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

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Pursuant to LR 7.7, Intervenors respectfully submit this reply in support of their motion for judgment on the pleadings or to dismiss ("Mot."; ECF No. 90).

I. Plaintiffs Lack Standing

A. Plaintiffs Lack Prudential Standing

Intervenors' opening brief argued that "All Plaintiffs lack prudential standing because their claims rest on the legal right or interests of" the General Assembly, yet they failed to identify any "hindrance" to the General Assembly asserting its own rights. Mot. 6-7 (quotations omitted).

Congressional Plaintiffs do not respond at all or make any argument that they have prudential standing. They do not dispute that their Elections Clause claims rest on purported legal rights of the General Assembly, nor do they assert any hindrance to the General Assembly asserting its own rights. Instead, their opposition wrongly asserts that Intervenors "do not appear to allege that Federal [Congressional] Plaintiffs lack 'prudential standing.'" Opp. 35 n.14 (ECF No. 117). Intervenors' motion unequivocally asserted, twice, that "*All Plaintiffs* lack prudential standing." Mot. 1, 6 (emphasis added). Nothing remotely limited Intervenors' arguments to State Plaintiffs. And while Congressional Plaintiffs try to show injury-in-fact, prudential standing bars them from raising a violation of a third party's rights "[e]ven if an injury in fact is demonstrated." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988).

By failing to respond substantively, Congressional Plaintiffs waived the issue of prudential standing. "[A] party who fails to brief an issue [in its opposition to a motion to dismiss] waives that issue." *Frey v. Grumbine's RV*, 2010 WL 4718750, at *8 (M.D. Pa. Nov. 15, 2010) (citing *Gorum v. Sessions*, 561 F.3d 179, 185 n.4 (3d Cir. 2009)); *see D'Angio v. Borough of Nescopeck*, 34 F. Supp. 2d 256, 265 (M.D. Pa. 1999).

Waiver aside, *all* Plaintiffs lack prudential standing. Their claims rest on the *General Assembly's* purported rights under the Elections Clause. This is evident from the titles of the two counts in the Complaint:

- COUNT I: "Usurpation of *Legislative* Authority"
- COUNT II: "Failure to Afford *the General Assembly* an Adequate Opportunity to Enact a Remedial Plan."

Compl. ¶¶ 35, 37 (emphases added). And the body refers repeatedly and exclusively to violations of purported rights of "the legislature" and "the General Assembly." *Id.* ¶¶ 98-117.

Because Plaintiffs' claims rest on a third party's purported rights, Plaintiffs must meet three "preconditions" to establish third-party standing, including that "the third party must face some obstacles that prevent it from pursuing its own claims." *Holland v. Rosen*, 277 F. Supp. 3d 707, 730 (D.N.J. 2017) (quoting *Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288-89 (3d Cir. 2002)). Plaintiffs cannot meet this requirement. The General Assembly was a

party and litigated its rights in state court. Mot. 6-7 & n.2. It successfully asserted legislative privilege (Mot. 7), and on January 31 its counsel submitted a letter to the state court advising that "this firm represents the institution of the General Assembly" and that "legislation is currently advancing through the General Assembly that could result in a newly-enacted map."[1] The General Assembly had every ability to assert its own rights. No Plaintiff argues otherwise.[2]

B. Plaintiffs Lack Article III Injury

As to State Plaintiffs, individual legislators lack cognizable injury unless their votes would have been sufficient to change a legislative outcome. State Plaintiffs rely heavily on *Coleman v. Miller*, 307 U.S. 433 (1939). Opp. 30-31, 33-34. But "*Coleman*, as [the Supreme Court] later explained in *Raines*, stood for the proposition that legislators *whose votes would have been sufficient* [to change the legislative outcome] have standing to sue." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015) (emphasis added). The plaintiffs in *Coleman* were "20 (of 40) Kansas State Senators, *whose votes would*

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[1] *See* http://www.pacourts.us/assets/files/setting-6015/file-6770.pdf?cb=b86d1d.

[2] Another "precondition" to third-party standing requires Plaintiffs to show they have a "close relationship" with the General Assembly. *Holland*, 277 F. Supp. 3d at 730. But if Plaintiffs share such a "close relationship" with the General Assembly that they may sue on its behalf, then issue preclusion, *Pennzoil*, *Rooker-Feldman*, and *Colorado River* clearly apply, as the General Assembly was a party in state court. Plaintiffs cannot have it both ways.

have been sufficient to defeat a resolution ratifying a proposed federal constitutional amendment." *Id.* (quotations and alterations omitted) (emphasis added). Similarly, in *Dennis v. Luis*, 741 F.2d 628 (3d Cir. 1984), the plaintiffs were "eight of the fifteen members of the [Virgin Islands] legislature"—more than half. *Id.* at 629.

State Plaintiffs note that *Arizona* found standing "for [an] Elections Clause claim brought by [a] state *legislature*." Opp. 34 (emphasis added). Exactly. The Supreme Court held that the Arizona Legislature had Article III injury based on a purported usurpation of its power under the Elections Clause, while "individual" legislators would not have standing. *Arizona*, 135 S. Ct. at 2664-66.[3] Unlike a legislature, two Pennsylvania Senators cannot change a legislative outcome in the Pennsylvania Senate, much less in the House.

Other cases cited by State Plaintiffs are even worse for them. In *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1337-38 (D.C. Cir. 1999) (Mot. 30), the D.C. Circuit held that "the individual Alaskan legislators" lacked standing because "there is not the slightest suggestion here that these particular legislators had the votes to enact a particular measure." And *Kennedy v. Sampson*, 511 F.3d

[3] Justices Scalia and Thomas dissented on the ground that even the Arizona Legislature lacked standing to raise the Elections Clause claim. *Id.* at 2694-99.

430 (D.C. Cir. 1974) (Mot. 30-31), is no longer good law. Its holding was abrogated by the Supreme Court's "intervening decision in *Raines v. Byrd*." *Chenoweth v. Clinton*, 181 F.3d 112, 112-13 (D.C. Cir. 1999).

Congressional Plaintiffs also cannot establish cognizable injury based on the loss of their former districts. They cannot distinguish *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980), which held that members of Congress lacked Article III injury because "a representative has no … interest in representing any particular constituency." 503 F. Supp. at 672. None of the out-of-circuit cases cited by Plaintiffs involved Article III standing, and their Supreme Court and Third Circuit cases concerned challenges to ballot-access and campaign-finance laws, not redistricting. Opp. 35-36.

C. Plaintiffs Have Not Pled Causation as to Count II

Plaintiffs fail to plead causation as to Count II because they do not allege that, with "adequate" time, the General Assembly and Governor would have agreed on a new map, much less one that substantially preserved the 2011 map's unconstitutional districts. Plaintiffs assert that Intervenors "fail to cite even a single case" supporting this argument. Opp. 37. But Intervenors cited the seminal Supreme Court case holding that, when standing "depends on the unfettered choices made by independent actors," plaintiffs must "adduce facts showing that those choices have been made or will be made in such manner as to produce

causation." Mot. 11 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)). Plaintiffs' opposition, like their Complaint, adduces no facts showing that the General Assembly and Governor would have agreed to *any* new map.

In a footnote, Plaintiffs assert that their injury is not "predicated upon the legislature agreeing with the Governor" because the General Assembly might have "override[n] any veto by the Governor." Opp. 35 & n.14. But Plaintiffs cannot establish causation through "mere speculation," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013), and the notion that the General Assembly would have overridden a veto is exceedingly speculative. A veto-override theory still depends on the unfettered choices of third parties, including House Democrats whose votes would be needed to override a veto. Standing cannot rest on "speculation about the decisions of independent actors." *Id.* at 414.

D. Plaintiffs' Alleged Injuries Are Not Redressable

Congressional Plaintiffs' purported injuries are not redressable because this Court cannot reinstate a congressional plan that violates the state constitution. The plain text of 2 U.S.C. § 2a(c) mandates that any congressional plan must be enacted "in the manner provided by [state] law." Plaintiffs complain that § 2a(c) is "arcane and obscure," Opp. 39, but all federal statutes, obscure and famous alike, are equally binding. And Plaintiffs' assertion that courts "seldom" consider § 2a(c)

does not accord with reality. *Id.* The Supreme Court addressed this statute three years ago in *Arizona* and before that in *Branch v. Smith*, 538 U.S. 254 (2003).

Plaintiffs argue that, although the state court struck down the 2011 map for violating the state constitution, § 2a(c) "does not apply" because the map "was adopted in the procedural manner provided by Commonwealth law." PI Reply 23 (ECF No. 118). But *Arizona* made clear that § 2a(c)'s reference to "the law thereof" refers to *all* state law, including a state's "constitution." 135 S. Ct. at 2679. Congress removed any doubt when it eliminated a reference to "the legislature" in a prior version of the statute and replaced it with the current language, "the law thereof." *Id.* at 2668-69.

Plaintiffs claim that federal courts "repeatedly" have allowed elections to proceed "under an unconstitutional districting." Opp. 39-40; *see* PI Reply 23-24. But nearly every case they cite involved state legislative elections, to which § 2a(c) does not apply. Their remaining cases did not authorize elections under unconstitutional congressional plans. The interim plans in *Upham v. Seamon*, 456 U.S. 37 (1982), and *Perez v. Texas*, 891 F. Supp. 2d 808 (W.D. Tex. 2012), were not unconstitutional. And in *Flanagan v. Gillmor*, 561 F. Supp. 36, 50 (S.D. Ohio 1982), the court reserved judgment on whether the plan was constitutional. Plaintiffs thus do not cite a single case where a federal court authorized

congressional elections under an unconstitutional plan, let alone a plan that violates a state constitution and triggers § 2a(c).

Finally, if the Remedial Plan were enjoined, § 2a(c)(5) would require at-large elections, further foreclosing redressability for Congressional Plaintiffs' alleged injury. Pennsylvania would lack a plan that complies with state law, and there is insufficient time to implement a new plan before the May 15 primaries. Mot. 13. Plaintiffs argue that this statutory requirement could be avoided by postponing the congressional primaries to allow for the creation of a yet another plan. Opp. 40. But creating another plan would not redress Congressional Plaintiffs' claimed injury, which is the loss of the 2011 plan.

II. This Lawsuit Is Jurisdictionally and Procedurally Barred

A. This Court Must Abstain Under *Pennzoil*

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14-16 (1987), precludes "federal injunctions" that seek to "interfere with the execution of state judgments" based on purported federal constitutional infirmities with the state court's procedures. Plaintiffs note that the Supreme Court has cabined *Younger* abstention, but *Pennzoil* is a category of *Younger* abstention that remains valid. *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013), cited *Pennzoil* for the proposition that *Younger* continues to apply where a federal challenge

"implicate[s] a State's interest in enforcing the orders and judgments of its courts." That is exactly what is at stake here.

Plaintiffs assert, without citation, that *Pennzoil* does not apply because this is not a "typical state court judgment" or "regular state court procedure." Opp. 48. *Pennzoil* contains no exception for "atypical" state judgments or "irregular" state procedures; the doctrine's whole point is to prevent any federal court but the U.S. Supreme Court from second-guessing the legitimacy of a state court's process for enforcing a particular judgment. Plaintiffs argue that it is "unrealistic" to limit review to the Supreme Court. Opp. 49. That's not only realistic, it's the law. *See* 28 U.S.C. § 1257.

Plaintiffs claim that "there was no opportunity in the *LOWV* action to challenge the state court's" supposed Elections Clause violations. Opp. 49. That is false, as Plaintiffs' own counsel raised the Elections Clause arguments before the state court, repeatedly. *Infra* pp.10-11 & nn.4-6 (collecting briefs).

Plaintiffs argue that *Pennzoil* does not apply because they were not parties in the state court action. But losing parties in state court cannot simply deploy their proxies to collaterally attack a state's procedures in federal court; the *Pennzoil* doctrine would be entirely ineffectual otherwise. And a sufficient nexus exists here between the state and federal litigants under all the formulations that courts have applied in this context. Contrary to Plaintiffs' suggestion, this case involves

the equivalent of an "employer" and "employee" asserting "identical interests" across federal and state cases. *Sullivan v. City of Pittsburgh, Pa.*, 811 F.2d 171, 178 (3d Cir. 1987) (quotations omitted). State Plaintiffs are members of the General Assembly, a party in the state court. They are also agents of Senator Scarnati. Congressional Plaintiffs likewise have an "identity of activities and interests" with the General Assembly, Speaker Turzai, and Senator Scarnati. *Sullivan*, 811 F.2d at 178; *see 66 E. Allendale v. Borough of Saddle River*, 2007 WL 4526586, at *5 (D.N.J. Dec. 18, 2007) (applying *Younger* "where the plaintiffs' interests are so inextricably intertwined that direct interference with the state court proceeding is inevitable" (quotations omitted)).

B. Plaintiffs' Arguments Are Barred by Issue Preclusion

Plaintiffs cannot avoid the preclusive effect of the state court's judgment.

First, Plaintiffs' Elections Clause claims are "identical" to the Elections Clause arguments raised and rejected in state court. Speaker Turzai and Senator Scarnati pressed those arguments at every opportunity. In their post-trial brief in the Commonwealth Court, they argued that the state courts "lack[] the authority to adopt any criteria that the Pennsylvania Legislature has not adopted" because the Elections Clause "vests Pennsylvania's legislature with the primary duty of

drawing Congressional districts."[4] In the Pennsylvania Supreme Court, they had an entire section of their brief titled: "This Court Lacks the Authority to Adopt Any Criteria That the Pennsylvania Legislature Has Not Adopted."[5] And in their two stay applications submitted to the Pennsylvania Supreme Court, they argued that the decision violated the Elections Clause because it "d[id] not afford the General Assembly a genuine opportunity to enact legislation creating a new map."[6]

These arguments are carbon copies of the arguments that Plaintiffs press here. The fact that the Pennsylvania Supreme Court addressed these claims "subsequent to trial" (Opp. 17) is irrelevant. They were raised in, and rejected by, the state court. The Pennsylvania Supreme Court rejected the arguments underlying Count I here in its February 7 opinion, and it rejected the arguments underlying both counts in its February 19 order, which affirmed the court's authority to implement a remedial plan and specifically addressed Speaker Turzai and Senator Scarnati's arguments that they lacked an adequate opportunity to enact

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[4] 12/18/17 Leg. Resps.' Proposed Findings of Fact and Conclusions of Law at 130-33, goo.gl/Mh6oFP.

[5] 01/10/18 Leg. Resps.' Br. at 59-60, goo.gl/4QyD2K.

[6] 01/23/18 Appl. for Stay of Court's Order 5, goo.gl/NpcdGV; 02/22/18 Appl. for Stay of Court's Order 3, goo.gl/kDdhbz.

a map. 2/19/18 Order 3 n.2, 5 n.6 (ECF No. 1-3, 1-4). And the court further rejected these arguments in denying both stay applications.

Second, Plaintiffs are in privity with the state court litigants for preclusion purposes. State Plaintiffs are members of the General Assembly and in the Senate leadership with Senator Scarnati. State Plaintiffs thus are in a principal-agent relationship with these state-court defendants, and issue preclusion must apply. *Perelman v. Adams*, 945 F. Supp. 2d 607, 618 (E.D. Pa. 2013), *aff'd* (Oct. 25, 2013. If a hypothetical company and its COO lose a state court lawsuit, the company's CFO cannot take the adverse judgment across the street and challenge it in federal court. Indeed, if preclusion did not apply here, it would mean that individual state legislators could keep filing serial challenges to the state court's ruling,.

Congressional Plaintiffs are also in privity with the state legislative defendants. Plaintiffs mischaracterize Intervenors' argument as advancing a "virtual representation" theory of privity. *Nationwide* expressly acknowledges that there exist categories of privity—separate and apart from the virtual representation theory—that are based on a party's adequate representation of an aligned nonparty's interests. *Nationwide Mut. Fire Ins. Co. v. George v. Hamilton, Inc.*, 571 F.3d 299, 312 (3d Cir. 2009).

All Plaintiffs are fully "aligned" with the state legislative defendants' interests and are acting "in a representative capacity for" or as their "designated representatives." *Id.* Speaker Turzai and Senator Scarnati announced repeatedly that they would work with the "GOP legal team" to attack the Pennsylvania Supreme Court's judgment in federal court, and that is exactly what their legal team did. Mot. 14-15. Plaintiffs do not deny this, and their legal team now makes the same arguments they made in state court. If this is not enough to show identity of interests and adequacy of representation, nothing is.

C. Plaintiffs' Arguments Are Judicially Estopped

Judicial estoppel bars Plaintiffs' claims because their proxies, Speaker Turzai and Senator Scarnati, successfully advocated the exact opposite view of the Elections Clause in the federal *Diamond* case. Plaintiffs do not dispute that judicial estoppel applies to those in privity with a party to a prior lawsuit, Mot. 22, and their argument that they are "not in privity with Speaker Turzai or Senator Scarnati," Opp. 26, fails for all the reasons described above.

Plaintiffs acknowledge that Speaker Turzai and Senator Scarnati argued in *Diamond* that the state court had authority—and indeed primacy—to adjudicate a challenge to the 2011 map. *See* Opp. 27. They argued that federal courts are "**required**" to defer to the state "legislative *or* judicial branch," and that "federal judges are to prefer *both* state branches to federal courts as agents of

apportionment." *Diamond v. Torres*, 5:17-cv-05054-MMB, ECF No. 69-2 at 16 (E.D. Pa. 2017) (quotations omitted). Nor do Plaintiffs dispute that this argument succeeded when the *Diamond* court granted a stay in deference to the state court action.

Plaintiffs contend that Speaker Turzai and Senator Scarnati urged deference to the state court only on the assumption that the state court would uphold the 2011 plan. Opp. 27. Buyer's remorse is not a defense to judicial estoppel. Regardless, Speaker Turzai and Senator Scarnati continued pressing their deference-to-state-courts argument even *after* the state court's January 22 order striking down the 2011 map and giving the General Assembly 18 days to submit a new map to the Governor. Despite learning of the state court's judgment and remedial process, they still argued that the federal court was "required to defer to Pennsylvania's legislative, executive, and judicial branches" under "the plain language of *Growe*." *Diamond*, ECF No. 81 at 2, 5. Plaintiffs argue that their January 22 *Diamond* submission did not "endorse" the state court's decision, Opp. 28, but that is irrelevant. They asked for *deference* to that decision on the ground that the state court had authority under *Growe*.

It would be a "miscarriage of justice" and reflect "bad faith" (Opp. 28) for different federal courts to grant simultaneous orders based on diametrically opposed positions: first a stay in *Diamond* on the theory that the state court had

primary authority to review the 2011 map and implement its remedial process, then a separate injunction against the state court's judgment and remedy on the theory that the state court lacked authority.

D. *Rooker-Feldman* and *Colorado River* Require Abstention

In light of the Court's guidance to avoid unnecessary duplication, Intervenors continue to assert that *Rooker-Feldman* and *Colorado River* require dismissal and direct the Court to the Defendants' reply brief.

III. Plaintiffs Fail to State a Claim

A. Count I

Count I's assertion that the Elections Clause authorizes the legislature to defy Pennsylvania's Constitution is contrary to a century's worth of U.S. Supreme Court precedent. This sentence from *Arizona* sums it up: "Nothing 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." 135 S. Ct. at 2673.

Ignoring this dispositive language from *Arizona*, Plaintiffs draw a line between "lawmaking" and constitutional interpretation. Opp. 52-54. But *Arizona* requires state legislatures to comply with the state's "prescriptions for lawmaking," 135 S. Ct. at 2668, echoing earlier decisions holding that the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws" or exclude a "restriction imposed by state Constitutions upon state Legislatures

when exercising the lawmaking power." *Smiley v. Holm*, 285 U.S. 355, 365, 369 (1932). Likewise, *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), not only rejected any notion that the Elections Clause authorized a congressional map that was contrary to "the Constitution and laws of the state," but held that the state court's "decision below is conclusive on that subject." *Id.* at 568.

Contrary to Plaintiffs' claim, substantive constitutional limitations are just as much part of a state's "prescriptions for lawmaking" as procedural limitations. *See Brown v. Secretary of State of Florida*, 668 F.3d 1271, 1279 (11th Cir. 2012). A statute that violates the Free and Equal Elections Clause (or the federal Equal Protection Clause) is just as unconstitutional as a statute that was not properly enacted because it was vetoed by the Governor, as in *Smiley*. Plaintiffs do not cite a single case supporting their proposed distinction.

As for Plaintiffs' emphasis on the "people" (Opp. 52-53), the Free and Equal Elections Clause has been repeatedly ratified by the people of Pennsylvania following constitutional conventions, most recently in 1968. Not only that, the state court proceedings here took place under a Pennsylvania statute, 42 Pa C.S. § 726, through which the state legislature has granted the Pennsylvania Supreme Court power to assume "plenary jurisdiction" and "enter a final order or otherwise cause right or justice to be done" in any matter, "notwithstanding any other provision of law."

Plaintiffs' view that the Elections Clause "vests [redistricting] authority" exclusively in state legislatures and Congress, Opp. 51, is also flatly contrary to *Wesberry v. Sanders*, 376 U.S. 1 (1964), which rejected the notion that the Elections Clause's reference to "Congress" deprives *federal* courts of power to review congressional maps and impose a one person, one-vote rule. "[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws … from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Wesberry*, 376 U.S. at 6-7.

Plaintiffs' argument that the Pennsylvania Supreme Court misinterpreted the Pennsylvania constitution does not state a claim. Opp. 53-55; *see* PI Reply 3. The Elections Clause permits states to require compliance with the state constitution, and federal courts have no business second-guessing a state supreme court's interpretation of its own state constitution on the ground that the constitutional provision requires some interpretation. Courts interpret broad constitutional provisions like the Free and Equal Elections Clause all the time, *e.g.*, U.S. Const. amend. XIV; that does not render judicial review illegitimate or a "usurp[ation]," Compl. ¶ 103. Indeed, *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964), identified a mandatory one-person, one-vote rule from a generic guarantee of equal protection.

Interference here would also violate *Growe*'s repeated admonitions that federal courts must defer to state courts in the congressional redistricting contexts. *Growe v. Emison*, 507 U.S. 25 (1993). "[A] federal court must neither affirmatively obstruct state reapportionment" by a state court "nor permit federal litigation to be used to impede it." *Id.* at 34. Plaintiffs all but ignore the case, arguing that "nothing about the state court's redistricting plan [in *Growe*] violated the U.S. Constitution." PI Reply 6. But the state court plan in *Growe* used precisely the same traditional districting criteria that the Pennsylvania Supreme Court used here(and which Plaintiffs say violate the U.S. Constitution). *Growe*, 507 U.S. 31 (state court plan focused on "preservation of municipal and county boundaries"). No such requirements were specifically enumerated in the Minnesota constitution.

Indeed, these criteria are called the "traditional" districting criteria for a reason. They have long been employed by the U.S. Supreme Court, including as evidence of racial gerrymandering in violation of the Equal Protection Clause. The Supreme Court has noted that "in many cases, perhaps most cases, challengers will be unable to prove an unconstitutional racial gerrymander without evidence that

the enacted plan conflicts with traditional redistricting criteria." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017).[7]

Even if the first half of the Elections Clause restricted the application of state constitutions to congressional districting, Congress has abrogated any such restriction under the second part of the Elections Clause, which allows Congress "at any time" to "make or alter" regulations related to congressional redistricting. Through 2 U.S.C. § 2a(c), Congress has provided that congressional maps are invalid if they do not comply with state "law[]," which the Supreme Court held means the state constitution, not just legislative acts. *Arizona*, 135 S. Ct. at 2669-70. Congress's decision to enshrine state constitutional law eliminates any claim in this case.

B. Count II

Plaintiffs' opposition brief, like their Complaint, cites no case that has ever adjudicated whether a court gave a state legislature enough time to adopt a congressional plan. While *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), and *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (plurality) held that it was "commendable"

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[7] Plaintiffs are wrong that no state court has ever applied a broad state constitutional provision to invalidate a congressional map. *E.g.*, *Moran v. Bowley*, 347 Ill. 148, 163 (1932) (applying Illinois Constitution's Free and Equal Elections Clause, before *Wesberry*, to require one-person one-vote; citing additional cases).

or "appropriate, whenever practicable," for a federal court to give the legislature an opportunity to redraw districts, neither case even involved the Elections Clause. Nor did either case address what constitutes enough time.

Plaintiffs certainly cite no case in which a federal court has decided whether a state court gave a state legislature enough time. They do not even cite any case holding that a state court must give a state legislature any time to pass a remedial plan after striking down a prior plan. Nor do Plaintiffs offer any standard to govern how much time is constitutionally required. Their claim is a shapeless and unprecedented invitation for federal courts to intrude into disputes between branches of state government.

Even worse, Plaintiffs run away from their own counsel's statement at oral argument before the Pennsylvania Supreme Court. Asked whether three weeks would be a "fair" amount of time, counsel indicated that it was—he said that the General Assembly would like "at least three weeks" to pass a remedial plan. Oral Arg. Tr. 103-104. Thus, while Plaintiffs now submit a declaration from a former parliamentarian stating that no legislation of substance could be passed in 18 days, that is not what Plaintiffs' counsel told the state high court, which expressly relied on that representation. Compl. Ex. J at 3 n.2.

In a footnote, Plaintiffs assert that their counsel's representation "assumed the General Assembly would have the benefit of the full criteria." PI Reply 11 n.4.

But the January 22 order gave familiar and clear criteria: the remedial plan could not subordinate the listed traditional criteria to any other consideration. Compl. Ex. B at 3. Plaintiffs now acknowledge that it is "technically true" that the criteria in the February 7 opinion "did not conflict at all" with the January 22 order. PI Reply 10. That should end the matter. The claim that it was "impossible" to draw a new map without the February 7 opinion is fictional on its face.

The February 7 opinion did not impose a proportional representation requirement. Opp. 59. And of Plaintiffs' five bullets (Opp. 59), the first three were not "newly-minted" but simply reflected the requirements in the January 22 order. In the final two bullets, the state court was describing the mean-median and efficiency gap of the 2011 map, not imposing constitutional requirements. Compl. Ex. F at 128.

And despite all of Plaintiffs' complaints about having only two days after the February 7 opinion, Speaker Turzai and Senator Scarnati submitted a plan to the state court exactly two days later, on February 9. They asserted that their proposed plan "clearly satisfies the requirements set forth in the Court's January 22, 2018 Order."[8] Speaker Turzai and Senator Scarnati had no problem developing a plan by the court's deadline. The problem was that the Governor rejected it.

[8] https://www.brennancenter.org/sites/default/files/legal-work/LWV_v_PA_Brief-of-Legislative-Respondents-in-Support-of-Proposed-Remedial-Map.pdf.

Plaintiffs do not allege any facts that could establish that 18 or 19 days was in fact inadequate. Compl. ¶¶ 108-11.

The claim independently fails because Plaintiffs do not plead that affording more time was "practicable." *Wise*, 437 U.S. at 540. *Branch* requires state courts to redistrict if a valid map will not be in place in time for the election. 538 U.S. at 266-72. The state court's February 19 order explained that it gave the legislature all the time it possibly could in light of the upcoming primary deadline and the need to have a map in place by February 20. Compl. Ex. J at 3 n.2. This alone dooms Plaintiffs' claim. Plaintiffs argue that the state court could have "allow[ed] the 2018 election to proceed under the 2011 Plan," PI Reply 16, but they do not argue that the Elections Clause *required* that result. In any event, that option is not available for congressional plans that violate state law as opposed to federal law. *Supra* pp.6-8.

Relatedly, Plaintiffs are wrong that in *Arizona*, "[n]o Justice suggested that state courts might share in" the redistricting function. Opp. 52. The Court held that, under § 2a(c), "Congress expressly directed that when a State has been redistricted in the manner provided by state law—whether by the legislature, *court decree*, or a commission established by … the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives." *Arizona*, 135 S. Ct. at 2670 (emphasis added) (quotations and alterations omitted). And 2 U.S.C.

§ 2c authorizes state and federal courts to "remedy[] a failure" by the state legislature "to redistrict constitutionally," and "embraces action by state and federal courts when the prescribed legislative action has not been forthcoming." *Branch*, 538 U.S. at 270, 272. That is what happened here.

CONCLUSION

The Court should dismiss this case.

Dated: March 8, 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 Intervenors' Reply Brief in Support of Motion for Judgment on the Pleadings or Alternatively to dismiss, contains 4,999 words, calculated using Microsoft Word's word count feature.

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CERTIFICATE OF SERVICE

I, Thomas B. Schmidt, III, hereby certify that on March 8, 2018, I caused a true and correct copy of the foregoing Intervenors' Reply 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.

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