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; JONATHAN M. MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation, Defendants.	CIVIL ACTION No. 1:18-cv-00443-CCC-KAJ-JBS Three-Judge Panel Pursuant to 28 U.S.C. § 2284(a) Circuit Judge Kent Jordan Chief Judge Christopher Conner District Judge Jerome Simandle

BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Defendants, Acting Secretary of the Commonwealth Robert Torres and Commissioner of the Bureau of Commissions, Elections, and Legislation Jonathan M. Marks, respectfully submit this brief in opposition to Plaintiffs' Motion for Preliminary Injunction (the "Motion").

I. INTRODUCTION

Plaintiffs, a group of federal and state legislators, ask this federal court to overturn the Pennsylvania Supreme Court's ruling on an issue of state law: that the congressional districting map that Pennsylvania enacted in 2011 was a partisan gerrymander that violated the Pennsylvania Constitution. Plaintiffs demand that this Court enjoin use of the remedial map that the Pennsylvania Supreme Court has put in place, an action that would require the Commonwealth to either postpone an upcoming primary election, an enormously disruptive step that would cost taxpayers more than $20 million, or cancel it. If the Court grants the relief that Plaintiffs seek, dozens of congressional candidates who have already circulated their nomination petitions will have to discard them and start again, and Pennsylvania voters will have to go to the polls under a congressional districting map that the Pennsylvania Supreme Court has held to be unconstitutional. A grant of this relief would cause incalculable harm to the public, to candidates, to state and local elections officials, and to the Commonwealth as a whole.

In order to justify subjecting a state's election process to such serious, irreparable, and wide-ranging disruption, Plaintiffs would have to show that they will suffer even greater harm if the Court does not act. Plaintiffs cannot come close to making this showing; in fact, they cannot show that they will be harmed at all. They delayed filing this lawsuit for weeks, a delay that renders this Court unable to grant them relief without derailing a scheduled election. Plaintiffs speculate about theoretical harms to constituents, communities, and the Pennsylvania legislature, but do not explain how they themselves can be harmed. Plaintiffs plainly disagree with the outcome of the state court lawsuit, but their angry rhetoric, without more, does not show irreparable harm. Plaintiffs' disagreement does not even rise to the level of concrete and particularized harm that would confer standing; it certainly cannot justify a remedy that would derail a statewide election.

Plaintiffs also cannot show that they have any chance of succeeding in this lawsuit, let alone that they are reasonably likely to succeed on the merits. Indeed, Plaintiffs' claims are so deficient in so many aspects that they should not survive Defendants' concurrently filed Motion to Dismiss. First, it is inappropriate for a federal court to interfere in ongoing state court litigation or to overrule a state court's interpretation of state law; this is not one of those rare cases where such an intrusion into a sister court's authority is permissible. Second, Plaintiffs lack

standing to bring their claims. Third, the Pennsylvania state court's rulings preclude Plaintiffs' claims. Fourth, the Elections Clause of the U.S. Constitution simply cannot support the interpretation that Plaintiffs try to give to it.

Even if Plaintiffs' claims could get past all these legal hurdles, they would fail on the facts. Plaintiffs insist, for example, that the Pennsylvania Supreme Court did not give the Pennsylvania legislature an "adequate opportunity" to pass a law with new congressional districts. The undisputed facts show, however, that the Pennsylvania Supreme Court gave the General Assembly ample time, and that the General Assembly could have voted on a new map if its leadership, which includes two of the Plaintiffs, had allowed that vote to happen.

Plaintiffs contend, with no evidentiary support, that implementation of the new congressional map is causing chaos, confusion, and voter uncertainty. This is simply not so. The map is in place, and preparations for the 2018 primary are going forward as smoothly as preparations for any other election. If this Court grants Plaintiffs' motion, however, chaos and confusion are inevitable.

II. STATEMENT OF FACTS

A. The Pennsylvania Supreme Court Strikes the 2011 Plan on the "Sole Basis" That It "Clearly, Plainly and Palpably Violates" the Pennsylvania Constitution

In *League of Women Voters, et al., v. The Commonwealth of Pennsylvania, et al.*, No. 159 MM 2017 (the "State Court Litigation"), the Petitioners, a group of

Pennsylvania voters, alleged that the congressional districting plan set forth in the Pennsylvania Congressional Redistricting Act of 2011, 25 P.S. §§ 3596.101, *et seq*. (the "2011 Plan") was a partisan gerrymander that violated their rights under the Pennsylvania Constitution. A judge of the Pennsylvania Commonwealth Court held a weeklong trial and issued recommended findings of fact and conclusions of law, finding that the Petitioners had shown intentional discrimination, but that Pennsylvania law did not provide them with a remedy. *See* Affidavit of Representative Frank Dermody ("Dermody Aff."), attached hereto as Exhibit A, at Ex. 1 at COL ¶¶ 58-65. The Pennsylvania Supreme Court ordered briefing and heard oral argument. On January 22, 2018, it issued a per curiam Order holding that the 2011 Plan "clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania, and, on that sole basis, we hereby strike it as unconstitutional." Compl. Ex. B at 2.[1]

In the January 22 Order, the Pennsylvania Supreme Court gave the General Assembly and the Governor 24 days to enact a remedial map:

> [S]hould the Pennsylvania General Assembly choose to submit a congressional districting plan that satisfies the requirements of the Pennsylvania Constitution, it shall submit such plan for consideration by the Governor on or before **February 9, 2018.** If the Governor accepts the General Assembly's congressional districting plan, it

[1] Detailed descriptions of the background of the 2011 Plan and the procedural history of the State Court Litigation are set forth in the Intervenors' Brief in Opposition to Motion for Preliminary Injunction ("Intervenor Br.").

> shall be submitted to this Court on or before
> **February 15, 2018.**

Id. at 2 (emphasis in original). The court also set forth the criteria for a remedial map: "[T]o comply with this Order, any congressional districting plan shall 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." *Id.* at 3.

The Order noted that an Opinion would follow. *Id*. It did not tell the parties to defer work on a remedial map until after the Opinion issued, and did not suggest that the Opinion would change the criteria set forth in the Order.

B. The Pennsylvania Supreme Court Gives the General Assembly Enough Time to Draft and Vote On a Remedial Map

1. Plaintiffs' Counsel Concedes at Oral Argument That Three Weeks Is Sufficient Time for the Legislature to Act

By January 17, 2018, the date of the Pennsylvania Supreme Court oral argument, the parties and the court were aware that a critical election deadline was just over a month away. Defendant Marks, who was a Respondent in the State Court Litigation, had submitted an affidavit to the Commonwealth Court stating that in order to hold the congressional primary election as scheduled, on May 15, 2018, any new congressional districting map would have to be put in place by February 20, 2018. *See* Affidavit of Commissioner Jonathan M. Marks

("Marks Aff."), attached hereto as Exhibit B, at ¶¶ 18-19 and Ex. 1. Thus, it was clear that if the Supreme Court struck the 2011 Plan, a remedial plan would be needed in less than a month. At oral argument, no one contended that this time would be inadequate.

In fact, attorneys for the Republican caucus leaders who were respondents in the State Court Litigation, House Speaker Michael Turzai and Senate President Pro Tem Joseph Scarnati (the "Legislative Respondents"), conceded that the General Assembly would have enough time to act. Justice Baer asked counsel for Legislative Respondents, Jason Torchinsky,[2] how much time the legislature would need to draft a remedial map:

> Justice Baer: Assume, reluctantly, that you do not prevail in constitutionality is three weeks a fair opportunity for a legislature to redraw these maps? Because I think it should get the opportunity.
>
> Mr. Torchinsky: Your Honor, as I mentioned at the beginning, I'm going to defer to Mr. Braden on a remedy. But I think we would like at least three weeks . . . .

See Declaration of Michele D. Hangley ("Hangley Decl."), attached hereto as Exhibit C, at Ex. 1, 103:19-104:2. Mr. Braden requested "maybe a month" so that candidates would have "a chance to do the politics here":

> Here are people running and deciding where to run, and are actually running right now as we speak, and that any

[2] Mr. Torchinsky is also counsel for Senators Jacob Corman and Michael Folmer (the "State Plaintiffs") in this case.

> remedy should be for the next election. If you're saying that we're not going to do that, then maybe a month. Give them a chance to do the politics here.

Id. at 127:14-19.

2. For Reasons That Are Not Clear, the General Assembly Never Votes on a Proposed Remedial Map

(a) The General Assembly Prepares to Vote on a Map on Short Notice

Under Article III, Section 4 of the Pennsylvania Constitution, the General Assembly can pass legislation in as little as five days. Dermody Aff. ¶ 14. The 2011 Plan, for example, moved through the legislative process in 16 days, less time than the General Assembly was given in this case. *Id.* ¶ 15. A "shell" bill with no descriptions of the districts, S.B. 1249, was introduced in the Senate on December 7, 2011; legal descriptions were added on December 14; and the bill was passed, and signed by the then-Governor, on December 22. *See id*. ¶¶ 16, 19, 22.

Shortly after the January 22 Order issued, the General Assembly began taking steps that would have allowed it to vote on a remedial map quickly, as it had done in 2011. On January 29, 2018, Senate Bill 1034 was introduced in the Senate. *Id*. ¶ 23; Affidavit of Senator Jay Costa ("Costa Aff."), attached hereto as Exhibit D, at ¶15. This bill repealed the statutory descriptions of the districts included in the 2011 Plan and replaced them with "shell" language, as had happened in 2011. *See* Dermody Aff. ¶ 23; *id.* Ex. 5; Costa Aff. ¶¶ 16-17. The Senate considered the measure on January 29 and 30 and approved it on final

passage on January 31. Dermody Aff. ¶¶ 24; Costa Aff. ¶¶ 15, 18. The bill then moved to the House of Representatives, where it was reported to the State Government Committee on February 1, and reported out of committee and given first consideration on February 6. Dermody Aff. ¶ 24-25; Costa Aff. ¶¶ 19-20.

At that point, it would have been possible to amend the bill to include legal descriptions of a proposed map and pass the bill by February 9. *See* Dermody Aff. ¶ 26; Costa Aff. ¶¶ 26-27. Instead, the General Assembly let S.B. 1034 die on the vine. The majority leaders did not try to amend the bill or schedule additional session days. Dermody Aff. ¶ 28; Costa Aff. ¶¶ 26, 29.

(b) The General Assembly Leadership Chooses Not to Work on a Map Until the Last Minute, Then Drafts One in Two Days

Plaintiffs appear to concede that members of the General Assembly did not begin work on a remedial map until the Pennsylvania Supreme Court issued its Opinion on February 7, 2018. *See* Plaintiffs' Brief in Support of Motion for Preliminary Injunction ("Br.") at 11-12 ("[W]ithout the benefit of the rationale and benchmarks contained in the extensive Majority Opinion, the Legislature simply could not begin formulating a cogent and compliant redistricting plan."). The reasons for this delay are not clear. A February 5 newspaper article reported on the comments of Senator Corman, the lead plaintiff in this action:

> [L]eaders hadn't had many meetings to discuss specifics of the maps. Corman said that leaders must decide

> whether they have the desire to try to draw a new one. . . . "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 this work to just have them throw it out?"[3]

Another article, from February 6, reported that "GOP leaders seemed to hit a moment of reckoning after [the previous day's] decision by U.S. Supreme Court Justice Samuel Alito denying their request for a stay of the state court's order," and "[t]op Senate and House staffers said . . . their leaders had resigned themselves to try to comply with" the January 22 Order.[4]

Once the legislature's leaders began drafting a map, they completed the job in two days, claiming to have had no difficulty in complying with the Pennsylvania Supreme Court's rulings. *See* Hangley Decl. at Ex. 2 (Letter from Legislative Respondents stating that they produced a map in the "short time period" after the February 7 Order); *see also* Press Release, Pennsylvania Legislative Leaders Submitting Congressional Map (Feb. 9, 2018). [5]

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[3] Jonathan Lai & Liz Navratill, "SCOTUS denies Pa. GOP lawmakers' attempt to delay drawing new congressional map," Philly.com, Feb. 5, 2018, https://goo.gl/yFkf8j

[4] Charles Thompson, "A reluctant Pa. legislature settles in for a map-making cram session," Pennlive.com, Feb. 6, 2018, https://goo.gl/T2kkP9

[5] http://www.senatorscarnati.com/2018/02/09/pennsylvania-legislative-leaders-submitting-congressional-map-2/.

(c) Even After the General Assembly Leadership Has a Proposed Map in Hand, They Do Not Bring It to a Vote

In the days after Speaker Turzai and President Pro Tempore Scarnati issued their map, the "General Assembly still had time to convene session and pass a remedial congressional districting plan to present to the Governor for his consideration on or before the February 15 deadline for his approval." Dermody Aff. ¶ 31. The Legislative Respondents stated that they could bring their joint map, or another map, to a vote before February 15 deadline. On February 13, for example, after Governor Wolf rejected their map, the Legislative Respondents wrote to Governor Wolf, "Quit being coy . . . . Produce your map and we will put it up for a vote." Hangley Decl. at Ex. 2 at 2; *see also, e.g.*, "GOP leaders unveil revamped Pa. congressional map," Triblive, Feb. 9, 2018[6] ("Crompton said . . . a decision about whether to bring [the map] up for floor votes early next week will partially depend on the response from Wolf.").[7] Despite all this talk about votes, the General Assembly's leadership never scheduled additional session days and never voted on a map.

[6] http://triblive.com/state/pennsylvania/13284571-74/pa-republicans-say-theyve-revised-gerrymandered-district-map.

[7] It was not necessary to seek Governor Wolf's approval before voting on a proposed map. "No law or procedural rule of the General Assembly requires

C. The Department of State Has Implemented the Current Plan Quickly and Without Complications

As the State Court Litigation progressed, the Bureau of Commissions, Elections and Legislation (the "Bureau") determined that if the 2011 Plan was held to be unconstitutional, it would be challenging, but possible, to put a new districting map into place in time for the May 15, 2018 primary. The Bureau carefully considered all aspects of the elections calendar and calculated that if a new map issued by February 20, 2018, and if the Department of State (the "Department") implemented a combination of internal administrative adjustments and Court-ordered date changes, the May 15 primary date could hold. *See* Marks Aff. ¶ 15. Throughout the State Court Litigation, the Executive Branch Respondents repeatedly informed the courts and the other parties that pushing the issuance of a new map beyond February 20 would likely mean that the May 15 primary could not go forward, at least for congressional candidates. *See, e.g.*, Marks Aff. Ex. 1.

The Pennsylvania Supreme Court honored the Department's scheduling needs. In its January 22 Order, it announced that "a congressional districting plan will be available by February 19, 2018." Compl. Ex. B at 3. It met that deadline, adopting a remedial map (the "Current Plan") on that date. In the month between

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gubernatorial approval prior to the amendment or passage of legislation." Costa Aff. ¶ 30.

the January 22 Order and the release of the Current Plan, the Department engaged in intensive internal planning efforts to ensure that it could put the Current Plan in place as quickly and efficiently as possible. *See* Marks Aff. ¶¶ 20-25.

On the day after the Current Plan was released, the Department began a multi-pronged implementation effort involving database updates, social media outreach, voter and candidate education, and a purchase of $150,000 in newspaper space. *Id.* ¶¶ 26-48. These efforts have continued at a rapid pace between the release date and today. To date, the Department's implementation of the Current Plan has been a success. Nomination petitions were available online five days before February 27, the first day of the petition circulation period. *Id.* ¶ 30. To date, 150 candidates have downloaded petition packets, and presumably have begun to circulate their petitions. *Id.* ¶ 31.

Defendant Marks has observed that in his close dealings with elections officials from the Commonwealth's counties, he has not heard any reports that implementation of the Current Plan is causing unusual confusion or difficulty. *Id*. ¶ 50. From the counties' point of view, little needs to be done other than some data entry in some counties. *Id*. ¶ 51. Under the Current Plan, election dates, polling locations, and election rules are the same as they were under the 2011 Plan. *Id*. ¶ 52. The Department and the counties are on track to meet all election-related

deadlines, including deadlines required under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. §§ 20301 *et seq.* *Id.* ¶ 56.

D. If the Current Plan Is Replaced, the Commonwealth Will Have to Postpone or Cancel the Primary Election

Now that the election cycle has begun under the Current Plan, reversing course would make it impossible to hold the 2018 congressional primary as scheduled. *Id*. ¶ 70. As Defendant Marks has explained, the Department compressed its schedule in order to accommodate the Current Plan, but there is no additional room for changes. *Id.* ¶ 72. Accordingly, if use of a different map is ordered now, candidates will not have sufficient time to circulate petitions, collect signatures, and submit nomination petitions before the County Boards of Elections' March 26 absentee ballot deadline. *Id.* ¶ 71. The Department would also have to conduct an entirely new wave of outreach to ensure that candidates, County Boards of Elections, and the public were aware of the changes. *See, e.g.*, *id.* ¶ 26. Petitions would need to be recirculated and signatures collected anew, causing competing sets of nomination petitions that require lengthy, manual review. *Id.* ¶ 73. The time and funds spent preparing to hold the 2018 primary under the Current Plan would have to be spent again. *Id.* ¶ 74. And all of these efforts would need to happen without any of the advance preparation and coordinated strategy that enabled the Department to put the Current Plan in place so rapidly. *Id.* ¶ 75.

The ripple effect of these delays would inevitably require the Commonwealth to postpone the 2018 primary, at an additional cost of $20 million that would fall primarily on the counties. *Id.* ¶ 79. Rescheduling the primary would also cause a great deal of confusion: staff and polling places that have been reserved for May 15 may not be available at a later date, and educating the public on new dates will be far more difficult on the heels of the Department's consistent messaging that the Current Map would not result in changes in polling places, rules, or major dates. *Id.* ¶¶ 80-81; *id.* Ex. 6.

III. STATEMENT OF QUESTIONS PRESENTED

1. Have Plaintiffs shown a reasonable probability of success on their claims for a violation of the Elections Clause of the U.S. Constitution?

2. Are Plaintiffs entitled to a preliminary injunction where they delayed filing suit for weeks and waited until a new congressional map was put in place, and where a grant of the relief they seek will require postponing or cancelling Pennsylvania's upcoming primary election?

3. Is it in the public interest to grant relief that will require either postponing the primary election, at a cost to the public of more than $20 million, or cancelling it entirely?

IV. ARGUMENT

A preliminary injunction is "an extraordinary remedy." *American Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994) (quotation omitted). Such relief is only warranted when a movant can "convince the court that (1) the movant has shown a reasonable probability of success on the merits; (2) the movant will be irreparably injured by denial of relief; (3) granting preliminary relief will not result in even greater harm to the other party; and (4) granting preliminary relief will be in the public interest." *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987) (citing *SI Handling Systems, Inc. v. Heisley*, 753 F.2d 1244, 1254 (3d Cir. 1985)). Plaintiffs fall far short of carrying their burden on any of these requirements.

Although Plaintiffs could not meet their burden in any event, a suit seeking injunctive relief related to an upcoming election faces an even higher burden. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (requiring court, in addition to the regular preliminary injunction facts, to evaluate "considerations specific to election cases and its own institutional procedures"). And because Plaintiffs seek to disturb, rather than maintain, the status quo, they are faced with a higher burden yet. *See, e.g.*, *Doe v. New York Univ.*, 666 F.2d 761, 773 (2d Cir. 1981) ("Where, as here, mandatory relief is sought, as distinguished from maintenance of the status quo, a strong showing of irreparable injury must be made, since relief changing the

status quo is not favored unless the facts and law clearly support the moving party.").

A. Because Plaintiffs' Claims Fail Factually and Legally, Plaintiffs Cannot Show a Reasonable Probability of Success

1. Plaintiffs' Claims Are Legally Deficient and Should Not Survive Defendants' Motion to Dismiss

As the concurrently filed Motions to Dismiss of Defendants and Intervenors make plain, Plaintiffs are not only unlikely to succeed on the merits, they are unlikely to make it past multiple threshold barriers to judicial review. First, under the *Rooker-Feldman* doctrine, suits that "essentially invite[] federal courts of first instance to review and reverse unfavorable state-court judgments" must be "dismissed for want of subject-matter jurisdiction." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283-284 (2005); *see* 28 U.S.C. § 1257. Second, this Court should abstain under the doctrine announced in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) , which calls on federal courts to abstain when "there is a parallel state proceeding that raises substantially identical claims and nearly identical allegations and issues." *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307 (3d Cir. 2009). Third, this Court is required to give "the same preclusive effect to a state-court judgment as another court of that State would give." *Parsons Steel Inc. v. First Ala. Bank*, 474 U.S. 518, 523 (1986). Here, the Elections Clause issue was actually litigated and

decided in the Pennsylvania Supreme Court and so issue preclusion bars this Court from reconsidering the Pennsylvania Supreme Court's judgment. *See In re Stevenson*, 40 A.3d 1212, 1223-1224 (Pa. 2012). Finally, Plaintiffs lack Article III standing to bring this challenge.

2. Plaintiffs Cannot Show That the Legislature Was Not Given a Reasonable Opportunity to Enact a Remedial Map

Even if this Court finds that the Elections Clause did require the legislature to have another chance at drawing district lines, the undisputed record demonstrates that the Pennsylvania Supreme Court gave it just such an opportunity. After that court struck down the 2011 Plan as unconstitutional under the Pennsylvania Constitution, the court gave the General Assembly an opportunity to craft a constitutional map. Compl. Ex. B at 2. In its Order, the court provided the General Assembly with clear, familiar criteria for drawing the new plan, requiring any map 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." *Id.* at 3. These traditional districting principles have "deep roots in Pennsylvania constitutional law," *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 745 (Pa. 2012), and are widely recognized by courts, both state and federal, considering challenges to congressional redistricting plans. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993);

Vieth v. Jubelirer, 541 U.S. 267 (2004); *see also Legislature v. Reinecke*, 516 P.2d 6 (Cal. 1973).

Plaintiffs' claim that these criteria were "newly-hatched," Br. at 7, is specious. Indeed, at oral argument, counsel for Legislative Respondents (and for State Plaintiffs in this case) assured the court that they were well aware of these traditional districting principles and how to apply them. *See* Hangley Decl., Ex. 1 at 88:22-89:23. The court's written Opinion did not change any of those criteria, but merely applied them to the 2011 Plan.[8] Indeed, the Opinion repeated the wording of the Order verbatim and "emphasize[d] that, while explicating our rationale, nothing in this Opinion is intended to conflict with, or in any way alter, the mandate set forth in our Order of January 22, 2018." Compl. Ex. F at 4; *see also id.* at 123.

The Court also granted Legislative Respondents adequate time to enact a remedial plan. At oral argument, Legislative Respondents' counsel represented that the General Assembly "would like at least three weeks" to draw a new map.

[8] Plaintiffs' attempt to reinterpret the opinion as setting a standard of proportional representation must fail. The court was simply underscoring the fundamental principle, which dates back to *Reynolds v. Sims*, that every citizen is entitled to a vote equal to every other citizen, and that the 2011 Plan violated that principle by diluting certain citizens' votes.

Hangley Decl., Ex. 1 at 103:24-104:2.[9] The January 22 Order gave the General Assembly 18 days to send a new map to the Governor for review.[10] This period was plainly sufficient, particularly in light of the U.S. Supreme Court's recognition of "the reality that States must often redistrict in the most exigent circumstances." *Growe v. Emison*, 507 U.S. 25, 35 (1993).[11] As the Pennsylvania Supreme Court explained in its order adopting the Current Plan, the timeline it adopted required it to balance the requests of the parties and the Governor's representation that, to hold the primary on May 15, a plan would need to be in place by February 20.

[9] Legislative Respondents' co-counsel suggested the General Assembly "need[s] a month" – only slightly more time than the Court allotted. *See* Hangley Decl., Ex. 1 at 127:17-19.

[10] Courts routinely give legislatures the same or less time to remedy redistricting violations, especially "given recent advances in computer technology" that ensure "constitutional plans can be crafted in as short a period as one day." *Larios v. Cox*, 305 F. Supp. 2d 1335, 1342 (N.D. Ga. 2004) (giving the state legislature nineteen days to craft a new plan); *see also Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 679 (E.D. Pa. 2002) (three weeks); *Stephenson v. Bartlett*, 582 S.E.2d 247, 248-249 (N.C. 2003) (20 days); *Common Cause v. Rucho*, --- F. Supp. 3d ---, 2018 WL 341658, at *76 (M.D.N.C. 2018), *stayed on other grounds sub nom. Rucho v. Common Cause*, No. 17A745, 2018 WL 472142 (U.S. Jan. 18, 2018) (two weeks). In fact, North Carolina has codified a two-week period for the legislature to remedy a defective plan, after which the court will impose its own plan. N.C. Gen. Stat. § 120–2.4.

[11] And, indeed, the Pennsylvania General Assembly itself has successfully adopted redistricting legislation in less time in the past. *See* Dermody Aff. ¶ 15 (noting that the 2011 Plan was adopted in 16 days); *see also Mellow v. Mitchell*, 607 A.2d 204, 205 (Pa. 1992) (affirming Commonwealth Court's adoption of a court-ordered plan after General Assembly failed to enact a compliant plan within 12 days).

Compl. Ex. J at 3 n.2. Tellingly, neither Legislative Respondents nor anyone else sought additional time to adopt a compliant map. Compl. Ex. J at 5.

Instead, although the General Assembly considered a "shell" bill that would permit legal descriptions of the district boundaries to be added and a plan passed by February 9, Legislative Respondents never brought that plan to a vote. Dermody Aff. ¶¶ 26-29. Rather than ask the General Assembly to vote on a plan, Legislative Respondents devised their own plan and submitted it to Governor Wolf for his consideration. *Id.* ¶ 29. And even after the Governor rejected that map, Legislative Respondents made no attempt to advance the pending redistricting bill in the General Assembly. *Id.* ¶ 31.

B. Plaintiffs Cannot Demonstrate a Cognizable Injury, Let Alone Irreparable Harm

Plaintiffs rest their entire claim of irreparable harm on the fact that the Pennsylvania Supreme Court Order 1) invalidates a piece of enacted legislation and 2) imposes a Remedial Plan that "alter[s] voting districts and election results." Br. at 17. Neither of these is a proper basis for a finding of irreparable harm.

The fact that the Pennsylvania court struck the 2011 Plan as unconstitutional and adopted remedial districts is not, in and of itself, an irreparable harm. Plaintiffs simply have *no* legal right to have elections proceed under an unconstitutional map. Nor does the timing of the Pennsylvania Supreme Court's order somehow create such a right. As the U.S. Supreme Court has explained,

"once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). This is not such an "unusual" case. A remedial plan is already in effect that will permit the 2018 elections to proceed as scheduled. Marks Aff. ¶¶ 26-52. Plaintiffs cite no evidence for their hyperbolic claims that this schedule is "radically altered," Br. at 17, nor will they be able to produce any such evidence, because the most significant election dates have not changed *at all*.

As discussed above, Plaintiffs also cannot show that they were deprived of an opportunity to draw a new map. *See* pp. 17-20, *supra*. They simply failed to take advantage of it. Plaintiffs may not complain of "irreparable" harms of their own creation.

C. A Grant of the Relief Plaintiffs Seek Would Cause Enormous and Irreparable Harm to Defendants and to the Public

The balance of the harms and the public interest also weigh decisively in favor of Defendants. At this late date, the preliminary injunction that Plaintiffs request would require postponing or cancelling the 2018 primary elections, and would force the residents of Pennsylvania to endure yet another election cycle under a map that "clearly, plainly, and palpably" violates the state's constitution.

1. Now That the 2018 Election Cycle Is Underway, Any Injunction Would Be Severely Disruptive

Courts are understandably extremely reluctant to impose last-minute changes to voting rules just before an election. In this case, the Pennsylvania Supreme Court made every effort to expedite its proceedings to ensure that it could order relief with sufficient time for the implementation of a new map, should that prove necessary. The Court's efforts proved fruitful and ensured that a new map was in place in time for state executive officials, including Defendants, to implement the necessary changes to be ready for the primary. That process is nearly complete, and the election cycle has begun. Millions of voter registration files have been updated to enable candidates to obtain voter lists. *See* Marks Aff. ¶¶ 32-33. The Department is carrying out a coordinated communications and social media campaign to ensure candidates and voters are informed of the Current Plan. *Id.* ¶¶ 35-48. New petitions, specifically tailored to the congressional districts in the Current Plan, have been posted, downloaded by 150 candidates, and are being circulated. *Id.* ¶¶ 30-31. As a result, it would be profoundly disruptive for a federal court to enter an injunction now, and doing so would require that the May 15 primary be postponed or cancelled.[12]

[12] The Pennsylvania Election Code establishes rare instances in which parties, rather than voters in primary elections, select candidates for the general election. *See* 25 P.S. § 2953. This statute has never been invoked as a means to supplant an entire primary election, and it is unclear whether it would apply here, where the

Indeed, both the Eastern District of Pennsylvania and the Third Circuit, considering requests for relief similar to the one raised by Plaintiffs here, have declined to enter injunctions out of concern that doing so would disrupt or delay the election. In *Pileggi v. Aichele*, 843 F. Supp. 2d 584 (E.D. Pa. 2012), the court addressed a federal court challenge to state legislative elections in a posture nearly identical to what Plaintiffs present here. In that case, the Pennsylvania Supreme Court had struck down the proposed 2011 state legislative map and left the 2001 map in place until a constitutional map could be created by the Legislative Reapportionment Commission. *Id.* at 588. A few days after the period for nominating petitions began – very nearly the same point in the election cycle as in this case – Speaker Turzai and Senator Pileggi, then Senate Majority Leader, sought a temporary restraining order and preliminary injunction against the use of the 2001 plan. *Id.* at 591. Judge Surrick denied the request for a TRO, explaining that "[a]t this late date, granting a temporary restraining order will not provide clarity, speed or certainty. In fact, it will accomplish just the opposite. Granting a temporary restraining order at this stage will delay the primary election and potentially disenfranchise Pennsylvania voters." *Id.* at 595.[13]

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primary can proceed as under the Current Plan. Moreover, invoking § 2953 as a basis for cancelling a primary would not be satisfactory to voters or to those candidates who are not selected.

[13]Indeed, Judge Surrick found the claim in *Pileggi* so lacking in substance that he dismissed the complaint without constituting a three-judge panel. *See id*. at 597

Similarly, in *Page v. Bartels*, the Third Circuit refused to enjoin the implementation of a redistricting plan adopted by New Jersey's Apportionment Commission where such judicial action would have likely delayed or suspended the legislative elections and required the State of New Jersey to hold two separate primaries and general elections for its state offices. 248 F.3d 175 (3d Cir. 2001). The Court recognized that "[f]ederal court intervention that would create such a disruption in the state electoral process is not to be taken lightly." *Id.* at 195-196.

The U.S. Supreme Court's ruling in *Purcell* is also highly instructive. There, the Court admonished the Ninth Circuit Court of Appeals for enjoining Arizona from enforcing state law on the eve of an election. *Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006). The Court explained that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4-5.

Applying the principles of *Purcell*, federal courts faced with eleventh-hour requests to interfere in a state's election laws after the election process has begun overwhelmingly deny injunctive relief. *See, e.g.*, *Sw. Voter Registration Educ.*

("The injunctive relief that Plaintiffs request—intervention by this Court to stop Defendant from moving forward with the April 24, 2012 primary election process—is not a reasonable option. Plaintiffs, therefore, are not entitled to a three-judge panel.").

Project v. Shelley, 344 F.3d 914, 919 (9th Cir. 2003) (en banc) (noting that "election cases are different from ordinary injunction cases" because "[t]he public interest is significantly affected" and affirming denial of injunctive relief in consideration of the fact that "hardship [would] fall[] not only upon the putative defendant, the California Secretary of State, but on all the citizens of California"); *Colon–Marrero v. Conty–Perez*, 703 F.3d 134, 139 n.9 (1st Cir. 2012) (remarking that "even where plaintiff has demonstrated a likelihood of success, issuing an injunction on the eve of an election is an extraordinary remedy with risks of its own"); *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) (en banc) (staying an injunction "in light of the importance of maintaining the status quo on the eve of an election").

Plaintiffs are undoubtedly familiar with this standard. Legislative Respondents and legislative intervenors repeatedly cited *Purcell* in the State Court Litigation in support of their unsuccessful efforts to stay the Pennsylvania Supreme Court's order instituting a remedy for the 2018 elections. *See* Legislative Respondents' first Application for Stay, No. 159 MM 2017 (Pa. Jan. 25, 2018) at 3, second Application for Stay, No. 17A795 (U.S. Jan. 26, 2018) at 18, 19, and

third Application for Stay, No. 17A909 (U.S. Feb. 27, 2018) at 32; Intervenors' Application for Stay, No. 17A802 (U.S. Jan. 26, 2018) at 2, 14, 19.[14]

Now that the procedures necessary to hold the election on May 15 as scheduled have begun, those considerations weigh strongly against injunctive relief. First, as the passage of time continues to bring the election date closer, any further change will prevent Defendants and other Commonwealth and local officials from completing the steps necessary to conduct an orderly primary on May 15. The passage of time likewise makes it increasingly difficult to ensure that voters and candidates are well informed and prepared for the election. Second, unlike the situation in the State Court Litigation, Pennsylvania voters now have the opportunity to participate in the 2018 congressional election under a plainly constitutional map. Neither Plaintiffs nor anyone else has raised any claim that the Current Plan itself is flawed. Rather, Plaintiffs have raised solely procedural issues regarding the Pennsylvania Supreme Court's actions in adopting the Current Plan.[15] Third, there is no contention in this case that any voter's right to vote will

[14] Ironically, Plaintiffs themselves cite *Purcell* in their brief in support of a preliminary injunction, drawing special attention to the Court's caution against "conflicting orders." Br. at 21 (*quoting Purcell*, 594 U.S. at 5). But there are no "conflicting orders" currently. Rather, it is Plaintiffs themselves who seek to create the very confusion *Purcell* argues against by asking this Court to issue an order in conflict with that issued by the Pennsylvania Supreme Court less than two weeks ago.

[15] The Complaint casts vague aspersions on the result of the state court's efforts, musing that the Current Plan "does not *appear* to comply with" certain criteria and

be imperiled by an election under the Current Plan.[16] And, indeed, legislators repeatedly claimed in earlier federal court litigation that voters do not even have standing to bring claims under the Elections Clause, the sole basis for Plaintiffs' claims here. *See, e.g.*, Legislative Defendants' Motion to Dismiss, Dkt. No. 108, at 3-4, *Agre v. Wolf*, No. 17-cv-4392 (E.D. Pa. 2017).

A stay at this late stage is particularly inappropriate in light of Plaintiffs' inexcusable delay in seeking an injunction. Nothing about Plaintiffs' claims is specific to the new map that was issued on February 19, and Plaintiffs have offered no reason for their failure to institute this challenge sooner. Plaintiffs cannot claim an injunction is necessary to prevent disorder and confusion while pursuing litigation that exponentially compounds the chaos they purport to fear.

"*appears* . . . to pack Republicans into as few districts as possible." Compl. ¶¶ 87-88 (emphasis added). But the Plaintiffs did not actually challenge the court's map on this basis or offer any evidence supporting such contentions, which would be the proper way to raise such concerns. *See Growe*, 507 U.S. at 36. That failure is telling, and strongly counsels this Court against giving such innuendo any serious weight.

[16] Plaintiffs raise a passing concern about compliance with UOCAVA and the votes of military personnel and overseas voters. Br. at 21-22. But the adoption of the Current Plan and the brief delay in completion of the nomination process associated with it have created no UOCAVA issues beyond those faced in a normal election cycle. Marks Aff. ¶¶ 53-69. If anything, it is Plaintiffs' requested relief – re-imposition of the 2011 Plan, resulting in yet further delay – that would complicate compliance with UOCAVA. Thus, Plaintiffs' vague references to UOCAVA do nothing to advance their claims.

The balance of the equities in this case is particularly stark. Defendants testified in the State Court Litigation – and have reiterated here – that the election can proceed as scheduled under the Current Plan. Marks Aff. ¶¶ 18-19; 26-52. But any further change to the map at this point will require the primary election to be postponed or cancelled. *Id.* ¶¶ 70-81. Thus, as the cases cited above make clear, Plaintiffs' burden is at its apex because their claims present this Court with a choice between allowing Pennsylvania's election to proceed as scheduled or requiring it to be cancelled or postponed. Even where the districts created by an apportionment plan have already been found unconstitutional – a circumstance that Plaintiffs have not even alleged here – the "disruption of the election process which might result from requiring precipitate changes" may counsel against immediate injunctive relief. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

2. The Reinstatement of an Unconstitutional Plan Has Staggering Implications for Pennsylvania Citizens' Right to Vote

Pennsylvania voters have a fundamental interest in participating in fair elections under a valid districting map. While Intervenors, who are themselves Pennsylvania voters, may have more to say on this topic, a stay threatens to impose harm of constitutional dimensions by postponing or denying voters their rights under the state constitution as authoritatively determined by the Commonwealth's highest court. The harm voters would suffer if forced to proceed through a fourth

consecutive election cycle under a map that has been declared constitutionally invalid by the Pennsylvania Supreme Court is staggering. Courts regularly deny stays in redistricting cases precisely because they recognize that the practical effect of a stay is the perpetuation of a constitutional violation. *See, e.g., Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016); *Larios v. Cox*, 305 F. Supp. 2d 1335, 1336, 1344 (N.D. Ga. 2004); *Vera v. Bush*, 933 F. Supp. 1341, 1348 (S.D. Tex. 1996).[17]

V. CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court deny Plaintiffs' request for relief.

Dated: March 2, 2018

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[17] Indeed, the relief Plaintiffs seek here is even more egregious. In the cases cited above, courts refused to grant a stay that would have the effect of *leaving* an unconstitutional map in place. Here, Plaintiffs ask this Court to affirmatively re-impose an unconstitutional map.

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CERTIFICATE OF WORD COUNT

I, Mark A. Aronchick, hereby certify pursuant to Local Civil Rule 7.8(b)(2) that the text of the foregoing Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction contains 7109 words as calculated by the word-count function of Microsoft Word, which is within the limit of 7500 words granted by the Court in response to Defendants' Motion for Leave to File Brief in Excess of the Word Limit.

Dated: March 2, 2018

/s/ Mark A. Aronchick
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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2018, I caused the foregoing Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction to be filed with the United States District Court for the Middle District of Pennsylvania via the Court's CM/ECF system, which will provide electronic notice to all counsel and parties of record.

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