

**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

**DEFENDANT AICHELE'S MEMORANDUM OF LAW IN RESPONSE TO
PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW**

Defendant Carol Aichele, the Secretary of the Commonwealth of Pennsylvania, presents this response to Plaintiffs' supplemental memorandum of law filed January 25, 2013 (Doc. 63), and in further support of her motion to dismiss and in opposition to Plaintiffs' motion for a preliminary injunction.

In their supplemental memorandum of law, Plaintiffs make no new claims or arguments in support of their contention that the Commonwealth violated the Equal Protection Clause of the 14th Amendment in its conduct of the 2012 elections for 228 seats in the Pennsylvania General Assembly. Rather, Plaintiffs in their supplemental memorandum present only several alternative forms of remedy that they claim this Court might consider implementing to undo what Plaintiffs continue to insist – contrary to law – were constitutional violations committed by the Commonwealth in its 2012 legislative elections.

Plaintiffs reiterate their request that this Court order Commonwealth officials to conduct special primaries and special elections on May 21, 2013, and November 5, 2013, respectively (*i.e.*, the dates scheduled by Pennsylvania law for its municipal primary and municipal election), for all 203 seats in the House of Representatives and 25 seats in the Senate of Pennsylvania. Now Plaintiffs ask this Court to consider several **alternative remedies** for the mythical constitutional violation that they imagine occurred in 2012.

Plaintiffs' suggested alternative remedies are these:

- (1) Because the Commonwealth does not yet have in place a redistricting plan that has the force of law (because appeals from the redistricting plan adopted by Defendant 2011 Legislative Reapportionment Commission in 2012 are pending before the Pennsylvania Supreme

Court), Plaintiffs ask this Court to appoint a special master to assist the Court in devising and imposing upon the Commonwealth a redistricting plan that the Commonwealth would be required to use in the conduct of the special primary and special elections that Plaintiffs insist this Court must order to be held in 2013.

- (2) In the event that a redistricting plan having the force of law under Pennsylvania law (or a redistricting plan adopted by order of this Court) does not exist in time for use in a special primary to be conducted on May 21, 2013, coincident with the scheduled Municipal Primary, Plaintiffs ask this Court to consider ordering the Commonwealth to conduct “a standalone special election primary,” which would be held sometime after the May 21, 2013 Municipal Primary and would be followed by a special election on November 5, 2013.
- (3) In the event that this Court should determine not to order any special elections to be held in 2013 (and the Secretary agrees that no such elections should be ordered), Plaintiffs would have this Court order the Commonwealth to conduct special primaries and special elections **in 2014** for the oddly-numbered Senate districts, *i.e.*, those Senate

districts that were subject to regularly-scheduled elections in 2012 and not scheduled again for regular elections until 2016.

ARGUMENT

A. There is no constitutional violation to be remedied

For the reasons described at length in the briefs that Secretary Aichele previously filed in this matter (*see* Docs. 36, 49), the Commonwealth in 2012 did not violate – and is not now violating – the equal protection rights of Plaintiffs or any other citizen. 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, as Secretary Aichele has emphasized repeatedly, the question of constitutional consequence is whether the State “has a reasonably conceived plan for periodic readjustment of legislative representation.” *Reynolds v. Sims*, 377 U.S. 533, 583 (1964).

As described in her previous briefs, 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. 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, certainly can be – and, in Pennsylvania, is – part of a well-conceived plan for readjustment of legislative representation as envisioned by the U.S. Supreme Court in *Reynolds*.

That the Pennsylvania Supreme Court for several months (during late 2012 and early 2013) has been considering appeals from the revised reapportionment plan adopted by the Legislative Reapportionment Commission in 2012 is no cause for alarm at this point. Under the Constitution of Pennsylvania, elections for the Pennsylvania General Assembly occur during even-numbered years only. *See* Pa. Const. art. II, § 2 (legislative elections are held during a general election); art. VII, § 2 (general elections are held in even-numbered years). Therefore, so long as a constitutionally-sound legislative reapportionment plan for Pennsylvania attains the force of law before the commencement of the election process for legislative elections in early 2014 – *i.e.*, **one full year from now** – the Commonwealth is in no danger of conducting another round of legislative elections using a reapportionment plan that is not based on the results of the 2010 Census.¹

¹ Secretary Aichele would note that, under Pennsylvania law, special elections to fill **vacancies** in the General Assembly that occur between general elections may be held during odd-numbered years and on dates selected by the presiding officer of the affected chamber. *See* Pa. Const. art. II, § 2. In fact, two current vacancies in the Pennsylvania House of Representatives caused by resignations of members

Consistent with this Court's observation a year ago in *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 594 (E.D. Pa. 2012), there remains no indication that Pennsylvania's redistricting authorities are sliding their feet in moving forward with a valid redistricting plan. The process has been ongoing for over a year and is likely to be completed in plenty of time for the regularly-scheduled legislative elections to be held in 2014. Thus, because no violation of federal law has occurred or is likely to occur in the near future, there is no cause for federal court intervention. *See Political Action Conference v. Daley*, 976 F.2d 335, 338 (7th Cir. 1992); *French v. Boner*, 963 F.2d 890, 892 (6th Cir. 1992); *Graves v. City of Montgomery*, 807 F. Supp. 2d 1096, 1111 (M.D. Ala. 2011). Thus, this Court should deny Plaintiffs' motion for a preliminary injunction and dismiss their action.

B. The Alternative Remedies Proposed by Plaintiffs Are Not Suitable

As described above and in previous briefs, because the Commonwealth of Pennsylvania has not violated the Equal Protection Clause of the 14th Amendment

who were elected to other public offices will be filled in special elections ordered by the Speaker of the House to be held on May 21, 2013 – coincident with the Municipal Primary. As provided by Pennsylvania law, there will be no primaries preceding the special elections; rather, candidates are selected through other means as provided by the Pennsylvania Election Code. *See* 25 P.S. § 2779. In addition, as required by Pennsylvania law, those special elections will be conducted in the legislative districts as prescribed by the reapportionment plan that is currently in effect, *i.e.*, the 2001 Final Reapportionment Plan. *See Fagan v. Smith*, 41 A.3d 816 (Pa. 2012).

or other relevant federal law, there is no cause for this Court to order any remedial relief whatsoever. Therefore, this Court should consider none of Plaintiffs' proposed alternative orders. However, even if consideration of remedial relief were proper under the circumstances, the alternatives proposed by Plaintiffs are problematic and should not be ordered under any circumstances.²

1. Special Elections in 2013

To repeat one more time: There is no constitutionally-compelled reason for this Court to order the conduct of special elections for the General Assembly in 2013. As required by the Pennsylvania Constitution and laws, elections were held in 2012 for all 203 seats in the House of Representatives for terms that commenced on December 1, 2012, and will conclude on November 30, 2014. All 203 seats in the House will again be subject to election in 2014 – with a primary in May and election in November – subject to a redistricting plan that will be based on the

² Secretary Aichele notes her opposition to the appointment of a special master or the empanelment of a three-judge court, both requested by Plaintiffs. Neither request warrants the Court's time and attention at this time because no constitutional violations have occurred or are occurring. However, should the Commonwealth over the course of 2013 unexpectedly prove itself unable to adopt a redistricting plan in time for use in the 2014 elections, this Court would be well within its power and discretion **at that time** to consider the empanelment of a three-judge court and the appointment of a special master. But at this point – **more than one year before the 2014 election process even begins** – it would be imprudent, and perhaps beyond this Court's legal authority, to proceed along the path requested by Plaintiffs. Secretary Aichele refers the Court to the arguments made by Defendant 2011 Legislative Redistricting Commission in opposition to these requests made by Plaintiffs.

2010 census. The terms of those elected in 2014 will commence December 1, 2014.

In the Senate, 25 members of the Senate representing odd-numbered districts were elected in November 2012 for terms of four years. In accordance with the Pennsylvania Constitution, the other half of the 50-member Senate – those representing even-numbered districts – will be subject to election in 2014.

Plaintiffs' proposed remedy for special elections (including special primaries – a process **never** used under Pennsylvania law for special elections held for seats in the General Assembly) would be tremendously and needlessly disruptive to the Commonwealth. Disruption would be especially harmful to the proceedings of the General Assembly, which traditionally conducts its business in biennial sessions beginning in January following a general election and ending in November following the next general election (*e.g.*, January 2013 to November 2014). A mid-session special election in November 2013 for the entire House and one-half of the Senate would be unprecedented, and the negative consequences to the business of the General Assembly both dramatic and unpredictable.

With no obvious constitutional violation committed by the Commonwealth and no constitutional injury suffered by Plaintiffs of the kind that has been recognized by any court examining similar circumstances, this Court should simply reject out of hand the issuance of any judicial mandate that would require the

Commonwealth to completely re-order its election cycles and effectively to command the General Assembly to split its 2013-14 biennial session into two parts and to endure elections for its entire two years. The seismic nature of the harms that such an injunction likely would cause to the functioning of the Commonwealth government, and the undeserved detriment that would befall the important interests of the Commonwealth's citizens that are properly the business of the General Assembly, far surpass the ephemeral electoral interests that Plaintiffs claim in having to wait an additional 12 months for representation in the General Assembly that is based on the 2010 Census.

Even more harm to the Commonwealth and its citizens would result from an order of this Court that would require special primaries to be held statewide on a date that does not coincide with a regularly-scheduled election. As noted above, Pennsylvania law does not provide for primaries in advance of special legislative elections at all, *see* 25 P.S. § 2779 (providing nominations procedure for special election for Representative in Congress, Senator and Representative in the General Assembly and member of council or legislative body of cities, boroughs, towns and townships), much less a primary that is held on a date other than a regularly-scheduled primary. The costs and confusion of a statewide standalone special primary to the Pennsylvania election machinery – a responsibility principally of

county government – and to its voting public are incalculable and should not be considered under any circumstances.

In summary, no special elections should be ordered by this Court to be conducted in 2013. Moreover, under no circumstances should this Court require the Commonwealth to conduct unprecedented standalone primaries.

2. Special Senate Elections

In the event that this Court should decide – as it should – to order no special legislative elections in 2013 and to allow the biennial session of the General Assembly to be conducted and concluded without intervening elections, Plaintiffs ask this Court as a final alternative remedy to require the Commonwealth to conduct special elections (with special primaries) **in 2014** for the 25 odd-numbered Senate seats that were the subject of the 2012 elections. In so doing, the Court would effectively cause the Commonwealth in 2014 to conduct elections for **all 50 members of the Senate in one election year**, contrary to the staggered elections and terms of office that the Pennsylvania Constitution prescribes for the Senate.

Because there is no constitutional violation for this Court to remedy, this Court should resist Plaintiffs' effort to redistrict the Senate in one fell swoop election. Instead, the Court should simply allow the ordinary constitutional procedure devised by the Pennsylvania Constitution to operate – with the 25 even-numbered Senate districts being subject to regular elections in 2014 and the 25

odd-numbered districts not included on the ballot until 2016 when the four-year terms of those elected in 2012 are about to expire.

As the U.S. Court of Appeals held in *French v. Boner*, 963 F.2d 890, 891-92 (6th Cir. 1992), considerations of mathematical equality in representation or the presumption in favor of redistricting every ten years do not outweigh equally important considerations about the validity and value 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. These considerations counsel strongly against the entry of a federal court decree that would truncate the four-year terms of those members of the Senate of Pennsylvania elected in 2012 and the extra-constitutional conduct of an election for 25 seats in the Senate two full years before those seats are scheduled for election under the Pennsylvania Constitution. There is no constitutionally-compelled reason for this Court to embark upon this extraordinary path of interference with Pennsylvania's constitutional structure of legislative government.

Plaintiffs' citations to Pennsylvania's experience with off-schedule Senate elections in 1966 is no precedent for the circumstances of 2013 and 2014. In 1964 – four years after the 1960 census had been conducted – the Supreme Court of Pennsylvania held in *Butcher v. Bloom*, 415 Pa. 438, 203 A.2d 556 (1964) (*Bloom I*), that Pennsylvania's districting plan for the General Assembly enacted in 1964

was unconstitutional. However, given the imminence of the 1964 election, the court determined that the legislative elections must be allowed to proceed using the 1964 legislative plan, but it said adamantly that the 1964 plan could not be used again in the 1966 elections. The Supreme Court gave the General Assembly until September 1965 – approximately one year after its decision in *Bloom I* and several months preceding the commencement of the 1966 election process – to enact a constitutional redistricting plan to be used for the 1966 elections. *Id.* at 468, 203 A.2d at 573. When the deadline imposed by the court in *Bloom I* came and passed without legislative action, the Pennsylvania Supreme Court undertook to redistrict the General Assembly under its own constitutional and equitable authority and ordered that the court-devised plan be used in the 1966 elections. *See Butcher v. Bloom*, 420 Pa. 305, 216 A.2d 457 (1966) (*Bloom II*). In further exercise of its equitable jurisdiction and with obvious frustration at the Legislature’s unwillingness to act nearly six years after the census was issued and after the court had given it months to do so, the Supreme Court ordered the Secretary of the Commonwealth in 1966 to conduct elections for all 50 members of the Senate, with elections for those 25 seats not regularly scheduled for election in 1966 to be conducted for two-year terms only. *Bloom II* at 310 & n.11, 216 A.2d at 459 & n.11.

At the time that *Bloom II* was decided, the census was already six years old and elections for the Senate twice – in 1962 and 1964 – had been conducted without proper regard for the most recent census. With no explanation or analysis, the Supreme Court in *Bloom II* simply decreed that the entire Senate would be elected using the court’s constitutional plan.

The circumstances presented to this Court are drastically different. We find ourselves today not yet three years distant from the conduct of the 2010 census – only half the time that had passed between the 1960 census and the Supreme Court’s order in *Bloom II*. Moreover, unlike in 1966, Pennsylvania’s redistricting authorities have not failed to act to adopt a new redistricting plan based on the recent census. Unlike the situation presented in 1966, there is no need at this point for any court – this Court or the Supreme Court of Pennsylvania – to undertake the process of redistricting the General Assembly on its own authority. Because the circumstances presented in *Bloom II* are so dramatically different from those facing the Court today, *Bloom II* serves as no guidance here.

For these reasons, this Court should allow the Commonwealth of Pennsylvania to follow its normal constitutional process for the conduct of elections to the Senate of Pennsylvania, continuing the staggered structure of four-year terms that has been the hallmark of the Senate for generations.

CONCLUSION

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

Respectfully submitted,

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DATE: February 7, 2013

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CERTIFICATE OF SERVICE

I, GREGORY E. DUNLAP, certify that on February 7, 2013, I served this *Memorandum of Law in Response to Plaintiffs' Supplemental Memorandum of Law* 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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