UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

----------X JOE GARCIA, FERNANDO QUILES, DALIA RIVERA MATIAS, 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. ----------X	Civil Action No. 12-0556 RBS

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(1)

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Plaintiffs, through undersigned counsel, submit this Memorandum of Law and Proposed Order in Support of Plaintiffs' Opposition To Defendant 2011 Legislative Reapportionment Commission's Motion To Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. P. 12(B)(1).

PRELIMINARY STATEMENT

Plaintiffs filed this action to remedy the unconstitutional quagmire in which they and other Pennsylvania voters find themselves, one in which Pennsylvania's 2012 state legislative elections will occur based on 2001 reapportionment district lines in violation of the One Person, One Vote doctrine of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This representational dilemma arose out Defendant 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION ("Defendant 2011 LRC") failing to reapportion the State's legislative districts in a timely fashion to garner the approval of the Pennsylvania Supreme Court, who found their first plan "contrary to law" on January 25, 2012 and thereby ordered that the 2001 Plan would remain in effect until a new 2011-12 Reapportionment Plan with the force of law was approved. As a result, 2012 state legislative elections will take place using the 2001 Plan due to Defendant 2011 LRC's failure to promulgate a properly approved 2011 Reapportionment map.

Though the Legislative Reapportionment Commission issued a Revised Final Reapportionment Plan on June 8, 2012, as of the date of this filing, there is still no approved 2011 Legislative Redistricting Plan that currently has the full force and effect of law given that thirteen petitions challenging the Revised Final Reapportionment Plan have been filed with the Pennsylvania Supreme Court. Therefore, contrary to the position asserted in its Motion to Dismiss, Defendant 2011 LRC has not yet successfully discharged its obligations under the Pennsylvania Constitution. As with the Original 2011 Final Reapportionment Plan, the

Pennsylvania Supreme Court may well find that this Revised Final 2011 Plan is contrary to law and issue an order remanding the Revised Final 2011 Plan to Defendant 2011 LRC with orders to reapportion the Commonwealth once more.

Consequently, Plaintiffs maintain that Defendant 2011 LRC is an indispensable party to Plaintiffs' suit over which this Court has subject matter jurisdiction. Though the special election relief recently requested by Plaintiffs is within the exclusive province of Defendant AICHELE, a properly approved and legally valid 2011 Reapportionment Plan is nevertheless a precondition to that remedy and presently lacking. Only Defendant 2011 LRC can prepare the Reapportionment Plan upon which the special election will be based. Without a valid Reapportionment Plan in place, Plaintiffs' requested remedy of a special election to address the injury alleged in this matter, namely the current 2012 elections proceeding under the 2001 Reapportionment Plan, cannot occur. This injury is directly traceable to Defendant 2011 LRC's inaction and delay in drafting an appropriate plan capable of surviving judicial scrutiny to date. Accordingly, in the event that the Revised Final Plan is again found by the Pennsylvania Supreme Court to be contrary to law, a favorable decision with respect to Defendant 2011 LRC in the form of an order to timely promulgate a lawful Reapportionment Plan by a date certain to permit the special election to proceed as requested will redress Plaintiff's injury. Consequently, Plaintiffs' complaint and preliminary injunction motion are not moot given the uncertain status of Defendant 2011 LRC's Revised Final Reapportionment Plan.

STATEMENT OF FACTS

While Defendant 2011 LRC correctly identifies the constitutional language governing the Pennsylvania Legislative Reapportionment Process (*see* Doc. 21 at 2-4, Section II., Background), its interpretation of precisely when the reapportionment "clock" began to run under the Pennsylvania Constitution is flawed. (*See* Statement of Facts, Section 1(c), *infra* at 4.) Further, Defendant 2011 LRC ignores two key factual developments in this case. First, that thirteen Pennsylvania Supreme Court petitions were recently filed regarding Defendant 2011 LRC's Revised Final 2011 Plan, holding the Revised Plan's enforceability in abeyance until such time as the Pennsylvania Supreme Court issues its decision. (*See* Statement of Facts, Section 1(e), *infra* at 7). Second, Defendant 2011 LRC does not address that Plaintiffs recently filed a preliminary injunction motion requesting a special election remedy to cure the equal protection violations alleged to which a properly approved and legally valid 2011 Reapportionment Plan is a necessary precondition. (*See* Statement of Facts, Section 2, *infra* at 8; *see also* Doc. 19). Accordingly, Plaintiffs below address the 2011 Reapportionment Process as well as Plaintiffs' recently filed preliminary injunction motion as these elements were omitted by Defendant 2011 LRC in its motion to dismiss.

1. The 2011 Legislative Redistricting Process

a. Availability of Federal Census Data

On December 21, 2010, apportionment counts for determining federal legislative representation (total population by state plus those individuals living abroad) were released by U.S. Census Bureau. On January 13, 2011 2010 TIGER/line Shapefiles for Pennsylvania

released by U.S. Census Bureau.[1] Finally, on March 09, 2011, L94-171 population data for Pennsylvania was released by the U.S. Census Bureau.[2]

b. Composition of Defendant 2011 LRC

On February 18, 2011, within the sixty days from the release of "the official reporting of the Federal decennial census as required by Federal law" on December 21, 2010, State Legislative Leaders certified four of the five members of the 2011 Legislative Reapportionment Commission.[3] *See* Pa. Const. art. II, § 17(b). Though the Legislative Reapportionment Commission was obligated by the Constitution to select its final member and Chair forty-five days later by April 4, 2011, it was unable to do so[4] such that its final member was ultimately appointed by the Pennsylvania Supreme Court on April 19, 2011 within the resulting thirty-day period proscribed.[5] *Id*. Consequently, as of April 19, 2011, Defendant 2011 LRC was properly certified.[6] *Id.*

c. Defendant 2011 LRC Prepares its First Reapportionment Plan

Per Section 17(c) of Article II of the Pennsylvania Constitution and the aforementioned dates, Defendant 2011 LRC had until July 18, 2011 to file a preliminary reapportionment plan.

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[1] 2011 Legislative Reapportionment Commission, Recent Updates, http://www.redistricting.state.pa.us/ (last visited Aug. 13, 2012).

[2] Press Release, 2011 Legislative Reapportionment Commission, *Legislative Reapportionment Commission to Hold First Public meeting on March 23* (Mar. 16, 2011), http://www.redistricting.state.pa.us/Press/ViewArticle.cfm?ID=1006; *see also Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 716, 719 (Pa. 2012).

[3] Press Release, 2011 Legislative Reapportionment Commission, *Legislative Leaders certified as Members of the 2011 Legislative Reapportionment Commission* (Feb. 18, 2011), http://www.redistricting.state.pa.us/Press/ViewArticle.cfm?ID=1004.

[4] 2011 Legislative Reapportionment Commission, Recent Updates, http://www.redistricting.state.pa.us/ (last visited Aug. 13, 2012).; *see also Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 716, 719 (Pa. 2012).

[5] Press Release, 2011 Legislative Reapportionment Commission, *PA Supreme Court Appoints Judge McEwen to Chair Legislative Reapportionment Commission* (Apr. 19, 2011), http://www.redistricting.state.pa.us/Resources/Press/SupremeCourtAppointsChairman.pdf; *see also Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 716, 719 (Pa. 2012).

[6] Press Release, 2011 Legislative Reapportionment Commission, *PA Supreme Court Appoints Judge McEwen to Chair Legislative Reapportionment Commission* (Apr. 19, 2011), http://www.redistricting.state.pa.us/Resources/Press/SupremeCourtAppointsChairman.pdf; *see also Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 716, 719 (Pa. 2012).

See Pa. Const. art. II, § 17(c) ("No later than ninety days after either the commission has been duly certified [in this case, April 19, 2011] or the population data for the Commonwealth as determined by the Federal decennial census are available [in this case, March 9, 2011], whichever is later in time, the commission shall file a preliminary reapportionment plan with such elections officer.") Yet despite having the requisite L94-171 population data for Pennsylvania as of March 9, 2011 and this clearly stated constitutional deadline, Defendant 2011 LRC did not conclude that 2010 census data was in usable form until five months later on August 17, 2011.[7] Moreover, a preliminary plan was not filed until October 31, 2011 – approximately four months after the explicit constitutional deadline of July 18, 2011.[8] *See id.* Finally, it was not until December 12, 2011 that Defendant 2011 LRC adopted its final plan for 2011.[9]

d. Appeals Regarding Defendant 2011 LRC's First Reapportionment Plan

Twelve petitions challenging the Final Reapportionment Plan were, in turn, filed with the Pennsylvania Supreme Court, placing the finality of the 2011 Plan in doubt.[10] On January 25,

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[7] Agenda, 2011 Legislative Reapportionment Commission (Aug. 17, 2011), http://www.redistricting.state.pa.us/Resources/Press/2011-08-17_Agenda_and_Final_Resolutions-2.pdf; *see also Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 716, 719 (Pa. 2012).

[8] Press Release, 2011 Legislative Reapportionment Commission (Nov. 7, 2011), http://www.redistricting.state.pa.us/Resources/Press/2011-11-18%20LRC%20Press%20Release.pdf.; *see also Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 716, 720 (Pa. 2012)

[9] Press Release, 2011 Legislative Reapportionment Commission, *Final Reapportionment Plan Approved for State House and Senate* (Dec. 15, 2011), http://www.redistricting.state.pa.us/Resources/Press/2011-12-15%20-%20Final%20Reapportionment%20Plan%20News%20Release%20-%20FINAL.pdf; *see also Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 716, 720 (Pa. 2012).

[10] *See e.g.*, *Mayor Comitta, et al v. 2011 Legislative Reapportionment Commission*, 2 MM 2012 (Pa. Jan. 10, 2012); *Mayor Scoda, et al v. 2011 Legislative Reapportionment Commission*, 3 MM 2012 (Pa. Jan. 10, 2012); *Schiffer, et al v. 2011 Legislative Reapportionment Commission*, 4 MM 2012 (Pa. Jan. 10, 2012); *Alosi v. 2011 Legislative Reapportionment Commission*, 10 MM 2012 (Pa. Jan. 11, 2012); *Baylor v. 2011 Legislative Reapportionment Commission*, 9 MM 2012 (Pa. Jan. 11, 2012); *Bradley, et al. v. 2011 Legislative Reapportionment Commission*, 8 MM 2012 (Pa. Jan. 11, 2012); *Coles, et al, v. 2011 Legislative Reapportionment Commission*, 5 MM 2012 ({Pa. Jan. 11, 2012); *Costa, et al. v. 2011 Legislative Reapportionment Commission*, 1 WM 2012 (Pa. Jan. 10, 2012); *Holt, et al v. 2011 Legislative Reapportionment Commission*, 7 MM 2012 (Pa. Jan. 11, 2012); *Kim, v. 2011 Legislative Reapportionment Commission*, 6 MM 2012 (Pa. Jan. 11, 2012); *Kortz, et al. v. 2011 Legislative Reapportionment Commission*, 4 WM 2012 (Pa. Jan. 11, 2012); *Zayas v. 2011 Legislative Reapportionment Commission*, 17 MM 2012 (Pa. Jan. 11, 2012).

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 ("Holt I")*, 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 Court elaborated that the overall 2011 Plan contained numerous political subdivision splits that were not absolutely necessary, and failed to abide by the State constitutional mandate in Article II, Section 16 to respect the compactness, contiguity, and integrity of political subdivisions. *See Holt v. 2011 Legislative Reapportionment Commission ("Holt II")*, 38 A.3d 716, 759 (Pa. 2012). In this subsequent decision, the Court declined to provide any guidance for the upcoming remap by Defendant 2011 LRC, the imminent political calendar, or the then upcoming April 24, 2012 primary election date, deeming those issues to be within the "province of the political branches" and not properly briefed and presented to the Court. *See id*. at 761. Accordingly, the April 24, 2012 state legislative primary elections proceeded based on 2001 apportionment lines.[11]

[11] 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).

e. Appeals Regarding Defendant 2011 LRC's Second Reapportionment Plan

On April 12, 2012, Defendant 2011 LRC filed its Revised Preliminary Plan with the Pennsylvania Department of State.[12] On June 8, 2012, Defendant 2011 LRC issued its Revised Final Reapportionment Plan[13]. However, as of the date of this filing, there is still no final approved 2011 Legislative Redistricting Plan that currently has the full force and effect of law given that thirteen petitions challenging the Revised Final Reapportionment Plan were filed with the Pennsylvania Supreme Court by the applicable July 9, 2012 thirty-day review deadline.[14] Pa. Const. art. II, § 17(d)-(e). Per the Pennsylvania Supreme Court's order consolidating all of the appeals filed, following full briefing, oral argument regarding these cases will be heard during their September Argument Session in Philadelphia. *See e.g*. Consolidation Order, *Vargo, et al. v. 2011 Legislative Reapportionment Commission*, 42 WM 2012 (Pa. Jul. 10, 2012).

Consequently, this Revised Final Reapportionment Plan will only have the force of law when the Supreme Court has "finally decided" these thirteen current appeals. Pa. Const. art. II, § 17(e). Therefore, per the January 25, 2012 order of the Pennsylvania Supreme Court, which was not vitiated by the court's opinion of February 3, 2012, the 2001 Legislative Reapportionment

[12] Press Release, 2011 Legislative Reapportionment Commission, (Apr. 13, 2011), http://www.redistricting.state.pa.us/Resources/Press/2012-04-13-Press-Release.pdf.

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

[14] *Baylor v. 2011 Legislative Reapportionment Commission*, 126 MM 2012 (Pa. Jul. 3, 2012); *Sabatina & Caltagirone v. 2011 Legislative Reapportionment Commission*, 127 MM 2012 (Pa. Jul. 5, 2012); *Schiffer, et al. v. 2011 Legislative Reapportionment Commission*, 128 MM 2012 (Pa. Jul. 6, 2012); *Amadio v. 2011 Legislative Reapportionment Commission*, 40 WM 2012 (Pa. Jul. 9, 2012); *Brown, et al. v. 2011 Legislative Reapportionment Commission*, 130 MM 2012 (Pa. Jul. 09, 2012); *Costa, et al. v. 2011 Legislative Reapportionment Commission*, 39 WM 2012 (Pa. Jul. 06, 2012); *Cruz, et al. v. 2011 Legislative Reapportionment Commission*, 132 MM 2012 (Pa. Jul. 9, 2012); *Doherty, et al. v. 2011 Legislative Reapportionment Commission*, 131 MM 2012 (Pa. Jul. 09, 2012); *Holt, et al. v. 2011 Legislative Reapportionment Commission*, 133 MM 2012 (Pa. Jul 9, 2012); *Kim v. 2011 Legislative Reapportionment Commission*, 129 MM 2012 (Pa. Jul. 9, 2012); *Lattanzi v. 2011 Legislative Reapportionment Commission*, 41 WM 2012 (Pa. Jul. 9, 2012); *Shapiro, et al. v. 2011 Legislative Reapportionment Commission*, 134 MM 2012 (Pa. Jul. 9, 2012); *Vargo, et al. v. 2011 Legislative Reapportionment Commission*, 42 WM 2012 (Pa. Jul. 9, 2012).

Plan, "shall remain in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved." *Holt I*, 38 A.3d at 715.

2. Plaintiffs' Motion for a Preliminary Injunction[15]

On June 29, 2012, Plaintiffs moved for a preliminary injunction, requesting 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. Accordingly, Plaintiffs requested that Defendant CAROLE AICHELE be ordered to hold a special election in 2013, in connection with 2013 Pennsylvania Municipal Primaries regarding those state legislative seats currently subject to election.[16] (Doc. 19.) Plaintiffs' motion also requested that Defendant 2011 LRC be ordered to issue an approved 2011 Legislative Reapportionment Plan by a date certain to enable the special election to occur, in the event that the Pennsylvania Supreme Court ultimately rejects the Revised Final Reapportionment Plan. (*Id*.)

ARGUMENT

I. Plaintiffs Have Article III Standing Over Defendant 2011 LRC.

In its apparent factual attack[17] upon this Court's subject matter jurisdiction to hear Plaintiffs' claims, based on allegations of insufficient standing, Defendant 2011 LRC

[15] For a full summary of the proceedings to date in this action, Plaintiffs refer the Court to its recently filed Preliminary Injunction Motion. (*See* Doc. 19.)

[16] 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.

[17] While Defendant 2011 LRC fails to specify the exact nature of its Fed. R. Civ. P. 12(b)(1) attack in its motion (s*ee generally* Doc. 21), it would appear that the attack is factual in nature given that Defendant 2011 LRC is alleging "the actual failure of [Plaintiffs'] claims to comport factually with the jurisdictional prerequisites." *United States DOT ex rel. Arnold v. CMC Eng'g*, 745 F. Supp. 2d 637, 641 (W.D. Pa. 2010) (citing *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) and *Gibbs v. Buck*, 307 U.S. 66, 72, 59 S. Ct. 725, 83 L. Ed. 1111 (1939)); (s*ee generally* Doc. 21). Further support for this conclusion lies in the fact that in support of its motion, Defendant 2011 LRC refers to facts extrinsic to the complaint via the declaration annexed to its motion. *See e.g.* Doc. 21-1 (Declaration of Charles E. O'Connor, Jr.); *Petruska v. Gannon Univ.*, 462 F.3d 294, 302, n.3 (3d Cir.

mischaracterizes both the injuries alleged in Plaintiffs' complaint as well as recent factual developments that maintain rather than undermine Plaintiffs' standing over Defendant 2011 LRC. As Defendant 2011 LRC mistakenly interprets Plaintiffs' complaint, it played no role in Plaintiffs' injury, namely the 2012 state elections proceeding under the 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. (Doc. 21 at 12.) Instead, Defendant 2011 LRC maintains that it discharged its obligations to create a reapportionment plan under the Pennsylvania Constitution only to have the Pennsylvania Supreme Court independently conclude that its plan was contrary to law and that the 2001 Plan would remain in effect until a Revised Final 2011 Plan having the force of law was finally issued. (*Id*. at 13-14.) Consequently, having recently issued a Revised Final 2011 Plan, Defendant 2011 LRC believes that any relief sought against them by Plaintiff is now moot. (*Id*. at 12.) Notwithstanding its characterization of the complaint, Defendant 2011 LRC misses certain key facts alleged by Plaintiffs. Specifically, that Defendant 2011 LRC's delay in timely issuing a reapportionment plan resulted in the 2001 Plan remaining in effect during the 2012 election given that insufficient time was allotted for any appeals regarding the 2011 Plan to be addressed in time for the 2012 elections. (*See* Doc. 1 ¶ 22; *see* Statement of Facts, Section 1(c), *supra* at 4.) Further, Defendant 2011 LRC's motion ignores two significant factual developments in this case. First, that thirteen Pennsylvania Supreme Court petitions were recently filed regarding Defendant 2011 LRC's Revised Final 2011 Plan (*see* Statement of Facts, Section 1(e), *supra* at 7) such that there is still no 2011 Plan that currently has the full force and

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2006) (noting that a factual attack is one based on facts extrinsic to the complaint); *see also Apex Digital, Inc. v. Sears, Roebuck & Co*., 572 F.3d 440, 444 (7th Cir. 2009) (explaining that a 12(b)(1) factual attack occurs when a plaintiff sufficient alleges subject-matter jurisdiction but a defendant contends that there is "in fact" no subject-matter jurisdiction through a separate offer of proof.) A facial attack, by contrast, occurs where a defendant asserts that the allegations of the complaint are insufficient to establish jurisdiction. *U.S. ex rel. Atkinson v. Pa. Shipbuilding Co*., 473 F.3d 506, 513 (3d Cir. 2007). Under those circumstances, the court may only consider the allegations of the complaint, and must do so in the light most favorable to plaintiff. *Id*.

effect of law until the Pennsylvania Supreme Court issues its ruling on the Revised Final 2011 Plan. Second, that Plaintiffs recently filed a preliminary injunction motion requesting a special election remedy to cure the equal protection violations alleged, which requires a Revised Final Plan with the full force and effect of law that only Defendant 2011 LRC can provide. (*See* Statement of Facts, Section 2, *supra* at 8; *see also* Doc. 19.) Consequently, despite Defendant 2011 LRC's characterization of the complaint and record to date, it remains integral to this case and the declaratory and injunctive relief sought by Plaintiffs.

Given Defendant 2011 LRC's erroneous description of the record, apparent from a review of the evidence proffered in connection with this opposition, Plaintiffs assert that they have established their standing to sue Defendant 2011 LRC and this Court's attendant subject matter jurisdiction by the applicable preponderance of the evidence standard. *See Irwin v. Veterans Admin*., 874 F.2d 1092, 1096 (5th Cir. 1989) ("[w]hen a defendant makes a 'factual attack' on the court's jurisdiction, the plaintiff must 'prove the existence of subject-matter jurisdiction by a preponderance of the evidence'"), *aff'd sub nom*., *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990); *see also Dev. Fin. Corp. v. Alpha Hous. & Health Care*, 54 F.3d 156, 158 (3d Cir. 1995) (as the party asserting jurisdiction, the plaintiff "bears the burden of showing that its claims are properly before the district court"); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)("[w]hen subject matter jurisdiction is challenged under 12(b)(1), the plaintiff must Bear the burden of persuasion"). In reviewing the evidence proffered by Plaintiffs in response to Defendant 2011 LRC's factual attack of the complaint on standing grounds, uncontroverted factual allegations are accepted as true. *United States DOT ex rel. Arnold v. CMC Eng'g*, 745 F. Supp. 2d 637, 641 (W.D. Pa. 2010) (citing *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) and *Gibbs v. Buck*, 307 U.S. 66, 72, 59 S. Ct.

725, 83 L. Ed. 1111 (1939)). The existence of disputed material facts, in turn, "will not preclude the trial court from evaluating for itself the merits of jurisdictional claims" as this Court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Petruska v. Gannon Univ.*, 462 F.3d 294, 302, n.3 (3d Cir. 2006) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884 at 891 (3d Cir. 1977).) Given the evidence available, much of it incontrovertible, Plaintiffs assert that they have successfully established standing over Defendant 2011 LRC.[18]

First, Plaintiffs have suffered an actual concrete injury-in-fact in the form of voter disenfranchisement resulting from the Commonwealth's use of an outdated 2001 Reapportionment Plan in the upcoming 2012 election. *Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 137-38 (3d Cir. 2009) (setting forth Article III standing elements: injury-in-fact, traceability/causation, and redressability.) Second, that injury is directly traceable to Defendant 2011 LRC's failure to fashion a reapportionment plan capable of surviving judicial scrutiny in time for use in the 2012 elections. *See id.* Third, in the event that the Revised Final Plan is found to be contrary to law, a favorable decision, in the form of an order to institute a lawful Reapportionment Plan by a date certain to permit the special election to proceed as requested, will redress Plaintiff's injury. *See id.* After all, a special election using 2011-2012 reapportionment lines will reflect populations shifts within the state that have occurred since the 2000 census, thereby addressing Plaintiff's equal protection claims.

[18] Unlike a motion to dismiss under Rule 12(b)(6), courts do not convert a Rule 12(b)(1) motion into a motion for summary judgment by considering matters outside the pleading, unless the jurisdictional question is intertwined with the merits of the case. *See e.g.*, 2-12 Moore's Federal Practice - Civil § 12.30 (citing *Kamen v. AT&T Co*., 791 F.2d 1006, 1011 (2d Cir. 1986) (submission of affidavits did not convert motion under Fed. R. Civ. P. 12(b)(1) into motion for summary judgment); *Stanley v. CIA*, 639 F.2d 1146, 1157 (5th Cir. 1980) (Fed. R. Civ. P. 12(b)(1) motion erroneously converted into one for summary judgment; when matters outside pleadings were considered, dismissal should have been for lack of jurisdiction); *Crawford v. United States*, 796 F.2d 924, 927 (7th Cir. 1986) (converting motion under Fed. R. Civ. P. 12(b)(1) to motion for summary judgment inconsistent with Fed. R. Civ. P. 12(b)); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of matters outside pleadings does not convert Fed. R. Civ. P. 12(b)(1) motion into one for summary judgment).

a. In failing to fulfill its reapportionment duties in a timely fashion, Defendant 2011 LRC injured Plaintiffs by thwarting the exercise of their fundamental right to vote.

Courts consistently find that plaintiffs alleging injury to their voting rights have standing to bring suit.[19] Plaintiffs' case is no different given that they face the prospect of using an outdated 2001 Reapportionment Plan for the 2012 election, effectively disenfranchising Latino voters given recent population changes within the state. (*See* Argument I(b) *infra* at 4.) To demonstrate injury-in-fact for standing purposes, all Plaintiffs need to do is allege a "threat" that their voting rights may be diluted. *Federal Election Comm'n v. Akins,* 524 U.S. 11, 21-25 (1998) (finding a minimal quanta of injury satisfied the injury-in-fact requirement for standing when a group of voters challenged the Federal Election Commission's determination that the American Israel Public Affairs Committee ("AIPAC") is not a "political committee" as defined by the Federal Election Campaign Act of 1971, and, therefore, did not need to make disclosures regarding its membership, contributions, and expenditures given that "there is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election.") ; *see also Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) ("[one] does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.") Notwithstanding, this threat must be "realistic" not

[19] *See e.g. Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124-25 (2000) (finding that though term-limit related ballot initiative applied only to those seeking election, Plaintiffs, alleging adverse impact upon registered voters who opposed the term limits pledge, or who support candidates who oppose the term limits pledge, had standing to challenge the initiative's constitutionality and seek a writ of prohibition given that it altered voter ballots to reflect which legislators had made and/or broken the term-limit pledge and therefore resulted in a "distinct palpable injury" to Plaintiffs' right to vote as that it would infringe on their ability to effectively cast votes by "greatly diminishing the likelihood [that] the candidate of their choice will prevail in the election" and constitute a state invasion of the privacy and sanctity of the voting booth); *Miller v. Moore*, 169 F.3d 1119, 1123 (8th Cir. 1999) (finding voters had standing to challenge ballot endorsement law).

"conjectural" or "hypothetical." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (finding that farmworkers had standing to challenge an agricultural employment relation statutory scheme, which designated procedures governing the election of employee bargaining representatives, given that the election procedures created "inescapable delays" that "preclude[ed] conducting an election promptly enough to permit participation by many farmworkers engaged in the production of crops having short seasons".)

The harm to Plaintiffs is certain as demonstrated by Plaintiffs' careful statistical analysis submitted in connection with their recent Motion for a Preliminary Injunction. In it, Plaintiffs demonstrated how using the 2001 Plan in the upcoming 2012 election will result in total population disparities for the State Senate at over 29% and for the State House at over 42%, well in excess of 10% deviation from precise population equality required to establish a *prima facie* case of discrimination under the Equal Protection Clause violation under the Fourteenth Amendment.[20] (*See generally* Doc. 19; Doc 19-1 at 4-32.) Further, Plaintiffs explained how using the 2001 Plan in the upcoming 2012 election will specifically affect them and other Latino voters within the state given Latino population growth in Lehigh, Berks, and Philadelphia counties. (*See generally* Doc. 19; Doc. 19-1 at 33-41.) Specifically, this growth would permit the creation of four Latino majority districts within the State House in the 197th and 180th districts benefiting Philadelphia County, the 22nd House district affecting Lehigh County, and the 127th House district pertaining to Berks County, otherwise benefiting Plaintiffs as residents of those areas.[21] (*See generally* Doc. 19; Doc. 19-1 at 33-41.) This data proves with complete

[20] Further, as already addressed in Plaintffs' recent preliminary injunction motion (Doc. 19), in response to Plaintiffs' *prima facie* showing, Defendants will be unable to present evidence of state policy considerations that explain this equal population disproportion. Given that the use of the 2001 Plan merely stemmed from the absence of a constitutionally approved 2011 Plan and encroaching 2012 election deadlines, and not on any conscious policy based state concern or objective, no justifications for the deviations at issue are plausible. (*See generally* Doc. 19.)

[21] "Plaintiff Joe Garcia is a Latino registered voter who resides in Philadelphia, Pennsylvania. He resides in the current 180th House District and the current 2nd Senatorial District. Mr. Garcia is a United States citizen and a

certainty the actual harm to Plaintiffs and other Latino voters resulting from Defendant 2011 LRC's actions required to establish injury-in-fact for standing. *See e.g. Department of Commerce v. United States House of Representatives, 525 U.S.* 316, 331-32 (1999) (finding that where Plaintiffs challenged the U.S. Census Bureau's intended use of statistical sampling methods to determine the 2000 census population and offered an extensive statistical analysis proving that Indiana would lose a State Representative to the United States Congress under the new proposed method, Plaintiffs had established standing given that "[w]ith one fewer Representative, Indiana residents' votes will be diluted" and that "the threat of vote dilution through the use of sampling is 'concrete' and 'actual or imminent, not 'conjectural' or 'hypothetical'.") (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

b. Plaintiffs' injury is fairly traceable to the challenged inaction of the Defendant 2011 LRC and not the result of the independent action of a third party not before the Court.

Though Defendant 2011 LRC attempts to characterize the Pennsylvania Supreme Court's decision to invalidate the Commission's First Plan and order that 2012 elections proceed under the 2001 Plan as an independent and direct intervening cause to Plaintiffs' representational dilemma (*see* Doc. 21 at 13-15), Plaintiffs' injury remains legally traceable to Defendant 2011 LRC's delay in drafting a timely reapportionment plan. "The fact that the harm to [Plaintiffs] may have resulted indirectly does not in itself preclude standing." *Warth v. Seldin*, 422 U.S. 490, 504 (1975). Instead, it is well established that "[w]hen a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the

registered voter." (Doc. 1 ¶7.) "Plaintiff Fernando Quiles is a Latino registered voter who resides in Philadelphia, Pennsylvania. He resides in the current 180th House District and the current 2nd Senatorial District. Mr. Quiles is a United States citizen and a registered voter." (Doc. 1 ¶8.) "Plaintiff Dalia Rivera Matias is a Latino registered voter who resides in Allentown, Pennsylvania. Upon information and belief she resides in the current 132nd House District and the 16th Senate District. Ms. Rivera is a United States citizen and a registered voter." (Doc. 1 ¶9.)

person harmed of standing to vindicate his rights. *Id*. at 505 (citing *Roe v. Wade*, 410 U.S. 113, 124 (1973). Accordingly, contrary to Defendant 2011 LRC's arguments, proximate cause is not required. 15-101 Moore's Federal Practice - Civil § 101.41 (citing cases *Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309, 346 (2d Cir. 2009), *rev'd on other grounds*, -- U.S. --, 180 L. Ed. 2d 435 (2011) (plaintiffs sufficiently alleged that current and future injuries were "fairly traceable" to carbon dioxide emissions of defendants; tort-like causation not required to establish standing); *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) ("Tracing an injury is not the same as seeking its proximate cause."; although defendant board's decision could be overridden by court, injury could still be traced to defendants because they significantly contributed to plaintiffs' alleged injuries); *Maya v. Centex Corp*., 658 F.3d 1060, 1070 (9th Cir. 2011) ("Defendants would have us require plaintiffs to demonstrate that defendants' actions are the 'proximate cause' of plaintiffs' injuries. Plaintiffs do not bear so heavy a burden."); *Smith v. Block*, 784 F.2d 993, 995 (9th Cir. 1986).

Further, a thorough review of case law reveals several examples where indirect injury was sufficient for standing purposes. In *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), Plaintiffs alleged that a 2.5 percent proposed nationwide railroad freight rate surcharge would discourage the use of "recyclable" materials and promote the use of raw materials, thus causing "economic, recreational and aesthetic harm" in the form of widespread environmental harm. Even though the injury alleged was indirect and "the Court was asked to follow [an] attenuated line of causation," the Court nevertheless found that the complaint had "alleged a specific and perceptible harm" flowing from the actions of the United States and Interstate Commerce Commission such that Plaintiffs had established standing. *Id.* at 688-689. Similarly, in *Data Processing Serv. v. Camp*, 397 U.S. 150 (1969), the Plaintiffs,

data processing service organizations, instituted an action against the Comptroller of the Currency and a national bank, challenging the Comptroller's ruling that national banks could make data processing services available to bank customers and to other banks. The Court found that Plaintiffs had standing against both Defendants as the Comptroller's rulings had caused injury in the form of lost profits resulting from the authorization of competing data processing services by national banks, including the Defendant Bank. *Id.* at 158. Finally, in *Barlow v. Collins*, 397 U.S. 159 (1970), the Court found standing where tenant farmers, eligible for payments under the upland cotton program of the Food and Agriculture Act of 1965 filed suit against the Secretary of Agriculture to challenge the validity of the Secretary's amended regulation. Plaintiffs alleged that the program, as amended, permitted their landlords to demand assignment of cotton program benefits as a condition precedent to obtaining a lease, causing them to finance all of their farm needs through their landlord at high prices and interest rates rather than use the advance subsidy payments to form co-operatives and buy supplies elsewhere. *Id.* at 162-164. Again, though the direct economic harm originated with the landlords in *Barlow*, Plaintiffs were found to have standing over the Secretary of Agriculture.

As in these cases, here, the requisite injury-in-fact, Plaintiffs' representational dilemma in the form of 2012 state legislative elections occurring based on 2001 reapportionment district lines, is directly traceable to Defendant 2011 LRC's failure to properly reapportion the State's legislative districts in time to garner the approval of the Pennsylvania Supreme Court. Moreover, Plaintiffs are not the first to admonish Defendant 2011 LRC for its reapportionment delays. The Pennsylvania Supreme Court did as much following its initial invalidation of the Final 2011 Plan with its second opinion setting forth its reapportionment directives to Defendant 2011 LRC. *See generally Holt II*, 38 A.3d at 718 ("The delay of the LRC in producing a Final

Plan has created a situation where, notwithstanding the alacrity with which this Court has acted, this Court's discharge of its constitutional duty to review citizen appeals has resulted in disruption of the election primary season. But, in these circumstances, ones not of this Court's creation, the rights of the citizenry and fidelity to our constitutional duty made the disruption unavoidable. . . . Even with accelerated briefing and argument, the appeals could not be decided with a reasoned opinion before January 24, 2012. And, obviously, the lateness of the adoption of the Final Plan virtually ensured that no remand could be accomplished without disrupting the primary process.") The Pennsylvania Supreme Court specifically focused on Defendant 2011 LRC's five-month delay in generating "usable" data until August 17, 2011, despite having the requisite L94-171 population data for Pennsylvania as of March 9, 2011. The Court glibly stated that there was no explanation for such an extensive delay and further noted that this unexplained delay "stands in stark contrast to the timing of the adoption of prior plans, plans that were no doubt created with less advanced computer technology." *Id.* at 721. Specifically, the court noted that in 1991 "with far less sophisticated technology . . . and with two fewer rounds of redistricting experience, the LDPC [Legislative Data Processing Center] was able to produce the census data in usable form by June 27th of that year -- fifty-one days sooner [that August 17th]." *Id.* at 722. Consequently, the Commission had greater time for commentary and adjustment. *Id.* This, in turn, permitted the legal adoption of the 1991 Final Plan, "which also affected a presidential primary election season, as early as November 15, 1991, twenty-seven days sooner than the 2011 Final Plan was filed." *Id.* at 721, 722. Similarly, "the 2001 LRC, which did not face the compression of a presidential primary season, produced its Final Plan on November 19, 2001, twenty-three days earlier than the Plan adopted by the 2011 LRC." *Id.*

Though the Pennsylvania Supreme Court focused on Defendant 2011 LRC's delay in generating "usable" data, it also noted that none of the parties to the state appeal had objected to the notion that the data must be in "usable" form before the Commission could formulate a preliminary plan. *Id.* at 719. In so doing, the Court acknowledged a bright line reading of the Pennsylvania Constitution and its deadlines, further evidencing the egregiousness of Defendant 2011 LRC's delays. (*See* Statement of Facts, Section 1(c), *supra* at 4.) Specifically, the Constitution reads "[n]o later than ninety days after either the commission has been duly certified or the population data for the Commonwealth as determined by the Federal decennial census are available, whichever is later in time, the commission shall file a preliminary reapportionment plan with such elections officer." Pa. Const. art. II, § 17(c). Given that the Commission was duly certified on April 19, 2011 and the population data for the Commonwealth as determined by the Federal decennial census became available on March 9, 2011, the preliminary plan needed to be filed with the elections officer by the later of July 18, 2011 or June 7, 2011. (*See* Statement of Facts, Section 1(c), *supra* at 4); *see also* Pa. Const. art. II, § 17(c). Accordingly, under this strict reading, the Constitutional deadline for the First Preliminary Plan was July 18, 2011, ninety days from April 18, 2011, the date the Commission had been duly certified. (*See* Statement of Facts, Section 1(c), *supra* at 4); *see also* Pa. Const. art. II, § 17(c). Yet rather than adopt this plain reading of the Constitution, the Commission issued its Preliminary Plan on October 31, 2011 seventy-five days after August 17, 2011, when the Commission deemed the census data "usable". *See* Statement of Facts, Section 1(c), *supra* at 4); *see also* Pa. Const. art. II, § 17(c). Further troubling, nowhere in the Pennsylvania Constitution is there any mention of the data made available by the Federal decennial census needing to be made "usable" before the Commission's ninety day clock to draft the Preliminary Plan would begin. *See generally* Pa.

Const. art. II, § 17(c); *see also Holt II*, 38 A.3d at 719, n.6 (elaborating on how this "usable" data distinction was essentially read into the Constitution by the Commission).

Regardless of whether the constitutional "clock" began to run when the data was made available by the federal decennial census or when the LDPC deemed the data to be usable, Defendant 2011 LRC's conduct under either scenario had the same undesired outcome – a late plan. *Holt II*, 38 A.3d at 722. As a result, Defendant 2011 LRC injured Plaintiffs by creating a set of circumstances in which the Pennsylvania Supreme Court was left with no alternative but to invalidate the Final 2011 plan, given that it was not only late but also contrary to law, and order the 2001 Plan to remain in effect during the 2012 election. Specifically, the First Final Reapportionment Plan was issued on December 12, 2011, a mere forty-three days before the January 24, 2012 deadline to circulate primary nomination petitions. *Id*. The reapportionment appeals window was itself thirty days, further compounding the problem. *Id*. Consequently, given the appeals that predictably followed on January 11, 2012, once the Pennsylvania Supreme Court invalidated the plan on January 25, 2012, the Court adjusted the election schedule and ordered that the 2001 Plan remain in effect during the 2012 election. *Id*. at 718, 722.

c. The relief requested by Plaintiffs against Defendant 2011 LRC will redress their injury.

Redressability requires a showing that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000). Redressability does not require that the plaintiff actually be entitled to the relief sought; it is enough that the requested relief, if granted, would relieve or reduce the discrete injury alleged to have occurred to the plaintiff. 15-101 Moore's Federal Practice - Civil § 101.42 (citing *Lac Du Flambeau Band of Lake Superior v. Norton*, 422 F.3d 490, 501-502 (7th Cir. 2005); *Salmon Spawning v. United States Customs and Border Prot.*, 550

F.3d 1121, 1130-1131 (Fed. Cir. 2008) (trial court erred in concluding plaintiffs' injury was unredressable because they were not entitled to relief sought). Accordingly, for redressability to be lacking, some other law or doctrine would have to operate to independently impede the relief sought by Plaintiff. *See e.g. Coastal Outdoor Adver. Group, L.L.C. v. Twp. of E. Hanover*, 630 F. Supp. 2d 446, 451 (D.N.J. 2009) (finding that plaintiff's claims were not redressable, given that even if the statute at issue were deemed invalid, Defendant has shown other current statutory authority preventing the relief sought such that "a decision on the merits would not redress" Plaintiff's alleged injury) (collecting cases). Defendant 2011 LRC has alleged no such intervening factor that would definitively impede the relief sought by Plaintiffs.

Instead, a review of the petitions filed reveals that in issuing its Revised Plan, Defendant 2011 LRC has not heeded the advice provided by the Pennsylvania Supreme Court in *Holt II*. In the Petition of Amanda E. Holt et al., for example, the lead appeal upon which *Holt II* was based, Holt argues that an "analysis of the Revised LRC Plan shows that, even after taking account of the *Holt [II]*'s more flexible population equality standard, the LRC has not fulfilled any of the mandates of Section 16". Petition for Review of Amanda E. Holt et al. at 12, *Holt v. 2011 Legislative Reapportionment Commission*, 132 MM 2012 (Pa. Aug. 6, 2012).[22] Holt asserts that her "alternative plan once again shows that 'the LRC could have easily achieved a substantially greater fidelity to all of the mandates in Article II, Section 16 compactness, contiguity, and integrity of political subdivisions,'" yet failed to do so. *Id*. (quoting *Holt II*, 38 A.3d at 718.) Specifically, addressing "the number of [political subdivision] splits under the Revised LRC Plan" Holt posits that "while marginally reduced due to the relaxed population equality standard,

[22] Copies of the Holt Petition are publicly available at http://www.senatorpileggi.com/PDF/redistricting/080712/Holt-et-al-Brief.pdf. Other currently pending Pennsylvania Supreme Court Reapportionment Petitions are also available at http://www.senatorpileggi.com/redistricting.htm. Plaintiffs ask that the Court take judicial notice of these items.

[the Revised LRC Plan] remains far too high to satisfy the unambiguous mandate of Article II, Section 16 of the Constitution." *Id*. at 24. As in *Holt I* and *II*, after applying a comparable adjustment to population deviation, the Revised Holt plan again demonstrates the unconstitutionality of the LRC's Revised Plan by presenting reapportionment alternatives reducing that the total number of splits by more than 50%. Therefore, as with *Holt II*, it is likely that the Pennsylvania Supreme Court will find that "it is equally 'inconceivable' these excess splits were 'unavoidable,' particularly given the increased flexibility the Court provided to the LRC in terms of population equality." *Id*. (quoting *Holt II*, 38 A.3d at 718.)

Accordingly, in the event that the Revised Final Plan is found to be contrary to law, a favorable decision with respect to Defendant 2011 LRC in the form of an order to institute a lawful Reapportionment Plan by a date certain to permit the special election to proceed as requested will redress Plaintiff's injury. Given that Plaintiffs filed this action to remedy Pennsylvania's 2012 state legislative elections proceeding based on 2001 reapportionment district lines in violation of the One Person, One Vote doctrine of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, it is evident that a special election conducted using a current 2011-2012 Reapportionment Plan with the full force and effect of law will have the intended effect of remedying the injury alleged. After all, a special election using 2011-2012 reapportionment lines will reflect populations shifts within the state that have occurred since the 2000 census, upon which the 2001 reapportionment lines were based.

II. Plaintiffs' case against Defendant 2011 LRC is not moot.

Given the uncertain status of Defendant 2011 LRC's Revised Final Reapportionment Plan, Plaintiffs' complaint and preliminary injunction motion are not moot. (*See* Statement of Facts, Section 1(e), *supra* at 7; *see* Argument, Section I(c), *supra* at 19.) Simply put, not only

did a controversy exist at the time the complaint was filed, but one continues to exist. "A case might become moot if subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 174 (2000) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)). Additionally, "it may occur because a party no longer has a personal stake in the controversy and has, in essence, been divested of standing." 15-101 Moore's Federal Practice - Civil § 101.90. Plaintiffs maintain that neither scenario has elapsed in the current action. Further the "heavy burden of persuading" the Court that the challenged conduct cannot reasonably be expected to resume lies with the party asserting mootness, in this case, Defendant 2011 LRC. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968).

Defendant 2011 LRC has simply failed to carry this burden as it neglects to address Plaintiffs' recently requested special election remedy or the thirteen Pennsylvania Supreme Court petitions filed regarding the Revised 2011 Plan, holding the Revised Plan's enforceability in abeyance until such time the Pennsylvania Supreme Court issues its decision. Further, given the strength of the petitions submitted to date, it is entirely plausible that the Pennsylvania Supreme Court will again invalidate the Revised Plan. *See e.g.* Petition for Review of Amanda E. Holt et al., *Holt v. 2011 Legislative Reapportionment Commission*, 132 MM 2012 (Pa. Aug. 6, 2012). Consequently, a live controversy continues to exist. Plaintiffs still face the prospect of disenfranchisement in the upcoming 2012 election and consequently seek the continued intervention and assistance of this Court in ordering the special election remedy requested to

which a properly approved and legally valid 2011 Reapportionment Plan remains integral, rendering Defendant 2011 LRC an indispensable party to the action.

CONCLUSION

For all the reasons noted above, Plaintiffs respectfully request that this Court deny Defendant 2011 LRC's Motion to Dismiss the Complaint.

Dated: August 15, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nancy M. Trasande, Esq., hereby certify that on the August 15, 2012, copies of the foregoing *Memorandum Of Law In Opposition To Defendant 2011 Legislative Reapportionment Commission's Motion To Dismiss Plaintiffs' Complaint Pursuant To Fed. R. Civ. P. 12(B)(1)* with accompanying *Proposed Order* were electronically filed with the Clerk of Court for the Eastern District of Pennsylvania using the CM/ECF system, which will send electronic notification of such to the following counsel of record:

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