No. 13-2319

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOE GARCIA, et al.,

Plaintiffs-Appellants,

v.

CAROL AICHELE, in her capacity as Secretary of the Commonwealth of Pennsylvania, and as Chief Elections Officer of the Commonwealth of Pennsylvania,

Defendant-Appellee.

On Appeal From The Memorandum Opinion And Order Of The Honorable R. Barclay Surrick Entered On April 8, 2013 (Docket Nos. 70 And 71) In The Eastern District Of Pennsylvania, Civil Action No. 12-0556

BRIEF OF *AMICI CURIAE* SENATORS DOMINIC PILEGGI AND JAY COSTA IN SUPPORT OF APPELLEE AND THE AFFIRMATION OF THE DISTRICT COURT'S OPINION AND ORDER

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INTEREST OF THE AMICI CURIAE

Statement of Interest of Amicus Curiae Senator Dominic Pileggi

Dominic Pileggi is the State Senator for Pennsylvania's Ninth Senatorial District and the Majority Leader of the Pennsylvania Senate.[1]

By way of this action, the Garcia Appellants seek the following drastic remedy: court-ordered special elections for all 50 of Pennsylvania's Senate districts in 2014, rather than just the regularly scheduled senatorial elections at that time for only half of Pennsylvania's Senate districts (the even-numbered districts).[2] Affording the Garcia Appellants their desired relief would result in Senator Pileggi and the other 24 sitting senators for Pennsylvania's odd-numbered Senate districts elected to four-year terms of office in 2012, in conformance with Pennsylvania's Constitution and Election Code, being forced to run for election three times in a four-year period: in 2012, a second time two years later in 2014 pursuant to the requested special election, and yet a third time in 2016 to reset the staggered election cycle mandated by Pennsylvania's Constitution and Election Code.

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[1] Senators Pileggi and Jay Costa (discussed below) were also two of the five members of the Commonwealth of Pennsylvania's 2011 Legislative Reapportionment Commission (the "LRC"), a former party to this action and appeal. This Court dismissed the LRC from this appeal on June 13, 2013.

[2] As used herein, the term "Garcia Appellants" refers collectively to Appellants Joe Garcia, Fernando Quiles, and Dalia Rivera Matias.

As the State Senator for Pennsylvania's Ninth Senatorial District since 2002, and the Majority Leader of the Pennsylvania's Senate since 2006, Senator Pileggi is interested in this action for various reasons. Specifically, Pennsylvania's Constitution directs that Pennsylvania's State Senators shall serve four-year terms with half of such body running for election every two years, mandates established to bolster experience, continuity and stability within the Senate which, similar to the United States Senate, is a continuing body. As a sitting senator, Senator Pileggi has a direct interest in informing the Court of (i) the deleterious effect on the Senate's continuity and stability, and therefore legislative operation, that could result were the entire Senate caused to run for election in 2014, and (ii) the adverse impact to the settled expectations of Senator Pileggi and his constituents, as well as those of the 24 other senators elected in 2012 and their constituents, were Senator Pileggi and those other senators forced to run for reelection in 2014.

Moreover, as the Senate's Majority Leader, Senator Pileggi is the elected head of the Senate's 27-member Republican Caucus, which includes 12 members representing odd-numbered senatorial districts who were elected to four-year terms in 2012. For this additional reason, Senator Pileggi is uniquely situated to inform the Court of the adverse impact that almost certainly would result from affording the Garcia Appellants their requested relief.

Given his position, Senator Pileggi is also well situated to inform the Court of the significant costs that would likely be borne by him and individuals running for election in Pennsylvania's other 24 odd-numbered senatorial districts were this Court to order that special elections be conducted for Pennsylvania's odd-numbered senatorial districts in 2014 (setting aside the costs that would be incurred by the Commonwealth and counties in conducting these elections).

Statement of Interest of Amicus Curiae Senator Jay Costa

Jay Costa is the State Senator for Pennsylvania's Forty-Third Senatorial District and the Minority Leader of the Pennsylvania Senate.

As the State Senator for the Forty-Third Senatorial District, Senator Costa is interested in this action for various reasons. Specifically, Pennsylvania's Constitution directs that Pennsylvania's State Senators shall serve four-year terms with half of such body running for election every two years, mandates established to bolster experience, continuity and stability within the Senate which, similar to the United States Senate, is a continuing body. As a sitting senator, Senator Costa has a direct interest in informing the Court of (i) the deleterious effect on the Senate's continuity and stability, and therefore legislative operation, that could result were the entire Senate caused to run for election in 2014, and (ii) the adverse impact to the settled expectations of Senator Costa and his constituents, as well as

those of the 24 other senators elected in 2012 and their constituents, were Senator Costa and those other senators forced to run for reelection in 2014.

Moreover, as the Senate's Minority Leader, Senator Costa is the elected head of the Senate's 23-member Democratic Caucus, which includes 13 members representing odd-numbered senatorial districts who were elected to four-year terms in 2012. For this additional reason, Senator Costa is uniquely situated to inform the Court of the adverse impact that almost certainly would result from affording the Garcia Appellants their requested relief.

ARGUMENT

Senators Pileggi and Costa submit this brief of *amici curiae* in support of the Appellee, Secretary of the Commonwealth of Pennsylvania, Carole Aichele ("Secretary Aichele"), and to request that this Court affirm the well-reasoned Order and Opinion of the Honorable R. Barclay Surrick entered on April 8, 2013, *see Garcia v. 2011 Legislative Reapportionment Comm'n*, No. 12-0556, 2013 U.S. Dist. LEXIS 50375 (E.D. Pa. April 8, 2013), and dismiss this appeal.[3] The radical

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[3] Counsel for Senators Pileggi and Costa prepared this brief. No party or other person contributed to the preparation or funding of this brief. *See* Fed. R. App. P. 29(c)(5).

As set forth in Section III, *infra*, Senators Pileggi and Costa agree with the well-reasoned conclusions of the District Court and with the position advocated by Secretary Aichele in this appeal, that the Garcia Appellants have failed to establish a constitutional injury and, therefore, there is no need to order a special election or other remedy. The Senators submit this brief of *amici curiae* to provide their

remedy the Garcia Appellants seek would require the federal courts to intervene in what is recognized as a state legislative matter, and in so doing upset Pennsylvania's historic and constitutional system for the staggered election of Pennsylvania's state senators to four-year terms while simultaneously disrupting the settled expectations of the 25 Pennsylvania state senators elected to four-year terms in 2012, including Senators Pileggi and Costa, and their constituents. Moreover, the special elections for *all* senatorial districts demanded by the Garcia Appellants would impose significant costs on the Commonwealth and senatorial candidates, as it would require the candidates for odd-numbered senatorial districts, like Senators Pileggi and Costa, to stand for election three times in a four-year period. Finally, there is no need to alter Pennsylvania's regular system of elections because the Garcia Appellants have failed to demonstrate a constitutional injury. Indeed, with the regularly scheduled 2014 elections, when only the even-numbered Pennsylvania Senate districts will be up for election, the apportionment scheme of the entire Pennsylvania Senate will be reset according to the 2012 Final

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perspectives on the disruptive and costly impact the Garcia Appellants' proposed drastic remedy would have on the Pennsylvania Senate, its senators, their constituents, and the Commonwealth generally.

Reapportionment Plan approved by the Supreme Court of Pennsylvania (the "2012 Plan"), i.e., the very plan that the Garcia Appellants favor.[4]

I. THE RELIEF SOUGHT BY THE GARCIA APPELLANTS WOULD, IF AFFORDED, HAVE A PROFOUND NEGATIVE EFFECT ON PENNSYLVANIA'S SENATE, A BODY ALWAYS IN SESSION.

A. The Existence and History of Pennsylvania's Senate and the Rationale Underlying Its Members' Four-Year, Staggered Terms.

Setting aside that the Garcia Appellants lack a constitutional injury to be remedied (as discussed briefly in Section III, *infra*), the drastic remedy they demand would require the federal courts to upend Pennsylvania's system of senatorial elections and thereby frustrate the expectations of Pennsylvania voters and the senators they elected in 2012. In so doing, the Garcia Appellants ask the Court to turn a blind eye to the constitutional and historical role of Pennsylvania's Senate as a source of experience, continuity, and stability in the government of the Commonwealth, a role derived from the longer terms and staggered election of Pennsylvania senators.

The Commonwealth's initial constitution, the Constitution of 1776, created a unicameral legislature consisting of representatives with one-year terms. *See*

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[4] Additionally, as explained in Section III, *infra*, even assuming that there existed a constitutional injury that merited remedial action (and there does not), the total number of constituents within odd-numbered senatorial districts supposedly disenfranchised by use of the 2001 Plan for the 2012 general election for those districts is relatively minor, as the "retained constituency" in those districts (i.e. constituents remaining in such districts whether the 2001 Plan or 2012 Plan is used) is 82.1%.

Pennsylvania Constitutional Convention 1967-68, Ref. Manual No. 3, "A History of Pennsylvania Constitutions," at 2. When that system quickly proved unwieldy and dysfunctional, the drafters of the Constitution of 1790, many of whom had also contributed to the drafting of the United States Constitution, set out to create a bicameral system with an upper legislative chamber composed of longer-serving elected officials to serve as a source of stability and check on the passions of the lower chamber. *Id.* at 4. What emerged from those efforts, memorialized within the Commonwealth's Constitution of 1790, was a reconfigured Senate wherein senators served four-year terms with staggered elections. *Id.* at 5.

Since ratification of the Constitution of 1790, Pennsylvania has restructured its constitutional system on three separate occasions, producing the Constitutions of 1839, 1874, and 1968. *Id.* at 8-10; *see* Pennsylvania Constitutional Convention 1967-68, Ref. Manual No. 1, "The Convention."[5] Yet, despite the passage of over 200 years since ratification of the Constitution of 1790, and despite the ratification of several new Constitutions during the interim, the basic configuration of Pennsylvania's Senate has remained unchanged: senators with four-year terms elected on a staggered basis. Indeed, Article II, Section 3 of Pennsylvania's

[5] The 1968 Constitutional Convention was the fifth, and most recent, in Pennsylvania's history and differed from the others in that it was a limited convention, not authorized to draw up an entirely new constitution. Pennsylvania Constitutional Convention 1967-68, Ref. Manual No. 3, "A History of Pennsylvania Constitutions," at 1.

current Constitution establishes: "Senators shall be elected for the term of four years. . . .", while the staggered election of senators from odd and even-numbered senatorial districts is outlined not only within Sections 3 and 4 of Schedule I to the Pennsylvania Constitution, but within Section 2209 of Pennsylvania's Election Code. *See* 25 P.S. § 2209. The justification for maintaining Pennsylvania's senatorial configuration, including its election timing, was succinctly identified by the members of Pennsylvania's 1968 Constitutional Convention who explicitly found:

> [W]here senators have longer terms than representatives, as in Pennsylvania, senators may have greater freedom than do representatives in voting on legislation without having to face an immediate campaign for re-election. In addition, a longer senatorial term would contribute to greater ***experience***, ***continuity***, and ***stability*** in the Legislature.

Pennsylvania Constitutional Convention 1967-68, Ref. Manual. No. 6, "Legislative Apportionment," at 34 (emphasis added). The foregoing justifications are particularly apropos given that the Senate is a continuing body ("Gen. Assembly vs. Senate"). *See* Pa. Const. Art. II, § 4.

These principles of experience, continuity, and stability also underlie the composition and distinctions between the federal House of Representatives and Senate, upon which Pennsylvania's bicameral legislative system is based. As the Court is no doubt aware, while members of the House of Representatives hold

office for two years and are required to stand for reelection simultaneously every two years, United States senators are afforded six-year terms with only a third of that body subject to election every two years. The United States Senate Historical Office has explained the rationale underlying the six-year terms: to "control turnover in the legislature, allow senators to take responsibility for measures over time, and make senators largely independent from public opinion." *See* http://www.senate.gov/artandhistory/history/common/briefing/Constitution_Senate.htm. And, with respect to the system of staggered elections, they serve to "protect the Senate from a rapid turnover in ideas, and encourage senators to deliberate measures over time." *Id.* The United States Senate Historical Office also offers the following justification for the configuration of the United States Senate: "Most importantly, as the federal government's only continuing body, the Senate ... provide[s] leadership after major elections and during other periods of national uncertainty." *Id.*

As with Pennsylvania, the Framers of the United States Constitution were guided by these same principles of experience, continuity, and stability in affording United States senators a six-year term and staggered elections. In *The Federalist Papers, No. 62*, the author Publius[6] warned against "[t]he mutability in the public councils arising from a rapid succession of new members," as they have a

[6] It is widely accepted that James Madison, Alexander Hamilton and John Jay authored various Federalist Papers as "Publius."

propensity "to yield to the impulse of sudden and violent passions." To cure this infirmity, the Framers cited "the necessity of some stable institution of government," "to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration." *Id.* Moreover, the Framers saw a Senate composed of longer-serving elected officials with staggered elections as a means of composing a legislative body that would be more responsible than the House of Representatives, which, because of the shorter two-year terms of representatives and elections for the entire body every two years, would not be able to carry-through with legislative projects lasting a period of several years. *See Federalist Papers, No. 63.* In contrast, the Senate would "hav[e] sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects." *Id.*[7]

[7] Notably, the Senate Historical Office explains that that the Framers of the United States Constitution based the staggered election of senators on models established by colonial and state governments, including "Pennsylvania's unicameral council," which was "divided into three classes on a one-year rotation." *See* http://www.senate.gov/artandhistory/history/common/briefing/Constitution_Senate.htm.

B. The Drastic Relief Sought by the Garcia Appellants Would Directly, Adversely and Profoundly Affect the Pennsylvania Senate's Experience, Continuity and Stability, and Therefore Its Operations.

The Garcia Appellants would have the federal courts cast aside the foregoing constitutional protocol, its historical underpinnings and its continued justifications to remedy an alleged one-person, one-vote violation that the district court found "insubstantial," *see Garcia*, 2013 U.S. Dist. LEXIS 50375 at *34, and that, at most, has resulted in an alleged injury that will be mooted in its entirety by the upcoming 2014 elections of the even-numbered Pennsylvania Senate districts – an election that necessarily results in the resetting of all Pennsylvania senatorial districts. *See* Section III, *infra* (explaining that the district lines and constituencies of all senatorial districts will be reset with the regularly scheduled elections of senators from only the even-numbered districts in 2014). The Court should decline the Garcia Appellants' invitation, just as the district court did.

Setting aside the absence of a constitutional injury (as discussed briefly in Section III, *infra*), the primary reason that the Court should decline awarding the Garcia Appellants' their requested relief is simple, straightforward and self-evident: requiring a 2014 election for odd-numbered senatorial districts in addition to the regularly-scheduled election for even-numbered senatorial districts will cause great disruption to the continuity and stability of the Senate as *all* of the members of that body are forced to simultaneously run for reelection (and thus

divert at least a portion of their attention away from legislating). Put differently, requiring those senators from odd-numbered senatorial districts (who won election not even a year ago) to conduct reelection campaigns in 2014 alongside their colleagues from even-numbered senatorial districts will result in exactly the lack of continuity and stability sought to be avoided by the Pennsylvania Constitution's adoption of four-year terms and a staggered election cycle. Such an event could, of course, only adversely affect the speed and efficiency of the Senate's operations, as *all* of its members simultaneously vie for reelection. Such an event would almost certainly lead to diminished senatorial experience when, for example, a senator elected to an odd-numbered district in 2012 (and therefore having over a year of experience by the 2014 election) loses his or her reelection bid – another result sought to be avoided by Pennsylvania's Constitution. And, such an event could only serve to undercut the settled expectations of voters in, and senators from, odd-numbered districts, who were elected to four-year terms just last year.

The detrimental effects that would result from affording the Garcia Appellants their desired remedy are not simply theoretical. On the contrary, disrupting Pennsylvania's constitutional scheme by requiring all senators to stand for election in 2014 would necessarily slow the legislative process as committee chairmen and members of the Senate's leadership who are not scheduled to stand for reelection until 2016 would be required to run in 2014. That list includes the

top three Senate Leaders, namely President Pro Tempore Joe Scarnati, Majority Leader Pileggi and Minority Leader Costa, along with the Chairmen of the Senate Committees on Agriculture, Banking and Insurance, Community, Recreational and Economic Development, Environmental Resources and Energy, Game and Fisheries, Intergovernmental Operations, State Government, Urban Affairs and Housing, and Public Health and Welfare. Leaving the existing constitutional and statutory scheme intact will enable all of these members of the Senate to dedicate more time to the consideration of legislative matters in 2014, as envisioned by the drafters of Pennsylvania's Constitution. It is also foreseeable that holding currently unscheduled elections in 2014 could result in greater turnover in the Senate, among both members and staff, causing the premature loss of institutional knowledge and resulting in slowed or stopped work on legislative issues.

It is these concerns, coupled with the absence of a constitutional injury that caused the district court to properly deny the Garcia Appellants' their requested relief. Specifically, the district court rejected the Garcia Appellants' proposed remedy as "drastic" and "disrupt[ive]," and determined to simply allow the ordinary electoral procedure devised by the Pennsylvania Constitution to operate – permitting the regularly-scheduled elections for Pennsylvania's 25 even-numbered senatorial districts to be held in 2014 while not slating the 25 odd-numbered

senatorial districts for election until 2016 (when the four-year terms of those elected in 2012 expire). *Garcia*, 2013 U.S. Dist. LEXIS 50375 at *34.

The district court reached the proper result under applicable law; the same result reached by the United States Court of Appeals for the Sixth Circuit in *French v. Boner* under similar circumstances. 963 F.2d 890 (6th Cir. 1992). In *French*, the Sixth Circuit was faced with the question of whether the Equal Protection Clause required the city of Nashville to conduct new elections for local legislators elected under an outdated and mal-apportioned plan. The Sixth Circuit concluded that considerations of mathematical equality in representation and 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, and the need for stability and continuity of office. *Id.* at 891-92.[8]

So drastic is the relief that the Garcia Appellants seek, that the only time that special elections were ordered in Pennsylvania for *all* Senate districts at one time occurred in strikingly different circumstances. In 1964 – four years after the 1960

[8] While the district court's rejection of the Garcia Appellants' drastic remedy was based, in part, on the Sixth Circuit's well-reasoned analysis in *French*, *Garcia*, U.S. Dist. LEXIS 50375 at *29, the Garcia Appellants' brief conspicuously fails to mention this authority, thus tacitly admitting the infirmity of their position in light of this pertinent precedent. Additional decisions have reached the same conclusion as *French*. *See, e.g., Political Action Conference of Illinois v. Daley*, 976 F.2d 335 (7th Cir. 1992).

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.[9] Given the imminence of the 1964 election, however, 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 afforded the General Assembly until September 1965 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 *Bloom I* passed without legislative action, the Pennsylvania Supreme Court undertook to redistrict the General Assembly pursuant to 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*"). Obviously frustrated with the Legislature's unwillingness to act within the nearly six years since the census was issued, even after it had been explicitly ordered to do so, the Supreme Court, in further exercise of its equitable jurisdiction ordered the Secretary of the Commonwealth to conduct elections for all 50 of Pennsylvania's senatorial

[9] In *Bloom I* the Pennsylvania Supreme Court applied the newly enunciated standards for state reapportionment set forth in the United States Supreme Court decision *Reynolds v. Sims*, 377 U.S. 533 (1964).

districts, with those 25 senators winning election in districts not regularly scheduled for election in 1966 afforded only two-year terms. *Id.* at 310 n. 11, 216 A.2d at 459 n. 11.[10]

The current situation is plainly and markedly different from that confronting the Supreme Court of Pennsylvania in *Bloom II*. In the situation at bar, the Supreme Court of Pennsylvania has expressly established that the 2012 Plan "shall . . . have the force of law, beginning with the 2014 election cycle." *Holt v. 2011 Legislative Reapportionment Comm'n*, 2013 Pa. LEXIS 923, *93 (Pa. May 8, 2013) ("*Holt II*").[11] With those regularly scheduled elections for the even-numbered senatorial districts, the district lines and populations of *all* Senate districts will be reset according to the 2012 Plan. In sum, there is no need for the federal courts to intervene and disrupt Pennsylvania's constitutional election system and frustrate the expectations of Pennsylvania's voters and elected officials because Pennsylvania's legislative reapportionment system, which is primarily a

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[10] Because in *Bloom II* the Pennsylvania Supreme Court was enforcing the newly enunciated standards for state reapportionment set forth by the United States Supreme Court in *Reynolds*, *Bloom II* must be read in the context of the drastic change in judicial review of state reapportionment that had just occurred. Here, the short delay in implementation of a new plan was directly related to the requirements of public input and judicial review set forth in the Pennsylvania Constitution.

[11] Supreme Court of Pennsylvania, Middle District, Docket Nos. 133 MM 2012, 126 MM 2012, 127 MM 2012, 128 MM 2012, 129 MM 2012, 130 MM 2012, 131 MM 2012, 132 MM 2012, 134 MM 2012, 39 WM 2012, 41 WM 2012, and 42 WM 2012.

legislative matter, worked, and a constitutional plan will govern elections going forward.

II. THE SPECIAL ELECTIONS FOR ALL PENNSYLVANIA SENATE DISTRICTS PROPOSED BY THE GARCIA APPELLANTS WOULD IMPOSE SIGNIFICANT AND UNNECESSARY COSTS ON THE COMMONWEALTH AND SENATE CANDIDATES.

The drastic remedy proposed by the Garcia Appellants' would also necessarily require Senators Pileggi and Costa as well as the other senators of odd-numbered districts freely elected to four-year terms in 2012 to stand for re-election three times in a four-year period: once in 2012, a second time two-years later in 2014 pursuant to the requested special election, and yet a third time in 2016 to reset the staggered election of state senators mandated by Pennsylvania's Constitution and Election Code. The costs of senatorial campaigns and elections are significant, and requiring those 25 senators who won election to odd-numbered senatorial districts less than a year ago, in 2012, to run for reelection again in 2014 will necessarily impose undue financial burdens on senatorial candidates and the Commonwealth. For example, based on data obtained from the Pennsylvania Department of State's Campaign Finance Division, the average cost of the 17 contested 2012 state senate elections was $1.2 million. Total spending on these elections was $19.9 million. Hence, assuming that the costs of elections will remain constant (which is likely contrary to fact, as the costs of elections appear to be ever-increasing), the Garcia Appellants' proposal for a special election in 2014

would necessitate approximately $20 million in additional campaign spending on top of the tens of millions already expended on regularly-scheduled senatorial elections. This, of course, does not take into account the amount the Commonwealth will be obligated to expend in conducting elections in odd-numbered senatorial districts in 2014. In sum, the drastic remedy sought by the Garcia Appellants' is attended by a heavy cost to not only senatorial candidates but also to the Commonwealth.

III. THE GARCIA APPELLANTS HAVE NOT DEMONSTRATED A CONSTITUTIONAL INJURY

The district court found that Pennsylvania followed "a reasonably conceived plan of decennial reapportionment [] ***sufficient to guarantee the constitutionality of the 2012 election***," and thus rightly concluded that there was "no need to disturb the settled expectations of both voters and elected officials by ordering the requested special election." *Garcia*, 2013 U.S. Dist. LEXIS 50375 at *29 (emphasis added); *see also id.* at *27 (recognizing that a special election of ***all*** state senators in 2014 proposed by the Garcia Appellants was "a drastic remedy and one that would disrupt the orderly electoral process contemplated by the Pennsylvania Constitution."). The district court was right not to intervene in what was then, and remains now, a primarily legislative matter in Pennsylvania. *See id.* at *28 ("We will not intervene at this time in what is primarily a legislative matter."). *See also Reynolds*, 377 U.S. at 586 ("[L]egislative reapportionment is primarily a matter for

legislative consideration and determination, and [] judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having an adequate opportunity to do so."). Indeed, when the district court reached its conclusions and issued its opinion, the LRC had "complied with Pennsylvania's constitutionally acceptable legislative reapportionment scheme" and a "Final Reapportionment Plan [was] being reviewed by the Supreme Court of Pennsylvania." *Id.* Since then, the Supreme Court of Pennsylvania has found the 2012 Plan to have met all federal and state constitutional requirements, and ordered that it "shall [] have the force of law, beginning with the 2014 election cycle." *Holt II*, 2013 Pa. LEXIS 923 at *93.

Importantly, with the regularly scheduled elections in 2014, when only the even-numbered Pennsylvania senatorial districts are set for election, the apportionment scheme of the entire Pennsylvania Senate will be reset according to the 2012 Plan in *Holt II*.[12] ***Put differently, the violation of the one-person, one-***

[12] For example, the district lines and populations of Senate District Nine, the district represented by Senator Pileggi, and Senate District Forty-Three, the district represented by Senator Costa, will change following the 2014 elections to those set forth in the 2012 Plan approved by the Supreme Court of Pennsylvania in *Holt II*. Senators Pileggi and Costa, who were elected senators of the Ninth Senatorial District and Forty-Third Senatorial District, respectively, in 2012, will remain those districts' senators and stand for election again in 2016. The fact that their respective constituencies will change in part with the resetting of the Ninth and Forth-Third Senatorial Districts' lines does not amount to a constitutional injury. Indeed, such resetting necessarily always occurs the first time a new redistricting plan is used in a subsequent senatorial election.

vote principle under the Equal Protection Clause alleged by the Garcia Appellants will be mooted with the regularly-scheduled 2014 elections. Therefore, now, even more so than when this matter was before the district court, it is plain that the Garcia Appellants have no constitutional injury.

Even assuming the existence of a constitutional injury arising from the use of the 2001 Plan for the 2012 senatorial elections (and there was none, as properly found by the district court), any harm resulting to the Garcia Appellants from use of the 2001 Plan was minor. Specifically, the "retained constituency" within the odd-numbered senatorial districts, i.e. the electorate that remains in such districts irrespective of whether the 2001 Plan or 2012 Plan is used, is 82.1%.[13] In other words, on average only 18% of the electorate residing within odd-numbered senatorial districts as delineated by the 2012 Plan were ineligible to vote for the senators who will represent such districts beginning on December 1, 2014 due to

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As this Court found in *Donatelli v. Mitchell*, "[n]umerous courts have concluded that temporary disenfranchisement resulting from the combined effect of reapportionment and a staggered election system meets the rational-basis test and therefore does not violate the *Equal Protection Clause.*" 2 F.3d 508, 515 (3d Cir. 1993) (citations omitted). Like the other courts cited in *Donatelli*, this Court found that Pennsylvania's constitutional legislative reapportionment scheme was "primarily the duty and responsibility of the State" and its apportionment decisions were rationally based. *Id.* at 518.

[13] A chart identifying retained constituency figures for each of Pennsylvania's odd-numbered senatorial districts is attached hereto as **Exhibit A.** The chart also identifies totals and averages for all of the odd-numbered senatorial districts, as well as retention percentages.

the use of the 2001 Plan for the 2012 elections. This statistic further illustrates that any harm suffered by the Garcia Appellants and those they purport to represent is, at most, quite minor; therefore further militating against the drastic remedy sought by the Garcia Appellants.

CONCLUSION

For all the foregoing reasons, *amici curiae* Senators Pileggi and Costa respectfully urge this Court to affirm the well-reasoned Order and Opinion of the Honorable R. Barclay Surrick entered on April 8, 2013 and dismiss this appeal.

August 26, 2013.

Respectfully submitted,

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EXHIBIT "A"

Retained Constituents in 2012 Plan

SD	Retained	Total	% Retained
01	242,582	256,509	94.6%
03	191,827	244,331	78.5%
05	235,246	263,142	89.4%
07	206,799	244,493	84.6%
09	193,612	257,631	75.2%
11	225,421	256,183	88.0%
13	212,377	260,090	81.7%
15	184,788	254,449	72.6%
17	240,837	259,712	92.7%
19	158,058	264,133	59.8%
21	189,715	260,675	72.8%
23	238,807	244,986	97.5%
25	205,019	246,500	83.2%
27	237,154	247,893	95.7%
29	173,099	250,472	69.1%
31	225,360	255,939	88.1%
33	209,311	264,160	79.2%
35	173,562	252,940	68.6%
37	245,629	263,549	93.2%
39	213,020	244,149	87.2%
41	197,886	243,946	81.1%
43	187,534	252,278	74.3%
45	187,000	257,947	72.5%
47	200,643	247,614	81.0%
49	229,235	244,074	93.9%
Total	**5,204,521**	**6,337,795**	**82.1%**
Average	**208,181**	**253,512**	**82.1%**
Republican	**2,496,003**	**3,024,055**	**82.5%**
Democrat	**2,708,518**	**3,313,740**	**81.7%**

CERTIFICATIONS OF COUNSEL

I, William R. Cruse, hereby certify that:

1. I am a member of the bar of this Court;

2. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief contains 4,902 words and has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman (14 point font);

3. The electronic version of this brief is identical to the text version in the paper copies filed with the Court. This document was scanned using Symantec Endpoint Protection, with all virus definitions updated as of this date, and found to be clean of viruses.

Dated: August 26, 2013

/s/ William R. Cruse
William R. Cruse