IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CAROL ANN CARTER, *et al.*,	:	
	:	
Petitioners,	:	
	:	
v.	:	Docket No. 132 M.D. 2021
	:	
VERONICA DEGRAFFENRIED, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania, *et al.*,	:	
	:	
Respondents.	:	

BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS OF THE SPEAKER AND MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES AND THE PRESIDENT *PRO TEMPORE* AND MAJORITY LEADER OF THE PENNSYLVANIA SENATE

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INTRODUCTION

The predicate for all four claims in the Petition for Review is Petitioners' allegation that ***if*** the General Assembly and Governor do not adopt a new congressional district plan by an arbitrary deadline, almost six months from now, constitutional and statutory violations will occur. Petitioners, in other words, do not allege that they have sustained a present or imminent injury. They instead hypothesize that they *might* be injured at some point in the distant future. This type of speculative and prospective injury does not suffice to give Petitioners standing to prosecute this action. They are not free to sue nearly a year in advance of their own arbitrary deadline, simply to reserve their place in line to be the lead petitioners if future impasse litigation becomes necessary.

The lack of a present or imminent injury also helps to illustrate that Petitioners' claims are not ripe for disposition. The claims are based on a temporally remote state of affairs that, as Petitioners concede, might never come into existence – and that runs contrary to the presumption that public officials will act with regularity and without violating the rights of citizens. The claims are therefore unripe and the Court lacks jurisdiction to adjudicate them. *See Carter v. Virginia State Board of Elections*, 2011 WL 665408 at *2 (W.D. Va. Feb. 15, 2011) (dismissing as unripe a lawsuit in which plaintiffs alleged that Virginia's

legislative district plans were malapportioned following a new census, where the suit was filed four months before the scheduled primary election).

The claims, in addition, are not justiciable. Because federal law and the Pennsylvania Constitution do not impose a deadline to enact a congressional district plan or otherwise address the timing of such an enactment, the General Assembly has exclusive and plenary power on that topic. And, to date, the General Assembly has chosen not to legislate on that topic. The result is that, to the extent that Petitioners are asking the Court to establish a redistricting deadline and adopt and implement its own congressional district map "if the political branches fail to enact a plan by [the] date certain set by this Court," *see* Petition for Review at Prayer for Relief, they are asking the Court to usurp the General Assembly's exclusive legislative authority. In asking the Court to adopt and implement its own congressional district map, moreover, Petitioners are asking it to usurp the General Assembly's exclusive authority under Article I, Sections 2 and 4 of the United States Constitution. Indeed, in permitting the Legislative Leaders to intervene in this matter, this Court recognized that Petitioners' requested relief would "impair[]" the "Legislators' ability to legislate" on redistricting. Slip Op. (Sep. 2, 2021) at 12. If the Court were to usurp the General Assembly's authority in either of these ways, it would violate the Separation of Powers doctrine.

And the Counts in the Petition otherwise fail to state claims upon which relief may be granted. Counts I and II allege a violation of the "one-person, one-vote" principles of the United States and Pennsylvania Constitutions, which require districts to be as nearly equal in population as practicable. While this principle requires states to have a rational approach to readjustment of legislative representation, it does *not* compel states to complete redistricting immediately upon the publication of a new decennial census. Rather, it is expected—and uncontroversial—that at the end of a decade, there will be some imbalance of population while the census results are being addressed through a redistricting process, and the imbalance does not offend one-person, one-vote. In fact, the Pennsylvania Supreme Court itself ordered that General Assembly elections in 2012 be held under the 2001 plan, after it had sustained objections to the 2011 Legislative Reapportionment Commission's plan, until such time as a new plan was passed and it approved the new plan. *See Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 719-21 (Pa. 2012) ("Holt I").

Count III, claiming a violation of 2 U.S.C. § 2c, also lacks merit. Petitioners contend that the reduction in Pennsylvania's apportionment for the next Congress (the 118th Congress) by one seat (from 18 to 17) renders the current redistricting plan illegal. But the current plan applies to the current, 117th Congress, to which Pennsylvania has been apportioned 18 seats. Furthermore, the pertinent statutory

scheme includes a fail-safe provision, 2 U.S.C. § 2a(c)(5), which provides that upon the failure of a state to redistrict in time for the next Congress following the reduction in a state's apportionment, the state's delegation will be elected at-large—an election method that is not dilutive.

Finally, in Count IV, Petitioners claim that the current redistricting plan violates the right to petition as guaranteed by Article I, Section 20 of the Pennsylvania Constitution. But, by definition, a redistricting plan does not impair the right to petition the government, or other associational rights. Not surprisingly, then, the Petition does not plausibly identify any redistricting plan that has impaired any such rights.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

I. SCOPE OF REVIEW

"In ruling on preliminary objections, the courts must accept as true all well-pled allegations of material fact as well as all inferences reasonably deducible from the facts. However, unwarranted inferences, conclusions of law, argumentative allegations or expressions of opinion need not be accepted." *Christ the King Manor v. Dep't of Pub. Welfare*, 911 A.2d 624, 633 (Pa. Cmwlth. Ct. 2006) (internal citation omitted).

II. STANDARD OF REVIEW

Preliminary objections should be sustained "in cases clear and free from doubt that the facts pleaded…are legally insufficient to establish a right to relief." *Werner v. Zazyczny*, 681 A.2d 1331, 1335 (Pa. 1996).

STATEMENT OF QUESTIONS INVOLVED

Each of the four claims in the Petition is predicated on the allegation that ***if*** the General Assembly and Governor do not adopt a new congressional district plan by an arbitrary and remote deadline (almost six months from now), constitutional and statutory violations will occur. This allegation gives rise to the following questions:

1. Whether Petitioners lack standing to litigate their claims because they do not allege that they have sustained a present or imminent injury but instead hypothesize that they *might* be injured at some point in the distant future.

2. Whether Petitioners' claims are unripe because they are based on a future state of affairs that might never come into existence and one that, at the same time, runs contrary to the presumption that public officials will act with regularity and without violating the rights of citizens.

3. Whether the Counts in the Petition are non-justiciable because they call for the Court to substitute its policy judgment for the General Assembly's

policy judgment with regard to (i) whether there should be a deadline for the enactment of a new congressional district plan and (ii) the content of that plan.

4. Whether Counts I and II (one person, one vote) otherwise fail to state a claim upon which relief may be granted because the one-person, one-vote principle only requires a state to have "a rational approach to readjustment of legislative representation," *Reynolds v. Sims*, 377 U.S. 533, 583 (1964), the Commonwealth undisputedly has a rational approach to congressional redistricting, and any end-of-decade "imbalance" in district populations while the General Assembly creates the redistricting plan does not itself offend the principle.

5. Whether Count III (2 U.S.C. § 2c) otherwise fails to state a claim upon which relief may be granted because nothing in that statute compels a state to redistrict the moment that new census data comes out.

6. Whether Count IV (right-to-petition) otherwise fails to state a claim upon which relief may be granted because Petitioners have not plausibly alleged that Pennsylvania's redistricting plan unconstitutionally impairs their Article I, Section 20 petition rights.

Suggested Answer to Each: Yes.

STATEMENT OF THE CASE

I. RELEVANT PROCEDURAL HISTORY

On April 26, 2021, Petitioners filed their Petition for Review ("Petition"). In doing so, they named as Respondents the Acting Secretary of the Commonwealth and the Director for the Bureau of Election Services and Notaries, a division of the Pennsylvania Department of State (collectively, the "Named Respondents").

On June 1, 2021, the Speaker and Majority Leader of the Pennsylvania House of Representatives and the President *pro tempore* and Majority Leader of the Pennsylvania Senate (collectively, the "Legislative Leaders") filed an application for leave to intervene, which was coupled with preliminary objections that they proposed to file if this Court granted the application.

On July 1, 2021, the Named Respondents filed preliminary objections to the Petition for Review. On August 2, 2021, Petitioners filed an answer and memorandum in opposition to the Named Respondents' preliminary objections.

On August 24, 2021, the Court held a hearing on the Legislative Leaders' application for leave to intervene. On September 2, 2021, the Court granted the application and directed the Prothonotary to accept the Legislative Leaders' preliminary objections. It also directed the Named Respondents and Legislative Leaders to file and serve briefs in support of their respective preliminary objections "within 14 days of the exit date of this order."

The Legislative Leaders now submit this brief in support of their preliminary objections.

II. RELEVANT FACTS

According to Petitioners, they brought this action to challenge Pennsylvania's current congressional district plan. *See* Petition at ¶ 1. They allege that, in light of the April 26, 2021 publication of the 2020 census apportionment numbers, the map is "unconstitutionally malapportioned." *Id*. at ¶ 2. Petitioners contend that, as a result, "if a new congressional plan is not in place in a timely manner," their constitutional rights will be infringed. *Id*. at ¶ 4. They assert, in particular, that a new congressional districting plan must be enacted before March 2022 – the current statutory deadline for filing nominating papers for candidates who wish to appear on the ballot for the Commonwealth's 2022 primary election. *Id*. at ¶ 31.

The General Assembly is the Legislature of this Commonwealth, *see* Pa. Const. art. II, § 1, and therefore has the authority and responsibility to create a new congressional district plan. This power and obligation is assigned and delegated to the General Assembly by Article I, Sections 2 and 4 of the United States Constitution, pursuant to which the "legislative branch plays the primary role in congressional redistricting." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006).

Although Petitioners acknowledge this point, *see* Petition at ¶ 5, they claim that because the Pennsylvania Senate and House are controlled by Republicans, the Governor is a Democrat, and "Republican control of the General Assembly is not large enough to override a gubernatorial veto[,]" it is "extremely unlikely" that the legislative process will yield "a lawful congressional districting plan in time to be used during the upcoming 2022 election." *Id*. at ¶ 29. Petitioners allege, similarly, that "Governor Wolf and the Republican-controlled General Assembly have repeatedly conflicted over a broad range of policies," that "Census delays have compressed the amount of time" for congressional redistricting to take place, and that, as a result, "the political branches are highly likely to be at an impasse this cycle and to fail to enact a new congressional district plan." *Id*. at ¶ 33.[1]

In light of these allegations, Petitioners assert four causes of action: (1) violation of Article I, Section 5 of the Pennsylvania Constitution, (2) violation of Article I, Section 2 of the United States Constitution, (3) violation of 2 U.S.C. § 2c, and (4) violation of Article I, Section 20 of the Pennsylvania Constitution. *See id.*

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[1] Petitioners' allegations that the legislative process is highly unlikely to result in a timely congressional district plan are speculative and constitute argumentative allegations and expressions of opinion and, therefore, the Court should not accept them as true for purposes of deciding the Legislative Leaders' preliminary objections. *See Christ the King Manor*, 911 A.2d at 633. As the Court noted when it granted the Legislative Leaders' application for leave to intervene, "[a]t this juncture, it is *not known* how the redistricting process will proceed." Slip Op. (Sept. 2, 2021) at 12 (emphasis added).

at ¶¶ 34-53. As relief, they ask for (i) a declaration that the current congressional district plan is unconstitutional, (ii) an injunction against the plan's continued implementation and enforcement, (iii) the Court to set a schedule and draft a new congressional district plan for the Commonwealth "by a date certain should the political branches fail to enact such plan by that time," and (iv) the implementation of the new map "if the political branches fail to enact a plan by a date certain set by this Court." *Id*. at Prayer for Relief.

SUMMARY OF THE ARGUMENT

All of Petitioners' claims are premised on their supposition that, months down the road, Pennsylvania's legislative process will fail to produce a timely new congressional district plan for the Commonwealth, which will result in constitutional and statutory violations. Because Petitioners do not allege that they have sustained a present or imminent injury, and instead speculate about what might happen in the distant future, they lack standing to prosecute their claims. The claims, in addition, are not ripe for disposition because they are based on a future state of affairs that might never come into existence and one that runs contrary to the presumption that public officials will act with regularity, lawfully, and without impeding the rights of citizens. What is more, Petitioners' claims are non-justiciable. By asking the Court to establish a redistricting deadline and adopt and implement its own congressional district map "if the political branches fail to

enact a plan by [the] date certain set by this Court," *see* Petition for Review at Prayer for Relief, Petitioners are asking the Court to usurp the General Assembly's exclusive legislative authority in multiple ways, in violation of the Separation of Powers doctrine.

Even apart from these procedural and substantive defects, Petitioners' claims are not claims upon which relief may be granted. Their one-person, one-vote claims (Counts I and II) fail to allege a violation of that venerable legal principle, since Pennsylvania has a rational approach to periodic congressional redistricting. And Petitioners have failed to plead a cognizable claim for a violation of 2 U.S.C. § 2c (Count III) or of Article I, Section 20 of the Pennsylvania Constitution (Count IV), neither of which compel the General Assembly to redistrict the Commonwealth immediately upon publication of a new decennial census.

The Petition for Review should be dismissed.

ARGUMENT

I. PETITIONERS LACK STANDING TO LITIGATE THEIR CLAIMS

Petitioners do not allege that they have sustained a present or imminent, legally-cognizable injury. The result is that they lack standing to litigate their claims.

As a general rule, a party has standing to challenge a governmental action only if the party has a substantial, direct, and immediate interest in the matter.

Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269, 280 (Pa. 1975); *see also Commonwealth v. J.H.*, 759 A.2d 1269, 1271 (Pa. 2000). The party's interest is "substantial" if the interest has "substance – there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *Wm. Penn,* 346 A.2d at 282; *see also J.H.*, 759 A.2d at 1271. As a corollary, "we can find no reasonable grounds for standing where interests or injuries are hypothetical in nature." *Strasburg Associates v. Newlin Twp.*, 415 A.2d 1014, 1017 (Pa. Cmwlth. Ct. 1980). The party's interest in the matter is "direct" if there is "causation of the harm to his interest by the matter of which he complains." *Wm. Penn,* 346 A.2d at 282. And, the party's interest in the matter is "immediate" if there is a "sufficiently close causal connection between the challenged action and the asserted injury." *Id.* at 286.

The entirety of this lawsuit hinges on Petitioners' *assumption* that because the General Assembly is controlled by one political party, the Governor is a member of another political party, and there has been "conflict" between these actors in the past, there is a high likelihood that Pennsylvania will not enact a new congressional district plan by March 2022 – *i.e.*, almost six months from now – and that such a failure would harm Petitioners.

But Petitioners acknowledge that "there is still time for the General Assembly and the Governor to enact a new congressional plan[.]" Petition at ¶ 9. And, at the same time, they ignore the legal presumption that public officials will act with regularity, in accordance with the law, and without violating the rights of citizens.[2] *See, e.g., Albert v. Lehigh Coal and Navigation Co.*, 246 A.2d 840, 845 n.5 (Pa. 1968) ("There is a *prima facie* presumption of the regularity of the acts of public officials which exists until the contrary appears[.]"); *Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Cmwlth. Ct. 2010) ("We must presume the opposite, *i.e.*, that an agency will act in accordance with law."); *Nason v. Commonwealth*, 494 A.2d 499, 502 (Pa. Cmwlth. Ct. 1985) (noting the "time honored presumption that public officials will perform their duties properly" and rejecting any presumption that "the State Treasurer will not fulfill his duty to disburse funds should that duty actually arise").

Against this backdrop, it is plain that Petitioners do not allege that they have sustained a present or imminent injury. They instead hypothesize that they *might* be injured at some point in the distant future. Indeed, as this Court explained in granting the Legislative Leaders' application for leave to intervene, "[a]t this

[2] In alleging that the General Assembly and Governor are highly likely to reach an impasse on a new congressional district plan, Petitioners are making argumentative allegations and expressing opinions and, therefore, the Court should not accept those allegations as true for purposes of deciding the Legislative Leaders' preliminary objections. *See* footnote 1, *supra*.

juncture, it is *not known* how the redistricting process will proceed." Slip Op. (Sept. 2, 2021) at 12 (emphasis added). Petitioners are therefore alleging a speculative and prospective injury, which does not suffice to give them standing to prosecute this action. *See, e.g., Twp. of North Fayette v. Commonwealth*, 436 A.2d 243, 246 (Pa. Cmwlth. Ct. 1981) (township lacked standing to challenge DOT's plan for detouring traffic because "while the Township insists that dire consequences will result from DOT's actions, in fact, nothing has happened"); *Strasburg Associates*, 415 A.2d at 1017 ("we can find no reasonable grounds for standing where interests or injuries are hypothetical in nature").

Because Petitioners lack standing to prosecute their claims, the Petition should be dismissed.

II. THIS MATTER IS NOT RIPE FOR DISPOSITION

The Counts in the Petition are predicated on the occurrence of events that have not occurred and might never occur. This matter is therefore not ripe for disposition.

Under the ripeness doctrine, "[w]here no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained." *Cherry v. City of Philadelphia*, 692 A.2d 1082, 1085 (Pa. 1997); *see also Borough of Marcus Hook v. Pennsylvania Mun. Ret. Bd.*, 720 A.2d 803, 804 (Pa. Cmwlth. Ct. 1998) (a court may not "decide issues that do not determine the resolution of an actual case

or controversy"). "In deciding whether the doctrine of ripeness bars our consideration of a declaratory judgment action, we consider [1] whether the issues are adequately developed for judicial review and [2] what hardships the parties will suffer if review is delayed." *Twp. of Derry v. Pennsylvania Dep't of Labor and Indus.*, 932 A.2d 56, 57-58 (Pa. 2007) (internal quotations omitted); *see also City Council of Philadelphia v. Commonwealth*, 806 A.2d 975, 978 (Pa. Cmwlth. Ct. 2002) (same).

Rooted in the first part of this test is the principle that "[o]nly where there is a real controversy may a party obtain a declaratory judgment. A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic." *Gulnac v. South Butler County Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991) (internal citations omitted); *see also City of Philadelphia v. Philadelphia Transp. Co.*, 171 A.2d 768, 770 (Pa. 1961) ("Declaratory judgment will not lie to determine rights in anticipation of an event uncertain of occurrence."). The same principles apply to injunctions. *See Brown v. Commonwealth*, 673 A.2d 21, 23 (Pa. Cmwlth. Ct. 1996) ("*Any action*…may not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.")

(emphasis added) (citing *Gulnac*); *see also Bliss Excavating Co. v. Luzerne County*, 211 A.2d 532, 534 (Pa. 1965) (vacating preliminary injunction and stating: "The action was patently premature and amounted merely to an attempt to obtain an advisory opinion."). Put differently, a court may not issue a declaratory judgment or an injunction with regard to a future state of affairs that might never come into existence and that, as a result, might never give rise to a live controversy.

Here, as the predicate for their claims, Petitioners allege that ***if*** the General Assembly and Governor do not adopt a new congressional district plan by an arbitrary deadline, almost six months from now, constitutional and statutory violations will occur. Petitioners are therefore acknowledging that their claims are tied to a temporally remote contingency. *See* Petition at ¶¶ 4 & 31. The claims, in other words, are based on a future state of affairs that, in fact, might never come into existence – and one that runs contrary to the presumption (noted above in Argument Part I) that public officials will act with regularity, lawfully, and without violating the rights of citizens. As this Court observed in granting the Legislative Leaders' application for leave to intervene, "[a]t this juncture, it is *not known* how the redistricting process will proceed." Slip Op. (Sept. 2, 2021) at 12 (emphasis added). Simply put, "[t]he events which might bring these parties into actual conflict are thus too remote to justify our resolution of this dispute by declaratory

judgment." *South Whitehall Township v. Pennsylvania Department of Transportation*, 475 A.2d 166, 169 (Pa. Cmwlth. Ct. 1984); *see also Alaica v. Ridge*, 784 A.2d 837, 843 (Pa. Cmwlth. Ct. 2001) (claims were unripe where "plaintiffs challenge the constitutionality of the EEA based on what might happen in their districts, not what necessarily will happen or what has happened").

For this reason, in *Carter v. Virginia State Board of Elections*, 2011 WL 665408 (W.D. Va. Feb. 15, 2011), a Virginia court dismissed as unripe a similar lawsuit, which was filed fast on the heels of the release of the 2010 census. There, the plaintiffs claimed that the 2010 census data showed that Virginia's Senate districts were malapportioned. They sought functionally the same relief that Petitioners seek here: "(i) an injunction barring defendants from holding elections under the current Senate redistricting plan, which was enacted in 2001; (ii) an order setting deadlines for the General Assembly and governor to enact a plan based on the new Census data; and, (iii) should the requested deadlines be missed, they ask the court to impose a redistricting plan." *Id*. at *1 (internal citation omitted). The court dismissed the case, noting that the 2010 census data had only recently been released, that it was "unaware of any official timetable for the 2011 redistricting[,]" and that "there are no scheduled Virginia Senate elections until the primary, currently planned for June 14, 2011," which was four months away. *Id*. at *2. The court therefore concluded that, "[a]s plaintiffs have alleged no immediate

harm, and their claims are contingent on future uncertainties, this case is not ripe for review." *Id*.

Here, likewise, Petitioners have alleged no immediate harm (because they allege that they might be harmed only if, almost six months from now, the Pennsylvania legislative process does not produce a new congressional district plan) and their claims are contingent on future uncertainties (namely, the possibility that the General Assembly and Governor will not enact a new plan on that timeline). Like the *Carter* case, therefore, "this case is not ripe for review."

Petitioners' claims are unripe for disposition and this Court lacks jurisdiction to adjudicate them.

III. PETITIONERS' STANDING AND RIPENESS ARGUMENTS ARE MISPLACED

In their memorandum in opposition to the Named Respondents' preliminary objections, Petitioners argue that they have standing to prosecute their claims and that their claims are ripe. In doing so, they rely heavily on the Eastern District of Wisconsin's decision in *Arrington v. Elections Board*, 173 F.Supp.2d 856 (E.D. Wis. 2001). *See* Petitioners' Memorandum in Opposition to Respondents' Preliminary Objections ("Petitioners' Memorandum") at 11-19. They also reference certain orders that the Minnesota Supreme Court issued in two pending "impasse" lawsuits. *See id.* at 11-12. Petitioners' approach is misguided.

The decision in *Arrington* is inapposite, as a threshold matter, because it involved a federal trial court's application of federal standing and ripeness principles, while the Legislative Leaders' preliminary objections implicate questions of standing and ripeness under Pennsylvania law. *See, e.g., In re Hickson*, 821 A.2d 1238, 1243 n.5 (Pa. 2003) ("State courts, however, are not governed by Article III and are thus not bound to adhere to the federal definition of standing.").

And *Arrington* is otherwise not persuasive here. The plaintiffs there were voters who sought a declaration that Wisconsin's then-current congressional district plan was unconstitutionally malapportioned, an injunction that would bar the use of that plan in connection with future elections, and, "in the absence of subsequent action by state legislators, the institution of a judicially-crafted redistricting plan." 173 F.Supp.2d at 858. In concluding that the voters had standing to litigate the action, the court noted that a plaintiff generally has standing "if he is in imminent danger of suffering an injury the court is capable of preventing[,]" and the voters, for their part, had alleged "a realistic threat of imminent injury to their voting rights[.]" *Id*. at 861 & 862. In concluding that the action was ripe, the court noted that, under federal law, "contingent future events generally do not deprive courts of jurisdiction" and that, "[w]hile injury is by no means certain, the [voters'] fear of injury is realistic." *Id*. at 863 & 866. The court

later observed, however, that it should "refrain from initiating redistricting proceedings" until the "appropriate state bodies have attempted – and failed – to do so on their own[,]" and therefore it stayed the action for a period of months. *Id.* at 867.

Under Pennsylvania law, by contrast, it is ***not*** the rule that "contingent future events generally do not deprive courts of jurisdiction." To the contrary, as explained above in Argument Part II, Pennsylvania law establishes that an action, "including a declaratory judgment action, may not be employed to determine rights in anticipation of events which may never occur[.]" *Brown*, 673 A.2d at 23. And, as also explained above, Petitioners' claims fall squarely into this category because they are based on events which may never occur, namely, the failure of the General Assembly and Governor to adopt a new congressional district plan before a point in time that is months down the road. Petitioners' claims should therefore be dismissed.

More fundamental, however, is that the *Arrington* decision is internally inconsistent and therefore lacks persuasive value. If the voters there had actually alleged "a realistic threat of ***imminent*** injury to their voting rights" and their claims were actually ripe for disposition, there would not have been a basis for the court to stay its hand so that the "appropriate state bodies" could continue with their congressional redistricting efforts. And yet the court took precisely that action. As

Judge Easterbrook therefore explained in his dissenting opinion, "reserving a place in line is not a proper reason to invoke the judicial power. We should dismiss this complaint and make it clear that no replacement will be received until there is a real controversy (which by entering a stay my colleagues imply could not happen before [the stay ends])." 173 F.Supp.2d at 869.

This reasoning applies with equal force here. Petitioners' claims are based on a future state of affairs that, in fact, might never come into existence. The claims also ignore the presumption that public officials will act with regularity, lawfully, and without violating the rights of citizens. Petitioners' desire to "reserve[e] a place in line" in case they might need it one day does not give them standing or make their claims ripe. *See also Carter*, 2011 WL 665408 at *2.

Finally, the Legislative Leaders note that Pennsylvania courts have been able to move swiftly to implement remedial congressional districting plans, which further undermines Petitioners' demand for immediate, premature relief. In *Mellow v. Mitchell*, 607 A.2d 204, 205 (Pa. 1992), for example, eight Democratic state senators brought an action on January 28, 1992, the first day to circulate nominating petitions that year, asking the Court to create a new congressional district plan due to an impasse. On March 10, 1992, only 42 days after the lawsuit was filed, the Pennsylvania Supreme Court adopted a remedial plan. *Id.* at 206. Similarly, in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa.

2018), the Pennsylvania Supreme Court, on January 22, 2018, struck down the 2011 congressional district plan. *Id.* at 825. On February 19, 2018, just 28 days later, the court adopted a remedial plan. *League of Women Voters v. Com.,* 181 A.3d 1083 (Pa. 2018).

Here, there remains ample time for the General Assembly and Governor to adopt a new congressional district plan. And certainly there is no reason for this Court to abrogate the General Assembly's plenary authority *now*, just to allow a select group of Democratic Party-allied voters to reserve their place in line to serve as petitioners in the event that, some months from now, an impasse claim becomes ripe.

Petitioners separately point to several orders that the Minnesota Supreme Court issued in two pending impasse lawsuits. According to Petitioners, these orders show that "the Minnesota Supreme Court has already put the gears of judicial redistricting into motion under similar circumstances" to what they allege in their Petition for Review. Petitioners' Memorandum at 11. But, while Petitioners describe some of the orders, they do not point to anything in the orders – let alone any opinion from the Minnesota Supreme Court – that contains any analysis of relevance to the standing and ripeness issues at hand. The orders, in other words, amount to a red herring. In any event, Minnesota law, of course, does not apply here.

IV. THE COUNTS IN THE PETITION ARE NOT JUSTICIABLE

Separately, the Counts in the Petition are non-justiciable because they call for the Court to substitute its policy judgment for the General Assembly's policy judgment with regard to whether there should be a deadline for the enactment of a new congressional district plan and, likewise, the content of that plan.

Under Article II, Section 1 of the Pennsylvania Constitution, the Commonwealth's legislative power is vested exclusively in the General Assembly. *See* Pa. Const. art. II, § 1. The General Assembly's legislative power is not only exclusive, but also plenary. As a consequence, unless federal law or the Pennsylvania Constitution says otherwise, the General Assembly has authority over and may enact legislation regarding any subject. *Luzerne County v. Morgan*, 107 A. 17, 17 (Pa. 1919) ("The legislature may do whatever it is not forbidden to do by the federal or state Constitutions."); *see also Commonwealth v. Keiser*, 16 A.2d 307, 310 (Pa. 1940) ("powers not expressly withheld from the Legislature inhere in it, and this is especially so when the Constitution is not self-executing"); *Kotch v. Middle Coal Field Poor Dist.*, 197 A. 334, 338 (Pa. 1938) ("the General Assembly has jurisdiction of all subjects on which its legislation is not prohibited"). In this regard, our Supreme Court has cautioned that "[t]he Constitution has given us a list of the things which the Legislature may not do. If we extend that list, we alter the instrument; we become ourselves the aggressors,

and violate both the letter and spirit of the organic law as grossly as the Legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar." *Russ v. Commonwealth*, 60 A. 169, 172 (Pa. 1905).

Given that federal law and the Pennsylvania Constitution do not impose a deadline to enact a congressional redistricting plan or otherwise address the timing of such an enactment, the General Assembly has exclusive and plenary power on that topic. *See Luzerne County*, 107 A. at 17. And, to date, the General Assembly has opted ***not*** to legislate on that topic. As Petitioners acknowledge, Pennsylvania law "does not set a deadline by which congressional redistricting plans must be in place prior to the first congressional election following release of the Census." Petition at ¶ 30. The result is that, to the extent that Petitioners are asking this Court to establish such a deadline and adopt and implement its own congressional district map "if the political branches fail to enact a plan by [the] date certain set by this Court," *see id.* at Prayer for Relief, they are asking for the Court to usurp the General Assembly's exclusive legislative authority. Petitioners, in other words, are asking this Court to substitute its judgment for the General Assembly's judgment with regard to the desirability of legislation. If the Court were to do so, it would violate the Separation of Powers doctrine. *See, e.g., Glenn Johnston, Inc. v. Commonwealth, Dep't of Revenue*, 726 A.2d 384, 388 (Pa. 1999) ("policy

determinations, however, are within the exclusive purview of the legislature, and it would be a gross violation of the separation of powers doctrine for us to intrude into that arena"); *Commonwealth v. Hicks*, 466 A.2d 613, 615 n.4 (Pa. 1983) ("It is, of course, improper for a court to substitute its policy judgment for that of the Legislature."); *Mayhugh v. Coon*, 331 A.2d 452, 456 (Pa. 1975) ("The court's function is to interpret legislative enactments and not to promulgate them."); *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 199 A.2d 266, 267 (Pa. 1964) ("It is not for us to enunciate public policy. That responsibility rests with the legislature and is for that body alone to resolve.").

In asking for the Court to adopt and implement its own congressional district map, moreover, Petitioners are asking the Court to usurp the General Assembly's exclusive authority under Article I, Sections 2 and 4 of the United States Constitution. As the U.S. Supreme Court has stressed, under Article I, Section 4, congressional "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015). Pennsylvania's legislative power (and therefore its power to engage in congressional redistricting) is vested exclusively in the General Assembly, as noted above. Therefore, if the Court were to undertake congressional redistricting on its own, it would be

performing the General Assembly's lawmaking function and would therefore contravene the Separation of Powers doctrine.

As a result, the Counts in the Petition are non-justiciable and not claims upon which relief may be granted, and this Court lacks jurisdiction to adjudicate them. *See, e.g., Maurer v. Boardman*, 7 A.2d 466, 472-73 (Pa. 1939) ("There is no appeal to the courts from the judgment of the legislature as to the wisdom or policy which the Commonwealth shall adopt.").

V. THE COUNTS IN THE PETITION DO NOT OTHERWISE STATE CLAIMS UPON WHICH RELIEF MAY BE GRANTED

The Counts in the Petition should be dismissed in light of the various procedural and substantive defects that are discussed above. But if the Court does not dismiss them on those grounds, it should dismiss them because they do not otherwise state claims upon which relief may be granted.

A. Counts I and II (One Person, One Vote)

Counts I and II allege violations of the "one-person, one-vote" principles of the U.S. and Pennsylvania Constitutions and do so based on a theory that the release of 2020 census data makes Pennsylvania's current congressional redistricting plan unconstitutionally malapportioned. This theory is wrong.

Equal Protection does not demand a constant, minute-by-minute updating of district lines to ensure precisely equal populations. Rather, compliance with the one-person, one-vote standard is process-driven, requiring states to have only "a

rational approach to readjustment of legislative representation" or, stated differently, a "reasonable plan for periodic revision." *Reynolds v. Sims*, 377 U.S. 533, 583 (1964). This process-driven standard recognizes that "[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years *leads to some imbalance in the population of districts toward the end of the decennial period*." *Id.* (emphasis added).

The Petition does not allege that Pennsylvania lacks a rational approach to redistricting the Commonwealth's congressional districts. Rather, it alleges that the current districts are malapportioned, *see, e.g.*, Petition at ¶¶ 25–27, which is merely a description of the "imbalance…toward the end of the decennial period" that *Reynolds* deemed to be non-invidious. Following *Reynolds*, "courts have recognized that no constitutional violation exists when an outdated legislative map is used, so long as the defendants comply with a reasonably conceived plan for periodic reapportionment." *Garcia v. 2011 Legislative Reapportionment Comm'n*, 938 F. Supp. 2d 542, 550 (E.D. Pa. 2013), *aff'd on other grounds* 559 F. App'x 128 (3d Cir. 2014); *see also, e.g.*, *Pol. Action Conf. of Illinois v. Daley*, 976 F.2d 335, 341 (7th Cir. 1992); *Graves v. City of Montgomery*, 807 F. Supp. 2d 1096, 1109 (M.D. Ala. 2011); *French v. Boner*, 940 F.2d 659 (6th Cir. 1991) (unpublished); *Mac Govern v. Connolly*, 637 F. Supp. 111, 114 (D. Mass. 1986);

Cardona v. Oakland Unified Sch. Dist., California, 785 F. Supp. 837, 842 (N.D. Cal. 1992).[3]

At the time when the Petition was filed, Petitioners complained that the congressional lines were not *already* redrawn, which was effectively a demand for the impossible. At the time, the census results that have historically played a vital role in the redistricting process had not yet been issued, a point the Petition obliquely concedes. *See* Petition at ¶¶ 22–23. A state does not lack "a rational approach to readjustment," *Reynolds*, 377 U.S. at 583, merely because the General Assembly lacks a time machine that it can use to obtain information that will not be issued for months. *Compare Pol. Action Conf. of Illinois*, 976 F.2d at 340 (criticizing plaintiffs' objection to election under malapportioned districts where "[t]he census figures became available only two weeks before the…election.

[3] As an example of this principle, on January 25, 2012, the Pennsylvania Supreme Court struck down the 2011 Legislative Reapportionment Commission's initial General Assembly apportionment plans and remanded to the LRC to draw new plans. *Holt I*, 38 A.3d at 719–21. The Court ordered that the prior decade's plans, the 2001 plans, would "be used in all forthcoming elections to the General Assembly until the next constitutionally mandated reapportionment shall be approved." *Id.* The associated delay meant the 2012 General Assembly elections proceeded under the prior decade's plan, a resolution the Pennsylvania Supreme Court found acceptable, *see Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211, 1216 (Pa. 2013) ("Holt II"), and that a federal court found did not violate *Reynolds*. *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 592–93 (E.D. Pa. 2012).

Redrawing Chicago's ward for that election using the new census data was not possible.").[4]

Indeed, Petitioners have yet to identify a redistricting deadline that the General Assembly has failed to meet. And even if they had identified such a deadline, strict compliance with a state-law redistricting deadline is not required to comply with one-person, one-vote. In cases where state law *has* imposed a deadline to complete redistricting (which is *not* the case with Pennsylvania's Constitution and statutes), courts have rejected one-person, one-vote claims *even where the deadline went unmet*. *See Clark v. Marx*, 2012 WL 41926, at *10 (W.D. La. Jan. 9, 2012) ("[T]he City Council's violation of its own Charter provision," which set a redistricting deadline, "is not of constitutional concern"); *Garcia*, 938 F. Supp. 2d at 550–52.[5] Because the one-person, one-vote principle is not offended when a redistricting authority violates a statutory redistricting deadline, the principle cannot plausibly be read to *itself* impose a deadline for the Commonwealth to redistrict.

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[4] It is true that census results were published on August 12, 2021, and the nonpartisan Pennsylvania Legislative Data Processing Center is presently processing that data for the General Assembly's use in redistricting. The Legislative Leaders anticipate that the General Assembly will imminently receive this data for redistricting uses. But these developments do not impact Petitioners' claims, which are no more ripe today than when they filed the Petition in April 2021.

[5] *Holt I*, dealing with state legislative reapportionment, involved a reapportionment process that exceeded the deadline. *Holt I*, 38 A.3d at 716.

Petitioners' theory that this Court's intervention is appropriate because the "political branches [are] divided between the two major parties," Petition at ¶ 33, blames the public for its voting choices. Needless to say, a state does not lack "a rational approach to readjustment," *Reynolds*, 377 U.S. at 583, merely because its voters send a bipartisan government to the state's capitol. As explained above, there is no basis in law for the courts to presume that duly elected officials will neglect their responsibilities before they have had an opportunity to fulfill them. Instead, the opposite presumption applies. Nor is there any basis in fact to assume that members of different parties are necessarily incapable of compromise. *See, e.g.*, *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 796 (2017) (recounting how the Virginia General Assembly in 2011 passed a redistricting plan "with broad support from both parties" during a time of divided government). To the extent that Petitioners allege otherwise, their assertions are not well-pleaded and, in deciding the Legislative Leaders' preliminary objections, the Court should not accept them as true. *See, e.g., Christ the King Manor v. Dep't of Pub. Welfare*, 911 A.2d 624, 633 (Pa. Cmwlth. Ct. 2006) (internal citation omitted) (at preliminary objection stage, court need not accept as true "unwarranted inferences, conclusions of law, argumentative allegations or expressions of opinion").

Petitioners' assertion that the current congressional plan will be diluted in "any future election," Petition at ¶ 28, ignores that the plan is not yet dilutive and

also confuses Pennsylvania's right to 17 members in Congress, which will take effect in January 2023, with its right to have 18 members in Congress now. *See also* Petition at ¶¶ 18–21 (explaining that Pennsylvania lost a seat in the recent apportionment, but failing to note that this change does not take effect until the 118th Congress). The Petition suggests that all future elections, including any special elections that take place prior to November 2022, should occur under a redistricting plan with 17 seats, lest Petitioners' votes be diluted. But (as discussed further below) Pennsylvania is not obligated to switch over to a 17-seat system during the 117th Congress, to which it has lawfully sent 18 members, and more than a year before the 118th Congress takes session.

Even apart from these points, Petitioners' votes cannot be diluted at a time that is long before the voting occurs. *See Garcia*, 559 Fed. App'x at 134–35 (finding no injury to voters where election at issue was not imminent). Nor will they go without representation before the next election. *Cf. Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1955 (2019) ("[D]elegates continue to represent the districts that elected them, even if their reelection campaigns will be waged in different districts.").

Pennsylvania's Free and Equal Elections Clause does not change any of this one-person, one-vote analysis. Petitioners say that, in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), the Pennsylvania Supreme Court

afforded the Clause "the broadest interpretation." Petition at ¶ 45 (citing *League of Women Voters*, 178 A.3d at 814). But nothing in *League of Women Voters* suggests that there is a requirement for constant redistricting of the genre that *Reynolds* deemed to be impracticable and unnecessary. The case concerned partisan considerations in redistricting, not malapportioned districts. The case reaffirmed that the "primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature." 178 A.3d at 821–22. It cannot be read to impose the types of absurd obligations that *Reynolds* eschewed but which Petitioners favor.

For all of these reasons, Counts I and II fail to state a claim and should be dismissed.

B. Count III (2 U.S.C. § 2c)

Count III of the Petition alleges a violation of 2 U.S.C. § 2c, which provides that, "[i]n each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative…, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled…." 2 U.S.C. § 2c. Petitioners theorize that "the *current* congressional district plan violates Section 2c's requirement" because it "contains 18 districts," whereas "Pennsylvania is *currently* allotted only 17 seats in the U.S. House." Petition at ¶ 47. This reasoning is misguided.

Pennsylvania, in fact, is *currently* allotted *18* seats in the U.S. House. Right now, the 117th Congress is in session. In that Congress, Pennsylvania is entitled to 18 seats. *Compare* 2 U.S.C. § 2a(a) *with id.* § 2a(b) (making clear that the reapportionment takes effect for the *next* Congress—*e.g.*, "Eighty-second" to "Eighty-third"—not immediately). "The reapportioned Congress will be the 118th, which convenes in January 2023." Press Release, U.S. Census Bureau, 2020 Census Apportionment Results Delivered to the President (Apr. 26, 2021), at https://www.census.gov/newsroom/press-releases/2021/2020-census-apportionment-results.html; *see also* Congressional Research Service, Apportionment and Redistricting Following the 2020 Census at 2 (updated April 27, 2021) ("New apportionment applies at the start of the next Congress.").

The release of apportionment results in April 2021 does not, under Section 2c, obligate Pennsylvania to instantaneously redistrict, as Petitioners suggest. The statute aligns the number of districts to the number of seats "in the…Congress" whose election is at issue. 2 U.S.C. § 2c. The mandate to redistrict under Section 2c has always been recognized to operate under the same timing principles that the Supreme Court has established for the one-person, one-vote doctrine. *See Branch v. Smith*, 538 U.S. 254, 268–69 (2003) (plurality opinion of Scalia, J.) (recounting historical purpose of Section 2c to respond to the "new era in which federal courts were overseeing efforts by badly malapportioned States to conform their

congressional electoral districts to the constitutionally required one-person, one-vote standards").

Finally, Petitioners fail to state a claim under Section 2c because a failure to redistrict under that provision would not "unlawfully dilute Petitioners' votes." Petition at ¶ 48. To the contrary, under Section 2c, if redistricting does not occur, the so-called "failsafe" provisions of 2 U.S.C. § 2a(c) come into play and mandate at-large elections. *See Branch*, 538 U.S. at 271–722 (plurality opinion). An at-large election is not dilutive of individual votes. *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

C. Count IV (Right-to-Petition)

Finally, Count IV of the Petition alleges a violation of Petitioners' right to petition as guaranteed by Article I, Section 20 of the Pennsylvania Constitution. Petition at ¶ 50, *citing* Pa. Const. art. I, § 20. But the Petition fails to identify any burden on Petitioners' rights to associate and petition.

A redistricting plan is a map—not legislation impacting associational or other expressive conduct. As the U.S. Supreme Court has held, "there are no restrictions on speech, association, or any other [expressive or petitioning] activities in the districting plans at issue. The [Petitioners] are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019). There is no authority to support

Petitioners' suggestion that the rights of petitioning and association include the concept of electoral convenience, perhaps the convenience of knowing months before certain filing deadlines where congressional lines will fall.

In any event, Pennsylvania has a compelling interest in limiting "the frequency of reapportionment," including its "need for stability and continuity in the organization of the legislative system." *Reynolds*, 377 U.S. at 583. And it has the highest imaginable interest in not having already redistricted—as Petitioners say is constitutionally required—because doing so would have been impossible. A state has a compelling interest, to say the least, in not being obligated to undertake actions that are impossible. Further, Pennsylvania has paramount interests in seeing its legislative actors afforded a reasonable opportunity to redistrict, given that the "primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature." *League of Women Voters*, 178 A.3d at 821–22. "[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality," whereas a court "possess[es] no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Connor v. Finch*, 431 U.S. 407, 414–15 (1977). Even if the legislative process does not produce the instantaneous—indeed, *impossible*—results that Petitioners demand, the State has

a paramount interest in letting that process run its course before seeing a court draw the congressional lines.

In short, the current redistricting plan does not place any burden on the right to petition and it serves paramount state interests. Count IV, like Petitioners' other claims, fails on the merits and should be dismissed.

CONCLUSION

For the reasons stated above, the Legislative Leaders respectfully request that this Court sustain their preliminary objections and dismiss this matter with prejudice.

Respectfully submitted,

September 16, 2021

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CERTIFICATE OF WORD COUNT

I hereby certify that, based on the word count feature of Microsoft Word 2016, the foregoing brief complies with the word-count limit described in Pennsylvania Rule of Appellate Procedure 2135(a)(1).

/s/ Anthony R. Holtzman
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CERTIFICATION OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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