UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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.	Civil Action No. 12-0556 RBS

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF THE APPOINTMENT OF A SPECIAL MASTER IN CONNECTION WITH PLAINTIFFS' PENDING PRELIMINARY INJUNCTION MOTION AND OPPOSITION TO ARGUMENTS PRESENTED IN THE FIRST INSTANCE BY *AMICUS CURIAE* SENATOR PILEGGI AT ORAL ARGUMENT

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Per this Court's January 15, 2013 order[1], Plaintiffs, through undersigned counsel, submit this supplemental memorandum of law in support of the appointment of a special master in connection with Plaintiffs' pending preliminary injunction motion[2] and to new address arguments raised in the first instance by *amicus curiae* Senator Pileggi at oral argument.

PRELIMINARY STATEMENT

At present, the Plaintiffs herein, indeed all Pennsylvania voters, are being represented by unconstitutionally elected officials in Harrisburg. Defendants have not challenged the wildly disparate population deviations presented by the Plaintiffs regarding the 2001 legislative reapportionment plan that was used for the 2012 elections. Effectively conceding liability on Plaintiffs one person, one vote constitutional claim, Defendants take the position that a remedy is unwarranted. Indeed, Defendant 2011 Legislative Reapportionment Commission ("Defendant 2011 LRC") adopted the startling position during oral argument that there is nothing this Court can do to address the current violation of federal constitutional rights as reapportionment "is primarily the responsibility of the State through its assigned actors, in this case the Legislative Reapportionment Commission, and the State Supreme Court."[3] Nothing could be further from the truth. It is the province of the federal courts to protect the federal constitutional rights of United States citizens, especially the right to vote. Every vote cast by elected officials in Harrisburg on legislative bills and other matters is a vote cast on an unconstitutional premise that debases the right to the franchise. Plaintiffs submit that under the current circumstances in Pennsylvania, this Court is well within its constitutional powers to intercede, shorten the current electoral terms, order a remedial special election, and if need be, take over the redistricting process when, as here, state actors have failed to act.

[1] (Doc. 60.)
[2] (Doc. 19.)
[3] (Doc. 61, Prelim. Inj. Mot. Tr. at 17.)

Without federal court intervention to address the ongoing absence of a legally valid 2011 reapportionment plan, Plaintiffs' constitutional right to an election that reflects the one person, one vote rule will once again be violated. In effect, Plaintiffs will be foreclosed from receiving the special election remedy to which they are legally entitled. As discussed in Plaintiffs' preliminary injunction briefing, the 2012 election occurred using the 2001 Legislative Reapportionment Plan, unconstitutionally depriving Latinos and all Pennsylvania voters of effective representation for a two-year house term as well as a four-year term for half of the senate, necessitating a special election to cure this error. Federal intervention in the reapportionment process is now required as two branches of the Pennsylvania state government – both Defendant 2011 Legislative Reapportionment Commission and the Pennsylvania Supreme Court – continue to fail Plaintiffs and all Commonwealth voters in this process.

Following the release of 2010 Census data, Defendant 2011 LRC harmed voters by neglecting to issue a timely reapportionment plan capable of surviving constitutional scrutiny. Thus, Defendant 2011 LRC left the Pennsylvania Supreme Court with an invalid plan and no time to draft an alternate one in time for the 2012 elections, requiring that the outdated 2001 plan be used instead. The Pennsylvania Supreme Court, in turn, has yet to rule on the validity of the second reapportionment plan issued by Defendant 2011 LRC on June 8, 2012, despite having heard oral argument on September 13, 2012.

No end to Pennsylvania's protracted reapportionment process appears to be in sight, drawing into question whether a plan will be available in time for the special election requested by Plaintiffs or even by the forthcoming 2014 legislative election. Consequently, in the absence of a valid reapportionment plan, Plaintiffs and all Pennsylvania voters face a constitutional violation with no prospect of a timely remedy despite the strength of their special election

request. In response to these delays presented by both Defendant 2011 LRC and the Pennsylvania Supreme Court, as well as the fact there is still no valid plan in place months after Plaintiffs filed the instant motion for a preliminary injunction on June 29, 2012, Plaintiffs hereby amend their original preliminary injunction motion to include the designation of a special master and various alternative schemes under which the special election requested might be conducted. Plaintiffs, accordingly, request that this Court refer this matter to a three-judge panel should Plaintiffs' arguments present merit to implement the relief sought in a timely fashion.[4]

Amicus curiae Senator Pileggi's argument, first introduced at oral argument, that the one person, one vote constitutional violations alleged do not warrant a special election for state senatorial seats because "there is no realistic possibility that a Hispanic majority-minority Senatorial District could be included in any lawful Redistrict[ing] Plan for the Commonwealth"[5] is a rather unique, unsupportable interpretation of the Constitution. Taken to its logical extreme Senator Pileggi posits that since there are so few Latino voters in concentrated areas of the Commonwealth to satisfy a statutory remedy under the Voting Rights Act, they cannot obtain a court remedy for this clear violation of their constitutional rights. As set forth herein, such a

[4] 28 U.S.C. § 2284 requires that a district court of three judges, rather than a single judge, hear actions such as this one, challenging the constitutionality of "the apportionment of any statewide legislative body." 28 U.S.C. § 2284. Although a single district judge has certain limited powers, including the power to issue temporary restraining orders, until the convening of a three-judge court, a single judge does not have the power to entertain applications for preliminary injunctive relief. *See* 28 U.S.C. § 2284(b)(3). In this case, Plaintiffs' complaint and temporary restraining order requested a three judge court pursuant to 28 U.S.C. § 2284. (*See* Docs. 1 and 2.) Though Plaintiffs' preliminary injunction motion failed to make this request explicit, Plaintiffs are nevertheless entitled to have the matter referred to the district court as three-judge courts are mandatory for cases encompassed within § 2284(a). *Armour v. Ohio*, 925 F.2d 987, 989 (6th Cir. 1991)("[a]lthough § 2284 seems to contemplate 'the filing of a request for three judges' by a party and a determination by the district judge of the need for such a court, the 'shall' language of the statute quoted above appears to make the convening of such a court a jurisdictional requirement once it becomes clear that there exists a non-frivolous constitutional challenge to the apportionment of a statewide legislative body."); *see also Allen v County School Board*, 28 FRD 367 (E.D. Va. 1961) (denying motion to dismiss suit on ground that injunctive relief requested could not be granted except by District Court of three judges, where plaintiff was entitled to be heard on paramount question of whether state defendants were deliberately circumventing desegregation order of the District Court). Accordingly, Plaintiffs renew their request for a three judge trial court pursuant to 28 U.S.C. § 2284.

[5] (Doc. 61, Prelim. Inj. Mot. Tr. at 32.)

novel interpretation of the Constitution is misplaced and enjoys no case support that neither the Senator nor the Plaintiffs can identify. It should, consequently, be dismissed out of hand.

STATEMENT OF FACTS

Given that both Defendant 2011 LRC and the Pennsylvania Supreme Court continue to fail Plaintiffs and all Commonwealth voters in their handling of the reapportionment process approximately one year since initiating this action, Plaintiffs here update the statement of facts included in their preliminary injunction motion and submit it for the Court's review as it is germane to the issue of federal intervention in the Commonwealth's reapportionment process, and thus essential to Plaintiffs' special election request.

a. Federal Census Data Becomes Available.

On December 21, 2010, apportionment counts for determining federal legislative representation (total population by state plus those individuals living abroad) were released by the U.S. Census Bureau. On January 13, 2011 2010 TIGER/line Shapefiles for Pennsylvania were released by the U.S. Census Bureau.[6] Finally, on March 09, 2011, L94-171 population data for Pennsylvania was released by the U.S. Census Bureau.[7]

b. Defendant 2011 LRC Becomes Certified.

On February 18, 2011, within sixty days from the December 21, 2010 release of "the official reporting of the Federal decennial census" State Legislative Leaders certified four of the five members of the 2011 Legislative Reapportionment Commission.[8] *See* Pa. Const. art. II, §

[6] 2011 Legislative Reapportionment Commission, Recent Updates, http://www.redistricting.state.pa.us/ (last visited Aug. 13, 2012).

[7] 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).

[8] 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.

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[9] such that its final member was ultimately appointed by the Pennsylvania Supreme Court on April 19, 2011 within the resulting thirty-day period proscribed.[10] *See id*. Consequently, as of April 19, 2011, Defendant 2011 LRC was properly certified. [11] *See id*.

c. Defendant 2011 LRC Prepares its First Reapportionment Plan.

Per Section 17(c) of Article II of the Pennsylvania Constitution, Defendant 2011 LRC has no more 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 [becomes] available" to file a preliminary reapportionment plan. *See* Pa. Const. art. II, § 17(c) Accordingly, Defendant 2011 LRC had ninety days from April 19, 2011, the date the Commission was certified to file its preliminary reapportionment plan. The preliminary plan was, therefore, due on July 18, 2011 at the latest. *See id*. 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.[12] Moreover, a preliminary plan was not filed until October 31, 2011 – approximately four months after the explicit constitutional deadline of July

[9] 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).

[10] 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).

[11] 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).

[12] 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).

18, 2011.[13] *See id*. Finally, it was not until December 12, 2011 that Defendant 2011 LRC adopted its final plan for 2011.[14]

d. Defendant 2011 LRC's First Reapportionment Plan is Challenged.

Twelve petitions challenging the 2011 Final Reapportionment Plan were filed with the Pennsylvania Supreme Court.[15] None addressed the constitutionality of using the 2001 Plan in the 2012 election or what remedies would be available to the Pennsylvania Supreme Court if it declared the plan invalid. *See generally Holt v. 2011 Legislative Reapportionment Commission ("Holt II")*, 38 A.3d 716, 759 (Pa. 2012).

e. The Pennsylvania Supreme Court Finds the 2011 Reapportionment Plan to be Contrary to Law.

On January 25, 2012, the Pennsylvania Supreme Court deemed the 2011 Reapportionment Plan "contrary to law" in a *per curiam* order issued in *Holt v. 2011 Legislative Reapportionment Commission ("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 January 25, 2012 order, the

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[13] 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)

[14] 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).

[15] *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).

Pennsylvania Supreme Court elaborated that the overall 2011 Final Reapportionment 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 II*, 38 A.3d at 759. 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. The Pennsylvania Supreme Court explicitly declined to address any possible special election remedying the use of the 2001 plan in the 2012 election, 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.") The Pennsylvania Supreme Court added that they were "not in a position to predict when the LRC will complete its task of developing a new final redistricting plan that complies with law, nor when such a new plan can become final and have force of law." *Id*. Accordingly, following this District Court's denial of Plaintiffs' request for a temporary restraining order to enjoin the then upcoming 2012 legislative elections (Doc. 10), the April 24, 2012 state legislative primary elections proceeded based on 2001 apportionment lines.[16] In issuing its decision, the Pennsylvania Supreme Court also carefully detailed the failings of Defendant 2011 LRC in the Commonwealth's reapportionment process, which this

[16] 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).

Court will find instructive in its analysis of the preliminary injunction motion pending. (*See Statement of Facts*, *infra* at 8-13.)

1. The Pennsylvania Supreme Court Admonishes Defendant 2011 LRC For Failing To Issue A Timely Plan.

The Pennsylvania Supreme Court's February, 2012 opinion noted Defendant 2011 LRC's untimeliness following its initial invalidation of the first reapportionment plan.[17] *See generally Holt II*, 38 A.3d at 718. It 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 on March 9, 2011. The Pennsylvania Supreme Court 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 Pennsylvania Supreme 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, Defendant 2011 LRC 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

[17] 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. 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.

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*.

2. Defendant 2011 LRC Extended, By Unilateral Interpretation, The State Constitution's Deadlines Governing The Reapportionment Process.

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). Based on when the Commission was certified and when the population data became available, the preliminary plan needed to be filed by July 18, 2011. (*See* Statement of Facts, Section C, *supra* at 5-6); *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 5-6); *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 (citing Del Sole Cavanaugh Stroyd LLC Memorandum at 4-5, *Holt v. 2011 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)). Even the Commission acknowledged 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.
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> Del Sole Cavanaugh Stroyd LLC Memorandum at 5, *Holt v. 2011 Legislative Reapportionment Commission*, No. 1 WM 2012 (Pa. 2012).

By contrast, at oral argument, Defendant 2011 LRC maintained that an unpublished decision of the Pennsylvania Supreme Court authorized Defendant 2011 LRC's reading of "available" as "usable" but that it could not be located. Defendant 2011 LRC argued that the District Court must, therefore, defer to the account provided by Professor Gormley in his book, *The Pennsylvania Legislative Reapportionment of 1991*. (Doc. 61, Prelim. Inj. Mot. Tr. at 25-26.) When pressed by the District Court, Defendant 2011 LRC conceded that direct authority concerning the distinction between "usable" and "available" does not exist but advocated that practical considerations should prevail. (*Id*. at 26.)

3. The Pennsylvania Supreme Court Finds That Defendant 2011 LRC Failed To Budget For An Adequate Appeals Period.

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 resulted in a late and legally invalid plan. Moreover, Defendant 2011 LRC left no time to develop a truly constitutional alternative for use in the 2012 election and thus debased of the weight of Pennsylvania citizens' votes. *See Holt II*, 38 A.3d at 722.

The Pennsylvania Supreme Court noted that Defendant 2011 LRC filed its the First Final Reapportionment Plan on December 12, 2011, a mere forty-three days before the January 24, 2012 deadline to circulate primary nomination petitions. *Id*. Because any appeals are due thirty days from when a final reapportionment plan is issued, Defendant 2011 LRC only allotted thirteen days to entertain the appeals filed, which the Court found insufficient. *Id*. at 723. Given that the "Constitution specifically authorizes appeals from final plans" the Pennsylvania Supreme Court found that any future plan should be prepared "with an eye toward affording sufficient time for meaningful appellate review, if appeals are filed." *Id.* This review period is essential as Defendant 2011 LRC's final plan does not enjoy a presumption of constitutionality. *Id.* at 730 (noting that "[o]n its face, the Constitution does not dictate any form of deference to the LRC, it does not establish any special presumption that the LRC's work product is constitutional, and it also places no qualifiers on this Court's scope of review.") Consequently, given the appeals that predictably followed, as they had in each and every previous reapportionment cycle[18], once the Pennsylvania Supreme Court invalidated the plan on January 25, 2012, the Court had no other option but to adjust the election schedule and order that the 2001 Plan remain in effect during the 2012 election. *See id*. at 761 ("As we have noted earlier, we recognize that our constitutional duty to remand a plan found contrary to law has disrupted the 2012 primary election landscape. That disruption was unavoidable in light of the inexcusable failure of the LRC to adopt a Final Plan promptly so as to allow the citizenry a meaningful opportunity to appeal prior to commencement of the primary season.")

[18] Each reapportionment since the amendment to the 1968 Constitution has brought its own appellate challenge. *See Albert v. 2001 Legislative Reapportionment Commission*, 567 Pa. 670, 790 A.2d 989, 991 (Pa. 2002)*; 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).

f. Defendant 2011 LRC Issues Its Second Reapportionment Plan.

Though the Pennsylvania Supreme Court "trust[ed] that the LRC [would] avert similar delay as it [was] called upon to faithfully execute its task upon remand"[19] and received assurances from certain appellants "that, with the use of available computer technology and familiarity with the necessary data, a new preliminary plan accounting for the objective criteria set forth in our Constitution could be generated in a matter of days"[20], Defendant 2011 LRC did not file its Revised Preliminary Plan with the Pennsylvania Department of State until April 12, 2012.[21] It took over two months for Defendant 2011 LRC to release a new preliminary plan, during which time it adjourned several public hearings in the process.[22] Following release of the preliminary plan, Defendant 2011 LRC convened two public hearings on May 2, 2012 and May 7, 2012.[23] On June 8, 2012, Defendant 2011 LRC issued its Revised Final Reapportionment Plan[24].

g. Defendant 2011 LRC's Second Final Plan is Challenged.

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.[25] Pa.

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[19] *Holt II*, 38 A.3d 716, 761 (Pa. 2012).
[20] *Holt II*, 38 A.3d at 761 n.39.
[21] Press Release, 2011 Legislative Reapportionment Commission, (Apr. 13, 2011), http://www.redistricting.state.pa.us/Resources/Press/2012-04-13-Press-Release.pdf.
[22] 2011 Legislative Reapportionment Commission, Recent Updates, http://www.redistricting.state.pa.us/ (last visited Jan. 20, 2013).
[23] 2011 Legislative Reapportionment Commission, Recent Updates, http://www.redistricting.state.pa.us/ (last visited Jan. 20, 2013).
[24] Press Release, 2011 Reapportionment Commission (Jun. 8, 2012), http://www.redistricting.state.pa.us/Resources/Press/2012-06-14-Press-Release.pdf.
[25] *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*

Const. art. II, § 17(d)-(e). None of the appeals addressed the possibility of ordering a special election to remedy the fact that the 2012 election proceeded under an outdated 2001 plan.[26]

h. The Pennsylvania Supreme Court Has Yet To Issue A Ruling Regarding Defendant 2011 LRC's Second Final Plan.

Following consolidation of the appeals and full briefing, the Pennsylvania Supreme Court heard oral argument regarding these petitions on September 13, 2012.[27] However, as of the date of this filing, the Pennsylvania Supreme Court has not ruled on the validity of the second plan pending. 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.

ARGUMENT

I. Federal Court Intervention In The Reapportionment Process Is Now Required.

As part of the special election remedy requested, this Court can intervene in the reapportionment process and designate a special master, [28] such as an assigned magistrate,[29] to address the ongoing absence of a legally valid 2011 reapportionment plan for the Commonwealth. Federal courts in other states have ordered special elections to avoid holding elections based on unconstitutional reapportionment plans, and those same courts have routinely

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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).

[26] *See supra* n. 25.

[27] *See* Supreme Court of Pennsylvania, Court Daily Argument Lists, (January 20, 2013), http://www.pacourts.us/OpPosting/Supreme/out/September2012SessionList.pdf.

[28] Though Plaintiffs first raised the need for a special master at oral argument, it is worth noting that authority in support of this amended request was actually provided in connection with Plaintiff's preliminary injunction motion in support of their request for a deadline by which Defendant 2011 LRC would have to enact a third revised plan in the event that the Supreme Court of Pennsylvania invalidate the second plan drafted. (*See* Doc. 19 at 21-22.)

[29] *See Favors, et al. v. Cuomo et al.*, 11-CV-5632 (DLI)(RR)(GEL), 2012 U.S. Dist. LEXIS 36849 (E.D.N.Y. Mar. 12, 2012) (three-judge panel referred the task of creating a redistricting plan to the undersigned magistrate judge and delineated the responsibilities and powers accompanying the task).

threatened to draft their own reapportionment plan should the state legislature in those cases fail to issue a new, constitutional plan prior to the special election. *See e.g. Smith v. Beasley*, 946 F.Supp. 1174, 1213 (D.S.C. 1996)(setting a deadline for the legislature to enact a new district plan that comported with the Constitution and noting that "if the legislature fails to pass a constitutional redistricting plan [by an enumerated deadline], the court will discharge its unwelcome obligation to put its own remedial plan into effect"); *see also Cosner v. Dalton*, 522 F.Supp. 350, 364 (E.D.Va. 1981) (same); *WMCA, Inc. v. Lomenzo*, 246 F. Supp. 953, 955 (S.D.N.Y. 1965), *enforcing*, 377 U.S. 633, 655 (1964), *summarily aff'd*, *Hughes v. WMCA*, Inc., 379 U.S. 694 (1965) (same). The state of Pennsylvania is well past that point of threatening to intervene here. Federal court action is required as both Defendant 2011 LRC and the Pennsylvania Supreme Court have failed to act in a timely manner,[30] potentially jeopardizing the special election sought in connection with upcoming Commonwealth municipal elections, given that candidate petitioning for that election is set to occur between February 19, 2013 and March 12, 2013. 25 P.S. § 2861.

Though Defendants and Amici acknowledge that federal courts may intervene in state reapportionment matters where there is evidence that state legislative or judicial branches "will fail to timely perform that duty",[31] each fails to accept federal intervention here despite the absence of a legally valid reapportionment plan in 2013. Such logic defies comprehension as the "duty" of the state branches here is to create a legally valid plan not merely endeavor to do so

[30] (*See generally Statement of Facts*, *supra* at 8-13.)

[31] Both defendants and amici agree that "absent evidence that these state branches [legislative and state judicial' will fail timely to perform [its reapportionment duty,] a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to impede it." (Doc. 36 at 20 (Defendant Aichelle); Doc. 41 at 10 (Defendant 2011 LRC); Doc. 53 at 10 (*Amicus Curiae* Representative Turzai); Doc. 31 at 4 (*Amicus Curiae* Senator Pileggi) (quoting *Growe v. Emision*, 507 U.S. 25, 34 (1993)).

repeatedly without success.[32] Nowhere is this more apparent than in *Reynolds*, where the U.S. Supreme Court affirmed the district court's interference in the Alabama reapportionment process. In that case, the Alabama Legislature failed "to act effectively in remedying the constitutional deficiencies in the State's legislative apportionment scheme". *Reynolds v. Sims*, 377 U.S. 533, 586-587 (1964). Though Alabama had not been reapportioned since 1911, the district court declined to take corrective action before the 1962 primary, allowing the legislature another attempt at reapportionment. In so doing, the district court stated "that, if the legislature failed to act, **or if its actions did not meet constitutional standards**, [the district court] would be under a 'clear duty' to take some action on the matter prior to the November 1962 general election." *Id*. at 543 (emphasis added). The Alabama Legislature responded by passing two apportionment plans, which the district court and all parties agreed violated the equal protection clause. *Id*. at 552. Accordingly, the district court created an interim plan for use in the primary and general elections, having found that the original proposed by the legislature violated the equal protection clause. *Id*. at 586-87. In addition, the district court retained jurisdiction in the event that it needed to take "some further action should the reapportioned Alabama Legislature fail to enact a constitutionally valid, permanent apportionment scheme" by the next legislative election in 1966. *Id. at* 586.

Given the U.S. Supreme Court's endorsement of federal court intervention under such circumstances and the analogous failures here on the part of Defendant 2011 LRC and the Pennsylvania Supreme Court to institute a legally valid reapportionment plan despite their best

[32] More troubling still, Senator Pileggi argues that the deadline for any federal intervention would be a failure to reapportion in advance of the next upcoming election "[i]n this case, the upcoming election in 2014." (Doc. 61, Prelim. Inj. Mot. Tr. at 32). Such an assertion again ignores that there has been a failure to reapportion in advance of the 2012 election and that this unconstitutional error must be corrected. (*See generally* Doc. 19 and Doc. 46 at 21-28.) As Plaintiffs repeatedly stressed at oral argument, the Commonwealth was last reapportioned on February 15, 2002, *Albert v. 2001 Legislative Reapportionment Commission*, 567 Pa. 670, 790 A.2d 989 (Pa. 2002), and is well beyond the ten-year deadline specified in *Reynolds*. *See Reynolds v. Sims*, 377 U.S. 533, 583 (1964); (*see also* Doc. 61, Prelim. Inj. Mot. Tr. at 39-40.)

efforts, intervention is required. *See id*. After all, it is 2013 and the Commonwealth still does not have a plan, only a reapportionment process plagued by a pattern of delays. Specifically, at least a five-month delay by Defendant 2011 LRC in the issuance of its first plan (*see Statement of Facts*, Section C, *supra* at 5-6), which the Pennsylvania Supreme Court summed up as an "inexcusable failure of the LRC to adopt a Final Plan promptly so as to allow the citizenry a meaningful opportunity to appeal prior to commencement of the primary season." *Holt II*, 38 A.3d at 761. This "inexcusable failure" was later followed by Defendant 2011 LRC's two-month delay in the drafting of its second reapportionment plan. (*See Statement of Facts*, *supra* at 12). The Pennsylvania Supreme Court, in turn, has had the second plan under consideration for over five months. (*See Statement of Facts*, *supra* at 13.) In the meantime, what remains apparent based on the uncontroverted evidence presented to date,[33] using the 2001 reapportionment plan in the 2012 election resulted in total population deviations for the State Senate at over 29% and for the State House at over 42%. (*See* Docs. 19 at 19-23 and 19-1.) This evidence well exceeds the *prima facie* threshold required to establish an Equal Protection Clause violation under the Fourteenth Amendment. (*See* Doc. 19 at 24-26.) This is a constitutional harm that warrants both prospective and retrospective relief as "[p]rospective relief alone is 'of little consequence to the many voters who sought to vote . . . and could not do so effectively.'" *Ketchum v. City Council of City of Chicago, Ill*., 630 F. Supp. 551, 565 (N.D. Ill. 1985) (granting the special election relief sought) (quoting *Coalition for Education in District One v. Board of Elections*, 370 F. Supp. 42, 58 (S.D.N.Y.), *aff'd*, 495 F.2d 1090 (2d Cir.1974)). "[W]here 'voters are represented by unconstitutionally elected officials . . . [courts have] had no difficulty in determining that the terms of the officials elected' should be shortened and special elections held. *Id*. (quoting *Tucker v. Burford*, 603 F. Supp. 276, 279 (N.D. Miss.1985)). Accordingly, as

[33] (Doc. 61, Prelim. Inj. Mot. Tr. at 9-10.)

discussed in Plaintiffs' briefing and at oral argument, this Court abstaining from ordering a special election, or from intervening to address the absence of a plan, will merely ensure that Latinos and all Pennsylvania voters will be deprived of effective representation for a four-year term for half of the senate and a two-year house term. Deferring to the Pennsylvania Supreme Court, will merely render this a certainty as that Court has already deemed this matter a political issue. (*See Statement of Facts*, *supra* at 7.) Even if a plan comes into effect tomorrow, these seats will not be corrected until 2014 for the House and 2016 for the oddly numbered Senate seats at issue. In the interim, Plaintiffs and all citizen of Pennsylvania will be disenfranchised.

Though *Reynolds* did not speak to special elections directly, one cannot read the decision as precluding a federal court from ordering a special election to stop an ongoing voting rights violation. Certainly, *Reynolds* considered the proximity of an election as a factor that might justify withholding immediate relief in a legislative apportionment case. However, the decision did not preclude special elections as a remedy. In fact, the Court left the field wide open for a federal-court-mandated special election, stating:

> We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.
>
> *Reynolds*, 377 U.S. at 585.

Further, to read *Reynolds* as prohibiting a special election remedy would ignore that "[f]ederal courts have often ordered special elections to remedy violations of voting rights [given that] [p]rospective relief alone is 'of little consequence to the many voters who sought to vote . . . and could not do so effectively.'" *Ketchum*, 630 F. Supp. at 565 (granting the special election

relief sought) (quoting *Coalition for Education in District One v. Board of Elections*, 370 F. Supp. 42, 58 (S.D.N.Y.), *aff'd*, 495 F.2d 1090 (2d Cir.1974)). Some courts have even gone so far as to fashion a set of criteria by which a special election may be granted, where plaintiffs must demonstrate that: "1) there has been a serious and substantial violation of . . . voting rights; 2) there is a "reasonable possibility" that the violation affected the outcome of the challenged elections; and 3) plaintiffs exercised due diligence in seeking relief in advance of the challenged election." *Id*. at (citing *Smith v. Cherry*, 489 F.2d 1098, 1103 (7th Cir. 1973) (granting the special election relief sought), *cert. denied*, 417 U.S. 910 (1974)).

All of the special election factors apply here. First, plaintiffs have provided *prima facie* evidence of an equal protection violation, total population deviations of over 29% for the State Senate and over 42% for the State House, which was effectively conceded by Defendants. (*See* Docs. 19 and 19-1; Doc. 61, Prelim. Inj. Mot. Tr. at 9-10.) Second, given growth within the state, regardless of the 2011 map implemented, district lines are likely to have changed affecting which legislators are assigned to represent a given area and in turn the Pennsylvanians living within a district's boundaries. The outcome of the election using an up-to-date plan would therefore be different as compared with the plan presently in place. Third, Plaintiffs tried to enjoin the 2012 election in the first instance but were denied. (*See* Doc. 10.)

Accordingly, Plaintiffs propose that the special election remedy requested be implemented in any one of the four following ways given the ongoing absence of a legally valid reapportionment plan:

1. Order state legislators elected in 2012 to serve a shortened one-year term and convene a special election to properly elect legislators to these positions pursuant to an approved 2011 Legislative Reapportionment Plan in

conjunction with the May 21, 2013 municipal state primary and the November 5, 2013 municipal election. If there is no legally valid 2011 reapportionment plan by March 1, 2013, appoint a special master or assign a United States Magistrate Judge to oversee the reapportionment process in time to produce a plan by upcoming candidate-petitioning deadlines for the 2013 municipal election, slated between February 19, 2013 and March 12, 2013.

2. Order state legislators elected in 2012 to serve a shortened one-year term and convene a special election to properly elect legislators to these positions pursuant to an approved 2011 Legislative Reapportionment Plan in conjunction with a standalone special election primary to be held after the February 19, 2013 municipal primary, followed by a special general election held in connection with November 5, 2013 general municipal elections. If there is no legally valid 2011 reapportionment plan by March 1, 2013, appoint a special master or assign a United States Magistrate Judge to oversee the reapportionment process in time to produce a plan by a delayed candidate petitioning period corresponding with the standalone special election primary scheduled.

3. Order state senators elected to oddly numbered districts in 2012 to serve a shortened two-year term and convene a special election to properly elect senators to these districts pursuant to an approved 2011 Legislative Reapportionment Plan in connection with the 2014 legislative election. Those elected to oddly numbered senate districts in 2014 would serve a shortened two-year term to be followed by regularly scheduled legislative elections in

2016.[34] If there is no legally valid 2011 reapportionment plan by December 1, 2013, appoint a special master or assign a United States Magistrate Judge to oversee the reapportionment process in time to produce a plan by the applicable 2014 candidate-petitioning period. Under this alternative remedy, House representatives elected in 2012 would be allowed to serve out their full term, despite the unconstitutionality of their election, with elections for new house terms to occur in 2014 as regularly scheduled. In support of this specific remedy, *Butcher v. Bloom* (*Butcher* I), 203 A.2d 556 (Pa. 1964) and *Butcher v. Bloom* (*Butcher* II), 216 A.2d 457 (Pa. 1966)[35] are especially instructive. Following equal protection challenges under the one person, one vote doctrine, the Pennsylvania Supreme court found the General Assembly's plan unconstitutional and ordered that the invalid plan be used as an interim reapportionment plan during the 1964 election with instructions that a new plan be drafted by the Assembly by September 1, 1965. Should the Assembly fail to draft a new plan as instructed, the Pennsylvania Supreme Court would issue its own. Given the Assembly's failure to meet the Court's deadline, following input from the parties, the Court issued its own Senate and

[34] *See also Mann v. Davis*, 238 F. Supp. 458 (E.D. Va. 1964), *enforcing*, *Davis v. Mann*, 377 U.S. 678 (1964) (holding that following an election conducted under an unconstitutional apportionment scheme, "the terms of the 1963 elected Senators as well as Delegates must come to an end not later than January 1966" and be followed by a special election).

[35] Though a district court action was filed prior to *Butcher v. Bloom* (*Butcher* I), 203 A.2d 556 (Pa. 1964) and ultimately dismissed, *Drew v. Scranton*, 229 F.Supp. 310 (M.D. Pa. 1964), *vacated and remanded on appeal*, *Scranton v. Drew*, 379 U.S. 40 (1964), abstention remains inappropriate here. First, during Pennsylvania's last reapportionment crisis in the 1960's, the Pennsylvania Supreme Court was not withholding its decision on the validity of a plan, delaying the prospect of any retrospective or prospective constitutional relief. Second, in the 1960's, the Pennsylvania Supreme Court had not opined that special election relief was precluded on political grounds altogether, eliminating retrospective relief despite its avid recognition as a remedy and thereby necessitating federal court intervention. (*See Statement of Facts*, *supra* at 7.) Further, the *Drew* decision was issued prior to *Reynolds v. Sims*, 377 U.S. 533 (1964) and case law addressing the limits of abstention has developed considerably since then with *Scott v. Germano*, 381 U.S. 407 (1965) and *Growe v. Emison*, 507 U.S. 25 (1993).

> Assembly plan and directed that they be implemented in the 1966 election process. Further, the court added that all fifty senatorial seats were to be filled in the 1966 election, with those senators representing odd numbered senatorial districts to serve a two-year term and senators representing even numbered senatorial districts to serve a constitutional four-year term. Following the expiration of the odd numbered senatorial district terms, the elective term for those districts would revert to the four-year constitutional term, subject to constitutional vacancy provisions.

II. *Amicus Curiae* Senator Pileggi's Arguments First Presented at Oral Argument Are Without Merit.

Plaintiffs now address *Amicus Curiae* Senator Pileggi's argument, first introduced at oral argument, that the one person, one vote constitutional violations alleged do not warrant a special election that concerns state senatorial seats because "there is no realistic possibility that a Hispanic majority-minority Senatorial District could be included in any lawful Redistrict[ing] Plan for the Commonwealth." (Doc. 61, Prelim. Inj. Mot. Tr. at 32.) Accordingly, Senator Pileggi clarified that with respect to the special election requested, "[w]e think to the extent the Court is considering granting such relief, that it should exclude a special election for those senatorial seats." (*Id.* at 38.)[36]

At the outset, Senator Pileggi confuses the nature of Plaintiffs' preliminary injunction motion. The possibility of creating a majority-Latino senatorial district would fall under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, which was neither alleged in Plaintiffs' complaint nor in their preliminary injunction motion. (*See* Docs. 1 and 19.) Instead, Plaintiffs' reference to

[36] It should be noted that Senator Pileggi did not advance a similar theory regarding the House on behalf of *amicus curiae* Representative Turzai who was absent from the oral argument, despite indicating his availability for argument on January 11, 2013. (*See generally* Doc. 61 Prelim. Inj. Tr.)

the number of majority Latino districts that could be created in the State House, in their preliminary injunction motion, aimed to highlight Latino growth within the Commonwealth as it pertains to the one person, one vote doctrine. More specifically, it highlighted the need for a special election using an up-to-date reapportionment plan to cure the fact that the 2012 election occurred under the 2001 plan, despite considerable Latino growth since the 2001 plan's creation.

Accordingly, not only does Senator Pileggi's argument fail to cite any legal authority, as evidenced by a review of the oral argument transcript[37] but Senator Pileggi grossly ignores that the one person, one vote doctrine is a wholly independent constitutional requirement separate from any claim one might plead under the Voting Rights Act. It is not a doctrine that merely applies to the House over the Senate. It applies equally to both state legislative entities. Finally, the one person, one vote doctrine is not invalidated by whether or not Latino majority districts can be created in either the state house or the state senate within any given reapportionment plan. To suggest otherwise, intimates that Latinos within the state should be afforded disparate treatment by virtue of their minority status or could somehow be less deserving of equal protection under the one person, one vote doctrine.

[37] (*See generally* Doc. 61, Prelim. Inj. Tr.)

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 Defendants Motions to Dismiss Plaintiffs' Complaint and grant Plaintiffs' Motion for a Preliminary Injunction as amended herein.

Dated: January 25, 2013

Respectfully submitted,

s / Nancy M. Trasande

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CERTIFICATE OF SERVICE

I, Nancy M. Trasande, Esq., hereby certify that on the January 25, 2013, copies of the foregoing *Plaintiffs' Supplemental Memorandum Of Law In Support Of The Appointment Of A Special Master In Connection With Plaintiffs' Pending Preliminary Injunction Motion And Opposition To Arguments Presented In The First Instance By Amicus Curiae Senator Pileggi At Oral Argument* 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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