

IN THE SUPREME COURT OF PENNSYLVANIA

No. 142 MM 2021

**PHILIP T. GRESSMAN; RON Y. DONAGI; KRISTOPHER R. TAPP;
PAMELA GORKIN; DAVID P. MARSH; JAMES L. ROSENBERGER;
AMY MYERS; EUGENE BOMAN; GARY GORDON; LIZ MCMAHON;
TIMOTHY G. FEEMAN; AND GARTH ISAAK,**

Petitioners,

vs.

**VERONICA DEGRAFFENREID, IN HER CAPACITY AS ACTING
SECRETARY OF THE COMMONWEALTH; AND JESSICA MATHIS, IN
HER CAPACITY AS DIRECTOR FOR THE PENNSYLVANIA BUREAU
OF ELECTION SERVICES AND NOTARIES,**

Respondents.

**RESPONSE TO OPPOSITION OF PROPOSED INTERVENORS TO
PETITIONERS' APPLICATION FOR THE EXERCISE OF
EXTRAORDINARY JURISDICTION OR KING'S BENCH POWER**

Sam Hirsch*
Jessica Ring Amunson*
Lindsay C. Harrison*
Tassity S. Johnson*
Claire M. Lally*
JENNER & BLOCK LLP
1099 New York Avenue, NW,
Ste. 900
Washington, DC 20001
(202) 639-6000

**Pro Hac Vice* applications
forthcoming

April A. Otterberg*
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654-3456
(312) 222-9350

**Pro Hac Vice*
application forthcoming

Kim M. Watterson
Devin M. Misour
REED SMITH LLP
225 Fifth Avenue, Ste. 1200
Pittsburgh, PA 15222
(412) 288-3131

Shannon E. McClure
REED SMITH LLP
Three Logan Square
1717 Arch Street, Ste. 3100
Philadelphia, PA 19103
(215) 851-8100

Counsel for Petitioners

INTRODUCTION

Petitioners—a group of nonpartisan Pennsylvania voters who are also mathematicians and data scientists—do not oppose the participation of Proposed Intervenors¹ in this matter, in principle. Petitioners object, however, to Proposed Intervenors’ argument that this Court should not exercise its extraordinary jurisdiction to ensure that a congressional redistricting plan is in place in time for the orderly administration of the primary election. As Petitioners set out in their application—and as Respondents agree—this is a matter of the utmost public importance, and there simply is no time to allow the case to proceed first through the Commonwealth Court and then into *de novo* review in this Court. All the parties agree that this case should be resolved by this Court through exercise of extraordinary jurisdiction. Proposed Intervenors may not seek to participate in this case for the purpose of frustrating its timely resolution.

ARGUMENT

I. As a General Matter, Petitioners Do Not Oppose the Proposed Intervenors’ Participation in this Proceeding.

Although Proposed Intervenors have not filed in this Court any application to intervene in this proceeding, Petitioners do not oppose the participation of Proposed

¹ The Proposed Intervenors are Bryan Cutler, Speaker of the Pennsylvania House of Representatives; Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives; Jake Corman, President Pro Tempore of the Pennsylvania Senate; and Kim Ward, Majority Leader of the Pennsylvania Senate.

Intervenors in this case, in principle.² But as explained below, Proposed Intervenors do not have rights greater than the parties. All parties to this proceeding agree that this Court should exercise its extraordinary or King’s Bench jurisdiction and take up the matter of congressional redistricting now. Petitioners’ Appl. for Exercise of Extraordinary Jurisdiction or King’s Bench Power (“Pet’rs’ App.”); Carter Pls.’ Appl. for Extraordinary Relief; Resp’ts’ Combined Answer to Pet’rs’ Appl. for Exercise of Extraordinary Jurisdiction or King’s Bench Power (“Resp’ts’ Ans.”) at 1. Accordingly, if Proposed Intervenors wish to participate in the judicial remedial process, their participation should be conditioned on their taking the case as they find it—and litigating it in this Court as all parties agree. *See Northampton Trust Co., Trustee, v. Northampton Traction Co.*, 270 Pa. 199, 205 (1921) (“The general rule is that an intervenor must take the suit as he finds it.”).

II. Petitioners Do Oppose Intervention If It Will Disrupt this Court’s Proper Exercise of Its Jurisdiction in a Timely Manner.

Petitioners object to intervention to the extent that Proposed Intervenors’ aim is to disrupt this Court’s exercise of its extraordinary jurisdiction or its ability to timely adjudicate this case in advance of the 2022 primary-election process. This Court should reject Proposed Intervenors’ arguments for delay.

² On December 27, 2021, Proposed Intervenors filed an application to intervene in the Commonwealth Court. That court has not yet ruled on that application.

A. Judicial Intervention Is Necessary to Ensure a Timely and Smooth Primary-Election Process.

All parties to this proceeding—as well as Proposed Intervenors—agree on one thing: absent very prompt political action, judicial intervention will be necessary to ensure that a new congressional map is in place in time for the 2022 primary election. *See* Resp’ts’ Ans. at 4–5; Proposed Intervenors’ Opp. at 1. Although both Proposed Intervenors and Respondents assert that there remains some possibility of political action, the calendar suggests otherwise. Candidates may begin filing for the primary election on February 15, 2022, and Respondents have previously stated that a congressional map must be in place by, at the latest, 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. to Pet. for Rev., *Carter v. Degraffenreid*, No. 132 MD 2021, ¶ 15 (Pa. Commonw. Ct. July 1, 2021). Although a proposed congressional plan has received first consideration in the House, the General Assembly adjourned on December 15, 2021, without enacting a new congressional district map.³ The General Assembly’s next legislative session does not begin until January 4, 2022,⁴ and even the map proposed in the

³ *See* Pa. House of Representatives, House Session Days: December 15, 2021, <https://www.legis.state.pa.us/SessionDays.cfm?Chamber=H> (last visited Dec. 29, 2021); Pa. House of Representatives, Senate Session Days: December 15, 2021, <https://www.legis.state.pa.us/SessionDays.cfm?Chamber=S> (last visited Dec. 29, 2021).

⁴ *See* Pa. House of Representatives, House Session Days: January 4, 2022, <https://www.legis.state.pa.us/SessionDays.cfm?SessionYear=2022&SessionInd=0&Cha>

House is considered only a “starting point” for further discussion and compromise. Jan Murphy, *Pa. House Panel Approves Preliminary Congressional Map as ‘a Starting Point’ for Negotiation*, lehighvalleylive.com (Dec. 15, 2021) (quoting House State Government Committee Chair Rep. Seth Grove, R-York). Any proposed map must still pass the full House, the full Senate must pass its own map, and the two chambers must come together to pass an identical map that then would be sent to Governor Wolf for his approval. There is no realistic prospect that all this will happen before Respondents’ deadline of January 24, 2022.

B. There Is Not Enough Time for a Two-Step Judicial Redistricting Process.

Though they agree judicial action is warranted, Proposed Intervenors nevertheless argue that the likely absence of a new map in time for the 2022 primary is not a matter of public importance meriting this Court’s intervention. Proposed Intervenors’ Opp. at 8–9. That is incorrect. As Respondents acknowledge, *see* Resp’ts’ Ans. at 2, this Court has repeatedly assumed extraordinary jurisdiction over challenges to the Commonwealth’s congressional redistricting plan. *See, e.g., League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737, 766–67 (Pa. 2018) (“*League of Women Voters I*”); *Erfer v. Commonwealth*, 794 A.2d 325,

mber=H (last visited Dec. 29, 2021); Pa. House of Representatives, Senate Session Days: January 4, 2022, <https://www.legis.state.pa.us/SessionDays.cfm?SessionYear=2022&SessionInd=0&Chamber=S> (last visited Dec. 29, 2021).

328 (Pa. 2002), *abrogated by League of Women Voters I*, 178 A.3d 737; *Mellow v. Mitchell*, 607 A.2d 204, 205–06 (Pa. 1992). This Court thus has previously decided that “there is a heightened public interest” in ensuring the Commonwealth has a lawful, constitutional congressional plan.⁵ See Proposed Intervenors’ Opp. at 7. In this case, there is undoubtedly such a heightened public interest given the imminence of the 2022 primary and the absence of a usable, 17-district congressional map following the 2020 Census. Pet’rs’ App. at 3, 6, 21.

The relevant question is therefore not *whether* this Court should exercise jurisdiction, but *when*. That question turns on whether there is adequate time, before the primary-election process begins, for the case to proceed first in the Commonwealth Court and then in this Court. Quite clearly, the answer is no. Respondents, who are charged with administering the 2022 primary, have affirmed that there is no time for review in both the Commonwealth Court and this Court. Resp’ts’ Ans. at 3–4. And the timeline proposed by the Commonwealth Court and touted by Proposed Intervenors here would not result in a decision in *that* court until

⁵ Proposed Intervenors assert that the Court should not exercise its extraordinary jurisdiction here because the record does not “clearly demonstrate[.]” the Petitioners’ right “to their preferred choice” of a congressional plan. Proposed Intervenors’ Opp. at 9. But Petitioners’ right to vote in the 2022 primary under a lawful, constitutional congressional plan is undisputed, and indisputable. *Id.* at 8–9. The ongoing violation of that right is why Petitioners have sought this Court’s intervention. Which plan should be adopted is a question about remedy, not about the right to proceed.

February, more than a week *after* Respondent’s January 24, 2022 deadline for a final and legally binding congressional district map.

The earliest date of a Commonwealth Court decision, presumably the day after its planned January 31 evidentiary hearing, is just two weeks before candidates may begin filing for the primary election. *See* Order ¶ 4, No. 464 M.D. 2021 (Pa. Commw. Ct. Dec. 20, 2021); 25 P.S. § 2873. Then, as Proposed Intervenors acknowledge, *see* Proposed Intervenors’ Opp. at 11, this Court would need to commence its own review and decision-making process. This Court’s review of whether a map produced by the Commonwealth Court is constitutional would be *de novo*. *See Erfer*, 794 A.2d at 329; *see also League of Women Voters I*, 178 A.3d at 801 n.62; *In re Vencil*, 152 A.3d 235, 241 (Pa. 2017).

Thus, a two-step judicial redistricting process either would severely rush, diminish, and compromise this Court’s work, or it would drastically disrupt the primary election. Neither option is acceptable. Such a two-step judicial redistricting process would not afford Respondents adequate time to implement the new map correctly nor candidates adequate notice to run and campaign, much less associate with and educate voters.⁶

⁶ Given the imminent primary election, Petitioners did not believe it was an option to move for the Commonwealth Court to adopt an expedited schedule before asking this Court to exercise extraordinary jurisdiction. There simply is not time for two full levels of review, even on an expedited timeframe.

Proposed Intervenors rely on the superficial argument that, in prior cases, judicial redistricting has extended later in the calendar year. Proposed Intervenors’ Opp. at 10–11. But critically, in each of those cases, this Court did *exactly* what Petitioners now ask it to do in this case: The Court assumed extraordinary jurisdiction. *See League of Women Voters I*, 178 A.3d at 766–67; *Mellow*, 607 A.2d at 206. And in no case did the Court do what Proposed Intervenors now ask it to do—dismiss an uncontested application for extraordinary jurisdiction only weeks before the primary season begins with no constitutional plan in place.⁷

Proposed Intervenors also suggest that this Court could move the primary election back by a few weeks to build additional time into the schedule. Even if the

⁷ While Proposed Intervenors suggest that this Court directed certain factfinding by the Commonwealth Court in *League of Women Voters*, they neglect to identify fundamental differences in the timeline and substance of that matter. This Court assumed extraordinary jurisdiction in that case in early November 2017, and then directed the Commonwealth Court to issue findings of fact by the end of December 2017. 178 A.3d at 766–67. Then, this Court had three weeks to evaluate those findings and the parties’ briefs before it ruled, on January 22, 2018, that the existing congressional map was unconstitutional. After that, this Court had more than three weeks to review submissions and issue its decision adopting a constitutional map. *See League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083 (Pa. 2018). In this case, however, the timeline is far more compressed—and it would be even more so under the Proposed Intervenors’ schedule, which allows a mere two weeks after a decision by the Commonwealth Court for the parties to file briefs *and* for this Court to conduct and complete its *de novo* review. *See Proposed Intervenors’ Opp.* at 11. The factfinding in *League of Women Voters*, moreover, concerned whether the map’s partisan gerrymandering violated the Pennsylvania Constitution. 178 A.3d at 768–81. Here, neither the parties nor Proposed Intervenors dispute that the current map is unconstitutionally malapportioned. *See Resp’ts’ Ans.* at 2-3; *Proposed Intervenors’ Opp.* at 8-9. Thus, only a remedial process in the courts, to produce a constitutional and lawful congressional map, is necessary.

Court took that substantial step, that still would not create enough time for two separate courts to conduct hearings and adopt a constitutional map. Should there be a degree of flexibility in the timing, the redistricting process would benefit most not from rushing review in two separate courts, but rather from affording this Court—Pennsylvania’s highest—adequate time to conduct a thorough review. Indeed, a more thorough review by this Court is far more likely to instill public confidence in the outcome than a rushed and compressed review that proceeds only after the Commonwealth Court has taken its run at a map. *Contra* Proposed Intervenors’ Opp. at 14.

C. This Court Is Equipped to Manage These Proceedings in a Thorough and Expeditious Manner.

Finally, proposed Intervenors assert that the “fact-intensive issues of redistricting require a lengthy evidentiary hearing,” which they argue the Commonwealth Court is best suited to conduct. Proposed Intervenors’ Opp. at 12. Tellingly, proposed Intervenors do not actually identify any of these “fact-intensive issues.” And Petitioners do not believe that such issues will exist here; as proposed Intervenors appear to concede, there is no question that Pennsylvania cannot proceed with its current congressional map given that it is badly malapportioned and given that Pennsylvania lost a congressional seat following the 2020 census. Accordingly, the question presented will be relatively straightforward: which map best achieves the legal criteria set forth in Pennsylvania’s constitution, as elucidated by this

Court's precedent. *League of Women Voters*, 178 A.3d at 814, 816. An evidentiary hearing is not necessary to answer this question. *E.g.*, Minn. Special Redistricting Panel, Orders dated July 22, 2021, Aug. 24, 2021, and Oct. 26, 2021, *available at* <https://www.mncourts.gov/2021RedistrictingPanel> (establishing a judicial redistricting process that does not involve an evidentiary hearing). That said, if this Court does believe some factfinding is needed, it can always conduct the hearing itself—or, as in *League of Women Voters I*, retain jurisdiction and delegate particular factfinding questions to the Commonwealth Court. This can be done without the needless delay that would result if this Court declined altogether to exercise its extraordinary jurisdiction.

CONCLUSION

The need for a constitutional congressional redistricting plan is a matter of utmost importance and urgency to the democratic foundation of the Commonwealth. Although Petitioners do not object to Proposed Intervenors' request to participate in this matter, they do oppose any intervention that could thwart this Court's proper and timely exercise of its extraordinary jurisdiction. This Court should grant Petitioners' application and proceed forthwith to enter a schedule that permits this matter to proceed expeditiously and in a manner that does not disrupt the fast-approaching primary-election process.

Dated: December 29, 2021

Respectfully submitted,

By: /s/ Kim M. Watterson

Sam Hirsch*
Jessica Ring Amunson*
Lindsay C. Harrison*
Tassity S. Johnson*
Claire M. Lally*
JENNER & BLOCK LLP
1099 New York Avenue, NW, Ste. 900
Washington, DC 20001
(202) 639-6000
SHirsch@jenner.com
JAmunson@jenner.com
TJohnson@jenner.com
LHarrison@jenner.com
CLally@jenner.com
**Pro Hac Vice applications forthcoming*

April A. Otterberg*
JENNER & BLOCK LLP
353 North Clark Street
Chicago, IL 60654-3456
(312) 222-9350
AOtterberg@jenner.com
**Pro Hac Vice application forthcoming*

Kim M. Watterson (PA 63552)
Devin M. Misour (PA 311892)
REED SMITH LLP
225 Fifth Avenue, Ste. 1200
Pittsburgh, PA 15222
(412) 288-3131
kwatterson@reedsmith.com
dmisour@reedsmith.com

Shannon E. McClure (PA 164502)
REED SMITH LLP
Three Logan Square
1717 Arch Street, Ste. 3100
Philadelphia, PA 19103
(215) 851-8100
smcclure@reedsmith.com

Counsel for Petitioners

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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: Kim M. Watterson

Signature: /s/ Kim M. Watterson

Name: Kim M. Watterson

Attorney No. PA 63552

PROOF OF SERVICE

On December 29, 2021, I caused a copy of the foregoing to be served via the electronic filing system, PACFile, upon all counsel of record.

/s/ Kim M. Watterson
Kim M. Watterson (PA 63552)
REED SMITH LLP
225 Fifth Avenue, Ste. 1200
Pittsburgh, PA 15222
(412) 288-3131
kwatterson@reedsmith.com