, there is no Supreme Court case directly addressing the question of how long [is too long] ... without running afoul of the Fourteenth Amendment.” *Clark v. Marx*, C.A. No. 11-2149, 2012 U.S. Dist. LEXIS 2429, \*24 (W.D. La. January 9, 2012). Surely the principles of equal protection that are grounded in *Reynolds*, as well as the requirements of the Voting Rights Act, are flexible enough to accommodate the Pennsylvania Constitution and the involvement of its judiciary in such a foundational exercise as the decennial redistricting of the state’s legislature, particularly when the state’s highest court has made new pronouncements about the requirements of the Pennsylvania Constitution and the redistricting authorities need

time to apply the newly-minted standards through the deliberative and public process required by the Constitution.

The Commonwealth of Pennsylvania through its responsible officials is acting in accordance with Pennsylvania law and consistent with federal constitutional and statutory standards. Plaintiffs' complaint states no claim under either the Equal Protection Clause or section 2 of the Voting Rights Act. Consequently, there is no need for this Court to consider a remedy for a legal violation that has not occurred and is not occurring. For these reasons, the Court should deny Plaintiffs' motion for a preliminary injunction, grant Defendant Aichele's motion to dismiss, and dismiss the above-captioned action with prejudice.

**B. Principles of Abstention Bar Plaintiffs' Claims and Request for Preliminary Injunction.**

As explained in the preceding section, this Court should dismiss Plaintiffs' action with prejudice for failure to state a claim. In the alternative, this Court should dismiss Plaintiffs' action based on principles of abstention found in *Growe v. Emison*, 507 U.S. 25 (1993), and *Scott v. Germano*, 381 U.S. 407 (1965). Further in the alternative, in the event that this Court does not find legal cause to dismiss Plaintiffs' action at this time, the Court should deny the requested preliminary injunction and stay the matter pending the Pennsylvania Supreme Court's final disposition of the appeals pending in *In re: Petitions for Review Challenging the Final 2011 Reapportionment Plan Dated June 8, 2012*, Nos. 126-134 MM 2012, 39-42 WM 2012.

In *Scott v. Germano*, 381 U.S. 407 (1965), the U.S. Supreme Court required a federal district court to defer consideration of disputes involving redistricting where the state, through its legislative or judicial branch, already had begun to address the highly political task of redistricting itself. The Supreme Court reviewed a district court ruling that had invalidated Illinois' State Senate districts and entered an order requiring the state to submit to the court any

revised Senate districting scheme it might adopt. An action had previously been filed in state court attacking the same districting scheme. In the state case, the Illinois Supreme Court held (subsequent to the federal court's order) that the Senate districting scheme was invalid, but expressed confidence that the General Assembly would enact a lawful plan during its then-current session. The Illinois Supreme Court retained jurisdiction to ensure that upcoming elections would be conducted pursuant to a constitutionally valid plan.

The U.S. Supreme Court disapproved of the district court's action and ruled that the court "should have stayed its hand"; and, in failing to do so, the district court overlooked the Supreme Court's teaching that state courts have a significant role in redistricting. *Germano*, 381 U.S. at 409. The Court stated emphatically: "The power of the judiciary of a State to require valid reapportionment ... has not only been recognized by this Court but appropriate action by the States in such cases has been **specifically encouraged.**" *Id.* (emphasis added).

As in *Germano*, Plaintiffs in this case seek federal judicial intervention into the state legislative reapportionment process, including judicial review by the state's highest court, before it has concluded. Plaintiffs demand that this Court gratuitously establish a strict time frame for the Commonwealth to adopt a valid redistricting plan so that this Court might order special elections to be held just nine months from now for the very same 228 legislative seats that are scheduled for regular election in November. This Court should entertain none of it.

The Pennsylvania Supreme Court is in the process of reviewing the validity of the LRC's revised reapportionment plan. Thus, as in *Germano*, the appropriate state authorities are in the midst of addressing the "highly political task of redistricting" the Commonwealth's legislative bodies. Following the abstention principles of *Scott v. Germano*, this Court should stay its hand

and dismiss this action or, in the alternative, stay all proceedings until the Pennsylvania Supreme Court has finally decided all pending appeals.

In *Grove v. Emison*, 507 U.S. 25 (1993), an action was brought in federal district court seeking declaratory and injunctive relief barring the use of allegedly fragmented districts for future elections and adoption of new districts in both congressional and state legislative redistricting. *Id.* at 28. Prior to the commencement of the federal action, a state court action was commenced against state officials seeking injunctive relief to preclude the use of malapportioned districts and to compel the adoption of new ones based on the most recent census. *Id.* at 27. The district court held that the state redistricting plan fragmented minority voting rights under section 2 of the Voting Rights Act. On appeal, the U.S. Supreme Court held that the district court erred in not deferring to the state court's timely efforts to redraw legislative and congressional districts.

The Court in *Grove* held that the U.S. Constitution gives states primary responsibility for apportionment of election districts. The Court reaffirmed the principle that the legislative and judicial branches of state governments are preferred to federal courts; and, absent evidence that either branch is shirking its duty, the federal courts should not impede or obstruct state reapportionment efforts. The Court explained that it has “required deferral, causing a federal court to ‘sta[y] its hands,’ when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case.” *Id.* at 32 (quoting *Railroad Comm’n of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941)).

The Court's ruling in *Grove* reaffirmed the principle expressed in *Germano*, which derives from the recognition that the Constitution leaves with the States primary responsibility for apportionment of their legislative districts. *Grove*, 507 U.S. at 34. The Court held that,

absent evidence that state branches will fail to timely perform their redistricting duties, federal courts must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it. *Id.* at 34. Reversing the district court's judgment, the Supreme Court in *Grove* found that the state court was neither unwilling nor unable to adopt a redistricting plan in a timely manner.

In this case, as in *Grove*, both the Pennsylvania Supreme Court and the LRC are actively engaged in the constitutionally-prescribed process of adopting a new legislative redistricting plan for the Commonwealth. Therefore, under *Grove*, this Court should defer to the Pennsylvania Supreme Court's consideration of both the LRC's revised redistricting plan and such other instruction that the Pennsylvania court might make through its disposition of the pending appeals.

Based on the abstention principles of *Germano* and *Grove*, this Court should abstain from considering Plaintiffs' action, including their motion for a preliminary injunction. Thus, the Court should deny Plaintiffs' motion for a preliminary injunction and dismiss their action. In the alternative, the Court should deny Plaintiffs' motion for a preliminary injunction and stay all proceedings until the Supreme Court of Pennsylvania has finally disposed of all appeals in *In re: Petitions for Review Challenging the Final 2011 Reapportionment Plan Dated June 8, 2012*.

**IV. CONCLUSION**

For the reasons stated in this brief, this Honorable Court should deny Plaintiffs' motion for a preliminary injunction and dismiss Plaintiffs' action with prejudice for failure to state a claim.

In the alternative, this Court should abstain, deny Plaintiffs' motion for a preliminary injunction, and dismiss Plaintiffs' action in deference to the Supreme Court of Pennsylvania's consideration of appeals pending in *In re: Petitions for Review Challenging the Final 2011 Reapportionment Plan Dated June 8, 2012*.

Further in the alternative, this Court should deny Plaintiffs' motion for a preliminary injunction and stay all further proceedings until the Pennsylvania Supreme Court has finally disposed of all appeals and all issues presented in *In re: Petitions for Review Challenging the Final 2011 Reapportionment Plan Dated June 8, 2012*.

Respectfully submitted,

JAMES D. SCHULTZ  
General Counsel

By: /s/Gregory E. Dunlap  
Gregory E. Dunlap  
Senior Deputy General Counsel  
Office of General Counsel  
333 Market Street, 17<sup>th</sup> Floor  
Harrisburg, PA 17120  
717.787.9336  
[gdunlap@pa.gov](mailto:gdunlap@pa.gov)

DATE: August 13, 2012

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOE GARCIA; FERNANDO QUILES; and  
DALIA RIVERA MATIAS,

Plaintiffs,

v.

2011 LEGISLATIVE REAPPORTIONMENT  
COMMISSION; and CAROLE AICHELE, in  
her Capacity as Secretary of the  
Commonwealth of Pennsylvania and as Chief  
Election Officer of the Commonwealth of  
Pennsylvania,

Defendants.

Civil Action No. 12-0556 RBS

**CERTIFICATE OF SERVICE**

I, GREGORY E. DUNLAP, certify that on August 13, 2012, I served this *Brief of Defendant Aichele in Support of her Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction* by Notice of Docket Activity sent automatically by CM/ECF on the following counsel who are registered as CM/ECF filing users who have consented to accepting electronic service through CM/ECF:

Jose Luis Ongay, Esquire  
[ongaylaw@aol.com](mailto:ongaylaw@aol.com)  
521 South Second Street  
Philadelphia, PA 19147  
(215) 928-0859

Jose Perez, Esquire  
[jperez@latinojustice.org](mailto:jperez@latinojustice.org)  
Juan Cartagena, Esquire  
[jcartagena@latinojustice.org](mailto:jcartagena@latinojustice.org)  
Nancy M. Trasande, Esquire  
[ntrasande@latinojustice.org](mailto:ntrasande@latinojustice.org)  
LATINO JUSTICE  
99 Hudson Street, 14<sup>th</sup> Floor  
New York, NY 10013  
(212) 219-3360

*Counsel for Plaintiffs*

Bryan Devine, Esquire  
[bdevine@dscslaw.com](mailto:bdevine@dscslaw.com)  
DEL SOLE CAVANAUGH STROYD LLC  
200 1<sup>st</sup> Avenue, Suite 300  
Pittsburgh, PA 15222  
(412) 261-2393

*Counsel for Defendant Pennsylvania Legislative Reapportionment Commission*

Brian S. Paszamant, Esquire  
[paszamant@blankrome.com](mailto:paszamant@blankrome.com)  
BLANK ROME  
One Logan Square  
Philadelphia, PA 19103  
(215) 569-5791

Carl M. Buchholz, Esquire  
[carl.buchholz@dlapiper.com](mailto:carl.buchholz@dlapiper.com)  
DLA PIPER US LLP  
One Liberty Place, Suite 4900  
1650 Market Street  
Philadelphia, PA 19103  
(215) 656-3358

*Counsel for Proposed Amicus Curiae, Senator Dominic Pileggi*

/s/Gregory E. Dunlap  
Gregory E. Dunlap  
Senior Deputy General Counsel  
[gdunlap@pa.gov](mailto:gdunlap@pa.gov)  
Office of General Counsel  
333 Market Street, 17<sup>th</sup> Floor  
Harrisburg, PA 17120  
717.787.9336

*Counsel for Defendant Carol  
Aichele, Secretary of the  
Commonwealth*

Date: August 13, 2012