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

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

INTERVENORS' BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS OR ALTERNATIVELY TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

This federal lawsuit is antithetical to how the American judicial system is supposed to work. It is brought by proxies of losing parties from a state court action—represented by the same counsel—collaterally attacking the state court's judgment that a state law violated the state constitution. Worse, the ostensible bases for federal jurisdictional are constitutional arguments that the state court expressly rejected, that the U.S. Supreme Court already rejected once in denying the state court litigants a stay, and that are now pending again before the U.S. Supreme Court. This case is merely an attempt to get a fourth bite at the apple.

It is no surprise that a litany of jurisdictional and procedural bars preclude this suit. All Plaintiffs lack prudential standing because their claims rest on the purported legal rights of a third party, the Pennsylvania General Assembly, which was a separate party in the state action. Plaintiffs also all lack Article III standing. Among other problems, *Raines v. Byrd* and its progeny squarely bar the individual state legislators' claims, and the congressmen cannot show causation or redressability because they do not allege that, if given more time, the General Assembly and the Governor would have agreed to a new map that preserved their old districts, and because this Court cannot reinstate a congressional map that violates the state constitution. This Court also must abstain under *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), which precludes federal courts from interfering

with a state court's enforcement of its judgment based on arguments that were raised or could have been raised in state court. Issue preclusion independently bars Plaintiffs' arguments, which the state court rejected. So does *Rooker-Feldman*'s prohibition on federal collateral attacks on state court judgments. In all events, this Court should abstain or stay this case under *Colorado River* pending the U.S. Supreme Court's review of the state court's judgment. All of these doctrines exist precisely to prevent what Plaintiffs are trying to do in this case—to raise serial challenges to an adverse state court ruling in a lower federal court.

What's more, Plaintiffs' desperate efforts to cling to a gerrymandered map do not even come close to stating a viable federal claim. Plaintiffs' Count I asserts that the state high court's determination on a question of state constitutional law violates the Elections Clause, a claim that a century of U.S. Supreme Court precedent rejects. Count II would have this federal court referee, as no federal court before has ever done, a dispute between co-equal branches of a state government over state legislative processes. Count II also rests on the demonstrably false premise that the state court's January 22 order did not set forth clear criteria, when Plaintiffs' own Complaint shows it did.

The case should be dismissed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs are two Pennsylvania state senators ("State Plaintiffs") and eight Pennsylvania congressmen ("Congressional Plaintiffs"). They filed this action on February 22, 2018, collaterally attacking the Pennsylvania Supreme Court's judgment and remedy in Intervenors' ongoing state court action challenging Pennsylvania's 2011 congressional map. *See* Compl. ¶ 1 (ECF No. 1). Both the 2011 map and the state court proceedings are described more fully in Intervenors' concurrently filed opposition to Plaintiffs' motion for a preliminary injunction.

Plaintiffs' Complaint asserts two claims under the federal Elections Clause, U.S. Const. art. I, § 4. Count I directly challenges the Pennsylvania Supreme Court's decision that the 2011 map violates the Pennsylvania Constitution. It asserts that the state court "impermissibly usurped" the General Assembly's power under the Elections Clause by imposing "mandatory redistricting criteria found nowhere in Pennsylvania's Constitution." Compl. ¶¶ 99, 103. Count II challenges an aspect of the Pennsylvania Supreme Court's remedial process. It asserts that the state court, upon striking down the 2011 map, failed to give the General Assembly an "adequate opportunity to enact a remedial plan." *Id.* at 37.

On March 1, 2018, this Court granted Intervenors' motion to intervene.

QUESTIONS PRESENTED

1. Should this case be dismissed for lack of standing?

2. Should this Court abstain under *Pennzoil*?

3. Are Plaintiffs' arguments barred by issue preclusion?

4. Are Plaintiffs' Elections Clause arguments judicially estopped?

5. Should the Court abstain or stay this action under *Colorado River*?

6. Does this Court lack jurisdiction under the *Rooker-Feldman* doctrine?

7. Does the Complaint fail to state a claim under the Elections Clause?

ARGUMENT

A Rule 12(c) motion for judgment on the pleadings is judged by the "same standards" as a motion to dismiss under Rule 12(b).[1] *See Revell v. Port. Auth. of N.Y. & N.J.*, 598 F.3d 128, 134 (3d Cir. 2010).

"To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Pearson v. Sec'y Dep't of Corr.*, 775 F.3d 598, 604 (3d Cir. 2015)

[1] At the March 1 scheduling conference, the Court directed Intervenors to file a Rule 12(c) motion rather than a Rule 12(b) motion. Courts allow intervenors to file a Rule 12(b) motion after having submitted a proposed answer with their motion to intervene, as required by Rule 24(c). *See, e.g.*, *Hallmark Cards, Inc. v. Lehman*, 959 F. Supp. 539, 541 n.1 (D.D.C. 1997) (noting that "an intervenor may move to dismiss a proceeding" because "[t]he intervenor is to be treated as if it were an original party to the claim once the intervention has been allowed," and granting intervenor's motion to dismiss after intervenor had submitted proposed answer with its motion to intervene (see ECF No. 13, Case No. 95-318 (D.D.C.)). In any event, the distinction is immaterial because the standards are the same.

(quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))). "A claim is facially plausible when the facts alleged in the complaint allow a court to draw a reasonable inference that the defendant is liable." *Id.* "However, mere threadbare recitals of the elements of a cause of action, supported by conclusory statements, are insufficient to survive a motion to dismiss." *Id.* (quotations and alterations omitted).

"[T]he standard is the same when considering a facial attack under Rule 12(b)(1)." *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 633 (3d Cir. 2017) (quotations omitted). "Thus, to survive a motion to dismiss for lack of standing, a complaint must contain sufficient factual matter that would establish standing if accepted as true." *Id.* (quotations and alterations omitted). By contrast, in a "a factual challenge, no presumptive truthfulness attaches to [the] plaintiff's allegations." *Id.* (quotations and alterations omitted).

I. Plaintiffs Lack Standing

"The doctrine of standing … involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004) (quotations omitted). To establish Article III standing, a plaintiff must prove (1) injury-in-fact, (2) traceable to the defendant's conduct, and (3) redressable by a favorable ruling. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Prudential limitations further require that a plaintiff

"generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski*, 543 U.S. at 128 (quotations omitted). Here, all Plaintiffs lacks Article III and prudential standing.

A. Plaintiffs Lack Prudential Standing

All Plaintiffs lack prudential standing because their claims "rest … on the legal rights or interests of third parties." *Kowalski*, 543 U.S. at 129 (quotations omitted). "Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988). But Plaintiffs' claims are predicated solely on the General Assembly's purported rights under the Elections Clause, and nothing more. They argue that the Pennsylvania Supreme Court "usurped" the *General Assembly's* redistricting power under the Elections Clause and gave the *General Assembly* "insufficient time" to enact a remedial map after striking down the 2011 map. Compl. ¶¶ 103, 113. Plaintiffs here are not the General Assembly.

The Court must apply the "usual rule" here, *Am. Booksellers Ass'n*, 484 U.S. at 392, because there is no "'hindrance' to the possessor's ability to protect his own interests," *Kowalski*, 543 U.S. at 129; *see Purpura v. Christie*, 687 F. App'x 208, 210 (3d Cir. 2017) ("[T]o establish third-party standing, a litigant *must* demonstrate … some hindrance to the third party's ability to protect his or her own interests.") (emphasis added). The General Assembly is a separate defendant in

the state court action (as are the leaders of both chambers); it is represented there by separate counsel; and it litigated to protect its own institutional interests. For instance, the General Assembly filed a brief in state court successfully asserting legislative privilege "to defend and safeguard the constitutionally-endowed [rights] of the Legislative Branch."[2] Because Plaintiffs seek to "assert[] the legal rights of others" who are capable of protecting themselves, prudential limitations "bar" Plaintiffs' claims. *Phila. Marine Trade Ass'n-Int'l Longshoremen's Ass'n Pension Fund v. C.I.R.*, 523 F.3d 140, 145 (3d Cir. 2008).

Dismissing for lack of prudential standing here is required not only by the law, but by common sense. The Court should not permit a collateral attack on the judgment of a state court by parties who assert only the purported rights of the state legislature, which was fully represented in the state court action.

B. Plaintiffs Lack Cognizable Injury

Prudential standing aside, Plaintiffs do not and cannot establish any of the requirements for Article III standing. To begin with, no Plaintiff has injury-in-fact. State Plaintiffs claim injury in their official capacity as state legislators, alleging

[2] Br. of General Assembly in Supp. of Institutional Speech or Debate Privilege of the Legislative Branch and Other Privileges at 1 (Nov. 17, 2017), https://www.pubintlaw.org/wp-content/uploads/2017/06/2017-11-17-General-Assembly-Brief.pdf.

"usurpation" of their powers and a purported failure to give adequate opportunity to exercise those powers. Compl. ¶¶ 93-117. But it is firmly established that individual legislators lack standing to bring claims based on such injuries. In *Raines v. Byrd*, 521 U.S. 811 (1997), the Supreme Court held that individual legislators lack standing to sue over purported usurpations of legislative power unless they *personally* could have changed the legislative outcome but-for the usurpation. Absent a showing that their personal "votes would have been sufficient to defeat (or enact) a specific legislative Act," *Common Cause of Pa. v. Pennsylvania*, 558 F.3d 249, 265-67 (3d Cir. 2009) (quotations omitted), individual legislators cannot "tenably claim a 'personal stake' in the suit," *Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n*, 135 S. Ct. 2652, 2664-65 (2015). Here, State Plaintiffs do not allege and cannot establish that their two votes "would have been sufficient" to pass either the old map or any new map. *Id.* Their claims thus are squarely foreclosed under *Raines* and its progeny.

Congressional Plaintiffs fare no better. "A legislative representative suffers no cognizable injury … when the boundaries of his district are adjusted by reapportionment." *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980). "While the voters in a representative's district have an interest in being represented, a representative has no like interest in representing any particular constituency. It is only the voters, if anyone, who are ultimately harmed." *Id.* The

affidavits submitted by three of the Congressional Plaintiffs bear this out. Each affidavit focuses on alleged hardships to specific voters or communities, but any such injuries must be asserted by these voters; Congressional Plaintiffs lack any particularized interest. Nor do Congressional Plaintiffs allege that they have suffered personal injury from the expenditure of campaign funds. The Complaint (but not the affidavits) assert the congressmen have spent money running for re-election in their old districts, but that money was spent by their "campaign committees," which are separate legal entities. The Complaint contains no facts alleging that Congressional Plaintiffs themselves have suffered financial harm.

Lance v. Coffman, 549 U.S. 437 (2007) (per curiam), is instructive. There, the Colorado Supreme Court had held that the state legislature's congressional map violated the state constitution and imposed a court-drawn map instead. *Id.* Just like here, a new group of plaintiffs filed a federal lawsuit alleging that the state court's decision violated the Elections Clause. *Id.* And like here, the Colorado General Assembly had been a party to the state action, but was not a party to the new federal case. *Id.* The U.S. Supreme Court held that the federal plaintiffs lacked Article III standing to bring claims under the Elections Clause. *Id.* at 441-42. The Court distinguished prior cases that had entertained Elections Clause challenges, because "[e]ach of [those] cases was filed by a relator on behalf of the

State rather than private citizens acting on their own behalf." *Id.* at 442. So too here.

C. Plaintiffs Have Not Pled Causation as to Count II

Even if Plaintiffs had injury-in-fact, they fail to plead any facts that could establish causation as to Count II of the Complaint. To plead Article III standing, Plaintiffs must plausibly allege that the constitutional violation was a "but for" cause of their purported injuries. *Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016). For Count II, they must establish that the failure to give the General Assembly "an adequate opportunity to enact a remedial map" was a but-for cause of Congressional Plaintiffs' loss of their old districts and the usurpation of State Plaintiffs' (purported) rights to pass a congressional map. Compl. at p. 37.

Plaintiffs' theory of harm requires an attenuated chain of causation involving third parties (the General Assembly and the Governor) that Plaintiffs do not even attempt to plead in the Complaint. Plaintiffs could establish causation only if the General Assembly would have passed a new plan, and the Governor would have signed it, had the General Assembly been given more time. What's more, Congressional Plaintiffs must plead that the General Assembly and the Governor would have reached agreement on a remedial map that substantially preserved Congressional Plaintiffs' old districts. Otherwise, Congressional Plaintiffs would

have suffered the same injury—the loss of their own districts—even if the General Assembly had been given more time.

Critically, however, the Complaint does not contain a single allegation—not one—that could establish the General Assembly, if given "adequate" time, would have reached agreement on a new map with the Governor. Plaintiffs do not even say what "adequate" time is. And they certainly do not allege that the General Assembly and the Governor would have agreed to a new map that substantially preserved the old, gerrymandered districts. Nor could they. The absence of such essential allegations is fatal: "to survive a motion to dismiss for lack of standing, a plaintiff must allege facts that affirmatively and plausibly suggest" it has met each of the three standing elements. *Finkelman*, 810 F.3d at 194.

Moreover, a plaintiff's burden to establish standing is "substantially more difficult" where, as here, "[t]he existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors." *Lujan*, 504 U.S. at 562. The plaintiff must "adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redress ability of injury." *Id*. Congressional Plaintiffs adduce no facts showing that the General Assembly and the Governor, with more time and left "unfettered," would have agreed to a remedial map that substantially preserved the 2011 map's gerrymandered districts. The Governor publicly pledged that he

would not sign any new map that was a "partisan gerrymander." Tom Wolf, *It's Time to Fix Gerrymandered Maps*, Daily Kos, Jan. 24, 2018. No matter how much time the Pennsylvania Supreme Court gave the Legislature, the Governor was not going to agree a new map that prevented Congressional Plaintiffs' purported injuries by preserving the old map. The Complaint does not and cannot allege any fact to the contrary.

D. Plaintiffs' Alleged Injuries Are Not Redressable

Nor are Congressional Plaintiffs' purported injuries redressable by this Court. To redress Plaintiffs' injuries, this Court would have to reinstate the 2011 map's districts that the state's highest court held violate the state constitution. This Court cannot grant such relief. In addition to foundational principles of federalism, a federal statute bars this Court from ordering congressional elections under a map that was not enacted "in the manner provided by [state] law." 2 U.S.C. § 2a(c). Under this provision, a congressional map is enacted "in the manner provided by state law" where it is "established … in whatever way [states] may have provided by their constitution and by their statutes." *Ariz. State Legislature*, 135 S. Ct. at 2669 (quotations omitted). The 2011 map was not established in a way that complies with the state constitution, and it therefore is not valid map for purposes of § 2a(c). This Court accordingly cannot reinstate the old districts. They are gone for good.

In fact, if this Court were to enjoin use of the state court's remedial map, it would only exacerbate the Congressional Plaintiffs' purported injuries. They would suddenly find themselves running in at-large elections pursuant to 2 U.S.C. § 2a(c)(5). That statute mandates at-large elections where (i) a state lost a congressional seat from the prior decade's reapportionment (as occurred in Pennsylvania); (ii) the state does not have a congressional map enacted "in the manner provided by the law thereof"; and (iii) "there is no time for either the State's legislature or the courts to develop one." *Branch v. Smith*, 538 U.S. 254, 275 (2003) (plurality op.).

At-large elections would exacerbate, not eliminate, Congressional Plaintiffs' purported injuries from the loss of their old, gerrymandered districts.

II. This Lawsuit Is Jurisdictionally and Procedurally Barred

Beyond the lack of standing, at least five additional independent jurisdictional and procedural bars doom this lawsuit. A federal district court is not a proper forum to collaterally attack a state court judgment or the manner in which the state court effectuates its judgment. The only proper forum for such arguments is the U.S. Supreme Court, which has already once refused to grant a stay based on the arguments Plaintiffs present here. And the U.S. Supreme Court is now considering a second emergency stay application brought by Speaker Turzai and

Senator Scarnati. That stay application is a near carbon copy of Plaintiffs' preliminary injunction brief here.

Relevant to several of the doctrines discussed below, Speaker Turzai and Senator Scarnati's public statements make clear their close alignment with Plaintiffs here and their attempt to use this lawsuit as a second bite at the apple:

- On February 5, after the U.S. Supreme Court denied their first emergency stay application, Speaker Turzai and Senator Scarnati issued a joint statement publicly announcing that they "may be compelled to pursue further legal action in federal court."[3]

- On February 7, Senator Scarnati declared: "If Pennsylvania justices decide to start drawing maps of Congressional districts, we view that as a federal issue, and we will go to federal court."[4]

- On February 9, Speaker Turzai said: "Once we see what the supreme court does, we will look at our other remedies, we may be very well back in federal court."[5]

- On February 16, the Senate's top lawyer, Drew Crompton, said that it was "'certainly probable' the GOP will take action in federal court" once a remedial map was adopted, but "the GOP legal team [was] figuring out who

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[3] Katie Meyer, *Legislature's Plan Remains Hazy In PA Congressional Map-Redrawing*, Feb. 6, 2018, 90.5 WESA, http://wesa.fm/post/legislature-s-plan-remains-hazy-pa-congressional-map-redrawing#stream/0.

[4] Charles Thompson, *A reluctant Pa. legislature settles in for a map-making cram session*, Feb. 6, 2018, *PennLive*, goo.gl/yrMbYv.

[5] *Pa. Republican leaders meet challenge to redraw congressional districts*, FOX43, Feb. 9, 2018, goo.gl/cjwBH7.

it would name as a defendant in a new lawsuit, because it could not sue the state Supreme Court."[6]

- On February 20, Speaker Turzai said that he and Senator Scarnati were "preparing [a] challenge" that "would focus on 'jurisdictional issues.'"[7]

- On February 21, the day before this suit was filed, Speaker Turzai wrote in email to Republican members of the Pennsylvania House: "House and Senate Republican leadership will be initiating action in the Federal Court in the Middle District of Pennsylvania."[8]

Multiple federal abstention doctrines preclude precisely such collateral attacks and vexatious litigation. Regardless, this Court would be required to abstain even if the defendants in the Pennsylvania Supreme Court had had nothing to do with this lawsuit.

A. This Court Must Abstain Under *Pennzoil*

This Court must abstain under *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). In *Pennzoil*, after Texaco lost in state court, it filed a federal lawsuit seeking to enjoin enforcement of the state court judgment, alleging that the state's process for compelling compliance with the judgment violated the U.S. Constitution. *Id.* at 13. The U.S. Supreme Court, citing "the importance to the

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[6] Sam Levine, *Pennsylvania Republicans Plan Another Lawsuit To Fight Fix To Gerrymandering*, HuffPo, Feb. 16, 2018, goo.gl/gkcxvN.

[7] Jonathan Lai, *Pushing gerrymandering fight, Republicans prepare lawsuits challenging Pa. congressional map*, The Inquirer, Feb. 19, 2018, goo.gl/qGtY5n.

[8] Email from Speaker Turzai to Republican House Members, Feb. 21, 2018, *available at* goo.gl/LmkaUv.

States of enforcing the orders and judgments of their courts," held that the federal district court could not entertain the suit. *Id.* at 13. "[F]ederal injunctions" may not be used to "interfere with the execution of state judgments," particularly where the federal lawsuit "challenge[s] the very process by which [the state court] judgments were obtained" and the federal constitutional claim could have been raised in the state court action. *Id.* at 14-16. Under *Pennzoil*, it is "inappropriate for the federal court to proceed on an injunctive claim to render [a] state judgment nugatory." *Schall v. Joyce*, 885 F.2d 101, 110 (3d Cir. 1989); *see also Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013) (*Pennzoil* applies where a federal challenge "implicate[s] a State's interest in enforcing the orders and judgments of its courts").

Pennzoil forbids the relief Plaintiffs seek here. Plaintiffs not only ask this Court to render the state court's judgment "nugatory," but Count II specifically challenges the "process" by which the state court enforced its decision and crafted a remedy. *Pennzoil*, 481 U.S. at 14. That is "precisely the type of" claim for which *Pennzoil* abstention is required. *Lazaridis v. Wehmer*, 591 F.3d 666, 671 (3d Cir. 2010). The proper forum for any federal constitutional challenge to the Pennsylvania Supreme Court's procedures for developing a remedial map was in the state court itself, or in the U.S. Supreme Court on direct review. "Were [this] District Court to grant [the] relief" Plaintiffs request, "it could readily be

interpreted as reflecting negatively upon the state court's ability"—and, indeed, the U.S. Supreme Court's ability—"to enforce constitutional principles." *Id.*

Pennzoil applies even though Plaintiffs were not formally parties in the state court action. *Pennzoil* is a form of *Younger* abstention, and numerous courts have held that *Younger* bars claims of federal plaintiffs whose interests are "inextricably intertwined with," or "essentially derivative" of, parties to a state court action. *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 82-84 (2d Cir. 2003); *accord Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 881 (8th Cir. 2002); *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1230-31 (10th Cir. 2004); *Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630, 636 (6th Cir. 2005).

Plaintiffs' interests are clearly "intertwined with" and "essentially derivative" of the interests of General Assembly, Speaker Turzai, Senator Scarnati, and the Republican congressional candidates who intervened in the state court action. *Spargo*, 351 F.3d at 82-84. Beyond Speaker Turzai and Senator Scarnati's clear role in orchestrating this lawsuit, *supra* pp.14-15, the sole premise of both Counts is that the state court violated the institutional rights of the General Assembly, a party to the state court action. Plaintiffs may not "interfere with the execution of [the] state judgment[]" based on a purported violation of the rights of a state court litigant who could have raised these arguments in state court. Settled "principles of comity" require this Court to abstain. *Pennzoil*, 481 U.S. at 13-14.

B. Plaintiffs' Arguments Are Barred by Issue Preclusion

Issue preclusion independently bars Plaintiffs' claims. Under the full faith and credit statute, federal courts must "give res judicata effect to a state judgment to the extent the state would give its own prior judgment such effect." *Davis v. U.S. Steel Supply, Div. of U.S. Steel Corp.*, 688 F.2d 166, 170 (3d Cir. 1982) (citing 28 U.S.C. § 1738). When applied to a "state court judgment," collateral estoppel "not only reduce[s] unnecessary litigation and foster[s] reliance on adjudication, but also promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980); *see also Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81-84 (1984). These principles would be eminently well-served here.

Under Pennsylvania law, collateral estoppel applies if "(1) the issue decided in the prior case is identical to the one presented in the later action; (2) there was a final adjudication on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment." *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 512 (Pa. 2016).

Each requirement is satisfied here. After full briefing and argument, the Pennsylvania Supreme Court rejected Speaker Turzai and Senator Scarnati's Elections Clause arguments. 02/07/18 Op. 137 n.79 (ECF No. 1-2, 1-3). The state high court also rejected their arguments that the General Assembly lacked enough time to enact a new map. 2/19/18 Order 3 n.2, 5 n.6 (ECF No. 1-3, 1-4). The state court thus squarely ruled on the issues presented in this federal action, and the state court's rulings on these issues were essential to its judgment.

Plaintiffs are in privity with Speaker Turzai, Senator Scarnati, and the General Assembly for preclusion purposes. "Privity" in this context "is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within the res judicata." *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 493 (3d Cir. 1990) (Alito, J.). Pennsylvania courts apply a "broad[]" conception of privity in the preclusion context, barring re-litigation of issues by those who share "such an identification of interest … with another as to represent the same legal right." *Bergdoll v. Commonwealth*, 858 A.2d 185, 197 (Pa. Commw. Ct. 2004), *aff'd*, 874 A.2d 1148 (Pa. 2005); *accord Sec'y U.S. Dep't of Labor v. Kwasny*, 853 F.3d 87, 94-95 (3d Cir. 2017). Federal courts similarly have recognized that privity exists where the "nonparty was adequately represented by someone with the same interests who was a party," or where "the nonparty attempts to bring suit as the designated representative of

someone who was a party in the prior litigation." *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 312 (3d Cir. 2009) (quotations omitted).

Courts applying Pennsylvania preclusion law have thus found privity in a variety of different contexts. *See, e.g.*, *Gambocz v. Yelencsics*, 468 F.2d 837, 842 (3d Cir. 1972); *U.S. Steel Corp.*, 921 F.2d at 493; *Jett v. Beech Interplex, Inc.*, 2004 WL 1595734, at *4 (E.D. Pa. July 15, 2004); *Williams v. City of Allentown*, 25 F. Supp. 2d 599, 604 (E.D. Pa. 1998); *BuyFigure.com, Inc. v. Autotrader.com, Inc.*, 76 A.3d 554, 560 (Pa. Super. Ct. 2013); *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1317 (Pa. Super. Ct. 1983).

To deter "fence-sitting" and promote finality, courts apply an even broader conception of privity where, as here, plaintiffs raise a public law issue. *Robertson v. Bartels*, 148 F. Supp. 2d 443, 450 (D.N.J. 2001) (three-judge court). "[B]ecause of the potentially large number of plaintiffs with standing in public law cases, were they allowed to raise issues continually, public law claims would assume immortality." *Id.* (quotations omitted).

Under any applicable standard, Plaintiffs here are in privity with the legislative defendants in the state court action—defendants who previously presented the same Elections Clause arguments and lost. State Plaintiffs are members of the General Assembly. They not only share an identity of interests with the state court legislative defendants and are asserting those defendants'

"same legal right[s]," *Bergdoll*, 858 A.2d at 197, but are also "agents" of those litigants "for purposes of res judicata," *Day*, 464 A.2d at 1317.

Congressional Plaintiffs likewise share a perfect identity of interests with the state court legislative defendants, are asserting those defendants' same legal rights, and filed an amicus brief in support of those defendants' emergency stay application to the U.S. Supreme Court. In fact, Congressional Plaintiffs are represented by the same counsel, Mr. Haverstick, who represented Senator Scarnati in the state court action. The sharing of counsel is "indicative of privity," *Guthrie Clinic, Ltd. v. Travelers Indem. Co. of Ill.*, 104 Fed. App'x 218, 223 (3d Cir. 2004), and can be "of singular significance" to a privity analysis, *Ruiz v. Comm'r of Dep't of Transp. of City of N.Y.*, 858 F.2d 898, 903 (2d Cir. 1988). Congressional Plaintiffs would be hard-pressed to claim that their interests were not "adequately represented" in state court when their own lawyer represented Senator Scarnati. *Nationwide*, 571 F.3d at 312-13.

It is also clear that there is an "understanding" that Congressional Plaintiffs are acting in a "representative capacity" for, or "as designated representatives" of, Speaker Turzai and Senator Scarnati in this case. *Nationwide*, 571 F.3d at 312-13. As described above, Speaker Turzai and Senator Scarnati planned this lawsuit for weeks. They filed a (second) U.S. Supreme Court stay application in their own names, and their lawyers are raising identical arguments in this action under

Congressional Plaintiffs' names. If ever there were a case where a litigant was acting as a stand-in for a litigant from a prior proceeding, it is here.

If collateral estoppel does not bar Plaintiffs from raising their Elections Clause arguments in this suit, where will it end? Will Speaker Turzai, Senator Scarnati, and their counsel recruit other congressional candidates or members of the General Assembly to file suit in the Western District of Pennsylvania? And if that does not work, maybe try the Eastern District next? Issue preclusion exists precisely to prevent such abuse of the judicial system.

C. Plaintiffs' Arguments Are Judicially Estopped

Plaintiffs are judicially estopped from arguing that the state court lacked power to invalidate the 2011 map and adopt a remedial map. Their proxies, Speaker Turzai and Senator Scarnati, took exactly the opposite legal positions in other federal litigation, and won. "The doctrine of judicial estoppel precludes a party from asserting a position inconsistent with a position successfully taken by the same party or a party in privity in a prior lawsuit." *National Union Fire Ins. Co. v. Allfirst Bank*, 282 F. Supp. 2d 339, 348 (D. Md. 2003); *accord Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 996 (9th Cir. 2012) (judicial estoppel applies equally to those in privity with a party to a prior lawsuit); *Maitland v. Univ. of Minn.*, 43 F.3d 357, 364 (8th Cir. 1994) (same).

To determine if a party is judicially estopped under federal law, courts consider whether (1) the party's position is "clearly inconsistent with its earlier position"; (2) "the party has succeeded in persuading a court to accept that party's earlier position"; and (3) "the party seeking to assert an inconsistent position would derive an unfair advantage ... if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (quotations omitted). All three factors are met here—it is difficult to imagine a clearer case where estoppel is warranted "to prevent improper use of judicial machinery." *Id.*

First, Speaker Turzai and Senator Scarnati advanced the opposite of Plaintiffs' current position in separate federal litigation. On November 20, 2017, in a federal lawsuit challenging the 2011 map (*Diamond v. Torres*), Speaker Turzai and Senator Scarnati—represented by the same counsel who represent Plaintiffs here—asked the federal court to stay and/or abstain based on the state court action and an earlier federal lawsuit challenging the 2011 map. *Diamond*, 5:17-cv-05054-MMB, ECF No. 26-4 (E.D. Pa. 2017). With respect to the state court action, they argued that the federal court was "required" to defer to the state court under binding U.S. Supreme Court precedent. *Id.* at 24. Under *Growe v. Emison*, 507 U.S. 25 (1993), they argued, state courts are valid and preferable "agents of apportionment" with respect to congressional redistricting. *Diamond*, ECF No. 26-4 at 24. The federal court granted an initial stay on November 22, and

subsequently extended the stay through January 8, 2018 on the basis of the state court action. *Diamond*, ECF Nos. 40, 48.

After the stay expired, Speaker Turzai and Senator Scarnati filed a new stay motion, again asserting that "federal judges are '**required** … to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.'" *Diamond*, ECF No. 69-2 at 16 (emphases in original) (quoting *Growe*, 507 U.S. at 33). Speaker Turzai and Senator Scarnati added: "In fact, federal judges are to 'prefer[] *both* state branches to federal courts as agents of apportionment.'" *Id.* (emphasis in original) (quoting *Growe*, 507 U.S. at 34).

On January 22, 2018—after the Pennsylvania Supreme Court struck down the 2011 map and set forth the timeline for the legislature to enact a new map—Speaker Turzai and Senator Scarnati filed a reply brief in *Diamond* again asserting that the federal court had to defer to the state court. *Diamond*, ECF No. 81. They argued that the *Diamond* court was "required to defer to Pennsylvania's legislative, executive and judicial branches" under the "plain language of *Growe*." *Id.* at 2, 5.

On January 23, the *Diamond* court granted Speaker Turzai and Senator Scarnati's motion and stayed the case indefinitely "upon consideration of Legislative Defendants' motion to stay (Doc. No. 69), as well as the *per curiam*

order entered by the Supreme Court of Pennsylvania on January 22, 2018 in *League of Women Voters of Penn. v. Commw. of Penn.*" *Diamond*, ECF No. 84.

In these circumstances, there can be no question that inconsistent positions have been taken across these cases. Plaintiffs' Complaint here alleges that the Elections Clause preluded the state court from "invalidating the 2011 map" under the theory advanced in Intervenors' state court lawsuit, Compl. ¶ 98, and also precluded the state court's remedial schedule, Compl. ¶¶ 104-114. But Speaker Turzai and Senator Scarnati—who are in privity with Plaintiffs and represented by the same counsel—said the opposite to the *Diamond* court. They asserted there that the Pennsylvania Supreme Court was a valid "agent[] of apportionment" whose authority to review and remedy congressional districting maps was so unquestioned that the federal courts were "required" to defer to the state court. Speaker Turzai and Senator Scarnati reiterated these arguments to the *Diamond* court even *after* the state court issued its January 22 order that forms the basis of Count II here. *Diamond*, ECF No. 81.

Second, this argument "succeeded" in *Diamond*. *New Hampshire*, 532 U.S. at 750-51. The court there granted a full and indefinite stay based on the argument that state courts have authority and primacy in addressing congressional redistricting challenges. *Diamond*, ECF No. 84. This stay has allowed Speaker Turzai and Senator Scarnati to avoid discovery and trial in federal court and

precluded the *Diamond* plaintiffs from obtaining relief from the federal court in time for the 2018 elections.

Finally, judicial estoppel is necessary to prevent an "unfair advantage" and abuse of the "judicial machinery." *New Hampshire*, 532 U.S. at 750-51. If this Court were to grant an injunction, two different federal courts will have granted two *simultaneous* orders based on diametrically opposed positions: (1) a stay in *Diamond* based on the argument that the Pennsylvania Supreme Court has primary authority to resolve the challenge to the 2011 map; and (2) an injunction of the state high court's judgment and remedy, based on the argument that the state court had no authority to resolve the challenge to the 2011 map. The judicial estoppel doctrine exists precisely to prevent such results.

D. This Court Should Stay or Abstain Under *Colorado River*

This Court should abstain or stay this action while parallel state-court proceedings raising identical legal claims are pending before the U.S. Supreme Court. Again, Plaintiffs abbreviate their discussion of this abstention doctrine in light of the court guidance's to avoid duplication with the other Defendants' brief.

Briefly, all of the relevant factors for abstention under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976), are met. Abstention is necessary to prevent "piecemeal litigation" of the same issues in parallel state court proceedings. *Trent v. Dial Med. of Fla., Inc.*, 33 F.3d 217, 225

(3d Cir. 1994). In the Pennsylvania state court proceedings, the defendants are raising exactly the same legal issues in their stay applications to the U.S. Supreme Court, and will make those arguments again in their petitions for certiorari. The state court action preceded this case, and it is only now after losing in the state courts that Plaintiffs seek a second bite at the apple in federal courts. This "attempt to avoid adverse rulings by the state court … weighs strongly in favor of abstention." *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989). The state legislative process and state separation of powers questions at issue are better adjudicated by the state high court, and if there is truly a federal issue, by the U.S. Supreme Court. And the U.S. Supreme Court is clearly an adequate forum to "protect the federal plaintiffs' rights." *Trent*, 33 F.3d at 225.

Even if this Court does not abstain under *Colorado River*, a stay of this case is warranted until the conclusion of U.S. Supreme Court review. This Court may, "[i]n the exercise of its sound discretion," hold this suit "in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues." *Clientron Corp. v. Devon IT, Inc.*, 2014 U.S. Dist. LEXIS 31086 (E.D. Pa. 2014). If ever there were a case where a federal district court should await the outcome of another matter, it is this one.

E. This Court Lacks Jurisdiction Under *Rooker-Feldman*

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

In line with the Court's direction at the March 1 scheduling conference to avoid duplication, Intervenors refer the Court to the named Defendants' briefing on this topic, which substantially overlaps with what Intervenors would have written. *See also Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 91 (2d Cir. 2005); *Bert v. N.Y.C. Bd. of Elections*, No. CV-06-4789(CPS), 2006 WL 2583741, at *5 (E.D.N.Y. Sept. 7, 2006); *Lawrence v. Bd. of Election Comm'rs of City of Chicago*, 524 F. Supp. 2d 1011, 1022 (N.D. Ill. 2007); *Cruz v. Bd. of Elections of City of New York*, 396 F. Supp. 2d 354, 355 (S.D.N.Y. 2005).

III. Plaintiffs' Elections Clause Claims Have No Merit

Even if Plaintiffs had standing (which they do not) and could surmount all of the jurisdictional and procedural obstacles described above (which they cannot), this action still should be dismissed because neither count in the Complaint states a viable claim. Intervenors' concurrently filed opposition to Plaintiffs' preliminary

injunction motion explains in detail that Plaintiffs' claims are squarely foreclosed by binding precedent. In line with the Court's direction to avoid duplication, we briefly summarize below why Plaintiffs fail to state a claim.

Plaintiffs' Count I challenges the Pennsylvania Supreme Court's decision "invalidating the 2011 Plan." Compl. ¶ 98. Plaintiffs allege that the Pennsylvania Supreme Court violated the Elections Clause because it "legislated criteria that the Pennsylvania Supreme Court must satisfy when drawing congressional plans." *Id.* at 36. This theory is a non-starter. Nearly a century's worth of U.S. Supreme Court precedent holds that congressional districting plans must comport with state constitutional requirements, and that nothing in the Elections Clause dictates otherwise. Just three years ago, the U.S. Supreme Court held that "[n]othing in [the Elections] Clause instructs, nor has [the] Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legislature*, 135 S. Ct. at 2673. Here, the state's highest court has held that, under the Pennsylvania Constitution's Free and Equal Elections Clause, congressional districting maps may not subordinate the traditional districting criteria, which the 2011 map did. This determination of state law by the state high court is unreviewable by any federal court. The 2011 map is invalid under state law and cannot be revived.

Count II likewise fails as a matter of law. Plaintiffs do not cite a single case recognizing a federal cause of action for any party—much less a party other than the state legislature—to challenge a state court's purported failure to give the state legislature enough time to pass a remedial map. Their procedural objections are all based on state law, not federal law, and would improperly involve federal courts in disputes between branches of state government.

In any event, Plaintiffs do not plausibly plead that the General Assembly lacked sufficient time to pass a remedial map. Plaintiffs' claim rests on the false premise that the state court's January 22 order did not provide sufficiently clear guidance to the General Assembly on the criteria for a remedial map, such that the General Assembly could only begin work with the February 7 opinion. But they do not identify any requirement in the February 7 opinion that was absent from the January 22 order. Plaintiffs effectively concede that the General Assembly had sufficient time if the January 22 order was the relevant starting date, and for good reason: Speaker Turzai's and Senator Scarnati's own counsel requested just three weeks to pass a new map at oral argument before the Pennsylvania Supreme Court, which the court gave. What's more, the General Assembly itself was a separate party represented by separate counsel in the state case and never objected to the timeframe afforded by the court—not after the January 22 order, not after the

February 7 opinion, not ever. Plaintiffs cannot argue that the General Assembly needed more time when the General Assembly itself never argued as much.

CONCLUSION

For the foregoing reasons, the Court should dismiss this case.

Dated: March 2, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to Local Rule 7.8(b)(2), I, Thomas B. Schmidt III, hereby certify that the foregoing Brief in Support of Motion to Intervene as Defendants, contains 7,188 words, calculated using Microsoft Word's word count feature.

/s/ Thomas B. Schmidt III
Thomas B. Schmidt III

CERTIFICATE OF SERVICE

I, Thomas B. Schmidt, III, hereby certify that on March 2, 2018, I caused a true and correct copy of the foregoing Intervenors' Brief in Support of Motion for Judgment on the Pleadings or Alternatively To Dismiss to be served on all counsel of record with the CM/ECF system.

/s/ Thomas B. Schmidt III
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