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Aria C. Branch
Christina A. Ford
Jyoti Jasrasaria
Elias Law Group LLP
10 G St. NE Ste. 600
Washington, D.C. 20002
abranch@elias.law
cford@elias.law
jjasrasaria@elias.law
T: (202) 968-4490

Abha Khanna
Elias Law Group LLP
1700 Seventh Ave. Ste. 2100
Seattle, WA 98101
akhanna@elias.law
T: (206) 656-0177

Robert J. Clark, No. 308105
Edward D. Rogers, No. 69337
Marcel S. Pratt, No. 307483
Michael R. McDonald, No. 326873
Paul K. Ort, No. 326044
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
ClarkR@ballardspahr.com
RogersE@ballardspahr.com
PrattM@ballardspahr.com
McDonaldM@ballardspahr.com
OrtP@ballardspahr.com
T: (215) 665-8500
F: (215) 864-8999

Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CAROL ANN CARTER; MONICA PARRILLA; REBECCA POYOUROW; WILLIAM TUNG; ROSEANNE MILAZZO; BURT SIEGEL; SUSAN CASSANELLI; LEE CASSANELLI; LYNN WACHMAN; MICHAEL GUTTMAN; MAYA FONKEU; BRADY HILL; MARY ELLEN BALCHUNIS; TOM DEWALL; STEPHANIE MCNULTY; and JANET TEMIN,

Petitioners,

v.

VERONICA DEGRAFFENREID, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; JESSICA MATHIS, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries,

Respondents.

No. 132 MD 2021

PETITIONERS' MEMORANDUM IN OPPOSITION TO LEGISLATIVE INTERVENORS' PRELIMINARY OBJECTIONS

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INTRODUCTION

Petitioners ask this Court to undertake a familiar task that courts across the country, including in Pennsylvania, have done for decades: guarantee that congressional districts satisfy the constitutional one person, one vote requirement after each decennial census, and prepare to draw new district maps in the likely event that partisan gridlock prevents Pennsylvania's political branches from doing so themselves.

This suit is not novel. It is also far from a request to this Court "to usurp the General Assembly's exclusive legislative authority" over redistricting, as the Legislative Leaders ("Intervenors") claim. Brief in Support of Prelim. Obj'ns ("Br.") at 2. As this suit proceeds, the General Assembly remains entirely free to draw district lines and work with Governor Wolf to enact a new, lawful congressional map this cycle. But as Petitioners have alleged—and as history demonstrates—there is no reasonable prospect that Pennsylvania's political branches will be able to do so in time for the 2022 elections.

Pennsylvania voters are not required to wait indefinitely for that reality to become even clearer. The federal and state Constitutions' requirements are unforgiving: equally apportioned districts ***must*** be drawn following each decennial census and ***must*** be in place in advance of the coming elections. Filing deadlines and the 2022 primary elections loom closer every passing day. And Respondents

concede that—for all practical purposes—a new map must be signed into law by December 2021 "to permit proper implementation of the new congressional districts." Respondent's Prelim. Obj'ns ¶¶ 15–18. **The conceded practical deadline for the legislature to act is fewer than three months away**. Given the constitutional mandate, the rapidly approaching December deadline, and the fact that Petitioners' alleged injuries can be remedied only prospectively, it is imperative that this action proceed beyond the pleadings stage so that this Court may be prepared for its anticipated involvement in the map-drawing process.

That is all that Petitioners presently seek; they do *not* ask this Court to effectuate new maps before the legislature has had its chance to act. To accept Intervenors' position would be to adopt novel and dangerous standards for impasse suits, under which courts would be foreclosed from hearing these cases until the eleventh hour, when the political branches—and the public—have run out of time. That approach is not only inconsistent with precedent but would also functionally preclude courts from protecting the citizenry's constitutional rights by crafting remedial maps in time for elections should the state fail to timely redistrict.

As decades of redistricting precedent confirm, now is the time for impasse redistricting litigation in Pennsylvania. Petitioners have standing to sue. Their case is ripe. Nothing about the relief Petitioners seek would violate the separation of powers doctrine. And their claims are properly stated. The work of implementing

the Commonwealth's new political boundaries may be a time-intensive task, but resolving these preliminary objections is not. This Court should swiftly overrule them.

BACKGROUND

On April 26, 2021, the same day the Census Bureau publicly released its apportionment counts, Petitioners filed this action in the Commonwealth Court. The 2020 census confirmed that, as a result of significant population shifts in the past decade, Pennsylvania's congressional districts are now unconstitutionally malapportioned. *See* Pet. ¶¶ 22–28. Redrawing Pennsylvania's congressional districts is therefore required prior to the upcoming 2022 congressional election.

Pennsylvania law provides that the state's congressional district plan should be enacted through legislation, which must pass both chambers of the General Assembly and be signed by the Governor (unless both chambers override the Governor's veto by a two-thirds vote). *Id.* ¶ 6 (citing Pa. Const., Art. III, § 5 & Art. IV, § 15). Consequently, the redistricting needed to alleviate the constitutional injury of malapportionment faces a significant obstacle: partisan deadlock. The Republican Party currently controls both legislative chambers, but it lacks the supermajority necessary to override a veto from the Democratic governor. *Id.* ¶¶ 7, 29. This partisan divide makes it extremely unlikely that the branches will pass a lawful congressional redistricting plan in time to be used for the 2022 elections—let alone

before February 15, 2022, the date that congressional candidates may start circulating nomination papers for party primaries, *id.* ¶ 31 (citing 25 P.S. § 2868), and much less December 2021, the practical deadline for enactment suggested by Respondents. Respondents have conceded "the Department of State must receive a final and legally binding congressional district map no later than January 24, 2022," to "help the counties reduce errors, allow for timely notice to candidates, and permit proper implementation of the new congressional districts." Resp'ts' Prelim. Obj'ns ¶ 15. Further, according to Respondents, "any timeline must factor in sufficient time for litigation before the Department receives the final map," pushing the deadline for enactment even earlier. *Id.* ¶¶ 16–18.

The last time a redistricting cycle coincided with a period of divided government in Pennsylvania, the political branches failed to enact a congressional redistricting plan in time for the next elections, forcing Pennsylvania's judiciary to delay the nominating timeline for congressional candidates and implement a new plan. *See Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992).

And although Petitioners do not discount the diligence of Pennsylvania courts in "mov[ing] swiftly to implement remedial congressional districting plans" when necessary, Br. at 21, Intervenors' references to the 42-day and 28-day remedial timelines in *Mellow* and *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), respectively, do not tell the whole story. Though 42 days passed between

the time the Commonwealth Court took jurisdiction in *Mellow* and the day it approved the new map, two more weeks passed before the Supreme Court issued a written opinion, *see* 607 A.2d at 205–06, followed by another few weeks of federal court challenges that led right up to the April 1992 primary, *see Valenti v. Mitchell*, 962 F.2d 288 (3d Cir. 1992). Likewise, the *League of Women Voters* remedial plan process, though it lasted just 28 days, benefitted from litigation that began seven months earlier and included, among other things, significant expert analysis.

This year's redistricting timeline is uniquely compressed due to pandemic-related delays in the delivery of 2020 census data. The U.S. Secretary of Commerce delivered the apportionment data obtained by the 2020 census to the President on April 26, 2021, nearly four months after the typical delivery of the data. *See* Pet. ¶ 2. On August 12, she delivered to the state its redistricting data file in a legacy format, which Pennsylvania can use to tabulate the new population of each political subdivision. *See* Pet. ¶ 23. On September 16, 2021, the Secretary delivered to Pennsylvania that same detailed population data showing the new population of each political subdivision in a tabulated format. *Id*. These data—commonly referred to as "P.L. 94-171 data" in reference to the 1975 legislation that first required this process—are typically delivered no later than *April* of the year following the decennial census. *Id*. Redistricting thus usually begins months before it will begin this year.

Still, in 2011, when Republicans held control of state government and received the relevant data on time, the congressional district map was not signed into law until December 22, 2011. *See League of Women Voters*, 178 at 743–44. The delays in data delivery and imminent risk of impasse this year, combined with what is already a lengthy and divisive process even under the most favorable circumstances, begs this Court's prompt intervention.

Petitioners are registered Pennsylvania voters who reside in now-overpopulated congressional districts and are consequently "deprived of the right to cast an equal vote, as guaranteed to them by the U.S. Constitution and the Pennsylvania Constitution." Pet. ¶¶ 11–12. The present malapportionment and likelihood of impasse additionally infringes on Petitioners' rights to associate with fellow voters and engage in the business of electing representatives. Pet ¶¶ 49–52. Just as in *Mellow*, Petitioners in this action ask the Court "to declare Pennsylvania's current congressional district plan unconstitutional; enjoin Respondents from using the current plan in any future elections; [and] implement a new congressional district plan that adheres to the constitutional requirement of one-person, one-vote should the General Assembly and Governor fail to do so." Pet. ¶ 1.

LEGAL STANDARD

Under Pennsylvania law, preliminary objections should be sustained "only when, based on the facts pleaded, it is clear and free from doubt that the complainant

will be unable to prove facts legally sufficient to establish a right to relief." *Kuren v. Luzerne Cty.*, 146 A.3d 715, 718 n.1 (Pa. 2016) (quoting *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 101 (Pa. 2008)). In conducting its review, the Court must "accept as true all well-pleaded material facts set forth in the [petition for review] and all inferences fairly deducible from those facts." *Id.*; *Yocum v. Com., Pa. Gaming Control Bd.*, 161 A.3d 228, 237 (Pa. 2017) (applying the same standard in considering preliminary objections based on standing and ripeness). The Court must overrule objections to a plaintiff's complaint if the complaint pleads sufficient facts which, if believed, would entitle the plaintiff to the relief sought. *Wilkinsburg Police Officers Ass'n v. Com.*, 636 A.2d 134, 137 (Pa. 1993).

ARGUMENT

Intervenors cite two related doctrines—standing and ripeness—to suggest that the Petition is not justiciable, but neither prevents this Court from hearing this case, as Petitioners outlined in their memorandum opposing Respondents' preliminary objections. None of Intervenors' arguments to the contrary are persuasive.

Moreover, Intervenors' assertion that the Petition infringes on their legislative authority and arguments that Petitioners fail to state a claim betray a fundamental misunderstanding of the relief that Petitioners seek. Simply put, Pennsylvania's current congressional districts, adopted by court order in 2018 based on 2010 population data, are unconstitutionally malapportioned, as confirmed by the U.S.

Secretary of Commerce's release of preliminary census data on April 26, 2021. That the legislative process *might* yield a new map—which Petitioners allege is highly unlikely due to entrenched political divisions—does not erase the fact that Petitioners are currently living in overpopulated districts, are currently suffering harm, and stand to suffer even greater harm soon. The Court need not wait until the eve of an unconstitutional election before remedying Petitioners' injuries. Regardless of this lawsuit, the General Assembly and the Governor will remain free to enact a new congressional plan. Although the Court must prepare for the likely impasse, it need only implement a new map in the event that the other branches fail—a common process that is repeated throughout the United States during every redistricting cycle, and one that is necessary to prevent the violation of Petitioners' rights to an equal, undiluted vote, and to participate in the elective process.

In other words, allowing this case to go forward would not impede that political process in any way. Indeed, the only immediate consequence of denying the Preliminary Objections will be that the Petition must be answered. As a result, the pleadings will not even close in this matter until November 2021, fewer than two months before Respondents' conceded deadline for legislative action. *See* Pa. R. Civ. Proc. 1028(d), Pa. R.A.P. 1516(b). At this juncture in the proceedings and under these circumstances, if the parties are not permitted to press forward, and the political

process fails (as Petitioners allege it is highly likely to do), the result will be the clear and severe violation of Petitioners' constitutional rights.

I. Petitioners have standing.

Despite Intervenors' assertion that Petitioners' injuries are too speculative, Petitioners allege all that is necessary to establish justiciability under Pennsylvania's standing requirements. *See* Pet'rs' Memo. Opp. to Resp'ts' Prelim. Obj'ns ("Opp. to Resp'ts' Obj'ns") at 8–18. "For standing to exist, the underlying controversy must be real and concrete, such that the party initiating the legal action has, in fact, been 'aggrieved.'" *Com., Off. of Governor v. Donahue*, 98 A.3d 1223, 1229 (Pa. 2014) (quoting *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 659 (Pa. 2005)).

Under Pennsylvania law, "[a] party is aggrieved for purposes of establishing standing when the party has a substantial, direct and immediate interest in the outcome of litigation." *Id.* (citations and quotations omitted). Courts—including the U.S. Supreme Court—have routinely concluded that voters in overpopulated districts possess a particularized injury, distinct from the general public, that conveys standing to bring suit. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 206–08 (1962) (holding that voters in overpopulated legislative districts have standing to sue); *Gill v. Whitford*, 138 S. Ct. 1916, 1929–31 (2018) (explaining that "injuries giving rise to [malapportionment] claims were individual and personal in nature because the claims were brought by voters who alleged facts showing disadvantage to

themselves as individuals" (quotations marks and citations omitted)); *see also Rendell v. Pa. State Ethics Comm'n*, 983 A.2d 708, 717 (Pa. 2009) ("Pennsylvania courts have frequently found the extensive body of federal decisions helpful in addressing standing and other prudential considerations."). Petitioners here, like the plaintiffs in previous malapportionment cases, "assert[] a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law." *Baker*, 369 U.S. at 208 (quotations marks and citations omitted). Because Petitioners seek to safeguard their personal voting and associational power against constitutional deprivation, they have asserted a "substantial" and "direct" interest in this action.

Intervenors, like Respondents before them, do not contend otherwise. Rather, they take issue with only the final requirement for standing—that of immediacy, which exists "when the causal connection with the alleged harm is neither remote nor speculative." *Donahue*, 98 A.3d at 1229; Br. at 12–14. However, Petitioners adequately allege that the General Assembly and Governor are highly likely to reach an impasse on a new congressional district plan. *See* Pet. ¶ 33. That allegation, despite Intervenors' arguments otherwise, *see* Br. at 13, is supported by facts about partisan gridlock and the census data release timeline that this Court must accept as true at the pleadings stage. These facts as pleaded are sufficient to overcome the

prima facie presumption of regularity that Intervenors contend bars Petitioners' injury. *See* Br. at 13 (asserting that Petitioners "ignore the legal presumption that public officials will act with regularity, in accordance with the law, and without violating the rights of citizens"); *see also Albert v. Lehigh Coal & Nav. Co.*, 246 A.2d 840, 845 (Pa. 1968) (explaining that "such presumption must yield if the facts and reasonable deductions therefrom indicate the contrary").

As Petitioners set forth in their opposition to Respondents' preliminary objections, *Arrington v. Elections Board*, 173 F. Supp. 2d 856 (E.D. Wis. 2001), is instructive in showing that Petitioners' interest is indeed immediate. *See* Opp. to Resp'ts' Obj'ns at 15–16. The *Arrington* court rejected the same argument Intervenors make here: that the case should be dismissed for lack of standing because the possibility remained that the state legislature would enact a new plan and remedy the plaintiffs' injury. 173 F. Supp. 2d at 860–62. The court's decision was driven by the fact that the plaintiffs alleged—just as Petitioners do here—that they would be injured if the map remained as it was when the suit was filed, and that there was no reasonable prospect that the state legislature would enact a new plan due to a partisan division between the state's political branches. *Compare id.*, *with* Pet. ¶¶ 4, 27–28. The *Arrington* court concluded that the plaintiffs' allegations of impasse (a "threat" to their voting rights) were "not unrealistic" based in part on the fact that 12 of the 43 states that needed to redistrict during the prior cycle failed to legislatively enact

congressional redistricting plans. 173 F. Supp. 2d at 862; *see also Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury."). Ultimately, the fact that the political branches' actions *could* have prevented the plaintiffs' claimed injury was "irrelevant" to the *Arrington* court's conclusion that plaintiffs had standing, because they had "realistically allege[d] actual, imminent harm." 173 F. Supp. 2d at 862.

Intervenors offer no attempt to distinguish *Arrington* other than to emphasize that the decision was based on federal law and that one member of the panel dissented from the majority's jurisdictional ruling. *See* Br. at 19–21. But as noted above, "Pennsylvania courts have frequently found the extensive body of federal decisions helpful in addressing standing and other prudential considerations." *Rendell*, 983 A.2d at 717. If anything, the standards for adjudicating justiciability in Pennsylvania courts are *less rigid* than their federal counterparts. *See Robinson Twp. v. Com.*, 83 A.3d 901, 917 (Pa. 2013) (citations omitted) ("In contrast to the federal approach, notions of case or controversy and justiciability in Pennsylvania have no constitutional predicate, do not involve a court's jurisdiction, and are regarded instead as prudential concerns implicating courts' self-imposed limitations."); G. Ronald Darlington et al., *20 West Pennsylvania Appellate Practice Series*, § 501:15, at 803 (2015–16 ed.) (footnotes omitted) (noting that "in light of the 'requirement of

standing under Pennsylvania law [being] prudential in nature,'" Pennsylvania courts have adopted "a very flexible, if not amorphous, concept of standing to sue").

Second, Judge Easterbrook's dissent did not carry the day. Indeed, it now stands in contrast to the opinion of yet another federal court panel in Wisconsin that, just this month, unanimously "follow[ed] the approach taken by the [*Arrington*] panel" to deny a motion to dismiss asserting the same standing and ripeness arguments asserted in *Arrington*. *Hunter v. Bostelmann*, No. 21-cv-512, 2021 WL 4206654, at *3 (W.D. Wis. Sept. 16, 2021). The Wisconsin Supreme Court, too, took jurisdiction of an impasse case just last week. *See* Order at 2, *Johnson v. Wis. Elections Comm'n*, No. 2021-AP-1450-OA (Wis. Sept. 22, 2021).

Wisconsin courts are not alone in taking up redistricting cases alleging impasse this cycle. The Minnesota Supreme Court has also asserted jurisdiction in similar lawsuits alleging likely impasse. Like Pennsylvania, Minnesota currently has a divided government, creating a high risk of an irreparable impasse between the political branches—and a consequent failure to enact constitutionally apportioned maps in time for next year's elections. Recognizing the need to prepare for judicial intervention, the Minnesota Supreme Court asserted jurisdiction in two lawsuits that alleged legislative deadlock, including one that was filed two months *before* the release of census data in April. *See* Order at 1–2, *Sachs v. Simon*, No. A21-0546 (Minn. May 20, 2021); Order at 1–3, *Wattson v. Simon*, No. A21-0243 (Minn. Mar.

22, 2021). Although the Minnesota Supreme Court initially imposed a short stay, it *sua sponte* lifted the stay three months ago and appointed a special redistricting panel to "order implementation of judicially determined redistricting plans for state legislative and congressional seats that satisfy constitutional and statutory requirements in the event that the Legislature and the Governor have not done so in a timely manner," noting that the panel's "work . . . must commence soon in order to permit the judicial branch to fulfill its proper role in assuring that valid redistricting plans are in place for the state legislative and congressional elections in 2022." Order at 2, *Wattson*, Nos. A21-0243, A21-0546 (Minn. June 30, 2021).[1]

Just as in *Arrington*, *Hunter*, and *Wattson*, the partisan division between the General Assembly and the Governor precludes any reasonable prospect that the political process will timely yield a reapportionment plan in Pennsylvania ahead of the 2022 congressional elections. The General Assembly is controlled by Republicans who lack the supermajority necessary to override a veto from the Governor, a Democrat. *See* Pet. ¶¶ 7, 29.[2] To make matters worse, the delays caused

[1] Although the Minnesota courts follow their own law and procedures for redistricting, as noted by Respondents and Intervenors in their effort to distinguish the Minnesota Supreme Court's orders, the existence of a formal judicial process for redistricting does not change the fact that the Minnesota Supreme Court recognized that it possessed jurisdiction over a similar impasse case months ago.

[2] The 2010 redistricting cycle demonstrates the debilitating effect partisan divides can have on the reapportionment process. Of the ten states with divided government

by the COVID-19 pandemic have compressed the timeline during which redistricting can take place, *see* Pet. ¶ 33, further increasing the already significant likelihood the political branches will reach an impasse this cycle and fail to enact a new congressional district plan.

Moreover, Petitioners do not allege only a vote dilution injury; until a lawful congressional map is in place, such that candidates can prepare to run in appropriate districts, Petitioners cannot "assess candidate qualifications and positions, organize and advocate for preferred candidates, and associate with like-minded voters." Pet. ¶ 51. Petitioners thus not only face a constitutional injury to their rights to equal representation but also a present and ongoing injury to their associational rights. *Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983) ("The [absence] of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens."). This injury should not be needlessly prolonged. To avoid such an unconstitutional outcome, this Court should deny the Preliminary Objections and allow this case to proceed, to ensure Petitioners' and other Pennsylvanians' voting strength is not diluted and associational rights are not further impeded.

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control of redistricting, *six*—Colorado, Minnesota, Mississippi, Nevada, New Mexico, and New York—required courts to draw congressional maps, legislative maps, or both.

II. Petitioners' claims are ripe.

Likewise, Petitioners' claims are ripe for this Court's adjudication. Ripeness, which "overlaps substantially with standing," *Rendell*, 983 A.2d at 718, similarly requires "the presence of an actual controversy." *Bayada Nurses, Inc. v. Dep't of Labor & Indus.*, 8 A.3d 866, 874 (Pa. 2010). In determining whether a particular matter is ripe, courts "generally consider whether the issues are adequately developed and the hardships that the parties will suffer if review is delayed." *Id.* (quoting *Twp. of Derry v. Pa. Dep't of Labor & Indus.*, 932 A.2d 56, 60 (Pa. 2007)).

In *Arrington*, the court found that the plaintiffs' claims were ripe for review, highlighting that "contingent future events generally do not deprive courts of jurisdiction." 173 F. Supp. 2d at 863 (citing *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 142 (1974)). In doing so, the court also noted that the plaintiffs alleged associational harms that manifested long before an election, preventing them from influencing members of Congress, contributing to candidates, and more—just as Petitioners do here. *Compare id.* at 863 n.13, *with* Pet. ¶ 51; *see also Arrington*, 173 F. Supp. 2d at 865 ("[W]ho is to say when a citizen (especially a potential candidate) must start preparing for [the primary elections]?"). Intervenors' citation to *Brown v. Com., Liquor Control Bd.*, 673 A.2d 21, 23 (Pa. Commw. 1996), to suggest that "contingent future events" deprive the Pennsylvania state courts of jurisdiction misses that *Brown* refers only to the Pennsylvania courts' inability to issue wholly

advisory opinions. *Brown* says nothing about contingent events when a case or controversy is present, as it is here. *See* Opp. to Resp'ts' Obj'ns at 8–14.

Further, the *Arrington* court rejected a ripeness argument on the ground that the mere possibility of legislative action did "not contradict the plaintiffs' propositions." *Id.* at 864. "While the court might be tempted to dismiss the [Petition] and wait to see if the legislature enacts its own districting plan in a timely fashion, the question then would become 'how long' must the court wait before allowing the plaintiffs to re-file." *Id.* at 865 (explaining that calculating when a purportedly unripe case becomes ripe would be an advisory opinion).

Intervenors invoke *Carter v. Virginia State Board of Elections*, No. 11-cv-7, 2011 WL 665408 (W.D. Va. Feb. 15, 2011) (unreported), for the proposition that the case is unripe, but in *Carter* the court found that the plaintiffs did not have standing in large part because "there [was] *no reason* to suspect that Virginia's lawmakers will fail to enact appropriate redistricting legislation in a timely manner." 2011 WL 665408, at *2 (emphasis added). In contrast, Petitioners have specifically alleged that there is "no reasonable prospect that Pennsylvania's political branches will reach consensus," and have supported that allegation with a detailed history of Pennsylvania's repeated redistricting impasses, including one between Governor Wolf and the General Assembly in 2018 after the Pennsylvania Supreme Court's invalidation of the plan enacted in 2011. *See* Pet. ¶¶ 8, 32. The Petition also alleges

the General Assembly's structural inability to override Governor Wolf's veto and provides evidence of the growing hyper-competitive partisan environment in Pennsylvania that has resulted in repeated conflicts between Governor Wolf and the General Assembly and will lead again to impasse. *See id.* ¶¶ 7, 33.

Petitioners need not wait any longer to seek redress from this Court. Indeed, courts routinely hear redistricting cases when political impasse is similarly alleged. *See, e.g.*, *Mellow*, 607 A.2d at 211 (holding that failure to adhere to a pre-announced judicial deadline to implement a plan in face of impasse "would create or would have created chaos"); *Scott v. Germano*, 381 U.S. 407, 409 (1965) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."); *Growe v. Emison*, 507 U.S. 25, 33–34 (1993) (same); *Flateau v. Anderson*, 537 F. Supp. 257, 262 (S.D.N.Y. 1982) ("While there has been no final failure to reapportion to date, the inevitability of such failure if this court does not direct reapportionment has persuaded us that the matter is ripe for adjudication."). Intervenors' suggestion that the Court should wait to exercise jurisdiction over Petitioners' claims turns a deaf ear to the ticking clock. Fewer than four months remain until January 24, 2022, the date by which, per Respondents' own assertion, "the Department of State must receive a final and legally binding congressional district map." Resp'ts' Prelim.

Obj'ns ¶ 15. Even less time remains before Respondents' asserted December deadline for challenging a new map. There is a quickly-closing window for the Court to properly remedy Petitioners' harms by adopting a new map in the likely event of impasse. That process must begin now.

III. The Petition does not deprive the General Assembly of its authority to redistrict.

Intervenors' non-justiciability argument hinges on an overarching mischaracterization of the underlying Petition: the idea that Petitioners are asking this 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." Br. at 23. But Petitioners seek no such thing.

While Petitioners do contend that a redistricting impasse is exceedingly likely given the practical realities in Pennsylvania, Petitioners do not ask this Court to seize the power to redistrict from the General Assembly. Instead, Petitioners ask this Court "to implement a new congressional district plan that adheres to the constitutional requirement of one-person, one-vote *should the General Assembly and Governor fail to do so*," Pet. ¶ 1 (emphasis added), and to establish a schedule for implementing such plans in the event of such an impasse, *see id.* at Prayer for Relief (e). In addition to remedying the harm to Petitioners' constitutional rights, these requests are grounded in the reality that redistricting plans do not spring from thin air; should the

Court need to adopt one, it will need to appoint a special master and undertake the fact-intensive work of considering and drafting congressional plans consistent with redistricting principles and constitutional doctrines, including conducting hearings on plans proposed by the various parties and potential amici. This process does not and cannot happen overnight. It also need not interfere with or supersede the political branches' own process for devising a new map. Asking the Court to recognize this reality does not impermissibly intercede on the General Assembly's power to redistrict in the first instance.

While Petitioners do not dispute there is no statutorily-prescribed "deadline" by which the General Assembly must enact a congressional redistricting plan, that does not foreclose a court from setting a date for *itself* by which it will implement an apportionment plan in order to ensure constitutional boundaries are in place before the next election. In *Mellow*, for example, another Pennsylvania redistricting impasse suit, Judge Craig of the Commonwealth Court "provided notice that the Court would select a plan if the Legislature failed to act by February 11, 1992." 607 A.2d at 205. When the General Assembly did in fact fail to act by the court's deadline, the Commonwealth Court moved forward in selecting a reapportionment plan for the Commonwealth. On appeal, and over the General Assembly's protest, the Pennsylvania Supreme Court concluded that "Judge Craig was absolutely correct in adhering to the pre-announced deadline of February 11" when the General

Assembly failed to act. *Id*. at 206. As the Court explained, allowing the Commonwealth to continue into primary election season without a constitutional apportionment plan would cause nothing but "chaos." *Id.* at 211. The date necessary to avert "chaos" here has already been suggested by Respondents: December 2021. *See* Resp'ts' Prelim. Obj'ns ¶¶ 15–18.

This approach, moreover, is entirely consistent with those taken by other courts, which have often set dates by which the judiciary will intercede if the Legislature has failed to act. *See, e.g*., *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 698 (E.D.N.Y. 1992) (New York federal redistricting panel developed new apportionment plan while waiting for the Legislature to pass their own, ordering that, "if no other valid redistricting plan is in place by 5:00 pm, Eastern Daylight Savings Time, on July 8, 1992, the Special Master's plan shall automatically take effect as the plan of congressional districts for the 1992 primary and general elections in the State of New York"); *Monier v. Gallen*, 446 A.2d 454, 455 (N.H. 1982) (New Hampshire Supreme Court noting filing dates were approaching and explaining, "[t]his court will issue appropriate orders on or after Friday, May 28, 1982, at 10:00 a.m., unless a senate reapportionment plan has properly become law by that time"); *Larios v. Cox*, 306 F. Supp. 2d 1214, 1215–16 (N.D. Ga. 2004) ("[W]e gave the Georgia General Assembly until March 1, 2004, to submit to the court enacted reapportionment plans that are acceptable to the

legislature. . . . The Georgia General Assembly having been unable to meet this deadline, it now falls to this court to draw interim reapportionment plans for use in the upcoming election cycle.").

As history demonstrates, it is entirely proper (and in fact common) for a court to set a date by which it will adopt a redistricting plan if the General Assembly has failed to do so. Doing so does not, as Intervenors contend, "usurp the General Assembly's exclusive legislative authority" to redistrict. Br. at 24. Far from it, setting such a date respects the General Assembly's right to redistrict in the first instance.[3]

Nothing in Petitioners' lawsuit seeks to force the General Assembly to relinquish control over redistricting; it remains entirely within legislators' power to attempt to enact a new congressional plan. In 2002 in New York, for example, a federal court adopted a congressional map and ordered its use for the 2002 elections, but then two weeks later, with enough time before the relevant filing and primary deadlines, the Legislature and Governor agreed to a plan. That legislatively enacted

[3] Notably, by being prepared to timely implement a plan should the political branches fail to do so, state courts also ensure redistricting will not be ceded to federal courts. While Supreme Court precedent requires federal courts to defer to state courts in implementing redistricting plans, it also counsels that a "[federal] District Court would [be] justified in adopting its own plan if it [were] apparent that the state court, through no fault of the [federal] District Court itself, would not develop a redistricting plan in time for the primaries." *Growe*, 507 U.S. at 36. Accordingly, by failing to take timely action, this Court would risk ceding its own primacy in the redistricting process to federal courts.

plan mooted and superseded the Court-drawn plan. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 357 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004). Thus, in the likely event the political branches fail to enact a map on time, and when this Court inevitably is tasked with redrawing a congressional apportionment plan for the Commonwealth, it will be because the General Assembly has abdicated its responsibility to redistrict, not because this Court has deprived the General Assembly of its power. This lawsuit threatens no breach to the separation of powers, and the Court should not grant the preliminary objections on that ground.

IV. The Petition properly states claims under the state and federal constitutions and 2 U.S.C. § 2c.

Intervenors also argue that Petitioners fail to state a claim upon which relief can be granted, but these arguments misunderstand the nature of the relief Petitioners seek.

A. Petitioners state a malapportionment claim.

There can be no dispute that continuation of the status quo is unconstitutional. Article I, Section 2 of the United States Constitution requires congressional districts to be as equivalent in population as possible "to prevent debasement of voting power and diminution of access to elected representatives." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969). This constitutional mandate is commonly referred to as the "one-person, one-vote principle." *Gray v. Sanders*, 372 U.S. 368, 381 (1963). The census data released on April 26, 2021 make clear that the configuration of

Pennsylvania's congressional districts does not account for the current population numbers in the state, violating the "Constitution's plain objective of [] equal representation for equal numbers." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); *see also* Pet. ¶ 17; *Arrington*, 173 F. Supp. 2d at 860 ("[A]pportionment schemes become 'instantly unconstitutional' upon the release of new decennial census data." (citation omitted)).

While it is *possible* that the political branches might come to an agreement and enact a new plan, that faint prospect does not change the fact that the existing plan is malapportioned. And although Intervenors attempt to characterize Petitioners' position as one that would demand "constant redistricting," Br. at 31–32, that is, again, a mischaracterization of the Petition—which alleges only that the districts are malapportioned *now* that the decennial census data has been released.

Thus, Intervenors' argument on this score is essentially just a repackaging of their ripeness argument. *See* Br. at 29 (characterizing Petitioners' concern as one related to the timing of redistricting); *id.* at 30 ("[T]here 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."); *id.* at 31 ("Petitioners' votes cannot be diluted at a time that is long before the voting occurs."). However, as explained above, if the Court were to dismiss this action now and force Petitioners to wait until

impasse had occurred, then there would be no time for it to undertake the complicated work of crafting the necessary remedy.

B. Petitioners state a claim under 2 U.S.C. § 2c.

Likewise, Petitioners do not assert that the release of data requires "instantaneous[] redistrict[ing]," as Intervenors suggest. *See* Br. at 33. They simply state that *future* use of the current plan would be unconstitutional.

Importantly, contrary to Intervenors' contention, 2 U.S.C. § 2a(c) has no bearing on this Court's jurisdiction or the merits of this action. The U.S. Supreme Court explained in *Branch v. Smith*, 538 U.S. 254 (2003), that § 2a(c)'s "stopgap provisions" may be invoked only when an election is "so imminent that no entity competent to complete redistricting pursuant to state law . . . is able to do so without disrupting the election process." *Id.* at 275; *see also id.* (noting that § 2a(c) is "a last-resort remedy" that cannot be applied as long as it is feasible for state or federal courts to develop a redistricting plan). Its existence is certainly not a reason for this Court to dismiss this suit and reliance on it here would, as a practical matter, cede responsibility for redistricting to the federal courts. *See supra* n.3.

C. Petitioners have stated a right-to-petition claim.

Intervenors mischaracterize Petitioners' associational rights claim as asserting a right to their preferred map. Petitioners' claim, however, is not that they will be injured based on which map is implemented. Instead, Petitioners are harmed by the

delay in establishing a map for the 2022 election. Uncertainty and ambiguity surrounding the contours of Pennsylvania's congressional districts will substantially interfere with the kind of "orderly group activity" Plaintiffs wish to pursue to advance their political beliefs in the next election. *Kusper v. Pontikes*, 414 U.S. 51, 56–57 (1973). These activities are protected by Article I, Section 20 of the Pennsylvania Constitution, and, in the absence of a timely redistricting plan, Plaintiffs will be harmed in two key ways: their inability to (1) identify and support prospective candidates, and (2) identify and associate with like-minded voters.

In this way, Petitioners' right-to-petition claim differs from the claim raised in *Rucho v. Common Cause,* 139 S. Ct. 2484, 2504 (2019); *see* Br. at 34. What was at stake in *Rucho* (and what was the basis for the claim the U.S. Supreme Court rejected) was voters' ability to associate with others in their *preferred* district. What is at stake here is Petitioners' ability to effectively associate *when there are no clear districts at all*. Intervenors do not engage with the harms resulting from the delay itself, and so they side-step the question posed to this Court: Do Petitioners alleging a burden to their ability to support candidates and associate with others in political expression state a claim under Article I, Section 20 of the Pennsylvania Constitution? Under a long line of associational rights cases, the answer is yes.

This Court and the Pennsylvania Supreme Court have recognized that "[t]he Pennsylvania Constitution affords greater protection of speech and associational

rights than does our Federal Constitution." *Working Families Party v. Com.*, 169 A.3d 1247, 1260 (Pa. Commw. 2017) (citing *DePaul v. Com.*, 969 A.2d 536, 546 (Pa. 2009)); *see also Com. v. Tate*, 432 A.2d 1382, 1388 (Pa. 1981) ("It is small wonder, then, that the rights of freedom of speech, assembly, and petition have been guaranteed since the first Pennsylvania Constitution, not simply as restrictions on the powers of government, as found in the Federal Constitution, but as inherent and 'invaluable' rights of man.").

The Pennsylvania Supreme Court has recognized that "the right to associate for the advancement of political beliefs includes the right to advance a candidate who represents those interests." *In re Street*, 451 A.2d 427, 432 (Pa. 1982). An untimely redistricting plan would pin Petitioners up against filing deadlines that would harm their ability to organize around and campaign for candidates in the 2022 election. In Pennsylvania, all congressional candidates who wish to participate in primary elections must obtain signatures from *within* the district which the candidate named on the paper will represent, if elected. Without a redistricting plan in place, Petitioners will have no way of knowing who to gather signatures from in support of their preferred candidates, which constitutes an obvious burden to their associational rights. *See Anderson*, 460 U.S. at 792 (noting that tight registration deadlines "burden[] the signature-gathering efforts" of prospective candidates). Moreover, courts have recognized that the burdens of late-breaking redistricting

plans are not distributed evenly. *See Favors v. Cuomo*, 866 F. Supp. 2d 176, 185 (E.D.N.Y. 2012) (explaining "insurgent candidates or political newcomers[] will be significantly prejudiced if no districting plan is in place"). Even if candidates in Petitioners' districts can qualify for the ballot in time, a delayed redistricting plan would restrict the window to learn about and debate the candidates' qualifications and positions, which the Supreme Court has recognized is the time for the First Amendment's "fullest and most urgent application." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) ("Free discussion about candidates for public office is no less critical before a primary than before a general election.").

In addition to the barriers created to supporting candidates, an untimely redistricting plan would burden Petitioners' "constitutional interest" in associating with "like-minded voters to gather in pursuit of common political ends." *Norman v. Reed*, 502 U.S. 279, 288 (1992). Petitioners' ability to connect and organize with other voters in their congressional districts—whether to advocate for a party, candidate, or issue—requires the ability to "identify the people who constitute the association." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986). Delay in establishing districts, however, means that "voters who want to become fully involved in the process will not timely know in which district they are going to be, and thus will not timely know where and with whom to become involved." *Smith*

v. Clark, 189 F. Supp. 2d 503, 510–11 (S.D. Miss. 2002). Intervenors argue that a delay in redistricting simply burdens Petitioners' "convenience of knowing months before certain filing deadlines where congressional lines will fall." Br. at 35. Never mind that such deadlines are rapidly approaching. But the problem is much more than one of convenience: a delay interferes with Petitioners' ability to associate within and by means of the political units defined by their districts—burdening their "associational opportunities at the critical juncture at which the appeal to common principles may be translated into concerted action, and hence to political power." *Tashjian*, 479 U.S. at 216.

CONCLUSION

For these reasons, Petitioners respectfully request this Court overrule Intervenors' Preliminary Objections.

Dated: September 30, 2021

Respectfully submitted,

/s/ Edward D. Rogers

Aria C. Branch
Christina A. Ford
Jyoti Jasrasaria
Elias Law Group LLP
10 G St. NE Ste. 600
Washington, D.C. 20002
abranch@elias.law
cford@elias.law
jjasrasaria@elias.law
T: (202) 968-4490
F: (202) 968-4498

Abha Khanna
Elias Law Group LLP
1700 Seventh Ave. Ste. 2100
Seattle, WA 98101
akhanna@elias.law
T: (206) 656-0177
F: (206) 656-0180

Robert J. Clark, No. 308105
Edward D. Rogers, No. 69337
Marcel S. Pratt, No. 307483
Michael R. McDonald, No. 326873
Paul K. Ort, No. 326044
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
ClarkR@ballardspahr.com
RogersE@ballardspahr.com
PrattM@ballardspahr.com
McDonaldM@ballardspahr.com
OrtP@ballardspahr.com
T: (215) 665-8500
F: (215) 864-8999

CERTIFICATE OF COMPLIANCE

I 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.

Submitted by: Edward D. Rogers

Signature: */s/ Edward D. Rogers*

Name: Edward D. Rogers

Attorney No.: 69337

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Ann Carter; Monica Parrilla; Rebecca Poyourow; William Tung; Roseanne Milazzo; Burt Siegel; Susan Cassanelli; Lee Cassanelli; Lynn Wachman; Michael Guttman; Maya Fonkeu; Brady Hill; Mary Ellen Balchunis; Tom DeWall; Stephanie McNulty; and Janet Temin, Petitioners v. Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	132 MD 2021

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PROOF OF SERVICE

(Continued)

Service

Served:	Anthony Richard Holtzman
Service Method:	eService
Email:	anthony.holtzman@klgates.com
Service Date:	9/30/2021
Address:	K&L Gates LLP 17 N. Second Street, 18th Floor Harrisburg, PA 17101
Phone:	717--23-1-4500
Representing:	Intervenor Jake Corman Intervenor Kim Ward

Served:	Caleb Curtis Enerson
Service Method:	eService
Email:	cenerson@attorneygeneral.gov
Service Date:	9/30/2021
Address:	PA Office of Attorney General 15TH FL STRAWBERRY SQ Harrisburg, PA 17120
Phone:	717--70-5-5774
Representing:	Respondent Jessica Mathis Respondent Veronica DeGraffenreid

Served:	Dimitrios Mavroudis
Service Method:	eService
Email:	dmavroudis@tlgattorneys.com
Service Date:	9/30/2021
Address:	Tucker Law Group 1801 Market Street, Suite 2500 Philadelphia, PA 19103
Phone:	215--87-5-0609
Representing:	Respondent Jessica Mathis Respondent Veronica DeGraffenreid

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Jeffry William Duffy
Service Method:	eService
Email:	jduffy@bakerlaw.com
Service Date:	9/30/2021
Address:	Baker & Hostetler LLP 2929 Arch St., 12th Floor Philadelphia, PA 19104
Phone:	215--56-4-2916
Representing:	Intervenor Bryan Cutler Intervenor Kerry Benninghoff

Served:	Jessica Ann Rickabaugh
Service Method:	eService
Email:	jrickabaugh@tlgattorneys.com
Service Date:	9/30/2021
Address:	Tucker Law Group Ten Penn Center, 1801 Market Street, Suite 2500 Philadelphia, PA 19103
Phone:	215--98-2-2278
Representing:	Respondent Jessica Mathis Respondent Veronica DeGraffenreid

Served:	Joe H. Tucker Jr.
Service Method:	eService
Email:	jtucker@tlgattorneys.com
Service Date:	9/30/2021
Address:	Tucker Law Group 1617 JFK Blvd., Suite 1700 Philadelphia, PA 19103
Phone:	215--87-5-0609
Representing:	Respondent Jessica Mathis Respondent Veronica DeGraffenreid

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	John Brent Hill
Service Method:	eService
Email:	jbh@hangley.com
Service Date:	9/30/2021
Address:	One Logan Square 27th Floor Philadelphia, PA 19103
Phone:	215--56-8-6200
Representing:	Respondent Jessica Mathis Respondent Veronica DeGraffenreid

Served:	Karen Mascio Romano
Service Method:	eService
Email:	kromano@attorneygeneral.gov
Service Date:	9/30/2021
Address:	PA Office of Attorney General Strawberry Square, 15th Floor Harrisburg, PA 17120
Phone:	717- 78-7-2717
Representing:	Respondent Jessica Mathis Respondent Veronica DeGraffenreid

Served:	Kathleen Marie Kotula
Service Method:	eService
Email:	kkotula@pa.gov
Service Date:	9/30/2021
Address:	Room 306 North Office Building 401 North Street Harrisburg, PA 17120-0500
Phone:	(71-7) -783-0736
Representing:	Respondent Jessica Mathis Respondent Veronica DeGraffenreid

Served:	Keli Marie Neary
Service Method:	eService
Email:	kneary@attorneygeneral.gov
Service Date:	9/30/2021
Address:	Strawberry Square, 15th Floor Harrisburg, PA 17120
Phone:	717-787-1180
Representing:	Respondent Jessica Mathis Respondent Veronica DeGraffenreid

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Kenneth Lawson Joel
Service Method:	eService
Email:	kennjoel@pa.gov
Service Date:	9/30/2021
Address:	Office of General Counsel 333 Market Street, 17th Floor Harrisburg, PA 17120
Phone:	717--78-7-9348
Representing:	Respondent Jessica Mathis Respondent Veronica DeGraffenreid

Served:	Michele D. Hangley
Service Method:	eService
Email:	mhangley@hangley.com
Service Date:	9/30/2021
Address:	Hangley Aronchick Segal Pudlin & Schiller One Logan Square, 27th Floor Philadelphia, PA 19103
Phone:	215--49-6-7061
Representing:	Respondent Jessica Mathis Respondent Veronica DeGraffenreid

Served:	Robert Andrew Wiygul
Service Method:	eService
Email:	rwiygul@hangley.com
Service Date:	9/30/2021
Address:	Hangley Aronchick Segal Pudlin & Schiller One Logan Square, 27th Floor Philadelphia, PA 19103
Phone:	215--49-6-7042
Representing:	Respondent Jessica Mathis Respondent Veronica DeGraffenreid

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Courtesy Copy

Served:	Kathleen A. Gallagher
Service Method:	eService
Email:	kag@glawfirm.com
Service Date:	9/30/2021
Address:	436 Seventh Avenue 31st Floor Pittsburgh, PA 15219
Phone:	412-717-1900
Representing:	Possible Intervenor Barbara Steinour Possible Intervenor David J. Dillon Possible Intervenor David Torres Possible Intervenor Debra A. Biro Possible Intervenor Donald W. Beishl, Jr. Possible Intervenor Haroon Bashir Possible Intervenor James Curtis Jarrett Possible Intervenor James D. Bee Possible Intervenor Jeffrey Wenk Possible Intervenor Richard L. Lawson Possible Intervenor Rico Timothy Elmore Possible Intervenor Tegwyn Hughes Possible Intervenor Valerie Biancaniello

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ Edward David Rogers

(Signature of Person Serving)

Person Serving:	Rogers, Edward David
Attorney Registration No:	069337
Law Firm:	Ballard Spahr, LLP
Address:	Ballard Spahr Llp 1735 Market St Fl 51 Philadelphia, PA 191037599
Representing:	Petitioner Balchunis, Mary Ellen Petitioner Carter, Carol Ann Petitioner Cassanelli, Lee Petitioner Cassanelli, Susan Petitioner DeWall, Tom Petitioner Fonkeu, Maya Petitioner Guttman, Michael Petitioner Hill, Brady Petitioner McNulty, Stephanie Petitioner Milazzo, Roseanne Petitioner Parrilla, Monica Petitioner Poyourow, Rebecca Petitioner Siegel, Burt Petitioner Temin, Janet Petitioner Tung, William Petitioner Wachman, Lynn