

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT O'SHEA, CHAIRMAN OF THE WARD
6 DEMOCRATIC COMMITTEE, ET AL.,

Plaintiffs,

Civil Action No. 1:220cv012048-PBS

v.

BOSTON CITY COUNCIL,

Defendant.

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Now Come the Plaintiffs and respectfully submit this reply to Defendant's Opposition to Plaintiffs' Application for Preliminary Injunction pursuant to Fed. R. Civ. P. 65(b).

I. Amendment of Pleadings

As a preliminary matter, Defendant argues that the Defendant Boston City Council is not a proper Defendant. This Honorable Court has allowed Plaintiffs until February 27, 2023 to amend its complaint to add additional parties. Plaintiffs specifically intend to add the City of Boston and the Supervisor of Elections as Defendants prior to the hearing on the Preliminary Injunction. Plaintiffs further intend to add additional Plaintiffs who have expressed their dissatisfaction with the methods used by Defendant as well as the result reached.

Since Plaintiffs' claim is that the November 2022 redistricting ordinance was unlawfully and unconstitutionally put into place by the duly authorized Legislative and Executive branches of the City of Boston, the question is not rendered moot by virtue of the enactment of the offending ordinance. In addition, the City Council is not an independent branch of government but rather a core component of the City of Boston government. Therefore, the action brought against the Boston City Council is in

effect an action against the City of Boston government and amending the complaint to name the Mayor of Boston, the Supervisor of Elections, and the City of Boston are mere technicalities. On the issue of standing, the Defendant cannot both claim that it is not the proper party to this action and that the Plaintiffs lack standing to bring its claims in a Court of competent jurisdiction, especially before Defendant has joined in the case by filing its Answer or other responsive pleading.

II. Voting Rights Act

Defendant further argues that none of the Plaintiffs are minority members of District 4 and therefore may not bring a Voting Rights Act claim based on dilution of the black vote in District 4. Plaintiff intends to cure this issue as well with the addition of at least two residents of District 4, an African-American man and a Haitian-American man who each oppose the efforts of the Defendant to reduce their voting power.

Defendant agrees that there has been a reduction in the black vote in District 4 and an increase in the white vote, but argues that the amounts of the reduction of the black vote is insufficient to satisfy Section 2 of the Voting Rights Act. Plaintiffs contend that any reduction in the black vote in District 4 is catastrophic to the only black-majority district in the City, especially when viewed in historical context. At the time of the last redistricting in 2012, black voters made up approximately 61% of the vote in District 4. Over the last decade, gentrification and other socioeconomic forces have caused a sharp reduction in the black vote such that any further reduction has significantly compounded effects.

Here the Plaintiffs' arguments for a preliminary injunction are two-fold. The first basis is that the Defendant violated the Open Meeting laws ("OML") by not strictly complying with the meeting notice and language services requirements, especially as it pertains to the Section 2 protected language minority groups who are residents and voters in Boston. Since Defendant has admitted to at least one notice violation of the OML and Plaintiffs have made substantive allegations in the First Amended Complaint as to Defendant's repeated failures to provide notices and language services to its minority

residents, the Court has compelling grounds for a preliminary injunction under Section 2 of the Voting Rights Act without having to address the more complex and nuanced questions of whether the November 2022 redistricting ordinance discriminated against Black voters and residents of District 4.

III. The Open Meeting Law

Defendant agrees that at least one meeting (October 19, 2022) was held without notice, which Plaintiffs allege is a violation of the OML. Plaintiffs disagree, however, with Defendant's characterization of the Council's adherence to and respect for the OML during the nearly eighteen months of deliberation". As discussed in Plaintiffs' First Amended Complaint, the Council (or some quorum thereof) repeatedly met and deliberated without notice and constantly failed to provide language services to minority residents.

Having effectively shut minority voters out of the process, the Defendant Council has violated the OML. *See Foudy v. Amherst-Pelham Regional Sch. Comm.*, 402 Mass. 179, 184 (1988) ("It is essential to a democratic form of government that the public have broad access to the decisions made by its elected officials and to the way in which the decisions are reached."). Proper notice and language access are of particular importance in a proceeding such as legislative redistricting, which is exceedingly complex and arcane, and also implicates core Constitutional rights.

It should also be brought to this Honorable Court's attention that Plaintiffs have requested the Massachusetts Attorney General's Office ("AGO") to review the Council's violations of the OML. The AGO has assigned an AAG to review the matter. As of the writing of this Reply, the assigned AAG has not yet taken any action. However, if the AGO finds a violation, it may issue any of the remedies described in G.L. c. 30A, § 23(c) which includes a possible order to "nullify in whole or in part any action taken at the meeting." G.L. c. 30A, § 23(c)(3).

A preliminary injunction pending the Attorney General's determination of whether any violations of the OML warrant the nullification of the November 2022 redistricting ordinance would

eliminate the need for Federal Court intervention to address a State law issue that is best addressed by the State and local officials. The public interest is best served by allowing the AGO to discharge its statutory obligation under the OML, thereby vitiating the need for this Honorable Court to assert its federal question jurisdiction.

IV. Equal Protection and Racial Balancing

Under the Equal Protection Clause, a legislature may not "separate its citizens into different voting districts on the basis of race," without satisfying the rigorous requirements of strict scrutiny.

Miller v. Johnson, 515 U.S. 900, 911, 916, 920 (1995)

The record is littered with examples of the Council's desire to redistrict based primarily on race. Some examples include, but are not limited to:

1. September 30, 2022 – Boston City Council Working Session, available at <https://www.youtube.com/watch?v=ShKQHyScOm4> (last accessed January 27, 2023).
 - a. Co-author of the Unity Map Councilor Ricardo Arroyo stated: “I think part of this was trying to make sure that we kept . . . the racial demographics essentially in line[.]” (at 47:05)
 - b. Councilor Bok stated: “. . . the Voting Rights Act is racially conscious . . . because the history in America is of being racially conscious the other way, right, of trying to disenfranchise people of color and that therefore although communities of interest that are neighborhoods are important, that may come in second, right, to making sure that racial minorities have the opportunity to have strong political power.” (at 1:09:36)
 - c. Councilor Lara stated: “It’s someone’s turn on this map to be an opportunity district, it is very obvious that is District 3, and the reason why it’s not District 2, it’s because we build the Seaport and we put 13,000 white people into the Seaport.” (at 1:02:20)
 - d. Councilor Fernandes Anderson stated: “If this was monopoly and the pieces in the districts were houses and hotels and different types of objects and they all had different colors, black, white, brown, I think a ten year old would be able to make all these districts an opportunity district . . . A ten year old would be able to look at this entire map and shift it and split it evenly[.]” (at 1:29:12)
2. October 7, 2022 – Boston City Council Working Session, available at <https://www.youtube.com/watch?v=bchqzUfkAYE> (last accessed January 27, 2023).

- a. Chair Liz Breadon stated “. . . we’re trying to strengthen the, actually, we’re trying to balance the racial minority, the total minority numbers between District 3 and District 4 to try to get a little more, increase the opportunity in District 3. I think that’s really the crux of it.” (at 45:55)
 - b. Council Arroyo stated: “District 4, frankly, and I think the Voting Rights Act is clear on this, cannot pack more people of color into it, it has to become a more white district.” (at 1:34:40).
 - c. Councilor Mejia, discussed the negative racial history of District 2 and 3 and stated “So if he goal and the exercise is for us to move forward in an equitable way, I just think that we need to just be super mindful of staying here in the present because bringing into this conversation neighborhoods like Savin Hill to my colleague’s reference was very different in 1981, 1982, 1983, so let’s just try to remain focused on the here and now and the racial makeup of the city that we’re living in today.” (at 1:57:20).
3. October 17, 2022 – Boston City Council Working Session, available at <https://www.youtube.com/watch?v=HFrYE2zUPNg> (last accessed January 27, 2023).
 - a. Councilor Breadon stated: “Both District 5 and District 3 are opportunity districts, and we need to ensure that they continue to be opportunity districts and strengthen them.” Councilor Baker responded: “And so opportunity being 60% of non-white?” Councilor Breadon responded: “60% of non-white or ideally pushing it up higher than that up to 65.” Council Baker queried: “Ideally, as a political aspiration?”. Councilor Breadon responded: “Yes.” (at 1:09:07)
 - b. Councilor Breadon stated: “It’s my understanding that a white population of 9% in District 4 is not a high enough percentage.” (at 1:12:43)
 - c. Councilor Bok stated: “It’s one thing to talk about neighborhoods, it’s another thing to talk about multiple distinct neighborhoods being a block together in a way that then sort of definitionally creates racial blocks across multiple neighborhoods of the city as being like a block in and of themselves because then inherently you’re not going to be able to define a desegregating map.” (at 1:19:30)
 - d. Councilor Bok stated: “We clearly can’t have maps that make District 4, that reduce its white population, and I would say we clearly can’t have maps that increase District 3’s white population, those are very simple guardrails.” (at 1:18:08).
 4. October 20, 2022 – Boston City Council Redistricting Meeting, available at <https://www.youtube.com/watch?v=huEpOC3Mn9s&t=52s> (last accessed January 27, 2023).
 - a. Councilor Fernandes Anderson stated: “The redistricting process seems so contrived, doesn’t it, and there’s a lot of sort of mystical nuances to it. What exactly is happening in the back door it’s so political, it’s becoming so racial – wait – in fact

it is racial, it's the one thing that we can actually prioritize in this process." (at 1:47:30)

- b. Councilor Fernandes Anderson discussed Boston's history of segregation and stated "Racial tension? Yeah, that's right. That's a good thing. Let's talk about it because you know it's due time. And so if we're here and you're not used to it and you're uncomfortable, that is a good thing, let's have those conversations and talk about how we create true equity across the board for everyone, it's just something that we're not used to[.]" (at 1:49:48).

To pass strict scrutiny, the state must prove that its race-based redistricting scheme is "narrowly tailored" to meet a "compelling interest." Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 801 (2017). In order to show a violation of the Equal Protection Clause, Plaintiffs must show "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." Miller, 515 U.S. at 916. "To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." Id.

The prohibition on race-baced redistricting is to prevent the demeaning practice of "racial sorting." By assigning voters to districts based on race, a state "engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." Miller, *supra* at 911-12; *see also* Bethune-Hill, *supra* at 797.

It matters not that the Defendant Council sought to redistrict based on race to fulfill a purpose they believe to be noble. *See, e.g., Jacksonville Branch of the NAACP v. City of Jacksonville*, C.A. No. 3:22-cv-493-MMH-LLL (M.D. Fla. Oct. 12, 2022) ("Indeed, '[u]nder the Equal Protection Clause, districting maps that sort voters on the basis of race 'are by their very nature odious.' Wis. Legislature v. Wis. Elections Comm'n, 142 S.Ct. 1245, 1248 (2022) (quoting Shaw v. Reno (Shaw I). 509 U.S.

630, 643 (1993)). ‘This is true whether or not the reason for the racial classification is benign or the purpose remedial.’ See Shaw v. Hunt (Shaw II), 517 U.S. 899, 904-05 (1996).”).

The words and deeds of the Defendant Council as described hereinabove is direct evidence of their desire to redistrict the City of Boston along racial lines. The citizens of Boston are not mere widgets, to be traded amongst various districts based solely on the color of their skin, their ethnic backgrounds or their native language. These are individual persons who cannot be reduced to a single denomination of Black or White or Haitian or Vietnamese, etc.

The Defendant Councilors have repeatedly spoken of race in redistricting as the primary driving force behind the current redistricting plan. Their only legitimate purpose for redistricting is to balance the overall population among the districts as required by the City Charter. However, any of the alternative maps provided by Councilors Murphy, Baker, Flaherty or even the map proposed by Mayor Wu would have solved the population issue without causing unnecessary damage to various neighborhoods. Indeed, both the City Charter and G.L. c. 43 § 131 requires maps to be “drawn with a view toward preserving the integrity of existing neighborhoods.” The Defendant Council’s failure to protect the integrity of existing neighborhoods reinforces their express desire to redistrict based primarily on race.

For a preliminary injunction to issue, this Honorable Court need not find that actual race-based discrimination has occurred. Rather, Plaintiffs respectfully request this Honorable Court to determine whether prohibited racial considerations were so predominant and infecting of the legislative process that the November 2022 redistricting ordinance should be enjoined until a full evidentiary hearing can be conducted to determine if the Defendant can meet the burden of the strict scrutiny test by showing a compelling state interest, and that the redistricting map was narrowly tailored to that compelling state interest.

V. Conclusion

For the foregoing reasons, Plaintiff respectfully requests this Court issue a preliminary injunction enjoining the implementation of the Redistricting Plan (Docket #1275) approved by the Boston City Council on November 2, 2022 and enacted into law by the Mayor of the City of Boston on November 7, 2022, while this action and request for equitable relief is pending.

Respectfully submitted,
Plaintiffs,
By their Attorneys,

/s/ Paul Gannon, Esq.
Paul Gannon, Esquire
Law Office of Paul Gannon, P.C.
546 E. Broadway
South Boston, MA 02127
(617) 269-1993
BBO# 548865
pgannon@paulgannonlaw.com

/s/ Glen Hannington
Glen Hannington, Esq.
LAW OFFICES OF GLEN HANNINGTON
Ten Post Office Square, 8th Floor South
Boston, MA 02109
TEL#: (617) 725-2828
BBO#: 635925
glenhannington@aol.com

/s/ Frederick E. Dashiell
Frederick E. Dashiell, Esq.
Dashiell & Associates, P.C.
6 Codman Hill Avenue
Boston, Massachusetts 02124
Ph: (617) 590-5780 (Direct Line)
Fax: (972) 474-9171
BBO# 114520
Email: fred.dashiell@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was filed through the ECF System and will be served upon the attorney of record for each party registered to receive electronic service on this the 27th day of January 2023.

/s/ Glen Hannington
Glen Hannington, Esquire