Hearing Scheduled for May 28, 2013

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

MICHAEL PUYANA :
:
v. : C.A. No. PC12-1272
:
STATE OF RHODE ISLAND; :
GORDON FOX, in his official :
Capacity as Speaker of the Rhode :
Island House of Representatives; :
RALPH MOLLIS, in his official :
Capacity as Secretary of State of :
Rhode Island; and RHODE :
ISLAND BOARD OF ELECTIONS :

DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants, State of Rhode Island, Gordon Fox, in his official capacity as Speaker of the Rhode Island House of Representatives, Ralph Mollis, in his official capacity as Secretary of State of Rhode Island, and Rhode Island Board of Elections, submit this Reply Memorandum in Further Support of Their Motion for Judgment on the Pleadings.

In his Objection to Defendants' Motion for Judgment on the Pleadings, Plaintiff fails to establish that he has presented this Court with a justiciable controversy. He has not cited to any Rhode Island precedent to support his claim for standing. Rather, he relies heavily on certain federal redistricting cases to support his claim that he has been harmed by R.I.G.L. § 22-2-2. Plaintiff's reliance on these authorities is misplaced because they all deal with harm arising from voter dilution, something not at issue here. Plaintiff also fails to demonstrate that his claims are not moot, as any alleged harm likely would not re-occur. Finally, Plaintiff fails to demonstrate why the application of laches would not be appropriate where, as here, he timely filed his

complaint, but then failed to take any action whatsoever to prosecute his claims and allowed two elections to take place with respect to the allegedly improper districts.

ARGUMENT

I. Plaintiff Has Not Alleged Any Harm That Could Grant Him Standing in This Case

Plaintiff fails to plead facts that could plausibly confer him standing to pursue this action. He argues that when an electoral district is unconstitutionally gerrymandered to enhance or hinder the election prospects of a particular candidate, every voter in that district has standing to challenge the redistricting. *See* Plaintiff's Objection to Defendants' Motion for Judgment on the Pleadings, at 2 [hereinafter *Plaintiff's Obj.*]. To support his claim, Plaintiff relies largely on *Davis v. Bandemer*. *Plaintiff's Obj.* at 2-4. What Plaintiff fails to mention, however, is that *Davis* has been subsequently called into doubt by a plurality of the United States Supreme Court which held that claims for political gerrymandering can *never* be justiciable. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion).[1] Nevertheless, to the extent allegations of partisan gerrymandering ever could create justiciable controversies, Plaintiff still has not pled and cannot plead such a claim here because he has not suffered an actionable harm.

As the Supreme Court has long recognized,

> it would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

[1] The cases cited by Plaintiff principally turn on the question of whether gerrymandering is a non-justiciable political question, not whether a plaintiff's claims of gerrymandering are non-justiciable based on lack of standing. *See, e.g. Davis v. Bandemer*, 478 U.S. 109 (1986). To the extent that these cases do not discuss standing as an aspect of justiciability, it is unclear how, if at all, their holdings would be applicable to Plaintiff's arguments here.

Gaffney v. Cummings, 412 U.S. 735, 752-53 (1973). To present a justiciable cause of action based on gerrymandering, a plaintiff must plead some form of actionable harm to himself in addition to the gerrymandering itself. *See Davis v. Bandemer*, 478 U.S. at 130-33. Normally, and indeed in *every* gerrymandering case plaintiff has cited, the actionable harm arose from voter dilution caused by the redistricting. *See Davis*, 478 U.S. 109; *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Baker v. Carr*, 369 U.S. 186 (1962); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993); *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989); *Arrington v. Elections Bd.* 173 F. Supp. 2d 856 (E.D. Wis. 2001). In these instances, courts held that individual voters had standing because the legislatures disadvantaged the opportunity effectively to have their votes counted. *See Baker*, 369 U.S. at 206-07. In essence, where claims of voter dilution are at issue, an argument can be made that the legislature has harmed the voters as voters. *See id.*

By contrast, Plaintiff has made no such allegation of voter dilution or of any infringement on his ability to have his voice heard in the political process. Instead, he alleges that the legislature gerrymandered House Districts 47 and 48 "to ensure and or unfairly enhance Representative Cale Keable's reelection prospects and/or to *unfairly hinder and/or prevent the election prospects of Donald Fox . . .*" *Plaintiff's First Amended Complaint*, at ¶ 50 (emphasis added). Although Plaintiff makes an allegation of gerrymandering, the cases cited by him make clear that such allegations must be accompanied by allegations of a resulting harm to the Plaintiff to be actionable. *See, e.g. Davis*, 478 U.S. at 133-34; *Arrington*, 173 F. Supp. 2d at 862. Consequently, the federal redistricting cases cited by Plaintiff do not stand for the proposition that R.I.G.L. § 22-2-2 has *per se* created any actionable harm. Rather, they stand for the proposition that voter dilution allegations may create a potentially justiciable controversy –

something *not* at issue in this case. *See, e.g. Davis*, 478 U.S. at 133-34; *Arrington*, 173 F. Supp. 2d at 862.

Perhaps on an even more fundamental level, the federal cases cited by Plaintiff have no bearing on the standing inquiry presented to this Court. Article III standing under the United States Constitution is distinct from the standing requirements required by Rhode Island courts. *Tanner v. Town Council of E. Greenwich*, 880 A.2d 784, 792 n.5 (R.I. 2005).

> To invoke a federal court's jurisdiction, the plaintiff must have suffered some threatened or actual injury resulting from the putatively illegal action. The Rhode Island Constitution has no express case or controversy requirement and the federal limitation does not apply. Nevertheless, this Court has stated that the test for standing is 'injury in fact.' . . . This "injury in fact" requirement has been described as "an invasion of a legally protected interest which is (a) concrete and particularized * * * and (b) actual or imminent, not 'conjectural' or 'hypothetical.'

Id. As the Rhode Island Supreme Court recognized last year, Rhode Island's "long-standing jurisprudence, *perhaps to a greater degree than that of some other jurisdictions* – has had a *discernable focus on the requirement of concrete and particularized harm*." *Watson v. Fox*, 44 A.3d 130, 138 (R.I. 2012) (emphasis added).

Of particular importance here, Plaintiff has not cited a single Rhode Island case to support his claim of standing. Nor has he identified any actual "concrete and particularized harm" to himself. Rather he has alleged that the legislature engaged in unconstitutional gerrymandering targeted at a non-party to this case, the result of which in no way diluted or affected his right to have his vote counted. Rather, his allegation is that the legislature failed to follow the law, an allegation that both this state's courts and the federal courts have long held will not create standing. *See, e.g. Allen v. Wright*, 468 U.S. 737, 755 (1984) ("Respondents here have no standing to complain simply that their Government is violating the law."); *Ex Parte*

Levitt, 302 U.S. 633, 636 (1937) (holding that a party has no standing to challenge the validity of governmental action without proving that he has been directly injured); *Watson v. Fox*, 44 A.3d at 137-38 (no standing to compel government to follow the law) (cases cited therein). Without more, the allegation of harm to a non-party is insufficient and Plaintiff's Complaint should therefore be dismissed.

II. Plaintiff Has Failed to Show That His Claims Have Not Been Mooted by the 2012 Elections

Although the cases cited by plaintiff may be instructive on the general law of mootness, they are not on point. Mootness is inextricably linked with the issue of harm. *See Am. Ass'n of Univ. Professors, Univ. of R.I. Chapter v. Bd. of Regents for Educ.*, 373 A.2d 168, 169 n.2 (R.I. 1977). Where an alleged harm is "a recurring situation constantly escaping judicial review," courts will sometimes rule on an otherwise moot claim. *Id.* For example, in the cases cited by Plaintiff, the harm was racially motivated voter dilution; the minority voters were unable to have their votes adequately represented because of the state's redistricting. *See Blackmoon v. Charles Mix Cnty.*, 386 F. Supp. 2d 1108 (D.S.D. 2005); *Jeffers*, 730 F. Supp. at 202; *Smith v. Clinton*, 687 F. Supp. 1310, 1317 (E.D. Ark. 1988). For this reason, in every subsequent election, the exact same harm would necessarily occur, thus ensuring there would be a continuing injury to the minority voters. *See, e.g. Jeffers*, 730 F. Supp. at 202.

Here, there is no basis to conclude that subsequent elections would pose any actual threat of recurring harm. As alleged (and ultimately conceded) in Plaintiff's opposition, the harm in this case is the voters' prospects of participating in an allegedly unfair election in a district that was drawn purportedly to enhance or hinder the election prospects of a particular candidate. *Plaintiff's Obj.* at 2. Consequently, the harm of such an allegedly unfair election is tied specifically to the candidate whose prospects have been enhanced or hindered. As opposed to

claims of voter dilution, here the prospect of Plaintiff's alleged harm re-occurring in a subsequent election is entirely speculative. One can only resort to guesswork in order to surmise a candidate's election prospects in a subsequent election when he or she has had ample opportunity to campaign in the new district. Indeed, it is unknown whether a given candidate will even run in the next or future elections. Without a clearly defined, articulable, and non-speculative recurring injury, any decision by this Court "would fail to have any practical effect on the controversy." *Boyer v. Bedrosian*, 57 A.3d 259, 272 (R.I. 2012). As previously noted, the 2012 elections (left unchallenged by Plaintiff) rendered this case moot, and it should be dismissed accordingly.

III. Plaintiff Has Failed to Show How and Why the Application of Laches Would Not Be An Appropriate Result in This Case

Plaintiff has failed to establish how or why the doctrine of laches does not apply in this case. As an initial matter, Plaintiff's opposition fails to address, let alone distinguish, *Ole, Ole, Inc. v. Kozubowski*, the principal case cited by Defendants to support their laches argument. *See* 187 Ill. App. 3d 277, 286 (1989). Instead, Plaintiff attempts to patch together dissimilar redistricting cases in a vain attempt to have them fit the facts of this case. Upon examination, however, it is readily apparent that Plaintiff has failed to provide any reason why the application of the laches doctrine should not be appropriate here.

Plaintiff relies primarily on *Jeffers v. Clinton* and *Baker v. Carr* to support his argument that laches should not apply here. *Baker* is entirely inapposite. There the defendants never raised the issue of laches. *See Baker*, 369 U.S. 186, 186 (1962). First, as an equitable doctrine, laches is not a defense the Court would raise *sua sponte*. Second, there is not a single reference to the doctrine of laches in the Court's opinion. *See id.* Third, the fact that *Baker* dealt with a decades-

old redistricting statute is irrelevant to the question of whether the application of the doctrine of laches is appropriate to apply here. *See id.*

Jeffers dealt with plaintiffs who brought an action late. 730 F. Supp. at 202-03. In *Jeffers*, the court determined that laches should not apply because, *inter alia*, (a) plaintiffs' claim was not ripe until some five years after the redistricting occurred; (b) plaintiffs tried to intervene in a similar case in order to challenge the redistricting; and (c) after their motion to intervene was denied plaintiffs filed an independent action six months later. *Id.* The court recognized the amount of preparation required to mount a redistricting challenge and credited the plaintiffs for taking the time to thoroughly prepare their case before coming to court. *Id.* For that reason, the court held that it would be inequitable to deny plaintiffs the right at least to test the sufficiency of their complaint. *See id.*

None of this applies here. Plaintiff suggests that because the *Jeffers* court denied a laches defense in a specific case dealing with an 8-year old apportionment plan, he should be allowed to sit back, bide his time and never face any consequences for doing nothing whatsoever to advance his cause. Unlike *Jeffers*, however, Defendants do not deny that Plaintiff timely *filed* his complaint. *See id.* Rather, Defendants argue that since the filing of his complaint (and amended complaint) Plaintiff has failed to do anything whatsoever. The distinction is a clear and meaningful one in fact and law. Once the complaint was filed, Plaintiff had an obligation to diligently prosecute his case. *See Johnston v. Standard Mining Co.*, 148 U.S. 360, 370 (1893); *Pollitzer v. Foster*, 59 F.2d 901, 903 (6th Cir. 1932). He has completely failed to do so. If he were allowed to proceed with this action, the Defendants and the voters of the State of Rhode Island, all of whom have relied on R.I.G.L. § 22-2-2 since its enactment, would be harmed. The application of laches is appropriate here and Plaintiff's Complaint should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' Motion for Judgment on the Pleadings and dismiss Plaintiff's Complaint.

Dated: May 21, 2013

Gordon Fox, in his Official Capacity as Speaker of the Rhode Island House of Representatives
By his attorneys,

JOHN A. TARANTINO, #2586
PATRICIA K. ROCHA, #2793
VICTORIA M. ALMEIDA, #1755
KATY A. HYNES, #6659
ADLER POLLOCK & SHEEHAN P.C.
One Citizens Plaza, 8th Floor
Providence, RI 02903
Tel.: 401-274-7200
Fax: 401-351-4607

and

State of Rhode Island, Ralph Mollis, in his official capacity as Secretary of State, and the Rhode Island Board of Elections
By their attorneys,

s/ Rebecca Tedford Partington
s/ Thomas A. Palombo

REBECCA TEDFORD PARTINGTON, #3890
THOMAS A. PALOMBO, #4212
Assistant Attorneys General
R.I. Department of Attorney General
150 South Main Street
Providence, RI 02903-2907

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2013, I caused to be served a true copy of the within pleading *via first class mail, postage prepaid,* on the following counsel of record:

Attorney for Plaintiff:
Matthew L. Fabisch, Esq.
Fabisch Law, LLC
875 Centerville Road
Building 1, Suite 9
Warwick, RI 02886

Matthew L. Fabisch, Esq.
Fabisch Law, LLC
664 Pearl Street
Brockton, MA 02301

Debra Humm

645782.1