UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 12-0556 RBS

JOE GARCIA; FERNANDO QUILES; and DALIA RIVERA MATIAS,

Plaintiffs,

v.

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

Defendants

REPLY BRIEF OF DEFENDANT AICHELE IN SUPPORT OF HER MOTION TO DISMISS

Defendant Carol Aichele, the Secretary of the Commonwealth of Pennsylvania, presents this reply brief in support of her motion to dismiss the above-captioned action.

I. INTRODUCTION

As described in the Secretary's principal brief, 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 14th 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 14th 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 new elections in 2013, coincident with Pennsylvania's scheduled municipal primary and municipal election – 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 Plaintiffs now seek is **different** from the remedy that Plaintiffs described in their motion for a preliminary injunction filed on June 29, 2012. In their preliminary injunction motion, Plaintiffs sought "special elections" for the legislative seats to be held in May 2013 coincident with Pennsylvania's municipal primary.[1] But, as revealed for the first time in a footnote dropped in their memorandum of law in opposition to the Secretary's motion to dismiss and in further support of their motion for a preliminary injunction, *see* Plaintiffs' Memorandum of Law filed September 7, 2012 (Doc. 48), at 19 n.24, Plaintiffs now say that they seek not "special elections" in May 2013 under the procedures prescribed in Article VI(B) of the Pennsylvania Election Code, *see* 25 P.S. §§ 2778, 2779-87, but full-blown, statewide legislative elections for 228 seats in the General Assembly as part of the 2013 municipal elections – with a primary on May

[1] In their proposed preliminary injunction order, Plaintiffs ask this Court to order the Secretary "to call, hold, supervise and certify a **special election** in 2013 **in connection with 2013 Pennsylvania Municipal Primaries**, shortening the term of those state legislators elected pursuant to the 2001 Legislative Reapportionment Plan in the upcoming 2012 election...." *See* Doc. 19, at 36-37 (emphasis added).

21, 2013, and a "general" election on November 5, 2013, coincident with Pennsylvania's municipal election. Thus, as now "clarified," Plaintiffs want this Court to order the Secretary to conduct new legislative elections in 2013 through a **year-long** process that begins just over **three months** following the conclusion of the General Election scheduled for November 6, 2012, *see* 25 P.S. § 2868 (candidates who wish to have their names placed on the primary ballot may begin to circulate and file nomination petitions beginning on the 13th Tuesday before the primary, *i.e.*, February 19, 2013), and **just seven weeks** after those elected to the General Assembly in 2012 have been sworn and seated. *See* Pa. Const. art. II, § 4 (General Assembly must convene on the first Tuesday in January, *i.e.*, January 1, 2013). Of course, these "off-year" legislative elections demanded by Plaintiffs – to be specially scheduled by order of this Court – would be followed just as quickly by the regularly-scheduled legislative elections in 2014 at which 228 members of the General Assembly **again** would be chosen. Consequently, Plaintiffs have now made clear that they would have this Court effectively order **three years of continuous legislative elections throughout the Commonwealth of Pennsylvania**.

Since the time that the Secretary filed her motion and brief, the Supreme Court of Pennsylvania on September 13, 2012, did in fact hear oral argument to consider 13 consolidated 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, from the 2011 Legislative Reapportionment Commission's revised reapportionment plan adopted on remand from the Supreme Court's decision in *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711 (Pa. 2012). The court has taken those appeals under advisement.

II. ARGUMENT

As this Court emphasized in its February 8, 2012, opinion denying temporary injunctive relief, "[f]ederal courts must act cautiously when asked to interfere with state election matters...." *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 592 (E.D. Pa. 2012) (citing *Growe 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.* (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 *Growe*, at 34). Nothing that Plaintiffs have presented in their memorandum of law opposing the Secretary's motion to dismiss warrants this Court's extraordinary intervention into Pennsylvania's redistricting process.

A. Pennsylvania's Plan for Legislative Redistricting Is a Reasonably Conceived Plan for Redistricting its General Assembly as Required by Federal Law, and It Is Currently Working as Designed.

Though federal law requires a representational governmental body to respond to a decennial census by revising its district lines commensurate with shifts in population, the law does not require an immediate change in district lines. *Political Action Conference v. Daley*, 976 F.2d 335, 340 (7th Cir. 1992). Rather, the question of constitutional consequence is whether the State "has a reasonably conceived plan for periodic readjustment of legislative representation." *Reynolds*, at 583. As described in her principal brief, Pennsylvania's legislative redistricting plan – set forth in Pa. Const. art. II, § 17 – is a reasonably conceived plan that meets the *Reynolds* standard and is currently in the process of accomplishing its design of achieving a redistricting plan that conforms to law.

In their opposition memorandum insisting that Pennsylvania's redistricting process has failed the constitutional test in 2011-12, Plaintiffs focus most of their attention and energy on the perceived failings of Defendant 2011 Legislative Reapportionment Commission ("LRC") to proceed properly with its constitutionally assigned business of developing and adopting a preliminary and final reapportionment plan. *See* Plaintiffs' Memorandum of Law, at 2-4, 7-13. Plaintiffs go on at length about how, in their view, the LRC in 2011 failed to meet deadlines imposed by the Pennsylvania Constitution – deadlines that Plaintiffs say

that the LRC itself set in a manner that is purportedly at odds with the Pennsylvania Constitution, as Plaintiffs would read it. As a consequence of its constitutionally lackadaisical schedule (again, as Plaintiffs perceive it), the LRC adopted a final plan too late for use in the 2012 legislative elections. It is this failure of the LRC in 2011 to adhere to a constitutionally regulated pace that Plaintiffs claim renders Pennsylvania's plan for legislative redistricting deficient and that, therefore, has resulted in a violation of the Equal Protection Clause for which this Court must impose a remedy in the form of an order requiring new legislative elections in 2013.

Implicit in Plaintiffs' attack on the alleged slothfulness of the LRC in 2011 is an assumption that had the LRC acted at the pace that Plaintiffs insist the Pennsylvania Constitution requires, the 2012 legislative elections could have been conducted using a new redistricting plan that comports with equal protection and the requirements of section 2 of the Voting Rights Act. However, that assumption by Plaintiffs is simply and clearly belied by the public record and cannot form a legitimate basis of a plea to this Court to issue the extraordinary order that Plaintiffs seek.

Leaving aside the depths to which Plaintiffs would have this Court needlessly delve into the intricacies of the Pennsylvania Constitution and its operation – indeed, inviting this Court to a level of detail in reviewing the LRC's

2011 schedule that even the Pennsylvania Supreme Court (the final arbiter of such matters) saw no need to reach in *Holt* – the conclusion that Plaintiffs would have this Court reach after such an analytical excursion into the procedural niceties of Pennsylvania law is fundamentally and fatally flawed. Even if the LRC in 2011 had moved at the pace that Plaintiffs insist it should have, **the result in 2012 would have been the same.** Once the Supreme Court of Pennsylvania determined in *Holt* that the 2011 Final Reapportionment Plan was **substantively** contrary to law under the court's "recalibration" of its own precedent,[2] and that the development of an entirely new plan is required under the same procedural requirements prescribed by Article II, § 17, of the Pennsylvania Constitution, *see Holt*, 38 A.3d at 761 n.40,[3] it would have been **logistically impossible** for a new legislative reapportionment plan having the force of law to have been adopted in time for use in the 2012 legislative elections.

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[2] As explained by the Supreme Court: "[O]ur own review of our governing precedent in deciding these appeals has led us to conclude that it should be recalibrated to allow the LRC more flexibility in formulating plans, and particularly with respect to population deviation...." *Holt*, 38 A.3d at 759.

[3] In its remand instructions, the Supreme Court said this: "[O]nce 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.* This instruction is an implicit reference to the procedures prescribed by Pa. Const. art. II, § 17, for the development of a reapportionment plan and judicial review by the Supreme Court – a process that necessarily consumes months of time and would last well into 2012.

Thus, any unjustified delay by the LRC in not adopting a final plan until December 12, 2011 (if in fact any delay was legally unjustified), was of no consequence to 2012 elections once the Supreme Court decided that the plan was contrary to law and, therefore, could not be used in the impending 2012 elections. On the other hand, had the Supreme Court approved the 2011 final plan (as it had the four preceding legislative reapportionment plans adopted under Pa. Const. art. II, § 17), the 2012 elections would have proceeded using the 2011 final plan, just as had occurred in the previous decades. In other words, the efficient cause of the redistricting process not being completed in time for use in the 2012 elections was **not** the date on which the LRC adopted its final plan, but rather **the unprecedented decision of the Pennsylvania Supreme Court to disapprove the plan and remand it to the LRC to start anew using new standards**.

A review of the chronology of past reapportionment plans sharply makes the point. The earliest date on which the LRC has ever adopted a final plan was October 13, 1981, *see In re Reapportionment Plan for Pennsylvania General Assembly*, 497 Pa. 525, 530, 442 A.2d 661, 663 (1981) – approximately two months earlier than the 2011 plan was adopted.[4] The Supreme Court that year

[4] In fact, December 12, 2011, was not even the latest date on which the LRC has approved a final plan. The distinction of adopting a final plan latest in time belongs to the 1971 LRC, which did not adopt its final plan until December 29, 1971. *See Commonwealth ex rel. Specter v. Levin*, 448 Pa. 1, 4, 293 A.2d 15, 17

heard oral argument on appeals from the final plan on December 7, 1981,[5] and approved the plan on December 29, 1981 – only approximately four weeks earlier on the calendar than the Supreme Court entered its disposition order in *Holt*. Had the Supreme Court in 1981 – or any other year following a census – done what it did in 2012 and held the final plan to be contrary to law and remanded to the LRC to start again, **the exact same consequences would have occurred: it would have been necessary to conduct legislative elections using the plan that had been used during the previous decade.**

Based on this reality, the question effectively posed by Plaintiffs is not whether the pace of the LRC's work in 2011 caused Pennsylvania's mechanism for legislative redistricting to be executed in a constitutionally deficient manner. Rather, the question is whether the method prescribed by the Pennsylvania

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(1972). The other two final plans in the history of Article II, § 17, were adopted by the LRC on November 15, 1991, *see In re 1991 Pennsylvania Legislative Reapportionment Com.*, 530 Pa. 335, 342, 609 A.2d 132, 135 (1992), and November 19, 2001, *see Albert v. 2001 Legislative Reapportionment Comm'n*, 567 Pa. 670, 673, 790 A.2d 989, 991 (2002) – less than one month earlier than the 2011 LRC adopted its plan.

[5] In fact, it bears noting that despite the LRC's purported tardiness in adopting a plan in 2011, the Supreme Court's January 23, 2012, oral argument was actually held **earlier** than oral arguments that the court conducted in the other three years, *i.e.*, February 2, 1972; January 25, 1992; and February 5, 2002. Thus, any perceived delay in the LRC completing its work in 2011 did not impede the ability of the Supreme Court to consider appeals in the same expedited fashion that it has done in previous decades.

Constitution is defective under the Equal Protection Clause as a matter of law because of the reviewing role assigned by the Pennsylvania Constitution to the Supreme Court of Pennsylvania. The answer is no.

Plaintiffs cite no case – because there is none – that would support the proposition that a state violates the Equal Protection Clause if it empowers its highest court to review a redistricting plan and, through that review, the court requires the redistricting agency to adopt a new plan that conforms to law. To the contrary, the Pennsylvania Constitution's exquisite design of entrusting to the Supreme Court exclusive jurisdiction to review the legality of a legislative redistricting plan adopted by a legislative commission, and the power to require the LRC to develop and adopt a new plan when its first effort proves contrary to law, is a quintessentially well-conceived plan for readjustment of legislative representation as envisioned by the U.S. Supreme Court in *Reynolds*.

The Commonwealth's constitutional plan for redistricting is working as designed and continues now, for the second time, on review by the Pennsylvania Supreme Court. The system is working precisely as designed by the people of the Commonwealth in their foundational charter to assure that a deliberative plan that conforms to law is adopted and used in legislative elections until a new census is conducted and a new plan is adopted thereafter and achieves the force of law.

As this Court said in *Pileggi*, there is no indication that Pennsylvania's redistricting authorities are sliding their feet in moving forward with a valid redistricting plan. That process has been ongoing for over a year and is now nearing completion. No violation of federal law has occurred and, therefore, there is no cause for federal court intervention.

B. None of the Cases Cited by Plaintiffs Support Their Claims and Requested Remedy.

Plaintiffs rest their constitutional claim principally on *Flateau v. Anderson*, 537 F. Supp. 257 (S.D.N.Y.), *appeal dismissed*, 458 U.S. 1123 (1982) – a decision rendered over 30 years ago. In *Flateau*, certain New York State officials in 1982 claimed that they were not required under the New York Constitution (or, apparently, under the U.S. Constitution) to redistrict New York's legislature based on the 1980 Census until 1986 – **six years after the conduct of the Census**. *See* 537 F. Supp. at 259, 262-63. In response to the New York officials' intransigence to beginning the redistricting process, Plaintiffs brought suit claiming violation of their rights to equal protection under the law and their rights under the Voting Rights Act.

As the court described it, the defendants' reasons for delaying any redistricting efforts in 1982 were based entirely on "tradition." *Id.* at 265. "They [did] not assert that immediate reapportionment is impossible," for example. *Id.* Nor did the officials explain the delay based on the needs of the "political and

legislative process." *Id.* Absent expression of any "significant state interests or concerns" for a delay in redistricting, the court in *Flateau* said that it had no reason to defer to New York officials' pure will to delay redistricting just because New York law demanded no immediate action be taken. *Id.* Consequently, the court decided that it must exercise its equitable powers to compel New York officials immediately to begin the process for redistricting and to accord the New York Legislature "a reasonable opportunity" to meet its constitutional requirements. *Id.* at 266.

In acting to require legislative action, the court explained, it was respecting the U.S. Supreme Court's admonition in *Reynolds v. Sims* that a federal court tread lightly and cautiously before involving itself in a State's redistricting activities. Moreover, issuing its order in March, the *Flateau* court found it "not unreasonable" to expect the legislature (which was in session) to enact a redistricting plan, with approval of the Governor, in time for use in an election that would occur in September. *Id.*

Flateau provides no guidance to the current situation in Pennsylvania. Unlike in New York, Pennsylvania authorities spent much of 2011 engaged in the redistricting process prescribed in intricate detail by Pa. Const. art. II, § 17, with the intention of approving a plan that would achieve the force of law in time to be used in the 2012 legislative elections. Indeed, the LRC did adopt a final plan in

time to be reviewed by the Pennsylvania Supreme Court and, if judicially approved, to be used in the 2012 elections. It was only because the Supreme Court found constitutional flaws in the LRC's final plan that it became unavoidable that a new redistricting plan could not be available for use in the 2012 legislative elections. The redistricting process prescribed by the Pennsylvania Constitution and commanded by the Supreme Court in its remand order in *Holt* necessarily must continue well into 2012 to remedy the concerns raised by the Supreme Court.

The constitutionally consequential differences between New York in 1982 and Pennsylvania in 2012 could not be more obvious. Whereas New York in 1982 – nearly two years after the conduct of the 1980 census – had done **nothing** to undertake redistricting efforts and had no intentions of doing so anytime in the near future based on nothing but an amorphous "tradition" that had not even been evident in the previous two decades, Pennsylvania redistricting authorities were continuously at work on the task for nearly all of 2011 in the year following the conduct of the census and, as a result of instructions from the Pennsylvania Supreme Court, during much of 2012 as well. The lengthy process that Pennsylvania has been following in 2011 and 2012 is set out in detail in the Pennsylvania Constitution and serves the very substantial interests of the Commonwealth in achieving a redistricting plan produced by a rigorous, deliberative and open process, followed by careful judicial review before the

Commonwealth's highest court. Unlike the situation that the court faced in New York in *Flateau*, this Court is commanded by the principles of *Reynolds* to permit Pennsylvania the time it needs under the circumstances to complete its redistricting responsibilities in the constitutionally prescribed manner in an effort to achieve a legally, civically and politically sound final legislative redistricting product for the people of the Commonwealth. In other words, unlike in New York in 1982, there is no constitutional violation occurring in Pennsylvania in 2012 that requires a federal court remedy.

By contrast to *Flateau*, the cases cited by the Secretary, as well as other cases that follow a consistent thread emanating from *Reynolds v. Sims*, do offer helpful guidance to this Court for the Pennsylvania experience in 2012. In *Daley*, for example, the Seventh Circuit ruled that it was not unconstitutional for Chicago city aldermen to be elected for four-year terms under a 1980-based districting plan even after 1990 census data was available where redistricting had not been needlessly delayed. As interpreted by *Reynolds*, the Equal Protection Clause did not require Chicago to hold interim elections for those seats after the redistricting process had been completed. Instead, the aldermen elected in 1991 could be allowed to complete their four-year terms even though redistricting was accomplished shortly after their elections. *Political Action Conference v. Daley*, 976 F.2d 335, 338 (7th Cir. 1992).

Though Pennsylvania's legislative elections in 2012 are being held one year later in the decade than the elections involved in *Daley*, the justification for allowing those elected in 2012 to complete their elective terms is similar. It is simply not possible for the Pennsylvania redistricting process to be completed in time for the first legislative elections that are held following a census when, as occurred for the first time in Pennsylvania in 2012, the Supreme Court of Pennsylvania commands a second round to the process so that the redistricting plan conforms to law. The deliberative process of legislative redistricting in Pennsylvania, by design, can take more time than is compatible with the implementation of a new plan in the first set of legislative elections following a census. That is not unconstitutional, and the Equal Protection Clause is not offended simply because legislators chosen in that first election are allowed to complete their terms.

A similar principle convinced the Sixth Circuit in *French v. Boner*, 963 F.2d 890 (6th Cir. 1992), to deny interim elections for representatives elected under an old, malapportioned plan before redistricting could occur. As in *Daley*, the court ruled that the 14th Amendment did not require a city to conduct new elections after a redistricting plan is enacted just because the first post-census election for offices bearing a four-year term occurred under a malapportioned plan based on an earlier census. As the Sixth Circuit explained: "We do not believe that considerations of

mathematical equality in representation or the presumption in favor of redistricting every ten years outweigh ... considerations ... concerning the validity of four-year terms, the settled expectations of voters and elected officials, the costs of elections, and the need for stability and continuity of office." 963 F.2d at 892. Pennsylvania's elected officials and voters are deserving of no less consideration by this Court under the circumstances presented in this case.

Plaintiffs' strained efforts to distinguish the many cases in which federal courts uniformly have applied the Supreme Court's direction in *Reynolds v. Sims* to accord state and local governments substantial leeway in the development of their redistricting plans while still conducting regularly-scheduled elections are unconvincing. The *Reynolds* instruction is based on sound and practical considerations, as well as the principles of federalism implicit in the deference owed by federal courts to state redistricting authorities and state courts and should be honored here.

The wise counsel of the district court in *Graves v. City of Montgomery* bears repeating:

> 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. The fact that the elections proceed with population "imbalance" toward the end of a decennial period **is of no constitutional consequence under *Reynolds***.

807 F. Supp. 2d 1096, 1111 (M.D. Ala. 2011) (emphasis added; citation omitted).

Nothing that has occurred in Pennsylvania's redistricting process in 2011 and 2012 disqualifies the Commonwealth from the deference that *Reynolds* commands all federal courts to accord state and local governments. Pennsylvania currently is committing no violation of federal law in 2012 and, thus, Plaintiffs state no claim. Their action for declaratory and equitable relief, therefore, should be dismissed.

IV. CONCLUSION

For the reasons stated in this brief and in the Secretary's principal brief, this Honorable Court should dismiss Plaintiffs' action with prejudice for failure to state a claim.

Respectfully submitted,

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DATE: September 20, 2012

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CERTIFICATE OF SERVICE

I, GREGORY E. DUNLAP, certify that on September 20, 2012, I served this *Reply Brief of Defendant Aichele In Support of her Motion to Dismiss* 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:

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Date: September 20, 2012