

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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JOE GARCIA, FERNANDO QUILES, DALIA
RIVERA MATIAS,

Civil Action
No. 12-0556 RBS

PLAINTIFFS,

v.

2011 LEGISLATIVE REAPPORTIONMENT
COMMISSION and CAROLE AICHELE, in her
Capacity as Secretary of the Commonwealth of
Pennsylvania, and as Chief Election Officer of the
Commonwealth of Pennsylvania,

DEFENDANTS.

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PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Joe Garcia, Fernando Quiles and Dalia Rivera Matias, through their undersigned attorneys, respectively move this Court for a Preliminary Injunction, enjoining Defendants from authorizing full legislative terms for those State Senators and State House Representatives to be elected in 2012 under Pennsylvania's 2001 Legislative Reapportionment Plan (hereinafter "2001 Plan"). Because all 203 members of the State House and half of the State Senate will be elected in the upcoming 2012 election using the 2001 Plan and state primary elections regarding these positions have already been held pursuant that Plan, Plaintiffs' request encompasses State Senate Seats for Districts 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49 and State Assembly Seats for Districts 1 through 203. Plaintiffs respectfully request that these state legislators serve a shortened one-year term and that this Court mandate a special election be held in 2013 to properly elect legislators to these positions pursuant to an approved

2011 Legislative Reapportionment Plan. Plaintiffs solicit this course of action to allow for the constitutional election of Pennsylvania representatives pursuant to an approved 2011 Legislative Reapportionment Plan. Further, though the Legislative Reapportionment Commission recently issued a Revised Final 2011 Reapportionment Plan on June 8, 2012, as of this date, there is no 2011 Legislative Redistricting Plan having the full force and effect of law given that the thirty-day period within which any aggrieved person may file an appeal to the Pennsylvania Supreme Court has not yet lapsed. Accordingly, in the event that this reapportionment plan is ultimately rejected by the Pennsylvania Supreme Court, Plaintiffs request that this Court set and enforce a deadline by which Defendant 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION must enact a new district plan so that the proposed 2013 special election may, nevertheless, occur in connection with upcoming statewide 2013 municipal primaries. Plaintiffs request such relief to remedy the unconstitutional effects of the upcoming 2012 election cycle proceeding based on Pennsylvania's 2001 Plan in violation of the One Person, One Vote doctrine of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Though this representational dilemma arose out of the Pennsylvania Supreme Court invalidating the first 2011 Final Reapportionment Plan and resulting time constraints in instituting an alternative plan to meet upcoming 2012 election deadlines, Pennsylvania's Latino voters should not be forced to endure unconstitutional representation premised on the 2001 Plan until the next regularly scheduled election in 2014. Encroaching election deadlines, notwithstanding, allowing the 2012 election to proceed based on the 2001 Plan will violate the constitutional rights of Plaintiffs. In fact, Plaintiffs' constitutional rights have already been violated in connection with the legislative primary election held on April 24, 2012 using 2001 district lines. Accordingly, Plaintiffs request that this Court mandate a shortened one-year

election term for those state legislators elected in 2012 to be followed by a special election in 2013 regarding these positions utilizing a properly approved 2011-12 Legislative Reapportionment Plan. The injunctive relief sought will not result in greater harm to the Defendants given that any financial burden presented by this special election will be mitigated by conducting the 2013 special election in connection with upcoming statewide 2013 municipal primaries. To ensure the institution of a timely legislative reapportionment plan by this proposed special election date, Plaintiffs also request that this Court set and enforce a deadline by which Defendant 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION must enact a new district plan comporting with the Constitution in the event that the revised final reapportionment plan is ultimately rejected by the Pennsylvania Supreme Court.

As set forth in the Complaint, Memorandum of Law and Declarations of Jose Perez, Asher Ross, and Joe Garcia submitted in support of this motion, all of which are incorporated herein by reference, 2012 elections based on the 2001 Plan will violate the One Person, One Vote doctrine of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Additionally, a thorough review of case law demonstrates that where legislators are elected pursuant to an unconstitutional district map, this district court in addition to numerous other courts have routinely ordered a shortened term followed by a special election and, to that end, instituted deadlines by which legislative reapportionment commissions must enact a new reapportionment plan.

Defendant CAROLE AICHELE, as the Secretary of the Commonwealth and the Chief Election Officer in Pennsylvania, is the only official in the State authorized to call, hold, supervise and certify elections. Accordingly, this motion for a Preliminary Injunction seeks to order her and her office to conduct a special election in 2013 based on an approved 2011

Reapportionment Plan in connection with scheduled statewide 2013 municipal primaries. At such time, State Senate seats for Districts 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49 as well as House seats for Districts 1 to 203 will be subject to election.

In support of their motion for a Preliminary injunction, Plaintiffs state:

1. Plaintiffs have a significant probability of success on the merits because the 2010 Census results clearly show that the current 2001 Plan for State Senate and State House legislative districts are malapportioned and in violation of the Fourteenth Amendment to the United States Constitution. As stated in their Complaint, Plaintiffs assert that the total population deviation for the State Senate is 29.4% and that the corresponding total deviation for the State House is 42.8%. These deviations are well in excess of population deviations required to establish a *prima facie* violation of the One Person, One Vote doctrine of the Fourteenth Amendment.
2. Because Plaintiffs' constitutional rights have and will be violated if 2012 Pennsylvania legislative elections continue to proceed based on 2001 Plans, Plaintiffs, and other similar situated Latino voters, have clearly demonstrated evidence of irreparable harm warranting a preliminary injunction.
3. The injunctive relief sought will not result in greater harm to the Defendants given that any financial burden presented by this special election will be mitigated by conducting the 2013 special election in connection with upcoming statewide 2013 municipal primaries.

4. Granting preliminary relief under these circumstances is in the public interest as the constitutional rights of millions of Pennsylvania voters, particularly Latino voters in Pennsylvania, are at risk.
5. A thorough review of case law demonstrates that where elections are held pursuant to an unconstitutional district map, courts routinely order shortened terms, special elections, and deadlines by which legislative reapportionment commissions must enact a new district plan to cure such constitutional violations.

Accordingly, Plaintiffs move this Court to:

1. Mandate Defendant CAROL AICHELE and anyone controlled by her, or in common control with her to call, hold, supervise or certify a special election in 2013 in connection with 2013 Pennsylvania Municipal Primaries, shortening the term of those state legislators elected pursuant to the 2001 Plan in the upcoming 2012 election, specifically State Senators who will be elected to serve Districts 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49 and House Representatives elected to serve Districts 1 through 203, and ensure the election of their replacements pursuant to an approved 2011 Legislative Reapportionment Plan;
2. In the event that the revised reapportionment plan is ultimately rejected by the Pennsylvania Supreme Court, order Defendant 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION to issue an approved 2011 Legislative Reapportionment Plan by a date certain sufficient to conduct a special election in connection with 2013 Pennsylvania Municipal Primaries, and,

3. Order that Plaintiffs not be required to post a bond in this matter as it is unnecessary.

Dated: June 29, 2012

Respectfully submitted,

s / Jose Luis Ongay

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
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INTRODUCTION

Plaintiffs have filed this action for declaratory and injunctive relief to protect the most basic of constitutional rights: the right to have one's vote weighted and counted on equal terms with all other voters in Pennsylvania. Their straight-forward, two-count Complaint sets forth allegations that are all part of the public record and evidence that Pennsylvania is set to permit 2012 elections for the State Senate and State House to be held on the basis of a decade-old legislative reapportionment plan – one that wholly ignores those demographic shifts in Pennsylvania since the 2001 Census. Notwithstanding this course of action, Pennsylvania's demographic shifts since the 2001 census are real and have rendered the application of 2001 districts in 2012 elections unequal in population and unconstitutional under the One Person, One Vote doctrine of the Fourteenth Amendment.

Defendant 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION has had an opportunity to timely redistrict the State's legislative districts, but has failed to do so in a way that would garner the timely approval of the Pennsylvania Supreme Court. That court, in turn, halted the use of the Defendant's 2011 Reapportionment Plan on January 25, 2012 by declaring that it was "contrary to law." Further, on February 3, 2012, the Pennsylvania Supreme Court issued its full opinion on the issue, noting that any decisions regarding the timing, suspension, or deferment of the election calendar were not before the court as they are the "concern and province of the political branches."

Accordingly, Plaintiffs JOE GARCIA, FERNANDO QUILES, and DALIA RIVERA MATIAS, who are Hispanic voters in Pennsylvania with no control over the process of redistricting, turned to this Court for redress. Plaintiffs first sought to enjoin Defendants from calling, holding, supervising or certifying the forthcoming Pennsylvania elections using the 2001

Legislative Reapportionment Plan (hereinafter “2001 Plan”) given the unconstitutionality of conducting the 2012 election using the outdated 2001 Plan and for referral of their voting rights claims to a three-judge panel. This Court denied the motion, reasoning that because there was no readily available alternative redistricting plan, the harm to the public in delaying either the primary or the general election substantially outweighs the likely benefit to Plaintiffs in granting a preliminary injunction based on the issues presented. In turn, the April 24, 2012 state legislative primary elections proceeded based on 2001 apportionment lines.

Though the Legislative Reapportionment Commission issued a final revised reapportionment plan on June 8, 2012¹, as of this date, there is no 2011 legislative redistricting plan that has the full force and effect of law given that the thirty-day period within which any aggrieved person may file an appeal to the Pennsylvania Supreme Court has not yet lapsed. Because the 2012 election will proceed and these constitutional issues remain unaddressed, Plaintiffs now request that this Court shorten the term of service for those state legislators elected in 2012² and order Defendant CAROL AICHELE to hold a special 2013 election in connection with 2013 statewide municipal primary elections using the yet-to-be approved 2011-12 Legislative Reapportionment Plan. Further, in the event that the revised final reapportionment plan is ultimately rejected by the Pennsylvania Supreme Court, Plaintiffs request that this Court also set and enforce a deadline by which Defendant 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION must enact a new district plan comporting with the Constitution so that the 2013 special election may nevertheless proceed on the date proposed. To do otherwise, would irreparably harm the constitutional rights of Plaintiffs as well as those of

¹ Press Release, 2011 Reapportionment Commission (Jun. 8, 2012), <http://www.redistricting.state.pa.us/Resources/Press/2012-06-14-Press-Release.pdf>.

² In the upcoming 2012 election, State Senators will be elected to serve Districts 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49. At such time, House Representatives will also be elected to serve Districts 1 to 203.

other Pennsylvania voters, particularly Latino voters. Plaintiffs respectfully submit this Memorandum of Law in support of their Motion for a Preliminary Injunction Order.

STATEMENT OF FACTS

Plaintiffs rely upon the allegations of their Complaint, incorporated herein by reference, for the basic factual scenario that has led to this action. Plaintiffs further submit that one set of facts is critical for the issuance of a preliminary injunctive order in an action under the One Person, One Vote doctrine – the malapportionment of the legislative body.

1. The 2011 Redistricting Process is Still Underway.

Defendant 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION was established pursuant to Section 17(a) of Article 2 of the Pennsylvania Constitution specifically to redistrict the State's legislative districts according to the 2010 Census. On August 17, 2011 Defendant 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION concluded that the 2010 census data was in usable form. However, it was not until December 12, 2011 that Defendant 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION adopted its final plan for 2011.

The finality of the 2011 Legislative Redistricting Plan was placed in doubt once voters in Pennsylvania formally objected to the final plan by filing Petitions for Review before the Pennsylvania Supreme Court. Indeed, on January 25, 2012 the Pennsylvania Supreme Court deemed the 2011 Reapportionment Plan “contrary to law” in a *per curiam* order issued in *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711 (Pa. 2012). Further, the Pennsylvania Supreme Court concluded that until a 2011 Reapportionment Plan “with the force of law” is approved, the 2001 Plan “shall remain in effect.” *Id.* at 711.

Subsequently, in an opinion filed on February 3, 2012, which clarified and supported its earlier order of January 25, 2012, the Pennsylvania Supreme Court set forth its guidance for the upcoming remap by Defendant 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION. *See Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 716 (Pa. 2012). The Pennsylvania Supreme Court essentially concluded that the overall 2011 plan failed to abide by the State constitutional mandate in Article II, Section 16 to respect the boundaries of political subdivisions. Critically for the purposes of Plaintiffs' motion herein, the Pennsylvania Supreme Court only addressed the contours of the Pennsylvania Constitution and concluded that “[f]irst, and most simply, we reemphasize the importance of each of the mandates in Article II, Section 16 . . . [which] by its terms does not require that the overriding objective of reapportionment is equality of population.” *Id.* at 759 (internal quotes and citations omitted).

Regardless of how the Pennsylvania Supreme Court reassessed the constitutional mandate of Article II, Section 16, the most important decision it made was a non-decision. The court decided not to provide any guidance regarding the imminent political calendar and the April 24, 2012 primary election date, in particular it stated:

“[w]e are not in a position to predict when the [Legislative Reapportionment Commission] will complete its task of developing a new final redistricting plan that complies with the law, nor when such a new plan can become final and have force of law. Any issues respecting deferring the state legislative primary, or scheduling special elections, etc., are, in the first instance, the concern and province of the political branches. Such questions have not been briefed and presented to this Court.”

Id. at 761 (footnotes omitted).

Accordingly, the April 24, 2012 state legislative primary elections proceeded based on 2001 apportionment lines.³

³ Pennsylvania Department of State Elections Information, Official Returns for 2012 General Primary for Senator in the General Assembly (Apr. 24, 2012),

Though the Legislative Reapportionment Commission issued a revised final reapportionment plan on June 8, 2012⁴, as of the date of this filing, there is no 2011 Legislative Redistricting Plan that truly has the full force and effect of law given that the thirty-day period within which any aggrieved person may file an appeal to the Pennsylvania Supreme Court has not yet lapsed. *See* Pa. Const. art. II, § 17(d). This reapportionment plan will, therefore, only have the force of law when the Supreme Court has “finally decided” any appeal filed in connection with it, or when the time for filing an appeal has passed with no appeal being taken. *See id.* at § 17(e). Given these procedural hurdles, the January 25, 2012 order of the Pennsylvania Supreme Court, which was not vitiated by the court’s opinion of February 3, 2012, clearly states 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.” *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711, 715 (Pa. 2012).

2. Proceedings to Date

a. The Complaint

On February 2, 2012, Joe Garcia, Fernando Quiles and Dalia Rivera Matias, filed their complaint against the 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION, and Defendant CAROLE AICHELE, in her capacity as Secretary of the Commonwealth of Pennsylvania and Chief Election Officer of the Commonwealth of Pennsylvania. In that matter, Plaintiffs allege violations of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Section 2 of the Voting Rights Act of 1965. (Compl. ¶¶ 50-53.)

<http://www.electionreturns.state.pa.us/ElectionsInformation.aspx?FunctionID=13&ElectionID=45&OfficeID=12>; Pennsylvania Department of State Elections Information, Official Returns for 2012 General Primary for Representative in the General Assembly (Apr. 24, 2012),

<http://www.electionreturns.state.pa.us/ElectionsInformation.aspx?FunctionID=13&ElectionID=45&OfficeID=13>).

⁴ Press Release, 2011 Reapportionment Commission (Jun. 8, 2012),

<http://www.redistricting.state.pa.us/Resources/Press/2012-06-14-Press-Release.pdf>.

Plaintiffs requested various forms of relief, among them that this Court assume jurisdiction of the matter and empanel a three-judge court pursuant to 28 U.S.C. § 2284. Plaintiffs also requested that the court issue an order invalidating and enjoining the 2011 Reapportionment Plan as malapportioned and dilutive of Latino voting rights and mandate that a new legislative redistricting plan be timely enacted for the 2012 elections in April and November. Plaintiffs alternatively requested that a Special Master be instructed to oversee the state redistricting process. (*Id.* at ¶ 2.)

b. Motion for Temporary Restraining Order and for Convening of a Three-Judge Panel

On February 6, 2012, the Plaintiffs filed a Motion for Temporary Restraining Order and for Convening of Three-Judge Panel, requesting that the Defendants be enjoined from calling, holding, supervising or certifying any forthcoming Pennsylvania elections using the 2001 Plan given the unconstitutionality of conducting the 2012 election using the outdated 2001 Plan. (Doc. 2.) A hearing on Plaintiffs' Motion was held on February 6, 2012. (Doc. 5.)

At the hearing, the court also addressed two related pending motions filed in *Pileggi et al v. Aichele*, No. 12-0588 (E.D.Pa. Feb. 3, 2012) (hereinafter "Pileggi") and *Smith v. Aichele*, No. 12-488 (E.D.Pa. Jan. 30, 2012) (hereinafter "Smith") regarding the upcoming Pennsylvania election. Specifically, in *Pileggi*, Plaintiffs Senator Dominic Pileggi, Representative Michael Turzai and Louis B. Kupperman filed a complaint seeking to prevent Defendant AICHELE from administering the upcoming election given that the 2001 Plan violated the one person, one vote mandate of the Constitution. (*See* Doc. 10 (Mem. Op.)) Pileggi Plaintiffs also filed a related Motion for Temporary Restraining Order, Preliminary and Permanent Injunction and for Convening of Three-Judge Panel, which the Court heard on February 6, 2012. (*See id.*) In *Smith*, Pennsylvania House Speaker Samuel H. Smith filed a lawsuit in his official capacity

against Defendant Aichele. Smith, who is not a member of the Legislative Reapportionment Commission sought a declaratory judgment that using the 2001 Plan in future elections would violate both the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Equal Protection provisions of the Pennsylvania Constitution. (*See* Doc. 10 (Mem. Op.)) Accordingly, on February 3, 2012, Plaintiff Smith filed a Motion to Convene a Three-Judge Panel. (*See id.*)

The court denied all three motions in a joint February 8, 2012 Memorandum opinion, reasoning that because there was no readily available alternative redistricting plan, the harm to the public in delaying either the primary or the general election substantially outweighs the likely benefit to the Plaintiffs in granting a preliminary injunction. (*See generally* Doc. 10.)

3. Allowing the 2012 legislative election to proceed as scheduled using the 2001 Reapportionment Plan for a full term will violate the One Person, One Vote Doctrine.

Using the 2001 Plan, based on 2000 census data, for the upcoming 2012 election cycle will result in severe malapportionment given the current demographic realities of the 2010 Census. As explained in further detail below, the constitutional jurisprudence in this area requires compliance with the one person, one vote doctrine, which when practically applied attempts to achieve an equal population standard among all voting districts were possible. (*See* Argument I(a), *infra* at 12-15.)

Because Pennsylvania now has a total population of 12,702,379 according to the 2010 census, the ideal population sizes of its 203 State House and 50 State Senate districts are 62,573 and 254,048, respectively. (Ross Decl. at ¶7). Consequently, applying 2010 census population information to the 2002 districts currently in place, based on 2000 census data, reveals extreme deviations from the above referenced 2010 equal population standard calculations, overall as well as by region. (*Id.* at ¶6.)

Based on these figures, the House currently contains districts with deviations as high as 24.3% and as low as -18.5%. (*Id.* at ¶8.) Specifically, House District 13 in Chester County is over-populated by 15,204 persons for a deviation of 24.3%, while House District 24 in Allegheny County is under-populated by 11,569 persons for a deviation of 18.5%. (*Id.*) The Senate, in turn, contains districts with deviations as high as 13.6% and as low as -15.8%. (*Id.* at ¶9.) Senate District 44 encompassing Berks, Chester and Montgomery Counties is over-populated by 34,626 persons, yielding a deviation of 13.6%. (*Id.*) Senate District 38 covering Allegheny, Armstrong, and Westmoreland Counties, meanwhile, is under-populated by 40,058 persons for a deviation of 15.8%. (*Id.*) Total deviations, calculated using the difference between the highest and lowest district deviation percentages for each house, are 42.8% and 29.4% for the House and Senate, respectively. (*Id.* at ¶10.) Deviations this large clearly establish a *prima facie* case of an Equal Protection Clause violation. (*See* Argument I(a), *infra* at 12-15.)

In addition to these egregious equal population deviations by district, Latinos are specifically affected by the use of the 2001 Plan in the upcoming 2012 election given that the Latino population grew statewide by 325,572 since 2000, an increase of over 82%. (Ross Decl. at ¶11.) During this time, however, Pennsylvania's total population grew by just over 3%. (*Id.*) Whereas in 2000, Pennsylvania's 394,088 Latinos comprised 3.2% of the total population, in 2010 the state contained 719,660 Latinos, or 5.7% of the total population. (*Id.*) Further, at the county level, this Latino population increase was the highest in Lehigh, Berks, and Philadelphia counties and driven by large Latino growth within the cities of Allentown, Reading, and Philadelphia. (*Id.*)

Specifically, in Allentown, Pennsylvania (located within Lehigh County, containing part of Senate district 16 and all or part of House districts 131, 132, 133, and 135), the total

population in 2010 was 118,032, with Latinos numbering 50,461, or 42.8% of the total population. (*Id.* at ¶13.) In Reading, Pennsylvania (situated within Berks County, containing part of Senate district 11 and part of House districts 126 and 127), the total population in 2010 was 88,082 and Latinos numbered 51,230, or 58.2% of the total population. (*Id.* at ¶14.) Finally, in Philadelphia (located within Philadelphia County and containing all or part of House districts 154, 169, 170, 172-175, 177, 179-182, 184-186, 188, 190, 192, 194, 195, 197, 198, and 200-203 and Senate districts 1-5, 7, and 8), the Latino population has increased by more than 45%, a rate much higher than the overall growth rate of the city. (*Id.* at ¶12.) Consequently, in Philadelphia, in 2010, Latinos numbered 187,611, or over 12% of the city's total population. (*Id.*)

Further, using 2001 reapportionment districts in 2012 elections would also result in a high degree of regional malapportionment in the Berks and Lehigh areas predominated by Latinos – these counties are highly overpopulated compared to districts in other areas of the state. (*Id.* at ¶15.) Specifically, the average deviations from the ideal district size for districts in Berks and Lehigh counties are significantly above average of the deviations of districts in other areas of the state. (*Id.*) The average Berks/Lehigh House and Senate deviation percentages of 7.831% and 8.631%, respectively, contrast sharply with the low, negative average deviations of districts in the rest of the state, which are -0.580% for the State House and -1.405% for the State Senate. (*Id.*) Further, there are two current House districts, districts 132 and 133, that overlap Berks and Lehigh counties, and are entirely contained by those counties, whose average deviation of 10,560, or 16.9% is exceptionally high. (*Id.*)

Yet, despite this rapid Latino population growth in the Commonwealth over the past decade, comprising 719,660 or 5.7% of the Commonwealth's total population (*Id.* at ¶11), and

increasing numbers of Latino registered voters, Latino political representation has not increased at an equivalent pace (*see generally* Garcia Decl.). There are currently no majority Latino Senate districts. (*See generally id.*) There is currently only one majority Latino district in the House, the 180th district in Philadelphia. (*Id.* at ¶9.) These facts notwithstanding, there are current areas of new Latino population growth within the state (Ross Decl. at ¶¶11-14; Garcia Decl. at ¶¶6-8) allowing for the creation of four Latino majority districts within the State House (Garcia Decl. at ¶¶9-11).

Furthermore, Plaintiffs are not the only voters in Pennsylvania whose constitutional rights are at stake in this action. They figuratively represent hundreds of thousands of similarly situated voters whose rights to vote are weighted equally with respect to other voters. Therefore, while the 2012 election must proceed under the 2001 Plan given the public interest in an orderly election process and in voters' participation in the 2012 election, under no circumstances should the upcoming 2012 election results be allowed to stand until the next regularly scheduled election in 2014 given the persistent malportionment among voting districts described above. (*See Statement of Facts* at 7-9.) Should the results of the 2012 election, based on 2001 legislative districts, be allowed to stand until the next regularly scheduled election in 2014, Latinos as well as all Pennsylvania voters are at risk. Accordingly, because all 203 members of the State House and half of the State Senate will be elected in the upcoming 2012 election⁵ using the 2001 Plan and the state primary election regarding these positions has already been held using 2001 district lines⁶, Plaintiffs seek a special election in 2013 held in connection with

⁵ Pa. Const. art. II, § 3.

⁶ Pennsylvania Department of State Elections Information, Official Returns for 2012 General Primary for Senator in the General Assembly (Apr. 24, 2012), <http://www.electionreturns.state.pa.us/ElectionsInformation.aspx?FunctionID=13&ElectionID=45&OfficeID=12>; Pennsylvania Department of State Elections Information, Official Returns for 2012 General Primary for Representative in the General Assembly (Apr. 24, 2012), <http://www.electionreturns.state.pa.us/ElectionsInformation.aspx?FunctionID=13&ElectionID=45&OfficeID=13>).

upcoming statewide 2013 municipal primaries regarding State Senate Seats for Districts 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49 and State Assembly Seats for Districts 1 through 203. At such time, representatives to these legislative positions may be selected using a valid 2011 Reapportionment Plan based on the 2010 census. Finally, in the event that the revised final reapportionment plan is ultimately rejected by the Pennsylvania Supreme Court, Plaintiffs request that this Court set and enforce a deadline by which the Defendant 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION must enact a new district plan so that the proposed 2013 special election may, nevertheless, occur in connection with the upcoming statewide 2013 municipal primary.

ARGUMENT

1. Plaintiffs Satisfy All Requirements for the Issuance of a Mandatory Preliminary Injunction.

Permissive preliminary injunctions require a showing of four factors by Plaintiffs: 1) whether they can show a reasonable probability of success on the merits; 2) whether they can make a showing of irreparable harm; 3) whether granting preliminary injunctive relief results in greater harm to the non-moving party; and 4) whether granting preliminary injunctive relief is in the public interest. *Child Evangelism Fellowship of N.J. Inc. v. Stafford Township School*, 386 F.3d 514, 524 (3d Cir. 2004). Mandatory preliminary injunctions, by contrast, which seek to alter the status quo by some affirmative court-ordered action, are only granted when the facts and the law are clearly in favor of the moving party. *See e.g., Mclaughlin v. Pernsley*, 693 F. Supp. 318 (E.D.Pa 1988). As set forth below, Plaintiffs can meet each of these elements – both as to permissive and mandatory relief sought.

- a. Plaintiffs have established a *prima facie* case regarding the violation of the One Person, One Vote doctrine of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Plaintiffs can clearly show that the 2001 Plan is severely malapportioned according to the 2010 Census and therefore in violation of the One Person, One Vote doctrine derived from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment has been interpreted to require “that the vote of any citizen [be] approximately equal in weight to that of any other citizen in the State,” which is achieved through substantial population equality among the various state legislative voting districts. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). As a result, an “individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of [other] citizens.” *Id.* at 568. Under this one-person, one-vote doctrine, each state is required to “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.” *Id.*

Given its focus on “substantial equality,” the United States Supreme Court has found that apportionment plans with population deviations under 10% from precise equality will not result in a *prima facie* case of discrimination. Such plans are generally acceptable, unless they are the product of racial gerrymandering or other “political” considerations. *See, e.g., Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996). These minor deviations are ordinarily tolerated as it may be “a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters.” *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)(“Mathematical exactness or precision is hardly a workable constitutional requirement.”) Further, such deviations may also be necessary to permit states to pursue other legitimate objectives such as “[maintaining] the integrity of various political subdivisions” and “[providing] for compact

districts of contiguous territory.” *Id.* at 578. Notwithstanding, compliance with this “ten percent rule” does not create a safe harbor, precluding further constitutional inquiry. Instead, there is still the matter of whether a state has complied with the “good faith effort” to achieve “as nearly of equal population as is practicable.” *Id.* at 577. Consequently, given this standard, numerous courts have nevertheless rejected plans with deviations below 10%. *See Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (three-judge panel), *summarily aff’d*, 542 U.S. 947 (2004) (finding that though population deviations were just below 10 percent, the state legislative plan violated the Equal Protection Clause of the Fourteenth Amendment as it lacked an honest and good faith effort to construct equal district and originated from an effort to favor rural areas and to protect Democratic incumbents, rather than further a legitimate or consistently applied state policy); *Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 311-12 (E.D.N.Y. 2003) (finding claims where deviation is less than ten percent justiciable if some other discriminatory purpose is shown over and above obvious political motivations); *Licht v. Quattrocchi*, 449 A.2d 887 (R.I. 1982) (finding deviation of five percent to violate one-person, one-vote requirement because deviation “negated the effects of reapportionment”); *Fund for Accurate & Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662, 668 (N.D.N.Y.) (three-judge court), *aff’d mem.*, 506 U.S. 1017 (1992) (finding that “if the plaintiff can present compelling evidence that the drafters of the plan ignored all the legitimate reasons for population disparities and created the deviations solely to benefit certain regions at the expense of others,” a one-person, one-vote action will lie even with deviations below ten percent.)

By contrast, apportionment plans with population disparities greater than 10% create a *prima facie* case of discrimination, which must therefore be justified by the State. *See Swan v. Adams*, 385 U.S. 440, 444 (1967) (“De minimis deviations are unavoidable, but variations of