UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MICHAEL P. TURCOTTE	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Civil No.:** 11-cv-00312-DBH
	)	
PAUL R. LEPAGE	)	
	)	
Defendant,	)	
	)	
	)	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S OBJECTIONS AND SUPPLEMENTAL OBJECTIONS TO THE RECOMMENDED DECISION AND IN OPPOSITION TO PLAINTIFF'S REQUEST FOR HEARING ON THE MOTION TO DISMISS

On November 30, 2011, Magistrate Judge Kravchuk issued a Recommended Decision explaining that Plaintiff Turcotte's claims, as set out in his amended complaint, have been rendered moot, and that Defendant's motion to dismiss therefore should be granted. (*Docket* # 11). Plaintiff timely filed objections to that Recommended Decision on December 19, 2011 (Docket # 12), and, after the deadline for filing, a motion to supplement those objections with the supplement on December 22, 2011 (*Docket* ## 13 & 13-1). The motion to supplement objections has since been granted (Docket # 14). The headings to the objections and supplemental objections indicate that Plaintiff is also requesting a hearing on the underlying motion to dismiss. (*Docket* ## 12 & 13-1).

Plaintiff's Objections and Supplemental Objections fail to refute or even address the Recommended Decision's conclusion that this matter should be dismissed on the grounds of mootness. Similarly, Plaintiff wholly fails to explain why there should be a hearing on the

motion to dismiss, which was not sought previously. Plaintiff's Objections, Supplemental Objections and request for a hearing, therefore, should be rejected.

BACKGROUND

Reapportionment Process. In March of 2011, a suit was filed in federal court challenging the timing of reapportionment of the Congressional districts in Maine. *Desena v. LePage,* 1:11-cv-117-GZS-DBH-BMS. Following briefing, on June 21, 2011, the three-judge panel held that Maine's law allowing for the redistricting to occur after the 2012 congressional elections violated the federal Constitution, *id.* at *Docket* # 33. In light of that conclusion, and by separate order dated June 22, 2011 (*id.* at *Docket* # 34), the panel directed the state defendants to proceed with the process of redistricting in order to remedy the constitutional violation prior to January 1, 2012, the date on which those seeking to run for Congress in Maine could begin circulating petitions to run for office. In particular, in its order, the court "anticipate[d] that the Maine Legislature will complete its redistricting work no later than September 30, 2011," and to "the extent that the Maine Supreme Judicial Court plays any role in the redistricting for the 2012 congressional election, [it] will complete its work no later than November 15, 2011." *Id.* Should those efforts fail, the court made clear that it would "proceed with its own reapportionment of Maine's congressional districts" in order to meet the January 1, 2011 deadline. *Id.*

On June 28, 2011, the Maine Legislature adopted a Joint Order establishing a 15-member Commission to Reapportion Maine's Congressional Districts ("the Commission") to make redistricting recommendations to the Legislature. H. P. 1186, Joint Order to Establish the Commission to Reapportion Maine's Congressional Districts (125th Legis. 2011). *Docket* # 8-1. The Speaker of the House of Representatives, the President of the Senate, and the House and Senate leaders of the minority party had authority to and did appoint the members of this

Commission. Several public meetings were held. At the last meeting on August 30, each Commission member was given an opportunity to speak and to indicate a preference for a particular plan. All seven Democratic members preferred the Democratic plan, and all seven Republican members supported one or both Republican plans. The Chairman then stated his preference for the Democratic plan. A motion to recommend the Democratic plan was approved by a vote of 8 to 7.

Governor LePage called for a Special Legislative Session to be held on September 27, 2011. At that session, a substitute compromise plan was approved by overwhelming majorities in both chambers of the Legislature, with a final vote of 140-3 in the House and 35-0 in the Senate. Governor LePage signed this plan into law. P.L. 2011, c. 466 (eff. Sept. 28, 2011). *Docket* # 8-2. The population variance between the reconfigured districts is one vote, with the First District having a population of 664,180 and the Second District 664,181. Plaintiff Turcotte does not contest the constitutionality of this line.

By order dated October 4, 2011, pursuant to its authority under 21-A M.R.S. § 1206(3) and 4 M.R.S. § 8, the Maine Supreme Judicial Court ordered that any challenges to the enacted redistricting plan be filed on or before October 12, 2011, and if no challenge is filed the plan shall be considered final on that date. *In re 2011 Congressional Redistricting*, Docket No. SJC-11-1 (Procedural Order, dated Oct. 4, 2011). *Docket* # 8-3. No challenges were filed on or before October 12, 2011.

Present lawsuit. Mr. Turcotte filed his initial complaint on August 17, 2011. (*Docket* # 1). On August 19, he filed an amended complaint. (*Docket* # 6). The amended complaint asserts that the Congressional redistricting process contemplated by the Maine Constitution

violates a number of Constitutional provisions. *Amended Complaint*, ¶¶ 6-18 (*Docket* # 6). The relief sought, in pertinent part, includes:

> A temporary injunction preventing the legislatively-created redistricting commission from performing its duties in making recommendations. *Id.* at ¶ 21;
>
> The creation of an alternative apportionment commission of 21 – 31 registered voters, with 2 – 3 alternates, to be chosen by lottery, with a current or retired Maine Supreme Court Justice to be the moderator or facilitator. *Id.* at ¶¶ 24-37;
>
> A procedure by which the alternative commission would finalize the congressional reapportionment map by a two-thirds vote, and send it to the Maine House of Representatives. If that body failed to pass the map by a majority vote, the map would then be "sent to the Justices of the Supreme Court of Maine to be enacted by decree." *Id.* at ¶¶ 42 – 45. If the House "passes" the commission's map, the Governor would sign it into law. *Id.* at ¶ 46.

Plaintiff did nothing after filing the amended complaint to pursue his requests for relief.

On October 17, 2011, Defendant filed a motion to dismiss on the ground of mootness. *Docket* # 8. Following full briefing (*Docket* ## 8, 9 & 10), the Magistrate Judge on November 30 recommended that the motion be granted:

> Defendant is correct that, to the extent the complaint seeks temporary restraining orders barring the commission from devising a congressional reapportionment scheme or preventing the Governor from implementing any redistricting plan, subsequent events have rendered those issues moot. A congressional redistricting plan, not the commission's proposal, has been adopted by the State Legislature and no objection to the plan was timely filed with the State Supreme Judicial Court. The deed is done and the requested relief is impossible to achieve.

Docket # 11, at 3. The Magistrate Judge went on to explain:

> Turcotte contends that as long as the statute and constitutional provision concerning the political affiliation of the members of the Legislative Apportionment Commission remains in existence, his constitutional rights are being violated. And he maintains this is so despite the fact that the plan ultimately adopted rejected the Commission's proposal and enacted a legislative compromise. However, Turcotte's amended complaint does not seek declaratory relief on the issue of the constitutionality of the current Maine statutory and constitutional provisions. Were the amended complaint to seek such relief, it is abundantly plain that the provisions of Maine law pass constitutional muster.

> State legislatures are not required to divorce themselves from political motivations in drawing congressional lines. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 415-23 (2006).

Id. at 3-4.

ARGUMENT

This lawsuit should be dismissed as being moot.

Simply put, in his Objections and Supplemental Objections Plaintiff does not address the Recommended Decision's conclusions that his claims are moot. Plaintiff's filings do not even contain the word "moot." A claim is moot when the Legislature acts in a manner that renders the claim for relief impossible. *See Diffenderfer v. Gomez-Colon,* 587 F.3d 445 (1st Cir. 2009). Here, Plaintiff sought injunctive relief prescribing a process to achieve the "one person, one vote" constitutional mandate. The Maine Legislature adopted a different process by Joint Order, which is now complete, and then adopted its own redistricting plan. In the present case, the line-drawing work is done, and Plaintiff does not challenge it. This matter can be nothing other than moot.

To the extent Plaintiff may be attempting to suggest that the matter is not moot merely because a claim for declaratory relief is involved (*Plaintiff's Opp.* (*Docket* # 12) at 3-4 & *Plaintiff's Supp. Opp.* (*Docket* # 13-1) at 1-2, both referring to *Amended Complaint*, ¶ 19 (*Docket* # 6)), mootness dooms such a claim as well. *Preiser v. Newkirk,* 422 U.S. 395, 402 (1975); *Governor Wentworth Regional School Dist. v. Hendrickson*, 2006 WL 3259203, at *8 - *9 (1st Cir. 2006). To avoid a finding of mootness, there must be a "substantial controversy … of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Preiser*, 422 U.S. at 402. Plaintiff does not challenge the line established by the Legislature itself, nor that the Legislature itself established the line. Rather, Plaintiff seems to want a declaration that

the prefatory activity involving the political configuration of an advisory committee is unconstitutional. If, in 10 years, such a committee is formed, perhaps at that time, Plaintiff can bring such a declaratory claim, but that claim is not yet ripe. A declaration on the issue is at best advisory at this time.[1] Additionally, as the Recommended Decision states, there is no constitutional problem with political affiliations being part of the line-drawing process. *Docket* # 11, at 3-4, *citing League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415-23 (2006). The Supreme Court in *Perry* put to rest the previously debated notion that the courts could somehow conceive of a standard whereby politics could be regulated out of electing politicians, making clear that the federal courts would no longer attempt to do so.

For these reasons, the Recommended Decision should be accepted.

The request for hearing should be denied.

A hearing, particularly at this stage of the proceedings, is discretionary with the Court. Plaintiff wholly fails to explain how a hearing at this or any stage of the process will benefit the Court. As the motion turns entirely upon the application of established law to the uncontested events of the Legislature's drawing the new Congressional line, a hearing is an unnecessary waste of the Court's time.

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[1] Nor does this complaint conceivably fit under the "capable of repetition, yet evading review" exception to mootness. In order to fall within this exception, "there must be a 'reasonable likelihood that the same issues will imminently and repeatedly recur in future similar contexts,' yet escape review because of their 'fleeting or determinate nature.'" *Ten Voters of City of Biddeford v. City of Biddeford*, 2003 ME 59, ¶ 10, 822 A.2d 1196, 1200 (citation omitted). The voters of Maine have now approved a constitutional provision that sets forth the process to be used following the next federal decennial census in 2020. Const. Res. 2011, ch. 1, *passed in* 2011. Should Plaintiff have concerns with that procedure when it is implemented ten years from now, there will be more than sufficient opportunity for judicial review at that time.

Dated: January11, 2012

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CERTIFICATE OF SERVICE

Deputy Attorney General Paul Stern certifies that he served a copy of this document by Defendant by first-class mail today on the following:

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Dated: January 11, 2012

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