

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

JOE GARCIA, FERNANDO QUILES, :  
DALIA RIVERIA MATIAS, :  
 : CIVIL ACTION  
Plaintiffs, :  
 : NO. 12-0556 RBS  
v. :  
 :  
2011 LEGISLATIVE REAPPORTIONMENT :  
COMMISSION and CAROL AICHELE, in :  
her Capacity as Secretary of the :  
Commonwealth of Pennsylvania, and as Chief :  
Election Officer of the Commonwealth of :  
Pennsylvania, :  
 :  
Defendants. :

**BRIEF IN SUPPORT OF MOTION TO DISMISS  
COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(1)**

Defendant 2011 Legislative Reapportionment Commission, through its undersigned counsel, Del Sole Cavanaugh Stroyd LLC, submits this Brief in Support of Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and states the following in support:

**I. INTRODUCTION**

On January 25, 2012, the Pennsylvania Supreme Court found the reapportionment plan adopted by the 2011 Legislative Reapportionment Commission (hereinafter, the “LRC”) to be “contrary to law.” It remanded the plan to the LRC and ordered it to reapportion the Commonwealth in a manner consistent with its opinion. The Pennsylvania Supreme Court’s order also provided that the 2001 Legislative Reapportionment Plan shall remain in effect until a revised plan is approved and that all 2012 election dates shall remain the same with the exception of several dates related to nominating petitions.

In their Complaint, Plaintiffs aver that elections held under the 2001 Legislative Reapportionment Plan will “violate the ‘one person, one vote’ principle of the Equal Protection

Clause of the Fourteenth Amendment to the Constitution of the United States” and would “unlawfully dilute their voting strength under the federal Voting Rights Act of 1965”<sup>1</sup> because the current Senate and House legislative districts are malapportioned in light of the population shifts that have occurred in the Commonwealth of Pennsylvania since the 2000 federal decennial census.<sup>2</sup> They are seeking to prevent the present year’s elections from proceeding under the 2001 Legislative Reapportionment Plan.<sup>3</sup>

The injury-in-fact alleged by Plaintiffs in their Complaint - i.e., that the present year’s elections will proceed under the 2001 Legislative Reapportionment Plan - is not traceable to any action taken by the LRC and a favorable decision with respect to the LRC will not redress that alleged injury-in-fact. Moreover, the Plaintiffs request to have this Court set a deadline by which the LRC must adopt a new plan of reapportionment is now moot because the LRC has already adopted a new plan. As a result, Plaintiffs do not have Article III standing to maintain their claims against the LRC. Consequently, this Court does not have subject matter jurisdiction over the Plaintiffs’ claims against the LRC and the claims must be dismissed.

## **II. BACKGROUND**

### **A. Pennsylvania’s Legislative Reapportionment Scheme.**

The Pennsylvania Constitution requires the Commonwealth to reapportion its legislative districts for all seats of the Pennsylvania General Assembly in each year following the federal decennial census. Pa. Const. Art. II, § 17(a). Districts must be compact and contiguous, reasonably equal in population and without unnecessary divisions of counties and municipalities. Pa. Const. Art. II, § 16. The responsibility to reapportion the Commonwealth is vested in a Legislative Reapportionment Commission which is charged with one duty - to devise

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<sup>1</sup> Complaint, ¶ 1.

<sup>2</sup> Complaint, ¶¶ 1; 34-37 and 50-51.

<sup>3</sup> Complaint, ¶¶ 1; 34-37; 50-51; 38-49; and 52-53.

reapportionment plans that satisfy the requirements of Article II, Section 16 of the Pennsylvania Constitution. Pa. Const. Art. II, § 17(a). The commission consists of five members, four of whom are the majority and minority leaders of both the Senate and the House of Representatives, or deputies appointed by each of them, and a selected chairman. Pa. Const. Art. II, § 17(b).

The Pennsylvania Constitution provides a detailed framework by which a reapportionment plan attains the force of law. Legislative Reapportionment Commissions have ninety (90) days from the date on which they become duly certified or from the date on which the population data for the Commonwealth as determined by the federal decennial census becomes available, whichever is later, to file a preliminary reapportionment plan. Pa. Const. Art. II, § 17(c). The public then has a thirty (30) day period to file exceptions to the preliminary plan. Id. If no exceptions are filed during this period, or if exceptions are filed and acted upon by the commission, the plan becomes final. Id.

Once a plan is final, any person aggrieved by it has thirty (30) days to file an appeal from the final plan directly to the Pennsylvania Supreme Court. 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 Legislative Reapportionment Commission with direction to reapportion the Commonwealth in a manner not inconsistent with such order. Id. A reapportionment plan attains the force of law only when the Pennsylvania Supreme Court has “finally decided” all appeals, or when the time for filing appeals has passed with no appeal having been filed. Pa. Const. Art. II, § 17(e). Once a reapportionment plan attains the force of law, the legislative districts in the plan are to be used in subsequent elections of the General Assembly until the reapportionment following the next federal decennial census is required. Id.

**B. Pennsylvania’s 2012 Primary and General Election Dates.**

Pursuant to Section 2753(a) of the Pennsylvania Election Code, candidates for all offices to be filled at the ensuing general election shall be nominated at the General primary. In a Presidential election year, such as the present year, the General primary must be conducted on the fourth Tuesday of April, which was April 24, 2012. 25 P.S. § 2753(a).

The Pennsylvania Constitution provides that “[t]he general election shall be held biennially on the Tuesday next following the first Monday of November in each even-numbered year....” Pa. Const. Art. VII, § 2.<sup>4</sup> As a result, in the present year, the general election will take place on November 6, 2012. Representatives in the General Assembly and one half of the State Senate will be elected in this year’s general election. 25 P.S. § 2751.

**III. BACKGROUND FACTS**

**A. The Pennsylvania Supreme Court Found the 2011 Reapportionment Plan to Be Contrary to Law and Remands it to the LRC.**

The LRC was constituted in 2011 following the 2010 federal decennial census pursuant to Pa. Const. Art. II, § 17.<sup>5</sup> On December 12, 2011, the LRC adopted its final reapportionment plan (hereinafter, the “2011 Plan”) and filed it with the Secretary of the Commonwealth of Pennsylvania.<sup>6</sup> Twelve (12) separate appeals were filed with the Pennsylvania Supreme Court challenging the constitutionality of the 2011 Plan.<sup>7</sup> The three (3) Plaintiffs in this action did not

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<sup>4</sup> See also 25 P.S. 2751 (“The general election shall be held biennially on the Tuesday next following the first Monday of November in each even-numbered year.”)

<sup>5</sup> Complaint, ¶ 16; February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs’ Request for a Temporary Restraining Order, p. 6.

<sup>6</sup> Complaint, ¶ 17; February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs’ Request for a Temporary Restraining Order, p. 6.

<sup>7</sup> Complaint, ¶ 18; February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs’ Request for a Temporary Restraining Order, p. 6.

file appeals with the Pennsylvania Supreme Court challenging the constitutionality of the 2011 Plan.<sup>8</sup>

On January 25, 2012, the Pennsylvania Supreme Court issued a *per curium* Order in which it held that the 2011 Plan was “contrary to law.”<sup>9</sup> It 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.”<sup>10</sup> The Pennsylvania Supreme Court further ordered that the 2001 Legislative Reapportionment Plan “shall remain in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved.”<sup>11</sup> It also ruled that “all 2012 election dates shall remain the same” with the exception of several dates related to nominating petitions.<sup>12</sup> The Pennsylvania Supreme Court retained jurisdiction over the matter.<sup>13</sup>

On February 3, 2012, the Pennsylvania Supreme Court issued an eighty-seven page opinion.<sup>14</sup> In its opinion, it held that the LRC must abide by the framework set forth in Article II, § 17 of the Pennsylvania Constitution in devising a new plan upon remand:

We note that once the LRC approves a new preliminary plan, the Constitution affords persons aggrieved by the new plan a right to object, before the plan is finally approved by the LRC, and to a subsequent right to appeal to this Court. Should such appeals be filed, we will decide them with alacrity, as we have decided the ones now before us.<sup>15</sup>

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<sup>8</sup> Declaration of Charles E. O’Connor, Jr., ¶ 3.

<sup>9</sup> Complaint, ¶ 19; February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs’ Request for a Temporary Restraining Order, p. 7.

<sup>10</sup> Complaint, ¶ 19; February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs’ Request for a Temporary Restraining Order, p. 7.

<sup>11</sup> Complaint, ¶ 20; February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs’ Request for a Temporary Restraining Order, p. 7.

<sup>12</sup> February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs’ Request for a Temporary Restraining Order, p. 7.

<sup>13</sup> February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs’ Request for a Temporary Restraining Order, p. 7.

<sup>14</sup> February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs’ Request for a Temporary Restraining Order, p. 7.

<sup>15</sup> Holt, et. al v. 2011 Legislative Reapportionment Comm’n, No. 7 MM 2012 (Pa. Feb, 3, 2012).

**B. The New Preliminary and Final Plans.**

On April 12, 2012, the LRC adopted a new Preliminary Plan of Reapportionment (hereinafter, the “New Preliminary Plan”) and filed it with the Secretary of the Commonwealth of Pennsylvania as required by the Supreme Court of Pennsylvania’s February 3, 2012 Opinion.<sup>16</sup> Pursuant to the Supreme Court’s February 3, 2012 Opinion and Pa. Const. Art. II, § 17, the public had until May 12, 2012 to file exceptions to the New Preliminary Plan. Multiple exceptions were filed to the New Preliminary Plan. Joe Garcia, a Plaintiff in the instant action, filed an exception to the New Preliminary Plan on behalf of Latino Lines Redistricting Coalition.<sup>17</sup>

On June 8, 2012, the LRC adopted a new final reapportionment plan (hereinafter, the “2012 Plan”) and filed it with the Secretary of the Commonwealth of Pennsylvania.<sup>18</sup> Pursuant to the Supreme Court’s February 3, 2012 Opinion and Pa. Const. Art. II, § 17, any person aggrieved by the 2012 Plan has until July 9, 2012 to file an appeal with the Pennsylvania Supreme Court. The 2012 Plan will attain the force of law when the Pennsylvania Supreme Court has “finally decided” all appeals, or when the thirty (30) day period for filing appeals has passed with no appeal having been filed. Pa. Const. Art. II, § 17.

**C. The 2012 Primary Election.**

The General primary election in the Commonwealth of Pennsylvania took place on April 24, 2012 in accordance with 25 P.S. § 2753(a).<sup>19</sup> It was conducted under the 2001 Legislative

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<sup>16</sup> Declaration of Charles E. O’Connor, Jr., ¶ 3.

<sup>17</sup> Declaration of Charles E. O’Connor, Jr., ¶ 5.

<sup>18</sup> Declaration of Charles E. O’Connor, Jr., ¶ 6.

<sup>19</sup> Declaration of Charles E. O’Connor, Jr., ¶ 7.

Reapportionment Plan as required by the Pennsylvania Supreme Court’s January 25, 2012 Order.<sup>20</sup>

#### **IV. PROCEDURAL HISTORY**

On February 2, 2012, one (1) day before the Pennsylvania Supreme Court issued its Opinion, Plaintiffs Joe Garcia, Fernando Quiles and Dalia Rivera Matias (hereinafter, collectively referred to as the “Plaintiffs”), three registered Latino voters in the Commonwealth of Pennsylvania, initiated the instant lawsuit against the LRC and Carol Aichele in her capacity as Secretary of the Commonwealth of Pennsylvania. In their Complaint, the Plaintiffs aver that it is a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution for the present year’s primary and general elections to proceed under the 2001 Legislative Reapportionment Plan because the current Senate and House legislative districts are malapportioned in light of the population shifts that have occurred in the Commonwealth of Pennsylvania since the 2000 federal decennial census.<sup>21</sup>

Plaintiffs further aver that it is a violation of Section 2 of the Voting Rights Act of 1965 for the 2012 primary and general elections to proceed under the 2001 Legislative Reapportionment Plan because the current Senate and House legislative districts illegally dilute the voting rights of Latinos in Philadelphia, Lehigh and Berks Counties.<sup>22</sup> Specifically, they contend that Section 2 of the Voting Rights Act of 1965 compels the creation of: two (2) Latino majority House legislative districts in Philadelphia County; one (1) Latino majority House Legislative district in Allentown, Lehigh County; and one (1) Latino majority House Legislative district in Reading, Berks County.<sup>23</sup> To support their claim, Plaintiffs aver in their Complaint

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<sup>20</sup> Declaration of Charles E. O’Connor, Jr., ¶ 7.

<sup>21</sup> Complaint, ¶¶ 1; 34-37 and 50-51.

<sup>22</sup> Complaint, ¶¶ 1; 38-49 and 52-53.

<sup>23</sup> Complaint, ¶¶ 39-44.

that: “three additional majority Latino House legislative districts were proposed by Defendant 2011 State Legislative Reapportionment Commission: the 180<sup>th</sup> and 197<sup>th</sup> House Legislative districts in Philadelphia; the 22<sup>nd</sup> House legislative district in Allentown; and the 127<sup>th</sup> House legislative district in Reading.”<sup>24</sup>

Plaintiffs’ are requesting the following substantive relief in their Complaint:

1. The issuance of a declaratory judgment that the Commonwealth of Pennsylvania’s current State Senate and House Legislative districts are malapportioned, illegally dilute the voting rights of Latinos in Pennsylvania and are unlawful, null and void;
2. The issuance of a permanent injunction enjoining the Defendants from “calling, holding, supervising or certifying any elections under the current State legislative districting plan.”
3. The issuance of an order setting “a reasonable deadline for defendants and appropriate state authorities to enact or adopt a redistricting plan that is not malapportioned and does not dilute Latino voting strength”; and
4. The issuance of an order appointing a special master to create a new legislative redistricting plan that is not malapportioned and does not dilute Latino voting strength if the Defendants and appropriate state authorities fail to do so.<sup>25</sup>

On February 6, 2012, three (3) days after the Pennsylvania Supreme Court issued its Opinion, the Plaintiffs filed a Motion for a Temporary Restraining Order and for Convening of a Three-Judge Panel (hereinafter, the “Motion”). In its Motion, Plaintiffs sought a “Temporary Restraining Order to ensure that the Pennsylvania 2001 Legislative Reapportionment Plan is not used for the April 24, 2012 primary elections in the Commonwealth of Pennsylvania.”<sup>26</sup> They sought an order providing that: “Defendant Carol Aichele and anyone controlled by her, or in

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<sup>24</sup> Complaint, ¶ 33.

<sup>25</sup> Complaint, Prayer for Relief.

<sup>26</sup> Plaintiff’s Motion for a Temporary Restraining Order and for Convening of a Three-Judge Panel, p. 1.

common control with her, is hereby enjoined from calling, holding, supervising or certifying the April 24, 2012 primary election on the basis of the 2001 Legislative Reapportionment Plan until such time as a hearing for a Preliminary Injunction is adjudicated by this Court.”<sup>27</sup> The Plaintiffs did not seek any relief with respect to the LRC because as admitted in their Motion: “Defendant Carole Aichele as the Secretary of the Commonwealth and the Chief Election Officer in Pennsylvania is the **only** official in the State that is authorized to call, hold, supervise and certify elections.”<sup>28</sup>

On February 6, 2012, this Court conducted a hearing on Plaintiffs’ Motion. By Order dated February 8, 2012, this Court denied Plaintiffs’ Motion. A Memorandum of the same date explained in detail why this Court denied Plaintiffs’ Motion.

## V. **LEGAL STANDARD**

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges the lack of subject matter jurisdiction over the plaintiff’s claims. See Fed.R.Civ.P 12(b)(1). “At issue in a Rule 12(b)(1) motion is the court’s ‘very power to hear the case.’” Petruska v. Gannon Univ., 462 F.3d 294, 301 (quoting, Mortenson v. First Fed. Sav. and Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977)). As it is the party asserting jurisdiction, the plaintiff “bears 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). See also Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991)(“[w]hen subject matter jurisdiction is challenged under 12(b)(1), the plaintiff must bear the burden of persuasion”).

“In evaluating a Rule 12(b)(1) motion, a court must first determine whether the movant presents a facial or factual attack.” Schering Plough Corp. Intron/Temodar Consumer Class

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<sup>27</sup> Proposed Temporary Restraining Order, p. 1.

<sup>28</sup> Plaintiff’s Motion for a Temporary Restraining Order and for Convening of a Three-Judge Panel, p. 2 (emphasis added).

Action, 678 F.3d 235, 243 (3d Cir. 2012). A facial attack is an attack limited to the face of the complaint. Petruska, 462 F.3d at 302, n.3. When considering a facial attack, a “court must consider the allegations of the complaint as true.” Id. (quoting, Mortenson, 549 F.2d at 891). A factual attack is an attack based on facts extrinsic to the complaint. Petruska, 462 F.3d at 302, n.3. When considering a factual attack:

the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, 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. (quoting, Mortenson, 549 F.2d at 891).

## **VI. ARGUMENT**

### **A. A Federal Court Cannot Exercise Subject Matter Jurisdiction Over a Plaintiff’s Claim in the Absence of Article III Standing.**

Article III of the Constitution limits federal “judicial power” to the adjudication of “Cases” or “Controversies.” U.S. Const. Art. III, § 2. “A declaratory judgment or injunction can issue only when the constitutional standing requirements of a ‘case’ or ‘controversy’ are met.” National Parks Conservation Ass’n v. Lower Providence Twp., 608 F.Supp.2d 637, 643 (E.D. Pa. 2009)(quoting, St. Thomas-St. John Hotel & Tourism Ass’n, Inc. v. U.S. Virgin Islands, 218 F.3d 232, 241 (3d Cir. 2000)). “This limitation is essential to our system of separated powers.” Toll Bros., Inc. v. Township of Readington, 555 F.3d 131, 137 (3d Cir. 2009). “In cases involving state or local government, it ‘serves to protect and preserve the principle of dual sovereignty’ embedded in our founding charter.” Id. (quoting, Storino v. Borough of Point Pleasant Beach, 322 F.3d 293, 300 (3d Cir.2003)). “Courts ensure that the case or controversy requirement is met by following several justiciability doctrines, including standing, ripeness,

mootness, the political question doctrine, and the prohibition against advisory opinions.”

National Parks Conservation Ass’n, 608 F.Supp. at 643 (citing, Toll Bros., Inc, 555 F.3d at 137).

“Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff’s claims and they must be dismissed.” Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 188 (3d Cir, 2006). The “irreducible constitutional minimum” of Article III standing consists of three elements:

First, the plaintiff must have suffered a “concrete,” “particularized” injury-in-fact, which must be “actual or imminent, not conjectural or hypothetical.” Id. (quotation marks omitted). Second, that injury must be “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” Id. (quotation marks and alterations omitted). Third, the plaintiff must establish that a favorable decision likely would redress the injury. Id.

Toll Bros., Inc, 555 F.3d at 137-38 (citing, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). “If the injury-in-fact prong focuses on *whether* the plaintiff suffered harm, then the traceability prong focuses on *who* inflicted that harm. The plaintiff must establish that the defendant's challenged actions, and not the actions of some third party, caused the plaintiff's injury. Toll Bros., Inc., 555 F.3d at 142 (citing, Lujan, 504 U.S. at 560). The redressability prong is:

“closely related” to traceability, and the two prongs often overlap. Powell Duffryn, 913 F.2d at 73; See Dynalantic Corp. v. Dep’t of Def., 115 F.3d 1012, 1017 (D.C.Cir.1997) (describing traceability and redressability “as two sides of a causation coin”). The difference is that while traceability looks backward (did the defendants cause the harm?), redressability looks forward (will a favorable decision alleviate the harm?). See Lujan, 504 U.S. at 560-61, 112 S.Ct. 2130. The redressability prong thus requires a showing that “the injury will be redressed by a favorable decision.” Laidlaw, 528 U.S. at 181, 120 S.Ct. 693.

**B. Because the Plaintiffs Do Not Have Article III Standing to Assert Their Claims Against the LRC, This Court Lacks Subject Matter Jurisdiction Over Them and They Must Be Dismissed.**

The injury-in-fact alleged in Plaintiffs' Complaint is that the 2012 primary and general elections will proceed under the 2001 Legislative Reapportionment Plan despite the fact that the Senate and House legislative districts are now allegedly malapportioned in light of the population shifts that have occurred in the Commonwealth of Pennsylvania since the 2000 federal decennial census.<sup>29</sup> Specifically, Plaintiffs aver that elections held under the 2001 Legislative Reapportionment Plan would "violate the 'one person, one vote' principle under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States" and would "unlawfully dilute their voting strength under the federal Voting Rights Act of 1965."<sup>30</sup> As discussed below, the injury-in-fact alleged by the Plaintiffs is not traceable to any action taken by the LRC and a favorable decision with respect to the LRC will not redress the alleged injury-in-fact. Moreover, the Plaintiffs request to have this Court set a deadline by which the LRC must adopt a new plan of reapportionment is now moot because the LRC has already adopted a new plan. As a result, the Plaintiffs do not have Article III standing to maintain their claims against the LRC. Consequently, this Court does not have subject matter jurisdiction over Plaintiffs claims against the LRC and they must be dismissed.

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<sup>29</sup> Complaint, ¶¶ 1; 34-37; 50-51; 38-49; and 52-53.

<sup>30</sup> Complaint, ¶ 1.

**1. Plaintiff's Alleged Injury-in-Fact Is Not Traceable to Any Action That the LRC Has Taken or Could Take.**

- a. The LRC Played No Role in the Decisions to Keep the 2001 Legislative Plan in Effect Until a Revised Final 2011 Legislative Reapportionment Plan is Implemented or to Keep the 2012 Election Dates the Same.

The LRC is a creature of Article II, § 17 of the Pennsylvania Constitution. It is charged with only one duty - to devise a reapportionment plan for the Commonwealth in each year following the year of the Federal decennial census. See Pa. Const. Art. II, §§ 16 and 17. Legislative Reapportionment Commissions have no authority under the Pennsylvania Constitution to adjudicate challenges to the reapportionment plans they devise. That duty is vested entirely in the Pennsylvania Supreme Court. See Pa. Const. Art. II, § 17(e).

The LRC devised the 2011 Final Plan following the 2010 federal decennial census. As the Plaintiffs note in their Complaint, the LRC created new majority Latino House legislative districts in the 2011 Plan as a result of Latino population growth in certain areas of the Commonwealth.<sup>31</sup> Twelve (12) separate appeals were filed with the Pennsylvania Supreme Court challenging the constitutionality of the 2011 Plan.<sup>32</sup> The three (3) Plaintiffs in this action did not file appeals with the Pennsylvania Supreme Court challenging the constitutionality of the 2011 Final Plan.<sup>33</sup>

The LRC vigorously defended the 2011 Plan, but the Pennsylvania Supreme Court found it to be “contrary to law.”<sup>34</sup> The Pennsylvania Supreme Court remanded the 2011 Plan to the LRC “with a directive to reapportion the Commonwealth in a manner consistent with this

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<sup>31</sup> Complaint, ¶ 33.

<sup>32</sup> Complaint, ¶ 18; February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs' Request for a Temporary Restraining Order, p. 6.

<sup>33</sup> Declaration of Charles E. O'Connor, Jr., ¶ 3.

<sup>34</sup> Complaint, ¶ 19; February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs' Request for a Temporary Restraining Order, p. 7.

Court’s Opinion, which will follow.”<sup>35</sup> The Pennsylvania Supreme Court further ordered that the 2001 Legislative Reapportionment Plan “shall remain in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved.”<sup>36</sup> The Pennsylvania Supreme Court also ruled that “all 2012 election dates shall remain the same” with the exception of several dates related to nominating petitions.<sup>37</sup>

The LRC played no role, and could not have played any role, in the decision to keep the 2001 Legislative Plan in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved. That decision was made entirely by the Pennsylvania Supreme Court. The LRC also played no role, and could have played no role, in the decision to keep all 2012 election dates the same with the exception of several dates related to nominating petitions. Again, that decision was made entirely by the Pennsylvania Supreme Court.

After the Pennsylvania Supreme Court found the 2011 Plan to be “contrary to law,” the only action the LRC took, or could have taken, was to adopt the 2012 Plan as directed by the Court. Any appeals challenging the constitutionality of the 2012 Plan or any subsequent plans thereto will be adjudicated by the Pennsylvania Supreme Court. See Pa. Const. Art. II, § 17. As part of that adjudication, the Pennsylvania Supreme Court will also determine, what effect, if any, a newly approved plan of reapportionment will have on subsequent elections thereto. The LRC will not and cannot play any role in that adjudication. See id.

Given the above, the injury-in-fact alleged by Plaintiffs - i.e., that the present year’s elections will proceed under the 2001 Legislative Reapportionment Plan - is not traceable to any

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<sup>35</sup> Complaint, ¶ 19; February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs’ Request for a Temporary Restraining Order, p. 7.

<sup>36</sup> Complaint, ¶ 20; February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs’ Request for a Temporary Restraining Order, p. 7.

<sup>37</sup> February 8, 2012 Memorandum signed by the Honorable R. Barclay Surrick Denying Plaintiffs’ Request for a Temporary Restraining Order, p. 7.

action taken by the LRC. As a result, Plaintiffs do not have Article III standing to maintain their claims against the LRC and they must be dismissed.

b. The LRC Does Not Play Any Role in Calling, Holding, Supervising or Certifying Elections in the Commonwealth of Pennsylvania.

The LRC has only one duty - to devise a reapportionment plan for the Commonwealth in each year following the year of the Federal decennial census. See Pa. Const. Art. II, §§ 16 and 17. It does not play any role in the calling, holding, supervising or certifying of elections in the Commonwealth of Pennsylvania. As Plaintiffs admit in their Motion, those duties rest with the Secretary of the Commonwealth: “Defendant Carole Aichele as the Secretary of the Commonwealth and the Chief Election Officer in Pennsylvania is the **only** official in the State that is authorized to call, hold, supervise and certify elections.”<sup>38</sup> As a result, the LRC played no role, and could not have played any role, in calling, holding, supervising or certifying the primary election that took place on April 24, 2012<sup>39</sup> and it will not and cannot play any role in calling, holding, supervising or certifying the general election that will take place on November 6, 2012 or any subsequent elections thereto.

Given the LRC’s narrow constitutional mandate as described above, the injury-in-fact alleged by Plaintiffs - i.e, that the present year’s elections will proceed under the 2001 Legislative Reapportionment Plan - is not traceable to any action taken by the LRC. Consequently, Plaintiffs do not have Article III standing to maintain their claims against the LRC and they must be dismissed.

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<sup>38</sup> Plaintiff’s Motion for a Temporary Restraining Order and for Convening of a Three-Judge Panel, p. 2 (emphasis added).

<sup>39</sup> The April 24, 2012 primary election proceeded under the 2001 Legislative Reapportionment Plan. Accordingly, Plaintiffs’ attempt to stop that election from proceeding under the 2001 Legislative Reapportionment Plan is now moot. “If one or more of the issues involved in an action become moot ... the adjudication of the moot issue or issues should be refused.” N.J. Tpk. Auth. v. Jersey Cent. Power & Light, 772 F.2d 25, 30 (3d Cir.1985).

**2. A Favorable Decision with Respect to the LRC Will Not Redress the Injury-in-Fact Alleged by the Plaintiffs.**

Plaintiffs aver that elections held under the 2001 Legislative Reapportionment Plan will “violate the ‘one person, one vote’ principle under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States” and would “unlawfully dilute their voting strength under the federal Voting Rights Act of 1965.”<sup>40</sup> As a result, they are seeking to prevent the present year’s elections from proceeding under the 2001 Legislative Reapportionment Plan.<sup>41</sup> To that end, the Plaintiffs are seeking a declaratory judgment stating that Pennsylvania’s current State Senate and House Legislative districts are malapportioned, illegally dilute the voting rights of Latinos in Pennsylvania and are unlawful, null and void, as well as a permanent injunction enjoining the Defendants from calling, holding, supervising or certifying any elections under the current State legislative districting plan.<sup>42</sup> The granting of the requested relief with respect to the LRC will not redress the injury-in-fact alleged by Plaintiffs - i.e., that the present year’s elections will proceed under the 2001 Legislative Reapportionment Plan. As a result, Plaintiffs do not have Article III standing to maintain their claims against the LRC and they must be dismissed.

As discussed above, the LRC played no role in the decisions to keep the 2001 Legislative Plan in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved or to keep all 2012 election dates the same with the exception of several dates related to nominating petitions. Those decisions were made by the Pennsylvania Supreme Court. The LRC also has no role in calling, holding, supervising or certifying elections in the Commonwealth of Pennsylvania. As Plaintiffs admit in their Motion, those duties rest with the

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<sup>40</sup> Complaint, ¶ 1.

<sup>41</sup> Complaint, ¶¶ 1; 34-37; 50-51; 38-49; and 52-53.

<sup>42</sup> Complaint, Prayer for Relief.

Secretary of the Commonwealth.<sup>43</sup> As a result, no declaratory or injunctive relief granted with respect to the LRC will redress the injury-in-fact alleged by Plaintiffs - i.e., that the present year's elections will proceed under the 2001 Legislative Reapportionment Plan. Because the LRC plays no role in the calling, supervising or certifying of elections, no relief granted with respect to the LRC will prevent the present year's elections from proceeding under the 2001 Legislative Reapportionment Plan. Consequently, Plaintiffs do not have Article III standing to maintain their claims against the LRC and they must be dismissed.

**3. Plaintiffs' Request that the Court Set a Deadline by which the LRC Must Adopt a New Plan of Reapportionment is Moot Because the LRC has Already Adopted a New Plan.**

A federal court's lack of power "to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of [its] judicial power depends upon the existence of a case or controversy." North Carolina v. Rice, 404 U.S. 244, 246 (1971) (quoting, Liner v. Jafco, Inc., 375 U.S. 301, 306, n. 3, (1964)); U.S. Const. Art. III, § 2. The doctrine of mootness requires that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." Steffel v. Thompson, 415 U.S. 452, 459, n. 10, (1974); Roe v. Wade, 410 U.S. 113, 125 (1973); Golden v. Zwickler, 394 U.S. 103, 108 (1969). Thus, mootness has two aspects: (1) the issues presented are no longer "live" or (2) the parties lack a cognizable interest in the outcome. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980).

In their Complaint, Plaintiffs request this Court to enter an order setting a deadline by which the LRC must adopt a new reapportionment plan. The LRC, however, has already done this. On June 8, 2012, it adopted the 2012 Plan and filed it with the Secretary of the Commonwealth of Pennsylvania. As a result, the Plaintiffs' request for a deadline by which the

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<sup>43</sup> Plaintiff's Motion for a Temporary Restraining Order and for Convening of a Three-Judge Panel, p. 2 (emphasis added).

LRC must adopt a new plan is no longer “live.” “If one or more of the issues involved in an action become moot ... the adjudication of the moot issue or issues should be refused.” N.J. Tpk. Auth. v. Jersey Cent. Power & Light, 772 F.2d 25, 30 (3d Cir.1985).

As a result, Plaintiffs do not have Article III standing to maintain this claim against the LRC and it must be dismissed

## **VII. CONCLUSION**

For the foregoing reasons, Plaintiffs’ Complaint against the 2011 Legislative Reapportionment Commission should be dismissed pursuant to Fed.R.Civ.P. 12(b)(1) based on lack of subject matter jurisdiction.

**DEL SOLE CAVANAUGH STROYD LLC**

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Dated: July 2, 2012

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***Counsel for Defendant 2011 Legislative  
Reapportionment Commission***

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

JOE GARCIA, FERNANDO QUILES, :  
DALIA RIVERIA MATIAS, :  
 : CIVIL ACTION  
Plaintiffs, :  
 : NO. 12-0556 RBS  
v. :  
 :  
2011 LEGISLATIVE REAPPORTIONMENT :  
COMMISSION and CAROL AICHELE, in :  
her Capacity as Secretary of the :  
Commonwealth of Pennsylvania, and as Chief :  
Election Officer of the Commonwealth of :  
Pennsylvania, :  
 :  
Defendants. :

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing ***Brief in Support of Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(1)*** was served on the date set forth below via First Class, U.S. Mail, postage prepaid upon the following:

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Date: July 2, 2012

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