

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

JOE GARCIA, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO.
	:	
2011 LEGISLATIVE REAPPORTIONMENT :	:	12-0556 RBS
COMMISSION, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**SUPPLEMENTAL MEMORANDUM OF LAW OF SENATOR
DOMINIC PILEGGI AS *AMICUS CURIAE* CONCERNING
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

As *amicus curiae*, Senator Dominic Pileggi, by and through his attorneys, Blank Rome LLP, respectfully submits this supplemental memorandum of law in further support of his request that the Court deny the Motion for Preliminary Injunction of Plaintiffs, Joe Garcia, Fernando Quiles, and Dalia Riveria Matias, in deference to the efforts of the Commonwealth's Legislative Reapportionment Commission and the Pennsylvania Supreme Court as concerns the determination of a state legislative redistricting plan for the Commonwealth predicated upon the 2010 federal decennial census data.

I. ARGUMENT

- A. Plaintiffs Make No Attempt to Rebut the Fact That an Hispanic Majority-Minority Senatorial District Cannot Be Included in Any Lawful, Constitutionally-Compliant Redistricting of the Commonwealth That Is Predicated on the 2010 Census Data.

Senator Pileggi is firmly committed to ensuring that members of minority groups are fairly represented in the General Assembly. Any argument that the Senator has advocated here (or elsewhere) that a member of any such group “be afforded disparate treatment by virtue of [his or her] minority status or [is] somehow . . . less deserving of equal protection under the one person, one vote doctrine,” *see* Plaintiffs’ Supplemental Memorandum of Law (“Plaintiffs’ Supp. Mem.” or “Supplemental Memorandum”) at 22, is absurd. Senator Pileggi’s actual argument -- that a lawful, constitutionally-compliant redistricting plan for the Commonwealth that is predicated upon the 2010 federal census data will be, as a factual and legal matter, unable to include an Hispanic majority-minority Senate district -- stands unchallenged, much less unrebutted, by Plaintiffs.

- B. Even Were One to Assume That the 2012 Elections for the Commonwealth’s General Assembly Occurred in Violation of the One Person, One Vote Constitutional Mandate, Plaintiffs Have Failed to Demonstrate That a Remedy Arguably Appropriate to Address a Violation of the Federal Voting Rights Act Is Similarly Appropriate to Address a Violation of the One Person, One Vote Constitutional Mandate.

In their Supplemental Memorandum, Plaintiffs clarify that they do not rely on their status as members of a minority group to support their claim that a violation of the “one person, one vote” Constitutional mandate occurred in connection with the Commonwealth’s 2012 General Assembly elections, *i.e.*, they concede that conducting such elections did not violate the Federal Voting Rights Act (“Voting Rights Act”). *Id.* at 21-22. Instead, Plaintiffs

note, correctly, that the “one person, one vote doctrine is a wholly independent constitutional requirement separate from any claim one might plead under the Voting Rights Act.” *Id.* at 22. Indeed, to avoid offending the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, state legislative seats must be apportioned equally so as to ensure that the guaranteed right of suffrage is not denied by debasement or dilution of the weight of a citizen’s vote. A violation of this rule occurs if that *equal* apportionment does not occur, and this is true irrespective of any voter’s status in a majority or minority group.

The same is not true for a claimed violation of Section 2 of the Voting Rights Act. This law prohibits any state or political subdivision from imposing any voting qualification, standard, practice or procedure that results in the denial or abridgement of any United States citizen’s right to vote on account of race, color or status as a member of a language minority group. 42 U.S.C. § 1973(a).

Although Plaintiffs appear to acknowledge the difference between these two separate and distinct claims, they nonetheless attempt improperly to conflate the remedies potentially available for these disparate claims. Specifically, in support of the relief Plaintiffs now demand, they rely primarily upon cases addressing violations of the Voting Rights Act. *See* Supplemental Memorandum at 17-18 (citing *Ketchum v. City Council of City of Chicago*, 630 F. Supp. 551 (N.D. Ill. 1985); *Coalition for Education in District One v. Board of Elections*, 370 F. Supp. 42, 58 (S.D.N.Y.), *aff’d*, 495 F.2d 1090 (2d Cir. 1974)). In *Ketchum*, for example, the court observed that a violation of the voting rights of racial minorities in the election process warranted drastic relief:

It is not seriously challenged that where racial discrimination has affected the conduct of an election, it is the “established power of a Federal Court to extinguish its effects even to the point of setting aside the election.” *Bell v. Southwell*, 376 F.2d 659, 662-65 (5th Cir. 1967). The power to order special elections should be exercised whenever there is a possibility that the illegal voting practice affected the election’s outcome. *Smith v. Cherry*, 489 F.2d 1098, 1103 (7th Cir.1973), *cert. denied*, 417 U.S. 910, 94 S. Ct. 2607, 41 L. Ed. 2d 214 (1974).

630 F. Supp. at 565; *see also Saxon v. Fielding*, 614 F.2d 78, 79 (5th Cir. 1980) (“drastic, if not staggering” remedy of annulling state election and ordering new one inappropriate absent “serious voting violations or aggravating factors, such as racial discrimination or fraudulent conduct. . .”).

Here, there is no allegation of a lingering impact of past racial or ethnic discrimination. Additionally, there is no allegation that racial or ethnic discriminatory practices or conduct affected the process or outcome of the 2012 General Assembly elections, nor is there any allegation that irregularities in those elections had a discriminatory impact on a minority group. To the contrary, in their Supplemental Memorandum, Plaintiffs concede they are not pursuing a claim pursuant to the Voting Rights Act, Plaintiffs’ Supp. Mem. at 21-22, and instead clarify that the “one person, one vote” violation they here pursue harmed *all* Pennsylvania voters, indiscriminately and without regard to race, color or membership in a language minority group.

Thus, and in short, Plaintiffs have not here shown “a serious and substantial violation of minorities’ voting rights.” *Ketchum*, 630 F. Supp. at 565. Indeed, Plaintiffs have failed to allege, much less demonstrate, that the current situation could justify the type of extraordinary relief that they demand, redress that might arguably be appropriate in circumstances of racial or ethnic discrimination or of fraud.

C. Under Clear and Unequivocal Supreme Court Precedent, This Court Must Stay Its Hand to Afford the Commonwealth’s Legislative and Judicial Branches Adequate Opportunity to Perform Their Redistricting Duties.

The Supreme Court has been unambiguous and emphatic that the states have “‘primary jurisdiction’ over legislative reapportionment.” *Upham v. Seamon*, 456 U.S. 37, 41 (1982) (per curiam).

Time and again we have emphasized that “‘reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.’” *Grove [v. Emison]*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27, 42 L. Ed. 2d 766, 95 S. Ct. 751 (1975)). Accord, *Connor v. Finch*, 431 U.S. 407, 414, 52 L. Ed. 2d 465, 97 S. Ct. 1828 (1977) (“We have repeatedly emphasized that ‘legislative reapportionment is primarily a matter for legislative consideration and determination’” (quoting *Reynolds v. Sims*, 377 U.S. 533, 586, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964))).

Voinovich v. Quilter, 507 U.S. 146, 156 (1993). In fact, only after a state’s legislative *and* judicial branches have both failed to redistrict appropriately in a timely fashion may the federal judiciary intervene. *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam) (“The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.”).

The doctrine espoused in *Germano* establishes that *both* state branches – the state legislature and the state judiciary – are preferable to federal courts as agents of apportionment, and that the primacy of the role of those two branches of state government is to be respected.¹ It also establishes that a federal court must not prematurely involve itself in redistricting and should instead defer.

¹ It is therefore well-settled that, when it comes to which body should redistrict a state following the release of federal decennial data, the order of preference as to the entity that

Separately, the Supplemental Memorandum confirms that Plaintiffs' sole claim to entitlement to relief is predicated upon violations that purportedly occurred in connection with elections that already occurred, in 2012. *See* Supplemental Memorandum at 2 (“[T]he 2012 election occurred using the 2001 Legislative Reapportionment Plan, unconstitutionally depriving Latinos and all Pennsylvania voters of effective representation for a two-year house term as well as a four-year term for half of the [S]enate, necessitating a special election to cure this error.”). *Germano*, however, requires only that the state branches put a constitutional redistricting plan in place “*within ample time . . . to be utilized in the [upcoming] election.*” 381 U.S. at 409 (emphasis added).

Here, Plaintiffs have produced no evidence that the Commonwealth, through its legislative and judicial branches, will fail to perform their redistricting duties in ample time for a lawful redistricting plan to be utilized in connection with the 2014 General Assembly elections. As such, this Court must, under *Germano* and its progeny, stay its hand so that, in deference to the Legislative Reapportionment Commission and the Pennsylvania Supreme

does is as follows: one, the state legislature; two, the state judiciary; and three, the federal judiciary. As a consequence, it bears note that although Plaintiffs argue that they “exercised due diligence in seeking relief in advance of the challenged election,” Supp. Mem. at 18, they did not present their claim of a violation of the “one-person, one-vote” Constitutional mandate to the Pennsylvania Supreme Court. (Indeed, they made no filing whatsoever in that Court as concerns the 2012 elections.) No other party did so, either; Plaintiffs admit that none of the twelve appeals from the 2012 LRC Plan that are presently pending before the Pennsylvania Supreme Court “address[] the constitutionality of using the 2001 Plan in the 2012 election or what remedies would be available to the Pennsylvania Supreme Court if it declared the plan invalid.” *Id.* at 6. Finally, it bears mention that the *Butcher v. Bloom*, 203 A.2d 556 (Pa. 1964) and 216 A.2d 457 (Pa. 1966), decisions on which Plaintiffs rely were those of the Pennsylvania Supreme Court, not those of a federal court.

Court, the redistricting process already well underway in the Commonwealth may continue to advance, unimpeded.

II. CONCLUSION

For the foregoing reasons, Senator Pileggi urges this Court to defer to the Commonwealth's Legislative Reapportionment Commission and Supreme Court, and deny Plaintiffs' Motion for Preliminary Injunction.

Dated: February 8, 2013

Respectfully submitted,

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