No. 17-1339

In The
Supreme Court of the United States

LOUIS AGRE et al.,

Appellants,

v.

THOMAS W. WOLF, Governor of Pennsylvania, et al.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Pennsylvania

RESPONSE BRIEF IN OPPOSITION TO THE MOTIONS TO DISMISS AND AFFIRM

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ARGUMENT

I. THIS ELECTION CASE IS CAPABLE OF REPETITION WHILE EVADING REVIEW.

This Pennsylvania gerrymander case is not just "capable" but virtually certain of repetition after the 2020 census – without opportunity for full judicial review prior to the election that follows. Indeed, in a separate appeal, Joseph Scarnati, III, the Pennsylvania Senate President Pro Tempore, who is an Appellee in this case, agrees that an election case like this one – with these same or similar litigants – is virtually certain to arise again. *See Joseph Scarnati, III v. Louis Agre, et al.*, No. 17-1368. He makes this concession in his argument that this Court should take up the issue relating to legislative privilege but it applies to this appeal as well. To quote Scarnati:

> Redistricting challenges have been consistently filed after every ten year census. Pennsylvania alone has had each of its last four redistricting plans challenged. . . . And this appeal is brought less than two years from the April 1, 2020 Census day, after which the Pennsylvania Legislature will need to engage in redistricting again. There is thus a very strong likelihood this issue will repeat itself, and that *Appellant and other leaders of the Republican caucus in both chambers of the Pennsylvania General Assembly will be forced once again to defend the privilege.*

Id., J.S. at 37-38 (citations omitted) (emphasis supplied). This is a near-stipulation that the appeal here is not moot as well.

Furthermore, as this Court has noted, "time-sensitive" election cases are especially "capable of repetition but evading review" when the election is over. *See Davis v. FEC*, 554 U.S. 724, 735 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) ("We have recognized the 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks.").

There are twenty-six Appellants in this appeal – committed to enforcement of the Elections Clause and opposed to gerrymanders – and they will be likely voters in the elections after the next census. Assuming that the map is adopted in December 2021, as the prior map was adopted in December 2011, and that the election calendar starts under state law in February 2022, it leaves the Appellants no more than two months to seek judicial review. Given the statement of the Legislative Appellees that a Pennsylvania case is very likely to rise again, this Court should take jurisdiction of this appeal.

II. APPELLANTS MADE CLEAR THAT THEY SOUGHT ADDITIONAL RELIEF.

In addition, this case is not moot because Appellants did not obtain the full relief to stop the gerrymandering that the Legislative Appellees are still

committed to pursue. The motion to dismiss this appeal by the Executive Appellees suggests that the Appellants invented or thought up the remedy sought here after the ruling below, and never raised it in the trial court below. Aside from being uncharitable, this is untrue – as the Executive Appellees should know. At the start of this case, in their Response in Opposition to Defendants-Intervenors' Motion to Dismiss in the trial court below, the Appellants discussed the need not just for a new map but an order that might change the process by which the maps are drawn. Plaintiffs quote from the record below:

> **V. This Court has broad equitable authority to grant a remedy tailored to the violation.**
>
> Defendants argue for dismissal because gerrymandering will always be with us and there is nothing a court can do. Their motion is tainted with a certain degree of nihilism. Yes, defendants can cull quotes from the past when various Justices despair of getting rid of it. But such despairing statements are out of date. California, Arizona, Iowa and in this Circuit New Jersey have put in place neutral redistricting procedures that ensure compliance with the Elections Clause. These states typically require neutral or bipartisan advisory bodies that act in the open and develop the map or set of maps that the General Assembly may lawfully adopt. *By judicial order plaintiffs seek similar relief* – a directive to the State defendants to replace the 2011 Plan with a map or set of maps developed from a

> similar advisory body – or develop any other process to ensure compliance with the Elections Clause.
>
> Such an order is appropriate when the State defendants have abused their discretion under the Elections Clause. "Once a constitutional violation has been proven, federal courts have the power to issue remedial orders tailored to the scope of the constitutional violation." *See, e.g.*, *Judge v. Quinn*, 624 F.3d 352, 360 (7th Cir 2010) (requiring changes in state election laws to allow a vote to fill a vacancy in the U.S. Senate). . . .

Pl. Resp. Opp. Def. Mot. Dismiss, No. 2:17-cv-4392 (E.D. Pa. filed Oct. 31, 2017) (reproduced herein at App. 1).

Furthermore, in their First Amended Complaint, Appellants described gerrymandering in Pennsylvania as a structural or ongoing problem: "There has been a long history of gerrymandering in Pennsylvania and as demonstrated by past court challenges. The practice has become part of the political culture of the state." First Am. Compl. ¶ 42 (reproduced at Mot. Dismiss App. 9a). It is significant that no part of the prayer for relief asks for the court itself to redraw the map. Rather, Appellants sought a whole new process for drawing up maps instead of a new court-drawn map and asked the court to:

> Direct and order that prior to the 2018 Congressional elections the defendant State officers develop such plans through a process that has reasonable safeguards against partisan

> influence, including the consideration of voting preferences.

First Am. Compl. Count I.C (reproduced at Appellant's Mot. Dismiss App. 13a-14a). Furthermore plaintiffs raised the possibility of prospective relief beyond the 2018 election when they prayed the Court to "[r]etain continuing jurisdiction over the state defendants to comply with these requirements." *Id.* at Count I.D (reproduced at Appellant's Mot. Dismiss App. 14a). It is true that the case never reached the remedial stage, but in view of the "political culture" described in the complaint, plaintiffs at least intended to persuade the Court and the state defendants to keep this new process in place as a model for judicial relief in other gerrymandering cases.

The Legislative Appellees argue that it is beyond the jurisdiction of this Court to order the General Assembly to pass a law, as Appellants must intend. That is not the intent of the Appellants. It may well be that the Legislative and Executive Appellees refuse to agree to such a neutral process for mapmaking – but if they fail to comply, then the only remedy is a court-ordered remap. The Appellants believe there is a strong incentive for the Appellees, eventually, to decide that it is better to opt for a process approved by the federal courts rather than have particular maps redrawn by the federal courts with no input from defendants. For the sanction for refusal of this particular remedy is a court-ordered remap by a three-judge federal court, a remedy that may be even less palatable to a particular set of defendants. Furthermore, while it is

possible to inveigh against a court-ordered map as the Legislative Appellees in this case have inveighed against the Pennsylvania State Supreme Court, there are greater political risks in openly rejecting a neutral process that would be similar to the procedures that citizen movements have put in place in several states – or at least states where popular referendums are available to override the legislatures. The Appellants are seeking a remedy that grows out of these citizen movements which are intended to free the mapmaking process both from partisan politics *and* the court challenges that too often follow. This Court itself has taken note of and approved these citizen movements to establish a neutral process. *Arizona State Legislature v. Arizona Ind. Redistricting Comm.*, 135 S. Ct. 2652, 2676-77 (2015). Appellants never had an opportunity to put this process in place, and for purposes of the 2018 election there may not have been enough time. But with the 2020 census less than two years away, there would be time for a remand of this case and the pursuit of a process, not just a particular ad hoc map – a process that would ensure enforcement of the Election Clause with the least possible judicial involvement as to where the boundaries should go.

CONCLUSION

For the foregoing reasons, the motion to dismiss by the Executive Appellees and the motion to affirm by the Legislative Appellees should be denied, and this

appeal should be set down for briefing and oral argument.

Respectfully submitted,

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