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 AICHELE'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF CITATIONS

COURT CASES

RULES OF PROCEDURE AND STATE CONSTITUTIONAL AUTHORITY

MISCELLANEOUS AUTHORITY

Plaintiffs, through undersigned counsel, submit this Memorandum of Law In Opposition to Defendant Aichele's Motion to Dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and in further support of Plaintiffs' Motion for a Preliminary Injunction.

PRELIMINARY STATEMENT

Defendant Aichele would have this Court and the Pennsylvania electorate believe that 2012 state elections proceeding under the 2001 Reapportionment Plan are merely the result of the "expected and unavoidable transitional process of redistricting" and that, notwithstanding such delays, the Commonwealth's redistricting authorities have acted with "diligence and vigilance" in reapportioning the Commonwealth in accordance with federal and state law. Accordingly, Defendant Aichele argues that Plaintiffs' complaint should be dismissed for failure to state a claim. In the alternative, Defendant Aichele urges that this Court should dismiss this case based on abstention principles in deference to the legislative reapportionment process still currently underway. Defendant Aichele also requests, in the alternative, that this Court deny Plaintiffs' requested preliminary injunction and stay the matter pending the Pennsylvania Supreme Court's 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.

However, each of Defendant Aichele's requests suffers from several fundamental flaws. First, in maintaining that 2012 state elections proceeding under the Commonwealth's 2001 Reapportionment Plan presents no constitutional violation, Defendant Aichele not only overlooks the reapportionment delays at issue in this case but also misstates the case law cited in support of this very proposition. Second, in claiming that the doctrine of abstention bars Plaintiffs' claims, Defendant Aichele fails to acknowledge 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. Instead, Plaintiffs merely asks 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, relief wholly distinct from that presently sought before the Pennsylvania Supreme Court. Third, because Defendant Aichele neither addresses the substantive merits of Plaintiffs' preliminary injunction motion beyond Plaintiffs' reasonable probability of success on the merits nor cites any authority on why a stay should be granted pending the resolution of the appeals before the Pennsylvania Supreme Court, Defendant Aichele's final request should also be denied. Accordingly, Plaintiffs rely on the following statement of facts and argument in support of their position and ask that Defendant Aichele's motion to dismiss be denied and their motion for a preliminary injunction be granted.

STATEMENT OF FACTS

Given Defendant Aichele's failure to recognize that Defendant 2011 Legislative Reapportionment Commission ("Defendant 2011 LRC") did not reapportion the Commonwealth in a timely fashion after having had an adequate opportunity to do so, Plaintiffs carefully address the 2011 Reapportionment Process below and Defendant 2011 LRC's attendant shortcomings in meeting its obligations under the Pennsylvania Constitution.

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). 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. *Holt II*, 38 A.3d at 761. Accordingly, the April 24, 2012 state legislative primary elections proceeded based on 2001 apportionment lines.[11]

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

[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).

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

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 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.

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[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).

ARGUMENT

I. Defendant Aichele Has Failed To Establish That Plaintiffs Have Not Stated A Claim Upon Which Relief Can Be Granted.

Defendant Aichele has failed to discharge her burden in demonstrating that Plaintiffs have not stated a claim upon which relief can be granted.[15] *See Kehr Packages, Inc. v. Fidelcor, Inc*., 926 F.2d 1406, 1409 (3d Cir. 1991) (noting that under a Fed. R. Civ. P. 12(b)(6) motion, defendants have the burden of showing no claim has been stated as opposed to a 12(b)(1) motion where plaintiffs bear the burden of persuasion). She merely states that 2012 state elections proceeding under the 2001 Reapportionment Plan presents no constitutional violation. Rather than substantively address Plaintiffs' requested special election remedy, Defendant Aichele asserts that though 2010 L94-171 population data for Pennsylvania was available as of March 09, 2011, (*see* Statement of Facts, Section C, *supra* at 3-4), a new 2011 reapportionment plan did not need to be created and implemented in time to be used in Pennsylvania's 2012 legislative elections. (*See* Doc. 36 at 12-15.) In essence, Defendant Aichele reasons that to survive constitutional scrutiny only a periodic adjustment of the Commonwealth's legislative

[15] As Defendant Aichele has failed to address the standard of review governing such a motion, Plaintiffs do so now. In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), courts employ a three prong approach. First, the court must identify the elements that a plaintiff must plead to state a claim. *Santiago v. Warminster Twp*., 629 F.3d 121, 130 n.7 (3d Cir. 2010); *see Ashcrofi v. Iqbal*, 129 S. Ct. 1950, 1953 (2009). Second, it must ask whether the complaint sets forth factual allegations or conclusory statements and separate the factual and legal elements of the claims alleged, accepting the well-pleaded facts as true while disregarding any legal conclusions. *Santiago*, 629 F.3d at 130 n.7; *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). Third, in evaluating a complaint's factual allegations, the court must assume their veracity and draw reasonable inferences in favor of the non-moving party, and then determine whether the factual allegations plausibly give rise to an entitlement to relief. *Santiago*, 629 F.3d at 130 n.7; see *Ashcrofi v. Iqbal*, 129 S. Ct. 1950, 1953 (2009). The function of courts is not to weigh the evidence that must be presented to prove a claim but merely to determine whether the complaint itself is legally sufficient. *Phillips v. County of Allegheny*, 515 F.3d 224, 213-214, 234 (3d Cir. 2008). Accordingly, courts should not dismiss a complaint if the plaintiff has alleged enough facts to state a claim for relief that is plausible on its face. *Phillips*, 515 F.3d at 234; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Gelman v. State Farm Mut. Auto. Ins. Co*., 583 F.3d 187, 190 (3d Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1949 and *Twombly*, 550 U.S. at 556). Given the principles espoused in *Reynolds v. Sims*, 377 U.S. 533 (1964) and the statistical deviations specified in the complaint regarding the application of current census data to 2002 district lines, Plaintiffs maintain that they have presented allegations meeting the plausibility requirements of Fed. R. Civ. P. 12(b)(6).

representation is needed and that this adjustment need not be accomplished by any set deadline or implemented by any specific state election cycle, despite express language to the contrary in the Pennsylvania Constitution. (*See id*.) Specifically, Defendant Aichele argues that so long as "state or local authorities diligently go about the business of the redistricting process", "no constitutional violation or cause for judicial interventions [exists] when regularly scheduled elections occur under an old districting plan." (*Id*. at 16.) Such a theory not only grossly misconstrues the text of the Commonwealth's Constitution and overlooks the reapportionment delays at issue in this case, but it also misstates the case law cited by Defendant Aichele in support of this very proposition. Further, it fundamentally ignores the constitutional harm to be endured by Plaintiffs as a result of holding the 2012 state elections under the 2001 Reapportionment Plan, which occurred through no fault of their own.

a. Defendant Aichele wholly ignores that Defendant 2011 LRC failed to reapportion the Commonwealth in a timely fashion after having had an adequate opportunity to do so.

At the outset, Defendant Aichele fails to recognize that Defendant 2011 Legislative Reapportionment Commission ("Defendant 2011 LRC") did not reapportion the Legislature in a timely fashion after having had an adequate opportunity to do so. (*See* Statement of Facts, Section C, *supra* at 3-4.) The Pennsylvania Supreme Court recognized Defendant Aichele's untimeliness following its initial invalidation of the Final 2011 Plan with its second opinion setting forth its reapportionment directives to Defendant 2011 LRC.[16] *See generally Holt II*, 38

[16] The Pennsylvania Supreme Court admonished that:

> [t]he 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.

A.3d at 718. 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 C, *supra* at 3-4.) Specifically, the

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> And, obviously, the lateness of the adoption of the Final Plan virtually ensured that no remand could be accomplished without disrupting the primary process.
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> *Holt II*, 38 A.3d at 718.

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 C, *supra* at 3-4); *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 C, *supra* at 3-4); *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 C, *supra* at 3-4); *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). Instead, this "usable" data distinction was essentially read into the Constitution by the Commission. *See 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[17] (citing Del Sole Cavanaugh Stroyd LLC Memorandum at 4-5, *Holt v. 2011*

[17] During the 1981 and 1991 Reapportionment Processes, the Commission inquired as to whether data was deemed "available" when received in its "raw" form from the federal government or when translated into a form that was actually usable by the Commission. *Holt II*, 38 A.3d at 719, n.6 (citing Del Sole Cavanaugh Stroyd LLC Memorandum at 4-5; Ken Gormley, *The Pennsylvania Legislative Reapportionment of 1991*, at 22-24

Legislative Reapportionment Commission, No. 1 WM 2012 (Pa. 2012); Ken Gormley, *The Pennsylvania Legislative Reapportionment of 1991*, at 22-24 (Commonwealth of Pennsylvania Bureau of Publications 1994)).[18] Accordingly, in implementing this distinction, the Commission essentially took it upon itself to amend the deadlines specified in the Constitution regarding the reapportionment process in an effort to preserve its jurisdiction while simultaneously affording itself more time to address any deficiencies in the Commonwealth population data received from the Federal decennial census. *See* Ken Gormley, The Pennsylvania Legislative Reapportionment of 1991, at 23-24 (Commonwealth of Pennsylvania Bureau of Publications 1994). The only reason that this "usable data" distinction did not create the present situation faced by Plaintiffs in previous reapportionment cycles is that no reapportionment plan has been invalidated since the 1968 amendments to the Pennsylvania Constitution,[19] when legislative reapportionment duties were shifted from the General Assembly to the Legislative Reapportionment Commission and a series of specific constitutional reapportionment deadlines and guidelines were instituted given

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(Commonwealth of Pennsylvania Bureau of Publications 1994)). Accordingly, during the 1981 Reapportionment Process, it petitioned the Supreme Court for extraordinary jurisdiction and declaratory judgment to decide the issue. Ken Gormley, *The Pennsylvania Legislative Reapportionment of 1991*, at 23 (Commonwealth of Pennsylvania Bureau of Publications 1994). At such time, the Commission also suggested to the Court that "the data was 'available' when it had been translated by LDPC [Legislative Data Processing Center] into a form that was actually usable [by the Commission]." *Id.* However, on March 26, 1981, the Chief Justice of the Pennsylvania Supreme Court issued an unpublished Order, which stated that the ninety day period "within which the Commission was required to file a preliminary plan began to run on the date that the Commission received the population data from the federal decennial census 'in usable form (breakdown by precinct and ward).'" *Id.* Given that this order failed to resolve their concerns, during the 1991 Reapportionment Process, members of the Commission again sought clarification on the definition of "usable" data. *Holt II*, 38 A.3d at 719, n.6 (internal citations omitted). However, this time, the Commission declined to move for declaratory judgment, choosing to ignore the plain reading of the Constitution and instead decide *sua sponte*, that it, not the Supreme Court, was the best judge of when the data provided to it was in a form that was sufficiently "usable" for its purposes. *Id.* Accordingly, at such time, the Commission deemed the data "usable" once it had been revised and delivered to the Commission from the Legislative Data Processing Center ("LDPC"). *Id.*

[18] Even the Commission acknowledges the unilateral nature of its conduct, admitting that "[a]lthough never expressly decreed as such by the Supreme Court, it is a safe assumption based on previous experience that the census data becomes "usable" and hence "available" only after the raw data with the breakdown by precinct and ward has been processed and edited by the LDPC and the final form of data is delivered to the Commission. At that point, the constitutional "clock," with all of its pertinent deadlines, begins to run." Del Sole Cavanaugh Stroyd LLC Memorandum at 5, *Holt v. 2011 Legislative Reapportionment Commission*, No. 1 WM 2012 (Pa. 2012).

[19] *See Albert v. 2001 Legislative Reapportionment Comm'n*, 567 Pa. 670, 675-676 (2002).

Reynolds v. Sims, 377 U.S. 533 (1964). *Holt II*, 38 A.3d at 735, n.21, 744-745. Previous constitutions had lacked any sort of reapportionment timetable.[20] *Compare* 1874 Pa. Const. art. II, § 18 ("The General Assembly at its first session after the adoption of this Constitution, and immediately after each United States decennial census, shall apportion the State into senatorial and representative districts agreeably to the provisions of the two next preceding sections), http://www.duq.edu/law/pa-constitution/constitutions/1874.cfm. *with* 1968 Pa. Const. art. II, § 17 (setting forth timetables similar to those currently in place today), http://www.duq.edu/law/pa-constitution/constitutions/1968.cfm).

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 and legally invalid plan, with insufficient time to develop a truly constitutional alternative for use in the 2012 election and the consequent debasement of the weight of the vote for all Pennsylvania voters. *See Holt II*, 38 A.3d at 722. 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[21] on January 11, 2012, once the Pennsylvania Supreme Court invalidated the plan on January 25, 2012, the Court had no other option but to adjust the election

[20] The result of this previous system, lacking a set reapportionment timetable, was a General Assembly that "often failed to discharge its responsibility; indeed, it had failed to conduct a successful redistricting in over four decades [leading up to the Constitution of 1968]." *Holt II*, 38 A.3d at 735, n.21. Consequently "[d]espite the command that reapportionment occur every ten years . . . reapportionment in the Commonwealth [under the Constitution of 1874] remained sporadic." *Holt II*, 38 A.3d at 743.

[21] Each reapportionment since the amendment to the 1968 Constitution has brought its own appellate challenge. *See In re Pennsylvania Legislative Reapportionment Commission* [In re 1991 Reapportionment], 609 A.2d 132 (Pa. 1992); *In re Reapportionment Plan for the Pennsylvania General Assembly* [In re 1981 Reapportionment], 442 A.2d 661 (Pa. 1981); *Commonwealth ex rel. Specter v. Levin* [In re 1971 Reapportionment], 293 A.2d 15 (Pa. 1972).

schedule and order that the 2001 Plan remain in effect during the 2012 election. *Holt II*, 38 A.3d at 718, 722; *see* Pa. Const. art. II, § 17(d) ("If an appellant establishes that a plan is contrary to law, the Pennsylvania Supreme Court is required to issue an order remanding the plan to the Commission with direction to reapportion the Commonwealth in a manner not inconsistent with such order.")

b. Neither *Reynolds v. Sims*, 377 U.S. 533 (1964) nor the case law cited by Defendant Aichele supports the proposition that regularly scheduled elections occurring under an old districting plan are constitutional so long as the redistricting process continues.

Defendant Aichele maintains that "federal courts applying *Reynolds* have found no constitutional violation or cause for judicial intervention when regularly scheduled elections occur under an old districting plan while state or local authorities diligently go about the business of the redistricting process." (Doc. 36 at 16.) In advancing this theory, Defendant Aichele attempts to convert *Reynolds'* acknowledgement of "**some imbalance** in the population of districts toward the end of the decennial period" in its setting of a minimum reapportionment interval to mean that any and all reapportionment delays are to be tolerated, even at the expense of express state constitutional language calling for the implementation of a new plan by a specific deadline (*see* Statement of Facts, Section C, *supra* at 3-4) – in this case, the upcoming 2012 legislative election. (*See* Doc. 36 at 13-18); *Reynolds v. Sims*, 377 U.S. 533, 583 (1964) (emphasis added). A close review of *Reynolds* reveals that Defendant Aichele grossly misstates this "imbalance" language.

In *Reynolds*, the United States Supreme Court set a minimum ten-year interval by which redistricting should be accomplished to meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. In setting this ten-year threshold versus more frequently required reapportionment, the Court acknowledged that "reapportioning no

more frequently than every 10 years [would undoubtedly] lead to **some imbalance** in the population of districts toward the end of the decennial period" and also likely result in "resistance to change on the part of some incumbent legislators." *Reynolds*, 377 U.S. at 583 (emphasis added). However, it reasoned that setting a ten-year minimum threshold was "justified by the need for stability and continuity in the organization of the legislative system." *Id*. Nevertheless, more frequent reapportionment would still be constitutionally permissible but not required as the Court did not "regard the *Equal Protection Clause* as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation." *Id.* at 584. Accordingly, in relying on this language to support the notion that"[t]he law does not require an immediate change in district lines" following the availability of census data, only a reasonably conceived plan for periodic reapportionment undertaken with some degree of diligence and no express deadline, Defendant Aichele takes this "imbalance" language out of context. (*See* Doc. 36 at 13.) After all, the Court referred to it when weighing what would be an appropriate reapportionment interval to meet the minimal requirements for maintaining a reasonably current scheme of legislative representation, not as a justification for failing to implement a new plan in a timely fashion before an upcoming election where census data was readily available and released well in advance of the election at issue.

Instead Defendant Aichele's interpretation runs too far afield of *Reynolds* as demonstrated in *Flateau v. Anderson*, 537 F.Supp. 257 (S.D.N.Y. 1982), which addressed extending the life of an old reapportionment map through a general election held well after an intervening census and ordered immediate reapportionment. In *Flateau*, New York voters faced the prospect of a 1982 election under a 1972 reapportionment plan, despite the availability of

U.S. Census data on December 31, 1980. *Id*. at 260. Accordingly, Plaintiffs argued that immediate redistricting was required in advance of the 1982 election, given one person, one vote violations apparent from statistical data that revealed a maximum percentage population deviation of 84.75% for the Senate and 109% for the Assembly. *Id*. at 259, 263. Certain defendants, in turn, maintained that because carefully structured New York constitutional reapportionment provisions were in place that permitted reapportionment by 1986, New York need not reapportion its Senate and Assembly districts in the 1982 election year. *Id*. at 265.

In ordering immediate reapportionment by April 16, 1982 by the New York State Legislature, the court addressed what several other courts have construed to be *Reynolds'* "toleration of otherwise unjustifiable malapportionment if the state can demonstrate that it has adopted, and is in compliance with, 'a reasonably conceived plan for periodic readjustment of legislative representation.'" *Id*. at 264. When applying *Reynolds'* to these facts, the court found that because "the last reapportionment in New York occurred in 1972, a failure to reapportion the current districting lines for the state legislature with respect to terms commencing on or after January 1, 1983 would render New York's present apportionment scheme more than ten years old and hence 'constitutionally suspect.'" *Id*. Probing further, the court determined whether this scheme would be "constitutionally infirm" by balancing "the state's interest in delaying reapportionment until after the 1982 general elections against the interests of the thousands of New York voters whose voting strength in the 1982 general election stands to be diluted, relative to the voting strength of citizens living in other parts of New York State". *Id*. at 264-265. The court noted that "despite some tolerance for deviations in cases where a 'rational state policy' will otherwise be furthered, some deviations are so substantial that no state interests or policy can justify them." *Id*. at 264. Accordingly, the court considered the extent of the voter dilution

here and found that based on the data presented, using the 1972 plan in 1982 elections would constitute *per se* violations of the one person, one vote doctrine. *Id.* When weighing New York's competing interests justifying such statistical disparities, the court found that defendants presented no strong reasons why reapportionment should not be accomplished in time for the 1982 general elections as they merely asserted that such reapportionment delays should be maintained due to tradition. *Id.* at 265. Considering these competing interests, the court found that it was reasonable to insist that the legislature enact, and the Governor sign, a valid reapportionment statute in time for the 1982 elections to proceed as scheduled, given that the primary elections were six months away and the political process did not start until June 22nd. *Id*. at 266.

As in *Flateau*, this case also presents a constitutionally suspect plan given that the last round Pennsylvania legislative reapportionment was completed on November 19, 2001, well over ten years ago. S*ee Albert v. 2001 Legislative Reapportionment Comm'n*, 567 Pa. 670, 674 (2002). Further, applying the balancing test articulated in *Flateau* affords Plaintiffs the special election relief requested given that the use of the 2001 Plan in upcoming 2012 elections stemmed merely from the absence of a constitutionally approved 2011 Plan and encroaching election deadlines, rather than any conscious policy based state concern or objective. Consequently, no state justifications for the deviations alleged in Plaintiffs' complaint are plausible. Notwithstanding, Plaintiffs have alleged and established a *per se* violation of the one person, one vote doctrine. (*See* Doc. 1 ¶36; *see also* Doc. 19-1 at 4-31.)[22] As such, Plaintiffs have both

[22] Because the statistical data offered (*see e.g.* Doc. 19-1 at 4-31) is central to Plaintiffs' complaint and merely expands on the methodology used to calculate the malapportionment deviations specified in the complaint, the Courts consideration of these materials will not convert Defendant Aichele's motion to one for summary judgment. *See e.g. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc*., 998 F.2d 1192, 1196-97 (3d Cir. 1993) (holding that a court may consider an undisputedly authentic document if plaintiff's claims are based on the document); *Cortec Indus., Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47 (2d Cir. 1991*)* (if plaintiff's claims are predicated on document, defendant may attach document to Fed. R. Civ. P. 12(b)(6) motion even if plaintiff's complaint does not

adequately pled a claim upon which relief may be granted and established the merits of their preliminary injunction motion (*see* Doc. 19).

In addition to misconstruing *Reynolds*, Defendant Aichele cites cases in support of her "imbalance" argument that are inapposite to this matter. Specifically, *Political Action Conference v. Daley*, 976 F.2d 335 (7th Cir. 1992) and *Graves v. City of Montgomery*, 807 F.Supp. 2d 1096 (M.D. Ala. 2011) address circumstances where census data was released shortly before a disputed election, such that the election fell in the middle of the redistricting timeframe allowed by state law, rendering the creation and incorporation of a new reapportionment plan in the upcoming election logistically impossible. *See Daley*, 976 F.2d at 338 (1990 census data was released on February 11. 1991, just fifteen days before the disputed February 26, 1991 aldermanic election); *Graves*, 807 F.Supp. 2d at 1101 (census data released on February 24, 2011 and the disputed city council election was set to occur on August 23, 2011).[23] Neither case addresses the merits of Plaintiffs' special election remedy request. Instead, each deals with motions for preliminary injunctions and/or declaratory relief to enjoin pending elections and/or declare a given statutory reapportionment scheme unconstitutional given that upcoming elections were to be conducted using an outdated reapportionment plan in violation of plaintiffs' voting and equal protection rights.

Though Defendant Aichele's "imbalance" argument was relied upon in those cases to justify each of those elections proceeding on the basis of an old reapportionment plan, *Daley* and *Graves* Plaintiffs did not assert that a new redistricting plan was feasible or could be

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explicitly refer to it); *188 LLC v. Trinity Indus., Inc*., 300 F.3d 730, 734-735 (7th Cir. 2002*)* (district court properly considered liability limitation that was arguably incorporated by reference in contract in dispute).

[23] The same holds true for cases such as *Kahn v. Griffin*, Civil No. 03-5037 (JRT/FLN), 2004 U.S. Dist. LEXIS 13951 (D. Minn. Jul. 20, 2004); *French v. Boner*, 786 F. Supp. 1328 (M.D. Tenn. 1992), *Ramos v. Illinois*, No. 90-C-7211, 1992 WL 7831 (N.D. Ill. Jan. 2, 1992) , *New Democratic Coalition v. Secretary of State*, 41 Mich. App. 343 (Mich. Ct. App. 1972) not yet cited by Defendant Aichele.

implemented before the upcoming elections. *Daley*, 976 F.2d 335, 338; *Graves*, 807 F.Supp. 2d at 1104-1111. Nor did they assert that the reapportionment process was unreasonably delayed. *Daley*, 976 F.2d at 338; *Graves*, 807 F.Supp. 2d at 1104-1105. Accordingly, "this overlap [was found to be] of no constitutional consequence" and both *Graves* and *Daley* Plaintiffs' equal protection claims were dismissed. *See e.g. Graves*, 807 F.Supp. 2d at 1104-1112. Here, by contrast, there is no overlap – the 2011 Reapportionment Plan remains nonexistent and therefore well outside the timeframe specified by the Commonwealth's Constitution. Plaintiffs maintain that here there was an unreasonably delayed reapportionment procedure as census data was released well in advance of the upcoming 2012 elections. Moreover, here there was express state constitutional language calling for the implementation of a new plan by a specific deadline and that deadline was breached. (*See* Statement of Facts, Section C, *supra* at 3-4.) As such, both *Graves* and *Daley* are inapposite.

Further, while Defendant Aichele quotes language from *Clark v. Marx*, C.A. No. 11-2149, 2012 U.S. Dist. LEXIS 2429 (W.D. La. Jan. 9, 2012) in support of its "imbalance" argument, such language misrepresents the outcome achieved in that action and its bearing on this matter. (*See* Doc. 36 at 17 (citing *Clark*, 2012 U.S. Dist. LEXIS 2429, at *24 ("If a governing body has a plan for reapportionment every ten years, there is no Supreme Court case directly addressing the question of how long the governing body can delay reapportionment after the decennial census data is received without running afoul of the *Fourteenth Amendment*.") In *Clark*, 2010 census data was released to the State of Louisiana on February 3, 2011 while the disputed city council election cycle began with the primary set for March 24, 2012, and the general election set for April 21, 2012. *Clark*, 2012 U.S. Dist. LEXIS 2429, at *7-*9. Reapportionment was to occur "'[n]ot later than one (1) year following official publication of

each federal census by the United States Bureau of the Census for the area covered by the City and at least six (6) months prior to the next election for council members'". *Id*. at *8. Though the plan was final on November 22, 2011, within the one-year period but not within six months prior to the next election, the required preclearance of the plan had not been obtained by the November 30, 2001 deadline allowing the elections to proceed as scheduled. *Id*. at *10. Despite later preclearance of the plan, pursuant to a state statute, the current City Council members were to hold over in their offices until the next regularly scheduled primary election on November 6, 2012, and the general election, if necessary, held on December 1, 2012. *Id*. Plaintiffs moved for a preliminary injunction under 42 U.S.C. § 1983 alleging equal protection violations under the one person, one vote doctrine of the Fourteenth Amendment, requesting that the Court order elections go forward in March and April 2012, in contravention of the requirements of the State's general elections laws using the pre-cleared plan. *Id*. at *26. The court denied the motion on that basis finding that City Defendants complied with their Equal Protection obligations by reapportioning the electoral districts and obtaining preclearance from the Department of Justice in a reasonable period of time. *See id*. at *20-*32. The Court reasoned that "[t]he short [four-month] holdover period for current City Council members based on operation of the state's general election laws does not result in a constitutional deprivation necessitating this Court's intervention." *Id*. at *21. Given that city council members at issue in *Clark* are elected to serve four-year terms, *id*. at *7, the district court essentially validated relief similar to that sought in this matter, a special election following the availability of a properly approved plan.[24] Accordingly, Defendant Aichele's use of the case is misleading and inappropriate as it is used to

[24] To be clear, much like *Clark*, Plaintiffs propose a shortened one-year election term for those state legislators elected in 2012, followed by a special election conducted in connection with 2013 municipal elections. Given that a primary and general election will be required to institute this special election remedy and can easily occur in connection with the municipal primary and municipal general elections scheduled in 2013, Defendant Aichele's argument that Plaintiffs are in fact requesting a six-month shortened term is mistaken. (*See* Doc. 36 at 2 n.1.)

advance this limited reading of *Reynolds*' "imbalance" language. Further, the four month reapportionment delay or disenfranchisement in *Clark* pales in comparison to the outcome Defendant Aichele proposes here – complete disenfranchisement during an entire term for both the House and half of the Senate.

Finally, Defendant Aichele also overstates the degree to which *Pileggi v. Aichele*, C.A. Nos. 12-0588, 12-0556 and 12-0488, 2012 U.S. Dist. LEXIS 15227 (E.D. Pa. Feb. 8, 2012) recognizes that "federal courts applying *Reynolds* have found no constitutional violation or cause for judicial intervention when regularly scheduled elections occur under an old districting plan while state or local authorities diligently go about the business of the redistricting process". (Doc. 26 at 16.) *Pileggi* addressed a request to enjoin an imminent primary election schedule, which the Court reasoned might do more harm than good ultimately, despite the one person, one vote issues raised, given the public's interest in an orderly election process and the need to maintain voter participation. (*Id*. at 31-32 (addressing the "*Reynolds* principle that, 'where an impending election is imminent and a State's election machinery is already in progress,' a court may withhold granting relief, *even if the existing apportionment scheme is found to be invalid*.") (internal citations omitted).) At no point in that decision did this Court reach the merits of Defendant Aichele's "imbalance" argument as a justification for tolerating one person, one vote violations.

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

Defendant Aichele urges the Court to dismiss this action based on the principles of abstention[25] in deference to the legislative reapportionment process still currently underway so

[25] Though Defendant Aichele's notice of motion references 12(b)(1) and 12(b)(6) grounds for dismissal of Plaintiffs' claim, Defendant Aichele's abstention argument fails to address under which provision it raises this issue

that Defendant 2011 LRC and the Pennsylvania Supreme Court can adopt and approve a legislative reapportionment plan in the first instance. (*See* Doc. 36 at 18-21 (citing *Growe v. Emison*, 507 U.S. 25 (1993) and *Scott v. Germano*, 381 U.S. 40 (1965)). While Defendant Aichele 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 Aichele 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).

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or the corresponding burden of proof governing this ground for dismissal. Based on the phrasing of Defendant Aichele's notice of motion, Plaintiffs infer that 12(b)(1) grounds are being asserted, in which case, as the party asserting jurisdiction, Plaintiffs "bear the burden of showing that its claims are properly before the district court". *Dev. Fin. Corp. v. Alpha Hous. & Health Care*, 54 F.3d 156, 158 (3d Cir. 1995). In determining what evidence it may consider in evaluation this 12(b)(1) claim, 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 Aichele presents a facial attack of the complaint. (*See generally* Doc. 36 at 18-22.) Notwithstanding, 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).

In failing to perceive this distinction, Defendant Aichele 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 asks 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 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.[26] (*See id*.)

Conversely, Plaintiffs also ignore 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.[27] Moreover, it is worth nothing that in issuing its second

[26] Though Defendant Aichele characterizes 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).

[27] *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*

decision regarding the previous 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 II*, 38 A.3d at 761 ("[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, 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. 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

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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.

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 Stanovic*, 485 F. Supp.2d at 581. Given the voting rights issue 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.

III. Plaintiffs' Preliminary Injunction Motion Should Be Granted.

Given the distinct relief sought in this matter as compared with that presently before the Pennsylvania Supreme Court, it is difficult to see how Defendant Aichele's alternative request has any merit, namely that this Court deny Plaintiffs' requested preliminary injunction and stay the matter pending the Pennsylvania Supreme Court's 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. First, Defendant Aichele fails to address the substantive merits of Plaintiffs' preliminary injunction motion beyond Plaintiffs' reasonable probability of success on the merits, which Plaintiffs have already addressed at great length in the argument above.[28] (*See generally* Doc. 36); *Child Evangelism Fellowship of N.J. Inc. v. Stafford Township School*, 386 F.3d 514, 524 (3d Cir. 2004) (enumerating elements required for a permissive preliminary injunction 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); *Mclaughlin v. Pernsley*, 693 F. Supp. 318 (E.D.Pa 1988) (adding that mandatory preliminary injunctions are only granted

[28] In the event that Defendant Aichele uses her motion to dismiss reply brief to address such omitted arguments regarding Plaintiff's preliminary injunction motion, Plaintiffs request that any such arguments be stricken from the record. *See* Fed. R. Civ. P. 12(g)(2).

when the facts and the law are clearly in favor of the moving party.) Second, Defendant Aichele cites no authority regarding why a stay should be granted pending 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. (*See* Doc. 36 at 18-21.)

CONCLUSION

For all the reasons noted above and in order to safeguard the value of the vote for Plaintiffs and all other Pennsylvania voters, Plaintiffs respectfully request that this Court deny Defendant Aichele's Motion to Dismiss Plaintiffs' Complaint and 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 *Plaintiffs' Memorandum of Law in Opposition to Defendant Aichele's Motion To Dismiss Plaintiffs' Complaint and in Further Support of Plaintiffs' Motion for a Preliminary Injunction* 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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