

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOE GARCIA, FERNANDO QUILES,)
DALIA RIVERA MATIAS,)
)
Plaintiffs,)
)
v.)
)
2011 LEGISLATIVE REAPPORTIONMENT)
COMMISSION, et al.)
)
Defendants.)

Case No. 12-cv-00556-RBS

**REPLY OF *AMICUS CURIAE* REPRESENTATIVE MICHAEL TURZAI TO
PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW**

Representative Michael Turzai (“Leader Turzai”), by and through his attorneys, Eckert Seamans Cherin & Mellott, LLC, presents this Reply to Plaintiffs’ Supplemental Memorandum of Law and in support of Defendants’ Motions to Dismiss and as *amicus curiae* in this matter, states as follows:

Plaintiffs’ Supplemental Memorandum of Law is perplexing. The 2011 Legislative Reapportionment Commission (“the LRC”) has fulfilled its constitutional mandate by adopting the a Revised Final Reapportionment Plan (“the 2012 Plan”). The redistricting process will be complete once the Pennsylvania Supreme Court determines the pending challenges to the 2012 Plan. Further, this Court has already ruled upon the propriety and constitutionality of the 2012 elections. Although Plaintiffs rely upon the same facts and argument set forth in their original Motion, they now seek novel and extraordinary remedies which are inconsistent with the recent jurisprudence of both this Court and the Pennsylvania Supreme Court. Plaintiffs continue to seek a court order requiring the Commonwealth to conduct special elections for all 203 seats in the House

of Representatives and 25 seats in the Senate of Pennsylvania. However, for the first time, Plaintiffs now also demand this Court convene a three judge panel to appoint a special master or magistrate judge to reapportion the legislative districts of the Commonwealth.¹

Plaintiffs request for special elections must fail as it is solely based upon the premise that a constitutional violation occurs each time a jurisdiction does not implement a reapportionment plan immediately upon receipt of the census data. In *Reynolds v. Sims*, the Supreme Court clearly stated that “we do not regard the Equal Protection Clause as requiring daily monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation.” 377 U.S. 533, 583 (1964). In properly applying *Reynolds* to the facts of this case, this Court specifically held that “[t]here 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, by February 22, 2012.” *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 594 (E.D. Pa. 2012) (emphasis added). This Court denied the Plaintiffs request for a temporary restraining order and allowed the 2012 elections to move forward. Frankly, for the Plaintiffs to imply that this Court would make such a finding without considering the constitutional repercussions is somewhat naive.

Similarly, the Plaintiffs extraordinary request for a three judge panel to appoint a special master to reapportion the Commonwealth is inappropriate and should be denied. Plaintiffs' attempt to minimize the extreme nature of the relief they are requesting. They allege such relief is necessary due to the Commonwealth's “failure to act” on legislative reapportionment. Such an

¹ If this Court finds that Plaintiffs' Motion for Preliminary Injunction fails to state a claim for which relief can be granted, it does have the authority to dismiss this matter. *Maryland Citizens for a Rep. Gen. Assembly v. Gov. of Md.*, 429 F.2d 606, 608-610 (4th Cir. 1970); *Simkins v. Gressette*, 631 F. 2d 287, 296 (4th Cir. 1980).

argument fails to acknowledge that the LRC has already adopted the 2012 Plan. That plan is pending approval by the Pennsylvania Supreme Court and upon such approval, Plaintiffs' claims regarding reapportionment will be mooted. Accordingly, the relief requested from this Court is nothing more than an attempt to usurp the exclusive jurisdiction of the Pennsylvania Supreme Court to hear challenges to final reapportionment plans. As such, Leader Turzai continues to urge this Court to dismiss the Plaintiffs' Motion for Preliminary Injunction for failure to state a claim which relief can be granted.

I. Plaintiffs Cannot Set Forth a Prima Facie Equal Protection Claim.

While Leader Turzai understands the Plaintiffs frustration with the speed at which the redistricting process has taken, the law is clear that allegations set forth by the Plaintiffs in this case simply do not amount to a violation of their equal protection rights. *See e.g. Upham v. Seamon*, 456 U.S. 37,44 (1982) ("It is true that we have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. Necessity has been the motivating factor in these situations."); *Reynolds*, 377 U.S. at 585 (1964) (even when the existing apportionment scheme is found to be invalid there are certain circumstances in which a court should withhold injunctive relief); *Maryland Citizens*, 429 F.2d at 608-610; *Political Action Conference v. Dailey*, 976 F. 3d 335, 340 (7th Cir. 1992) ("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.") (internal quotations omitted); *French v. Boner*, 963 F.2d 890, 891 (6th Cir. 1992) ("[t]he Supreme Court has never drawn hard and fast rules about

the length of terms or how long after the decennial census year new elections under the new census must be conducted.”).

To be clear, the Plaintiffs are not seeking a determination that any deviation from the one person, one vote standard is a violation of their constitutional equal protection rights.² They are not challenging whether the 2012 Plan, which is currently pending before the Pennsylvania Supreme Court, complies with that standard. They have not asserted claims under the Voting Rights Act. Plaintiffs’ claims before this Court are much more limited. Plaintiffs’ claims rely upon one threshold question: whether the use of the 2001 Final Reapportionment Plan (“the 2001 Plan”) during the November 2012 elections violated Plaintiffs’ constitutional rights to equal protection under state and federal laws. This question has been answered by the Pennsylvania Supreme Court and by this Court and thus Plaintiffs Motion for Preliminary Injunction must be dismissed.

Plaintiffs’ continued insistence that the Commonwealth’s actions in conducting the 2012 elections under the 2001 Plan were unconstitutional completely ignores the fact that it was the Pennsylvania Supreme Court who specifically instructed the Commonwealth to act in this manner when it issued its opinion in *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 716, 2012 Pa. LEXIS 232 (Pa. 2012). The *Holt* Court held that the 2001 Plan “shall remain in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved.” *Id.* at

² Plaintiffs allege that Defendants and *amici* have effectively conceded liability on Plaintiffs’ one person, one vote constitutional claim as their arguments are limited to whether the requested remedy is warranted. Plaintiffs’ Brief at 1. Such an argument shows a fundamental misunderstanding of the procedural posture of this lawsuit. When deciding a Motion to Dismiss for Failure to State a Claim a Court must accept as true all properly pleaded facts and must draw all permissible inferences in Plaintiffs’ favor. FRCP 12(b)(6). It would be inappropriate at this phase of the litigation to attack the substance of Plaintiffs’ disparate population deviation arguments. Nevertheless, Defendants and *amici* neither concede this point, nor agree with the underlying premise that one person, one vote is the only factor to consider in fashioning a redistricting plan under Pennsylvania law. Although population deviations are the paramount consideration in redistricting, the Pennsylvania Supreme Court plainly de-emphasized population equality to afford the LRC greater flexibility to take into consideration issues such as respecting compactness and divisions of political subdivisions. *Holt*, 28 A.3d at 761.

* 12. The Court clearly understood that there was a strong likelihood that such a holding would result in conducting the 2012 elections under the 2001 Plan. The Pennsylvania Supreme Court would not have Ordered an election it believed to be unconstitutional.

The Plaintiffs in this case were well aware of that litigation and had the same opportunity to participate in that litigation as any other citizen of the Commonwealth. Curiously, despite their claims that conducting the 2012 elections under such terms would create immediate and irreparable harm, they chose not to bring their concerns to the Pennsylvania Supreme Court and instead chose this forum to attack this inherently state law issue.

In refusing to issue a temporary restraining order in this case, this Court implicitly affirmed the Pennsylvania Supreme Court's holding in *Holt* that conducting the scheduled 2012 elections using the 2001 Plan was appropriate and did not violated the equal protection clause. As this Court clearly stated in its February, 8, 2012 Order:

No party or intervenor in this action, or party in a Related Action, 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 597. Plaintiffs' have not raised any new issues or facts which should lead this Court to revisit that holding. As Plaintiffs cannot point to any other constitutional violation, the 2012 elections were proper, there is no basis for this Court to Order Special Elections, and the Plaintiffs' Motion for Preliminary Injunction should be dismissed.

II. **Redistricting is a State Law Issue Which Should Be Left to the Pennsylvania Supreme Court.**

The Commonwealth has not failed to timely perform its duties and thus the federal litigation should not impede the legislative process. The Plaintiffs' Supplemental Memorandum of Law dedicates nine pages to providing a detailed history of apportionment in the Commonwealth over the past two years.³ This information is completely irrelevant to Plaintiffs' claims in this case, which seek prospective injunctive relief. Instead of looking at the wrongs Plaintiffs' allege were committed in the past, this Court should assess the current status of apportionment in the Commonwealth to determine if such injunctive relief is necessary.

The Supreme Court has stated that "[a]bsent evidence that [a state legislature] will fail timely to perform [its] duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Grove v. Emison*, 507 U.S. 25, 34 (1993). In the Commonwealth, the reapportionment process is working exactly as was prescribed by the Pennsylvania Constitution and thus the federal litigation should not impede it. Upon the Pennsylvania Supreme Court's unprecedented determination that the 2011 Plan did not comply with the requirements of the Pennsylvania and federal Constitutions, the LRC has acted with expediency to adopt the 2012 Plan. The 2012 Plan is a bipartisan effort which complies with the U.S. Constitution, the Pennsylvania Constitution, and the guidance set forth by the Pennsylvania Supreme Court in *Holt*. As was the case with each reapportionment plan adopted since this process was created, petitions challenging the 2012 Plan have been filed with the Pennsylvania Supreme

³ As a member of the LRC, Leader Turzai contests the Plaintiffs' allegations that the LRC moved at an improper pace in 2011 and 2012. However, Leader Turzai will not engage in a debate about background facts that are irrelevant for purposes of this litigation.

Court. These citizen challenges are fully briefed and argued and are now before the Pennsylvania Supreme Court *sub judice*.⁴

In their Motion for Preliminary Injunction and other papers filed with this Court prior to the 2012 elections, the Plaintiffs requested that this Court intervene in reapportionment of the Commonwealth due to the legislature's alleged failure to act in a timely manner. Since that time, the LRC has adopted the 2012 Plan making that argument moot.⁵ However, instead of admitting the process is working as expected, Plaintiffs now take the position that this Court should intervene in the process due to a delay in the Pennsylvania Supreme Court's determination of citizen challenges to the 2012 Plan.⁶ The Plaintiffs have not pointed to any precedent that would allow this Court to intervene in a matter pending before a state supreme court. The relief requested from this Court is nothing more than an attempt to usurp the exclusive jurisdiction of the Pennsylvania Supreme Court to hear challenges to final reapportionment plans.

For the aforementioned reasons, Leader Turzai urges this Court to find, consistent with its prior rulings that the 2012 elections did not violate the equal protection rights of the Plaintiffs, that special elections are not appropriate and that this Court should dismiss the Motion for Preliminary Injunction and allow the Commonwealth to reapportion its legislative districts in accordance with the reasonably conceived reapportionment scheme set forth in the Pennsylvania Constitution.

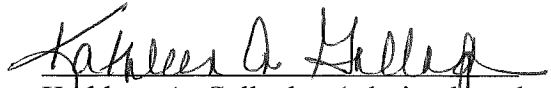
⁴ Despite every opportunity to voice their concerns regarding legislative reapportionment to the Pennsylvania Supreme Court, the Garcia Plaintiffs made the strategic determination not to become involved in that litigation but instead to pursue federal intervention into this state process.

⁵ As the LRC has already adopted the 2012 Final Plan it has satisfied its constitutional mandate. Assuming the Pennsylvania Supreme Court approves the 2012 Final Plan, the LRC has no further role in the reapportionment process.

⁶ Plaintiffs attack the Supreme Court for their delay in ruling on citizen challenges to the 2012 Plan. To the undersigned's knowledge, the Plaintiffs have not brought it to the attention of the Pennsylvania Supreme Court that they believe this delay is causing them or other citizens of the Commonwealth irreparable harm. The Pennsylvania Supreme Court is not a party to this litigation. The Plaintiffs did not challenge the 2011 Plan or become involved in any other way with that litigation. They have not challenged the 2012 Plan, or made any other filing before the Pennsylvania Supreme Court which would put the Court on notice of their claims.

Respectfully submitted,

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