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

JACOB CORMAN, et al., Plaintiffs, v. ROBERT TORRES, et al., Defendants, and CARMEN FEBO SAN MIGUEL, et al., Intervenor-Defendants.	No. 1:18-cv-00443-CCC Circuit Judge Jordan Chief Judge Conner Judge Simandle (*filed electronically*)

PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION (DOC. 2)

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INTRODUCTION

Plaintiffs submit this brief to highlight various deficiencies in the arguments submitted in opposition to Plaintiffs' Motion for Preliminary Injunction (the "Motion"). In the interest of brevity – and particularly because Defendants Torres and Marks ("Executive Defendants") advance arguments that are substantially similar to those raised by Intervenors (collectively, with Executive Defendants, "Defendants") – Plaintiffs, in accordance with this Court's Order, submit a single omnibus reply brief. *See* Dkt. No. 98.

In their initial brief in support of the Motion for Preliminary Injunction (the "Motion"), Plaintiffs clearly established that they are entitled to injunctive relief because the four relevant factors to award an injunction weighed decisively in their favor. Defendants largely avoid addressing Plaintiffs' *actual* arguments; instead they repeatedly mischaracterize Plaintiffs' positions and ultimately offer a prolix rebuke of a distorted version of those arguments. Defendants also rely on a similarly warped understanding of the standard by which courts faced with a request for a preliminary injunction assess the public interest and weigh the potential harm to the various parties. While perhaps effective in refuting the exaggerated – and, in some cases, fabricated – claims Defendants ascribe to Plaintiffs, their response utterly fails to undermine the conclusion that this Court should, as a matter of law, enjoin Executive Defendants from implementing the

Court Drawn Plan. Accordingly, this Court should reject Defendants' arguments and grant Plaintiffs' Motion.

ARGUMENT

I. Plaintiffs Are Likely To Succeed On The Merits

A. Defendants' Procedural, Doctrinal and Jurisdictional Arguments Do Not Withstand Scrutiny

Preliminarily, Defendants contend that Plaintiffs are unlikely to succeed on their claims because certain threshold considerations bar this Court from considering the present challenge. These issues – primarily centered on various iterations of preclusion, abstention, estoppel and standing – are also raised in Executive Defendants' Motion to Dismiss and Intervenors' Motion for Judgment on the Pleadings (collectively, "Defendants' Motions"). To avoid unnecessary repetition, Plaintiffs rely on their Omnibus Brief in Opposition to Defendants' Motions, which is being filed contemporaneously herewith.

B. The Criteria And Procedures Imposed By The Pennsylvania Supreme Court Were Legislative In Nature And Violated The Elections Clause

Turning to the merits of Plaintiffs' claims, Defendants argue that Plaintiffs are unlikely to succeed on their claim that implementation of the Court Drawn Plan drafted by the Pennsylvania Supreme Court, as opposed to the 2011 Plan, would violate the Elections Clause. The bulk of Defendants' argument in this regard is that a state court is the final arbiter of its state constitution and has the authority to

invalidate a congressional districting plan that violates state law. While that is undoubtedly true, it is also irrelevant because Plaintiffs have never challenged the Pennsylvania Supreme Court's authority to interpret Pennsylvania law.

Rather, what Plaintiffs challenge here is the Pennsylvania Supreme Court's violation of the Elections Clause by creating from whole cloth mandatory redistricting criteria and procedures that can be found nowhere in the Pennsylvania Constitution or any Pennsylvania statute or regulation. Based on these newly-invented criteria and procedures, the court invalidated the 2011 Plan and imposed the Court Drawn Plan. In doing so, the Pennsylvania Supreme Court violated the plain language and meaning of the Elections Clause by usurping the General Assembly's absolute and unrestricted authority to oversee legislation related to congressional districting. If Defendants were to implement the Court Drawn Plan they, too, would violate the U.S. Constitution.

Defendants dismiss these substantial constitutional concerns as mere "inflammatory rhetoric" and submit that, "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." Int. Br. at 19-20. But that is simply not the case. There is a fundamental difference between a federal court review of a state court's

interpretation of state law and an examination of whether the state court's action violates the U.S. Constitution.

With this distinction in mind, it is clear that interposing congressional redistricting criteria purportedly drawn from a state constitutional provision that, by its very terms, *only* applies to state legislative reapportionment, was plainly lawmaking by the court. Moreover, the criteria and procedures adopted by the Pennsylvania Supreme Court are not based on any Pennsylvania Constitutional provision or statute. They are legislative in the most basic sense.

Defendants try to escape this inevitable conclusion by relying on *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) for the proposition that state legislatures are not the only body authorized to prescribe regulations for congressional redistricting under the Elections Clause. Int. PI Opp. Br. at 18. But, *Ariz. State Legis*. does not support Defendants' position – it contradicts it.

Ariz. State Legis. did not involve a court-drawn plan, but rather was a challenge brought by the Arizona State Legislature against the independent redistricting commission that had been put into place by a people's referendum. The U.S. Supreme Court rejected the challenge because it found that the legislative power in Arizona includes the initiative process that is controlled by the people. Thus, the people's decision to take redistricting out of the hands of the state

legislature and vest it in an independent commission was legislative and not a violation of the Elections Clause. *Id*. at 2659, 2661.

In issuing its decision, the Court reaffirmed that "[r]edistricting involves lawmaking in its essential features and most important aspect." *Id*. at 2667 (internal quotation marks omitted). Further, it found "that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Ariz. State Legis*., 135 S. Ct. at 2668. While five Justices in Arizona State Legislature construed "prescriptions for lawmaking" broadly enough to include "the referendum," and four believed only the state's formal legislature qualifies, (compare *id.* with *id.* at 2677-92 (Roberts, C.J., dissenting)), all the Justices agreed that redistricting is legislative in character. Most importantly for present purposes, no Justice suggested that state courts might share in that legislative function.

The majority opinion in *Ariz. State Legis.* drove home the legislative nature of redistricting in holding that the initiative process that established a new redistricting regime in Arizona was justified as "[d]irect lawmaking by the people." 135 S. Ct. at 2659 (emphasis added). Specifically, the majority opinion held that the "[Elections] Clause doubly empowers the people" to "control the State's lawmaking processes in the first instance" or to "seek Congress' correction of regulations prescribed by state legislature." *Id*. at 2677 (emphasis added); *id*. at

2671-72 (emphasizing "the people of Arizona"); *see also id*. at 2658 (emphasizing the "endeavor by Arizona voters"), *id.* at 2659 (emphasizing the "[d]irect lawmaking by the people"); *id*. at 2659 n.3 (emphasizing "the people's sovereign right to incorporate themselves into a State's lawmaking apparatus"); *id*. at 2660 (emphasizing "direct lawmaking" under the "initiative and referendum provisions" of the Arizona Constitution); *id*. (emphasizing the role of the "electorate of Arizona as a coordinate source of legislation"); *id*. at 2661 (emphasizing "the people's right…to bypass their elected representative and make laws directly").

Here, by contrast, the Pennsylvania Supreme Court is vested with zero lawmaking authority. *See Watson v. Witkin*, 22 A.2d 17, 23 (Pa. 1941) ("[T]he duty of courts is to interpret laws, not to make them."). Its ill-advised venture into legislative territory thus finds no support in *Ariz. State Legis*. as that case does not support the notion that a state judiciary, an antonym of both "people" and "legislature," may seize the lawmaking power from both.

Defendants' reliance upon *Growe v. Emison*, 507 U.S. 25 (1993) is similarly misplaced. Defendants cite *Growe* for the proposition that federal courts should not interfere with state courts that have fashioned their own redistricting plan. Int. PI Opp. Br. at 16. But *Growe* is inapposite because, unlike the Elections Clause violation here, in *Growe* the Court concluded there was nothing about the state court's redistricting plan that violated the U.S. Constitution. *Id.* at 31, 39. *Growe*

thus does not stand for the proposition that federal courts lack authority to intervene where a state court plan violates the U.S. Constitution. *See id.*

At bottom, Defendants argue that state courts should be vested with unlimited prerogative to create congressional-election rules through non-appealable, unchallengeable and wide-open "interpretation" of its own constitution. Such a proposition would frustrate the Elections Clause's manifest purpose to allocate what are fundamentally policy decisions to the branches best disposed to make policy. The Framers clearly intended to make such an allocation of duties. As explained in the Federalist Papers, Defendants fail to acknowledge that legislation and interpretation are fundamentally different: in exercising the interpretive function, "courts must declare the sense of the law" in an act of "JUDGMENT"; in lawmaking, by contrast, the legislature exercises "WILL." THE FEDERALIST No. 78 (Alexander Hamilton). When courts "exercise WILL instead of JUDGMENT, the consequence would be the substitution of their pleasure to that of the legislative body." *Id.*

If Defendants are right that this Court can do nothing about the Pennsylvania Supreme Court's clear violation of the Elections Clause, it would mean that there would be no limitation to a state supreme court's ability to legislate in violation of the Elections Clause. For example, a state supreme court could mandate that 75% of districts be drawn to ensure the election of Republican candidates, in obvious

violation of the Elections Clause, but thereafter avoid review by a federal court because, after all, that court is the ultimate arbiter of that state's laws. A state supreme court could likewise mandate that a district contain at least 500 buildings and avoid review. This cannot be the law.

There can be no doubt here that the Pennsylvania Supreme Court engaged in legislation when it invalidated the 2011 Plan and implemented the Court Drawn Plan. For this reason, Plaintiffs' chances of success on the merits are more than enough to meet the standard for preliminary injunctive relief.[1]

C. The PCO Did Not Give The General Assembly Sufficient Time To Have An Adequate Opportunity To Enact A Remedial Plan

Defendants offer various arguments that the General Assembly was afforded an adequate opportunity to pass a remedial map. But none of these arguments pass muster.

Preliminarily, Intervenors posit that Plaintiffs may not seek to enjoin a violation of the Elections Clause because there is no separate "cause of action" for asserting the General Assembly's right to an adequate opportunity to craft a redistricting plan. Under the *Ex Parte Young* Doctrine, however, there is "an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws." *Burgio & Campofelice,*

[1] *See also* Plaintiffs' Brief in Opposition to Defendants' Motions at 50-61 (discussing the Pennsylvania Supreme Court's constitutional violations).

Inc. v. New York State Dep't of Labor, 107 F.3d 1000, 1006 (2d Cir. 1997) (citing *Ex Parte Young*, 209 U.S. 123 (1908); *see also Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 333-34 (5th Cir. 2005). As such, because Plaintiffs are seeking to enjoin the Executive Defendants from violating the Elections Clause, they need not rely on any authority "recognizing a cause of action . . . to challenge the amount of time" provided to the legislature. Int. Br. at 20.[2]

Along these same lines, Intervenors assert that "it is dubious whether [the] General Assembly was constitutionally entitled to any time at all[,]" Int. Br. at 21 n.7, and in support of this contention, cite *Hays v. State*, 936 F. Supp. 360 (W.D. La. 1996). Intervenors are, once again, wrong. Although the *Hays* court invalidated a congressional districting plan and simultaneously issued its own map, Intervenors neglect to mention that the state legislature in *Hays* had enacted *three* redistricting plans since the decennial census and each of them had been invalidated on equal protection grounds. Seeing no prospect that a *fourth* plan in as many years would comply with the established guidelines familiar to the state legislature, the federal court assumed the map-making responsibility. Accordingly,

[2] To the extent Defendants suggest that the Elections Clause is somehow separate and distinct from the "adequate opportunity" requirement, that argument is similarly unpersuasive, since that rubric is directly tied to the Elections Clause and is a necessary product of its central tenet – i.e., that redistricting is primarily a legislative task. *See, e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 539–40 (1978).

Hays is inapposite to the circumstances here because the General Assembly, unlike the state legislature in *Hays*, had no opportunity to draft a remedial plan that complied with the Pennsylvania Supreme Court's directive.

Next, Defendants argue that the General Assembly was in fact afforded an "adequate opportunity" to enact a remedial redistricting plan, as required by the Elections Clause. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964); *see also Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (court must give the legislature a "reasonable opportunity" to adopt a remedial plan). This claim is inaccurate by any measure.

Defendants' argument is premised almost entirely on the supposition that the General Assembly had 18 days to devise and enact remedial legislation, rather than the *two* days actually afforded it. In this regard, Defendants assert that the PCO,[3] which included a threadbare recitation of the criteria and procedure that would ultimately be detailed in the Majority Opinion, provided the General Assembly with the requisite information to enact a plan. In support of this argument, Defendants argue that the criteria announced in the Majority Opinion did not conflict at all with the criteria described in the PCO. Def. PI Opp. Br. at 18. While that may be technically true, it misses the point.

[3] Capitalized terms used herein and not otherwise defined are ascribed the meanings given to them in the Complaint.

As detailed in the Motion, regardless of whether the PCO was consistent with the directives that were ultimately set forth in the Majority Opinion, the PCO simply did not provide enough information to understand the process that the General Assembly was required to follow. Indeed, as detailed in the Motion, critical aspects of the Majority Opinion, which were necessary to draft any remedial redistricting plan, were not included in the PCO. For example, the PCO did not provide any indication of the constitutional provision that had purportedly been violated; it did not provide any of the benchmarks or parameters regarding how to comply with the PCO's mandate that districts must be compact; and it did not give any explanation for why the 2011 Plan was invalidated. Moreover, the PCO did not give any explanation of whether traditional districting criteria, not mentioned in the PCO, such as incumbency, could be considered when drafting a remedial map. Defendants do not, because they cannot, even attempt to explain how a final remedial map could have been drawn without these details.[4] It was simply impossible for the General Assembly to draft a remedial redistricting plan without the benefit of the Majority Opinion.

[4] Defendants seek to rely on a representation by respondents' counsel in the *LOWV* Action that the General Assembly would need three weeks to pass a remedial plan. But that representation is irrelevant here because it assumed that the General Assembly would have the benefit of the full criteria and procedure required to implement such a plan. Because the Majority Opinion, which contained the critical criteria and procedure was not revealed until two days before the remedial plan needed to be submitted, counsel's representation is meaningless.

As a fallback position, Defendants argue that the Majority Opinion was not essential to devising new congressional boundaries because the criteria provided by the PCO had been previously applied in *state* legislative districting. That argument, too, must be rejected. The fact that the guidelines were derived from some existing legal principles applied in the *state* reapportionment process is not in dispute. But it does not follow that the application of those principles in the *congressional* redistricting context was in any way apparent from the PCO.[5] In the end, the PCO simply did not provide enough information for the General Assembly to draft a final remedial map.[6]

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[5] Intervenors' suggestion that these criteria were not novel in the *congressional* districting context is baseless. In *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), which Intervenors herald as the authority for this proposition, the Pennsylvania Supreme Court adopted its own congressional redistricting map because the political branches had failed to agree on a new map following the decennial census. In doing so, the Court explained that it would use the criteria traditionally used in state legislative redistricting. The Court did not, as Intervenors appear argue, establish any mandatory redistricting criteria. Subsequently, in *Erfer v. Commonwealth*, 794 A.2d 325, 334 n.4 (Pa. 2002), the court clarified that, "[i]n the . . . context of Congressional reapportionment . . . there are no analogous, direct textual references to such neutral apportionment criteria."

[6] In arguing that the PCO did not provide sufficient information to allow the General Assembly to create and pass a final remedial map, Plaintiffs do not intend to suggest that the Pennsylvania Supreme Court's PCO was inconsequential to the legislative effort or that members of the General Assembly did not attempt to comply with the court's order. The General Assembly took all constructive action it could prior to the issuance of the Majority Opinion. *See* Declaration of Joe Scarnati, annexed hereto as Exhibit A (detailing efforts by General Assembly leadership to create map legislatively, including negotiation with Governor Wolf,

Moreover, even assuming, as Defendants do, that the PCO's limited guidance was somehow sufficient to enable the General Assembly to begin devising a remedial map, the Pennsylvania Supreme Court nevertheless failed to afford the requisite "adequate opportunity." The PCO gave the General Assembly a mere eighteen days to pass a new plan, an utterly inadequate time in which to draft, debate and pass a plan. In addition to the requirement in the Pennsylvania Constitution that every bill be considered on three different days in each House, a redistricting plan, like any statute, must go through the normal legislative process including review in both chambers. And the General Assembly must go through the arduous process of obtaining votes, which often involves extensive back-and-forth as compromises are made. Demanding that the General Assembly analyze

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who opined that the PCO did not require actual legislation and that the General Assembly only needed to informally give the Governor "something" for his review). On January 29, notwithstanding the Pennsylvania Supreme Court's continued failure to issue an opinion in support of its PCO, a shell bill was introduced in the General Assembly to dispense with the initial procedural hurdles attendant in the legislative process and to facilitate the efficient enactment of a remedial map, once the Pennsylvania Supreme Court issued an opinion detailing the full procedures and criteria that needed to be followed. Certain leaders of the Republican Caucus also developed a proposed remedial map based on the limited criteria contained in the PCO, and it presented it to the Governor. But, in the end, the process of drafting a final remedial map that complied with the detailed procedures and criteria set forth in the 137-page Majority Opinion could not have been drafted based on the limited direction contained in the PCO.

the detailed criteria set forth in the Pennsylvania Supreme Court's Majority Opinion and legislate accordingly was, in practice, not possible.[7]

Indeed, this proposition is detailed in the Declaration of Mark Corrigan ("Corrigan"), who for over 30 years was the non-partisan Secretary-Parliamentarian of the Senate of Pennsylvania. *See* Corrigan Declaration, annexed hereto as Exhibit B. As Corrigan explains, it is not only the legalistic requirements of the Pennsylvania Constitution that dictate the timetable of legislation. *See* Corrigan Dec. at 8-11. Just as critical to the democratic process is the debate, negotiation and deliberation in which legislators must engage to create constitutional legislation, and "[t]hese efforts take time." *Id* at 14. Corrigan, who observed the creation of several Congressional maps via legislation, opines that the 18 days afforded to the General Assembly to legislate in this instance was not adequate in any real measure to allow for the drafting and passage of a constitutional legislative map. *Id.* at 24.

Executive Defendants, for their part, cite a handful of cases in which courts have given state legislatures three weeks or less to adopt a new districting plan. Their offered cases, however, are the exception, and not the rule. Indeed, in the vast majority of recorded cases, courts have recognized the authority of state

[7] The Pennsylvania Supreme Court itself said that the necessary analysis was "complex and nuanced." Maj. Op. at 4 n. 9.

legislatures and have given them significantly longer to enact new plans than what the General Assembly was afforded here by the Pennsylvania Supreme Court. *See, e.g.*, *Long v. Avery*, 251 F. Supp. 541 (D. Kan. 1965) (three months); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552 (E.D. Va. 2016) (court gave legislature three months to enact a new plan and only took up the task when the legislature failed to act); *Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035 (D.S.D. 2005), *aff'd*, 461 F3d 1011 (8th Cir. 2006) (court gave legislature 47 days to enact a new plan; on remand it gave the legislature 30 more days and issued its own remedial plan only when the legislature advised that it would not submit a plan); *DeGrandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992) (three months); *Jeffers v. Clinton*, 756 F. Supp. 1195 (E.D. Ark. 1990) (41 days); *Major v. Treen,* 574 F. Supp.325 (E.D. La. 1983) (four months); *Johnson v. Mortham,* 926 F. Supp. 1460 (N.D. Fla. 1996) (five weeks); *Sincock v. Gately*, 262 F. Supp. 739 (D. Del. 1967) (one year); *Drum v. Seawell,* 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd,* 383 US 381 (1966) (*per curiam*) (two months); *U.S. v. Osceola County*, 474 F. Supp. 2d 1254 (M.D. Fla. 2006) (34 days); *Long v. Avery*, 251 F. Supp. 541 (D. Kan. 1965) (three months).

More fundamentally still, the cases cited by the Executive Defendants in which a district court gave the legislature a very short time to enact a remedial plan involved vastly different facts and circumstances than are present here. For

instance, *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), which the U.S. Supreme Court has stayed, is distinguishable from this case in three ways: (1) a state statute prescribed two weeks as the required length of time for the legislature to conduct a reapportionment; (2) the challenged plan was itself a remedial plan designed to correct decades of racial gerrymandering and the court believed that the state was not entitled to another chance to get it right; and (3) the court issued a long, extremely detailed opinion explaining the infirmities in North Carolina's plan before giving the legislature two weeks to enact a new one. Similarly, in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *Harris v. McCrory,* 159 F. Supp. 3d (M.D.N.C. 2016), *Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003), and *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672 (M.D. Pa. 2002), the short deadlines were given in detailed opinions by those respective courts that provided the legislature with appropriate guidance.

Defendants contend that the short time frame to draft a new map was sufficient because the Pennsylvania Supreme Court had no choice but to act precipitously because of the imminence of the 2018 primary election. Defendants neglect to mention, however, that the Court had another option: allow the 2018 election to proceed under the 2011 Plan while requiring adoption of a new plan for future elections. The U.S. Supreme Court has permitted elections to take place under unconstitutional apportionment plans where there was no reasonable

opportunity to enact a new plan prior to the next scheduled election. *See, e.g.*, *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967); *Ely v. Klahr*, 403 U.S. 108 (1971); *Wells v. Rockefeller*, 394 U.S. 542, 547 (1969) ("Since the 1968 primary election was only three months away on March 20, we cannot say that there was error in permitting the 1968 election to proceed under the plan despite its constitutional infirmities"); *see also White v. Weiser*, 412 U.S. 783, 789 (1973) (noting that it had granted a stay of an order of a district court finding a state plan unconstitutional, with the result that the intervening election was conducted under the existing plan). The U.S. Supreme Court specifically cautioned in *Reynolds* that "equitable considerations" may justify a court in withholding immediate relief. The U.S. Supreme Court explained that lower courts "should consider the proximity of a forthcoming election" and reasonably endeavor to avoid "a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." 377 U.S. at 585. That is exactly what the Pennsylvania Supreme Court failed to do here. For all of these reasons, the timeline provided for in the PCO was simply insufficient for the General Assembly to have an adequate opportunity to draft a remedial plan in accordance with the Elections Clause.

D. The PCO Deprived The General Assembly Of Its Opportunity To Implement A Remedial Plan By Ordering Implementation Of A Plan Outside The Legislative Process

Additionally, as Plaintiffs' opening brief explained (at 10-11, 13-16), the PCO deprived the General Assembly of an adequate opportunity to craft a remedial plan, and thus violated the Elections Clause, by ordering the implementation of a plan outside of the legislative process established by the Pennsylvania Constitution. Specifically, the legislative process requires that the Governor be provided with ten days to consider the legislation, that the public be provided with notice of the status of legislation via the legislative journal, and that the legislature be provided with the opportunity to reconsider the legislation in light of the executive's objections. The PCO circumvented all of these requirements, eliminating the standard legislative process and plainly violating the Elections Clause. *Smiley v. Holm*, 285 U.S. 355, 367 (1932) (under the Elections Clause, "the exercise of the [legislative] authority must be in accordance with the method which the state has prescribed for legislative enactment.").

Executive Defendants do not contest this point, and Intervenors' rejoinder on this point is entirely meritless. First, Intervenors argue that circumventions of legislative process under *Smiley* do not create an Elections Clause claim. But this wrong. Discussing the authority conferred by the Elections Clause, the *Smiley*

Court concluded, "[a]s the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." 285 U.S. at 367.

Intervenors further argue that the Pennsylvania Supreme Court's interference with the gubernatorial veto is excusable because the Governor has not objected to the interference, and because Plaintiffs allegedly lack standing. This is also wrong. The fact that the Governor does not object to the encroachment of his constitutional power is of no moment. Constitutional safeguards designed to maintain the balance of power between the branches cannot be disturbed by one branch acquiescing to the arrogation of its authority. *See New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.").[8] Similarly, Intervenors' standing argument must also fail

[8] *Buckley v. Valeo*, 424 U.S. 1, 118–137 (1976) (holding infringement on President's appointment power under the U.S. Constitution could not be excused merely because the President had agreed to it); *INS v. Chadha*, 462 U.S. 919, 944–959 (1983) (holding "legislative vetoes" violated the U.S. Constitution, despite the President's approval of such provisions); *Clinton v. City of New York*, 524 U.S. 417, 445-46 (1998) (holding the Line Item Veto Act exceeded the power granted to the President under the U.S. Constitution and, thus, was invalid, despite Congress' overwhelming approval of the statute).

because the Governor does not have exclusive standing when the diminution of his power causes otherwise cognizable harm to others. *See, e.g.*, *Clinton*, 524 U.S. at 434-36 ("Once it is determined that a particular plaintiff is harmed by the defendant, and that the harm will likely be redressed by a favorable decision, that plaintiff has standing—regardless of whether there are others who would also have standing to sue."). Intervenors' attempt to downplay the requirement that the Governor must be afforded ten days to consider a bill is also unpersuasive, since that timetable is required by the plain language of the Pennsylvania Constitution, one of the "manifest" purposes of which is to "provide the Governor with suitable time to consider the legislation[.]" *Scarnati v. Wolf*, 173 A.3d 1110, 1125 (Pa. 2017).

Finally, in an attempt to ignore the Pennsylvania Supreme Court's elimination of the General Assembly's right to override a gubernatorial veto, Intervenors aver that "[t]he Pennsylvania Supreme Court never suggested that a remedial map could not be enacted pursuant to a veto override." That is simply false. The Pennsylvania Supreme Court's PCO, by its very terms, provided that if the Governor did not approve the General Assembly's proposal, the Pennsylvania Supreme Court would assume the mapmaking task. *See* Compl. Ex. B at 2 ("should the Governor not approve the General Assembly's plan on or

before February 15, 2018, this Court shall proceed expeditiously to adopt a plan…").

II. Plaintiffs Will Suffer Irreparable Harm In The Absence Of An Injunction

Defendants attempt to refute Plaintiffs' showing of irreparable harm in two ways. First, they argue that Plaintiffs have no cognizable injury. Second, they assert that Plaintiffs' injuries are not redressable because the 2011 Plan is a "dead letter." Defendants are wrong on both points.

Plaintiffs have demonstrated concrete, particularized and imminent harm that can be redressed by this Court. Among other things, Federal Plaintiffs have demonstrated cognizable injury in the potential loss of their congressional seats and the loss of the benefits of incumbency, campaign efforts, and expenditures they made prior to the Pennsylvania Supreme Court's radical restructuring of the congressional map. Similarly, State Plaintiffs have shown injury to their legislative authority to apportion Congressional districts, which, as described in detail in Plaintiffs' Opposition Brief to Defendants' Motions, is cognizable harm in this Circuit.

In addition, Defendants contend that the harm that Plaintiffs will suffer in the absence of injunctive relief cannot be redressed by this Court because the 2011 Plan is invalid and cannot be restored. Def. Opp. Br. at 20. This is simply

incorrect. The U.S. Supreme Court has routinely permitted elections to take place under unconstitutional apportionment plans when there was no reasonable opportunity to enact a new plan prior to the next scheduled election. *See infra* at 23-25.

Intervenors, for their part, claim that the 2011 Plan "is a dead letter" based on 2 U.S.C. § 2a(c) – a rarely-utilized statute that has remained largely dormant over the decades. Specifically, Intervenors, as well as Common Cause as *amicus curiae,* assert that if this Court were to enjoin the Court Drawn Plan, it would be bound to order at-large congressional elections under Section 2a(c). Intervenors' argument fails for at least three reasons.

First, Section 2a(c)(5) is a provision of last resort that is inapplicable to this situation on its face. The statute provides, in relevant part, that "if there is a decrease in the number of Representatives" after an apportionment, the "Representatives … shall be elected" at-large "[u]ntil a State is redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c)(5). Furthermore, the U.S. Supreme Court has confirmed that Section 2a(c) "is inapplicable *unless* the state legislature, and state and federal courts, have failed to redistrict pursuant to § 2c." *Branch v. Smith*, 538 U.S. 254, 275 (2003) (emphasis in original); *see also Ariz. State Legis. v. Ariz. Indep. Redistricting Commission*, 135 S. Ct. 2652, 2670 (2015). In this case, the General Assembly did not fail to redistrict after an

apportionment. Pennsylvania did, in fact, enact a map in 2011 after the last census and the loss of a seat. And, although the Pennsylvania Supreme Court struck down the 2011 Plan, that does not change the analysis that the 2011 Plan was adopted in the procedural manner provided by Commonwealth law (i.e., as normal legislation, reviewed and signed into law by the Governor). Thus, Section 2a(c) on its face does not apply.

Second, the U.S. Supreme Court and other federal courts have ruled that holding elections under an unconstitutional plan is preferable to disrupting the electoral process. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 44 (1982). Even if 2011 Plan were defective under the Pennsylvania Constitution, it should nonetheless be applied in the upcoming primary elections rather than using the Court Drawn Plan or at-large elections. Notwithstanding Section 2a(c), federal courts have regularly ordered that elections be conducted under unconstitutional maps rather than be conducted at-large. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 44 (1982) ("It is true we have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements."); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (affirming district court's decision to conduct elections under its own temporary apportionment plan that itself was a violation of the Constitution); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967)

(affirming a district court's order conducting state legislative elections under the current "constitutionally infirm" apportionment law); *Toombs v. Fortson*, 241 F. Supp. 65, 71 (N.D. Ga. 1965), *aff'd,* 384 U.S. 210 (1966); *Perez v. Texas*, 891 F. Supp. 2d 808, 810-11 (W.D. Tex. 2012) (conducting congressional elections under unconstitutional plan); *Flanagan v. Gillmor*, 561 F. Supp. 36, 50 (S.D. Ohio 1982) (allowing a congressional election to be conducted when there are open one-person one-vote questions and noting that the "plan is the product of the elected representatives of Ohio citizens…we believe that deference to the legislatively enacted plan is appropriate because there is doubt about the controlling constitutional standard."); *Smith v. Beasley*, 946 F. Supp 1174, 1213 (D.S.C. 1996) (permitting state legislative elections under unconstitutional map but setting special elections for the following year); *Covington v. North Carolina*, 317 F.R.D. 117, 177 (M.D.N.C. 2016) (the district court "regrettably concluded" that there was insufficient time to draw new maps and therefore ordered the state legislative elections to proceed under old maps despite "severe constitutional harms"). As such, this Court can and should order that the 2018 elections proceed under the 2011 Plan until the General Assembly is given adequate time to enact a remedial plan. As long as the Court orders restoration of the 2011 Plan by March 16, 2018, it will be possible to conduct the congressional primary on May 15, 2018, in a

manner consistent with state law. *See* Declaration of Carol Aichele, annexed hereto as Exhibit C.

Third, it is within this Court's and the Executive Defendants' power to order that the 2018 primary election cycle be temporarily postponed to afford the General Assembly an adequate opportunity to draw new congressional maps, in accordance with its constitutionally granted authority. Executive Defendants, as they have made clear, have "complete power, to order moving the primary" and to adjust the election time frames to suit any judicial decision. Counsel for Executive Defendants represented before the Pennsylvania Supreme Court at oral argument that congressional primaries could be held as late as September, and the Secretary of the Commonwealth was able to have petitions available for circulation a mere eight days after the Court Drawn Plan was imposed. *See* Transcript of January 17, 2018 Oral Argument, Exhibit A to Intervenors' Brief In Opposition To Plaintiffs' Motion For A Preliminary Injunction, at 35:6-38:7. In addition, unlike the state courts, this Court also has the power to adjust the timelines imposed on the state by the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), *see* 52 U.S.C. §§ 20301 *et seq.*, including delaying the deadline for mailing military and overseas ballots to less than 45 days before the primary elections, while simultaneously extending the deadline for the return of absentee ballots.

There can be little question that the harm to Plaintiffs' protected interests will be irreparable if injunctive relief is not promptly granted, and Defendants do not seriously dispute this point. *See* Federal Plaintiffs' Declarations, annexed hereto as Exhibit D (describing, among other things, efforts spent campaigning in now substantially altered districts). Because the Court Drawn Plan will alter voting districts and election results, the potential harm to candidates is, by definition, irreparable. *Loftus v. Twp. of Lawrence Park*, 764 F. Supp. 354, 359 (W.D. Pa. 1991) ("The election is a single event incapable of repetition, and it is of such paramount importance to both the candidate and his community, that denying a candidate his effective participation in it is … of great, immediate, and irreparable harm[.]"(internal quotation marks omitted)); *see also Connecticut Dep't of Envtl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) ("[V]iolations of constitutional rights are presumed irreparable[.]" (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). At least some of the Federal Plaintiffs are almost certain to lose their seats – after all, this was the purpose of the Court Drawn Plan.[9]

[9] See John Verhovek and Adam Kelsey, *New Pennsylvania congressional map could impact balance of power in the US House*, ABC News (Feb. 21, 2018) (quoting redistricting expert stating that "[i]f the Pennsylvania map changes, it's hard to imagine how the Republicans hold control of the house. . . ."), *available at* http://abcnews.go.com/Politics/pennsylvania-congressional-map-impact-balance-power-us-house/story?id=53197211 (last visited Mar. 4, 2018).

The Court Drawn Plan and the speed of its implementation have created significant confusion and concern for the citizens of Pennsylvania, congressional candidates from both parties and, most importantly for this motion, Federal Plaintiffs. To add to the confusion, the Court Drawn Plan inexplicably renumbers all of Pennsylvania's congressional districts.

The primary is in two and a half months.[10] But everything that the voters, the candidates, and the political parties believed to be true was overturned in the blink of an eye by the Court Drawn Plan, undoing all of the actions that the candidates and their supporters have done over the last two years to prepare for the 2018 elections. *See* Brief of *Amici Curiae* Brian McCann, *et al.* (Doc. 66) at 4 (describing the proposed testimony of *amicus* Thomas Whitehead, Chair of the Monroe County Republican Committee). The electorate and the candidates, including the Federal Plaintiffs, are left confused as to who is running in which congressional district, in which congressional district they reside, and for whom they can vote in the primary. If the Court Drawn Plan is implemented, Federal Plaintiffs will be forced to campaign under radically altered circumstances in an

[10] The Supreme Court has recognized the threat of imminent harm caused by reapportionment on the eve of a primary. *See Wells v. Rockefeller*, 394 U.S. 542, 547 (1969) (affirming conduct of elections under a map struck down because the "primary election was only three months away"); *Kilgarlin v. Martin*, 386 U.S. 120, 121(1967) (per curiam); *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. 1970), *aff'd sub nom.*, *Ely v. Klahr*, 403 U.S. 108 (1971) (similar timing).

unreasonable time period, thereby subjecting them to imminent and irreparable harm.

III. Injunctive Relief Will Not Adversely Affect The Public Interest.

Defendants argue that injunctive relief would adversely affect the public interest. Before turning to Defendants' specific arguments, it is important to correct the broader framework within which Defendants present their argument. Reciting the familiar doctrine that the aim of preliminary injunctions is to preserve the status quo, Executive Defendants repeatedly suggest, without explanation, that a preliminary injunction would "disturb, rather than maintain, the status quo[.]" Def. Br. at 15. As such, Executive Defendants conclude, Plaintiffs must meet the higher burden faced by parties who seek to change the status quo. The predicate to this argument, of course, is that the Court Drawn Plan, which had been in place for a mere four days prior to the initiation of this action, is the status quo, rather than the 2011 Plan, under which seven congressional elections had been conducted and on which Federal Plaintiffs had reasonably relied for over a year in planning for their campaign. This premise, however, is in direct conflict with settled precepts because "[t]he status quo to be preserved by a preliminary injunction . . . is not the circumstances existing at the moment the lawsuit or injunction request was actually filed, but the last uncontested status between the parties which preceded the

controversy."[11] *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012); *accord Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990) ("[O]ne of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties") (citations omitted).[12] Defendants cannot seriously dispute that the 2011 Plan was the last uncontested status prior to the controversy.[13]

When Executive Defendants' warped interpretation of the "status quo" is replaced with the proper understanding of the term, most of their arguments

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[11] Executive Defendants also accuse Plaintiffs of undue delay, arguing the relief "is particularly inappropriate in light of Plaintiffs' inexcusable delay in seeking an injunction." Def. Br. at 27. Plaintiffs filed their Complaint, along with their Motion and supporting brief a mere *four days* after the Court Drawn Plan was released, which is the point at which the harm to Plaintiffs became legally cognizable.

[12] *See also N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc*., __ F.3d __, __, n.5, 2018 WL 1021223, at *3 n.5 (2d Cir. Feb. 23, 2018) (noting "[t]he 'status quo' in preliminary-injunction parlance is really a 'status quo ante,' and concluding that "[t]his special 'ante' formulation of the status quo in the realm of equities shuts out defendants seeking shelter under a current 'status quo' precipitated by their wrongdoing"); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004) (en banc) (*per curiam*) (explaining that the heightened standard is not appropriate when "requir[ing] a party who has recently disturbed the status quo to reverse its actions" because "[s]uch an injunction restores, rather than disturbs, the status quo ante"); *Am. Can Co. v. Local Union 7420, United Steelworkers of Am.*, 350 F. Supp. 810, 812 (E.D. Pa. 1972) ("status quo is the last uncontested status which precedes the pending controversy").

[13] Indeed, the 2011 Plan was the uncontested state of affairs for over five years and three election cycles until it was challenged in June 2017 by Intervenors.

relative to public policy are unsustainable. For instance, Executive Defendants seek to avail themselves of various decisions that caution against upsetting the electoral process when an election is imminent. These cases, however, stand for the unremarkable proposition that courts should be especially careful to maintain the status quo – *i.e.*, the last, peaceable, uncontested status of the parties – in the context of elections. Accordingly, the authority that they cite rebuking interference with the status quo in the face of an impending election only strengthens Plaintiffs' argument.

Along these same lines, Defendants also urge that it would be against public policy to conduct another election under the 2011 Plan because it has been found unconstitutional. In this regard, Defendants lament the possibility that a fourth election could be conducted under an unconstitutional districting map. Even if the 2011 Plan is unconstitutional, Plaintiffs recourse to equity should not be countenanced. It is axiomatic that "equity favors the vigilant and looks with disfavor on the dilatory suitor[,]" *Biophone Corp. v. W. Elec. Co.*, 91 F.2d 727, 727 (3d Cir. 1937), and this principle applies with equal force in the context of elections. *See Valenti v. Mitchell*, 962 F.2d 288, 299 (3d Cir. 1992) (affirming district court's denial of relief to candidate who was not diligent in bringing challenge to claim because "[e]quity aids the vigilant, not those who rest on their rights"). Here, Intervenors waited nearly six years to assert their rights, while

Executive Defendants conducted seven elections under the 2011 Plan, before deciding that an eighth time would be impermissible. Thus, as the "dilatory suitor," they should be forced to bear the burden of their delay.

Moreover, equitable principles aside, Executive Defendants' argument would also contravene legal precepts. Again, assuming *arguendo* that the 2011 Plan is constitutionally defective, Intervenors are asking this Court to permit a violation of the U.S. Constitution, so as to avoid a violation of the Pennsylvania Constitution. Subordinating the U.S. Constitution to the Pennsylvania Constitution in this manner would plainly violate the Supremacy Clause. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.").

Against this backdrop, and stripped of improper recourse to the concept of "status quo," Executive Defendants' assertion that the public interest militates against entrance of preliminary injunction is spurious. First, their argument concerning voter confusion and disturbance to the electoral process is pure conjecture and, while Executive Defendants may have expert knowledge of certain technical aspects of administering elections, neither their official job descriptions nor the background information provided in their Affidavits provides any indication that they have any specialized knowledge of the concerns and reactions expressed by the actual voters. The various individuals who have

submitted Declarations on Plaintiffs' behalf, on the other hand, are local officials and community leaders with first-hand knowledge of the Court Drawn Plan's impact on ordinary voters. Although their descriptions differ in various respects, the common thread running through all of the Declarations is that the Court Drawn Plan has engendered mass chaos. *See* Exhibit E (various citizen declarations). And although many of them recognize that adjusting the calendar further is not ideal for various reasons, the benefits of restoring the status quo, even if it means proceeding under an amended timetable, would far outweigh the detriments.

Second, the relief Plaintiffs seek can be granted without the parade of evils suggested by Defendants. Specifically, Executive Defendants aver that revising the calendar any further would require postponing the primary to comply with federal requirements on transmitting absentee ballots under UOCAVA. Although Executive Defendants are correct that the statute generally imposes a 45-day period, federal courts faced with similar circumstances routinely craft plans that permit an election to be held as scheduled, while also requiring elections administrators to implement additional measures to protect the rights of overseas voters. Most often, courts order state and county officials to extend the deadline for accepting absentee ballots. *See Department of Justice, CASES RAISING CLAIMS UNDER THE UNIFORMED AND OVERSEAS CITIZEN ABSENTEE*

VOTING ACT, available at https://www.justice.gov/crt/cases-raising-claims-under-uniformed-and-overseas-citizen-absentee-voting-act (collecting cases). Applying that remedy here, the primary can be held as scheduled, with the only delay being the official certification of the election results. Particularly given that Pennsylvania's primary is relatively early, a short postponement in this respect will not be disruptive. Thus, it would be entirely feasible to revert to the 2011 Plan without violating the federal statute.

CONCLUSION

Wherefore, for the reasons set forth herein and in the Motion, Plaintiffs respectfully request that the Court grant the Injunction.

Dated: March 7, 2018

Respectfully submitted,

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WORD COUNT CERTIFICATION

I hereby certify that the foregoing brief complies with the word-count limitation set forth in this Court's Order dated March 5, 2018 (Doc. 98), granting Plaintiffs leave to file a single omnibus reply brief, totaling 10,000 words. Based on the word count feature of the word-processing system used to prepare this brief, I certify that it contains 7866 words, exclusive of the cover page, tables, and the signature block.

Dated: March 7, 2018 /s/Matthew H. Haverstick

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2018, a true and correct copy of the foregoing Plaintiffs' Reply Brief in Further Support of Motion for Preliminary Injunction was electronically filed with the Court and served upon all counsel and parties of record via the CM/ECF system.

Dated: March 7, 2018 /s/Matthew H. Haverstick