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IN THE SUPREME COURT OF PENNSYLVANIA

NO. 159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, *et al.*,
Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

ANSWER OF RESPONDENTS GOVERNOR THOMAS W. WOLF, ACTING SECRETARY ROBERT TORRES, AND COMMISSIONER JONATHAN MARKS TO LEGISLATIVE RESPONDENTS' AND INTERVENORS' APPLICATIONS FOR STAY OF COURT'S ORDER OF JANUARY 22, 2018

Review of the Commonwealth Court's Recommended Findings of Fact and Conclusions of Law, No. 261 M.D. 2017

Thomas P. Howell, Deputy General Counsel (ID No. 079527)
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563

Timothy E. Gates,
Chief Counsel (ID No. 202305)
Kathleen M. Kotula, Deputy Chief Counsel (ID No. 318947)
Ian B. Everhart, Assistant Counsel (ID No. 318947)
Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Tel: (717) 783-0736

Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
Claudia De Palma (ID No. 320136)
Ashton R. Lattimore (*pro hac vice*)
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

Counsel for Respondents

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INTRODUCTION

Legislative Respondents and Republican Intervenors (together, "Applicants") have made a last-ditch request for a stay of this Court's January 22, 2018 Order (the "Order"), making arguments that this Court has already heard and rejected. Such a stay would hobble the orderly and efficient implementation of a map for the 2018 election cycle. This Court should deny Applicants' request.

ARGUMENT

A stay is an extraordinary remedy and is only warranted if "1. The petitioner makes a strong showing that he is likely to prevail on the merits[;] 2. The petitioner has shown that without the requested relief he will suffer irreparable injury[;] 3. The issuance of a stay will not substantially harm other interested parties in the proceedings[;] and 4. The issuance of a stay will not adversely affect the public interest." *Pennsylvania Pub. Util. Comm'n v. Process Gas Consumers Grp.*, 467 A.2d 805, 809 (Pa. 1983). Applicants cannot meet any of these factors. Given the Court's finding that "the Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania," Order at 1, it would cause great harm to the parties and the public to postpone redistricting until after the 2018 congressional elections. Applicants also cannot

demonstrate any irreparable harm, and there is little likelihood that their novel argument will prevail before the U.S. Supreme Court.

I. There is No Risk of Irreparable Harm

A. Applicants' Request for a Stay Ignores Voluminous Record Evidence Demonstrating that the Court's Proposed Timeline Is Feasible

Applicants posit that any change in the congressional map "poses a profound threat to the integrity" of Pennsylvania's elections. (LR App. 2.) But Applicants vastly overstate the challenges associated with implementing a new map in the timeframe allotted by the Court. Before the Commonwealth Court, Executive Branch Respondents set forth unrebutted testimony demonstrating that if the Department of State has a map in place by February 20, the 2018 election cycle, including the May primary, can proceed with minimal adjustments to the election schedule. (FOF ¶ 447-454.) The Order provides for a new map to be put in place by February 19. Within this timeframe, the Department of State is more than capable of ensuring an orderly and efficient congressional election.

There is no basis for Applicants' claim that implementing a new map will "cause voter confusion" or "depress turnout." (LR App. 4.) District lines change, at a minimum, every ten years. Each time, voters easily adjust. First, redistricting does not affect polling locations. Second, public education will help prevent voter confusion. Congressional redistricting laws typically require the Secretary of the

Commonwealth to advertise the verbal descriptions of the new districts in newspapers across the Commonwealth; the purpose is to educate voters about the new lines. *See e.g.*, Act 2011-131, § 304. Presumably, any new legislation issued pursuant to the Court's Order will contain the same requirement. Executive Branch Respondents will also leverage social media, issue press releases, and post information to the Department of State's publicly accessible website to educate and notify voters of these changes. It is not uncommon for this reeducation to happen quickly. The 2011 Plan, for example, became law on December 22, 2011, the Department of State advertised the new lines in newspapers on January 18, 19, and 20, and the petition filing began on January 24, 2012. Third, Applicants have never presented any evidence that redistricting will "depress turnout," and there is no evidence that it will.

Applicants also raise the specter of voters arriving at their precincts only to discover that they don't recognize any of the "facts, issues, and players" on their ballots. (LR App. 4.) But the facts and issues are not going anywhere, and candidates have not yet even been permitted to circulate petitions under the existing schedule. In any event, any changes to the borders of the districts should not be entirely unexpected. This lawsuit was filed in June 2017, and citizens who pay some measure of attention to the news have been on notice since then that there was some possibility the district lines were subject to change. (Given the

extensive publicity surrounding the impending redistricting, it is possible that voters in the 2018 primary elections will be more educated about who their Congressional representatives are than they have been in recent decades.) Moreover, voters' expectations do not stop courts from ordering, or the General Assembly from legislating, late-breaking changes to candidates and ballot contents. *See, e.g.*, *In re Guzzardi*, 91 A.3d 701 (Pa. 2014) (Republican gubernatorial candidate removed from the statewide ballot 19 days before 2014 primary); *see also In re Vodvarka*, 135 A.3d 1017 (Pa. 2016) (Democratic candidate for U.S. Senate reinstated on statewide ballot one week before 2016 primary); *see also* H.R. 783 (2016) (General Assembly passed a concurrent resolution and removed a ballot question about judicial retirement age from the statewide ballot 14 days before 2016 primary).

Congressional candidates have also been on notice, and they will also adjust.[1] Once the new lines are in place, claims that candidates will face "an uncertain configuration of voters" are unjustified. (LR App. 4.) Although some of the municipalities that make up each district may change in part, the actual voters

[1] Applicants claim that candidates other than congressional candidates will be affected by the Court's Order. (RI App. 7.) This is incorrect. The dates and deadlines for all other candidates will proceed unchanged under the current 2018 election calendar. Moreover, Applicants argue that "changing congressional districts during the nomination petition circulation period" creates a risk that a voter may sign the wrong petition. (RI App. 9.) This argument makes an incorrect assumption, because districts will be redrawn before the circulation period for congressional candidates begins.

assigned to the precincts within those municipalities will not.[2] As a result, candidates only have to obtain a copy of the registered list of voters – available online for download within minutes – and sort it by municipality and precinct to identify the voters who can sign their nomination petitions. This work can be done as soon as the legislature enacts a map; the time the Department of State will need to update its database will not hamper campaigns' ability to prepare and instruct their petition circulation staff.

Regardless of what hurdles candidates may face, they do not have the right to proceed under a map that violates others' constitutional rights. This Court has clearly, and repeatedly, held that the fundamental rights guaranteed by the Pennsylvania Declaration of Rights "cannot lawfully be infringed, even momentarily[.]" *Pap's A.M. v. City of Erie*, 812 A.2d 591, 607 (2002).

B. The Commonwealth Can Hold Orderly 2018 Elections Under a Constitutional Map, and Is Dedicated to Doing So

Given the schedule the Court has ordered, the election calendar is still amenable to adjustments and the Executive Branch Defendants are committed to doing whatever is necessary to achieve an orderly and efficient 2018 election cycle. (FOF ¶¶ 448-454.) Although there may be costs and challenges involved,

[2] Notably, Legislative Respondents appear to presume, without support, that the majority, or even a substantial portion, of constituent precincts within districts will change. There is no evidence for this assertion.

they should be no impediment to ensuring that the 2018 election can take place under a constitutional map.

II. Applicants Cannot Prevail on the Merits

A. Applicants' Purported U.S. Supreme Court Challenge Does Not Raise a Substantial Federal Question or Implicate A Federal Constitutional Right

The U.S. Supreme Court can only review state court judgments decided on state law grounds that involve a substantial federal question or implicate a federal constitutional right. *See* 28 U.S.C. § 1257(a). Applicants do not claim that they will challenge the Pennsylvania Supreme Court's ruling based on an erroneous interpretation of federal equal protection or free speech principles; nor could they, as this Court explicitly ruled on adequate and independent state law grounds. *See* Order at Paragraph "First" (striking down the 2011 Plan on the "sole basis" that it violates the Pennsylvania Constitution); *see Michigan v. Long*, 463 U.S. 1032 (1983). Instead, they argue that this Court's ruling must be scrutinized by the U.S. Supreme Court because "the question of what constitutes a 'legislative function' under the Elections Clause[] is a question of federal, not state law." (LR App. 10.) Applicants' claim is unsupported.

B. This Court Has the Inherent Authority to Right Constitutional Wrongs

This Court's Order falls squarely within the scope of its authority to review the constitutionality of Pennsylvania's congressional redistricting scheme. As this

Court ruled in *Erfer*, the Elections Clause does not "suspend[] the constitution of our Commonwealth vis-à-vis congressional reapportionment" and with it, the Court's ability to review state constitutional challenges to districting plans. *Erfer v. Com.*, 794 A.2d 325, 331 (Pa. 2002). The U.S. Supreme Court has likewise rejected the argument that the Elections Clause exempts redistricting legislation from the regular checks and balances of the co-equal branches of state government. *See, e.g.*, *Smiley v. Holm*, 285 U.S. 355, 367-68 (1932). In this regard, the U.S. Supreme Court has explicitly recognized "[t]he power of the judiciary of a State to require valid reapportionment," *Scott v. Germano*, 381 U.S. 407, 409 (1965), and affirmed the state court's proper role as an "agent of apportionment." *Growe v. Emison*, 507 U.S. 25 (1993).

This Court's authority to review the constitutionality of a redistricting map includes the power to impose a remedial map if the General Assembly fails to enact a valid plan. This Court has done so, as have other state courts. *See, e.g.*, *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992); *League of Women Voters of Florida v. Detzner*, 179 So. 3d 258 (Fla. 2015); *Hippert v. Ritchie*, 813 N.W.2d 374 (Minn. 2012). Although Applicants attempt to suggest that the Court's remedy cuts the legislature off at the knees, there is nothing in the Order to support this claim. In fact, the Court has expressly provided the General Assembly with the opportunity

to correct their unconstitutional enactment. Only if the legislature fails to do so will the Court take further action.

Redistricting plans are no more and no less than legislative enactments. The Court's authority to review those enactments, and to address any constitutional violations they may raise, is well established. It does not convert a judicial remedy into a legislative act.

C. The Order Provides the General Assembly With More Than Enough Time and Information to Remedy the Violation

Applicants argue that the Court's Order does not provide the General Assembly with "a genuine opportunity to enact legislation creating a new map." (LR App. 5.) However, Applicants set forth no valid reason why they cannot pass a new bill under the parameters issued by the Court, and they have demonstrated, through their admissions in this case and their actions in the past, that they can do so.

1. The General Assembly Has More than Enough Time to Pass Legislation

Applicants complain that the Court has given them "only 19 days to create and secure the Governor's approval for a new plan." (LR App. 5.) However, they point to no authority suggesting that a "genuine" opportunity requires more than 19

days or that this timeframe is legally insufficient.[3] In fact, courts have routinely ordered the enactment of new redistricting plans in similar timeframes. In *Mellow*, this Court affirmed an order by the Commonwealth Court that required the General Assembly to enact a redistricting map within 12 days of its ruling. *Mellow v. Mitchell*, 607 A.2d 204 (1992). *See also Larios v. Cox*, 305 F. Supp. 2d 1335, 1342 (N.D. Ga. 2004) (giving the state legislature three weeks to craft a new plan); *League of United Latin Am. Citizens v. Perry*, 457 F. Supp. 2d 716, 718 (E.D. Tex. 2006) (setting a deadline of 16 days for the parties to submit new maps).[4]

Applicants' own actions belie their protests. At oral argument, Legislative Respondents' counsel represented that the General Assembly "would like three weeks" to draw a new map. (*See* Jan. 17, 2018 Oral Argument (Torchinsky) at 1:46:05.)[5] In 2011, the General Assembly moved the 2011 Plan through the legislative process in far less than that amount of time, suspending procedural rules in order to push the plan through the Senate on the same day it was introduced and

[3] Instead, they cite to the inapposite *Butcher v. Bloom*, in which this Court allowed elections to proceed under the existing, redistricting map after striking it down a mere six weeks before the general election in November, and more than five months *after* the primary. *Butcher v. Bloom*, 203 A.2d 556, 568 (Pa. 1964). The timeline that compelled the court's remedy in *Butcher* is not present here. There are currently four months left until the primary and more than nine months until the general election.

[4] North Carolina has actually codified a two-week rule for remedying districting plans: under N.C. Gen. Stat. § 120–2.4, North Carolina's General Assembly is afforded two weeks to remedy any defect identified by North Carolina courts in a state legislative or congressional districting plan, after which the court is free to impose its own interim plan.

[5] Legislative Respondents' co-counsel suggested the General Assembly "need[s] a month" – only slightly more time than the Court has allotted. (See Jan. 17, 2018 Oral Argument (Braden) at 2:12:45.)

getting it signed into law within eight days. (FOF ¶¶104-109, 114-121, 126, 128.) If the General Assembly's leadership fails to move this legislation at the slower pace the Court contemplates, it will be because they lack the will to do so, not because they are not able to do so.

2. The Court Has Provided the General Assembly with Familiar, Manageable Criteria for Redrawing the Map

Applicants complain both that the Court cannot impose new criteria with which the General Assembly must draw the new map (LR App. 9-10), and that the Court has given them no criteria with which to draw a new map (LR App. 6). Each of these contradictory claims is baseless.

The Order set forth parameters for compliance: "any congressional districting plan shall consist of: congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population." *See* Order at Paragraph "Fourth."

These criteria are not new or court-made. They have "deep roots in Pennsylvania constitutional law" and "represent important principles of representative government." *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 745 (Pa. 2012). They are explicitly recognized in the Pennsylvania Constitution with respect to state and municipal apportionment. *See* Pa. Const. art.

II § 16 and art. IX § 11. They have also been used by this Court to evaluate congressional districting maps. *See Mellow*, 607 A.2d at 215 (analyzing proposed maps by looking at, *inter alia*, "avoiding fragmentation of local government territories and the splitting of election precincts [and] creating compact and contiguous districts . . ."). These principles have also been widely recognized by the U.S. Supreme Court and numerous federal and state courts considering challenges to congressional redistricting plans. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993); *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004); *see also Legislature v. Reinecke*, 516 P.2d 6, 10 (Cal. 1973).

Applicants are well aware of this. At oral argument, Legislative Respondents acknowledged both the familiarity and the applicability of these principles:

> JUSTICE BAER: Is it your position, respectfully, that compactness, contiguousness, lack of splitting a municipal, county line, that those are not criteria that this Court should apply. . .?
>
> MR. TORCHINSKY: Not at all, Your Honor. And again, we look to what the Court said in *Mellow*…

(*See* Jan. 17, 2018 Oral Argument (Torchinsky) at 1:32:15.) Applicants cannot now claim that the Court is "forc[ing] the General Assembly to fly blind." (LR App. 6.) The General Assembly is well informed about these traditional districting principles, and well equipped to draw a map that respects them without further delay.

CONCLUSION

For the foregoing reasons, the Executive Branch Respondents respectfully request that the Court deny Applicants' requests for a stay of this Court's January 22, 2018 Order.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: January 25, 2018

/s/ Mark. A. Aronchick

Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
Claudia De Palma (ID No. 320136)
Ashton R. Lattimore (*pro hac vice*)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300
maa@hangley.com
mdh@hangley.com
cdp@hangley.com
arl@hangley.com

Attorneys for Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks

Thomas P. Howell (ID No. 079527)
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
Fax: (717) 787-1788
thowell@pa.gov

Attorney for Governor Wolf

Timothy E. Gates (ID No. 202305)
Kathleen M. Kotula (ID No. 86321)
Ian B. Everhart (ID No. 318947)
Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Tel: (717) 783-0736
tgates@pa.gov
kkotula@pa.gov
ieverhart@pa.gov
Attorneys for Acting Secretary Torres and Commissioner Marks

CERTIFICATION

This 25th day of January, 2018, I certify that:

Electronic version. The electronic version of this Answer that has been provided to the Court in .pdf format in an electronic medium today is an accurate and complete representation of the paper original of the document that is being filed by Respondents Governor Thomas W. Wolf, Acting Secretary Robert Torres, and Commissioner Jonathan Marks.

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

The undersigned verifies that the preceding Answer does not contain or reference exhibits filed in the Commonwealth Court under seal. Therefore, the preceding Answer does not contain confidential information.

Service. I am this day serving this Answer in the manner indicated below, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

VIA eService

Mary M. McKenzie
Michael Churchill
Benjamin D. Geffen
George A. Donnelly, IV
Daniel Urevick-Ackelsberg
THE PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway, 2nd Flr.
Philadelphia, PA 19103
Tel: (215) 627-7100
Email: mchurchill@pubintlaw.org; bgeffen@pubintlaw.org; mmckenzie@pubintlaw.org; George.a.donnelly@gmail.com; dackelsberg@pubintlaw.org
Counsel for Petitioners

Kathleen A. Gallagher
Carolyn Batz McGee
Russell D. Giancola
Jason R. McLean
CIPRIANI & WERNER, P.C.
650 Washington Road, Suite 700
Pittsburgh, PA 15228
Tel: (412) 563-2500
Fax: (412) 563-2080
Email: kgallagher@c-wlaw.com; cmcgee@c-wlaw.com rgiancola@c-wlaw.com jrmclean@c-wlaw.com
Counsel for Michael C. Turzai

Michael R. Abbott
CIPRIANI & WERNER, P.C.
450 Sentry Pkwy, Suite 200
Blue Bell, PA 19422
Tel: (215) 518-1054
Email: Mabbott@c-wlaw.com
Counsel for Michael C. Turzai

Brian S. Paszamant
Michael D. Silberfarb
Jason A. Snyderman
John P. Wixted
BLANK ROME LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
Tel: (215) 569-5791
Fax: (215) 569-5555
Email: paszamant@blankrome.com; snyderman@blankrome.com; jwixted@blankrome.com; msilberfarb@blankrome.com
Counsel for Joseph B. Scarnati, III

Alex M. Lacey
Clifford B. Levine
Alice B. Mitinger
COHEN & GRIGSBY, P.C.
625 Liberty Avenue, 5th Floor
Pittsburgh, PA 15222
Tel: (412) 297-4642
Fax: (412) 209-0672
Email: alacey@cohenlaw.com; clevine@cohenlaw.com; amitinger@cohenlaw.com
Counsel for Michael J. Stack III

Lawrence J. Tabas
Rebecca L. Warren
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Tel: (215) 665-3158
Fax: (215) 665-3165

Email: lawrence.tabas@obermayer.com;
rebecca.warren@obermayer.com;
timothy.ford@obermayer.com
Counsel for Republican Intervenors

Karl S. Myers
STRADLEY RONON STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103
Tel: (215) 564-8000
Fax: (215) 564-8120
Email: kmyers@stradley.com
Counsel for Pennsylvania General Assembly

Matthew H. Haverstick
Mark Seiberling
Joshua Voss
Kleinbard LLC
1650 Market. St., 46th Floor
Philadelphia, PA 19103
Tel: (215) 496-7225
Email: mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com
Counsel for Joseph B. Scarnati, III

VIA First-Class Mail, Postage Prepaid

Jason Torchinsky
Shawn Sheehy
Holtzman Vogel Josefiak Torchinsky Pllc
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Tel: (540) 341-8808
Fax: (540) 341-8809
Email: jssheehy@hvjt.law
pgordon@hvjt.law
Counsel for Michael C. Turzai and Joseph B. Scarnati, III

John E. Hall
CIPRIANI & WERNER, P.C.
650 Washington Road, Suite 700
Pittsburgh, PA 15228
Tel: (412) 563-2500
Fax: (412) 563-2080
Email: jhall@c-wlaw.com
Counsel for Michael C. Turzai

Patrick T. Lewis
BAKER & HOSTETLER LLP
Key Tower, 127 Public Square

Lazar M. Palnick
1216 Heberton Street
Pittsburgh, PA 15206
Tel: (412) 661-3633
Email: lazarp@earthlink.net
Counsel for Michael J. Stack III

Jonathan F. Bloom
Kyle A. Jacobsen
STRADLEY RONON STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103
Tel: (215) 564-8000
Fax: (215) 564-8120
Email: jbloom@stradley.com
kjacobsen@stradley.com
Counsel for Pennsylvania General Assembly

Bruce M. Gorman
Daniel S. Morris
BLANK ROME LLP
301 Carnegie Center, 3rd Fl
Princeton, NJ 08540
Tel: (609) 750-2642
Fax: (609) 897-7283

Cleveland, OH 44114
Tel: (216) 861-7096
Fax: (216) 696-0740
Email: plewis@bakerlaw.com
Counsel for Michael C. Turzai

Robert J. Tucker
BAKER & HOSTETLER LLP
200 Civic Center Drive, Suite 1200
Columbus, OH 43215
Tel: (614) 462-2680
Fax: (614) 462-2616
Email: rtucker@bakerlaw.com
Counsel for Michael C. Turzai

David P. Gersch
John A. Freedman
R. Stanton Jones
Helen Mayer Clark
Daniel F. Jacobson
John Robinson
Elisabeth S. Theodore
Lindsey D. Carson
John D. Cella
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Tel: (202) 942-5000
Fax: (202) 942-5999
Email: david.gersch@apks.com;
john.freedman@apks.com;
stanton.jones@apks.com;
helen.clark@apks.com;
daniel.jacobson@apks.com;
john.robinson@apks.com;
elisabeth.theodore@apks.com
lindsey.carson@apks.com
john.cella@apks.com
Counsel for Petitioners

Email: Gorman@blankrome.com;
morris-d@blankrome.com
Counsel for Joseph B. Scarnati, III

Huaou Yan
BLANK ROME LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
Tel: (215) 569-5449
Fax: (215) 569-5555
Email: HYan@blankrome.com
Counsel for Joseph B. Scarnati, III

Andrew D. Bergman
ARNOLD & PORTER KAYE SCHOLER LLP
700 Louisiana Street, Suite 4000
Houston, TX 77002
Tel: (713) 576-2430
Fax: (713) 576-2499
Email: andrew.bergman@apks.com
Counsel for Petitioners

Timothy J. Ford
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Tel: (215) 665-3158
Fax: (215) 665-3165
Email: timothy.ford@obermayer.com
Counsel for Republican Intervenors

/s/ *Mark A. Aronchick*
Mark A. Aronchick