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

JOE GARCIA, FERNANDO QUILES, DALIA RIVERIA MATIAS,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	NO. 12-0556 RBS
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.	:	

BRIEF IN OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF THE APPOINTMENT OF A SPECIAL MASTER IN CONNECTION WITH PLAINTIFFS' PENDING PRELIMINARY INJUNCTION MOTION

Defendant 2011 Legislative Reapportionment Commission, through its undersigned counsel, Del Sole Cavanaugh Stroyd LLC, submits this Brief in Opposition to Plaintiffs' Supplemental Memorandum of Law in Support of the Appointment of a Special Master in Connection with Plaintiffs' Pending Preliminary Injunction Motion and states the following in support:

I. INTRODUCTION

During Plaintiffs' rebuttal at the January 11, 2013 oral argument in this action, they, for the first time, sought the appointment of a special master to reapportion the Commonwealth of Pennsylvania so that the special election they have been requesting can be conducted pursuant to a plan created by the special master.[1] In their own words, the Plaintiffs are requesting that this

[1] If no special election is ordered, Plaintiffs' request for a special master to reapportion the Commonwealth is moot.

Court "take over the redistricting process" because "state actors have failed to act."[2] The appointment of a special master to reapportion the Commonwealth is an extreme measure that would deprive the citizens of the Commonwealth of their right under Article II, Section 17 of the Pennsylvania Constitution to have their elected representatives reapportion the Commonwealth. The Plaintiffs have offered no evidence to warrant such extraordinary intervention by a federal court into Pennsylvania's ongoing reapportionment process. There is simply no justification at this time for this Court to "take over the redistricting process."

First, the Commonwealth has neither refused nor failed to act. To the contrary, the Commonwealth is actively reapportioning its legislative districts in accordance with the reasonably conceived reapportionment scheme set forth in its Constitution. Its current plan is now under review by the Pennsylvania Supreme Court. Second, because the Commonwealth is actively reapportioning its legislative districts and a plan will almost certainly be in place for the 2014 legislative elections, the equal protection rights of the Plaintiffs have not been violated. This Court should therefore deny all relief sought by the Plaintiffs in their Motion for a Preliminary Injunction, including their recently raised request for the appointment of a special master to reapportion the Commonwealth.[3]

II. ARGUMENT

"[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." Growe v. Emison, 507 U.S. 25, 34 (1993). See also Chapman v. Meier, 420 U.S. 1, 27 (1975) ("We say once again what has been

[2] Plaintiffs' Supplemental Memorandum of Law in Support of the Appointment of a Special Master in Connection with Plaintiffs' Pending Preliminary Injunction Motion, p. 1.

[3] The Plaintiffs acknowledge in Footnote 4 of their Supplemental Memorandum of Law in Support of the Appointment of a Special Master in Connection with Plaintiffs' Pending Preliminary Injunction Motion that pursuant to 28 U.S.C. § 2284, a single judge does not have the power to grant them the injunctive relief they are requesting and that only a three-judge panel can grant such relief.

said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.") The United States Supreme Court has recognized that:

> a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name.

Connor v. Finch, 431 U.S. 407, 414-415 (1977). Federal "judicial relief becomes 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." Reynolds v. Sims, 377 U.S. 533, 586 (1964).

The Commonwealth has not failed to reapportion its legislative districts following the 2010 federal, decennial census. To the contrary, it is actively engaged in reapportioning its legislative districts and it must be provided with the opportunity to complete the process

A. The Commonwealth Has a Reasonably Conceived Plan for the Periodic Reapportionment of Legislative Districts.

In Reynolds, the Supreme Court wrote that while it was not imposing a rule that "decennial reapportionment is a constitutional requirement," less frequent apportionment "would assuredly be constitutionally suspect." Id. at 583. The Court ruled 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." Id.

Pennsylvania has a "reasonably conceived plan for periodic readjustment of legislative representation." Article II, Section 17 of Pennsylvania's Constitution requires the

Commonwealth to reapportion its legislative districts for all seats of the Pennsylvania General Assembly in each year following the federal decennial census. Pa. Const. Art. II, § 17(a). Districts must be compact and contiguous, reasonably equal in population and without unnecessary divisions of counties, municipalities and wards. Pa. Const. Art. II, § 16. The Pennsylvania Constitution specifically vests the responsibility to reapportion the Commonwealth in a Legislative Reapportionment Commission. Pa. Const. Art. II, § 17(a). The commission consists of five members, four of whom are the majority and minority leaders of both the Senate and the House of Representatives, or deputies appointed by each of them, and a selected chairman. Pa. Const. Art. II, § 17(b).

A Legislative Reapportionment Commission has ninety (90) days from the date on which it becomes duly certified or from the date on which the population data for the Commonwealth as determined by the federal decennial census becomes available, whichever is later, to file a preliminary reapportionment plan. Pa. Const. Art. II, § 17(c). The public then has a thirty (30) day period to file exceptions to the preliminary plan. Id. A Legislative Reapportionment Commission can also make corrections to the preliminary plan during the thirty (30) day exception period. Id. It must file a final plan within thirty (30) days of the expiration of the period for the filing of exceptions to the preliminary plan. Id.

Once a plan is final, any person aggrieved by it has thirty (30) days to file an appeal to it directly to the Pennsylvania Supreme Court. Pa. Const. Art. II, § 17(d). If an appellant establishes that a plan is contrary to law, the Pennsylvania Supreme Court is required to issue an order remanding the plan to the Legislative Reapportionment Commission with direction to reapportion the Commonwealth in a manner not inconsistent with such order. Id. A reapportionment plan attains the force of law only when the Pennsylvania Supreme Court has

"finally decided" all appeals, or when the time for filing appeals has passed with no appeal having been filed. Pa. Const. Art. II, § 17(e). Once a reapportionment plan attains the force of law, the legislative districts in the plan are to be used in subsequent elections of the General Assembly until the reapportionment following the next federal decennial census is required. Id.

The Plaintiffs do not, and cannot, contend that this scheme violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or any other federal law. It provides the citizens of the Commonwealth with the right to have their democratically elected representatives create reapportionment plans as well as the right to appeal such plans directly to the Pennsylvania Supreme Court if they believe said plans violate the Pennsylvania Constitution or federal law.

B. The Commonwealth Is Following its Scheme for the Periodic Reapportionment of Legislative Districts.

1. The Commonwealth Has Neither Refused Nor Failed to Act.

The LRC has not shirked its constitutional obligation to create a reapportionment plan for the Commonwealth following the 2010 decennial census.[4] To the contrary, it has fervently attempted to satisfy that obligation. On December 12, 2011, the LRC adopted its final reapportionment plan (hereinafter, the "2011 Plan") and filed it with the Secretary of the Commonwealth of Pennsylvania. This plan had virtually identical metrics as the 2001 Reapportionment Plan which the Pennsylvania Supreme Court upheld. Specifically, the LRC's 2011 plan contained fewer political subdivision splits than the Commonwealth's 2001 Reapportionment Plan while maintaining population deviations for both the House and the Senate that were virtually identical to the deviations in the 2001 plan:

[4] It should be noted that since the Commonwealth's current reapportionment scheme was implemented following the adoption of its 1968 Constitution, the Commonwealth has reapportioned its legislative districts following every federal, decennial census. It has no history of failing or refusing to reapportion its legislative districts.

Population Deviation

Year	2001 Plan	2011 Plan
Senate	3.98%	3.89%
House	5.54%	5.98%

Political Subdivision Splits

	Senate		House	
	2001 Plan	2011 Plan	2001 Plan	2011 Plan
Split Counties	29	28	49	52
Split Municipalities	3	4	122	108
Split Wards	30	27	144	132
TOTAL	62	59	315	292

Pursuant to Article II, Section 17(d) of the Pennsylvania Constitution, several citizens of the Commonwealth exercised their right to challenge the constitutionality of the 2011 Plan. Twelve (12) separate appeals were filed with the Pennsylvania Supreme Court, none of which asserted that the 2011 Plan violated the "one person, one vote principal." The LRC zealously defended the 2011 Plan against the appeals. In Holt, et. al v. 2011 Legislative Reapportionment Comm'n, 28 A.3d 711 (Pa. 2012), the Pennsylvania Supreme Court, after "recalibrating" its jurisprudence to permit greater population deviations so that the integrity of political subdivisions could be afforded greater protection and, for the first time ever, comparing an LRC plan to alternative plans submitted by appellants, found the LRC's 2011 Plan to be "contrary to law" in a four to three decision.

The Pennsylvania Supreme Court remanded the 2011 Plan to the LRC "with a directive to reapportion the Commonwealth in a manner consistent with this Court's Opinion, which will follow." It held that the LRC must abide by the framework set forth in Article II, § 17 of the Pennsylvania Constitution in devising a new plan upon remand:

> We note 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. Should such appeals be filed, we will decide them with alacrity, as we have decided the ones now before us.[5]

The Pennsylvania Supreme Court further ordered that the 2001 Legislative Reapportionment Plan "shall remain in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved." It also ruled that "all 2012 election dates shall remain the same" with the exception of several dates related to nominating petitions. The Pennsylvania Supreme Court retained jurisdiction over the matter.

Upon remand, the LRC heeded the Pennsylvania Supreme Court's opinion in Holt and, on June 8, 2012, adopted a new reapportionment plan (the "2012 Plan") containing legislative districts with population deviations that are well within Federal presumptions of constitutionality while significantly reducing the number of political subdivision splits:

Population Deviation

	2012 Plan Population Total Deviation
Senate	7.96%
House	7.88%

Political Subdivision Splits

	Senate		House	
	2011 Plan	2012 Plan	2011 Plan	2012 Plan
Split Counties	28	25	52	50
Split Municipalities	4	2	108	68
Split Wards	27	10	132	103
TOTAL	59	37	292	221

Several citizens of the Commonwealth exercised their right under Article II, Section 17(d) of the Pennsylvania Constitution to challenge the constitutionality of the 2012 Plan. Thirteen (13) separate appeals were filed with the Pennsylvania Supreme Court. None of the appeals contend that the 2012 Plan violates the "one person, one vote" principle grounded in the

[5] Holt, et. al v. 2011 Legislative Reapportionment Comm'n, 38 A.3d 711, 769, n. 40 (Pa. 2012).

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or that it violates the Voting Rights Act. The Plaintiffs in this matter did not file an appeal with the Pennsylvania Supreme Court with respect to the 2012 Plan. In fact, they admitted in the January 11, 2013 argument in this matter that they have no objection to the 2012 Plan: "we have no dispute with the contours and the content of the current plan that is being reviewed by the Pennsylvania Supreme Court."[6] The Pennsylvania Supreme Court heard argument on the appeals on September 13, 2012. The LRC again rigorously defended the 2012 Plan against the appeals.

2. The Commonwealth Has Not Engaged in Unreasonable Delay.

In light of the Commonwealth's conduct as detailed above, the Plaintiffs have not and cannot argue that the Commonwealth has refused or failed to reapportion its legislative districts following the 2010 federal, decennial census. Instead, they contend that both the LRC and the Pennsylvania Supreme Court have engaged in unreasonable delay that has deprived them of the equal protection of the laws.[7] Specifically, Plaintiffs' contend that the LRC took too long to adopt its 2011 Preliminary Plan (and, by extension, its Final Plan), that the LRC took too long to adopt a new plan after the Pennsylvania Supreme Court found the 2011 Plan to be "contrary to law" in Holt and that the Pennsylvania Supreme Court is taking too long to adjudicate the appeals filed with respect to the 2012 Plan. As discussed below, neither the LRC nor the Pennsylvania Supreme Court have engaged in unreasonable delay.

[6] Transcript of January 11, 2013 Argument, pp. 7-8.

[7] Plaintiffs' Supplemental Memorandum of Law in Support of the Appointment of a Special Master in Connection with Plaintiffs' Pending Preliminary Injunction Motion, p. 14.

a. The LRC Did Not Engage in Unreasonable Delay in Adopting the 2011 Plan.

Plaintiffs contend that the LRC's 2011 Preliminary Plan was required to be filed on July 18, 2011, ninety (90) days from the date that the U.S. Census Bureau released raw census data for Pennsylvania (March 9, 2011) as opposed to ninety (90) days from the date that the census data was declared "usable" by the LRC (August 17, 2011). They contend, therefore, that the LRC unreasonably delayed the adoption of its 2011 Preliminary Plan (and, by extension, its Final Plan). Such a contention ignores the practical aspects of reapportionment and the history of the reapportionment process under Pennsylvania's current reapportionment scheme.

First, the raw data provided by the U.S. Census Bureau cannot be used to develop a reapportionment plan because it is not broken down by county, municipality, ward and precinct. It must be broken down by county, municipality, ward and precinct with great care before it can be used to develop a reapportionment plan. This process takes time. If the raw data is not processed with great care, errors can effectively disenfranchise citizens of the Commonwealth and result in unnecessary splits of political subdivisions in violation of the Pennsylvania Constitution. The processing of the raw census data has been conducted by the Pennsylvania Legislative Data Processing Center ("LDPC") and third party vendors in ***every*** reapportionment conducted under the current reapportionment scheme.

Second, in the course of the 1981 reapportionment process, the 1981 LRC sought guidance from the Pennsylvania Supreme Court with respect to the meaning of the term "available" as used in Article II, Section 17(c) of the Pennsylvania Constitution. The Chief Justice issued an unpublished order stating that the ninety day period begins to run when the

Commission receives the data broken down into usable form, i.e., broken down by ward and precinct.[8]

Plaintiffs point to the Pennsylvania Supreme Court's criticism in Holt of the length of time it took for the raw census data to be processed and declared "useable" by the LRC to bolster their argument that the LRC took too long to adopt its 2011 Preliminary Plan (and, by extension, its Final Plan). [9] While the Pennsylvania Supreme Court was critical of the timing, it must be noted that it did not hold that the LRC missed a deadline set forth in Article II, Section 17 of the Pennsylvania Constitution. Article II, Section 17(h) of the Pennsylvania Constitution provides that: "[i]f a preliminary, revised or final reapportionment plan is not filed by the commission within the time prescribed by this section, unless the time be extended by the Supreme Court for cause shown, the Supreme Court ***shall*** immediately proceed on its own motion to reapportion the Commonwealth." Pa. Const. Art. II, § 17(h)(emphasis added). If the LRC had missed the deadlines to file either its 2011 Preliminary Plan or its Final 2011 Plan, the Pennsylvania Supreme Court would have been obligated to reapportion the Commonwealth, which it did not.

It should also be noted that neither the Plaintiffs in this matter nor any other citizen of the Commonwealth petitioned the Pennsylvania Supreme Court to reapportion the Commonwealth because the LRC missed a deadline set forth in Article II, Section 17 of the Pennsylvania Constitution. Instead, fifteen (15) months after the LRC adopted the 2011 Preliminary Plan (October 31, 2011), thirteen (13) months after the LRC adopted the Final 2011 Plan (December 12, 2011) and twelve (12) months after the Pennsylvania Supreme Court found the 2011 Plan to

[8] Kenneth Gormley, *The Pennsylvania Legislative Reapportionment of 1991*, p 23 (1994).

[9] Plaintiffs' have not offered any evidence to support its contention that the five (5) months it took for the raw federal census data to be processed and declared "useable" by the LRC was unreasonable and unjustified. The arguments of counsel are not evidence and cannot be the basis for the granting of the injunctive relief Plaintiffs' are requesting in their Motion for a Preliminary Injunction.

be contrary to law (January 25, 2012), the Plaintiffs for the first time have requested this Court to appoint a special master to reapportion the Commonwealth.

Finally, it must be noted that the Pennsylvania Supreme Court heard oral argument on the appeals filed with respect to the 1991 Plan on January 25, 1992 which was two (2) days later than the date on which it heard oral argument on the appeals filed with respect to the 2011 Plan on January 23, 2012 and it ruled on the appeals filed with respect to the 1991 Plan on February 14, 1992 which was twenty (20) days later than the date on which it ruled on the appeals filed with respect to the 2011 Plan on January 25, 2012. Both the 1991 Plans and the 2011 Plans were formulated in anticipation of being in place for primary elections in presidential election years which are earlier than primaries in non-presidential election years. Thus, the Plaintiffs' attempt to characterize the 2011 reapportionment process as an aberration with respect to timeliness simply lacks merit. The only difference between the 2011 reapportionment process and the prior reapportionment processes conducted under Pennsylvania's current reapportionment scheme is that the Supreme Court, after "recalibrating" its jurisprudence, found the 2011 Plan to be "contrary law." This finding placed the process in uncharted waters.

b. The LRC Did Not Engage in Unreasonable Delay in Adopting its 2012 Plan.

The Plaintiffs contend that the LRC's adoption of its 2012 Preliminary Plan on April 12, 2012 and its adoption of its Final 2012 Plan on June 8, 2012, after the Pennsylvania Supreme Court found the 2011 Plan to be "contrary to law" and remanded it back to the LRC on January 25, 2012, constitutes unreasonable delay. The Plaintiffs contention ignores the fact that the Pennsylvania Supreme Court specifically instructed the LRC to abide by the framework set forth in Article II, § 17 of the Pennsylvania Constitution in devising a new plan upon remand. It also demonstrates a lack of understanding of Pennsylvania's reapportionment scheme as it is based on

the apparent assumption that preliminary and final plans can be adopted by the LRC with a mere snap of its fingers. Such an assumption is simply wrong. Pennsylvania's reapportionment scheme requires substantial time for the adoption of both preliminary and final plans.

The Pennsylvania Constitution specifically vests the responsibility to reapportion the Commonwealth in a Legislative Reapportionment Commission which consists of five members, four of whom are the majority and minority leaders of both the Senate and the House of Representatives, or deputies appointed by each of them, and a selected chairman. Legislative Reapportionment Commissions can only act by means of a majority vote. As a result, the adoption of preliminary and final plans requires extensive negotiation between and compromise by the respective leaders of the Republican and Democrat parties in both the Senate and the House. Legislative Reapportionment Commissions must advertise the preliminary plan and provide the public with thirty (30) days to file exceptions to it before it can adopt a final plan. They also must provide the public with thirty (30) days to file appeals to the final plan with the Pennsylvania Supreme Court. Given that the Pennsylvania Supreme Court specifically directed the LRC to abide by the framework set forth in Article II, § 17 of the Pennsylvania Constitution in devising a new plan upon remand and the nature of the process set forth in that section, the Plaintiffs' contention that the LRC engaged in unreasonable delay in adopting its 2012 Plan upon remand lacks merit. It took the LRC two and a half (2 ½) months to adopt its 2012 Preliminary Plan upon remand and less than two (2) months to adopt its Final 2012 Plan after the adoption of its 2012 Preliminary Plan. These times are eminently reasonable given the nature of Pennsylvania's reapportionment scheme.

c. The Pennsylvania Supreme Court Has Not Engaged in Unreasonable Delay.

The Pennsylvania Supreme Court heard oral argument on the thirteen (13) appeals filed with respect to the 2012 Plan on September 13, 2012. It has not yet adjudicated those appeals. As a result, in accordance with its January 25, 2012 order in Holt, the 2001 Legislative Reapportionment Plan "remain[s] in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved." The Plaintiffs contend that the Pennsylvania Supreme Court's failure to timely adjudicate the appeals is "potentially jeopardizing the special election" which the Plaintiffs are requesting this Court to order.[10] The Plaintiffs' contention lacks merit. Since the Plaintiffs have chosen to seek a special election from this Court as opposed to the Pennsylvania Supreme Court, the Pennsylvania Supreme Court has no reason to know of the Plaintiffs' purported need to have the appeals immediately adjudicated. While no one can project what the Supreme Court will do, it is reasonable to conclude that the Court believes there is no immediate need to adjudicate the appeals because it previously ordered that the 2001 Legislative Plan shall remain in effect until a revised 2011 Plan is approved and that a revised 2011 Plan need only be in place by the time of the commencement of the election process for the 2014 legislative elections in early 2014, which is one year from now.

C. There is No Equal Protection Violation to Justify The Relief Requested by Plaintiffs.

When the Pennsylvania Supreme Court remanded the 2011 Plan to the LRC to reapportion the Commonwealth after finding it to be "contrary to law," it ordered that the 2001 Legislative Reapportionment Plan "shall remain in effect until a revised final 2011 Legislative

[10] Plaintiffs' Supplemental Memorandum of Law in Support of the Appointment of a Special Master in Connection with Plaintiffs' Pending Preliminary Injunction Motion, p. 14.

Reapportionment Plan having the force of law is approved." The result of this order was that the 2012 legislative elections were conducted under legislative districts established in the 2001 Reapportionment Plan despite the fact that there have been substantial population shifts in the Commonwealth between the 2000 and 2010 censuses. The question this court is presented with is, under the present circumstances, is it violation of the Plaintiffs' equal protection rights for the Senators and Representatives elected in the 2012 election to complete their full terms such that they must be shortened and the Commonwealth compelled to hold special elections under a reapportionment plan prepared by a special master. The answer to that question is no.

In French v. Boner, 963 F.2d 890 (6th Cir. 1992), the plaintiffs sought to compel the City of Nashville to conduct new elections for its district council members under a newly adopted reapportionment plan based on the 1990 federal census. The City held an election for its 35 district council members in August of 1991 according to a reapportionment plan based on the 1980 census. See id. at 891. The council members' term of office was four (4) years. See id. The Census Bureau had only made the 1990 census figures available to the city in the spring of 1991 which was "too late for the City to devise and adopt a completely new redistricting plan and put it into effect with sufficient notice to allow candidates to qualify and campaign prior to the impending August city election." Id. The parties agreed that the resulting population deviations would "not pass constitutional muster if the council districts currently in effect must be tested against the 1990 census rather than the 1980 census under which the plan was drawn." Id. The question posed by the plaintiffs was "[s]hould the court allow the city to use the old 1980 census figures for 15 years when the district plans are now grossly malapportioned under the 1990 census and the city has adopted a new constitutional plan to be used for the 1995 election?" Id.

The Sixth Circuit Court of Appeals upheld the district court's ruling that the Equal Protection Clause did not require new elections under these circumstances. See id. The Court recognized that: "[t]he Supreme Court has never drawn hard and fast rules about the length of terms or how long after a decennial census year new elections under the new census must be conducted." Id. at 892. The Court recognized that the result of Nashville conducting its 1991 election under the reapportionment plan based on the 1980 census would result in "the 1980 census figures… govern[ing] for twelve years rather than ten years." Id. The Court held that:

> [w]e do not believe that considerations of mathematical equality in representation or the presumption in favor of redistricting every ten years outweighs the considerations outlined above 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.

Id. The Court went on to explain that:

> [i]n our representative democracy the courts are charged with the responsibility of keeping the channels of representative government and majority rule open and free from significant dilution of voting strength under the one-person-one vote principle. [citation omitted] Nevertheless, there must be some tolerances in the machinery of majority rule under the Equal Protection Clause in order to take into account the values outlined above, as well as the practicalities of the local electoral processes established by states and cities for their own self-government.

Id.

An approved plan will almost certainly be in place when the commencement of the Commonwealth's election process for the 2014 legislative elections begins in early 2014, which is one year from now. All members of the House and those Senators from evenly number districts will be elected in 2014 under an approved plan. Those Senators from oddly numbers districts will be elected in 2016 under an approved plan. Just as in French, there is no violation of the Equal Protection Clause in the present case to justify the shortening of the terms of those

legislators elected in the 2012 election and the ordering of special elections pursuant to a reapportionment plan prepared by a special master. Under the circumstances of this case, the consideration of equality in representation does not outweigh the validity of the terms of the recently elected legislators, the settled expectations of both the voters and the recently elected legislators, the cost of the proposed special elections and the need for stability and continuity of office.

The Plaintiffs have failed to cite a single case in their supplemental brief that would justify the appointment of a special master to reapportion the Commonwealth under the facts of the present case. In fact, Smith v. Beasley, 946 F.Supp. 1174 (D. S. Carolina 1996), one of the cases upon which the Plaintiffs base their request for the appointment of a special master actually demonstrates that there is no justification for such an extreme remedy at this point. In that case, the South Carolina legislature's third attempt to reapportion the House and second attempt to reapportion the Senate based on the 1990 federal, decennial census was challenged by citizens of the state on the grounds that race was the predominant factor in drawing the lines of several House and Senate districts Id. at 1212, n. 16. The United States District Court for South Carolina found that a majority of the challenged districts were drawn along racial lines and violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Id. at 1212-13.

Despite the fact that six (6) years had passed since the 1990 census and the South Carolina legislature had already made three (3) attempts to reapportion the House and two (2) attempts to reapportion the Senate, the Court declined to reapportion the state and instead referred the matter of providing a redistricting plan for the post-1996 House and Senate elections to the South Carolina General Assembly to remedy the constitutional violations. Id. at 1213.

The Court retained jurisdiction of the matter and ruled that: "if the General Assembly fails to adopt a plan and have it precleared prior to April 1, 1997, this court will discharge its obligation to develop and put into effect an appropriate remedial plan." Id. The Court justified its action on "the well-established precedent that the state should have the first opportunity to create a constitutional redistricting plan." Id. at 1212 (citing, Wise v. Lipscomb, 437 U.S. 535, 539-40 (1978)).

The Court in Smith declined to take over South Carolina's reapportionment process by reapportioning the state despite the fact that the South Carolina legislature had already made three (3) attempts to reapportion the House and two (2) attempts to reapportion the Senate and a constitutional plan was still not in place six (6) years after the 1990 census. If the facts in Smith do not justify the extreme remedy of federal court reapportionment of a state's legislative districts, the facts in this matter certainly do not.

III. CONCLUSION

The Commonwealth is actively reapportioning its legislative districts in accordance with the reasonably conceived reapportionment scheme set forth in its Constitution. The fact that this process is not yet complete has not yet caused the deprivation of the Plaintiffs' equal protection rights. The Commonwealth must be provided with the opportunity to complete the process. There is simply no justification at this time for this Court to "take over the redistricting process" and to deprive the citizens of the Commonwealth of their right, under Article II, Section 17 of the Pennsylvania Constitution, to have their elected representatives reapportion the Commonwealth by appointing a special master to reapportion the Commonwealth. This Court should therefore deny all relief sought by the Plaintiffs in their Motion for a Preliminary Injunction, including the appointment of a special master to reapportion the Commonwealth.

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Dated: February 8, 2013

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

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	:	CIVIL ACTION
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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.	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing ***Brief in Opposition to Plaintiffs' Supplemental Memorandum of Law in Support of the Appointment of a Special Master in Connection with Plaintiffs' Pending Preliminary Injunction Motion*** was served on the date set forth below 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: February 8, 2012

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