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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CAROL ANN CARTER, *et al.*,
Petitioners,
v.
VERONICA DEGRAFFENREID, in her official
capacity as Acting Secretary of the Commonwealth of
Pennsylvania, *et al.*,
Respondents.

No. 132 MD 2021

**RESPONDENTS' BRIEF IN SUPPORT OF PRELIMINARY
OBJECTIONS TO PETITIONERS' PETITION FOR REVIEW**

TABLE OF CONTENTS

I. INTRODUCTION1

II. STATEMENT OF JURISDICTION2

III. STATEMENT OF THE CASE.....2

IV. STATEMENT OF THE QUESTIONS INVOLVED.....6

V. ARGUMENT6

VI. CONCLUSION.....10

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TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Arrington v. Elections Board</i> , 173 F. Supp. 2d 856 (E.D. Wisc. 2001).....	9
<i>Bayada Nurses, Inc. v. Department of Labor and Industry</i> , 8 A.3d 866 (Pa. 2010).....	6
<i>Garcia v. 2011 Legislative Reapportionment Commission</i> , 559 Fed. Appx. 128 (3d Cir. 2014).....	10
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018).....	5
<i>Markham v. Wolf</i> , 136 A.3d 134 (Pa. 2016).....	6
<i>Philips Brothers Electrical Contractors, Inc. v. Pennsylvania Turnpike Commission</i> , 960 A.2d 941 (Pa. Commw. Ct. 2008).....	7
<i>Pittsburgh Palisades Park, LLC v. Commonwealth</i> , 888 A.2d 655 (Pa. 2005).....	6, 8
<i>Robinson Township, Washington County v. Commonwealth</i> , 83 A.3d 901 (Pa. 2013).....	7
<i>Sachs v. Simon</i> , No. A21-0546 (Minn. Spec. Redistricting Panel Sept. 13, 2021), available at https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/A21-0243%202021%20Redistricting/A21-0243_Order-Briefing-Scheduling_9-13-2021.pdf	8
<i>Wattson v. Simon</i> , Nos. A21-0243 (Minn. Spec. Redistricting Panel Sept. 13, 2021), available at https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/A21-0243%202021%20Redistricting/A21-0243_Order-Briefing-Scheduling_9-13-2021.pdf	8, 9

Statutes

42 Pa. C.S. § 761(a)(1).....2

Act of Mar. 27, 2020 (P.L. 41, No. 12), 2020 Pa. Legis. Serv. Act
2020-12 (S.B. 422) (West).....5

Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. Act.
2019-77 (S.B. 421) (West).....4

Minn. Stat. Ann. § 204B.14(1a).....9

Other Authorities

Pa Congressional Redistricting PA House Republican Caucus, *Pa.
Redistricting*, <http://www.paredistricting.com> (last visited on Sept.
16, 2021)6

United States Census Bureau, *2020 Redistricting Data Datasets* (Aug.
12, 2021), [https://www.census.gov/programs-surveys/decennial-
census/data/datasets/rdo.html](https://www.census.gov/programs-surveys/decennial-census/data/datasets/rdo.html) (last visited on Sept. 16, 2021)6

Governor Tom Wolf, *Give Feedback on Pennsylvania Redistricting*,
<https://www.governor.pa.gov/redistricting-feedback/> (last visited
on Sept. 16, 2021).....6

Commonwealth of Pennsylvania Governor’s Office, *Executive Order*
(Sept. 13, 2021), [https://www.governor.pa.gov/wp-
content/uploads/2021/09/20210913-EO-2021-05-Redistricting-
Advisory-Council.pdf](https://www.governor.pa.gov/wp-content/uploads/2021/09/20210913-EO-2021-05-Redistricting-Advisory-Council.pdf) (last visited on Sept. 16, 2021).....6

Respondents, Acting Secretary of the Commonwealth Veronica Degraffenreid and Director of the Bureau of Election Services and Notaries Jessica Mathis, submit the following Memorandum of Law in support of their Preliminary Objections.

I. INTRODUCTION

The Petition for Review raises serious and weighty issues. Respondents agree with Petitioners that the right to vote of the individual Petitioners, and of all Pennsylvania voters, must be protected. They agree that timely congressional redistricting that complies with federal and state law is necessary to protect this right to vote. And they agree that, if the political branches of Pennsylvania's government fail to carry out that redistricting, the courts will be required to step in.

Respondents do not agree, however, that the political branches have failed in their responsibilities to voters, or that Petitioners have shown that failure is inevitable. At this point, all that Petitioners allege is that it is possible that the General Assembly and the Governor will reach an impasse on congressional redistricting legislation and will not be able to enact such legislation in time for the 2022 primary election. But the possibility of an impasse does not suffice to state a claim, and cannot justify the Court stepping in at this point.

Before this Court can intercede, Pennsylvania law requires more than a chance that Petitioners' rights may be endangered some time down the road. Under

bedrock principles of standing, the harm to Petitioners cannot be wholly contingent on future events. And for Petitioners' claims to be ripe, the facts must be sufficiently developed to permit judicial resolution. Here, Petitioners' claims fail on both fronts.

Respondents do not argue that the Court's doors are or should be closed to Petitioners permanently. As of today, however, Petitioners' forecast—stormy though it may be—is too uncertain to establish Petitioners' standing and state a ripe claim for relief.

II. STATEMENT OF JURISDICTION

The Petition for Review is addressed to this Court's original jurisdiction, pursuant to 42 Pa. C.S. § 761(a)(1).

III. STATEMENT OF THE CASE

Petitioners—16 individuals living in 11 different Pennsylvania congressional districts—filed their Petition for Review addressed to the Court's original jurisdiction on April 26, 2021. Petitioners allege that their voting rights will be potentially burdened by a chain of events that was set in motion by the completion of the 2020 decennial census. According to Petitioners, once the United States Secretary of Commerce delivered the apportionment data obtained by the 2020 Census to the President, use of the existing congressional districts of each state—including those of Pennsylvania—became unconstitutional. *See, e.g.*, Pet. ¶¶

2-4. Petitioners allege that unless new congressional districts are put in place in time for 2022's primary and general elections, their rights will be violated. *Id.* ¶ 7.

Petitioners acknowledge that under Pennsylvania law, congressional district maps are the responsibility of the political branches—the legislature and the executive—in the first instance. “In Pennsylvania, congressional district plans must be enacted through legislation, which requires the consent of both legislative chambers and the Governor (unless both legislative chambers override the Governor’s veto by a two-third vote).” Pet. ¶ 6 (citing *League of Women Voters v. Commonwealth*, 178 A.3d 737, 742 (Pa. 2018)).

Petitioners hypothesize, however, that redistricting is unlikely to proceed along ordinary legislative lines in 2021 and 2022, because Pennsylvania’s “political branches are highly likely to be at an impasse this cycle and to fail to enact a new congressional district plan.” *Id.* ¶ 33. The support Petitioners offer for this proposition is that Pennsylvania’s legislative and executive branches are controlled by different parties; that “[i]n just the last two years, Governor Wolf and the Republican-controlled General Assembly have repeatedly conflicted over a broad range of policies”; and that Census delays have compressed the legislature’s time to enact a new congressional district plan. *Id.* Without a new congressional district plan, Petitioners allege, they “will be forced to cast unequal votes[,]...[b]ecause the current congressional plan is unconstitutionally

malapportioned[.]” Pet. ¶ 4. Additionally, Petitioners allege that if they are forced to participate in upcoming elections that use the old map, their “right to associate with other voters in support of their preferred candidates will be infringed.” *Id.* As a result, Petitioners ask that the Court “assume jurisdiction now and establish a schedule that will enable the Court to adopt its own plan in the near-certain event that the political branches fail to timely do so.” *Id.* ¶ 9.

The potential harms that Petitioners allege are uncertain and far in the future. First, Petitioners do not allege that the political branches have announced an impasse. Second, they acknowledge that the legislature has not missed any deadlines. *See* Pet. ¶ 30 (“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.”).

Finally, Petitioners do not contend that it will be impossible for the legislative and executive branches to agree on a congressional district map, and could not reasonably contend this. While the Governor has exercised his veto power at times in the past two years, legislation has also passed during that time with bipartisan support and without a veto—including important voting-related legislation. For example, less than two years ago, the General Assembly enacted and the Governor signed Act 77 of 2019,¹ which allowed all eligible voters to vote

¹ Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. Act. 2019-77 (S.B. 421) (West).

by mail-in ballot and made many other important changes to Pennsylvania’s Election Code. Five months later, the General Assembly enacted and the Governor signed Act 12 of 2020,² which made further changes to the Election Code and included sweeping temporary measures to respond to the COVID-19 pandemic. Both of these important voting laws received bipartisan support in the General Assembly.

Petitioners also concede, as they must, that “there is still time for the General Assembly and the Governor to enact a new congressional plan[.]” *Id.* ¶ 9. The first day for candidates to circulate and file nomination petitions for the 2022 primary election is February 15, 2022. In order to ensure efficient election administration, allow for timely notice to candidates, and permit proper implementation of the new congressional districts, Respondents believe that the Department of State must receive a final and legally binding congressional district map no later than January 24, 2022. *See* Respondents’ Preliminary Objections ¶¶ 13-17. In order to account for potential litigation, Respondents believe that a new map must be signed into law by the end of December 2021. *Id.* ¶ 17. A map signed into law in late December would not be unprecedented. The congressional district map that followed the 2010 Census, for example, was signed into law on December 22, 2011. *League of Women Voters*, 178 A.3d at 743-44. If the political

² Act of Mar. 27, 2020 (P.L. 41, No. 12), 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West).

branches act promptly, they could easily meet a similar deadline.³

IV. STATEMENT OF THE QUESTIONS INVOLVED

1. Where Petitioners allege harm that is speculative and uncertain, should the Court sustain Respondents' Preliminary Objection for lack of standing and ripeness?

Suggested Answer: Yes.

V. ARGUMENT

To establish standing to seek relief from this Court, a party must demonstrate that it is "aggrieved," that is, that it has "a substantial, direct, and immediate interest in the matter." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016); *accord Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005). "[A]n interest is 'immediate' if the causal connection is not remote or speculative." *Pittsburgh Palisades Park*, 888 A.2d at 660 (citation omitted).

Like standing, the principle of ripeness "mandates the presence of an actual controversy." *Bayada Nurses, Inc. v. Department of Labor and Industry*, 8 A.3d

³ There is no indication that the political branches are delaying; they appear to be actively moving the redistricting process forward. The U.S. Census Bureau released redistricting data in legacy format on August 12, 2021. See <https://www.census.gov/programs-surveys/decennial-census/data/datasets/rdo.html>. Using that data, the House State Government Committee is soliciting public input on new maps, including by holding a series of hearings across the Commonwealth. See <http://www.paredistricting.com>. Governor Wolf is also soliciting the public's feedback, and has established a Redistricting Advisory Council to assist him in evaluating proposed maps. See <https://www.governor.pa.gov/redistricting-feedback/>; <https://www.governor.pa.gov/wp-content/uploads/2021/09/20210913-EO-2021-05-Redistricting-Advisory-Council.pdf>.

866, 874 (Pa. 2010). Unlike standing, however, ripeness “also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013).

Here, all of Petitioners’ claims turn on one key fact—whether or not there will be a new congressional district plan in place in time for the 2022 election. Petitioners allege only that it is “highly likely” that Pennsylvania’s political branches will “be at an impasse this cycle” and “fail to enact a new congressional district plan.” Pet. ¶ 33. That fact, as Petitioners acknowledge, is still unresolved: “there is still time for the General Assembly and the Governor to enact a new congressional plan[.]” Pet. ¶ 9. Because no one knows what will happen in the negotiations between the legislature and the Governor—let alone whether the negotiations will break down, a necessary prerequisite to Petitioners’ claims—the facts underlying the Petition for Review are quintessentially “not sufficiently developed to permit judicial resolution of the dispute,” and therefore are not ripe. *Robinson*, 83 A.3d at 917; see also *Philips Bros. Elec. Contractors, Inc. v. Pennsylvania Turnpike Comm’n*, 960 A.2d 941, 945 (Pa. Commw. Ct. 2008) (factors considered in ripeness inquiry include “whether the claim involves uncertain and contingent events that may not occur as anticipated or at all”) (citations omitted). Similarly, “any possible harm to Petitioners is wholly

contingent on future events.” *Pittsburgh Palisades Park*, 888 A.2d at 660. “[A]s Petitioners do not offer that [negotiation over a new congressional district plan] has harmed them or will harm them in any way that is not remote or speculative, they fail to demonstrate that they have an immediate interest,” as is required for standing. *Id.* (citation omitted).

Petitioners’ Memorandum in Opposition to Respondents’ Preliminary Objections (“Mem. Opp.”) sets forth no persuasive reason for the Court to conclude that Petitioners have standing or that their claims are ripe. First, Petitioners argue, courts in Minnesota and Wisconsin have exercised jurisdiction under similar circumstances. *See* Mem. Opp. at 11-13, 15-16, 18-20. But the cases Petitioners rely upon are not at all similar to this one. The Minnesota state court cases of *Wattson v. Simon*, No. A21-0243, and *Sachs v. Simon*, No. A21-0546, involve the work of a hybrid entity with no counterpart in Pennsylvania: a “special redistricting panel,” made up of judges, that conducts public outreach and factfinding in order to prepare itself to address any redistricting litigation that may arise. *See Wattson v. Simon*, Nos. A21-0243 and A21-0546 (Minn. Spec. Redistricting Panel Sept. 13, 2021), *available at*

https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/A21-0243%202021%20Redistricting/A21-0243_Order-Briefing-Scheduling_9-13-2021.pdf (stating that “the panel wishes to gather information about Minnesota

communities from Minnesota citizens” and scheduling ten public hearings across the state). Given the panel’s expansive and time-consuming role, and the fact that Minnesota, unlike Pennsylvania, has statutory deadlines for the establishment of new maps, *see* Minn. Stat. Ann. § 204B.14(1a), it is not surprising that the Minnesota Supreme Court concluded that the panel should begin its work in the summer of 2021. *See Wattson v. Simon*, Nos. A21-0243 and A21-0546 (Minn. June 30, 2021) at 2. That decision, under those unique circumstances, has no bearing on the standing and ripeness questions here.

Arrington v. Elections Board, 173 F. Supp. 2d 856 (E.D. Wisc. 2001), is similarly unhelpful. In that case, two groups of legislators—the State Senate Democratic Caucus, who intervened as plaintiffs, and the State Senate’s Speaker and Minority Leader, who intervened as defendants—filed briefs agreeing that the case was justiciable, and the Senate leaders agreed with the plaintiffs that impasse was a “very real possibility.” *Id.* at 858-59, 864. The court relied on these admissions to conclude that it had jurisdiction. *Id.* at 864. In this case, the political branches have not taken such a position. Moreover, *Arrington* interprets federal law as applied to the Wisconsin legislative process, and thus has no persuasive force here.

Petitioners’ second argument is that the Court must act now because the congressional districts are malapportioned. Mem. Opp. at 8-9. But the fact that the

current districts may not have equal numbers of voters causes no constitutional injury. “Malapportionment's harm is felt by individuals in overpopulated districts who actually suffer a diminution in the efficacy of their votes and their proportional voice in the legislature.” *Garcia v. 2011 Legislative Reapportionment Commission*, 559 Fed. Appx. 128, 133 (3d Cir. 2014). Accordingly, malapportionment cannot cause injury until an election occurs using the malapportioned districts—and, as discussed above, at this point such an injury is wholly speculative.

There may come a time when Petitioners’ claim ripens and they have standing, but as the allegations in their Petition show, that time has not arrived and may never arrive. Accordingly, this case cannot proceed.

VI. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court sustain their Preliminary Objection for lack of standing and ripeness and enter an order dismissing the Petition for Review without prejudice.

Respectfully submitted,

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Dated: September 16, 2021

By: /s/ Michele D. Hangle

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