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IN THE SUPREME COURT OF PENNSYLVANIA

CAROL ANN CARTER *et al.*, Petitioners, v. LEIGH M. CHAPMAN, 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. 7 MM 2022

PHILIP T. GRESSMAN *et al.*,

Petitioners,

v.

LEIGH M. CHAPMAN, 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.

RESPONDENTS' AND INTERVENOR-RESPONDENT GOVERNOR WOLF'S ANSWER IN OPPOSITION TO TEDDY DANIELS' EMERGENCY APPLICATION FOR INTERVENTION

Respondents, Acting Secretary of the Commonwealth Leigh M. Chapman and Director of the Bureau of Election Services and Notaries Jessica Mathis, and Intervenor-Respondent Governor Wolf file this Answer in Opposition to the Emergency Application for Intervention of Proposed Intervenor Teddy Daniels ("Application" or "App.").

I. INTRODUCTION

The Application is a transparent attempt to contrive a basis for federal court review of what is fundamentally a state-law case. Appropriately, then, to deny the Application, this Court need look no further than the Pennsylvania Rules of Civil Procedure: Under those Rules, Proposed Intervenor's Application is both untimely and legally insufficient.

First, a proposed intervenor would be hard-pressed to devise an intervention application that is more dilatory and more likely to cause undue delay, considering that this one comes six weeks after the Commonwealth Court's intervention deadline, after the evidentiary record has closed, and on the eve of oral argument addressing exceptions to the Special Master's Report and recommended congressional districting plan. Pennsylvania Rule of Civil Procedure 2329(3) is designed to thwart exactly this kind of gamesmanship.

Second, even if Proposed Intervenor had sought leave to intervene before the December 31, 2021 intervention deadline, he would have lacked an enforceable

interest in the litigation. *See* Pa. R. Civ. P. 2327(4).) Proposed Intervenor's asserted interests are not justiciable under this Court's well-established standing requirements: his interest as a voter is quintessentially "common to that of the public generally," *Kauffman v. Osser*, 271 A.2d 236, 239 (Pa. 1970); and his interest as a candidate is neither "peculiar" nor "individualized," *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005). For this reason, too, the Application must be denied.

II. PROCEDURAL HISTORY

Although the Court is already familiar with the posture of this case, key elements of the procedural history underscore Proposed Intervenor's extreme delay and the prejudice that his untimely intervention would cause.

A. Issues Regarding Congressional Districting and the Election Calendar Have Been on the Docket Since Even Before This Litigation

These consolidated actions are not the first iteration of redistricting litigation following the 2020 Census; similar issues were first raised in Spring 2021. On April 26, 2021, the same *Carter* Petitioners asked the Pennsylvania judiciary to prepare to adopt new congressional districting maps. *See Carter v. Degraffenreid*, 132 M.D. 2021, 2021 WL 4735059, at *1 (Pa. Commw. Ct. Oct. 8, 2021) (*Carter I*). Although the Commonwealth Court ultimately concluded the claims were not yet ripe, at least since *Carter I*, it has been abundantly clear the courts

may be involved in deciding issues regarding (1) redistricting and application of 2 U.S.C. § 2c, *see Carter I*, 2021 WL 4735059, at *2 & n.8 (citing 2 U.S.C. § 2c), and (2) the election calendar, *see Carter I*, 2021 WL 4735059 at *5 n.16 (discussing Respondents' concerns about the election calendar).

With Petitioners' initiation of these consolidated actions on December 17, 2021, those same issues reemerged. For example, the *Carter* Petition for Review here seeks relief regarding the congressional districting maps for the 2022 congressional elections and relies on 2 U.S.C. § 2c's requirement that a state have "a number of [congressional] districts equal to the number of Representatives to which such State is so entitled." *See, e.g.*, *Carter* Pet. for Review ¶¶ 3, 34, 60-63, *Carter, et al. v. Degraffenreid, et al.*, No. 464 MD 2021 (Pa. Commw. Ct. Dec. 17, 2021).

Issues with the election calendar likewise arose in short order. In the Commonwealth Court's first Scheduling Order, entered on December 20, 2021, the court stated it would "consider revisions to the 2022 election schedule/calendar as part of [an evidentiary] hearing." Order, *Carter, et al. v. Degraffenreid, et al.*, No. 464 MD 2021 (Pa. Commw. Ct. Dec. 20, 2021) (per curiam). The next day, on December 21, 2021, the *Carter* and *Gressman* Petitioners filed applications seeking this Court's exercise of extraordinary jurisdiction, based on their concerns about whether a final enacted plan would be in place in time for the 2022 primary

election. Respondents, in their answer to the applications, agreed about the importance of Petitioners' claims and the need for immediate resolution given the election calendar; moreover, Respondents explicitly requested that the Court address "whether any revisions to the 2022 primary election schedule are necessary." Respondents' Answer to Petitioners' Application for Extraordinary Relief Under 42 Pa. C.S. § 726 and Pa. R. A. P. 3309 at 5, No. 141 MM 2021 (Pa. Dec. 27, 2021.

Throughout this litigation, those issues have remained in the forefront. On January 11, 2022, Petitioners sought to expedite the proceedings in the Commonwealth Court because "expedited judicial redistricting [wa]s necessary to ensure that Pennsylvania's 2022 congressional primary election can proceed as scheduled under a lawful congressional map." *See*, *e.g.*, Application for Expedited Review, *Gressman, et al. v. Degraffenreid et al.*, No. 464 MD 2021 (Pa. Commw. Ct. Jan. 11, 2022). Not only did the Commonwealth Court grant the applications to expedite, it also reaffirmed that it would "consider revisions to the 2022 election schedule/calendar as part of [an evidentiary] hearing." Order at 3, *Carter v. Degraffenreid*, No. 464 MD 2021 (Pa. Commw. Ct. Jan. 14, 2022).

B. The Deadline for Filing Applications to Intervene Expired December 31, 2021, More Than Six Weeks Ago

In the Commonwealth Court's December 20, 2021 Scheduling Order, the court stated that "[a]ny applications to intervene, *see* Pa. R.A.P. 1531(b), shall be filed by December 31, 2021." Order, *Carter v. Degraffenreid*, No. 464 MD 2021 (Pa. Commw. Ct. Dec. 20, 2021) (per curiam).

Ten proposed intervenors filed applications to participate in the Consolidated Actions. Six of the applications were filed on behalf of elected officials; four were filed on behalf of groups of voters. On January 14, 2022, the Commonwealth Court granted all six elected official applications and denied all four voter applications while permitting the voter applicants to participate as amici. Order ¶ 1, *Carter v. Degraffenreid*, No. 464 MD 2021 (Pa. Commw. Ct. Jan. 14 2022) (per curiam). Three of the voter amici appealed the Commonwealth Court's denial of their applications for leave to intervene; this Court affirmed the Commonwealth Court's decision in each instance based on undue delay pursuant to Pa.R.C.P. 2329(3).[1] Since the passage of the deadline for parties to apply for

[1] *See Order*, *Carter et al v. Degraffenreid et al.*, Nos. 5 & 6 MAP 2022, 2022 WL 223313 (Pa. Jan. 26, 2022) (per curiam) ("Ali Order) (affirming denial of intervention by Khalif Ali et al.); *Carter v. Chapman*, Nos. 9 & 10 MAP 2022, 2022 WL 262283, at *1 (Pa. Jan. 28, 2022) (per curiam) ("Voters of the Commonwealth Order") (affirming denial of intervention of Voters of the Commonwealth of Pennsylvania based on Rule 2329(3) because "at least one of the case deadlines established by [order denying intervention] has already passed"); *Carter v. Chapman*, Nos. 11 & 12 MAP 2022, 2022 WL 302553, at *1 (Pa. Feb. 2, 2022) (per curiam) ("Citizen Voters Order") (affirming denial of intervention of Citizen Voters based on Rule 2329(3) because "deadlines established by [order denying intervention] have already passed").

leave to intervene, the Commonwealth Court denied as untimely a January 24, 2022 application to participate as amicus. *See* Order, *Carter v. Degraffenreid*, No. 464 MD 2021 (Pa. Commw. Ct. Jan. 26, 2022) (per curiam). The Commonwealth Court's Report on its recommended congressional redistricting plan also refused to consider an amicus's late-filed brief.[2]

III. ARGUMENT

A. The Court Should Deny the Application Under Pa.R.C.P. 2329, Based on the Proposed Intervenor's Undue Delay and the Likelihood That Intervention Would Delay These Proceedings

The Application should be denied under Pennsylvania Rule of Civil Procedure 2329, which sets forth several factors that give a court discretion to refuse an application for intervention, even if the proposed intervenor has made an adequate showing under Rule 2327.[3]

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[2] *See* Report Containing Proposed Findings of Fact and Conclusions of Law Supporting Recommendation of Congressional Redistricting Plan and Proposed Revision to the 2022 Election Calendar/Schedule at 222 n.49, *Carter v. Degraffenreid*, No. 464 MD 2021 (Pa. Commw. Ct. Feb. 7 2022) ("This Court additionally notes that it will not consider the Amici Curiae Brief of NAACP Philadelphia Branch and Black Clergy of Philadelphia & Vicinity in Support of Senate Democratic Caucus' Proposed Redistricting Plan 2, filed on January 31, 2022, which was after the evidentiary hearing in this matter.").

[3] Rule 2327 conditions intervention on an applicant's satisfying at least one of the following criteria:

> (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
>
> (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof;

> [A]n application for intervention may be refused, if …
>
> (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Pa. R. Civ. P. 2329(2), (3).

1. Proposed Intervenor Unduly Delayed in Filing the Application, Which, by Court Order, Was Due by December 31, 2021

An application for intervention like that of Proposed Intervenor "may always be refused if the petitioner has unduly delayed in making application therefor." *Darlington v. Reilly*, 69 A.2d 84, 87 (Pa. 1949) (citing Rule 2329(3)). The Commonwealth Court set a December 31, 2021 deadline for applications to intervene. Proposed Intervenor filed his Application on February 11, 2022, exactly six weeks after that deadline expired. In this case, the Court has already cited undue delay in affirming three orders denying intervention to proposed intervenors who filed *timely* applications to intervene, because deadlines passed between denial of intervention and their filing of notices of appeal. *See* Ali Order, 2022 WL

> (3) such person could have joined as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa.R.C.P. 2327. "[A] party [that] falls within any of the categories set forth in Pa.R.C.P. No. 2327 may [nonetheless] be refused intervention should the trial court determine that one of the circumstances set forth at Pa.R.C.P. No. 2329 is present." *Township of Radnor v. Radnor Recreational, LLC*, 859 A.2d 1, 5 (Pa. Commw. Ct. 2004).

223313; Voters of the Commonwealth Order, 2022 WL 262283, at *1; Citizen Voters Order, 2022 WL 302553, at *1. Unlike for those applications, where only "one of the case deadlines established by [the order denying intervention] ha[d] already passed," Voters of the Commonwealth Order, 2022 WL 262283, at *1, the *entire Commonwealth Court proceeding before the Special Master has already passed*. The evidentiary record is closed. This Court has exercised extraordinary jurisdiction. And the parties filed their exceptions to the Special Master's Report and recommendation *yesterday*. Proposed Intervenor did not just unduly delay; he missed the boat entirely.

The Application makes only a meager attempt to explain away the undue delay. According to the Application:

> First, Mr. Daniels's legal interests as a candidate were not affected until February 9, 2022, when this Court entered an order suspending the General Primary Election Calendar.
>
> Second, Mr. Daniels's legal interest as a voter did not arise until January 26, 2021, when Governor Wolf vetoed HB [2146], which was a proposed new Congressional map passed by the General Assembly.
>
> Finally, Mr. Daniels's legal interest in ensuring that state officials hold at-large elections, as required by 2 U.S.C. § 2a(c)(5), did not arise until this Court determined that it would be necessary to suspend the General Primary Election Calendar to allow for the imposition of a court-drawn map.

(App. ¶¶ 36-38.) None of these conclusory arguments withstands scrutiny.

As to the first and third assertions, which rest on the premise that Proposed Intervenor's interest in the election calendar arose only after this Court temporarily suspended the calendar, any calendar-related interest plainly arose by December 20, 2021, when the Commonwealth Court stated that, in these consolidated actions, it would "consider revisions to the 2022 election schedule/calendar as part of [an evidentiary] hearing." Order, *Carter, et al. v. Degraffenreid, et al.*, No. 464 MD 2021 (Pa. Commw. Ct. Dec. 20, 2021) (per curiam). Proposed Intervenor certainly did not need to wait until it was *too late*, after the election calendar was already temporarily suspended, to assert any interest he might have in the calendar or to articulate his position regarding the repercussions of changing the calendar.

And as to Proposed Intervenor's second argument—namely, that his interest did not arise until the Governor vetoed HB 2146 on January 26, 2021—the "real and concrete" threat of impasse was ascertainable weeks earlier. *City of Philadelphia v. Commonwealth of Pennsylvania*, 838 A.2d 566, 577 (Pa. 2003). The Commonwealth Court granted leave to intervene to six applicants, *including the state legislators and Governor*, *who would typically be responsible for enacting a congressional districting plan*, when they timely sought to intervene by December 31, 2021. It follows that at least as of December 31, 2021, all of those intervenors had an enforceable legal interest even before the Governor vetoed HB 2146. Indeed, on December 28, 2021 – weeks before he eventually vetoed HB

2146 – Governor Wolf publicly made clear that he would not sign HB 2146, on the grounds that it fails to adhere to the Governor's Redistricting Principles, violates constitutional requirements, and fails the test of fundamental fairness.[4]

Moreover, even accepting Proposed Intervenor's untenable premise that his interest did not arise until the Governor's veto on January 26, 2022, an application to intervene at that time still could have permitted Proposed Intervenor's participation in the Commonwealth Court's evidentiary hearing in the consolidated actions, and would have made Proposed Intervenor a party before this Court exercised extraordinary jurisdiction, before the Special Master filed a Report and recommended enactment of a congressional district map and modification of some election-calendar deadlines. But Proposed Intervenor has no explanation—other than gamesmanship—for why he waited another two weeks after Governor Wolf's veto (the supposed basis for at least some of his claims) to file his Application on February 11, 2022.

2. Permitting Proposed Intervenor to Intervene Would Unduly Delay this Litigation and Prejudice the Rights of the Parties, Voters, and Candidates

Allowing Proposed Intervenor to intervene would require substantially delaying the resolution of this litigation, prejudicing voters and candidates. As

[4] Letter from Governor Tom Wolf to Speaker and Majority Leader of Pennsylvania House of Representatives (Dec. 28, 2021), https://www.governor.pa.gov/wp-content/uploads/2021/12/12.28.21-TWW-Cutler-Benninghoff-HB-2146-Final.pdf

Chief Justice Baer emphasized while concurring in this Court's grant of extraordinary jurisdiction, there are "scant days available for this Court to obtain briefs, study this complex and important matter, and render a decision, all of which must occur before potential candidates gather signatures and prepare for the May 17, 2022 primary election." *Carter v. Chapman*, 7 MM 2022, 2022 WL 304580, at *2 (Pa. Feb. 2, 2022) (Baer, C.J., concurring). Entertaining Proposed Intervenor's (meritless) claims would require additional briefing and postponement of the oral argument already scheduled for this Friday, February 18, 2022, all in service of Proposed Intervenor's transparent attempt to gin up the possibility of federal court review where none currently exists. "In consideration of the many deadlines and the need for speedy resolution of this matter for the benefit of potential candidates and voters," the Court should deny the Application. *Id.*

B. The Court Should Deny the Application for Failure to Identify a Legally Enforceable Interest

Proposed Intervenor identifies only one basis for intervention under Rule 2327: he asserts that the determination of this action may affect his "legally enforceable interest[s]" as a candidate and voter. (App. ¶¶ 22, 25-27.) *See supra* note 3. Because well-established Pennsylvania law shows that Proposed Intervenor's interests are not legally enforceable, the Court should deny the Application.

Whether intervenors are "properly denied intervenor status [for failure to show a legally enforceable interest] … turns on whether they satisfy [this Court's] standing requirements." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). "[T]here is no question … that an intervening party must establish standing." *Id.* "[A] person who is not adversely impacted by the matter he or she is litigating does not enjoy standing to initiate the court's dispute resolution machinery." *Id.* (citing *Wm. Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 280-81 (Pa. 1975) (plurality)).

To determine where a party has standing, this Court looks to "whether the litigant has a substantial, direct, and immediate interest in the matter. To have a substantial interest, the concern in the outcome of the challenge must surpass 'the common interest of all citizens in procuring obedience to the law.'" *Id.* (quoting *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003). In particular, to qualify as "substantial," the interest at issue must be "peculiar" and "individualized," *Pittsburgh Palisades Park*, 888 A.2d at 660. "[T]here must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *In re Francis Edward McGillick Found.*, 642 A.2d 467, 469 (Pa. 1994)); *accord Markham*, 136 A.3d at 143 (explaining that "a generalized grievance regarding the workings of government that all citizens share[]" is insufficient to confer standing). All of Proposed Intervenor's alleged

injuries – as both a candidate and voter – are quintessential examples of "generalized" or "abstract" interests; none of them are "peculiar" or "individualized" as is required to establish an injury-in-fact.

First, Proposed Intervenor does not have standing under his "legally recognized right as a voter" to either "a statewide Congressional election under 2 U.S.C. § 2a(c)(5)" or "to have the Commonwealth's congressional map determined by the General Assembly." (App. ¶¶ 26-27.) Voter standing, where the purported interests of the voter are shared by *all* voters, is the prototypical example of a generalized, non-justiciable interest. "[I]t is hornbook law that a person whose interest is common to that of the public generally, in contradistinction to an interest peculiar to himself, lacks standing to attack the validity of a legislative enactment": "[T]he interest which [Proposed Intervenor] claim[s] is nowise peculiar to [him] but rather it is an interest common to that of all other qualified electors. In the absence of any showing of a legal standing or a justiciable interest to maintain this action, [the Court] cannot permit th[is] challenge." *Kauffman*, 271 A.2d at 239-40.

Second, the same principles apply equally to Proposed Intervenor's purported candidate injury. He alleges that he "has a legally recognized interest in this matter and his rights as a candidate are affected by the Court's order of February 9, 2022." (App. ¶ 25.) But Proposed Intervenor's candidacy is in the same position as every other candidate for office in the Commonwealth: the

Court's February 9, 2022 temporary stay applies equally to Proposed Intervenor, his "no fewer than 9 declared" primary opponents (App. ¶ 32), and every other candidate running in the May 2022 primary election. Proposed Intervenor makes no argument that he is in any way competitively disadvantaged by the Court's decision regarding the calendar. Thus, Proposed Intervenor's interests are neither "peculiar" nor "individualized." *Pittsburgh Palisades Park*, 888 A.2d at 660; *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975) (no standing when "asserted harm is a 'generalized grievance' shared in substantially equal measure" by "large class of citizens").

Third, Proposed Intervenor's interests are also non-justiciable for the related reason that he has not alleged that there will be "some discernible adverse effect" on his interests "other than the abstract interest of all citizens in having others comply with the law." *McGillick Found.*, 642 A.2d at 469; *accord Wm. Penn Parking Garage*, 346 A.2d at 282 (same). Because, as described above, Proposed Intervenor's candidacy is affected in the same way as all of the candidacies of his competitors, no one in the Republican primary election for Lieutenant Governor will benefit from the Court's February 9, 2022 Order: No candidate will have more or less time to collect signatures on nominating petitions (App. ¶¶ 33, 37); no candidate has more knowledge about when he or she can start circulating petitions or how long he or she will have to do so (*id.* ¶ 35); and no candidate has a better

understanding of how many volunteers will be needed or how to deploy them, (*Id.* ¶ 36). The same is true of Proposed Intervenor's interests as a voter, which also have not been impaired. Nothing that he complains about will dilute his vote or impair him from casting a vote. (*See* App. ¶¶ 43-44.) In other words, there has not been any "adverse effect" on Proposed Intervenor's interests, as a candidate or voter. *McGillick Found.*, 642 A.2d at 469.

Proposed Intervenor lacks standing in his capacity as both a voter and candidate. As such he does not have a legally enforceable interest in this litigation.

IV. CONCLUSION

For the foregoing reasons, Respondents, Acting Secretary of the Commonwealth Leigh M. Chapman and Director of the Bureau of Election Services and Notaries Jessica Mathis, and Intervenor-Respondent Governor Wolf respectfully request that Proposed Intervenor's Application to Intervene be denied.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
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Dated: February 15, 2022

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CERTIFICATION REGARDING 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.

Dated: February 15, 2022

/s/ *Robert A. Wiygul*
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