**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| SENATOR DOMINIC PILEGGI, REPRESENTATIVE MICHAEL TURZAI, AND LOUIS B. KUPPERMAN, | : | |
| Plaintiffs, | : | CIVIL ACTION |
| v. | : | No. _____ |
| CAROL AICHELE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, | : | |
| Defendant. | : | |

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION, AND FOR CONVENING OF THREE-JUDGE PANEL**

## I. INTRODUCTION

Plaintiffs have commenced this suit to prevent Defendant, the Secretary of the Commonwealth, from administering the April 24, 2012, primary elections – or any elections occurring in 2012 – in Pennsylvania under a decade-old and constitutionally infirm state legislative reapportionment plan. The Constitutional infirmities of the Commonwealth's 2001 Legislative Reapportionment Plan (the "2001 Plan") are apparent: the state legislative districts delineated in that plan can no longer be said to be comprised of equal population.

As of this filing, the Pennsylvania Supreme Court has not approved a state legislative reapportionment plan based on 2010 federal census data. Indeed, a Justice on that Court has

made plain that the April 24, 2012, primary elections in Pennsylvania will proceed on the basis of the 2001 Plan. Any such event will violate the constitutional rights of all Pennsylvania voters, including Plaintiffs. Immediate injunctive relief is therefore appropriate.

To prevent an unlawful disregard of the "one person, one vote" Constitutional mandate and irreparable harm to Plaintiffs, this Court is respectfully requested to enjoin Defendant, the Secretary of the Commonwealth of Pennsylvania, from administering, enforcing, or conducting any elections in 2012 in Pennsylvania on the basis of the 2001 Plan.

## II. STATEMENT OF FACTS

The Verified Complaint provides the recitation of the relevant facts, and those facts are as follows.

### A. Background and the Supreme Court of Pennsylvania's Order of January 25, 2012.

A Final Reapportionment Plan of the Pennsylvania Legislative Commission ("LRC") was filed on November 19, 2001, and approved by the Pennsylvania Supreme Court on February 15, 2002. This 2001 Plan was based on census data from the year 2000.

The most recent Federal decennial census data, that of 2010, exposes the current infirmities of the 2001 Plan, as the state legislative districts delineated in that plan can no longer be said to meet the equal population requirement established by the United States Constitution as well as the Pennsylvania Constitution. The 2010 census revealed, among other things, that in the decade since the 2000 census, a population shift from the west to the east has continued in the Commonwealth.

Pursuant to Section 17(a) of Article 2 of the Pennsylvania Constitution, in 2011, the year following the Federal decennial census, the LRC was constituted for the purpose of reapportioning the Commonwealth of Pennsylvania based on the 2010 census. The LRC declared the 2010 census data to be in usable form on August 17, 2011. On December 12, 2011, the LRC adopted its Final Reapportionment Plan for the Commonwealth (the "2011 Plan").

In a per curiam Order dated January 25, 2012, the Pennsylvania Supreme Court remanded the 2011 Plan to the LRC "with a directive to reapportion the Commonwealth in a manner consistent with this Court's opinion, which will follow." (A true and correct copy of this Order is attached to the Complaint as Exhibit A.) In that Order, the Pennsylvania Supreme Court advised that the 2001 Plan "shall remain in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved." As of the date of this filing, the Pennsylvania Supreme Court has not yet issued an opinion identifying the rationale behind its January 25, 2012, Order (or providing guidance to the LRC).

Pennsylvania Supreme Court Justice Max Baer, a Justice who, with respect to the Court's January 25 Order, voted with the majority, provided an interview with Capitolwire news service the day after that Order's entry. On January 26, 2012, that news service reported that Justice Baer advised that the majority of the Court believes that the process of fixing the legislative maps comprising the 2011 Plan that the LRC provided will take time. According to this press report, Justice Baer also stated: "**I think this year's election[s] are going to go on the 2001 lines**," and "I think that is what the majority intended and I think that is what a reading of the chief justice's order said." (Emphasis added.) (A true and

correct copy of this January 26, 2012, Capitolwire article is attached to the Complaint as Exhibit B.)

**B. The Effect of Utilizing the 2001 Plan.**

Any utilization of the 2001 Plan in the upcoming elections, however, will run afoul of the Federal and Commonwealth Constitutions. In short, when compared with the 2000 census data, the 2010 census data showed a substantial decline in population in the western part of the Commonwealth and a growth in population in the eastern part – rendering use of the 2001 Plan in light of Pennsylvania's current population constitutionally infirm.

Under the 2010 census, the current ideal Senate district population in the Commonwealth – the population that would allow equal apportionment of Pennsylvania residents among its 50 senatorial districts – is 254,048. The 2010 census data demonstrated that because of the ongoing eastward shift in the Commonwealth's population over the past 10 years, every Senate district in the west, other than Senate District 40, is now less than the ideal population and, with only a few exceptions, every district in the east is now greater than the ideal population.

Indeed, the populations of many of the current Senate districts (*i.e.*, existing under the 2001 Plan) in Southwestern Pennsylvania **fall short** of the current ideal Senate district population of 254,048 **by more than 10 percent**. *See, e.g.,* Senate District 38 [-15.7 percent; 39,773 people], Senate District 45 [-13.0 percent; 33,067 people], Senate District 32 [-11.2 percent; 28,411 people], Senate District 47 [-11.1 percent; 28,259 people]. Conversely, many Senate districts in the growing eastern and southeastern regions of the Commonwealth have populations that **exceed** the ideal population **by 10 percent or more**. *See, e.g.,* Senate

District 44 [+13.6 percent; 34,625 people], Senate District 16 [+13.5 percent; 34,225 people], Senate District 28 [+12.0 percent; 30,414 people], Senate District 19 [+10.6 percent; 26,926 people]. Put differently, the range of deviation within existing Senate districts exceeds 29 percent or more than 74,000 people.

Deviations within the current House of Representatives Districts (*i.e.*, existing under the 2001 Plan) are similarly out of line. According to 2010 census statistics, the ideal population among Pennsylvania's 203 legislative districts is 62,573 residents per district. The 2010 census data reveals that as a result of shifts in population over the past ten years, the current 203 legislative districts vary widely in population.

For example, current Representative District 134 has a population of 77,873 residents under the 2001 Plan district boundaries, which exceeds the 2010 ideal population by 15,300, or 24.45 percent. This District has the largest population disparity of Pennsylvania's 203 representative Districts. Conversely, current Representative District 24 has a population of 51,007 under the 2001 Plan district boundaries, which falls short of the 2010 ideal population by 11,566, or 18.48 percent. Indeed, Representative Districts 1, 9, 12, 13, 14, 19, 20, 24, 26, 27, 34, 35, 44, 47, 67, 71, 75, 77, 87, 89, 90, 92, 93, 94, 113, 130, 132, 134, 137, 146, 147, 150, 155, 159, 160, 175, 176, 189, 190, 191, 192, 196, 198, 200, and 201 all have population disparities of *at least* 10 percent under the 2001 Plan. In fact, the overall range of population deviation within Pennsylvania's Representative Districts under the 2001 Plan is 43 percent, or more than 33,000 people.

With respect to the existing Senate Districts of the individual plaintiffs, the population of Senate District 9, where Plaintiff Pileggi resides, exceeds the ideal population

by 9.2 percent. The population of Senate District 40, where Plaintiff Turzai resides, exceeds the current ideal population by 0.8 percent. And the population of Senate District 19, where Plaintiff Kupperman resides, exceeds the current ideal population by 10.6 percent.

With respect to the existing House Districts of the individual plaintiffs, the population of House District 159, where Plaintiff Pileggi resides, exceeds the ideal population by 10.9 percent. The population of House District 28, where Plaintiff Turzai resides, exceeds the current ideal population by 7.5 percent. And the population of House District 157, where Plaintiff Kupperman resides, exceeds the current ideal population by 7.1 percent.

If this year's elections are held utilizing the 2001 Plan, approximately 1.4 million Pennsylvania residents would live in Senate districts with populations in excess of 10 percent above the current ideal population, and thus would be severely and unconstitutionally under-represented in the Senate. Likewise, approximately 1.8 million Pennsylvania residents would live in House districts with populations in excess of 10 percent above the current ideal population, and thus would be severely and unconstitutionally under-represented in the House. Approximately 5 million more would be unconstitutionally under-represented in the Senate and the House by living in districts with populations in excess of 5 percent above the current ideal population.

## III. ARGUMENT

### A. The Court Should Grant Plaintiffs' Motion for a Temporary Restraining Order and, After Notice and a Hearing, a Preliminary Injunction.

Whether to issue a temporary restraining order or preliminary injunction depends on four factors: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief sought; (3) whether granting preliminary relief will result in even greater harm to the non-moving party; and (4) whether granting preliminary relief is in the public interest. *Child Evangelism Fellowship of N.J., Inc. v. Stafford Township Sch.*, 386 F.3d 514, 524 (3d Cir. 2004).

As discussed below, Plaintiffs demonstrate a reasonable chance of success on the merits; irreparable harm to Plaintiffs absent the relief requested is certain and severe; Defendant will not face harm greater than that confronting Plaintiffs if the requested relief is granted; and the relief sought is in the public interest. Because each of the foregoing test's four factors is met, the injunction Plaintiffs seek should issue.[1]

#### 1. Plaintiffs Are Likely to Succeed on Their Claim that the Use of the 2001 Plan Violates Plaintiffs' Constitutional Right to Equal Protection of Law.

As the United States Court of Appeals for the Third Circuit recently explained, a plaintiff "needs only to show a *likelihood* of success on the merits (that is, a reasonable chance, or probability, of winning) to be granted relief." *Singer Mgmt. Consultants, Inc. v. Milgram*, No. 09-2238, 650 F.3d 223, 2011 U.S. App. LEXIS 12106, at *6 (3d Cir. June 15,

[1] In a non-commercial case such as this, the security bond requirement under Rule 65(c) of the Federal Rule of Civil Procedure should be waived. *Elliot v. Kiesewetter*, 98 F.3d 47, 59-60 (3d Cir. 1996); *Temple University v. White*, 941 F.2d 201, 219-20 (3d Cir. 1991).

2011) (emphasis in original). That likelihood of success on the merits exists here.

As a result of the Pennsylvania Supreme Court's January 25, 2012, Order and Justice Baer's statements to the press concerning how that Court anticipates the primary elections scheduled for April 24, 2012, will be conducted, Plaintiffs confront the prospect of elections in 2012 occurring in the Commonwealth on the basis of the 2001 Plan. Any such election will be violative of the one-person, one-vote rule, thereby offending the Equal Protection Clause and Article 1, § 2 of the United States Constitution.[2]

It is a basic principle of representative government that the weight of a citizen's vote cannot be made to depend on where he or she lives. The Federal and Pennsylvania Constitutions thus mandate that state legislative seats be apportioned equally so as to ensure that the guaranteed right of suffrage is not denied by debasement or dilution of the weight of a citizen's vote. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("The *Equal Protection Clause* demands no less than substantially equal state legislative representation for all citizens, of all places . . .").

Here, substantial vote dilution shown by population disparity among the election districts is an actionable violation of equal protection. The *Reynolds* Court held that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is

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[2] Additionally, this conduct will result in the violation of Plaintiffs' rights under the Pennsylvania Constitution. Plaintiffs will be denied their rights under Article I §§ 1 and 26 to equal protection under the law because their voting power would be diluted as compared to that of other voters. Also, Plaintiffs will be denied their rights under Article I § 5 of the Pennsylvania Constitution to have the same rights as other voters and not to have their constitutional rights subverted because of the dilution of their voting power. Additionally, the requirement of Article II § 16 that legislative districts be "as nearly equal in population as practicable" will be violated.

in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Reynolds*, 377 U.S. at 568.

> [A]ll voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative reapportionment . . . . **Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.**

*Id.* at 565-66 (emphasis added).

*Reynolds*, the seminal case concerning the redistricting of state government districts, established two fundamental principles. First, the Fourteenth Amendment's mandate of "one person one vote" is applicable to state elections. Put differently, state legislative districts must not, when drawn, contain major variations between the least and most populated districts. Specifically, districts with less than 10 percent maximum variation will not support a prima facie case of denial of equal protection and need not be justified. *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

On the other hand, a prima facie case of denial of equal protection is established if, when drawn, districts have deviations exceeding 10 percent. Specifically, upon a plaintiff's demonstration of deviation in excess of 10 percent, the burden shifts to the state to show that the deviation is justified by a rational objective. *Voinovich v. Quilter*, 507 U.S. 146, 161-62 (1993). Such variations may be permissible only if, in defense of the plan, the state shows it to be "based on legitimate considerations incident to the effectuation of a rational state policy." *Mahan v. Howell*, 410 U.S. 315, 325 (1973).

*Reynolds* also established a second and equally important principle: legislative bodies, which need not continually redistrict to satisfy the requirement of one person, one vote, must establish a "reasonable plan for periodic revision." *Reynolds*, 377 U.S. at 583. As the Supreme Court observed,

> **Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth** . . . . Compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.

*Id.* at 583-84 (emphasis added). Reapportionment on a basis less frequent than once per decade would "assuredly be constitutionally suspect." *Id.* Put differently, *Reynolds* "set[s] a floor below which such [reapportionment] frequency may not constitutionally fall." *Garza v. County of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990); *see Flateau v. Anderson*, 537 F. Supp. 257 (S.D.N.Y. 1982) (holding that court interference was merited where more than 10 years had elapsed since last redistricting).

Expiration of the 10-year period that commenced on February 15, 2002, renders use of the Commonwealth's 2001 Plan constitutionally suspect. Analysis of the most recent Federal decennial census data, that of 2010, renders that decade-old plan constitutionally infirm. The state legislative districts delineated in that Plan can no longer be said to meet the equal population requirement established by the Federal and Commonwealth Constitutions. These deficiencies are described in detail above. *See* Section II.B., *supra* (identifying population deviations under current application of 2001 Plan). In short, the 2001 Plan, which is predicated upon data from the 2000 decennial census, has now resulted in districts that are over-populated and malapportioned. These disparities deprive Plaintiffs and all

citizens of the over-populated districts of the rights guaranteed to them by the Fourteenth Amendment to the United States Constitution.

In particular, the 2010 census has revealed, among other things, that in the decade since the 2000 census, a population shift from the west to the east has continued in the Commonwealth. Application of the 2010 census data to the 2001 map delineating the Commonwealth's legislative districts evidences that numerous districts have population deviations greater than 10 percent. These population disparities do not pass muster under *Reynolds'* "substantial equality" test; they are prima facie discriminatory and violative of the "one person, one vote" Constitutional mandate, rendering use of the 2001 Plan unconstitutional.

Moreover, there exists ***no*** rational state policy to justify conducting the 2012 elections in the Commonwealth under the 2001 Plan. Indeed, following the release of the 2010 Federal decennial census data, and the LRC's August 17, 2011, declaration that such data was in usable form, there was sufficient time for a new reapportionment plan to be crafted; additionally, although the Pennsylvania Supreme Court has entered its January 25, 2012, Order deeming the LRC's 2011 Plan unconstitutional, there nonetheless remains time, before the April 24, 2012, elections, for revisions by the LRC so that a revised final 2011 Plan may be approved as constitutional and have the force of law.

Because Plaintiffs have demonstrated a reasonable likelihood of success on the merits of their Section 1983 claim, the first element of the four-factor test for preliminary injunctive relief is met.

### 2. Plaintiffs Will Suffer Irreparable Harm in the Absence of the Requested Injunctive Relief.

Deprivation of a fundamental constitutional right has been consistently recognized as constituting irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 880, 883 (3d Cir. 1997) (finding violation of voting and association rights constitutes irreparable harm); *Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002) (loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury). If the primary elections presently scheduled to occur on April 24, 2012, proceed under the 2001 Plan, Plaintiffs will suffer the deprivation of federally-protected constitutional rights and immediate, permanent and irreparable harm.

The Supreme Court has recognized the singular importance of the right to vote and the irreparable harm caused by its abridgement through unconstitutional redistricting, stating:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

*Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

If the relief sought in this Motion is not obtained, the April 24, 2012, primary elections will proceed on the basis of the constitutionally infirm 2001 Plan. The harm to Plaintiffs if that should happen is certain and severe: they will be deprived of fundamental liberties, including the right to equal representation. This element of the four-factor test for preliminary injunctive relief is therefore met.

### 3. The Balance of the Equities and the Public Interest Weigh in Favor of Granting the Requested Temporary Restraining Order and Preliminary Injunction

This Court must balance the irreparable harm that Plaintiffs will experience if the 2012 elections were to take place based on the 2001 Plan against any harm that Defendant might suffer. In this case, the scale tips decidedly in Plaintiffs' favor. In short, Defendant lacks any legitimate state interest in continuing to adhere to a redistricting scheme that violates federal and state law. *See, e.g., Giovani Carandola, Ltd.* v. *Bason,* 303 F.3d 507, 521 (4th Cir. 2002) (holding that a state is "in no way harmed by issuance of a preliminary injunction that prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction."). Thus, when the lack of harm to Defendant is weighed against the very certain, immediate and irreparable harm that Plaintiffs will suffer if the requested injunctive relief is denied, it is clear that the "balance of hardships" tips overwhelmingly in Plaintiffs' favor.

In addition, the public interest will be served by the issuance of the requested preliminary injunction.[3] "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." *Reynolds*, 377 U.S. at 561-62. Requiring Defendant to conduct elections in compliance with the Fourteenth Amendment so that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of

[3] As a practical matter, "if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *Chicago Title Ins. Co. v. Lexington & Concord Search & Abstract, LLC*, 513 F. Supp. 2d 304, 321 (E.D. Pa. 2007) (quoting *AT&T v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994)).

our democracy. Perhaps not surprisingly, it is well recognized that upholding constitutional rights assuredly serves the public interest. *See Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456, 472 (D. Md. 2011) (citing *Carandola*, 303 F.3d at 521).

Issuing the preliminary injunction will further the public interest because time permits revisions to the LRC's final 2011 Plan, which was based on the 2010 Federal decennial data; following the necessary revisions, that 2011 Plan can be approved and found to have the force of law before the primary elections. It is certainly in the public interest to have a constitutionally valid redistricting plan.

Because the last two elements of the four-factor test for preliminary injunctive relief are therefore also met, Plaintiffs respectfully request that the Court grant this Motion.

**B. The Court Should Grant Plaintiffs' Request for a Three-Judge Panel.**

Plaintiffs also request the convening of a three-judge panel for any preliminary injunction hearing and/or trial conducted in this matter. Under 28 U.S.C § 2284(a), a district court of three judges is required in this action because it challenges the constitutionality of an apportionment of state legislative districts.

## IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask that this Court enter a preliminary injunction enjoining Defendant from calling, holding, supervising or certifying the April 24, 2012, primary elections – or any other 2012 election – in the Commonwealth of Pennsylvania on the basis of the 2001 Plan. Plaintiffs further request that this Court retain jurisdiction over this matter to provide such other additional relief as may prove necessary.

Dated: February 3, 2012 Respectfully submitted,

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