COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

December 16, 2013

Via Electronic Case Filing
Marcia M. Waldron
Clerk
U.S. Court of Appeals for the Third Circuit
601 Market Street
Philadelphia, PA 19106-1790

Re: *Joe Garcia,* et al. *v. Carol Aichele, Secretary of the Commonwealth*
No. 13-2319

Dear Ms. Waldron:

This letter memorandum is submitted at the invitation of the Court through correspondence to counsel dated December 9, 2013.

ISSUE PRESENTED

As directed by the Court, this letter memorandum is directed solely to the following issue:

> Whether appellants have standing to pursue their claim of voter dilution in the 2012 Pennsylvania senatorial election given that, as residents of even-numbered districts, it does not appear they were eligible to vote in that election.

SUMMARY OF ARGUMENT

Based on the averments made in their complaint filed in the district court – *i.e.*, that they are residents of ***even-numbered*** senatorial districts, *see* App. 40a-41a (Complaint ¶¶ 7-9) – and the claims that they now make and the relief that they now seek in this Court – *i.e.*, to shorten the four-year terms of all state senators elected in 2012 in ***odd-numbered*** senatorial districts and to set special elections for a two-year term for those seats in 2014, *see* Appellants' Brief at 38-39; Appellants' Reply Brief at 14 – Appellants lack standing.

Appellants have no standing to complain that the elections for the 25 offices of Pennsylvania state senators held in the ***odd-numbered*** senatorial districts in 2012 violated the Equal Protection Clause of the 14th Amendment, or to seek as a remedy therefor new elections for those districts to be held in 2014. Irrespective of whether the conduct of elections in the ***odd-numbered*** senatorial districts in 2012 violated the equal protection rights of some of those who were eligible to participate in those elections, ***Appellants themselves*** could have suffered no such constitutional injury because – as they have alleged – Appellants in 2012 resided in ***even-numbered*** senatorial districts.

Registered electors who – as Appellants allegedly do – reside in even-numbered senatorial districts will have the opportunity under Pennsylvania law to

vote for a state senator in 2014. The elections for state senator to be held in 2014 will be conducted using a redistricting plan adopted by the Pennsylvania Legislative Reapportionment Commission and approved by the Supreme Court of Pennsylvania that Appellants concede satisfies the requirements of the Equal Protection Clause and the Pennsylvania Constitution. Thus, the elections held in 2012 for state senator representing the odd-numbered districts could not have affected, cannot now affect, and cannot in the future affect, the rights of a resident of an even-numbered senatorial district. Inasmuch as each Appellant alleged in 2012 that he resided in an even-numbered senatorial district, Appellants lack standing to complain about the 2012 elections for state senator in Pennsylvania; and their appeal should be quashed.

ARGUMENT

It is well-settled that "[t]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[T]he plaintiff must suffer an injury-in-fact that is concrete and particularized and actual or imminent, as opposed to conjectural or hypothetical." *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 414 (3d Cir. 2013). "[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action

of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* (quoting *Lujan*, at 560). And "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.*

Federal courts repeatedly have refused to recognize "a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *United States v. Hays*, 515 U.S. 737, 743 (1995). "[I]t is the burden of the 'party who seeks the exercise of jurisdiction in his favor' 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *Id.*

The crux of the claim made by Appellants in this appeal is the denial of "the constitutionally protected right ***to participate*** in elections on an equal basis with other citizens." *See* Appellants' Reply Brief at 1 (emphasis added); *see also id.* at 5 ("[A] citizen has a constitutionally protected right ***to participate*** in elections on an equal basis with other citizens in the jurisdiction." (Emphasis added) (quoting *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10 (1982); and citing *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).). Indeed, Appellants emphasize that "the basic premise of [their] claim [is] that ***the 2012 election*** proceeded with districts created using 2000 census data instead of 2010 census data." Appellants'

Reply Brief at 7 (emphasis added). They acknowledge, by contrast, that state senate elections in even-numbered senatorial districts scheduled to be held in 2014 will be based on districts created from 2010 census data. *Id.*

Based on their own description of the claim they make in their brief to this Court, Appellants were not denied the opportunity ***to participate*** in the 2012 Pennsylvania State Senate elections on an equal basis with other citizens. Appellants simply can have no personal grievance with the conduct of the 2012 elections for the State Senate involving odd-numbered Senate districts since, as residents of even-numbered districts in 2012, they were not eligible to vote in those elections under Pennsylvania law. Rather, Appellants and other residents of even-numbered districts will be eligible to vote in State Senate elections in 2014 in which districts based on the 2010 census will be used.

Given their underlying claim, Appellants can state no injury-in-fact as a consequence of the 2012 State Senate elections, and the remedy they seek – special elections for the odd-numbered senatorial districts in 2014 – would afford no personal redress to them, Appellants lack standing to pursue the claims they make and the remedy they seek in this appeal. Only a registered elector who in November 2012 resided in an odd-numbered senatorial district having a disproportionately high population based on the 2010 census, and who continues

currently to reside in an odd-numbered senatorial district, would have standing to make the type of claim and seek the particular remedy that Appellants present to this Court. No Appellant has averred that he resided in an odd-numbered senatorial district in November 2012 and continues to do so.

The U.S. Supreme Court has made clear that a voter who is not directly affected by an alleged equal protection violation in the electoral process has no standing to make an equal protection claim under the Fourteenth Amendment. In *United States v. Hays*, 515 U.S. 737 (1995), the plaintiffs claimed that a congressional redistricting plan included a district that was racially "gerrymandered" in violation of the Equal Protection Clause of the 14th Amendment. However, the plaintiffs in *Hays* "[did] not live in the district that [was] the primary focus of their racial gerrymandering claim." *Id.* at 738. Nor did the plaintiffs "otherwise demonstrate[] that they, personally, [had] been subjected to a racial classification." *Id.*

Because they did not live in the district that was the subject of the alleged constitutional violation, the Supreme Court held the plaintiffs suffered no constitutionally cognizable harm from the alleged racial gerrymander. *Id.* at 745. That the composition of their home congressional district likely would have been different had the legislature not drawn the gerrymandered district as it did (*i.e.*, the

plaintiffs likely would have lived in a congressional district with a different racial composition) was not to the plaintiffs "a cognizable injury under the Fourteenth Amendment." *Id* at 746. The fact that a single gerrymandered district ***affects*** all voters of the state is "irrelevant," the Court said. The fact that the congressional redistricting plan allegedly inflicts constitutional injury on ***some*** of the state's voters, the Court held, does not mean that ***every*** voter of the state has standing to challenge the state government's action under the 14th Amendment. *Id.*

Appellants (and all other Pennsylvania voters who resided in even-numbered senatorial districts at the time of the 2012 elections) have no standing to challenge the 2012 elections simply based on the allegedly diluting effect that those elections had on some voters who resided in an odd-numbered district in 2012. Just as the plaintiffs in *Hays* had no standing to challenge a redistricting plan that unconstitutionally classified ***other*** voters of the state based on race, Appellants here have no standing to challenge the 2012 elections and seek remedial relief for ***other*** Pennsylvania voters who allegedly had their votes diluted in 2012.

CONCLUSION

Because no Appellant, each of whom was a resident of an even-numbered State Senate district in 2012, has standing to challenge the constitutionality of the 2012 elections held for the State Senate in the odd-numbered senatorial districts, this Court should quash the appeal for lack of standing.

Respectfully submitted,

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cc: All counsel of record