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

JACOB CORMAN, in his official capacity as Majority Leader of the Pennsylvania Senate, MICHAEL FOLMER, in his official capacity as Chairman of the Pennsylvania Senate State Government Committee, LOU BARLETTA, RYAN COSTELLO, MIKE KELLY, TOM MARINO, SCOTT PERRY, KEITH ROTHFUS, LLOYD SMUCKER, and GLENN THOMPSON, Plaintiffs, v. ROBERT TORRES, in his official capacity as Acting Secretary of the Commonwealth, and JONATHAN M. MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation, Defendants, and CARMEN FEBO SAN MIGUEL; JAMES SOLOMON; JOHN GREINER; JOHN CAPOWSKI; GRETCHEN BRANDT; THOMAS RENTSCHLER; MARY ELIZABETH LAWN; LISA ISAACS; DON LANCASTER; JORDI COMAS; ROBERT SMITH; WILLIAM MARX; RICHARD MANTELL; PRISCILLA MCNULTY; THOMAS ULRICH; ROBERT MCKINSTRY; MARK LICHTY; and LORRAINE PETROSKY, Intervenor-Defendants.	Civil Action No. 1:18-cv-00443 Judge Jordan Chief Judge Conner Judge Simandle ELECTRONICALLY FILED

INTERVENORS' BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Foundational principles of federalism prohibit this Court from enjoining a state court's decision striking down a state law on state constitution grounds. The claims in this case—that the Pennsylvania Supreme Court's decision striking down Pennsylvania's 2011 congressional map violated the Elections Clause, and that the state court failed to give the state legislature sufficient time to enact a new map—were raised with the U.S. Supreme Court last month. The U.S. Supreme Court has declined to stay the state court's judgment and remedial process. The same lawyers represent both Plaintiffs here and the state-court defendants who sought U.S. Supreme Court review. Their request for a preliminary injunction is effectively a request not only to overrule the Pennsylvania Supreme Court, but the U.S. Supreme Court.

This Court should decline the invitation. Plaintiffs have no likelihood of success. As fully addressed in Intervenors' concurrently filed motion for judgment on the pleadings, Plaintiffs lack standing. Among other problems, they are not even proper parties to raise Elections Clause claims on behalf of the Pennsylvania General Assembly. And a host of other jurisdictional and procedural bars doom this lawsuit, not least of which is the prohibition on lower federal courts interfering with judgments of state courts.

As addressed fully in this brief, moreover, Plaintiffs' claims lack any substantive merit. Their first claim asserts that the Pennsylvania Supreme Court lacked power to invalidate the 2011 map based on its construction of the Pennsylvania Constitution. But "[i]t is fundamental that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions," *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). And the U.S. Supreme Court has held in an unbroken line of decisions dating back a century that nothing in the Elections Clause permits a state legislature to enact a congressional map that violates the state's constitution. Plaintiffs cannot obtain the extraordinary remedy of a preliminary injunction based on their disagreement with the Pennsylvania Supreme Court's construction of the Pennsylvania Constitution.

Plaintiffs' second claim—that the state court needed to give the state legislature more time to enact a new map—is equally baseless. Plaintiffs cite no authority for the notion that the federal constitution required the state court to give the state legislature any particular amount of time to enact a new map, much less more time than was afforded here. The General Assembly was and is a party to the state court action, and it never raised any objection to the state court's remedial process. Meanwhile, House Speaker Turzai and Senate President Pro Tempore Scarnati specifically told the state court that they wanted at least three weeks. They got what they asked for, and it was ample time to pass a new map.

Nor can Plaintiffs establish irreparable harm, especially given that granting the injunction would not result in the restoration of the old map. A federal statute, 2 U.S.C. § 2a(c), bars the use of a congressional map that violates state law. Instead, if a state lacks a map that comports with state law and there is not enough time to develop a new map before the next election, the state must conduct at-large elections. Thus, were this Court to enjoin the state court's remedial map, § 2a(c) would require Pennsylvania to conduct 18 at-large elections in 2018. Finally, the balance of the equities and public interest weighs decidedly against granting relief.

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Pennsylvania's 2011 Congressional Districting Map

In the 2010 elections, Republicans gained exclusive control over Pennsylvania's legislative and executive branches, and thus controlled congressional redistricting following the 2010 census. 02/07/18 Pa. S. Ct. Op. 6 (hereinafter, "Op.") (ECF Nos. 1-2, 1-3). In 2011, leaders of the General Assembly crafted a congressional map in secret and then suspended the ordinary rules of procedure to rush it through in just 8 days. Op. 6-7.

The 2011 map "packed" Democratic voters into five districts that Democrats would win by wide margins, and "cracked" the remaining Democratic voters by spreading them across 13 districts that would reliably elect Republicans. This resulted in bizarre districts that ripped apart Pennsylvania's communities to an

unprecedented degree, as described in detail in the Pennsylvania Supreme Court's opinion, in an intentional effort to disadvantage Democratic voters. Op. 8-26, 127-28. Counsel for Speaker Turzai admitted to the Pennsylvania Supreme Court that "[v]oters were classified and placed into districts based upon the manner in which they voted in prior elections." Oral Arg. Tr. 111:7-16 (attached as Ex. A).

It worked. In each of the three election cycles under the 2011 map, Republican candidates won 13 of Pennsylvania's 18 congressional seats—the same 13 seats each time. Op. 29. These results held even when Republicans won only a minority of the total statewide vote. *Id.* at 31.

B. The Ongoing Pennsylvania State Court Proceeding

On June 15, 2017, Intervenors filed suit in Pennsylvania Commonwealth Court challenging the 2011 map exclusively under the Pennsylvania Constitution, including its Free and Equal Elections Clause, Pa. Const. Art. I, § 5. The suit named as defendants, among others, the General Assembly, Speaker Turzai, Senator Scarnati, and the Pennsylvania election officials named as defendants here. Republican voters and congressional or potential congressional candidates intervened as defendants. Op. 3 n.5.

On November 9, 2017, the Pennsylvania Supreme Court exercised plenary jurisdiction under 42 Pa. Cons. Stat. § 726 and ordered the Commonwealth Court to hold a trial and issue recommended findings of fact and conclusions of law.

On the eve of a pretrial conference in the Commonwealth Court, Senator Scarnati (represented by attorneys who represent Congressional Plaintiffs here) frivolously removed the case. After Judge Baylson called an emergency hearing, Senator Scarnati withdrew the removal and agreed to a remand to state court "with prejudice." *League of Women Voters v. Com. of Pa.*, ECF No. 22 at 4, No. 17-cv-5137 (E.D. Pa.).

Judge Brobson of the Commonwealth Court held a five-day trial in December 2017. Intervenors presented extensive evidence of the 2011 map's invalidity. Judge Brobson credited all of Intervenors' experts and found the legislative leaders' experts not credible. Ultimately, Judge Brobson found "intentional discrimination," *i.e.*, "the 2011 Plan was drawn through a process in which a particular partisan goal—the creation of 13 Republican districts—predominated." ECF No. 7 at 71, 128. The Commonwealth Court nonetheless recommended upholding the map.

At oral argument in the Pennsylvania Supreme Court, Speaker Turzai and Senator Scarnati's counsel—who also represents Plaintiffs here—stated that, if the 2011 map were struck down, these legislative leaders wanted "at least three weeks" to pass a new map. Oral Argument Tr. 104:4-7. Counsel also admitted that the Pennsylvania Supreme Court had previously applied the traditional districting criteria of compactness, contiguity, and avoiding splitting political subdivisions in

assessing congressional maps, and assured the Court that the defendants did not dispute that those criteria were applicable. *Id.* at 87:3-10, 89:8-90:2.

On January 22, 2018, the Pennsylvania Supreme Court struck down the 2011 map on the "sole basis" that it violated the Pennsylvania Constitution. 01/22/18 Order at 2 (ECF No. 1-2). The court gave the General Assembly nearly three weeks (until February 9) to submit a remedial map to the Governor, and another week (until February 15) for the Governor to consider such a submission. If they failed to agree on a valid map, the court stated that it would "proceed expeditiously to adopt a plan." *Id.* The court declared that there would be a remedial map in place by February 19, *id.*, in line with Commissioner Marks' earlier affidavit explaining that the May 15 congressional primaries would need to be postponed, at a cost of $20 million, if a new map were adopted after February 20.

The Pennsylvania Supreme Court's January 22 order set clear criteria for any remedial map. It had to "consist of: congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population." 01/22/18 Order at 3. Neither the General Assembly, Speaker Turzai, nor Senator Scarnati requested clarification of these criteria following the January 22 order.

On January 26, 2018, Speaker Turzai and Senator Scarnati, as well as the Republican voter and congressional-candidate intervenors, filed separate emergency applications asking the U.S. Supreme Court to stay the Pennsylvania Supreme Court's judgment and remedial process. The General Assembly did not seek a stay. Speaker Turzai and Senator Scarnati argued that the state court exceeded its authority under the Election Clause because the criteria it imposed constituted "legislation" and "judicial activism," that the Elections Clause required the court to afford the legislature a "genuine opportunity" to enact a new map, and that the court had failed to provide such an opportunity. Stay Appl. 11, No.17A795, 20, goo.gl/sGnHhA. In other words, precisely the arguments they make here. The Congressional Plaintiffs here filed an *amicus* brief in support of the applications. Justice Alito denied the stay applications on February 5.

Thereafter, Senator Corman (the lead Plaintiff here) admitted that, in the weeks since the state court's January 22 order, the General Assembly had done little to begin drawing a new map. J. Lai & L. Navratil, *SCOTUS denies Pa. GOP lawmakers' attempt to delay drawing new congressional map*, Philadelphia Inquirer, Feb. 9, 2018. "Corman said that leaders [would] decide whether they have the desire to try to draw a new one." *Id.* He added: "There is some thought that the Supreme Court is going to throw out anything we give them anyway, so what's the purpose of us going through all of this work." *Id.*

True to Corman's word, the General Assembly did nothing to pass a new map. It held no hearings or debates. No draft maps were introduced. Instead, Senator Scarnati openly refused to comply with the state court's order to provide certain data. *See* goo.gl/tPsSaa.

On February 7, 2018, the Pennsylvania Supreme Court issued its opinion explaining that the 2011 map violated the Pennsylvania Constitution's Free and Equal Elections Clause. The court's holding centered on the same traditional criteria set forth in the January 22 order: when the "neutral criteria" of equal population, contiguity, compactness, and avoiding splitting political subdivisions "have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates" Pennsylvania's Free and Equal Elections Clause. Op. 123. The court rejected Speaker Turzai and Senator Scaranti's argument that the Elections Clause deprives state courts of power to review and remedy congressional maps. *Id.* at 137 n.79.

Speaker Turzai and Senator Scarnati alone submitted a proposed map to the Governor on February 9. The Senate's top lawyer said publicly that "the map will be turned into legislation but a decision about whether to bring it up for floor votes early next week will partially depend on the response from Wolf." *GOP leaders unveil revamped Pa. congressional map*, Associated Press, Feb. 9, 2018. The

Governor rejected the map because it was another gerrymander, and neither it nor any other map was turned into legislation or even brought to a vote.[1]

On February 19, the Pennsylvania Supreme Court adopted a remedial map (the "Remedial Plan") developed with the assistance of a nonpartisan expert. The court explained that "[t]he Remedial Plan is based upon the record developed in the Commonwealth Court, and it draws heavily upon the submissions provided by the parties, intervenors, and amici." 02/19/18 Op. & Order at 6 (ECF No. 1-3, 1-4). The Remedial Plan strictly adheres to the criteria set forth in the court's January 22 order. *Id.* It splits 13 counties, compared to 27 under the 2011 map. *Id.* It splits 19 municipalities, compared to 68 under the 2011 map.[2] And it is far more compact than the 2011 map. *Id.* at 7.

Empirical analysis of the Remedial Plan confirms that it exhibits no partisan bias in favor of either party. If anything, it slightly favors Republicans. Under the Remedial Plan, 10 districts favored Donald Trump in the 2016 presidential election, while 8 favored Hillary Clinton. Objective metrics that redistricting scholars commonly use to evaluate districting plans similarly produce results slightly in Republicans' favor. *See* Brief of Amicus Campaign Legal Center.

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[1] 02/15/18 Petrs.' Br. in Supp. of Proposed Remedial Plans at 12-15, goo.gl/uQyNk8.

[2] *See* Pa. Supreme Court, goo.gl/1FRrxy (click on "Remedial Plan Reports").

C. This Federal Collateral Attack on the State Court's Remedy

Even before the Pennsylvania Supreme Court released the remedial map, Speaker Turzai and Senator Scarnati began formulating a plan to attack it in the federal courts. On February 21, Speaker Turzai announced the plan in an email to his General Assembly colleagues: First, Speaker Turzai and Senator Scarnati would file yet another emergency stay application with the U.S. Supreme Court. Second—and key here—"House and Senate Republican leadership will be initiating action in the Federal Court in the Middle District of Pennsylvania."[3]

Speaker Turzai and Senator Scarnati put the plan into action. On February 21, they again asked the U.S. Supreme Court for an emergency stay. The next day, Plaintiffs filed this lawsuit. The application to the U.S. Supreme Court and the motion for injunctive relief in this Court were filed by the same counsel and sought identical relief based on identical legal arguments.

COUNTER-STATEMENT OF QUESTION PRESENTED

Are Plaintiffs entitled to a preliminary injunction setting aside a state supreme court's judgment and requiring state officials to conduct elections under a map that violates the state constitution?

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[3] goo.gl/LmkaUv.

ARGUMENT

To obtain a preliminary injunction, a party must establish: "(1) a likelihood of success on the merits; (2) that [he] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). "A party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity." *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994). Plaintiffs cannot meet their heavy burden here.

I. Plaintiffs Have No Likelihood of Success on the Merits

A. Jurisdictional and Procedural Bars to this Suit Are Dispositive

This action is barred by multiple jurisdictional and procedural defects. All these defects are fully addressed in Intervenors' motion for judgment on the pleadings, and each also is a reason to deny the preliminary injunction. To preserve these arguments in the context of the preliminary injunction inquiry, but in line with the Court's direction at the March 1 scheduling conference to avoid unnecessary duplication, Intervenors set forth the arguments only in summary:

Plaintiffs Lack Standing. If "standing is doubtful," that "factor should weigh strongly against granting a preliminary injunction." *Holland v. Rosen*, 277 F. Supp. 3d 707, 726 (D.N.J. 2017). "[M]ere allegations will not support standing at the preliminary injunction stage." *Doe v. Nat'l Bd. of Med. Examiners*, 199 F.3d

146, 152-53 (3d Cir. 1999). Plaintiffs "must 'set forth' by affidavit or other evidence 'specific facts'" supporting standing, *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011), and "a party who fails to show a 'substantial likelihood' of standing is not entitled to a preliminary injunction," *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). Neither State nor Congressional Plaintiffs are proper parties to raise Elections Clause claims that rest on the purported legal rights of the General Assembly. Nor does any Plaintiff allege, much less show, cognizable Article III injury. As to Count II, Plaintiffs fail to allege causation, and they certainly do not set forth "specific facts" supporting causation, as required for a preliminary injunction. And none of Plaintiffs' purported injuries are redressable because this Court cannot reinstate a congressional map that violates the state constitution.

***Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).** Under *Pennzoil*, federal courts may not issue injunctions that "interfere with the execution of state judgments," particularly where the federal lawsuit "challenge[s] the very process by which [the state court] judgments were obtained." *Id.* at 14-16. That doctrine prohibits the issuance of a preliminary injunction in this case, because Plaintiffs' interests are "inextricably intertwined with," and "essentially derivative [of]," the interests of the defendants in the state court action. *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 82-84 (2d Cir. 2003).

Issue Preclusion. Plaintiffs' Elections Clause arguments were fully litigated in the Pennsylvania Supreme Court, which rejected them. Op. 137 n.79; 02/19/18 Order 3 n.2, 5 n.6. This Court must give the state court's judgment preclusive effect. 28 U.S.C. § 1738. Plaintiffs are in privity with the state court defendants—Speaker Turzai, Senator Scarnati, and the General Assembly. They represent the same legal rights—indeed, the legal rights they claim are entirely derivative of the purported rights of the General Assembly.

Judicial Estoppel. Speaker Turzai and Senator Scarnati obtained a stay in *Diamond v. Torres*, 5:17-cv-05054-MMB (E.D. Pa. 2017), another challenge to the 2011 map, based on arguments that are inconsistent with those advanced here. They persuaded the *Diamond* court to grant a stay on the theory that federal courts must defer to the "state judicial branch," which is an "agent[] of apportionment," in reviewing congressional maps. *Diamond*, ECF No. 26-4 at 22, 24; ECF No. 692-16. They made this argument even after the Pennsylvania Supreme Court ordered the schedule they now challenge, ECF No. 81 at 2, 5, and it worked, *Diamond*, ECF No. 84. Because Plaintiffs are in privity with Speaker Turzai and Senator Scarnati, Plaintiffs are judicially estopped from asserting that the state court lacked authority to strike down the 2011 map and impose its remedial process.

***Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).** This Court should abstain under *Colorado River* because parallel state-

court proceedings raising identical legal claims and functionally identical parties are pending before the U.S. Supreme Court. That lawsuit was filed first; proceeding here would result in piecemeal litigation; and Plaintiffs' claims raise questions of state legislative process and separation of powers that are better adjudicated by the state courts. Alternatively, the Court should stay this case pending the conclusion of U.S. Supreme Court review.

Rooker-Feldman. It is a "fundamental principle" that "a federal district court may not sit as an appellate court to adjudicate appeals of state court proceedings." *Port Auth. Police Benev. Ass'n, Inc. v. Port Auth. of N.Y. & N.J. Police Dep't*, 973 F.2d 169, 179 (3d Cir. 1992). That authority rests *solely* with the United States Supreme Court. 28 U.S.C. § 1257. *Rooker-Feldman* precludes Plaintiffs' attempts to evade this proper procedure.

B. Plaintiffs' Elections Clause Claims Are Meritless

Plaintiffs assert two claims under the Elections Clause—first, that the Pennsylvania Supreme Court lacks power to strike down the 2011 map under the Pennsylvania Constitution, and second, that the state high court needed to give the General Assembly more time to pass a new map. Neither claim will succeed.

1. Plaintiffs' Claim That the Pennsylvania Supreme Court Lacked Power to Strike Down the 2011 Map Has No Merit

The Pennsylvania Supreme Court held that the 2011 map violates the Pennsylvania Constitution's Free and Equal Elections Clause—a provision that has

no federal counterpart. It is a cornerstone of the American judicial system that federal courts cannot review a state court's construction of the state's constitution. *Nat'l Tea*, 309 U.S. at 557.

Nothing in the Elections Clause alters the state court's unreviewable authority to invalidate the 2011 map—a state law passed by the state legislature—for violating the state constitution. Not only do Plaintiffs fail to cite a single case from any court anywhere accepting their position, the Supreme Court has repeatedly rejected it. This is clear from nearly a century's worth of Supreme Court case law interpreting the Elections Clause.

In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws" *Id.* at 365. It does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 368.

In companion cases decided the same day as *Smiley*, the Court reiterated that state courts have authority to strike down congressional plans for violating "the requirements of the Constitution of the state in relation to the enactment of laws." *Koenig v. Flynn*, 285 U.S. 375, 379 (1932); *accord Carroll v. Becker*, 285 U.S. 380, 381-82 (1932). The Court also expressly affirmed state courts' authority to implement remedial congressional plans where the prior plan violated the state

constitution. *Carroll*, 285 U.S. at 381-82; *Koenig*, 285 U.S. at 379.

In *Growe v. Emison*, 507 U.S. 25 (1993), the Court held that state courts not only have authority to review and remedy congressional plans, but that federal courts must not interfere with state courts in this arena. After a Minnesota state court invalidated the state's prior congressional map, the state court "adopted final criteria for congressional plans and provided a format for submission of plans in the event the legislature failed to enact a constitutionally valid congressional apportionment plan." *Cotlow v. Growe*, C8-91-985 (Minn. Special Redistricting Panel Apr. 15, 1992).[4] A federal court then enjoined the state court from adopting a new plan and adopted its own remedial plan. *Growe*, 507 U.S. at 30-31. The state court subsequently released a provisional remedial plan, subject to the federal injunction, that used the traditional criteria of "minimiz[ing] the number of municipal and county splits" and promoting "compactness." *Cotlow*, C8-91-985, *supra*. But the federal injunction blocked the state court's plan from taking effect for the 1992 elections.

The U.S. Supreme Court reversed the federal court's injunction. Writing for a unanimous Court, Justice Scalia explained that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's … federal congressional

[4] *Available at* https://www.senate.mn/departments/scr/REDIST/COTLO415.HTM.

districts." *Growe*, 507 U.S. at 42. The Court repeatedly emphasized that state courts have the power to review and remedy congressional districting plans:

- "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." *Id.* (quotations omitted).

- "[T]he District Court's December injunction of state-court proceedings … was clear error. It seems to have been based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts. Thus, the January 20 deadline the District Court established was described as a deadline for the legislature, ignoring the possibility and legitimacy of state judicial redistricting. *Id.*

- "The Minnesota [court's] issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan in January), far from being a federally enjoinable 'interference,' was precisely the sort of state judicial supervision of redistricting we have encouraged." *Id.*

Following the Supreme Court's decision in *Growe*, the state court's remedial plan governed Minnesota's 1994 congressional elections.[5] And consistent with these principles, state courts frequently set the district boundaries for congressional elections; indeed, at least one-eighth of the members of the U.S. House of Representatives are currently in districts drawn by state courts.[6]

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[5] *Minnesota Redistricting Cases: the 1990s*, *supra* note 4.

[6] The following states currently have congressional districts that were drawn by state courts, in some cases after those courts struck down maps passed by the state legislature under the state constitution: *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258 (Fla. 2015); *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012); *In re Reapportionment Comm'n*, 36 A.3d 661 (Conn. 2012); *Hippert v. Ritchie*, 813

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Just three years ago, *Arizona State Legislature v. Arizona Independent Redistricting Comm'n,*135 S. Ct. 2652 (2015), again rejected the notion that the "Elections Clause renders the State's representative body the sole component of state government authorized to prescribe regulations for congressional redistricting." *Id.* at 2673 (quotations and alterations omitted). "Nothing in that Clause instructs, nor has [the] Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Id.*

Congress has codified this principle, providing that congressional districting plans are not valid unless they are adopted "in the manner provided by [state] law." 2 U.S.C. § 2a(c). In *Arizona State Legislature*, the Court explained that congressional maps are valid under § 2a(c) where they are "established . . . in whatever way [states] may have provided by their constitution and by their statutes." 135 S. Ct. at 2669. Conversely, a map is invalid under § 2a(c) where it does not comply with state law, however the state defines it. *See id.*

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N.W.2d 391 (Minn. 2012); *Egolf v. Duran* (N.M. Dist. Ct. Dec. 29, 2011), http://www.nmlegis.gov/lcs/redcensus/docs/Court%20Decision%20-%20Congressional.pdf; *Guy v. Miller* (Nev. Dist. Ct. Oct. 27, 2011), http://redistricting.lls.edu/files/NV%20guy%2020111027%20final%20order.pdf, aff'd, 373 P.3d 943 (Nev. 2011)).

In short, it is well-settled that state legislatures may not pass congressional maps that violate the "provisions of the State's constitution." *Arizona State Legislature*, 135 S. Ct. at 2673, and in Pennsylvania, the state supreme court determines the requirements of the state constitution, *Emerick v. Harris*, 1 Binn. 416, 1808 WL 1521 (Pa. 1808). Here, the Pennsylvania Supreme Court has held that the 2011 map, a state law, violates the Free and Equal Elections Clause of the Pennsylvania Constitution because it subordinated in whole or in part the traditional districting criteria of population equality, contiguity, compactness, and avoiding the split of political subdivisions for partisan political aims.

In light of all of the above authority, Plaintiffs concede that they "do not as a general proposition challenge the Pennsylvania Supreme Court's ability to declare the 2011 Plan unconstitutional under Pennsylvania's constitution." ECF No. 31 at 3. Rather, they make the extraordinary claim that a federal court can adjudicate whether a state high court engaged in "judicial overreach," and "legislative action ... cloaked as an exercise in judicial review," and violated the Elections Clause by "apply[ing] criteria found nowhere within Pennsylvania's Constitution or statutory framework for Congressional districting." *Id.* at 4; PI Mot. 8 (ECF No. 3-2).

But inflammatory rhetoric does not transform a state court's interpretation of the state's own constitution into a federal question. Plaintiffs basically argue that

the Elections Clause permits state courts to strike down state districting plans under the state constitution unless a federal court thinks the state court misinterpreted the state constitution. Foundational principles of federalism forbid federal courts from engaging in any such inquiry. Federal courts are, "of course, bound to accept the interpretation of [state] law by the highest court of the State." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976). As Plaintiffs' repeated quotations of the dissenting state high court Justices makes clear, Compl. ¶¶ 39-46, 70-85, their entire argument is nothing more than a request for this Court to overrule a majority of the Pennsylvania Supreme Court on a question of the interpretation of Pennsylvania's Constitution.

There is simply no likelihood of success on Count I of the complaint. The 2011 map is a dead letter that no federal court can revive.

2. Plaintiffs' Claim That the General Assembly Was Denied an Adequate Opportunity to Pass a New Map Has No Merit

Plaintiffs claim a "separate Elections Clause violation" on the theory that the General Assembly was denied an "adequate opportunity" to pass a new map. PI Mot. 9-10. Last month, the U.S. Supreme Court declined to stay the state court's judgment on the basis of this same argument, and rightly so.

To begin with, Plaintiffs cite no case—and we are aware of none—recognizing a cause of action under the Elections Clause to challenge the amount of time a state court gives the state legislature to draw a congressional map after

holding that the legislature previously enacted an unconstitutional map. Plaintiffs offer no judicially manageable standard for adjudicating such a cause of action. They do not say how federal courts should evaluate whether a legislature was given enough time in a particular case. Nor do they say how much time would have been adequate here. Federal courts should not be refereeing disputes between the legislative and judicial branches of a state's government over the timing of state legislative process. Besides, federal courts have given a state legislature only two weeks to remedy unconstitutional congressional districts. *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016).[7]

In any event, Plaintiffs should hardly be heard to argue that the General Assembly needed more time here. Intervenors' opening brief in the Pennsylvania Supreme Court suggested giving the legislature two weeks, and neither the General Assembly, Speaker Turzai, nor Senator Scarnati objected to that timeframe in their

[7] Indeed, it is dubious whether Pennsylvania's General Assembly was constitutionally entitled to any time at all. As three-judge federal panels have held, when a state legislature previously "disrespect[ed] historical political units and other traditional redistricting criteria," and reacted to a finding of unconstitutionality by crafting a "physically modified but conceptually indistinguishable" new district, a court may adopt a remedial map without delay. *Hays v. State*, 936 F. Supp. 360, 372 (W.D. La. 1996). "In its record of doggedly clinging to an obviously unconstitutional plan, the Legislature has left [the court] no basis for believing that, given yet another chance, it would produce a constitutional plan." *Id*. That is precisely the case here.

response brief. At oral argument, Speaker Turzai and Senator Scarnati's counsel Mr. Torchinsky, who represents Plaintiffs here, said his clients "would like at least three weeks" to enact a new map. Oral Argument Tr. 104:4-7. The state court gave them what they asked for—19 days for the General Assembly to pass a bill and six days after that for the Governor to sign or veto it. And even then, the General Assembly, Speaker Turzai, and Senator Scarnati never asked the state court for more time. Nor did they raise any purported state legislative procedural obstacle.

In fact, the General Assembly—which is the actual institution empowered to enact a map—is a separate party represented by separate counsel in the state court action, and has raised no argument to this day that its authority was usurped or that it was not afforded sufficient time. The General Assembly notably did assert its institutional rights on other issues in the state court case, filing a lengthy brief on legislative privilege. But the General Assembly never once suggested to the state court that it lacked an adequate opportunity to carry out its institutional prerogative to pass a new map. Plaintiffs are not proper parties to argue that the General Assembly was not given enough time or that its powers were otherwise stolen where the actual General Assembly has made no such argument.

In any event, the notion that the General Assembly procedurally could not pass a new map in the time allotted is demonstrably false. The 2011 map was

passed in less time. Leaders in the General Assembly first revealed the 2011 map on December 14, 2011, and within eight days the bill had been passed and signed into law. If eight days was long enough to pass the 2011 map, surely 25 days was enough to pass its replacement.

Plaintiffs' argument that there was insufficient time "as a function of simple arithmetic" rests on the false premise that the General Assembly could not begin work on a new map until the state high court issued its opinion on February 7. PI Mot. 10-11. As Plaintiffs allege in the Complaint, legislative leaders in fact introduced a shell bill on January 29 that enabled the legislature to comply with Pennsylvania procedural requirement of considering a bill on three different days. Compl. ¶ 58-59; Op. 6-7. And the state court's January 22 order provided the General Assembly express guidance: the remedial map must have "congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population." Compl. Ex. B at 3.

The claim that the Pennsylvania Supreme Court's February 7 opinion altered these requirements is patently false. PI Mot. 12-13. The opinion centered on the subordination of the traditional districting criteria that the court previously listed in its January 22 order. Plaintiffs do not identify a single thing the Legislature would

have done differently in crafting a map in light of the opinion as opposed to the earlier order. And this point just highlights that Plaintiffs are improper parties and lack standing to bring this claim. They assert that "the Legislature … could not have been expected to" draw a map based on the order, but they are not the Legislature.

And contrary to Plaintiffs' claim, the traditional criteria were neither "nebulous" nor "novel." *Cf.* PI Mot. 13. More than 25 years ago, in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), the Pennsylvania Supreme Court adopted a remedial *congressional* map using these very criteria, including "avoid[ing] splitting of political subdivisions and precincts," "preserv[ing] communities of interest," and "compactness." *Id.* at 208, 215-25. Counsel for Speaker Turzai and Senator Scarnati conceded in oral argument before the Pennsylvania Supreme Court that these criteria had been used before in reviewing Pennsylvania congressional maps and were appropriate here. Oral Argument Tr. 87:3-10, 89:8-90:2. Plaintiffs' suggestion that the Pennsylvania Supreme Court invented these criteria from whole cloth has no grounding in reality and is not a cognizable argument in federal court.[8]

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[8] Plaintiffs offer a host of hard-to-follow arguments about various other purported Pennsylvania state procedural requirements. None of these create a *federal* Elections Clause claim. Plaintiffs cite *Smiley*, 285 U.S. at 367, but it stands for the

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Even if the state high court's February 7 opinion were the relevant date (which it is not), Plaintiffs' assertion that the General Assembly could not pass a map at that point is belied by the statements and actions of the General Assembly's leaders. When Speaker Turzai and Senator Scarnati submitted their proposed remedial map to Governor Wolf on February 9, the Senate's top lawyer stated publicly that "the map will be turned into legislation but a decision about whether to bring it up for floor votes early next week will partially depend on the response from Wolf." *GOP leaders unveil revamped Pa. congressional map*, Associated Press, Feb. 9. The General Assembly was on standby to pass a new map but was never called into session. That is because Governor Wolf rejected the map proposed by Speaker Turzai and Senator Scarnati because it was an egregious

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opposite proposition. It holds that state procedural requirements as interpreted by the state courts apply without regard to the Elections Clause. *Id.* at 368. They are a "matter of state polity." *Id.* In any event, Plaintiffs' arguments about the lack of adequate time for the Governor to consider a veto are nonsense. *Cf.* PI Mot. 13-15. Plaintiffs have no standing to object that the Governor should have been given more time to veto a map, especially when the Governor himself has raised no such objection and no map was even passed. *Scarnati v. Wolf*, 173 A.3d 1110, 1120 (Pa. 2017), does not require the Governor to consider a bill for 10 days before that bill becomes law. *Cf.* PI Mot. 11, 14. It just notes that if the Governor does *not* veto the bill within 10 days, it becomes law. The Pennsylvania Supreme Court never suggested that a remedial map could not be enacted pursuant to a veto override (PI Mot. 14); again, this concern is entirely hypothetical since no map was ever passed in the first place. And nothing in the state court's order prevents the legislature from maintaining a legislative journal. PI Mot. 15.

gerrymander. Indeed, to this day, the General Assembly has not passed a map even though its legislative leaders claim that only the General Assembly is empowered to make a map. The problem here was not that the General Assembly lacked adequate time, it was that its leaders could not or would not produce a non-partisan map that the Governor would sign.

In all events, the Pennsylvania Supreme Court's timeline was entirely proper and precisely what federal law *requires*. The U.S. Supreme Court has made clear that courts should adopt a remedial congressional map without delay when, as here, a state lacks any valid map for an imminent election. In *Branch v. Smith*, 538 U.S. 254 (2003), the Court held that Congress, acting under the second part of the Elections Clause, has authorized "state and federal courts" to develop remedial congressional maps in these precise circumstances. *Id.* at 266-72 (majority). When a congressional election is approaching, "a court, state or federal, [may] redistrict[] pursuant to § 2c" to prevent the "last-resort remedy" of at-large elections under 2 U.S.C. § 2a(c)(5). *Branch*, 538 U.S. at 274-75 (plurality); *see infra* pp.28-29 (discussing § 2a(c)(5)).

Here, Pennsylvania's chief election officials attested that a new map needed to be in place no later than February 20 to avoid postponing the May congressional primaries, which would cost $20 million to the Commonwealth. Based on that deadline, the Pennsylvania Supreme Court gave the General Assembly and the

Governor all the time that was available, setting a schedule that would have a new map in place by February 19. As *Branch* instructs, the Elections Clause not only does not preclude the state high court's schedule, but Congress acting under the second part of the Elections Clause has specifically authorized courts to proceed in such an expeditious manner. The Pennsylvania Supreme Court did precisely what *Branch* instructed. *See also, e.g.*, *Favors v. Cuomo*, 2012 WL 928223, at *1 n.4, 3 (E.D.N.Y. Mar. 19, 2012) (adopting remedial congressional map drawn by Dr. Persily acting as special master, to avoid at-large elections under § 2a(c)(5)).

II. Plaintiffs Cannot Establish Irreparable Harm

Plaintiffs have no irreparable harm. With respect to the State Plaintiffs, it is well settled that individual legislators do not suffer "personal" injury from a purported usurpation of the legislature's authority. *Ariz. State Legislature*, 135 S. Ct. at 2664-65. Likewise, the Congressional Plaintiffs "suffer[] no cognizable injury" from having to run in a different congressional district. *City of Phila. v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980). "While the voters in a representative's district have an interest in being represented, a representative has no like interest in representing any particular constituency. It is only the voters, if anyone, who are ultimately harmed." *Id.* at 672. In any event, an inability to run in an unconstitutional district is not a cognizable harm, much less irreparable harm.

Even more fundamentally, Plaintiffs' entire theory that they will be irreparably harmed by the loss of "the boundaries established by the 2011 Plan," ECF No. 3-2 at 17, rests on the false premise that this Court can reinstate the 2011 map for the 2018 elections. It cannot. A binding federal statute forbids the use of any congressional map that was not enacted "in the manner provided by [state] law." 2 U.S.C. § 2a(c)(5); *see Ariz. State Legislature*, 135 S. Ct. at 2670. And the Pennsylvania Supreme Court held that the 2011 map was not enacted in the manner provided by the Pennsylvania Constitution. That state law conclusion is unreviewable. Federal law therefore precludes the 2011 map's use in 2018.

Were this Court to enjoin the current remedial map, § 2a(c)(5) instead would require at-large elections for all 18 of Pennsylvania's congressional seats in 2018. "Section 2a(c) sets forth congressional-redistricting procedures ... if the State, 'after any apportionment,' ha[s] not redistricted 'in the manner provided by state law.'" *Ariz. State Legislature*, 135 S. Ct. at 2670. In particular, § 2a(c)(5) prescribes mandatory procedures where (i) a state lost a congressional seat from the prior decade's reapportionment (as occurred in Pennsylvania); (ii) the state does not have a congressional plan enacted "in the manner provided by the law thereof"; and (iii) "there is no time for either the State's legislature or the courts to develop one." *Branch*, 538 U.S. at 275 (plurality op.); *see Ariz. State Legislature*, 135 S. Ct. at 2670. In those circumstances, § 2a(c)(5) requires at-large elections

for a state's entire congressional delegation. At-large elections would only exacerbate the Congressional Plaintiffs' claimed injury, meaning that they cannot show entitlement to a preliminary injunction because it is not the absence of the injunction that causes their claimed injury.

III. The Balance of Equities and the Public Interest Weigh Overwhelmingly Against an Injunction

Even if this Court could reinstate the 2011 map, Intervenors and millions of other Pennsylvanians would suffer grave injury from being forced to vote in unfair elections under districts that violate their rights under the Pennsylvania Constitution. The 2011 map was the worst partisan gerrymander in Pennsylvania's history and among the worst in American history. The map was designed to maximize the political advantage of Republicans and diminish the representational rights of Democratic voters. The mapmakers sorted Democratic voters into particular districts on the basis of their political views and their voters. They sought to predetermine the outcome of congressional elections for a decade. And for three election cycles, it worked. Without fail, the 2011 map gave Republicans 13 of 18 seats—the same 13 seats. These results held even when Democratic candidates won a majority of votes statewide. The map was impervious to the will of voters. To go back to the gerrymandered 2011 map now, after it has been struck down by the Pennsylvania Supreme Court under the Pennsylvania Constitution, would be deeply harmful and unfair to Pennsylvania voters.

The public interest strongly militates against an injunction. To begin with, the election process is already underway. The nomination petition circulation period began February 27. As Plaintiffs' own *amici* argue, "[c]hanging congressional districts during the nomination petition circulation period could cause a higher risk that voters may sign a nomination petition for the voting district." McCann Br. 5 (ECF No. 66). Voters would be confused by conflicting federal and state court orders ping-ponging back and forth between congressional maps, particularly after the Pennsylvania Supreme Court's widely publicized judgment and remedial map. And because it is too late to implement a different map before the May primaries, an injunction would cost the Commonwealth at least $20 million to move the congressional primaries.

Courts are extremely reluctant to impose last-minute changes just before an election that may result in "voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). "Comity between the state and federal governments also counsels against last-minute meddling." *Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396, 405 (E.D. Pa. 2016). "This important equitable consideration goes to the heart of our notions of federalism," and thus "[f]ederal court intervention that would create . . . a disruption in the state electoral process is not to be taken lightly." *Page v.*

Bartels, 248 F.3d 175, 195-96 (3d Cir. 2001); *see also United States v. City of Philadelphia*, No. 2:06CV4592, 2006 WL 3922115, at *2 (E.D. Pa. Nov. 7, 2006).

A federal court injunction blocking a state high court's remedy, and reinstating a congressional map that the state high court struck down, would offend core principles of federalism. Plaintiffs would have this federal court affirmatively order state election officials to violate the state constitution by holding the 2018 elections under the 2011 map. That would be unprecedented. And Plaintiffs ask this Court to take this unprecedented step on the eve of an election, after the state election officials have already made herculean efforts to implement the Pennsylvania Supreme Court's remedial map and at a point where election officials would have to postpone the primaries at a cost to the taxpayers of $20 million if an injunction were granted. All of this would be done to reinstate an historically extreme gerrymander that made a mockery of representative democracy. Regardless of one's view of the precise test for gerrymandering (the U.S. Supreme Court has not agreed on one although it holds that gerrymanders are actionable), "partisan gerrymanders … are incompatible with democratic principles." *Ariz. State Legislature*, 135 S. Ct. at 2658. There is zero public interest in granting the relief Plaintiffs request.

CONCLUSION

For the foregoing reasons, the Court should deny a preliminary injunction.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to Local Rule 7.8(b)(2), I, Thomas B. Schmidt III, hereby certify that the foregoing Brief in Support of Motion to Intervene as Defendants, contains 7,444 words, calculated using Microsoft Word's word count feature.

/s/ Thomas B. Schmidt III
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CERTIFICATE OF SERVICE

I, Thomas B. Schmidt, III, hereby certify that on March 2, 2018 I caused a true and correct copy of the foregoing Intervenors' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction to be served on all counsel of record with the CM/ECF system.

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