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

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| JOE GARCIA, FERNANDO QUILES, DALIA RIVERA MATIAS, Plaintiffs, | ) | |
| v. | ) | CIVIL ACTION NO. 12-0556 RBS |
| 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. | ) | |

**MEMORANDUM OF LAW OF REPRESENTATIVE MICHAEL TURZAI AS *AMICUS CURIAE* CONCERNING DEFENDANT'S MOTION TO DISMISS**

Representative Michael Turzai, by and through his attorneys, Eckert Seamans Cherin & Mellott, LLC, states as follows as *amicus curiae* in this matter:

## I. STATEMENT OF INTEREST OF AMICUS CURIAE

Michael Turzai ("Leader Turzai") is a Pennsylvania State Representative, Majority Leader of the State House of Representatives and as a result of that leadership position, a member of the Commonwealth's 2011 Legislative Reapportionment Commission (the "PALRC"), a defendant in this proceeding. In Leader Turzai's official capacities, he respectfully submits this Memorandum of *amicus curiae* in this proceeding.[1] Leader Turzai urges this Court to grant Defendant's Motion to Dismiss in deference to the reapportionment process already

[1] Leader Turzai has filed a Motion for Leave to file this Memorandum as *Amicus Curiae* simultaneously with the filing of the Memorandum.

underway before the PALRC and Pennsylvania Supreme Court, which process "is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." Chapman v. Meier, 420 U.S. 1, 27 (1975).

## II. STATEMENT OF FACTS

On June 29, 2012, Plaintiffs Joe Garcia, Fernando Quiles, and Dalia Rivera Matias ("Plaintiffs") filed a Motion for Preliminary Injunction, asking this Court to intervene in the Commonwealth of Pennsylvania's legislative reapportionment process, and essentially take over that process, by granting the extraordinary relief of shortening the terms of legislators not yet elected during the November 2012 General Election as well as schedule a special election in the year 2013 for the same legislative seats. In addition, Plaintiffs ask this Court to take the extraordinary action of setting and enforcing a deadline by which the PALRC, the body created by the Pennsylvania Constitution, must enact a new legislative redistricting plan. On July 2, 2012, the PALRC, a defendant in the instant litigation, filed a Motion to Dismiss for lack of jurisdiction.

On June 8, 2012, the PALRC adopted a new final reapportionment plan (known as both the "2012 Final Plan" and the "Revised 2011 Final Plan"). In accordance with Article II, Section 17 of the Pennsylvania Constitution, the PALRC then filed the Revised Final Plan with the Secretary of the Commonwealth of Pennsylvania. All Petitions seeking review of the 2012 Final Plan were due to be filed with the Pennsylvania Supreme Court by July 9, 2012. *See PA. CONST. art. II, § 17(d).* Following the filing of a number of petitions with the Pennsylvania Supreme Court (the "Petitions"), the Court, on July 10, 2012, issued an Order which provided, *inter alia,* that all briefs in support of the Petitions were due on August 6, 2012 and all briefs in opposition to the Petitions are due on August 20, 2012 (a copy of the Court's July 10, 2012

Order is attached hereto as Attachment A). On August 8, 2012, the Court issued Orders which set September 13, 2012 as the date for oral argument on the Petitions.

## III. ARGUMENT

As described below, United States Supreme Court precedent, Third Circuit jurisprudence, and this Court's own February 8, 2012 Opinion on the prior Motions for Temporary Restraining Order, Preliminary, and Permanent Injunctions, all make plain that this Court should grant Defendants' Motion to Dismiss because Plaintiffs' claims are barred by the doctrine of *res judicata* and federal court abstention principles. This Memorandum is submitted on these procedural issues alone and does not reach any substantive issue within Plaintiffs' Complaint.

Third Circuit jurisprudence dictates that under circumstances similar to those here, claims presented to federal district courts pertaining to legislative redistricting plans are precluded by the doctrine of *res judicata*. Robertson v. Bartels, 148 F.Supp.2d 443, 452 (D.N.J. 2001). Moreover, the United States Supreme Court requires federal courts to defer consideration of disputes involving state legislative redistricting, even if there has been a delay in the state court proceedings, as long as it appears that the state court is fully prepared to adopt a plan in as timely a manner as the federal court. Growe v. Emison, 507 U.S. 25 (1993). In this case, this Honorable Court must either defer to the Pennsylvania State Supreme Court and legislature's handling of legislative redistricting in Pennsylvania or abstain from hearing the Plaintiffs' claims.

Notably, this Court has already considered and denied a request from these Plaintiffs for injunctive relief of the type sought here. Garcia, et al. v. 2011 Legislative Reapportionment Commission, et al., No. 12-0556, memorandum at 9, 24 (E.D. Pa. Feb. 8, 2012). The principles espoused and relied upon by the Court in that circumstance similarly support dismissal of

Plaintiffs' claims. Indeed, this Court has already recognized that "Federal courts must act cautiously when asked to interfere with state election matters." Id. at 14. Moreover, "[T]he 'Constitution leaves with States [the] primary responsibility for apportionment of their federal congressional and state legislative districts.'" Id. at 14-15 (citing Growe v. Emison, 507 U.S. 25, 34 (1993). This Court acknowledged that federal courts should refrain from acting when "relief does not make sense" and where states are undertaking their responsibilities to arrive at an appropriate reapportionment plan. Id. at 15-18. As stated, the 2012 Final Plan is currently under review by the Pennsylvania Supreme Court. Id. at 18. Consistent with this Court's previous decision, since the 2012 Final Plan is under consideration by the Pennsylvania Supreme Court, this Honorable Court should refrain from entertaining Plaintiffs' Complaint and Plaintiff's Complaint should be dismissed based upon *res judicata* and abstention principles.

**A. *Res Judicata***

The doctrine of *res judicata* precludes this Honorable Court from providing the relief sought by the Plaintiffs. The preclusive effect of *res judicata*, in the context of a challenge to a redistricting plan, has been addressed in this Circuit. In Robertson v. Bartels, 148 F.Supp.2d 443, 452 (D.N.J. 2001), the District Court of New Jersey barred a redistricting lawsuit based upon *res judicata*. In Robertson, the plaintiffs, a group of incumbent candidates, mayors and individuals precluded from running for office, sought injunctive relief to prevent the defendants, the New Jersey Apportionment Commission and the New Jersey Secretary of State and Attorney General, from implementing a redistricting plan for New Jersey's Senate and General Assembly. Id. at 444. The plaintiffs alleged that the redistricting plan violated the First, Fourteenth and Fifteenth Amendments to the U.S. Constitution. However, before the Robertson plaintiffs filed suit, different plaintiffs had already filed a lawsuit in federal district court challenging the

redistricting plan and seeking an injunction against implementation of the new plan. See Page v. Bartels, 144 F.Supp.2d. 346 (D.N.J. 2001). After the Robertson plaintiffs commenced suit, the Page court rendered its decision denying plaintiffs' request for injunctive relief and entered final judgment in favor of the defendants. The Robertson defendants then filed a motion for summary judgment, arguing the plaintiffs' claims were barred by *res judicata*. Id. at 448. The Court stated that *res judicata* requires a showing that there has been: (1) a final judgment on the merits of a prior suit involving; (2) the same claim; and (3) the same parties or their privities. Id. (citing EEOC v. United States Steel Corp., 921 F.2d 489, 493 (3d Cir. 1990)).

The court found that the necessary showings had been made. First, the Robertson court found that a final judgment on the merits occurred in Page. Second, in deciding whether Robertson pertained to the same matters as those in Page, the Robertson court noted that the Third Circuit takes a broad view, looking to whether there is an "essential similarity of the underlying events giving rise to the various legal claims." Robertson, 148 F.Supp.2d at 448-49 (citing references omitted). Thus, causes of action are the same if they arise from the same transaction, within the scope of the transaction being determined by considering whether there is a common nucleus of operative facts. Id. In finding that both the Robertson and Page cases dealt with the same claims, the court noted that both sets of plaintiffs' claims arise from the same event: approval by the Commission of the new legislative redistricting plan. Id. The court went on to explain that the correct inquiry focuses not on the specific arguments plaintiffs set forth, but instead focuses on the facts and occurrences underlying and supporting the plaintiffs' requested relief. Id.

Third, the Robertson court determined that the plaintiffs in both cases were in privity with each other based upon a virtual representation theory.[2] Id. at 451 (citing Tyus v. Schoemehl, 93 F.2d 449, 455 (8th Cir. 1996)). The parties in both cases had a commonality of interests: their challenge to the validity of the redistricting plan. Id. After determining both sets of plaintiffs were in privity with each other, the district court ruled that *res judicata* precluded the plaintiffs' claims. Id.

As in Robertson, *res judicata* bars Plaintiffs' claims here. First, a final judgment was rendered in the Holt case pertaining to the validity of the 2011 Final Plan and subsequent procedure for enactment of a valid redistricting plan. Second, Plaintiffs incorrectly seek a different procedure than that which the Pennsylvania Supreme Court previously ordered. Third, like the Robertson plaintiffs, the Garcia Plaintiffs stand in privity with their predecessors in Holt. Both sets of plaintiffs have the same identity of interests, i.e. that a constitutionally valid redistricting plan be implemented in the Commonwealth of Pennsylvania as soon as possible. See Robertson, 148 F.Supp.2d at 449-50. Accordingly, this Honorable Court should dismiss Plaintiffs' claims as barred by *res judicata*.

[2] In Gustafson v. Johns, the district court stated, "[f]or res judicata purposes, redistricting lawsuits are precisely the type of public law issue to which virtual representation should be applied; without virtual representation, there is no limit to the number of potential plaintiffs who could bring successive lawsuits against a state for redistricting, and a state should not face an endless stream of lawsuits after each redistricting." Gustafson v. Johns, 434 F.Supp.2d 1246, 1257 (S.D.Ala. 2006). (holding that redistricting challenge was barred by res judicata). See Also: McNeil v. Legislative Apportionment Comm'n, 177 N.J. 364, 828 A.2d 840, 860-62 (2003) (barring a redistricting lawsuit because of res judicata).

**B. Abstention**

The United States Court of Appeals for the Third Circuit has provided the following synopsis of the general principles of abstention:[3]

> Abstention is a judicially created doctrine under which a federal court will decline to exercise its jurisdiction so that a state court or agency will have the opportunity to decide the matters at issue. The doctrine is rooted in concerns for the maintenance of the federal system and represents an extraordinary and narrow exception to the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them. Consequently, abstention is justified only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest. In other words, abstention from the exercise of federal jurisdiction is appropriate only under certain limited circumstances. Those circumstances are loosely gathered under discrete concepts of abstention named after leading Supreme Court cases, viz., "Pullman" ( Railroad Comm'n of Texas v. Pullman, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)); "Burford" ( Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943)); "Younger" ( Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)); and "Colorado River" ( Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483, (1976)).

Miller v. Ayres, 2009 WL 1230877 (W.D.Pa.2009) (quoting Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 303 (3d Cir.2004)). It has been said that unlike typical abstention cases, where a federal court's decision to decline to exercise jurisdiction is disfavored, in the redistricting and reapportionment context, when parallel state proceedings exist, **the decision to refrain from hearing litigant's claims should be the routine course.** Rice v. Smith, 988 F. Supp. 1437, 1439 (M.D. Ala. 1997) (emphasis added).

[3] This memorandum uses the term "abstention" broadly to refer not only to the decision to "abstain" from hearing a plaintiff's claims, requiring dismissal, but also to the decision to "defer" to parallel state proceedings while staying the federal court litigation. Although the United States Supreme Court differentiated in Growe v. Emison, 507 U.S. 25, 32 n. 1 (1993), between abstention and deferral, the lower courts and other authorities have continued to use the term "abstention" to describe both actions. See, e.g., Benavidez v. Eu, 34 F.3d 825, 832–33 (9th Cir.1994) (distinguishing between "deferral abstention" and "dismissal abstention").

**1. Pullman Abstention**

The Pullman doctrine was created by the Supreme Court in Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941). Plaintiffs were railroad employees who argued that an order of the Railroad Commission violated the United States Constitution and state statutory law. The U.S. Supreme Court found that state law was uncertain and that a favorable ruling on state law may obviate the need for the federal courts to decide the constitutional question. Accordingly, the Court ruled that the federal case should be stayed so the parties could get a definitive ruling from the state court on the state law issue.

Abstention under the Pullman doctrine is appropriate when:

> (1) Uncertain issues of state law underlying the federal constitutional claims brought in federal court;
>
> (2) State law issues amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims; and
>
> (3) A federal court's erroneous construction of state law would be disruptive of important state policies.

Buck v. Stankovic, 485 F.Supp.2d 576, 580-81 (M.D.Pa. 2007).

Two U.S. Supreme Court cases have applied Pullman doctrine principles in ordering district courts to defer or abstain from considering disputes involving state legislative redistricting.

In Growe v. Emison, 507 U.S. 25 (1993), plaintiffs sought declaratory and injunctive relief barring the use of allegedly fragmented districts for future elections and adoption of new districts in both congressional and state legislative redistricting. Id. at 28. Prior to the federal district court action, a state-court action has been commenced against state officials regarding the

malapportioned districts. Id. at 27. The district court held that the state redistricting plan fragmented minority voting rights under the Voting Rights Act.

On appeal, the U.S. Supreme Court held that the district court erred in not deferring to the state court's timely efforts to redraw legislative and congressional districts. Id. at 34. Indeed, this Court looked to Growe when it considered Plaintiffs' prior motion for injunctive relief. Garcia, No, 12-056, memorandum at 14-15 (Feb. 8, 2012). This Court quoted Growe as follows: "[T]he 'Constitution leaves with the States [the] primary responsibility for apportionment of their federal congressional and state legislative districts.'" Growe, 507, U.S. 25, 34 (1993) (citing U.S. Cons., Art. I, §2). The Supreme Court noted that the legislative and judicial branches of state governments are preferred to federal courts, and absent evidence that either branch is shirking its duty, the federal courts should not impede or obstruct state reapportionment.[4] Id.

The Growe Court explained that it has "required deferral, causing a federal court to 'sta[y] its hands,' when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case." Id. at 32 (quoting Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 501 (1941)). Previously, the U.S. Supreme

[4] Other courts have reached the same conclusion. According to the court in Brown v. Florida, 208 F.Supp.2d 1344 (S.D. Fla. 2002), removal of a congressional redistricting case to a federal court was unwarranted. The court noted that federal courts were courts of limited jurisdiction and there was a presumption against the exercise of federal jurisdiction; therefore, uncertainties about jurisdiction of the case should be resolved in favor of the state court. The court, in its remand to the state court, stated that the vindication of the federal rights of the litigant should be left to the state courts except when those rights would be denied by having the action in state court. Also, According to the court in Brown v. Butterworth, 831 So. 2d 683 (Fla. Dist. Ct. App. 4th Dist. 2002), reh'g denied, (Dec. 20, 2002), state courts were competent to hear claims relating to congressional reapportionment. The lower court judge had stated that under the United States Constitution, state courts were denied judicial review in congressional redistricting matters; rather, those matters were under the domain of the state legislature. In its reversal of the lower court, the court noted that under federal law, there was a strong policy of deference to state courts for the resolution of congressional redistricting challenges. In Alexander v. Taylor, 2002 OK 59, 51 P.3d 1204, 114 A.L.R.5th 759 (Okla. 2002), as corrected, (June 27, 2002), the court held that the state court had jurisdiction to consider congressional reapportionment disputes when the state legislature failed to act. Article 1, Section 4 of the United States Constitution provided that the time, place, and manner of holding elections for Senators and Representatives should be prescribed by the state legislatures; however, the court noted that this article did not prohibit courts from resolving redistricting disputes in appropriate cases. In its affirmance of the lower court, the court noted that the failure of the state legislature to act in congressional redistricting matters was a violation of the constitutional rights of citizens of the state, and the legislature's failure was subject to redress by the state courts.

Court encouraged abstention "when the federal action raises difficult questions of state law bearing on important matters of state policy, or when federal jurisdiction has been invoked to restrain ongoing state criminal proceedings." Id. (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814–817 (1976)).

The Court's ruling in Growe reaffirmed the principles expressed in Scott v. Germano, 381 U.S. 407 (1965), which derive from the recognition that the U.S. Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. Growe, 507 U.S. at 34. The court found that absent evidence that state branches will fail to timely perform their redistricting duty, federal courts must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it. Id. at 34.

In Growe, after reversing the district court's judgment, the U.S. Supreme Court noted that the state court was neither unwilling nor unable to adopt a redistricting plan in time for the election. Id. at 37. In the Garcia matter, both the Pennsylvania Supreme Court and the Commission are not unwilling nor unable to adopt a valid plan in accordance with the procedure set forth in Pennsylvania's Constitution.[5] Moreover, the Garcia Plaintiffs are complaining of constitutional issues concerning equal protection which relate to the unequal populations in voting districts under the 2001 legislative redistricting plan. If the Pennsylvania Supreme Court declares that the 2012 Plan is valid, the complained of constitutional issues are moot. Such a

[5] For the first time in Pennsylvania State history, the Pennsylvania Supreme Court declared a Legislative Reapportionment Commission Redistricting Plan contrary to law in Holt v. 2011 Legislative Reapportionment Commission, 38 A.3d 711 (Pa. 2012). In compliance with Pennsylvania Constitutional procedure, the Legislative Reapportionment Commission drafted and adopted a Revised Final Plan (known as both the 'Revised Final 2011 Plan' and the '2012 Final Plan'). Appeals were made from the Revised Final Plan in accordance with Article II, § 17 of the Pennsylvania Constitution. Currently, the Pennsylvania Supreme Court is hearing said appeals to determine the validity of the Revised Final Plan.

scenario is exactly what the Growe Court described.[6] Hence, per the U.S. Supreme Court's direction, this Honorable Court should defer to the Pennsylvania Supreme Court's handling of both the 2012 Plan and all subsequent elections under such plan.

In Scott v. Germano, 381 U.S. 407 (1965), another case this Court previously looked to when deciding Plaintiffs' prior motion, the U.S. Supreme Court required three federal district court judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, had begun to address the highly political task of redistricting itself. The U.S. Supreme Court reviewed a January 22, 1965 federal district court ruling that invalidated Illinois' Senate districts and entered an order requiring the state to submit to the court any revised Senate districting scheme the appropriate state agencies might adopt. An action had previously been filed in state court attacking the same districting scheme. In the state case, the Illinois Supreme Court held (subsequent to the federal court's order) that the Senate districting scheme was invalid, but expressed confidence that the General Assembly would enact a lawful plan during its then current session, scheduled to end in July 1965. Similar to the circumstances here, the Illinois Supreme Court retained jurisdiction over the matter.

The U.S. Supreme Court disapproved of the district court's action and ruled that the district court "should have stayed its hand," and in failing to do so overlooked the U.S. Supreme Court's teaching that state courts have a significant role in redistricting. Scott v. Germano, 381 U.S. 407, 409 (1965) The court went on to state that:

> "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged....The case is remanded with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State

[6] A federal court must "stay its hands when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case." Growe, 507 U.S. at 32

> Senate; provided that the same be accomplished within ample time to permit such plan to be utilized in the 1966 election...."

Id. (citations omitted).

Like Germano, state law issues are implicated in this case which pertains solely to state legislative reapportionment. Essentially, the relief Plaintiffs seek is that a time frame be set for adoption of a valid redistricting plan. However, the Pennsylvania Supreme Court is in the process of reviewing the validity of the 2012 Plan. As in Germano, the appropriate state agencies have already begun to address the "highly political task of redistricting." Moreover, in the instance that the Pennsylvania Supreme Court rules that the 2012 Final Plan/Revised 2011 Final Plan is valid, it would eliminate any need for this Court's involvement. As such, this Court should follow the precedent set by Growe and Germano and stay its hand due to the concurrent Pennsylvania state court proceedings pertaining to the same subject matter of which Plaintiffs complain of here.

## IV. CONCLUSION

Pursuant to U.S. Supreme Court and Third Circuit precedent and this Court's prior ruling, Plaintiffs' Complaint is barred by the doctrine of *res judicata* and abstention principles and should be dismissed.

Respectfully submitted,

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