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' REPLY MEMORANDUM OF LAW IN IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Plaintiffs, through undersigned counsel, submit this Reply Memorandum of Law in Further Support of Plaintiffs' Motion for a Preliminary Injunction.

PRELIMINARY STATEMENT

Rather than address the merits of Plaintiffs' preliminary injunction motion,[1] Defendant 2011 LRC again attacks the justiciability of Plaintiffs claims – a matter first raised in its motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) where it alleged a lack of standing[2] by Plaintiffs. Accordingly, in response to Plaintiffs' preliminary injunction motion for a special election, Defendant 2011 LRC now asserts two additional objections, namely that Plaintiffs' case is not ripe[3] for adjudication and that this Court should abstain[4] from this matter in deference to the legislative reapportionment process still currently underway. Both arguments are misguided and inapplicable to the case at bar.

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[1] Requirements for a permissive preliminary injunction are as follows: 1) whether the moving party can show a reasonable probability of success on the merits; 2) whether the moving party 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. *See Child Evangelism Fellowship of N.J. Inc. v. Stafford Township School*, 386 F.3d 514, 524 (3d Cir. 2004). Where mandatory preliminary injunctive relief is sought, as is the case here, the facts and the law must clearly favor the moving party. *Mclaughlin v. Pernsley*, 693 F. Supp. 318 (E.D.Pa 1988).

[2] (*See* Doc. 21.)

[3] While there is also a prudential element to ripeness, the question of ripeness generally goes to whether a court has subject matter jurisdiction. *See Armstrong World Industries, Inc. v. Adams*, 961 F.2d 405, 411 n.12 (3d Cir. 1992).

[4] Based on a thorough review of case law, whether dismissal based on abstention should be brought in a motion to dismiss for lack of subject matter jurisdiction or a motion to dismiss for failure to state a claim remains unclear. *See e.g. Carter v. Doyle*, 95 F. Supp.2d 855 n.8 (N.D. Ill. 2000) (noting that "a motion to dismiss for lack of subject matter jurisdiction based on abstention does not fit neatly into either of the two types of jurisdictional attacks generally raised under Rule 12(b)(1) --the challenge is neither to the facial insufficiency of the complaint or the factual basis pleaded in the complaint [such that] courts have [also] allowed . . . abstention challenge[s] to be raised in a 12(b)(6) motion or a 12(b)(1) motion" (internal citations omitted). Should 12(b)(6) status be assigned to Defendant 2011 LRC's abstention claims, then Plaintiffs' assert that Defendant 2011 LRC's abstention claim has been waived as it was not asserted in Defendant 2011 LRC's Motion to Dismiss. *See* Fed. R. Civ. P. 12(h). If properly brought as a 12(b)(1) challenge, and therefore not waivable, this Court "must first determine whether the movant presents a facial or factual attack." *Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012). A facial attack is one limited to the face of the complaint where the "court must consider the allegations of the complaint as true." *Petruska v. Gannon Univ.*, 462 F.3d 294, 302, n.3 (3d Cir. 2006) (quoting *Mortenson v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884,891 (3d Cir. 1977)). A factual attack, in turn, occurs when a defendant contends that there is "in fact" no subject-matter jurisdiction through a separate offer of proof such that "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* Given the absence of any reference to extrinsic facts in dealing with its abstention argument, Plaintiffs presume that Defendant

First, it bears repeating that Plaintiffs' preliminary injunction motion seeks a special election to remedy the disenfranchisement that will result from the Commonwealth's use of the 2001 Reapportionment Plan in its upcoming 2012 election. Given that 2012 elections will certainly proceed based on 2001 lines and that the statistical information already presented in Plaintiffs' opening memorandum of law regarding the resulting disenfranchisement will not vary, this issue is ripe for adjudication. That Plaintiffs' motion includes a request that "this Court set and enforce a deadline by which Defendant 2011 LRC 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"[5] has no impact upon this ultimate issue. Consequently, in claiming that this contingency renders Plaintiffs claims unripe, Defendant 2011 LRC not only confounds the ultimate issue for adjudication presented by this case, but also misconstrues the criteria applied by courts when assessing ripeness.

Second, in claiming that the doctrine of abstention bars plaintiffs' claims, Defendant 2011 LRC ignores that neither Plaintiffs' complaint nor pending preliminary injunction motion requests that this Court usurp the role of Defendant 2011 LRC or the Pennsylvania Supreme Court in their efforts to draft a properly approved and legally valid reapportionment plan. Rather, Plaintiffs merely ask this Court to correct a grievous injury – the abrogation of Plaintiffs' voting rights through the use of the Commonwealth's 2001 redistricting plan in its upcoming 2012 elections. Further, given the distinct relief sought by Plaintiffs, Defendant 2011 LRC also fails to realize that none of the Pennsylvania Supreme Court appeals currently pending raise arguments in connection with the constitutionality of conducting the 2012 elections under the 2001 Plan – such that there is nothing from which to abstain. Instead, all focus on the

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2011 LRC presents a facial attack of the complaint, if in fact, 12(b)(1) status applies in the first instance. (*See generally* Doc. 41.)

[5] (Doc. 19 at 3.)

constitutional propriety of the Revised Final Plan in the abstract. These differences preclude abstention on Plaintiffs' disenfranchisement claim.

ARGUMENT

I. Plaintiffs' Claims Are Ripe For Adjudication.

Defendant 2011 LRC responds to Plaintiffs' preliminary injunction motion by arguing that Plaintiffs' case is not ripe for adjudication given that their motion includes a request that "this Court set and enforce a deadline by which Defendant 2011 LRC 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." (Doc. 19 at 3.) In claiming that this contingency renders Plaintiffs claims unripe, Defendant 2011 LRC ignores that ripeness focuses on whether an injury or a dispute is sufficiently concrete to allow for adjudication of an issue, not on what form of relief may be appropriately plead or requested in the alternative. *Compare Peachlum v. City of York*, 333 F.3d 429, 433 (3d Cir. 2003) (explaining that the ripeness doctrine serves "to determine whether a party has brought an action prematurely, and counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine" (internal citations omitted)) *with Independent Enters. v. Pittsburg Water and Sewer Authority*, 103 F.3d 1165, 1175 (3d Cir. 1997) (pursuant to Fed. R. Civ. P. 8(d)(2) and (3), a Plaintiff may plead inconsistent facts and legal allegations, alternatively or hypothetically). Accordingly, at the outset, Defendant 2011 LRC improperly skews the issue that must be ripe for review. The dispute here is whether the Commonwealth's use of an outdated 2001 Reapportionment Plan in the upcoming 2012 election disenfranchises Plaintiffs such that a special election remedy is warranted, not whether Defendant 2011 LRC must prepare

a new map for use in the special election requested. Plaintiffs' entitlement to a special election is completely independent from the pending redistricting process.

In addition to confounding the ultimate issue for adjudication presented by this case, Defendant 2011 LRC's analysis fails to correctly address the criteria applied by courts when assessing ripeness. Specifically, rather than acknowledge both aspects of the ripeness test that are weighed in tandem by courts, Defendant 2011 LRC focuses exclusively on the "fitness for review" test and fails to weigh the hardship that would result if Plaintiffs' claims were withheld on grounds that this matter was not ripe for review. (*See* Doc. 41 at 9-10.) Notwithstanding, in assessing the ripeness of an action, courts examine two factors: (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *Peachlum*, 333 F.3d at 434 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977). The critical question concerning "fitness for review" is whether the claim "'rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all'". *Wyatt v. Gov't of the Virgin Islands*, 385 F.3d 801, 806 (3d Cir. 2004) (internal citations omitted). Hardship, in turn, involves direct and immediate harm that would result if consideration of the issue were withheld because the controversy was not ripe. *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 668 (4th Cir. 1997) (case involving imposition of sanctions on corporation by Office of Mining Reclamation and Enforcement was ripe for judicial review because sanctions (denial of mining permits) would inflict immense harm on corporation through canceled projects, increased costs, loss of business reputation, and job losses for workers).

Though both tests must be met for the ripeness requirement to be satisfied, there are no exact standards as to each factor, such that a particularly strong showing in one area may offset a

marginal showing in the other. *See Ernst & Young v. Depositors Econ. Protection Corp*., 45 F.3d 530, 535 (1st Cir. 1995) ("there may be some sort of sliding scale under which, say, a very powerful exhibition of immediate hardship might compensate for questionable fitness [such as a degree of imprecision in the factual circumstances surrounding the case] or visa versa"). Accordingly, the greater the anticipated harm, the more likely the court will deem the matter ripe for resolution, even if some factual issues remain unresolved. *See id*. Alternatively, if further factual development of the issues before the court is unlikely to have a significant effect on the legal issues presented, then the likelihood increases that a court can render a definitive decision on the issue. *See e.g. Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201 (1983) (finding fitness for judicial review supported by "predominantly legal" nature of question presented); *Duke Power Co. v. Carolina Envtl. Study Group, Inc*., 438 U.S. 59, 81-82 (1978) (finding fitness for judicial review supported by fact that further factual development would neither significantly advance the judiciary's ability to deal with the legal issues presented nor aid in resolution).

Therefore, even assuming that Defendant 2011 LRC's need to draft a new plan were a significant yet to be determined factual development in this case, it would have no bearing on the ultimate issue in this matter, namely whether Plaintiffs have demonstrated voter disenfranchisement such that a special election remedy is appropriate. (*See* generally Doc. 19.) As such, this contingency regarding which plan will be used in Plaintiffs' requested special election will not affect the ripeness of this action. *See Duke Power Co.*, 438 U.S. at 81-82 (finding fitness for judicial review supported by fact that further factual development would neither significantly advance judiciary's ability to deal with legal issues presented nor aid in resolution). Moreover, the extreme hardships presented to Plaintiffs, in the form of voter

disenfranchisement, should this court defer its decision, would also favor a finding that this matter is ripe for resolution. (*See* generally Doc. 19); *Depositors Econ. Protection Corp*., 45 F.3d at 535 ("there may be some sort of sliding scale under which, say, a very powerful exhibition of immediate hardship might compensate for questionable fitness [such as a degree of imprecision in the factual circumstances surrounding the case] or visa versa").

Notwithstanding these distinctions, Plaintiffs maintain that its claims survive the "fitness for review" test given that the harm alleged is subject to no contingent future event. After all, that 2012 elections will proceed based on 2001 lines remains a certainty in this action as does the resulting voter disenfranchisement to Plaintiffs. (*See* Doc. 19 at 11-15 (addressing *prima facie* violation of one person, one vote doctrine); Argument, Section II, *infra* at 7-9 (referring to the limits of issues explored in the pending Pennsylvania Supreme Court appeals.) Accordingly, while the final disposition of *In re: Petitions for Review Challenging the Final 2011 Reapportionment Plan Dated June 8, 2012*, Nos. 126-134 MM 2012, 39-42 WM 2012 by the Pennsylvania Supreme Court will determine whether Defendant 2011 LRC will need to draft a new plan before Plaintiffs can obtain their special election remedy, it does not affect the ripeness of this action as it does not go to the core dispute of this case.

II. In Claiming That The Doctrine Of Abstention Bars Plaintiffs' Claims, Defendant 2011 LRC Misconstrues The Relief Sought In This Action And Obfuscates The Issues Before This Court.

Defendant 2011 LRC[6] urges the Court to dismiss this action based on the principles of abstention in deference to the legislative reapportionment process still currently underway so that Defendant 2011 LRC and the Pennsylvania Supreme Court can adopt and approve a legislative

[6] Defendant 2011 LRC joins in Section III.B. of Defendant Aichele's Brief in Support of her Motion to Dismiss and in Opposition to Plaintiff's Motion for a Preliminary injunction (Doc. 36). Accordingly, for the Court's convenience, Plaintiffs repeat their arguments in opposition to those raised by Defendant Aichele herein while simultaneously addressing any additional issues raised by Defendant 2011 LRC worthy of response.

reapportionment plan in the first instance. (*See* Doc. 41 at 10-14 (citing *Growe v. Emison*, 507 U.S. 25 (1993) and *Scott v. Germano*, 381 U.S. 40 (1965)). While Defendant 2011 LRC is correct that federal courts should defer to state legislatures in the actual drawing of maps absent some persuasive justification, neither *Scott v. Germano*, 381 U.S. 407 (1965) nor *Growe v. Emison*, 507 U.S. 25 (1993) mandate that federal courts take a limited or *de minimus* role on all reapportionment issues, especially where broader constitutional voting rights issues are implicated, as they are here. *See e.g.*, *Harman v. Forssenius*, 380 U.S. 528, 537 (1965) (abstention held inappropriate in view of "the nature of the constitutional deprivation," a denial of the "fundamental right to vote"); *Edwards v. Sammons*, 437 F.2d 1240, 1244 (5th Cir. 1971) (finding that the district court erred in abstaining as "the delay which follows from abstention is not to be countenanced in cases involving such a strong national interest as the right to vote"). Accordingly, in requesting abstention, Defendant 2011 LRC has failed to meet its "heavy burden of persuasion." *Synagro-WWT, Inc. v. Rush Twp.*, 204 F. Supp. 2d 827, 835 (M.D. Pa. 2002).

In failing to perceive this distinction, Defendant 2011 LRC ignores that neither Plaintiffs' complaint nor pending preliminary injunction motion requests that this Court usurp the role of the Defendant 2011 LRC or the Pennsylvania Supreme Court in their efforts to draft a properly approved and legally valid reapportionment plan. (*See generally* Doc. 1; Doc. 19.) Rather, Plaintiffs merely ask this Court to correct a grievous injury – the abrogation of Plaintiffs' voting rights through the use of the Commonwealth's 2001 redistricting plan in its upcoming 2012 elections. Accordingly, Plaintiffs seek a declaratory judgment from this Court to that effect and request that this Court limit the term of state legislators elected in 2012 under 2001 redistricting lines and compel Defendant Aichele to hold a Special Election in 2013 under the new 2012 redistricting lines promulgated by Defendant 2011 LRC, assuming they are upheld by the

Pennsylvania Supreme Court. (*See* Doc. 19.) Alternatively, in the event the Revised Final Plan is rejected, as the 2011 district lines were, Plaintiffs request a strict timeframe be established for the Commonwealth to adopt a valid redistricting plan so that this Court might order special elections to be held in connection with 2013 municipal elections.[7] (*See id*.)

Conversely, Defendant 2011 LRC also ignores that none of the Pennsylvania Supreme Court appeals currently pending raise arguments in connection with the constitutionality of conducting the 2012 elections under the 2001 Plan. Instead, all focus on the constitutional propriety of the Revised Final Plan in the abstract.[8] Moreover, it is worth noting that in issuing its second decision regarding the previous reapportionment plan, the court explicitly declined to address any special election remedy finding such issues to be within "the concern and province of the political branches". *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 716, 761 (Pa. 2012) ("[a]ny 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.") As such,

[7] Though Defendant Aichele and, by extension, Defendant 2011 LRC characterize as gratuitous Plaintiffs' request for a strict timeframe by which a new plan will be prepared in the event that the current plan is invalidated (*see* Doc. 36 at 19 (referring to Doc. 19 at 3)), a close reading of *Germano* reveals a remand with directions similar to those sought in this matter. Specifically, *Germano* was remanded "with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, [would] validly redistrict the Illinois State Senate; provided that [it could be] . . . accomplished within ample time to permit [the] plan to be utilized in the 1966 [State Senate] election[s]". *Scott v. Germano*, 381 U.S. 407, 409 (1965); *see also Growe v. Emison*, 507 U.S. 25, 36 (1993).

[8] *See 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). Currently pending Pennsylvania Supreme Court Reapportionment Petitions are also available at http://www.senatorpileggi.com/redistricting.htm.

resolution of the Pennsylvania Supreme Court appeals will not moot the issues raised before this Court, just as this Court proceeding on Plaintiffs' requests will not infringe upon the Pennsylvania Supreme Court's decision regarding the Revised Final Plan and its reapportionment maps. The two proceedings simply address mutually exclusive issues. This is not an instance where parallel proceedings are occurring before a state and federal court. Accordingly, not only are *Scott v. Germano*, 381 U.S. 407 (1965) and *Growe v. Emison*, 507 U.S. 25 (1993) inapplicable but none of the special circumstances required for *Pullman* abstention exist. *See Busch v. Stanovic*, 485 F. Supp.2d 576, 581 (M.D.Pa 2007) (for *Pullman* abstention to apply three "special circumstances" must exist: "(1) uncertain issues of state law underlying the federal constitutional claims brought in federal court; (2) state law issues amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims; and (3) a federal court's erroneous construction of state law would be disruptive of important state policies.")

Moreover, even if all of the special circumstances required were present, this Court retains discretion in determining whether or not to abstain by considering equitable factors, "such as (1) the availability of an adequate state remedy, (2) the length of time the litigation has been pending, and (3) the impact of delay to the litigants." *See id at* 581. Given the voting rights issues at play in this case, abstention would pose significant harm to Plaintiffs as they face complete disenfranchisement during an entire term for both the House and half of the Senate. Protected litigation will only compound the harm by running the clock on the disputed legislative terms at issue in this case.

CONCLUSION

For all the reasons noted above, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for a Preliminary Injunction.

Dated: September 7, 2012

Respectfully submitted,

s / Nancy M. Trasande

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CERTIFICATE OF SERVICE

I, Nancy M. Trasande, Esq., hereby certify that on the September 7, 2012, copies of the foregoing *Reply Memorandum of Law in Further Support of Plaintiffs' Motion for a Preliminary Injunction* 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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