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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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Carol Ann Carter, Monica Parrilla, : **CASES CONSOLIDATED**  
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. : No. 464 M.D. 2021

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 :

Philip T. Gressman; Ron Y. Donagi; :  
Kristopher R. Tapp; Pamela Gorkin; :  
David P. Marsh; James L. :  
Rosenberger; Amy Myers; Eugene :  
Boman; Gary Gordon; Liz McMahan; :  
Timothy G. Feeman; and Garth Isaak, :  
Petitioners :

v. : No. 465 M.D. 2021

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 :  
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Bureau of Election Services and :  
Notaries, :  
Respondents

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**CARTER PETITIONERS' MEMORANDUM IN OPPOSITION TO THE  
LEGISLATORS' APPLICATION TO INTERVENE**

## INTRODUCTION

Earlier this month, the *Carter* Petitioners, a group of Pennsylvania voters residing in overpopulated congressional districts, filed this action alleging malapportionment in Pennsylvania’s districts under the Free and Equal Elections Clause of the Pennsylvania Constitution (Art. I, § 5) and Article I, Section 2 of the United States Constitution. Because the General Assembly—the actor tasked with initiating redistricting in the first instance—has failed to timely redistrict, the *Carter* Petitioners have now called on Pennsylvania’s judiciary to intercede, remedy the malapportionment, and protect their voting rights.

The General Assembly, under the Legislators’ control, had the better part of the past year to enact new redistricting plans. They failed to do so, thereby ceding responsibility for redistricting to the judiciary. Notably, the Legislators accepted that reality in briefing they filed at the Pennsylvania Supreme Court just three days ago. In that briefing, the Legislators no longer maintained, as they did for the better part of a year in this Court, that the judiciary’s intervention in the redistricting process infringes on their “exclusive” right to redistrict. The Legislators’ concession on this point effectively nullifies any interest they could assert to justify intervention in this action. For that reason, among several others, the Court should not permit the Legislators to intervene.

## BACKGROUND

In April 2021, the *Carter* Petitioners brought a substantially similar suit to the present one in the Commonwealth Court, alleging that the General Assembly and Governor were likely to come to an impasse in passing congressional plans in time for the 2022 election cycle. That suit was ultimately dismissed on ripeness grounds, but during the case’s pendency several groups attempted to intervene, including the same Legislators here, who were granted intervention. *See* Ex. A. In support of that prior Application to Intervene, the Legislators argued the *Carter* Petitioners’ suit infringed on their “legislative interests and their vested, *exclusive* authority to conduct congressional redistricting in the Commonwealth.” Ex. B at ¶ 26 (emphasis added). And in granting that Application to Intervene in *Carter I*, the Commonwealth Court credited those claimed interests. *See* Ex. A at 9, 12-13 (Commonwealth Court noting the legislators “claim a legally enforceable interest in defending their constitutional authority to prescribe the time, place, and manner of holding elections, which includes the authority to enact congressional district maps,” and that “[a]ny potential infringement of that right may diminish or deprive legislators of their ability to act as legislators”). That action was ultimately dismissed as unripe, however, because an impasse had not yet come to pass.

Once it became clear that the political branches would fail to timely redistrict, the *Carter* Petitioners filed a new action in the Commonwealth Court and asked the

Pennsylvania Supreme Court to exercise extraordinary jurisdiction over the case shortly thereafter.<sup>1</sup> Days later, the same Legislators who had previously intervened in the first *Carter* action applied to intervene in both this Court and in the Pennsylvania Supreme Court. *See* Ex. C. In their Application at the Supreme Court, the Legislators explain they do not “contest” that “[w]hen . . . the legislature is unable or chooses not to act, it becomes the judiciary’s role to determine the appropriate redistricting plan.” *Id.* at 3 (citing *League of Women Voters v. Commonwealth*, 645 Pa. 1, 130, 178 A.3d 737 *Id.*, 822 (2018)). They interposed no objection to “the commencement of a judicial redistricting process.” *Id.* at 6. And they agreed that this case raises no Elections Clause issues because “it is settled law that state courts have authority to declare and remedy violations of the U.S. Constitution, even with respect to laws governing congressional elections.” *Id.* at 3 n.2 (citing *Grove v. Emison*, 507 U.S. 25, 32–36 (1993)).

The *Carter* Petitioners opposed the Legislators’ intervention application at the Pennsylvania Supreme Court yesterday. *See* Ex. E. As of December 30, the Legislators’ Application is still pending in the Pennsylvania Supreme Court.<sup>2</sup>

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<sup>1</sup> Since the *Carter* Petitioners filed their application for extraordinary jurisdiction last week, the evidence of impasse has grown stronger. Just yesterday, Governor Wolf sent a letter to Speaker Cutler and Leader Benninghoff criticizing the proposed congressional plan released by the General Assembly, suggesting it may be unconstitutional, and making clear he would not approve such a map. *See* Ex. D.

<sup>2</sup> At a minimum, this Court should not grant the Legislators’ Application until the Pennsylvania Supreme Court has a chance to act on the Legislators’ Application pending in that court.

## LEGAL STANDARD

Applications to intervene are evaluated under Rule 2327 of the Pennsylvania Rules of Civil Procedure. To be entitled to intervene, the Legislators must establish under Rule 2327(3) that they “could have joined as an original party in the action or could have been joined therein,” or, under Rule 2327(4), that “the determination of [this] action may affect any legally enforceable interest” of the Legislators.<sup>3</sup> *See* Pa. R.C.P. 2327. This Court may also deny intervention under Rule 2329 should it find the Legislators’ interests are already adequately represented or their participation would unnecessarily complicate the litigation or prejudice the Petitioners. *See* Pa. R.C.P. 2329.

## ARGUMENT

### **I. The Legislators could not have been joined as original Respondents.**

In the prior iteration of this case, *Carter I*, this Court found that the Legislators could not intervene in the prior action under Rule 2327 (3). *See* Ex. A at 9 n.9. Nothing about that conclusion should change.

Contrary to the Legislators’ assertions, Petitioners could not have named the Legislators as Respondents in this case because the General Assembly and its members are not responsible for enforcing Pennsylvania’s electoral boundaries.

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<sup>3</sup> The Legislators do not contend that they qualify to intervene under subsections (1) and (2) of Rule 2327.

While the Legislature is responsible for proposing apportionment plans in the first instance, it is not the proper party to defend the constitutionality of those plans, just as the Legislature is not the proper party to defend the constitutionality of statutes or government action more generally. *See, e.g., In re Nov. 3, 2020 Gen. Election*, 244 A.3d 317 (Pa. 2020) (denying motion to intervene by leaders of General Assembly to defend Pennsylvania’s election statutes); *see also Robinson Twp., Washington Cnty. v. Commonwealth*, No. 284 M.D. 2012, 2012 WL 1429454, at \*3 (Pa. Commw. Ct. Apr. 20, 2012) (noting, “[c]learly, Legislatures do not fall with the category of persons permitted to intervene as described in [Rule 2327(3)]”), *aff’d*, 624 Pa. 219, 84 A.3d 1054 (2014). The task of defending Pennsylvania law—here, Pennsylvania’s current electoral boundaries—rests instead with those responsible for enforcing and implementing those boundaries directly—in this case, the Acting Secretary of the Commonwealth and the Director for the Bureau of Election Services, both of whom Petitioners have named as Respondents in this suit.

Petitioners similarly could not have named the Legislators as Respondents in this case because Petitioners do not seek any relief against the General Assembly or its members. It is axiomatic that a party is not properly joined as a Respondent if “no claim for relief is asserted against it in [the] complaint.” *Haber v. Monroe Cnty. Vocational-Technical Sch.*, 296 Pa. Super 54, 57, 442 A.2d 292, 294 (Pa. Super

1982). And indeed, Petitioners do not seek any relief against the General Assembly, nor do they ask the Court to order the General Assembly to do anything. *See* Pet. Prayer for Relief (a)-(d).

In support of their intervention, the Legislators note that, in prior redistricting cases, “the then-presiding officers of the General Assembly were named as original parties.” App. ¶ 35. But this argument elides the different nature of the relief sought in those cases. The Legislators cite, for example, *League of Women Voters*, the recent partisan gerrymandering challenge to Pennsylvania’s congressional districts. *See id.* But the Petitioners in *League of Women Voters* named the Presiding Officers of the General Assembly as Respondents precisely because the Petitioners sought relief *against the General Assembly*. That Petition, for example, sought to “[e]njoin the Pennsylvania General Assembly from creating any future congressional districts with the purpose or effect of burdening [voters on the basis of partisanship] and to “[e]njoin the Pennsylvania General Assembly from using data regarding a voter’s political party membership [in redrawing districts].” *See* Petition for Review at 51, *League of Women Voters of Pa. v. Commonwealth*, No. 261 MD 2017 (Pa. Commw. Ct. June 15, 2017). The Presiding Officers were thus (at least plausibly) proper Respondents in *League of Women Voters*, unlike here.

The Legislators also improperly cite *Mellow v. Mitchell*, 530 Pa. 44, a case in which State Senators themselves petitioned for relief when the political branches



reached an impasse in the 1990 redistricting cycle, for the proposition that they could have been original parties to this case. *See App.* at ¶ 35. At the outset, the Legislators do not seek to intervene here as Petitioners. But more importantly, *Mellow* predates now binding caselaw from the Pennsylvania Supreme Court holding that *only voters* (not parties, not candidates, not politicians) have a direct interest in redistricting litigation sufficient for standing. *See Albert v. 2001 Legislative Reapportionment Comm’n*, 567 Pa. 670, 678-79, 790 A.2d 989, 994-95 (2002).<sup>4</sup> For this reason, the Legislators would not have standing to initiate the same redistricting litigation today as they did in *Mellow*.

Because the General Assembly is not responsible for enforcing the boundaries of Pennsylvania’s congressional districts, Petitioners do not seek relief against the General Assembly, and thus its presiding officers could not have been properly named as Respondents. To the extent the Legislators claim they could have been Petitioners to this action, their requested intervention as respondents disclaims such an interest, and in any event the Pennsylvania Supreme Court has made clear that only voters have a direct interest in bringing redistricting litigation. Accordingly, the

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<sup>4</sup> In *Albert*, a malapportionment challenge to Pennsylvania’s legislative districts, the Pennsylvania Supreme Court explicitly considered whether non-voting entities (in that case, Chairs of the Republican and Democratic Committees, Boards of Commissions, and Townships) had a direct interest in redistricting litigation, concluding they did not. In so holding, the Court explained the “subject matter of a reapportionment challenge” is “the right to vote and the right to have one’s vote counted,” and thus, any non-voting entity lacked a direct interest in the outcome of the litigation—a rule which was meant to vindicate the “personal and individual” voting rights at stake in the case. *Albert*, 657 Pa. at 678–79 (citing *Reynolds v. Sims*, 377 U.S. 533, 544-55, 561 (1964)).

Legislators could not have been original parties to this action, and they are not proper intervenors in this case under Rule 2327(3).

**II. The Legislators no longer have a legally enforceable interest in this litigation.**

To be entitled to intervene under Rule 2327(4), the Legislators must establish, under Rule 2327(4), that “the determination of [this] action may affect any legally enforceable interest.” As the Legislators’ own briefing before this Pennsylvania Supreme Court earlier this week demonstrates, the Legislators do not meet this standard.

The Legislators’ claim to legislative standing rests on legislative interests which they have now openly acknowledged are not credibly under attack in this case. They also advance a claim for legislative standing without the official support of the full General Assembly, an independent basis for denying intervention. Under the circumstances, the Legislators have not established the requisite legislative standing sufficient to intervene under Rule 2327(4) and their Application should be denied.

**A. Pennsylvania courts permit legislators to intervene under Rule 2327(4) only in limited circumstances.**

The Legislators wrongly assert that a person seeking to intervene need not have a direct or substantial interest in the litigation; instead, they argue “a person seeking to intervene in a proceeding need have only an ‘interest of such nature that participation . . . may be in the public interest.’” App. ¶ 16 (citing *Sunoco Pipeline*

*L.P. v. Dinniman*, 217 A.3d 1283, 1288-89 (Pa. Commw. Ct. 2019)). As the *Carter* Petitioners previously argued, and this Court previously agreed, this argument both mischaracterizes *Sunoco* and, more critically, relies on the more lenient standard for initiating a complaint before Pennsylvania’s Public Utility Commission, not the standard for intervention in its civil courts. *See* Ex. A at 9 n.9.

Under the proper application of Rule 2327(4) for intervention in civil litigation, to determine whether a party has a “legally enforceable interest” sufficient to intervene, courts look to principles governing legal standing. *See Markham v. Wolf*, 635 Pa. 288, 297 (2016) (explaining, in a case in which Pennsylvania legislators attempted to intervene in civil litigation, that “whether Appellants were properly denied intervenor status . . . turns on whether they satisfy our standing requirements”). And when legislators seek to intervene in their official capacity under Rule 2327(4), they must demonstrate legislative standing to proceed. *See id.* at 294-95; *see also Allegheny Reprod. Health Ctr.*, 225 A.3d 902, 911 (Pa. Commw. Ct. 2020) (explaining courts look to “principles of legislative standing” in determining whether Legislators “ha[ve] demonstrated a ‘legally enforceable interest’ for purposes of Rule 2327(4)”).

In *Markham*, the Pennsylvania Supreme Court explained, “What emanates from our Commonwealth’s caselaw, and the analogous federal caselaw, is that legislative standing is appropriate only in limited circumstances.” *Markham*, 635 Pa.

at 305. In particular, legislative standing “exists only when a legislator’s direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator.” *Id.* (citation omitted); *see also Robinson Twp., Washington Cnty. v. Commonwealth*, 624 Pa. 219, 221 (2014) (explaining legislators have standing “where there [i]s a discernible and palpable infringement on their authority as legislators”).

**B. The Legislators no longer claim infringement on their legislative authority in briefing before this Court.**

While legislative standing requires a palpable infringement on one’s authority as a legislator, the Legislators no longer claim that interest is at risk. Specifically, in briefing this week before the Pennsylvania Supreme Court, the Legislators explain they do not “contest” that “[w]hen . . . the legislature is unable or chooses not to act, it becomes the judiciary’s role to determine the appropriate redistricting plan.” Ex. C at 3 (citing *League of Women Voters v. Commonwealth*, 645 Pa. 1, 130, 178 A.3d 737, 822 (2018)). They interpose no objection to “the commencement of a judicial redistricting process.” *Id.* at 6. And they now agree that this case raises no Elections Clause issues because “it is settled law that state courts have authority to declare and remedy violations of the U.S. Constitution, even with respect to laws governing congressional elections.” *Id.* at 3 n.2 (citing *Grove v. Emison*, 507 U.S. 25, 32–36 (1993)).

The *Carter* Petitioners agree with the Legislators on these points, each of which reflects a brand-new position for the Legislators in this ongoing impasse litigation. Specifically, this past June, in support of their Application to Intervene in *Carter I*, these same Legislators claimed a need to intervene “to defend their unique, legislative interests and their vested, *exclusive* authority to conduct congressional redistricting in the Commonwealth.” Ex. B at ¶ 26 (emphasis added). And in granting that Application to Intervene in *Carter I*, this Court credited those claimed interests. *See* Ex. A at 9, 12-13 (Commonwealth Court noting the legislators “claim a legally enforceable interest in defending their constitutional authority to prescribe the time, place, and manner of holding elections, which includes the authority to enact congressional district maps,” and that “[a]ny potential infringement of that right may diminish or deprive legislators of their ability to act as legislators”).

While the Legislators still appear to invoke an “exclusive” interest in redistricting in their recycled intervention application before this Court, *see* App. ¶ 21, they have explicitly disclaimed any such argument before the Pennsylvania Supreme Court. Specifically, the Legislators have now acknowledged, as they must, that redistricting properly becomes the responsibility of the state judiciary in the event the state’s political branches fail to enact a map. *See* Ex. C at 3. As the Legislators also openly acknowledge for the first time, judicial efforts towards implementing a redistricting plan do not stop the Legislators from continuing to

work on a political solution. *Id.* at 1 n.1. Simply put, because by their own admission this case will not restrict the Legislators’ “ability to participate in the voting process,” or “deprive” them of their official “legislative authority,” *Markham*, 635 Pa. at 305, there is no legally enforceable interest present to give the Legislators standing to intervene.

**C. The Legislators should not be permitted to intervene without the consent of the General Assembly.**

Even if the Legislators had identified an injury to their legislative interests sufficient for standing, their intervention should be denied because the Legislators have not intervened with the express consent of the General Assembly. Instead, the Legislators claim to intervene with only the authority of the “Republican Caucuses,” which they note “possess sufficient votes to pass legislation” in Pennsylvania. Ex. C at 5. Notably, the Legislators do not contend that the General Assembly *actually* authorized their intervention, just that they theoretically would have the votes to do so.

This factor is critical: while *Markham* represents the Pennsylvania Supreme Court’s most recent articulation of legislative standing, as one Justice has aptly noted, “[s]ince *Markham* was decided, the Supreme Court of the United States has had occasion to consider—and reject—the notion that a single chamber of a bicameral legislature has standing to intervene” without authorization to do so. *See*

*Disability Rts. Pa. v. Boockvar*, 234 A.3d 390, 392 (Pa. 2020) (Wecht, J., concurring) (citing *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019)).

In *Bethune-Hill*, the United States Supreme Court held that the Virginia House of Delegates, “as a single chamber of a bicameral legislature, ha[d] no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part.” 139 S. Ct. at 1950. The Court distinguished the Virginia House’s position from that of the Arizona Legislature in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), “in which the Court recognized the standing of the Arizona House and Senate—*acting together*—to challenge a referendum that gave redistricting authority exclusively to an independent commission, thereby allegedly usurping the legislature’s authority . . . over congressional redistricting.” *Bethune-Hill*, 139 S. Ct. at 1953 (emphasis added).

Here, the Legislators appear before this Court seeking to intervene to defend the state’s congressional redistricting plan without authorization from *any chamber* of the Pennsylvania General Assembly, let alone both. As Justice Wecht has noted, the Commonwealth’s “foundational Charter confers no authority on individual legislators or *caucuses* within each respective chamber to act on behalf of the General Assembly or to substitute their interests for the Commonwealth.” *Disability Rts. Pa.*, 234 A.3d at 393–94 (Wecht, J., concurring) (emphasis added). Because individual Legislators “cannot speak for the General Assembly as a whole, and

therefore do not collectively represent that body's legislative prerogatives," *see id.*, they should not be permitted to intervene under the pretense of doing just that.

Even if this Court concludes that a lack of authorization from the General Assembly does not alone bar the Legislators' Application to Intervene, the Court should consider this factor in weighing the strength of their claim to legislative standing. As Justice Dougherty noted presciently in *Markham*, "[a] bipartisan challenge brought by the General Assembly as a whole premised upon a claim of an improper inroad into legislative prerogative . . . presumably would present a stronger case for recognizing legislative standing than a claim forwarded by a single legislator (regardless of party affiliation)." *Markham*, 635 Pa. at 309 (Dougherty, J., concurring).<sup>5</sup>

The Legislators' involvement in this litigation is, by their own admissions, unnecessary and not warranted under the clear rules governing intervention in matters pending before Pennsylvania courts. They should not be permitted to intervene.

## CONCLUSION

For these reasons, Petitioners respectfully request this Court deny the Legislators leave to intervene.

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<sup>5</sup> As it should be clear, the Legislators' intervention is not bipartisan, as seen from the two additional interventions already filed in this case from members of the General Assembly from the opposing party, one of which seeks to intervene as Petitioners.



Dated: December 30, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below, I caused the foregoing Memorandum in Opposition to the Application to Intervene by the Citizen-Voter Intervenors to be served upon the following parties and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

By first class mail:

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By PACFile eService:

All counsel of record as set forth in the PACFile proof of service filed herewith

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# **Exhibit A**

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. :

No. 132 M.D. 2021  
Held: August 24, 2021

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 :

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE WOJCIK

Filed: September 2, 2021

Petitioners<sup>1</sup> filed a petition for review (Petition) addressed to this  
Court's original jurisdiction. The Petition seeks, among other things, a

declaration

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<sup>1</sup> Petitioners are Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael

that the Commonwealth of Pennsylvania’s 2018 congressional district map is unconstitutional and may not be used for the 2022 election year. Currently, the Court considers three applications for leave to intervene. Speaker of the Pennsylvania House of Representatives Bryan Cutler; Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff; President Pro Tempore of the Pennsylvania Senate Jake Corman; and Majority Leader of the Pennsylvania Senate Kim Ward (collectively, Legislators) filed the first application for leave to intervene. The Republican Party of Pennsylvania and Individual Republican Voters<sup>2</sup> (collectively, Republican Party) filed the second application for leave to intervene, and Voters of the Commonwealth of Pennsylvania (Voters of Commonwealth)<sup>3</sup> filed the third

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Guttman, Maya Fonkeu; Brady Hill; Mary Ellen Balchunis, Tom DeWall, Stephanie McNulty, and Janet Temin. Each named petitioner is a United States citizen and registered voter in Pennsylvania and intends to advocate and vote for Democratic candidates. *Id.*

<sup>2</sup> The application for leave to intervene identifies the following individuals as proposed intervenors: Patricia K. Poprik, David Torres, Billy Lanzilotti, Nancy Becker, Michael D. Straw, James Depp, Joseph P. Vichot, Justin Behrens, Thomas Whitehead, Lee Becker, Louis Capozzi, Kirk Radanovic, Paul Nyman, James McGuire, Jr., Kristine L. Eng, Donna Cosmello, James Foreman, David Ball, James Vasilko, Lynne Ryan, Cynthia Kirk, Daryl Metcalfe, Luke Negron, Sue Ann Means, Reverend Todd Johnson, Michael Harvey, and Louisa Gaughen. *See* Appl. for Leave to Intervene by Proposed Intervenors the Republican Party of Pennsylvania and Individual Republican Voters, ¶¶ 2-28. The application provides each proposed intervenor’s congressional district number; any position within the Republican Party that he or she may hold or has held in the past; where applicable, an indication of whether the individual is considering running for public office; and the individual’s participation in the election process whether it be volunteering/advocating for a Republican candidate or intent to vote for Republican candidates.

<sup>3</sup> “Voters of the Commonwealth of Pennsylvania” is not an organization but rather is used to generally refer to the named proposed intervenors in the application. The application is brought on behalf of Haroon Bashir, Vallerie Biancaniello, Debra A. Biro, Tegwyn Hughes, James D. Bee, Richard L. Lawson, David Dillon, Rico Timothy Elmore, Barbara Steinour, James Curtis Jarrett, Jeffrey Wenk, and Donald Beishl, Jr. *See* Appl. for Leave to Intervene by Voters of the Commonwealth of Pennsylvania, ¶¶ 10-21. The application identifies the voter by name, general area of residency and congressional district number, as well as the individual’s intention in voting in the 2022 elections. *Id.* Each allegation also indicates that the proposed intervenor voted for his/her General Assembly representatives with the expectation that the representatives would have the authority to enact a new congressional district map based on the 2020 Census data.

application. All proposed intervenors seek to be aligned with Respondents Veronica Degraffenreid, Acting Secretary of the Commonwealth of Pennsylvania, and Jessica Mathis, Director for the Pennsylvania Bureau of Election Services and Notaries (collectively, Secretary). Petitioners oppose all three applications, while the Secretary opposes only the applications of the Republican Party and Voters of Commonwealth. After hearing held August 24, 2021 and argument on the issue, we grant Legislators' application but deny the applications of the Republican Party and Voters of Commonwealth based on our conclusion that they lack a legally enforceable interest in the Petition and that they could not be named as original parties to the action.

#### **I. Petition for Review**

The Petition provides details regarding the results of the 2020 Census, the dates by which the United States (U.S.) Secretary of Commerce must provide the President of the United States and the states with the apportionment data, and the effect of the Covid-19 pandemic on the delivery of that data. The Petition further explains that, while the Commonwealth's population increased from the last decennial census, the 2020 Census shows that the Commonwealth will lose a representative seat in the U.S. House of Representatives. Starting with the upcoming 2022 elections, the Commonwealth will have 17 representatives in the House of Representatives, one fewer than the current 18 representatives. The Commonwealth's congressional district map must be redrawn to accommodate for the loss of a seat in the House of Representatives.

Petitioners claim that the Commonwealth's current congressional districts are malapportioned due to shifts in population within the Commonwealth.

They believe that the congressional districts in which they live are overpopulated, while other districts are underpopulated, and that, consequently, their votes for members of the U.S. House of Representatives are diluted.

The Petition observes that Pennsylvania law does not set a deadline by which a new congressional district map must be put in place prior to the first congressional election following a census. According to Petitioners, it is in the best interest of voters, candidates, and the Commonwealth's entire electoral apparatus to have a new, final congressional district map in place prior to February 15, 2022, the date on which candidates may begin collecting signatures for placement on the primary election ballot.

The Petition informs that the Commonwealth's current congressional district map was drawn by the Pennsylvania Supreme Court in *League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083 (Pa. 2018), after the Republican-controlled General Assembly and Democratic Governor failed to agree upon a new congressional district map following the Supreme Court's invalidation of the Commonwealth's 2011 congressional district map. The current political climate has not changed since 2018, as Republican representatives maintain the majority in both houses of the General Assembly and Governor Tom Wolf is a Democrat. For these reasons, Petitioners contend that it is unlikely that the "political branches" of the government will agree upon a new congressional district map.

Petitioners allege that the current congressional district map violates: (1) article I, section 5 of the Pennsylvania Constitution (free and equal elections

clause);<sup>4</sup> (2) 2 U.S.C. §2c (relating to districting for House of Representatives);<sup>5</sup> (3) article I, section 20 of the Pennsylvania Constitution (relating to right to petition);<sup>6</sup> and (4) Article I, Section 2 of the U.S. Constitution (relating to qualifications for member of the House of Representatives).<sup>7</sup> Petitioners seek a declaration that the

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<sup>4</sup> Article I, section 5 of the Pennsylvania Constitution, PA. CONST. art. I, § 5, states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”

<sup>5</sup> 2 U.S.C. §2c provides:

In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

<sup>6</sup> Article I, section 20 of the Pennsylvania Constitution, PA. CONST. art. I, § 20, provides: “The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.”

<sup>7</sup> Article I, Section 2 of the U.S. Constitution, U.S. CONST. art. I, § 2, provides:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and



Commonwealth's current congressional district map violates the above constitutional provisions; an injunction enjoining the Secretary, her agents, officers, employees, and successors from implementing, enforcing, or giving effect to the 2018 congressional district map; establishment of a schedule that will enable the Court to adopt and implement a new congressional district map by a date certain should the political branches fail to enact such a map by that time; implementation of a new congressional district map that complies with the U.S. and Pennsylvania Constitutions in the event that the political branches do not enact a new map by a date certain; an award of attorneys' fees, costs, and disbursements; and an award of any other relief the Court deems just and proper.

## **II. Applications for Leave to Intervene**

### **A. Standards for Intervention**

Although this matter was filed in the Court's original jurisdiction, the right to intervene is governed by Pennsylvania Rules of Civil Procedure Nos. 2326-

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within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

2350. Rule No. 2327, titled “Who May Intervene,” provides in relevant part and as asserted by the proposed intervenors:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if

.....

(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. No. 2327.<sup>8</sup>

Rule No. 2329, titled “Action of Court on Petition,” declares:

Upon the filing of the petition and after hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if

(1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or

(2) the interest of the petitioner is already adequately represented; or

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<sup>8</sup> Pursuant to Pennsylvania Rule of Civil Procedure No. 2328(a), the proposed intervenors attached to their respective applications for leave to intervene copies of the pleading that they would file if permitted to intervene. Each group of proposed intervenors would file preliminary objections to the Petition. Pa. R.C.P. No. 2328(a).

(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.C.P. No. 2329.

The determination of whether a proposed intervenor has a “legally enforceable interest” calls for “a careful exercise of discretion and consideration of all the circumstances involved,” *Realen Valley Forge Greenes Associates v. Upper Merion Township Zoning Hearing Board*, 941 A.2d 739, 744 (Pa. Cmwlth. 2008) (citations omitted), because the exact boundaries of the “legally enforceable interest” limitation in Rule No. 2327(4) are not clear. *Id.* Nevertheless, an applicant for intervention must have some right, either legal or equitable, that will be affected by the proceedings. *See generally Keener v. Zoning Hearing Board of Millcreek Township*, 714 A.2d 1120, 1122 (Pa. Cmwlth. 1998).

At this point, it is important to note that although we summarize the applications for leave to intervene, the Court has considered the entirety of the applications and supporting briefs, the case law cited therein, the replies to Petitioners’ and the Secretary’s opposition to the intervention applications, and the arguments, testimony and exhibits presented at the August 24, 2021 hearing in our determination of whether to grant intervention in this case.

## **B. Legislators’ Application**

Legislators’ application for leave to intervene asserts that the named legislators are the highest-ranking members of their respective chambers, that the Republican Caucuses of their chambers have authorized them to seek intervention, and that the U.S. Constitution empowers the General Assembly to establish the time, place, and manner of elections to Congress, which includes the authority to redistrict.

See U.S. CONST. art. I, § 4 (stating that the time, place and manner of elections are left to the states' legislatures). Legislators seek to intervene pursuant to Pa. R.C.P. No. 2327(3) and (4) to vindicate their authority to redistrict the Commonwealth.

Legislators' memorandum in support of their application expands upon the reasons why they should be permitted to intervene. They first claim that they could have been named as original parties to the action or could have been joined therein because they have a special interest in the action.<sup>9</sup> That special interest is Petitioners' alleged desire to divest Legislators of their constitutional authority to conduct congressional redistricting. Legislators also claim that their participation is required by the Declaratory Judgments Act,<sup>10</sup> which mandates that all persons who have or claim any interest that would be affected by a declaration be made parties to the action, and that absent their participation, no declaration may prejudice their rights. 42 Pa. C.S. § 7540(a). Legislators also claim a legally enforceable interest in defending their constitutional authority to prescribe the time, place, and manner of holding elections, which includes the authority to enact congressional district maps. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 808 (2015) ("redistricting is a legislative function, to be performed in

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<sup>9</sup> Legislators claim that they could have been joined as original parties because it is not uncommon for the courts to allow legislators to intervene in actions challenging the constitutionality of, or seeking to alter, redistricting plans. We reject such a blanket assertion. The cases upon which Legislators rely involved legislator participation *after* a redistricting plan was implemented and later challenged.

We also reject any reliance on *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Cmwlth. 2019), as supporting the right to intervene based on a special interest. *Sunoco* addressed standing to *initiate* formal complaints before the Pennsylvania Public Utility Commission and did not directly involve the issue of intervention in formal complaint proceedings. Regardless, the Commission's regulations provide the standards upon which intervention may be granted. There is no statutory or regulatory law addressing intervention in cases such as the one currently before the Court.

<sup>10</sup> 42 Pa. C.S. §§ 7531-7541.

accordance with the State’s prescriptions for lawmaking . . .”). They claim that Petitioners asked the Court to take over this process even before the General Assembly has the necessary tools to redistrict and to impose unreasonable deadlines.

The law is well settled as to legislator standing when seeking to intervene. In *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016), legislators sought to intervene in an action challenging an executive order that authorized direct care workers to organize. This Court denied the legislators’ application for leave to intervene, which the Supreme Court affirmed. In doing so, the Supreme Court identified the requirements for legislator standing.

Standing exists only when the legislator’s direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, *see* [*Wilt v. Beal*, 363 A.2d 876 (Pa. Cmwlth. 1976)], or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator, *see* [*Fumo v. City of Philadelphia*, 972 A.2d 487 [Pa. 2009),] (finding standing due to alleged usurpation of legislators’ authority to vote on licensing).

Conversely, a legislator lacks standing

where he or she has an indirect and less substantial interest in conduct outside the legislative forum which is unrelated to the voting or approval process, and akin to a general grievance about the correctness of governmental conduct, resulting in the standing requirements being unsatisfied.

*Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 225 A.3d 902 (Pa. Cmwlth. 2020)<sup>11</sup> (quoting *Markham*, 136 A.3d at 145).

The Supreme Court has held that

members of the General Assembly have sufficient interest to participate in legal action in their official capacity and based upon their special status “where there [i]s a discernable and palpable infringement on their authority as legislators.” A legislator’s legal interest has been recognized “to protect [the] legislator’s right to vote on legislation” and “in actions alleging a diminution or deprivation of the legislator’s . . . power or authority.” But, a legislator has no legal interest “in actions seeking redress for a general grievance about the correctness of government conduct.”

*Robinson Township v. Commonwealth*, 84 A.3d 1054, 1054 (Pa. 2014) (alterations in original; citations omitted) (affirming Commonwealth Court order denying legislators intervention in action challenging constitutionality of amendments to the Oil and Gas Act<sup>12</sup>). The principles of legislator standing are therefore relevant to the issue of whether the putative intervenor has demonstrated the legally enforceable interest required of Pa. R.C.P. No. 2327(4).

We disagree with Petitioners’ claims that Legislators lack a legally enforceable interest in this matter because the Petition does not seek to deprive Legislators of their authority to redistrict the congressional district map and that

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<sup>11</sup> The opinion appearing at 225 A.3d 902 (Pa. Cmwlth. 2020), addresses legislator standing. Thereafter, on March 26, 2021, the Court issued an order sustaining the respondents’ preliminary objections and dismissing the petition for review. The petitioners filed an appeal to the Supreme Court, which remains pending. See *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services* (Pa. Cmwlth., No. 26 M.D. 2019, filed March 26, 2021), *appeal pending*, (Pa., No. 26 MAP 2021).

<sup>12</sup> 58 Pa. C.S. §§ 3201-3274.

Legislators are mischaracterizing the Petition as such. Among other things, the Petition seeks an order establishing a date certain by which the Court will take control of the redistricting process should the General Assembly and Governor fail to act. Pennsylvania law, however, does not establish a date by which a new congressional district map must be put in place. While Petitioners correctly cite *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), for the proposition that there is nothing in the law prohibiting the court from establishing a deadline for enactment of a new congressional map, it is noteworthy that the petitioners in *Mellow* were eight senators who sought nearly the same relief as that sought here, and several members of the state House of Representatives and Senate were permitted to intervene. When the Supreme Court exercised plenary jurisdiction in *Mellow* and appointed a judge of this Court as master to conduct hearings and report to the Supreme Court, Judge Craig directed that the parties, including intervenors, submit their proposed congressional district plans by a date certain.

At this juncture, it is not known how the redistricting process will proceed. But it seems clear that Legislators' ability to legislate would be impaired if the Court imposes a deadline on the General Assembly and the Governor to put in place a new congressional district map and takes control of the redistricting process. Likewise, Legislators would have a legally enforceable interest in the submission of a proposed plan for the Court's consideration if called upon to draw a new congressional district map, as in the *Mellow* case.

We therefore grant Legislators' application for leave to intervene. They have a legally enforceable interest because Pennsylvania law does not prescribe the date by which a new congressional district map must be put in place and because they, as members of the General Assembly, have the constitutional authority to

establish the time, place, and manner of elections, which includes the authority to redistrict. *Arizona State Legislature*. Any potential infringement of that right may diminish or deprive Legislators of their ability to act as legislators.

### **C. Republican Party’s Application and Voters of Commonwealth’s Application**

We next consider the applications for leave to intervene filed by the Republican Party and Voters of Commonwealth. Both applications claim that the Republican Party, including the individual Party Voters, and Voters of Commonwealth could have been named as original parties. We disagree. Clearly, the Republican Party, the individual Republican Voters, and Voters of Commonwealth could not be joined as petitioners because they oppose Petitioners’ requested relief. Similarly, they could not be joined as respondents because Petitioners’ claims do not affect their liabilities. *See* Pa. R.C.P. No. 2229(b) (“A [petitioner] may join as [respondents] persons against whom the [petitioner] asserts any right to relief . . . in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact *affecting the liabilities of all such persons* will arise in the action.”) (emphasis added).<sup>13</sup> This factor militates against granting the Republican Party’s and Voters of Commonwealth’s applications for leave to intervene.

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<sup>13</sup> The Republican Party notes that the Court has permitted intervention in other cases, specifically *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5 (Pa. 2018). There, the Supreme Court noted that a judge of this Court, acting as master, permitted certain Republican voters, who included announced or potential candidates for Congress and other active members of the Republican Party, to intervene. The Court did not state the basis upon which intervention was granted, and our review of this Court’s docket in *League of Women Voters* (Pa. Cmwlth., No. 261 M.D. 2017), indicates that the Court’s order did not set forth its reasons for granting intervention.



We now address whether the Voters of Commonwealth or the Republican Party has shown a legally enforceable interest. For its part, the Voters of Commonwealth claim that they seek to intervene to preserve the existing framework that the General Assembly and Governor have until the first day to circulate nomination petitions to implement a new congressional district map. They claim that they are “mirror images” of Petitioners because they intend to advocate on behalf of Republican candidates in 2022. Voters of Commonwealth suggest that if the Court grants Petitioners the relief requested, such relief would curtail the ability of the Republican-controlled General Assembly to represent their interests. This would diminish or nullify their votes and would take away local officials’ constitutional duty to redistrict the Commonwealth. Local officials are more familiar with their constituents than Supreme Court jurists.

Voters of Commonwealth suggest that they have a special interest that allows them to intervene, that being that this matter may be of public interest. They allege an inalienable right to express and present their concerns regarding drawing of the congressional district map, and if this Court imposes a date certain by which the political branches must act or takes over the redistricting process, the General Assembly will be divested of its authority to draw the new map.<sup>14</sup> A court drawing

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<sup>14</sup> The Court admitted Voters of Commonwealth Exhibit 1, which contains the Affidavits of Tegwyn Hughes, Debra A. Biro, James Curtis Jarrett, James D. Bee, and Jeffrey Wenk, subject to Petitioners’ and the Secretary’s objections to the legal conclusions stated within the affidavits. The Affidavits largely echo the averments in the application for leave to intervene and are uniform for the most part. The affiants attest to their residency, registration as qualified electors in the Commonwealth, regularity in voting, voting with the expectation that their representatives would engage in the redistricting process based on the 2020 Census and ability to contact their representatives, and their intention in contacting their representatives relating to the new congressional district map. Each affiant states that he/she has an interest in the contours of his/her congressional districts and an inalienable right to express to his/her representatives concerns regarding redistricting under the First Amendment, U.S. CONST. amend. I. Further, affiants state that the Secretary does not have authority regarding redistricting and therefore does not represent the affiants’ interest.

the congressional district map will turn a legislative process into a judicial one, according to Voters of Commonwealth. Finally, newly enacted redistricting maps have been subject to voter challenges.

As for a legally enforceable interest, the Republican Party argues that it has an interest in expanding its power within the Commonwealth government and that redistricting is fundamentally about political power. It maintains that it has a legally enforceable interest in (1) the allocation of its resources, (2) advocating for its interest and that of its members in areas that are bipartisan, (3) who draws the new congressional district map, that being the Republican-controlled General

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They conclude that they have a substantial and particularized interest in preserving the existing framework that the General Assembly and the Governor have until the first day to circulate nomination petitions to implement a new district plan. Petitioners' requested relief would deprive them of their ability to contact their legislators regarding redistricting, thus nullifying their vote for a representative. Further, Petitioners' request that the Court invalidate the current congressional map would deprive affiants of their right to representation should a special election be needed in their district.

The Court also permitted Voters of Commonwealth to provide an additional exhibit after the proceedings, which Voters filed on August 26, 2021. Voters filed a supplemental affidavit in support of the Voters' application for leave to intervene by Vallerie Biancaniello. The affidavit is the same as those presented in Voters of Commonwealth Exhibit 1. The Secretary promptly responded, indicating that she does not object to the affidavit on hearsay grounds or the Court's consideration of the affidavit in lieu of live testimony, but she does object to the legal conclusions stated therein. Petitioners object on the same basis as the Secretary.

Upon review, we sustain the objections to the legal conclusions stated within each affidavit, including that: (1) the affiant has a substantial and particularized interest in preserving the existing framework; (2) the requested relief would have the effect of preventing the affiant from being able to interact with the elected representatives regarding redistricting and nullifies the affiants' votes in the 2020 election; (3) if the Court grants the requested relief, the General Assembly will be deprived of its authority to draw new congressional districts and deprive the affiant of his/her ability to provide input to his/her representative thus infringing on the affiant's free speech rights; (4) the affiants' votes would be nullified and their interests of having their representatives exercise their full scope of constitutional duties with respect to redistricting would be infringed; and (5) the affiants could be deprived of their right to representation if the current map is declared unconstitutional and a special election must take place before a new map is enacted. In sustaining the objections to the Exhibits, we did not consider the stated conclusions in our disposition of this matter.

Assembly or the Justices of the Supreme Court, who are mostly Democrats, (4) a change in the environment in how rival parties defend their concrete interests, (5) recruiting of candidates, (6) risk of confusion to voters, and (7) associational interests.<sup>15</sup> *See* PA. CONST. art. I, § 20 (“The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested

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<sup>15</sup> The Republican Party presented the testimony of Angela Alleman, Executive Director of the Pennsylvania GOP. Mrs. Alleman oversees all operations of the Party. She explained her concerns if the Supreme Court draws the congressional district map, including the removal of power to do so by the General Assembly, the Party’s ability to work with its legislators to influence the map but inability to advocate before the Supreme Court, and the Party’s diversion of funds to have experts prepare and analyze any map drawn by the Supreme Court. She believes that it is unfair to create a deadline for the General Assembly to act, especially when it is not clear when the 2020 Census data will be available. Mrs. Alleman stated that the uncertainty of the congressional district map affects candidate recruitment and makes it impossible for incumbents to know whether their districts will be realigned and the possibility that if realigned, whether the incumbent will be running against another incumbent. She acknowledged that regardless of who draws the new congressional district map, the Republican Party will have to spend money to educate voters, and for “get out and vote” campaigns. Mrs. Alleman agreed that Republican Party members may speak to their legislators regardless of who draws the map, and that the Republican Party has no power to make the General Assembly do what the Party wants. For Mrs. Alleman, the issue with the Petition is the request for a deadline by which the General Assembly and Governor must act and the allocation of the Party’s resources depending on who draws the congressional district map. She believes that if the General Assembly draws the map, the Republican legislators will negotiate the best possible map for the Party. Expenses the Republican Party would incur if the Supreme Court draws the map include legal fees, including fees for intervening in this action, expert fees for analyzing and preparing maps, and the diversion of the Party’s resources. The Court finds Mrs. Alleman’s testimony credible but not persuasive on the issue of whether the Republican Party has a legally enforceable interest.

The Court admitted 12 affidavits of the individual Republican Party members: Nancy Becker, James Depp, Thomas Whitehead, Louis Capozzi, Kirk Radanovic, Kristine L. Eng, David Ball, James Vailko, Daryl Metcalfe, Sue Ann Means, and Michael Harvey, and Justin Behrens. The affidavits are substantially the same and attest that the affiant is a U.S. citizen and registered voter in Pennsylvania; the district in which the affiant resides; the affiant’s participation in the election-related/Republican Party activities; the affiant is a long-time supporter of the Republican party; and that Petitioners’ and the Secretary are affiliated with the affiant’s political opponents, and that, therefore, they will not advocate for a congressional district map that represents the affiant’s interest as a supporter and/or official of the Republican Party. The affidavits also attest to the affiant’s resources invested in advocating on behalf of the Republican Party, including activities that may be affected by the Supreme Court’s drawing of the congressional district map.

with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.”).

First, the Court rejects the Voters of Commonwealth and the Republican Party’s argument that because they have a special interest in the matter, they are permitted to intervene. Both proposed intervenors rely on *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Cmwlth. 2019), but in that case, the primary issue was whether a senator had standing, either as a legislator or as a private citizen, to initiate a formal complaint with the Pennsylvania Public Utility Commission; the question of intervention was not at issue in *Sunoco*. The brief discussion of intervention was limited to distinguishing between standing to initiate a formal complaint and standing to intervene, which the Commission’s regulations expressly address. Years ago, in *Application of Biester*, 409 A.2d 848 (Pa. 1979), our Supreme Court established the standards for intervention. In *Biester*, a taxpayer sought to intervene in an action seeking to impanel a statewide investigative grand jury. The Court, after initially allowing the taxpayer to intervene, later vacated its order granting intervention. The Court determined that to intervene, the taxpayer must meet the “substantial, direct, and immediate” test set forth in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). That standard remains the law in this Commonwealth. *Markham*, 136 A.3d at 139 (“in order to intervene, individuals must have standing, Pa. R.C.P. [No.] 2327(3), (4), and to establish standing, one must have an interest that is substantial, direct[,] and immediate”). To have a substantial interest, the proposed intervenor’s concern in the outcome of the action must surpass “the common interest of all citizens in procuring obedience to the law.” *Markham*, 136 A.3d at 140. An interest is direct if the matter will cause

harm to the party's interest, and the concern is immediate "if that causal connection is not remote or speculative." *Id.*

We conclude that the Voters of Commonwealth and individual Republican Voters fail to meet the "substantial, direct, and immediate" test. Neither the individual Republican Voters, regardless of political interest, or Voters of Commonwealth have an interest that surpasses the interest of all qualified and registered voters in the Commonwealth. Based on the preliminary 2020 Census data, the Commonwealth will lose a seat in the U.S. House of Representatives and thus our current congressional district map must be redrawn. As counsel for Voters of Commonwealth stated, the current congressional district map is malapportioned across the state. *Every elector*, therefore, has an interest in redrawing a congressional district map that meets constitutional standards. Thus, the individual Republican Voters and Voters of Commonwealth do not have a substantial interest that surpasses the common interest of all citizens.<sup>16</sup>

The Republican Party, identified as non-profit organization, has no legally enforceable interest either. Based on our review, it appears that the Republican Party is complaining about what role it may play in the redistricting process, a role that is not protected by law. Redistricting, however, is fundamentally about protecting the one-person one-vote principle, that is, all votes have equal power as near as possible. *See Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711, 739 (Pa. 2012). The

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<sup>16</sup> We further disagree that Voters of Commonwealth are the "mirror image" of Petitioners because they will advocate for Republican candidates in 2022, whereas, Petitioners allege, they will advocate for Democratic candidates. Petitioners allege that the congressional districts in which they live are overpopulated as evidenced by the 2020 Census and, thus, their voting power is diluted. *See Voters of Commonwealth, Appl. for Leave to Intervene*, ¶¶ 10-21. Voters of Commonwealth do not speculate how their congressional districts may be affected by redistricting.

activities of the Republican Party, and how the Party allocates its resources, do not constitute a legally enforceable interest in how the congressional district map is determined and by whom. The case law cited by the Republican Party does not stand for the proposition that the asserted interests constitute legally enforceable interests sufficient to confer standing to intervene. The case law cited by the Secretary, rather, suggests otherwise and is more persuasive. *Cf. Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018) (recognizing that under the U.S. Supreme Court’s precedent, achieving a party majority in the legislature is a collective political interest, not an individual legal interest recognized by law); *see also Pennsylvania Voters Alliance v. Centre County*, 496 F. Supp. 3d 861, 868 (M.D. Pa. 2020) (recognizing that “‘statewide harm’ to a voter’s interest in ‘collective representation in the legislature’” or “in ‘influencing the legislature’s overall composition and policymaking’” is insufficient to support standing under Article III of the U.S. Constitution, U.S. CONST. art. III; “[t]o the extent that the latter interest is recognized, it is ‘embodied in [an individual’s] right to vote for [his or her] representative’”) (quoting *Gill*, 138 S. Ct. at 1931); *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002) (recognizing that Democratic committee lacked standing to challenge reapportionment plan because it was not an entity authorized to exercise the right to vote), *abrogated on other grounds by League of Women Voters*, 178 A.3d 737.

Moreover, we conclude that the Republican Party’s, individual Republican Voters,’ and Voters of Commonwealth’s claimed interests are speculative and not immediate. The U.S. Census Bureau has released the redistricting data to the states, with the final redistricting data toolkit to be delivered by September 30, 2021. *See* [https://www.census.gov/programs-surveys/decennial-census/decade/2020/2020-census results.html](https://www.census.gov/programs-surveys/decennial-census/decade/2020/2020-census%20results.html) (last visited August 30, 2021).

Therefore, our General Assembly can begin the process of moving forward with a new congressional district plan based on the Census data received. There is nothing preventing the Voters of Commonwealth, the individual Republican Voters, and the Republican Party from exercising their First Amendment and associational rights to make their positions known to their respective legislators.

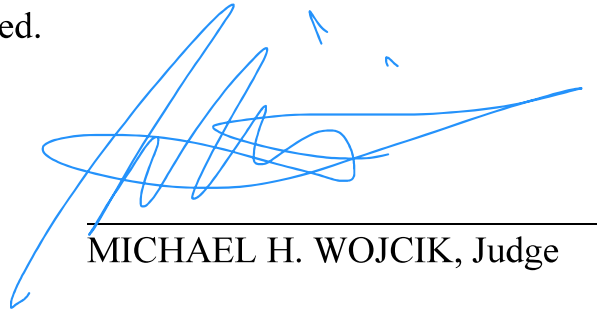
Because we conclude that the Republican Party, the individual Republican Voters, and Voters of Commonwealth have failed to show that they have legally enforceable interests in these proceedings, we deny their applications for leave to intervene.

### **III. Conclusion**

The General Assembly and the Governor are vested with authority to draw a new congressional district map. Pennsylvania law, however, does not provide a date by which they must act. The relief that Petitioners seek, the setting of a deadline by which the political branches must act, or taking control of the redistricting process, potentially infringes upon that authority. Accordingly, Legislators have shown a legally enforceable interest entitling them to intervene in this matter. *Markham; Allegheny Reproductive Health Center*; Pa. R.C.P. No. 2327(4).

Conversely, the Republican Party and Voters of Commonwealth have failed to demonstrate that they could be joined as original parties to the action or that they have a legally enforceable interest that would entitle them to intervene in this matter. Pa. R.C.P. No. 2327(3), (4).

Accordingly, the application for leave to intervene filed by Legislators is granted, and the applications for leave to intervene filed by the Republican Party and Voters of Commonwealth are denied.



MICHAEL H. WOJCIK, Judge



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. :

No. 132 M.D. 2021

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 :

**ORDER**

NOW 2<sup>nd</sup> day of September, 2021, upon consideration of the Applications for Leave to Intervene filed on behalf of (1) Speaker of the Pennsylvania House of Representatives Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff, President Pro Tempore of the Pennsylvania Senate Jake Corman, and Majority Leader of the Pennsylvania Senate Kim Ward (collectively, Legislators); (2) the Republican Party of Pennsylvania and Individual Republican Voters (collectively, Republican Party); and (3) Voters of the

Commonwealth of Pennsylvania (Voters of Commonwealth), and after hearing and argument on the issue, it is hereby ordered as follows.

Legislators' Application for Leave to Intervene is **GRANTED**. The Prothonotary shall accept for filing Legislators' Preliminary Objections to the Petition for Review, attached to Legislators' June 1, 2021 Application for Leave to Intervene.

Respondents<sup>1</sup> shall file and serve their brief in support of their preliminary objections (4 copies) within 14 days of the exit date of this order.

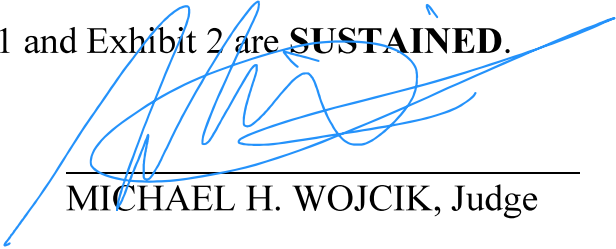
Legislators shall file and serve their brief in support of their preliminary objections (4 copies) within 14 days of the exit date of this order. Petitioners shall file and serve their brief in opposition to Legislators' preliminary objections within 14 days of service of Legislators' brief. Upon completion of the briefing schedule, the Prothonotary shall list the preliminary objections on the appropriate argument list.

The Applications for Leave to Intervene filed by the Republican Party and the Voters of the Commonwealth are **DENIED**. The Republican Party's Application for Extraordinary Relief, attached to its Application for Leave to Intervene, is **DISMISSED AS MOOT**.

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<sup>1</sup> Although Respondents filed preliminary objections, it appears that they have not filed their brief in support thereof. Petitioners, however, filed their brief in opposition to Respondents' preliminary objections on August 2, 2021.

Voters of the Commonwealth Exhibits 1 and 2 are admitted to the record. Petitioners' and Respondents' objections to the legal conclusions in the Voters of the Commonwealth's Exhibit 1 and Exhibit 2 are **SUSTAINED**.



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MICHAEL H. WOJCIK, Judge

# **Exhibit B**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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No. 132 MD 2021

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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 Bachunis; Tom DeWall; Stephanie McNulty; and Janet Temin,

Petitioners,

vs.

Veronica Degraffenreid, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

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**MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE BY 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**

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*Counsel for Proposed-Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives*

Bryan Cutler, Speaker of the Pennsylvania House of Representatives (“Speaker Cutler”); Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (“Leader Benninghoff” and, together with Speaker Cutler, the “House Leaders”); Jake Corman, President *pro tempore* of the Pennsylvania Senate (“President Corman”); Kim Ward, Majority Leader of the Pennsylvania Senate (“Leader Ward” and, together with President Corman, the “Senate Leaders” and, together with the House Leaders, the “Proposed Intervenors”) hereby file this Memorandum of Law supporting their Application for Leave to Intervene in the above-captioned matter filed by Carol Ann Carter, et al. (“Petitioners”).

The Proposed Intervenors satisfy the requirements for intervention under Pa.R.C.P. 2327 and seek to protect their exclusive authority, as legislators in the Pennsylvania General Assembly (the “General Assembly”) and as the leaders of the General Assembly as an institution, under Article I, Section 4 of the United States Constitution to prescribe the “Times, Places, and Manner” of congressional elections, and under the Pennsylvania Constitution to legislate and appropriate for elections in Pennsylvania, which Petitioners’ requested relief would usurp.

In support thereof, the Proposed Intervenors respectfully represent as follows:

## **I. BACKGROUND**

1. The United States and Pennsylvania Constitutions vest the General Assembly with the authority to redistrict this Commonwealth’s congressional

districts. Specifically, Article I, Section 4 of the United States Constitution (the “Elections Clause”) provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof...” Pursuant to the Elections Clause, as a matter of federal law, “redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking.” *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 808 (2015). The Commonwealth’s legislative power is vested in the General Assembly. PA. CONST. ART. II, § 1.

2. As Petitioners concede (Pet. at ¶ 6), congressional districting plans are legislative enactments of the General Assembly, passed like any other legislation. The Pennsylvania Supreme Court has confirmed that the “primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature.” *League of Women Voters v. Com.*, 178 A.3d 737, 821–22 (Pa. 2018), citing *Butcher v. Bloom*, 216 A.2d 457, 458 (Pa. 1966) (identifying the General Assembly as “the organ of government with the primary responsibility for the task of apportionment”) and *Grove v. Emison*, 507 U.S. 25, 34 (1993) (“the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts”).

3. By statute, the Secretary of Commerce, on behalf of the United States Census Bureau, must deliver to the President the apportionment figures from the



decennial census by December 31 of the year in which the Census is taken, and must deliver redistricting data (known as P.L. 94-171 data)<sup>1</sup> to states by April 1 of the year after the year in which the Census is taken. 13 U.S.C. § 141. Apportionment data is used to allocate House of Representatives seats to the States, and redistricting data is used by state legislatures or other redistricting authorities to draw representational districts.

4. This year’s Census results, however, have been and continue to be delayed. The apportionment results were delivered on April 26, 2021, and the Census Bureau has announced an intention to deliver “a legacy format summary redistricting data file to all states by mid-to-late August 2021.” Census Bureau, Press Release No. CB21-RTQ.09, Mar. 15, 2021, at <https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html>. This latter data file is a necessary part of the redistricting process, used by redistricting authorities to construct electoral districts of approximately equal population, as the Constitution requires.

5. Unlike in some states, there is no express deadline set forth in Pennsylvania’s Constitution or statutes by which the Commonwealth must enact a

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<sup>1</sup> The redistricting data consists of population counts for every census block in each state as of the decennial census date (April 1, 2020). Apportionment numbers are simply statewide population counts and, unlike the granular redistricting data, offer no insight about how the population is distributed within the state.

new congressional district plan following the publication of a new census. While Petitioners allude to the Census delay's potential impact on the 2022 primary calendar, in past decennial redistricting cycles, districting plans were passed at the end of the year that followed when decennial census data were published. For example, the 2011 congressional plan was enacted on December 22, 2011, *League of Women Voters*, 178 A.3d at 743, and the 2001 congressional plan was enacted on January 7, 2002. *See Erfer v. Com.*, 794 A.2d 325, 348 (Pa. 2002), overruled on other grounds by *League of Women Voters*. Hence, Census delays do not necessarily impede the General Assembly's legal authority to enact a districting plan.

6. Based on pure speculation that the General Assembly and Governor might prove unable to enact a congressional districting plan in the future, Petitioners filed their Petition for Review ("Petition") on April 26, 2021, asking this Court to declare the current plan unconstitutional, to enjoin the Respondents from conducting elections under that plan, and to craft a new congressional plan for the Commonwealth if "the political branches fail to enact a plan by a date certain set by this Court." (Pet. at 21) (Prayer for Relief). Oddly, Petitioners have sought this extraordinary relief months before availability of the redistricting data that anyone—the "political branches," this Court, or the Petitioners themselves—will need to develop a congressional districting plan.

7. Speaker Cutler is a duly elected, qualified, and serving Member of the House of Representatives from the 100th House District, and is also the duly elected Speaker of the House of Representatives and in such capacity is the presiding officer of that body.

8. Leader Benninghoff is a duly elected, qualified, and serving Member of the House of Representatives from the 171st House District, and is also the duly elected Majority Leader of the House of Representatives and, in such capacity, leads the Republican Caucus of the House of Representatives (the “House Republican Caucus”). The House Republican Caucus consists of 111 out of 203 Members of the House. As of about June 7, 2021, the House Republican Caucus will consist of 113 Members of the House, given recent results of special elections.

9. President Corman is a duly elected, qualified, and serving Member of the Senate from the 34th Senatorial District, and is also the duly elected President *pro tempore* of the Senate. In such capacity, he is the highest-ranking officer of the Senate and presides over that body in the absence of the Lieutenant Governor. *See* Pa. Const. art. II, § 9.

10. Leader Ward is a duly elected, qualified, and serving Member of the Senate from the 39th Senatorial District, and is also the duly elected Majority Leader of the Senate and, in such capacity, leads the Republican Caucus of the Senate (the “Senate Republican Caucus”). The Senate Republican Caucus currently consists of

28 out of 48 Members of the Senate (with two seats being vacant): 27 Republican Senators and 1 independent Senator who caucuses with the Republicans. As of June 9, 2021, the Senate Republican Caucus will consist of 29 out of 50 Members of the Senate: 28 Republican Senators and 1 independent Senator who caucuses with the Republicans.

11. As **Exhibit “A”** to this Petition, the Proposed Intervenors respectfully submit Preliminary Objections that they seek to file in this case.

## **II. THE PROPOSED INTERVENORS HAVE A RIGHT TO INTERVENE**

12. Under Pennsylvania law, a party has an absolute right to intervene in an action if it falls within one of the categories enumerated in Pa.R.C.P. 2327. *See id.*; Pa.R.C.P. 2329; *see also Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. 1999).

13. The grant of intervention is mandatory where the intervenor meets any one of the four criteria set forth in Pa.R.C.P. 2327. *Larock*, 740 A.2d at 313 (“if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary . . .”) (internal citations omitted).

14. Here, two independent bases exist to support the Proposed Intervenors’ right to intervene. First, Pa.R.C.P. 2327(3) provides that a party must be permitted to intervene if it “could have joined as an original party in the action or could have been joined therein.” *Id.* Second, Pa.R.C.P. 2327(4) provides that a party must be

permitted to intervene if “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.” *Id.*

15. Pennsylvania courts have established “that the inquiry to determine whether a party has standing to initiate litigation is different than the inquiry to determine whether a party can intervene in existing litigation.” *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Commw. Ct. 2019). Indeed, “[s]tanding to file a formal complaint requires the moving party to have a direct, immediate, and substantial interest in the subject matter of the controversy. . . . Conversely, a person seeking to intervene in a proceeding need have only an ‘interest of such nature that participation . . . may be in the public interest.’” *Id.* at 1288-1289 (citation omitted).

16. Moreover, the Proposed Intervenors are the presiding officers of both Houses of the General Assembly and intervene to protect the official, individual, and/or institutional interests described in this memorandum. As this Court held just last year, “there is a difference between personal standing and legislative standing,” and a legislator “may be able to initiate litigation in his legislative capacity, where the legislator can demonstrate an injury to his ability ‘to act as a legislator.’” *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep’t of Human Servs.*, 225 A.3d 902, 909 (Pa. Commw. Ct. 2020). These principles of legislative standing are relevant to whether a legally enforceable interest exists. *Id.* at 902.

17. Because the Proposed Intervenors have legally enforceable interests at play and could have been original parties to this case, they must be permitted to intervene as of right under both Pa.R.C.P. 2327 (3) and (4).

**A. Determination of This Action Will Affect the Proposed Intervenors' Enforceable Interest in Vindicating and Protecting Their Exclusive Interest and Right to Legislate Redistricting and Election laws, which Petitioners Seek to Divest.**

18. The Proposed Intervenors unquestionably have an enforceable interest in defending the constitutional authority of Pennsylvania's legislative actors to prescribe the "Times, Places, and Manner of holding elections for Senators and Representatives," U.S. CONST. ART. I, § 4, which includes the authority to enact congressional districting plans. *League of Women Voters*, 178 A.3d at 821–22. This action seeks to dilute, abrogate, impair, or abolish that constitutional prerogative. Petitioners ask the Court to take control over the congressional redistricting process before Proposed Intervenors even have the necessary tools to complete that process or else to impose unreasonable, restrictive deadlines on Proposed Intervenors' constitutional prerogative without any basis in law for doing so.

19. This enforceable interest satisfies Pa.R.C.P. 2327 and, accordingly, Proposed Intervenors have the right to intervene. Pennsylvania law affirms the exclusive authority of Pennsylvania's legislators to engage in congressional redistricting, and that authority lies at the heart of this case.

20. The Proposed Intervenors have an enforceable interest warranting intervention, and can “initiate litigation in [their] legislative capacity, where the legislator can demonstrate an injury to his ability ‘to act as a legislator.’” *Allegheny Reprod. Health Ctr.*, 225 A.3d at 909, citing *Sunoco Pipeline L.P.*, 217 A.3d at 1288.

21. In *Fumo v. City of Philadelphia*, the Supreme Court of Pennsylvania found that a city’s issuance of a license for the construction of a casino on a Pennsylvania river invaded the General Assembly’s exclusive authority to regulate submerged lands. 972 A.2d 487, 501–03 (Pa. 2009). In relevant part, the *Fumo* court held that six state legislators had legislative standing to “seek redress for an alleged usurpation of their authority as members of the General Assembly,” to “vindicate a power that only the General Assembly has,” and to “ask that this Court uphold their right as legislators to cast a vote or otherwise make a decision on licensing the use of the Commonwealth’s submerged lands.” *Id.* at 502.

22. This petition presents a stronger case for intervention. Regulating the times, places, and manner of congressional elections in Pennsylvania—a task that includes redistricting legislation—is an exclusive legislative function, not only under Pennsylvania law, but also under the U.S. Constitution. *See, e.g.*, U.S. CONST. ART. I, § 4; PA. CONST. ART. II, § 1; *League of Women Voters*, 178 A.3d at 821–22; *Butcher*, 216 A.2d at 458; *Arizona State Legislature*, 576 U.S. at 808; *Grove*, 507 U.S. at 34.

23. The power to redistrict is part of the General Assembly’s overall power to regulate elections. More than a century ago, the Supreme Court of Pennsylvania acknowledged that “[t]he power to regulate elections is a legislative one, and has been exercised by the general assembly since the foundation of the government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914), citing *Patterson v. Barlow*, 60 Pa. 54, 75 (1869). The primacy of the General Assembly in the area of elections is manifest. See *In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014) (“[s]ubject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania”). For that reason, “the judiciary should act with restraint, in the election arena, subordinate to express statutory directives.” *Id.*

24. Indeed, twice in the past year the Pennsylvania Supreme Court has granted legislative leadership leave to intervene in litigation concerning election statutes. In *Crossey v. Boockvar*, 239 A.3d 14, 15 n.4 (Pa. 2020) (per curiam), the Pennsylvania Supreme Court granted leave to intervene to the House and Senate presiding officers in a case challenging the constitutionality of an election bill, Act 77. Likewise, in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 354 (Pa. 2020), the Pennsylvania Supreme Court granted leave to intervene to the Senate’s then-President *pro tempore* and its then-Majority Leader in another action seeking relief directed to Act 77.



25. Petitioners seek, in pertinent part, a declaratory judgment finding the Commonwealth’s current congressional district plan unconstitutional, an injunction prohibiting Respondents from “implementing, enforcing, or giving any effect to” that plan, and an order to “implement a new congressional district plan...if the political branches fail to enact a plan by a date certain set by this Court.” (Pet. at 21) (Prayer for Relief). These requests directly seek to divest the Proposed Intervenors’ exclusive authority to determine the times, places, and manner of holding congressional elections under U.S. Const. Art. I, § 4, and to transfer that authority to this Court. The Commonwealth’s legislative actors have had no opportunity to engage in redistricting, the Census figures necessary to do so do not exist and will not exist for some time, and there is no deadline in law for redistricting to occur. Nor is there basis in law for an injunction against the prior redistricting plan, when it is not yet unconstitutional and where Pennsylvania is entitled to 18 seats in the current Congress, not the 17 seats it will be entitled to beginning in January 2023. In these circumstances, Petitioners’ demand is nothing short of a demand to bypass the General Assembly entirely and transfer complete redistricting authority to the courts.

26. The circumstances here are not one “akin to a general grievance about the correctness of governmental conduct...” *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016). The Proposed Intervenors do not seek “to offer evidence and argument with respect to the intent of the General Assembly in enacting [the law] [or] to the

procedure by which [it] was adopted.” *Robinson Twp. v. Com.*, 84 A.3d 1054, 1055 (2014). Rather, Proposed Intervenors propose to intervene in this action to defend their unique, legislative interests and their vested, exclusive authority to conduct congressional redistricting in the Commonwealth. Indeed, the primary law at issue—the forthcoming redistricting plan—has yet to be enacted. The question in this case is not what the General Assembly did in the past, but whether Pennsylvania’s legislators will maintain that authority in the future and whether the courts will place onerous, extra-legal conditions on that authority.

27. Thus, determination of this action necessarily and directly affects the Proposed Intervenors’ legally enforceable interests, and Proposed Intervenors therefore have a right to intervene. *Fumo*, 972 A.2d at 502 (“the claim reflects the state legislators’ interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, falls within the realm of the type of claim that legislators, qua legislators, have standing to pursue.”).

**B. The Proposed Intervenors Could Have Joined as an Original Party in the Action or Could Have Been Joined Herein.**

28. Pennsylvania courts recognize that parties with special interests implicated by an action could have been joined as original parties. *See, e.g., Appeal of Denny Bldg. Corp.*, 127 A.2d 724, 729 (1956) (finding intervention appropriate when parties “have an obvious special interest apart from that of the general public which would certainly have justified their joining as original parties in the action”);

*Harrington v. Philadelphia City Emps. Fed. Credit Union*, 364 A.2d 435, 441 (Pa. Super. 1976) (recognizing that candidates “could have been an original party or could have been joined in the action . . . [because they] had interests which would be drastically affected by the outcome of the equity action”).

29. Further, 42 Pa.C.S. § 7540(a) provides that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”

30. The Proposed Intervenors, as the parties to whom the constitutional authority to redistrict has been assigned, have a special interest in this action. The action seeks to divest—or, at a minimum, significantly impair—the Proposed Intervenors’ authority to conduct congressional redistricting for the Commonwealth for the 2022 elections and beyond.

31. Moreover, the Proposed Intervenors could have joined as original parties in this action. In fact, it is not uncommon for the presiding officers of the House and Senate—like Speaker Cutler and President Corman—to be named as original parties in cases challenging the constitutionality of, and seeking to alter, redistricting plans enacted by the General Assembly. For example, in both *League of Women Voters* and *Erfer*, the then-presiding officers of the General Assembly were named as original parties, including former Speaker Mike Turzai and former

President *pro tempore* Joseph Scarnati III in *League of Women Voters*, and former Speaker Matthew Ryan and then-Lieutenant Governor and President of the Senate, Robert Jubelirer in *Erfer*. Further, in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), an action brought to seek judicial intervention to draft a congressional districting plan when the General Assembly and Governor reached an impasse and failed to pass such a plan, the petitioners were eight Members of the Senate and thus original parties. *Id.* at 205.<sup>2</sup>

32. The Proposed Intervenors could have joined as original parties in this action, and, as these cases show, typically at least the General Assembly's presiding officers are joined. The instant action seeks a declaratory judgment and injunctive relief imposing improper restraints upon, and usurping, the exclusive domain of the General Assembly. If granted, the relief sought will directly impact the Proposed Intervenors' authority and interest as legislators and the official, institutional, and other interests they are further authorized to represent. Therefore, the Proposed Intervenors are entitled to intervene here as a matter of right.

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<sup>2</sup> Notably, *Mellow* was not filed until January 28, 1992, which was the first day on which nominating petitions for the U.S. House could begin circulating that year. 607 A.2d at 205.

**C. There Is No Reason To Refuse the Petition to Intervene.**

33. The Proposed Intervenors have shown entitlement to intervention in this case. Given this showing, Pa.R.C.P. 2329 provides only three reasons that could justify refusal of intervention. None applies.

34. First, Pa.R.C.P. 2329(1) permits refusal of intervention if “the claim or defense of the petitioner is in subordination to and in recognition of the propriety of the action,” which has been interpreted to mean that an “intervenor cannot question supported findings of fact made prior to the intervention” and that “an intervenor must take the suit as he finds it.” *Com. ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867, 870 (Pa. 1950). There are no subordination concerns here, given the early stage of this litigation.

35. Second, Pa.R.C.P. 2329(2) permits a court to refuse an application for intervention if “the interest of the petitioner is already adequately represented.” Here, Proposed Intervenors seek to vindicate rights and interests held by themselves and their members in their capacity as legislators. Their interests are not already adequately represented by any Respondent in the case, as the originally named Respondents are simply responsible for election administration and do not possess the interest in drafting and passing congressional districting plans that Petitioners’ Petition seeks to impair or abrogate. *See Shapp*, 391 A.2d at 608 (holding that “[s]urely, the defense of legislation adopted by the General Assembly must be within

the authority of its elected leaders”). After all, “an executive branch agency is simply not in a position to represent Proposed Intervenors’ interest in the exercise of legislative power under Article III of the Pennsylvania Constitution.” *Allegheny Reprod. Health Ctr.*, 225 A.3d at 913. Petitioners practically concede this point in alleging repeatedly that the divided government—where the legislative chambers are controlled by Republicans and the Governor is a Democrat—is categorically incapable of compromise. Petitioners cannot, after making this allegation, claim the Democratic Secretary of State or the Director of Elections represents Proposed Intervenors’ interests.

36. Finally, Pa.R.C.P. 2329(3) permits refusal of intervention where “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.” No such concern exists here. The Proposed Intervenors promptly filed this application for leave to intervene at the earliest stages of the litigation, before any substantive proceedings took place. The Proposed Intervenors’ participation in this case will simplify this action and is necessary as they will bring before the Court arguments and law that otherwise would not be present.

37. In summary, there is no basis allowing for refusal of the Proposed Intervenors’ right to intervene into this case.

**WHEREFORE**, for the foregoing reasons, the Proposed Intervenors respectfully request that the Court grant their Application for Leave to Intervene and enter the proposed order attached to it as **Exhibit “B,”** thereby granting the Application.

Dated: June 1, 2021

Respectfully submitted,

/s/ Anthony R. Holtzman

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*Counsel for Proposed-Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives*

## CERTIFICATION OF COMPLIANCE

I hereby 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.

/s/ Anthony R. Holtzman  
Anthony R. Holtzman



## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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Date: June 1, 2021

/s/ Anthony R. Holtzman  
Anthony R. Holtzman

# **Exhibit C**

**IN THE SUPREME COURT OF PENNSYLVANIA**

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No. 141 MM 2021

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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 Bachunis; Tom DeWall; Stephanie McNulty; and Janet Temin,

Petitioners,

vs.

Veronica Degraffenreid, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

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No. 142 MM 2021

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Philip T. Gressman; Ron Y. Donagi; Kristopher R. Tapp; Pamela A. Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahan; Timothy G. Feeman; and Garth Isaak

Petitioners,

vs.

Veronica Degraffenreid, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

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**OPPOSITION OF PROPOSED INTERVENORS 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 TO  
PETITIONERS' APPLICATIONS FOR EXERCISE OF EXTRAORDI-  
NARY RELIEF OR KING'S BENCH POWER**

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Benninghoff, Majority Leader of the  
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Neither set of Petitioners meets the “heavy burden” of justifying the exercise of extraordinary jurisdiction here. *Wash. Cty. Comm’rs v. Pa. Lab. Rels. Bd.*, 490 Pa. 526, 532, 417 A.2d 164, 167 (1980). Most of the issues in these matters are not difficult and do not call for this Court’s review, at least in this posture.

There is no dispute that the Commonwealth’s existing congressional district plan cannot be used in future elections. And, although there is still time for the General Assembly and the Governor to reach an accord and enact a new congressional redistricting plan, the Commonwealth Court, in its order of December 20, 2021, has ordered judicial redistricting proceedings. Based on that order, the Commonwealth Court has implicitly concluded that the process has advanced to a stage where judicial redistricting proceedings are appropriate even though the General Assembly has “the primary responsibility and authority for drawing federal congressional legislative districts.”<sup>1</sup> *League of Women Voters v. Commonwealth*, 645 Pa. 1, 129, 178 A.3d 737, 821 (2018). No matter which court adjudicates this case, it will have little or no difficulty enjoining the existing plan or ordering the commencement of remedial proceedings. That issue is not of “immediate public importance.” 42 Pa. Stat. and Cons. Stat. § 726.

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<sup>1</sup> The Commonwealth’s political actors continue to work toward a legislative solution. If these efforts succeed, the resulting legislation would set the congressional districts for future elections by operation of law, regardless of how far judicial proceedings have advanced and even if they have yielded a final judgment.

What *may* prove difficult and important is reviewing proposed plans and fashioning a remedy. Although Petitioners make these remedial proceedings the focus of their applications, they ignore institutional interests and competencies that counsel in favor of the familiar two-step process of trial-court adjudication and appellate review. And they inexplicably ask this Court to adopt a new redistricting plan without evidentiary proceedings or an opportunity for public input. A judicial redistricting process, like a legislative redistricting process, should be fact- and labor-intensive and involve opportunities for input and proposals, adversarial proceedings to establish facts germane to those proposals, and evidentiary hearings and submissions to ascertain an acceptable and lawful redistricting solution. In the prior impasse case that Petitioners cite, *Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992), a full evidentiary record was developed and trial proceedings were conducted before this Court adopted congressional redistricting remedies. The Commonwealth Court is the best-situated institution to conduct evidentiary proceedings, and this Court is the best-situated institution to review that court's judgment.

The applications for extraordinary review fail to establish, or even address, why extraordinary review is preferable to that familiar process, appropriately expedited. They should be denied. Alternatively, even if this Court exercises extraordi-

nary jurisdiction, it should provide for evidentiary proceedings and reject Petitioners' request to select a new redistricting plan solely on the basis of legal briefs and lawyers' arguments, without the benefit of a full vetting that the process deserves.

## BACKGROUND

After each decennial census, “States must redistrict to account for any changes or shifts in population.” *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). In Pennsylvania, “the primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature.” *League of Women Voters*, 645 Pa. at 129, 178 A.3d at 821. However, it is not contested in this case that, “[w]hen . . . the legislature is unable or chooses not to act, it becomes the judiciary’s role to determine the appropriate redistricting plan.”<sup>2</sup> *League of Women Voters*, 645 Pa. at 130, 178 A.3d at 822.

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<sup>2</sup> Officers of the General Assembly have argued in prior litigation, including the *League of Women Voters* case, that the “Elections Clause” of Article I, section 4 of the U.S. Constitution forecloses state courts from enforcing *state* law against an act of the state’s legislature, or at least imposes limitations when they do so. The difference here is that the current congressional plan contravenes the U.S. Constitution, and it is settled law that state courts have authority to declare and remedy violations of the U.S. Constitution, even with respect to laws governing congressional elections. *See Growe v. Emison*, 507 U.S. 25, 32–36 (1993). Proposed Intervenors do not dispute that the Pennsylvania courts have the authority to adjudicate Petitioners’ claims for violations of the U.S. Constitution or other federal laws, and it appears that the state-law issues they raise implicate standards that duplicate federal standards.



The relevant facts of this case are not in dispute. Pennsylvania’s existing congressional plan was fashioned by this Court in 2018 based upon the 2010 census results. *League of Women Voters*, 645 Pa. 576, 583, 181 A.3d 1083, 1087 (2018) (finding that the adopted plan achieved “equality of population”); *see also Carter* Petition ¶ 18 (alleging that the Court’s adopted plan was “based on the 2010 data”); *Gressman* Petition ¶ 2 (same).

The 2020 census results have since been released, both in the form of initial apportionment results at the level of each state and later in the form of census-block level population data suitable for redistricting *within* states. *Carter* Petition ¶¶ 19, 27; *Gressman* Petition ¶¶ 26–27. The results show, among other things, that Pennsylvania’s population has increased; that it has not increased sufficiently to keep pace with neighboring states; that Pennsylvania must lose one congressional seat, dropping from 18 to 17 seats; and that the existing districting plan—aside from being improperly crafted to yield 18 seats rather than 17—is malapportioned. *Carter* Petition ¶¶ 19–28; *Gressman* Petition ¶¶ 26–27. It is therefore undisputed that redistricting is essential for the Commonwealth to fulfill the Equal Protection Clause’s guarantee of “one person, one vote.” *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

The two Petitions for Review commencing these suits were filed in the Commonwealth Court on December 17, 2021. In each case, Petitioners allege that they

reside in underpopulated districts, and they assert that, without a new, properly apportioned redistricting plan, their votes will be diluted in future elections. *Carter* Petition ¶¶ 9, 49–63; *Gressman* Petition ¶¶ 10–22, 34–52. Although Proposed Intervenor do not have sufficient information to verify Petitioners’ factual assertions (such as their residencies), at the end of the day, Proposed Intervenor do not dispute the basic notion that the Commonwealth cannot use the existing congressional districting plan in 2022 elections for the simple reason that the Commonwealth cannot elect an 18-member delegation to the next Congress since it has only been apportioned 17 seats in that Congress. Nor do Proposed Intervenor disagree with the principle that the U.S. Constitution requires equally apportioned districts.

Proposed Intervenor are officers of the Pennsylvania Senate and House of Representatives who have authorization from members of the Republican Caucuses of those bodies, who possess sufficient votes to pass legislation, to seek intervention on their behalf in this suit. Proposed Intervenor have worked together with other legislators in good faith to develop a congressional redistricting plan that complies with the law and that the General Assembly could pass and present to the Governor. Although a plan has not yet been enacted, Proposed Intervenor will continue to take this approach to the work. The legislative process will continue, but Proposed In-

tervenors acknowledge that the Commonwealth Court has ordered the commencement of a judicial redistricting process, and Proposed Intervenors do not intend to file preliminary objections in either action.<sup>3</sup>

The Commonwealth Court quickly processed the Petitions, issued a scheduling order, called for petitions to intervene, and otherwise prepared to proceed expeditiously to resolve this case by early February. Although both sets of Petitioners criticize this schedule as insufficiently expedited, they did not move the Commonwealth Court to amend it.

Instead, Petitioners filed applications for extraordinary review in this Court, seeking to bypass the Commonwealth Court. They have proposed a scheduling order that would call for presentation of proposed plans and briefing regarding those plans, but no discovery or evidentiary hearings. *See Carter* Application 11; *Gressman* Application 22. Proposed Intervenors, meanwhile, petitioned the Commonwealth Court to intervene. Given the time-sensitive nature of this case, they are simultaneously filing this brief in opposition to the applications for extraordinary review, to provide the Court with adversarial briefing on those applications.

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<sup>3</sup> As the *Carter* Petitioners recount, they filed similar claims months *before* usable redistricting data were even released, and the Commonwealth Court correctly sustained preliminary objections to their original petition for review, concluding that the suit was premature and unripe. The *Carter* Petitioners did not appeal that judgment.

## ARGUMENT

This case does not fall within the narrow and exceptional circumstances meriting a departure from the ordinary two-stage judicial process of trial court adjudication and appellate review. Quite the opposite. Under current conditions, it is both preferable and feasible to adhere to that traditional process, albeit on an expedited basis.

To qualify for extraordinary review, a case must raise “an issue of immediate public importance.” 42 Pa. Stat. and Cons. Stat. Ann. § 726. “This court’s exercise of extraordinary jurisdiction should be used sparingly.” *Commonwealth v. Morris*, 565 Pa. 1, 18, 771 A.2d 721, 731 (2001); *accord Wash. Cty.*, 490 Pa. at 532, 417 A.2d at 167. To begin, Petitioners must establish both that there is a heightened public interest in the issues at hand and that the ordinary litigation process is insufficient to timely remedy alleged violations of their rights. *Bd. of Revision of Taxes, City of Phila. v. City of Philadelphia*, 607 Pa. 104, 122, 4 A.3d 610, 620 (2010); *see also Carter Application 7; Gressman Application 8–9*. Furthermore, “[t]he presence of an issue of immediate public importance is not alone sufficient to justify extraordinary relief. As in requests for writs of prohibition and mandamus, we will not invoke extraordinary jurisdiction unless the record clearly demonstrates a petitioner’s rights.” *Cty. of Berks ex rel. Baldwin v. Pennsylvania Lab. Rels. Bd.*, 544 Pa. 541,

549, 678 A.2d 355, 359 (1996) (citation omitted). “Even a clear showing that a petitioner is aggrieved does not assure that this Court will exercise its discretion to grant the requested relief.” *Id.* This standard is not met here.

**A. These Matters Present Fact-Intensive Questions That Do Not Meet The High Standards For Extraordinary Jurisdiction**

Most of the issues in these cases are not difficult or important within the meaning of the extraordinary-jurisdiction standard, and those that *may* prove to be so are fact-intensive and not amenable to clean resolution as a matter of law.

First, the liability issues are governed by clearly established law such that no serious contest is likely to arise. Issues that qualify under the “public importance” test include those as to which this Court should “provide guidance” because they are “likely to recur,” *Morris*, 565 Pa. at 18, 771 A.2d at 731, and those that remain unresolved and concern a variety of state instrumentalities and citizens, *Bd. of Revision of Taxes*, 607 Pa. at 122, 4 A.3d at 620. But these cases raise no issues that are unresolved or are “likely to recur.” Rather, they present a “garden variety” dispute, *id.*, in the sense that there is no basis even to contest the governing legal principles or their application. *See Carter* Application 7 (“[T]can be no dispute that continuation of the status quo is unconstitutional.”); *Gressman* Application 1 (“The current map’s malapportionment violates the Pennsylvania Constitution.”). As the U.S. Supreme Court has explained, the one-person, one-vote rule is “easily administrable” because judges are able “to decide whether a violation has occurred (and to remedy

it) essentially on the basis of three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts.” *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) (plurality opinion). There is no dispute here that the Commonwealth’s congressional districts are malapportioned, and there is unlikely to be a genuine dispute over where Petitioners reside. That portion of the case, at least, does not present “an issue of immediate public importance.” 42 Pa. Stat. and Cons. Stat. § 726.

Second, the issues that *may* rise to the level of public importance fail to qualify under independent elements of the extraordinary-review test. As noted, this Court “will not invoke extraordinary jurisdiction unless the record clearly demonstrates a petitioner’s rights.” *Cty. of Berks*, 544 Pa. at 549, 678 A.2d at 359 (citation omitted). As to any difficult and important issue, this record does not do so. The challenge in an impasse case lies in selecting a remedial districting plan. In that regard, Petitioners cannot show that the record clearly demonstrates their rights. There are infinite ways to divide the Commonwealth into 17 equally populated congressional districts, and Petitioners cannot establish a clear right to their preferred choice among numerous options. Neither set of Petitioners has even proposed a plan at this stage. The tribunal that adjudicates the facts of this case will be obliged to entertain competing proposals, take evidence, make factual findings, and make discretionary choices in fashioning a remedy. This situation is the opposite of one where “there is no factual

dispute,” and the matter of public importance raises an issue “of law, resolvable on the pleadings.” *Bd. of Revision of Taxes*, 607 Pa. at 122–23, 4 A.3d at 621. It is a poor fit for this Court’s extraordinary jurisdiction.

**B. There Is Time for an Expedited Proceeding in the Commonwealth Court and Review in This Court**

Petitioners are incorrect that proceedings in the Commonwealth Court “will be insufficient to timely remedy Petitioners’ rights.” *Carter* Application 8; *see also Gressman* Application 21–22 (“[T]he schedule established by the Commonwealth Court would effectively deny the parties any opportunity to appeal that Court’s judgment to this Court[.]”). Although proceedings undoubtedly must be expedited to ensure time for administration of any remedial plan, recent experience indicates that there is time for both trial and appellate proceedings here. Just three years ago, in the *League of Women Voters* litigation, this Court issued a liability ruling on January 22, 2018—after a full trial in the Commonwealth Court—and a remedial ruling on February 19, 2018. *League of Women Voters of Pa. v. Commonwealth*, 644 Pa. 287, 175 A.3d 282 (2018); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 576, 181 A.3d 1083 (2018). In *Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992), a final ruling came even later, on March 26 of 1992—which was an election year.

There is no indication that implementing remedies in either instance posed any administrative challenge.<sup>4</sup>

The Commonwealth Court is positioned to proceed on an expedited basis and issue a judgment in early February, which would permit review in this Court by the middle of February, achieve the *League of Women Voters* schedule, and outpace the *Mellow* schedule. Indeed, in *Mellow*, an order was issued providing that a court-selected plan would be imposed “if the Legislature failed to act by February 11, 1992.” *Id.* at 47, 607 A.2d at 205. Here, the Commonwealth Court set a more restrictive deadline of January 31, 2022. Furthermore, it is more important to take a few extra weeks to ensure that a suitable plan is adopted to govern the Commonwealth’s congressional elections for the next decade than to rush the process. But, if the Court perceives things differently, the appropriate remedy would be to direct the Commonwealth Court to expedite its proceedings beyond what it has already done. Yet Petitioners did not move the Commonwealth Court to amend its scheduling order.

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<sup>4</sup> Petitioners rely on prior assertions by the Department of State that January 24 is the deadline for a new plan, but they do not cite statutory authority for that proposition, and no one has explained why the dates that were found sufficient in *League of Women Voters* and *Mellow* are unworkable here.



**C. These Cases Cannot Be Resolved Without Evidentiary Hearings, and Petitioners Fail To Explain How Extraordinary Review Is Preferable to Appellate Review**

The applications contend that this Court may, through extraordinary review, bring this case to final judgment more expeditiously than adjudication in the Commonwealth Court followed by an appeal to this Court. But Petitioners ignore that, in all events, a two-step process is essential, because the fact-intensive issues of redistricting require a lengthy evidentiary hearing. The applications fail to explain why the familiar two-step process, appropriately expedited, is inferior to folding those two steps into one extraordinary review process. No reason is apparent and consolidating the entire process before this Court could lead to distrust of the process.

The two cases Petitioners rely on, *Mellow* and *League of Women Voters*, confirm the fact-intensive nature of the issues at hand and the necessity of evidentiary proceedings. Petitioners cite these cases for the proposition that they “are not asking this Court to do something it has not done before.” *Carter* Application 9; *see also Gressman* Application 5. But they *are*, in fact, making such a request, at least insofar as they request that a new plan be imposed without evidentiary proceedings and process for public input. *See id.* at 11; *Gressman* Application 22.

Both of the cases that Petitioners cite were decided after extensive evidentiary proceedings. In *Mellow*, the Court assigned a judge of the Commonwealth Court “as Master to conduct hearings” and issue a “report,” and, as a result, “three days of

hearings” were conducted “in the Commonwealth Court,” 607 A.2d at 206, resulting in a “Factual Analysis” subject to review in this Court, *id.* at 215. In *League of Women Voters*, this Court addressed remedial issues only after a liability trial had occurred in the Commonwealth Court (the case concerned “partisan gerrymandering,” not a decennial impasse), and this Court’s remedial ruling made it clear that “[t]he Remedial Plan is based upon the record developed in the Commonwealth Court.” *League of Women Voters*, 645 Pa. at 583, 181 A.3d at 1087. Here, however, Petitioners ask this Court to adopt a remedy (i.e., a new congressional redistricting plan that will be in place for the next decade) without evidentiary proceedings, either in the Commonwealth Court or this Court. Essentially, Petitioners request that this Court act as the map drawer and also the appellate court that reviews the legality of the adopted map. At a minimum, *this* request is untenable, unprecedented, and meritless.

To be sure, the *Mellow* decision signals that it is possible for this Court to exercise extraordinary jurisdiction in an impasse case and resolve evidentiary matters by resort to hearings before a special master (presumably, a Commonwealth Court judge) rather than through appellate review of a Commonwealth Court judgment. Although taking that approach is an *option*, the Court should decline to do so here. The difference between the options in terms of time to finality is marginal at most, since both options would entail the two steps of (1) evidentiary hearings in the

Commonwealth Court—whether before a “master” or a “judge”—and (2) subsequent briefing and argument in this Court.

And the Court’s interest in “promot[ing] confidence in the authority and integrity of our state and local institutions,” *Bd. of Revision of Taxes*, 607 Pa. at 122, 4 A.3d at 620, cuts in favor of respecting the traditional judicial process (on an expedited basis). On this point, it would be preferable for this Court to permit the Commonwealth Court to take evidence and issue findings and a judgment and, subsequently, exercise review as an appellate tribunal than to issue all findings itself after *de novo* review of a special master’s report. The former path would create two layers of review over the issues in this case and therefore afford disappointed litigants, and the public, recourse to an oversight process, which would highlight the integrity and fairness of the proceedings. Those values are essential to public faith in a redistricting process. By comparison, in an extraordinary-review process, the public would see this Court issue findings of fact and adopt a remedy and simultaneously declare those findings sound and the remedy lawful, leaving no room for additional oversight and review, except in the event of a colorable violation of federal law. Because it is almost certain that *someone* is bound to complain of any redistricting plan

adopted in any jurisdiction under any circumstances, interests of public confidence weigh against this approach.<sup>5</sup>

Denying the applications would also “conserve judicial resources,” *Morris*, 565 Pa. at 18, 771 A.2d at 731, by limiting this Court’s adjudication to those issues raised by the parties on appeal, after issues are narrowed in the Commonwealth Court. This approach would facilitate the narrowing of issues through trial-level litigation and the weeding out of issues that ultimately prove not to be material or worthy of this Court’s review. By contrast, folding both steps of adjudication into one process would, with or without a special master, make this Court responsible for resolving all disputes in the first instance, regardless of how material and difficult they prove to be.

Because Petitioners fail to acknowledge the need for evidentiary hearings, they are in no position to explain why evidentiary proceedings before a special master of the Commonwealth Court are preferable to evidentiary proceedings before a judge of the Commonwealth Court. And none is apparent. The *Mellow* decision did not address this question and appears not to have considered it. Therefore, contrary to what Petitioners suggest, it should not be read to establish that impasse cases must

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<sup>5</sup> One need not doubt the good faith of members of this Court to see that a process of oversight through ordinary appellate review enhances the appearance of fairness, due process, and integrity—which are all values underpinning the *League of Women Voters* decisions.

automatically be resolved in this Court's extraordinary jurisdiction. This is a differently composed Court, acting 30 years after *Mellow*, and is of course free to exercise its discretion in a different way, based on current circumstances and considerations.

## CONCLUSION

The applications should be denied. Alternatively, if this Court exercises extraordinary jurisdiction, it should adopt a scheduling order that provides for public evidentiary proceedings directed through an appointed special master.

Dated: December 27, 2021

Respectfully submitted,

/s/ Anthony R. Holtzman

/s/ Jeffry Duffy

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## **CERTIFICATION OF COMPLIANCE**

I hereby 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.

/s/ Anthony R. Holtzman  
Anthony R. Holtzman

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

**Service by PACFile eService as follows:**

All counsel of record

Date: December 27, 2021

/s/ Anthony R. Holtzman  
Anthony R. Holtzman



# **Exhibit D**



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF THE GOVERNOR

December 28, 2021

The Honorable Bryan Cutler  
Speaker  
Pennsylvania House of Representatives

The Honorable Kerry Benninghoff  
Majority Leader  
Pennsylvania House of Representatives

Dear Speaker Cutler and Leader Benninghoff:

I write to publicly share my review of the House Bill 2146, Printer's Number 2541 map passed by the House State Government Committee on December 15 by a 14-11 vote, with one Republican member joining Democrats in opposing approval of the map. Before and after that vote, I have been asked to negotiate a map with Republicans behind the scenes. Instead of conducting negotiations in this way, I intend to provide my review of proposed maps in a public forum, so that members of the General Assembly, as well as the public, can understand my evaluation process.

Earlier this year, in preparation for the redistricting cycle now fully under way in Harrisburg, I convened a Pennsylvania Redistricting Advisory Council made up of six members with expertise in redistricting, political science and mapmaking, to establish a set of Principles to help guide my review of maps considered and ultimately passed by the General Assembly.

The Council met numerous times, and subsequently held a series of eight in-person public listening sessions across the state, as well as a virtual public listening session, to take [public feedback](#) on the Principles and the redistricting process. The [Principles](#) were finalized and made public in late November and consist of guidance for compliance with legal requirements, such as ensuring that population deviations between districts comply with the Constitution, as well as guidance to ensure that communities of interest are maintained, representation is fair, and that the public can participate meaningfully in the process.

The House Bill 2146, Printer's Number 2541 map does not comply with the Principles outlined by the Redistricting Advisory Council. First, the difference in population between the largest and smallest district in the HB 2146 map is nearly 9,000 people. While I believe that perfect population equality should be balanced with other goals such as maintaining communities of interest, the deviation in the HB 2146 map may be successfully challenged as unconstitutional.

This significant population deviation is the result of last-minute changes made to the map submitted to the House State Government Committee by Lehigh County resident Amanda Holt and selected by Chairman Grove. The deviation among districts in Holt's submitted map was 1 person.

When Republican members of the House State Government Committee objected to aspects of the Holt map, Chairman Grove quickly abandoned the pretext of a citizen-selected map and redrew lines in ways that completely undermine the principles that motivated Holt's map in the first place. The result is a highly skewed map.

Second, the revised map splits multiple communities of interest, including splits in Luzerne, Dauphin, Philadelphia and Chester counties that do not appear to be motivated by compelling legal principles, but rather by a desire to make districts more favorable to Republican candidates.

Third, the Council also recommended that I review proposed maps to determine whether their expected performance is proportional to statewide voter preference. The HB 2146 map falls short on this basic measure of partisan fairness, giving a structural advantage to Republican candidates that far exceeds the party's voter support. A comparison of the HB 2146 map to prior election results and to neutrally drawn maps, using rigorous mathematical methodology, has demonstrated that the HB 2146 map would consistently deliver a disproportionate number of seats to Republican candidates when compared with Pennsylvania voters' preferences. This appears to be the result of intentional line-drawing choices that favor Republican candidates.

Fourth, the manner in which Chairman Grove has conducted the recent steps of this crucial process has been disgraceful. Despite his promise to conduct the "most open and transparent congressional redistricting process in PA history," it is not clear that he consulted with even the Republican members of his own Committee prior to selecting the Holt map -- much less the Democratic members, who have been completely cut out of the process. And despite Chairman Grove's attempt to make up a narrative as he goes, there is no explanation for the changes that were made, beyond the fact that some of them seem to correlate with complaints aired by members of his Committee when the original map was released.

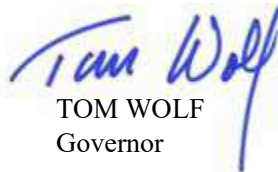
Finally, I have significant concern about the timeline for the final passage of this map. As Acting Secretary Degraffenreid noted in a June 28, 2021 letter to the leaders of the four legislative caucuses as well as the Chair of the Legislative Reapportionment Commission, the Department of State and county boards of elections have historically needed at least three weeks to prepare the Statewide Uniform Registry of Electors ("SURE") to facilitate the nomination petition process, which is statutorily mandated to begin on February 15, 2022.

As a result, the Acting Secretary urged in June that it "would be ideal for the Department to receive an approved final legislative reapportionment plan that has the force of law no later than January 24, 2022." Both the House and Senate currently have four voting session days scheduled in January 2022, including the 24<sup>th</sup>. This is an extraordinarily compressed schedule for passage of a congressional map, presentment for my review, and resolution of any legal challenges which may be brought, and further increases my concerns about the transparency with which this process is being conducted. It is not clear why the General Assembly did not move the process along more quickly despite an abundance of time to do so.

In sum, the people of Pennsylvania are looking for a fair election map drawn in an open and honest way. They neither want nor deserve a map drawn by self-serving politicians looking to feather their own nests along with those of their political friends. They deserve better and so does our democracy.

When it comes to drawing election maps, the Constitution invites us to do what we can to make sure the election process is a fair one. It is not an invitation to make cynical deals aimed at diminishing the importance of the vote. It is a recurring test of our commitment to the core principles of a healthy democracy. It is a test that HB 2146 fails.

Sincerely,



TOM WOLF  
Governor

CC: The Honorable Joanna McClinton, Democratic Leader, Pennsylvania House of Representatives  
The Honorable Seth Grove, Chair, House State Government Committee  
The Honorable Scott Conklin, Democratic Chair, House State Government Committee

# **Exhibit E**

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**IN THE SUPREME 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. 141 MM 2021

***CARTER* PETITIONERS' RESPONSE TO PROPOSED INTERVENORS'  
OPPOSITION TO PETITIONERS' APPLICATION FOR  
EXTRAORDINARY JURISDICTION**

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## INTRODUCTION

After spending most of the past six months arguing that Pennsylvania's Commonwealth Court lacked the authority to take any action to prepare for a redistricting impasse, the Proposed Intervenors (the "Legislators") now contend that the Commonwealth Court is the proper forum to resolve Petitioners' malapportionment claim. In so doing, the Legislators seek to derail the judiciary's ability to timely remedy Petitioners' constitutional injury once again. This Court should not permit them to do so.

The General Assembly, under the Legislators' control, had the better part of the past year to enact new redistricting plans. They failed to do so, thereby ceding responsibility for redistricting to the judiciary. Crucially, the Legislators now accept this reality in their brief before this Court; they no longer argue, as they did for the past six months, that the judiciary's intervention in the redistricting process infringes on their "exclusive" right to redistrict. The Legislators' concession on this point effectively nullifies any interest they could assert to justify intervention in this action. For that reason, among several others, the Court should not permit the Legislators to intervene.

Nor should the Court credit the Legislators' arguments against extraordinary jurisdiction now that, in part due to the Legislators' own making, Pennsylvania is mere weeks away from the first 2022 election deadlines without a congressional plan

in sight. It strains credulity to believe that this case is not one of public importance, and the Legislators never adequately explain why the Commonwealth Court is better suited to resolve the impasse than this Court at this juncture. While the Legislators express a preference for “fact-gathering” and discovery, the Commonwealth Court’s own scheduling order for the next month contemplates no such thing, perhaps recognizing that discovery is unnecessary in an impasse case such as this one.

The *Carter* Petitioners do not dispute that the “traditional judicial process” would have this case proceed in the Commonwealth Court in the first instance. That is why the *Carter* Petitioners filed their action in that court many months ago, anticipating this impasse and asking the Commonwealth Court to act to avoid the need for rushed judicial action. These same Legislators, however, strenuously opposed the *Carter* Petitioners’ attempt at a timely resolution in that court and helped procure the Commonwealth Court’s dismissal of that action. They cannot now be heard to complain that the Commonwealth Court will lack the opportunity to resolve the unconstitutional malapportionment of the state’s Congressional districts.

Less than four weeks remain to finalize reapportionment plans without jeopardizing the election calendar. Petitioners urge this Court to deny the Legislators’ application to intervene, accept extraordinary jurisdiction, adopt their proposed schedule, and proceed to hear this case.

## ARGUMENT

### I. The Legislators should not be permitted to intervene.

While the Legislators purported to file an “Application for Intervention” in this Court and styled themselves as Proposed Intervenors, the Legislators’ brief does not address a single element of the intervention standard. Instead, the Legislators submitted an Opposition to Plaintiffs’ Application for Extraordinary Jurisdiction to “provide adversarial briefing” to the Court. App. at 6. The Legislators are not named respondents in this case, and the Pennsylvania Supreme Court is not a forum for roving adversarial briefing submitted by persons without standing or authorization to do so. The Court should thus deny their Application and disregard their brief based on their failure to establish any basis for intervention in this Court.<sup>1</sup>

But even if they had formally applied to intervene in this Court, the Legislators do not meet the requirements for intervention. Applications to intervene are evaluated under Rule 2327 of the Pennsylvania Rules of Civil Procedure. *Accord* Pa. R.A.P. 106 (proceedings arising under an appellate court’s original jurisdiction are governed by the Rules of Civil Procedure to the extent applicable). To be entitled to intervene, the Legislators must establish, under Rule 2327(4), that “the

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<sup>1</sup> The same day the Legislators filed their opposition in this Court, they filed a true Application to Intervene in the Commonwealth Court, attached as Exhibit A to this response. Although the Legislators do not refer to or incorporate the arguments for intervention they asserted in their Application before the Commonwealth Court, the *Carter* Petitioners will address them herein as they are the only bases the Legislators have put forth in any filing for their entitlement to intervene.

determination of [this] action may affect any legally enforceable interest.” As their application to intervene in the Commonwealth Court and their own briefing before this Court demonstrates, the Legislators do not meet this standard.<sup>2</sup>

As discussed below, the Legislators’ claim to legislative standing rests on legislative interests which they have now openly acknowledged are not credibly under attack in this case. They also advance a claim for legislative standing without the official support of the full General Assembly, an independent basis for denying intervention. Under the circumstances, the Legislators have not established the requisite legislative standing sufficient to intervene under Rule 2327(4) and their Application should be denied.

**A. Pennsylvania courts permit legislators to intervene under Rule 2327(4) only in limited circumstances.**

In their Application at the Commonwealth Court, the Legislators improperly assert that a person seeking to intervene need not have a direct or substantial interest in the litigation; instead, they argue “a person seeking to intervene in a proceeding

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<sup>2</sup> The Legislators do not contend that they qualify to intervene under subsections (1) and (2) of Rule 2327. In the prior iteration of this case, *Carter I*, the Commonwealth Court also found that the Legislators could not intervene in the prior action under subsection (3). *See* Ex. D at 9 n.9. Nothing about that conclusion should change. Contrary to the Legislators’ assertions in the Commonwealth Court, Petitioners could not have named the Legislators as Respondents in this case because the General Assembly and its members are not responsible for enforcing Pennsylvania’s electoral boundaries and Petitioners did not seek any relief from them. To the extent the Legislators claim they could have been Petitioners to this action, their requested intervention as respondents in the Commonwealth Court disclaims such an interest, and in any event this Court has made clear in the years after *Mellow v. Mitchell* that only voters have a direct interest in bringing redistricting litigation. *See Albert v. 2001 Legis. Reapportionment Comm’n*, 567 Pa. 670, 678-79, 790 A.2d 989, 994-95 (2002).

need have only an ‘interest of such nature that participation . . . may be in the public interest.’” Ex. A, App. ¶ 16 (citing *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288-89 (Pa. Commw. Ct. 2019)). As the *Carter* Petitioners previously argued, and the Commonwealth Court previously agreed, this argument both mischaracterizes *Sunoco* and, more critically, relies on the more lenient standard for initiating a complaint before Pennsylvania’s Public Utility Commission, not intervention in its civil courts. *See* Ex. D at 9 n.9.

Under the proper application of Rule 2327(4) for intervention in civil litigation, to determine whether a party has a “legally enforceable interest” sufficient to intervene, courts look to principles governing legal standing. *See Markham v. Wolf*, 635 Pa. 288, 297 (2016) (explaining, in a case in which Pennsylvania legislators attempted to intervene in civil litigation, that “whether Appellants were properly denied intervenor status . . . turns on whether they satisfy our standing requirements”). And when legislators seek to intervene in their official capacity under Rule 2327(4), they must demonstrate legislative standing to proceed. *See id.* at 294-95; *see also Allegheny Reprod. Health Ctr.*, 225 A.3d 902, 911 (Pa. Commw. Ct. 2020) (explaining courts look to “principles of legislative standing” in determining whether Legislators “ha[ve] demonstrated a ‘legally enforceable interest’ for purposes of Rule 2327(4)”).

In *Markham*, the Pennsylvania Supreme Court explained, “What emanates from our Commonwealth’s caselaw, and the analogous federal caselaw, is that legislative standing is appropriate only in limited circumstances.” *Markham*, 635 Pa. at 305. In particular, legislative standing “exists only when a legislator’s direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator.” *Id.* (citation omitted); see also *Robinson Twp., Washington Cnty. v. Commonwealth*, 624 Pa. 219, 221 (2014) (explaining legislators have standing “where there [i]s a discernible and palpable infringement on their authority as legislators”).

**B. The Legislators no longer claim infringement on their legislative authority in briefing before this Court.**

While legislative standing requires a palpable infringement on one’s authority as a legislator, the Legislators no longer claim that interest is at risk. Specifically, in the present “Application to Intervene” before this Court, the Legislators explain they do not “contest” that “[w]hen . . . the legislature is unable or chooses not to act, it becomes the judiciary’s role to determine the appropriate redistricting plan.” App. at 3 (citing *League of Women Voters v. Commonwealth*, 645 Pa. 1, 130, 178 A.3d 737, 822 (2018)). They interpose no objection to “the commencement of a judicial redistricting process.” App. at 6. And they now agree that this case raises no Elections Clause issues because “it is settled law that state courts have authority to

declare and remedy violations of the U.S. Constitution, even with respect to laws governing congressional elections.” App. at 3 n.2 (citing *Grove v. Emison*, 507 U.S. 25, 32–36 (1993)).

The *Carter* Petitioners agree with the Legislators on these points, each of which reflects a brand-new position for the Legislators in this ongoing impasse litigation. Specifically, this past June, in support of their Application to Intervene in *Carter I*, these same Legislators claimed a need to intervene “to defend their unique, legislative interests and their vested, *exclusive* authority to conduct congressional redistricting in the Commonwealth.” Ex. C, App. ¶ 26 (emphasis added). And in granting that Application to Intervene in *Carter I*, the Commonwealth Court credited those claimed interests. *See* Ex. D at 9, 12-13 (Commonwealth Court noting the legislators “claim a legally enforceable interest in defending their constitutional authority to prescribe the time, place, and manner of holding elections, which includes the authority to enact congressional district maps,” and that “[a]ny potential infringement of that right may diminish or deprive legislators of their ability to act as legislators”).

While the Legislators still appear to invoke an “exclusive” interest in redistricting in their recycled intervention application before the Commonwealth Court in the new *Carter* action, *see* Ex. A, App. ¶ 21, they have explicitly disclaimed any such argument before this Court. Specifically, the Legislators have now

acknowledged, as they must, that redistricting properly becomes the responsibility of the state judiciary in the event the state's political branches fail to enact a map. *See App.* at 3. As the Legislators also openly acknowledge for the first time, judicial efforts towards implementing a redistricting plan do not stop the Legislators from continuing to work on a political solution. *App.* at 1 n.1. Simply put, because by their own admission this case will not restrict the Legislators' "ability to participate in the voting process," or "deprive" them of their official "legislative authority," *Markham*, 635 Pa. at 305, there is no legally enforceable interest present to give the Legislators standing to intervene.

**C. The Legislators should not be permitted to intervene without the consent of the General Assembly.**

Even if the Legislators had identified an injury to their legislative interests sufficient for standing, their intervention should be denied because the Legislators have not intervened with the express consent of the General Assembly. Instead, the Legislators claim to intervene with only the authority of the "Republican Caucuses," which they note "possess sufficient votes to pass legislation" in Pennsylvania. *App.* at 5. Notably, the Legislators do not contend that the General Assembly *actually* authorized their intervention, just that they theoretically would have the votes to do so.

This factor is critical: while *Markham* represents this Court's most recent articulation of legislative standing, as one Justice of this Court has aptly noted,



“[s]ince *Markham* was decided, the Supreme Court of the United States has had occasion to consider—and reject—the notion that a single chamber of a bicameral legislature has standing to intervene” without authorization to do so. *See Disability Rts. Pa. v. Boockvar*, 234 A.3d 390, 392 (Pa. 2020) (Wecht, J., concurring) (citing *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019)).

In *Bethune-Hill*, the United States Supreme Court held that the Virginia House of Delegates, “as a single chamber of a bicameral legislature, ha[d] no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part.” 139 S. Ct. at 1950. The Court distinguished the Virginia House’s position from that of the Arizona Legislature in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), “in which the Court recognized the standing of the Arizona House and Senate—*acting together*—to challenge a referendum that gave redistricting authority exclusively to an independent commission, thereby allegedly usurping the legislature’s authority . . . over congressional redistricting.” *Bethune-Hill*, 139 S. Ct. at 1953 (emphasis added).

Here, the Legislators appear before this Court seeking to intervene to defend the state’s congressional redistricting plan without authorization from *any chamber* of the Pennsylvania General Assembly. As Justice Wecht has noted, the Commonwealth’s “foundational Charter confers no authority on individual legislators or *caucuses* within each respective chamber to act on behalf of the

General Assembly or to substitute their interests for the Commonwealth.” *Disability Rts. Pa.*, 234 A.3d at 393–94 (Wecht, J., concurring) (emphasis added). Because individual Legislators “cannot speak for the General Assembly as a whole, and therefore do not collectively represent that body’s legislative prerogatives,” *see id.*, they should not be permitted to intervene under the pretense of doing just that.

Even if this Court concludes that a lack of authorization from the General Assembly does not alone bar the Legislators’ Application to Intervene, the Court should consider this factor in weighing the strength of their claim to legislative standing. As Justice Dougherty noted presciently in *Markham*, “[a] bipartisan challenge brought by the General Assembly as a whole premised upon a claim of an improper inroad into legislative prerogative . . . presumably would present a stronger case for recognizing legislative standing than a claim forwarded by a single legislator (regardless of party affiliation).” *Markham*, 635 Pa. at 309 (Dougherty, J., concurring).

The Legislators’ involvement in this litigation is, by their own admissions, unnecessary and not warranted under the clear rules governing intervention in matters pending before Pennsylvania courts. They should not be permitted to intervene and their opposition should be rejected.

## **II. This Court should exercise extraordinary jurisdiction in this action.**

The very purpose of this Court’s extraordinary jurisdiction powers is to resolve urgent matters of public importance which lack time for the ordinary litigation process. This is such a case.<sup>3</sup> In opposition to Petitioners’ Application, the Legislators argue (1) this is not a case of public importance, (2) this case requires too much “fact-gathering” or discovery to be suitable for extraordinary jurisdiction, and (3) this Court can simply move the Commonwealth’s statutory election deadlines to accommodate the Commonwealth Court’s initial review. None of these arguments is persuasive.

*First*, the Legislators’ argument that this case is not one of public importance is implausible on its face. This action will determine Pennsylvania’s congressional reapportionment plan for the next decade, affecting every Pennsylvania voter and every candidate who wishes to run for office. While the Legislators are correct that the specific *legal injury* that Petitioners raise (malapportionment) is not a novel one, it does implicate weighty constitutional rights, and the *legal remedy* this case requires to resolve that malapportionment does make it a case of public importance.

While extraordinary jurisdiction may be appropriate to provide guidance to lower courts on issues that are likely to recur, *see App. at 8* (citing *Commonwealth*

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<sup>3</sup> Since the *Carter* Petitioners filed their application for extraordinary jurisdiction last week, the evidence of impasse has grown stronger. Just yesterday, Governor Wolf sent a letter to Speaker Cutler and Leader Benninghoff criticizing the proposed congressional plans released by the General Assembly, suggesting they may be unconstitutional, and making clear he would not approve such maps. *See Ex. F.*

*v. Morris*, 565 Pa. 1, 18, 771 A.2d 721, 731 (2001)), this Court is not, as the Legislators suggest, limited to exercising extraordinary jurisdiction in only those circumstances. For example, public importance may also be demonstrated by the number of parties that will be affected by a decision or the need for speedy resolution. *See, e.g., Bd. of Revision of Taxes, City of Phila. v. City of Phila.*, 607 Pa. 104, 122, 4 A.3d 610, 620 (2010) (assuming extraordinary jurisdiction over a case that was of interest “to BRT members . . . to the City, to all City property tax payers, and to the Judiciary,” all of whom needed “a prompt and final determination”). Here, there can be no dispute that the present action will affect every Pennsylvania voter and the entirety of Pennsylvania’s congressional delegation for the next decade, and a “prompt and final determination” is necessitated by rapidly approaching election deadlines.

*Second*, the Legislators argue this case requires extensive “fact-gathering” without ever specifying what fact-gathering is necessary for this Court to resolve Petitioners’ claims. The remedy for malapportionment is a new legislative map, the selection of which does not require traditional discovery. Indeed, while the Legislators argue this Court is ill-equipped to such task, their own brief cites *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004), for the proposition that malapportionment claims are easily administered and remedied. App. at 8-9. Any contention otherwise is belied by the practice of other state courts involved in resolving substantially

similar impasse disputes. In just the past few months, for example, Minnesota and Wisconsin’s judiciaries have set up a process to adjudicate and resolve impasse and malapportionment claims in a single judicial process without the need for separate fact-finding, discovery, or a two-tiered review. *See, e.g., Wattson v. Simon*, Nos. A21-0243, A21-0546 (Minn. Special Redistricting Panel 2021); *Johnson v. Wis. Elections Comm’n*, No. 2021AP00 1450 (Wis. 2021).

The Legislators’ assumption that a proceeding in the Commonwealth Court would allow for more “fact-gathering” and discovery is also belied by the fact that the Commonwealth Court’s schedule does not contemplate *any* discovery, *see* Ex. B, and provides even less opportunity for the parties to exchange and comment on proposed maps than the schedule that both the *Carter* and *Gressman* Petitioners proposed to this Court. The Commonwealth Court schedule, for instance, simply calls for parties to submit a proposed plan on January 28, and for the Commonwealth Court to “select a plan” from among the submissions after a single, one-day hearing. *See* Ex. B.

The proposed *Carter* and *Gressman* schedules, by contrast, contemplate that parties will have an opportunity to review and comment on other parties’ maps—not simply an opportunity to submit a plan. The *Carter* and *Gressman* schedules also allow time for this Court to hear oral argument on the proposed plans. Notably, the

Legislators do not explain what the Commonwealth Court could achieve in its single hearing that this Court could not achieve in its own oral argument.

The Legislators also do not explain why extraordinary jurisdiction would be inappropriate here when it was utilized the last time Pennsylvania's political branches reached impasse. *See Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992). Instead, they make the counterfactual claim that the request for Extraordinary Jurisdiction is "unprecedented," App. at 13, while themselves urging this Court to deviate from its past decisions. All the Legislators offer in support of their argument that this Court should decline to follow *Mellow* is the observation that "this is a differently composed Court, acting 30 years after *Mellow*." App. at 16. It should go without saying that this Court should not act differently than it has in the past solely because the passage of time has rendered it "differently composed." Such a suggestion itself undermines the values of fairness and integrity that the Legislators otherwise suggest this Court must follow in this process.

*Third*, and finally, the Legislators' suggestion that this Court or the Commonwealth Court should simply move statutory election deadlines to squeeze in time for the Commonwealth Court's initial review is an extreme solution to a fictitious problem. To be sure, the *Carter* Petitioners agree redistricting remedies do not spring from thin air, which is precisely why they originally brought this case to the Commonwealth Court eight months ago to afford ample time for the judiciary to

adjudicate a remedy in the event of likely impasse. But it was these same Legislators who previously minimized the likelihood of an impasse and encouraged the Commonwealth Court decline from beginning *any* preparations to remedy Petitioners’ malapportionment claims. *See* Ex. E at 2 (arguing the Commonwealth Court would violate the separation of powers if it began to adjudicate Petitioners’ case and prepare for impasse). And in urging the Commonwealth Court to dismiss Petitioners’ action in *Carter I*, these same Legislators specifically argued “that Pennsylvania courts have been able to move swiftly to implement remedial congressional districting plans, which further undermines Petitioners’ demand for immediate, premature relief,” citing to cases in which the Pennsylvania Supreme Court exercised extraordinary jurisdiction over prior impasse disputes. *Id.* at 21. The fact that this case now requires fast decision-making is a consequence of the Legislators’ own making—and one that they should have anticipated in making those arguments to the Commonwealth Court throughout the summer and fall. For that reason, the Legislators should be estopped from advancing the argument that it would be improper for this Court to exercise extraordinary jurisdiction in these circumstances.<sup>4</sup>

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<sup>4</sup> Under Pennsylvania law, judicial estoppel applies when (1) a party takes a position “inconsistent” with a position taken in a separate litigation; and (2) the inconsistent position was “successfully maintained” in the other action. *In re Adoption of S.A.J.*, 838 A.2d 616, 620 (Pa. 2003) (quotations omitted). Both elements are met here.

This Court also should not readily accede to changing statutory election deadlines simply because the Court previously has taken such dramatic action, as it did in *Mellow*. Notably, the *Mellow* Petitioners did not file any action in the Commonwealth Court (or the Pennsylvania Supreme Court, for that matter) until the first day for circulating petitions. 530 Pa. at 47; 607 A.2d at 205. The Pennsylvania Supreme Court thus had little choice but to revise the election calendar and push out a cascading set of election deadlines. Here, in contrast, the Petitioners filed earlier in the cycle specifically so that there would be time to resolve the matter without moving such deadlines, which disrupts the election process for candidates and citizens alike.

The Court should not move election deadlines where it is not necessary to do so to resolve Petitioners' claims. The *Carter* and *Gressman* Petitioners presented this Court with a schedule that provides it with the opportunity to preserve the current election calendar and still remedy the constitutional violations in the current congressional plan. The Court should accept that opportunity—one it simply did not have in *Mellow*. While the Court has the authority to move election deadlines as necessary to effectuate Petitioners' rights, it should not *choose* to disrupt the election calendar on which voters, candidates, and state officials rely by forcing an unnecessary two-tiered judicial process.



## **CONCLUSION**

Petitioners respectfully request this Court deny the Legislators' Application for Intervention, exercise its extraordinary jurisdiction over this matter, and implement proceedings to ensure timely resolution of this case before the 2022 congressional elections.

Dated: December 29, 2021

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*\*pro hac vice forthcoming*

# **Exhibit A**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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No. 464 M.D. 2021

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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 Bachunis; Tom DeWall; Stephanie McNulty; and Janet Temin,

Petitioners,

vs.

Veronica Degraffenreid, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

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No. 465 M.D. 2021

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Philip T. Gressman; Ron Y. Donagi; Kristopher R. Tapp; Pamela A. 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 of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

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**MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR  
LEAVE TO INTERVENE BY 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**

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Bryan Cutler, Speaker of the Pennsylvania House of Representatives (“Speaker Cutler”); Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (“Leader Benninghoff” and, together with Speaker Cutler, the “House Leaders”); Jake Corman, President *Pro Tempore* of the Pennsylvania Senate (“President Corman”); Kim Ward, Majority Leader of the Pennsylvania Senate (“Leader Ward” and, together with President Corman, the “Senate Leaders,” and, together with the House Leaders, the “Proposed Intervenors”) hereby file this Memorandum of Law supporting their Application for Leave to Intervene in the above-captioned matters (“Application”), matters that were filed by Carol Ann Carter, *et al.* (“Carter Petitioners”) and Philip T. Gressman, *et al.* (“Gressman Petitioners”) (collectively, “Petitioners”).

The Proposed Intervenors satisfy the requirements for intervention under Pa.R.Civ.P. 2327 and, as members of the Pennsylvania General Assembly (the “General Assembly”) and leaders of the General Assembly as an institution, seek to protect their exclusive authority under Article I, Section 4 of the United States Constitution to prescribe the “Times, Places, and Manner” of congressional elections, and under the Pennsylvania Constitution to legislate and appropriate for elections in Pennsylvania. Petitioners’ requested relief would usurp this exclusive authority. Previously, in a nearly identical lawsuit that the Carter Petitioners filed in April 2021, in which they sought the same relief that they are seeking here,

Proposed Intervenors were granted leave to intervene, after which this Court dismissed the suit. As this Court stated in authorizing the intervention, “it seems clear that Legislators’ ability to legislate would be impaired if the Court imposes a deadline on the General Assembly and the Governor to put in place a new congressional district map and takes control of the redistricting process.” *Carter v. Degraffenreid*, No. 132 M.D. 2021 (Slip. Op. Sept. 2, 2021) at pg. 12 (copy attached as Appendix 1). The same point holds true now, and Proposed Intervenors should be permitted to intervene in both of these actions.

In support of their Application, the Proposed Intervenors respectfully state as follows:

**I. BACKGROUND**

1. The United States and Pennsylvania Constitutions vest the General Assembly with the authority to redistrict this Commonwealth’s congressional districts. Specifically, Article I, Section 4 of the United States Constitution (the “Elections Clause”) provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof....” Pursuant to the Elections Clause, as a matter of federal law, “redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking.” *Arizona State Legislature v. Arizona Indep.*

*Redistricting Comm’n*, 576 U.S. 787, 808 (2015). The Commonwealth’s legislative power is vested in the General Assembly. PA. CONST. ART. II, § 1.

2. Congressional districting plans are legislative enactments of the General Assembly, passed like any other legislation. The Pennsylvania Supreme Court has confirmed that the “primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature.” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 821–22 (Pa. 2018), citing *Butcher v. Bloom*, 216 A.2d 457, 458 (Pa. 1966) (identifying the General Assembly as “the organ of government with the primary responsibility for the task of apportionment”) and *Growe v. Emison*, 507 U.S. 25, 34 (1993) (“the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts”).

3. By statute, the Secretary of Commerce, on behalf of the United States Census Bureau, must deliver to the President of the United States the apportionment figures from the decennial census by December 31 of the year in which the Census is taken, and must deliver redistricting data (known as P.L. 94-171 data)<sup>1</sup> to the states by April 1 of the year after the year in which the Census is taken. 13 U.S.C. § 141.

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<sup>1</sup> The redistricting data consists of population counts for every census block in each state as of the decennial census date (here, April 1, 2020). Apportionment numbers are simply statewide population counts and, unlike the granular redistricting data, offer no insight about how the population is distributed within the state.



Apportionment data is used to allocate U.S. House of Representatives seats to the states, and redistricting data is used by state legislatures or other state redistricting authorities to draw representational districts.

4. This year's Census results, however, were significantly delayed. The apportionment results were delivered on April 26, 2021, but the Census Bureau did not deliver the P.L. 94-171 data until August 12, 2021.<sup>2</sup>

5. Unlike with some other states, there is no express deadline set forth in Pennsylvania's Constitution or statutes by which the Commonwealth must enact a new congressional district plan following the publication of a new census. *Carter*, 132 M.D. 2021, at pg. 12.

6. There is indeed still time for the General Assembly and Governor to reach an agreement on a congressional redistricting plan. Candidates for congressional seats cannot begin collecting the signatures that they need in order to be placed on the ballot until February 15, 2022 – over 45 days from now. And, in the past, those nominating petition deadlines have been moved for Congressional elections, and therefore could still be moved in this election cycle. *See, e.g., Mellow v. Mitchell*, 607 A.2d 204, 237 & 244 (Pa. 1992) (adopting the “Revised Election Calendar attached to this Order as Appendix B,” which moved the first day to

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<sup>2</sup> *See* <https://www.census.gov/data/datasets/2020/dec/2020-census-redistricting-summary-file-dataset.html> (last accessed December 22, 2021).

circulate and file nominating petitions from January 28 to March 10). Regardless, Proposed Intervenors certainly have an interest in any litigation that seeks to usurp their authority, especially when there is still time for the legislature to act, and even if, as Petitioners believe, the enactment of a redistricting plan is unlikely.

7. In *Mellow v. Mitchell*, the last case that involved an impasse like the one that Petitioners claim is certain to materialize here, the action was not filed until the first day when nominating petitions could be circulated. 607 A.2d at 205. Here, Petitioners' actions were filed over a month before the first day when nominating petitions can be circulated.

8. Speaker Cutler is a duly elected, qualified, and serving Member of the House of Representatives from the 100th House District, and is also the duly elected Speaker of the House of Representatives and in such capacity is the presiding officer of that body.

9. Leader Benninghoff is a duly elected, qualified, and serving Member of the House of Representatives from the 171st House District, and is also the duly elected Majority Leader of the House of Representatives and, in such capacity, leads the Republican Caucus of the House of Representatives (the "House Republican Caucus"). The House Republican Caucus consists of 113 out of 203 Members of the House.

10. President Corman is a duly elected, qualified, and serving Member of the Senate from the 34th Senatorial District, and is also the duly elected President *Pro Tempore* of the Senate. In such capacity, he is the highest-ranking officer of the Senate and presides over that body in the absence of the Lieutenant Governor. *See* Pa. Const. art. II, § 9.

11. Leader Ward is a duly elected, qualified, and serving Member of the Senate from the 39th Senatorial District, and is also the duly elected Majority Leader of the Senate and, in such capacity, leads the Republican Caucus of the Senate (the “Senate Republican Caucus”). The Senate Republican Caucus consists of 29 out of 48 Members of the Senate: 28 Republican Senators and 1 independent Senator who caucuses with the Republicans.

12. Attached to the Application as **Exhibits A and B**, respectively, are the Proposed Intervenors’ proposed Answers to the Petitions for Review.

## **II. THE PROPOSED INTERVENORS HAVE A RIGHT TO INTERVENE**

13. Under Pennsylvania law, a person has an absolute right to intervene in an action if he falls within one of the categories enumerated in Pa.R.Civ.P. 2327. *See id.*; Pa.R.Civ.P. 2329; *see also Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Cmwlth. 1999).

14. The grant of intervention is mandatory where the intervenor meets any one of the four criteria set forth in Pa.R.Civ.P. 2327. *Larock*, 740 A.2d at 313 (“if

the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary . . .”) (internal citations omitted).

15. Here, two independent bases exist to support the Proposed Intervenors’ right to intervene. First, Pa.R.Civ.P. 2327(3) provides that a person must be permitted to intervene if he “could have joined as an original party in the action or could have been joined therein.” *Id.* Second, Pa.R.Civ.P. 2327(4) provides that a person must be permitted to intervene if “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.” *Id.*

16. Pennsylvania courts have established “that the inquiry to determine whether a party has standing to initiate litigation is different than the inquiry to determine whether a party can intervene in existing litigation.” *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Cmwlth. 2019). Indeed, “[s]tanding to file a formal complaint requires the moving party to have a direct, immediate, and substantial interest in the subject matter of the controversy. . . Conversely, a person seeking to intervene in a proceeding need have only an ‘interest of such nature that participation . . . may be in the public interest.’” *Id.* at 1288-1289 (citation omitted).

17. Moreover, the Proposed Intervenors are the presiding officers of both Houses of the General Assembly and seek to intervene to protect the official,

individual, and/or institutional interests described in this memorandum. As this Court held just last year, “there is a difference between personal standing and legislative standing,” and a legislator “may be able to initiate litigation in his legislative capacity, where the legislator can demonstrate an injury to his ability ‘to act as a legislator.’” *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep’t of Human Servs.*, 225 A.3d 902, 909 (Pa. Cmwlth. 2020). These principles of legislative standing are relevant to whether a legally enforceable interest exists. *Id.* at 902.

18. This Court again recognized and re-affirmed these principles when it granted Proposed Intervenors’ request to intervene in the first lawsuit filed by the Carter Petitioners. *Carter*, 132 M.D. 2021, at pgs. 10-11.

19. Because the Proposed Intervenors have legally enforceable interests at play and could have been original parties to this case, they must be permitted to intervene as of right under both Pa.R.Civ.P. 2327 (3) and (4).

**A. Determination of This Action Will Affect the Proposed Intervenors’ Enforceable Interest in Vindicating and Protecting Their Exclusive Interest and Right to Legislate Redistricting and Election Laws, which Petitioners Seek to Divest.**

20. The Proposed Intervenors unquestionably have an enforceable interest in defending the constitutional authority of Pennsylvania’s legislative actors to prescribe the “Times, Places, and Manner of holding elections for Senators and Representatives,” U.S. CONST. ART. I, § 4, which includes the authority to enact congressional districting plans. *League of Women Voters*, 178 A.3d at 821–22. This

action seeks to dilute, abrogate, impair, or abolish that constitutional prerogative. Petitioners ask the Court to take control over the congressional redistricting process and impose unreasonable, restrictive deadlines on Proposed Intervenors' constitutional prerogative.

21. This enforceable interest satisfies Pa.R.Civ.P. 2327 and, accordingly, Proposed Intervenors have the right to intervene. Pennsylvania law affirms the exclusive authority of Pennsylvania's legislators to engage in congressional redistricting, and that authority lies at the heart of this case.

22. The Proposed Intervenors have an enforceable interest warranting intervention, and can "initiate litigation in [their] legislative capacity, where the legislator can demonstrate an injury to his ability 'to act as a legislator.'" *Allegheny Reprod. Health Ctr.*, 225 A.3d at 909 (citing *Sunoco Pipeline L.P.*, 217 A.3d at 1288).

23. In *Fumo v. City of Philadelphia*, the Pennsylvania Supreme Court determined that a city's issuance of a license for the construction of a casino on a Pennsylvania river invaded the General Assembly's exclusive authority to regulate submerged lands. 972 A.2d 487, 501–03 (Pa. 2009). In relevant part, the *Fumo* court held that six state legislators had legislative standing to "seek redress for an alleged usurpation of their authority as members of the General Assembly," to "vindicate a power that only the General Assembly has," and to "ask that this Court uphold their

right as legislators to cast a vote or otherwise make a decision on licensing the use of the Commonwealth's submerged lands." *Id.* at 502.

24. The Proposed Intervenors' Application presents a stronger case for intervention. Regulating the times, places, and manner of congressional elections in Pennsylvania—a task that includes redistricting legislation—is an exclusively legislative function, not only under Pennsylvania law, but also under the U.S. Constitution. *See, e.g.*, U.S. CONST. ART. I, § 4; PA. CONST. ART. II, § 1; *League of Women Voters*, 178 A.3d at 821–22; *Butcher*, 216 A.2d at 458; *Arizona State Legislature*, 576 U.S. at 808; *Grove*, 507 U.S. at 34.

25. The power to redistrict is part of the General Assembly's overall power to regulate elections. More than a century ago, the Pennsylvania Supreme Court acknowledged that "[t]he power to regulate elections is a legislative one, and has been exercised by the general assembly since the foundation of the government." *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v. Barlow*, 60 Pa. 54, 75 (1869)). The primacy of the General Assembly in the area of elections is manifest. *See In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014) ("[s]ubject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania"). For that reason, "the judiciary should act with restraint, in the election arena, subordinate to express statutory directives." *Id.*

26. Here, as in their last lawsuit, the Carter Petitioners seek, in pertinent part, a declaratory judgment that the Commonwealth's current congressional district plan is unconstitutional, an injunction prohibiting Respondents from "implementing, enforcing, or giving any effect to" that plan, and this Court's "[a]dopt[ion] [of] a new congressional district plan that complies with Article I, Section 5 of the Pennsylvania Constitution; Article I, Section 2 of the U.S. Constitution; and 2 U.S.C. § 2." Carter Pet. at 18-19 (Prayer for Relief).

27. Similarly, the Gressman Petitioners seek a declaration that Pennsylvania's current congressional districts are unconstitutional and an order enjoining Respondents from "implementing, enforcing, or giving any effect to Pennsylvania's current congressional district plan in any future election." Gressman Pet. at 14 (Prayer for Relief). The Gressman Petitioners also seek "implementation of a new congressional district map with the correct number of congressional districts that adheres to the one-person, one-vote standard and all other applicable constitutional and legal requirements." Gressman Pet. ¶ 1. Both sets of Petitioners, in addition, have already asked the Pennsylvania Supreme Court to take extraordinary jurisdiction of these matters and set an expedited schedule, culminating in the court's adoption of a new congressional district map.

28. These requests directly seek to divest the Proposed Intervenor's exclusive authority to determine the times, places, and manner of holding



congressional elections under U.S. Const. Art. I, § 4, and to transfer that authority to the Judiciary.

29. As this Court expressly recognized in the Carter Petitioners' prior suit, "it seems clear that Legislators' ability to legislate would be impaired if the Court imposed a deadline on the General Assembly and the Governor to put in place a new congressional district map and takes control of the redistricting process." *Carter*, 132 M.D. 2021, at pg. 12. But here, once again, Petitioners are asking the Court to take precisely those actions.

30. In addition, in the Carter Petitioners' prior suit, this Court recognized that "Legislators would have a legally enforceable interest in the submission of a proposed plan for the Court's consideration if called upon to draw a new congressional map, as in the *Mellow* case." *Carter*, 132 M.D. 2021, at pg. 12. Nothing about that interest has changed in the last three months.

31. Thus, as previously recognized by this Court, determination of this action necessarily and directly affects the Proposed Intervenors' legally enforceable interests, giving them a right to intervene. *Fumo*, 972 A.2d at 502 ("the claim reflects the state legislators' interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, falls within the realm of the type of claim that legislators, qua legislators, have standing to pursue.").

**B. The Proposed Intervenors Could Have Joined as an Original Party in the Action or Could Have Been Joined Herein.**

32. Pennsylvania courts recognize that parties with special interests implicated by an action could have been joined as original parties. *See, e.g., Appeal of Denny Bldg. Corp.*, 127 A.2d 724, 729 (1956) (finding intervention appropriate when parties “have an obvious special interest apart from that of the general public which would certainly have justified their joining as original parties in the action”); *Harrington v. Philadelphia City Empls. Fed. Credit Union*, 364 A.2d 435, 441 (Pa. Super. 1976) (recognizing that candidates “could have been an original party or could have been joined in the action . . . [because they] had interests which would be drastically affected by the outcome of the equity action”).

33. Further, 42 Pa.C.S. § 7540(a) provides that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”

34. The Proposed Intervenors, as the parties to whom the constitutional authority to redistrict has been assigned, have a special interest in these actions. The actions seek to divest—or, at a minimum, significantly impair—the Proposed Intervenors’ authority to conduct congressional redistricting for the Commonwealth for the 2022 elections and beyond.

35. Moreover, the Proposed Intervenors could have joined as original parties in these actions. In fact, it is not uncommon for the presiding officers of the House and Senate—like Speaker Cutler and President Corman—to be named as original parties in cases challenging the constitutionality of, and seeking to alter, redistricting plans enacted by the General Assembly. For example, in both *League of Women Voters* and *Erfer*, the then-presiding officers of the General Assembly were named as original parties, including former Speaker Mike Turzai and former President *Pro Tempore* Joseph Scarnati III in *League of Women Voters*, and former Speaker Matthew Ryan and then-Lieutenant Governor and President of the Senate Robert Jubelirer in *Erfer*. Further, in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), an action brought to seek judicial intervention to draft a congressional districting plan when the General Assembly and Governor reached an impasse and failed to pass such a plan, the petitioners were eight Members of the Senate, who were therefore original parties. *Id.* at 205; *see also Carter*, 132 M.D. 2021, at pg. 12 (finding that “in *Mellow* were eight senators who sought nearly the same relief as sought here, and several members of the state House of Representatives and Senate were permitted to intervene”).<sup>3</sup>

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<sup>3</sup> Notably, *Mellow* was not filed until January 28, 1992, which was the first day on which nominating petitions for the U.S. House could begin circulating that year. 607 A.2d at 205.

36. The Proposed Intervenors could have joined as original parties in these actions, and, as these cases show, the General Assembly's presiding officers are typically joined in these types of cases. The instant actions seek declaratory judgments and injunctive relief that would impose improper restraints upon, and usurp, the exclusive domain of the General Assembly. If granted, the requested relief would directly impact the Proposed Intervenors' authority and interest as legislators and the official, institutional, and other interests that they are further authorized to represent. Therefore, the Proposed Intervenors are entitled to intervene here as a matter of right.

**C. There Is No Other Reason for the Court to Deny the Application.**

37. The Proposed Intervenors have shown an entitlement to intervene in these cases. Given this showing, Pa.R.Civ.P. 2329 provides only three reasons that could justify a refusal of intervention. None of them applies.

38. First, Pa.R.Civ.P. 2329(1) permits refusal of intervention if "the claim or defense of the petitioner is in subordination to and in recognition of the propriety of the action," which has been interpreted to mean that an "intervenor cannot question supported findings of fact made prior to the intervention" and that "an intervenor must take the suit as he finds it." *Com. ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867, 870 (Pa. 1950). There are no subordination concerns here, given the early stage of this litigation.

39. Second, Pa.R.Civ.P. 2329(2) permits a court to refuse an application for intervention if “the interest of the petitioner is already adequately represented.” Here, Proposed Intervenors seek to vindicate rights and interests held by themselves and their members in their capacity as legislators. Their interests are not already adequately represented by the originally named Respondents in these cases, as those Respondents are simply responsible for election administration and do not possess the interest in drafting and passing congressional districting plans that Petitioners seek to impair or abrogate. *See Shapp*, 391 A.2d at 608 (holding that “[s]urely, the defense of legislation adopted by the General Assembly must be within the authority of its elected leaders”). After all, “an executive branch agency is simply not in a position to represent Proposed Intervenors’ interest in the exercise of legislative power under Article III of the Pennsylvania Constitution.” *Allegheny Reprod. Health Ctr.*, 225 A.3d at 913. Petitioners practically concede this point in alleging repeatedly that the divided Commonwealth government—where the legislative chambers are controlled by Republicans and the Governor is a Democrat—is categorically incapable of compromise. Petitioners cannot, after making this allegation, claim that the Democratic Secretary of State or the Director of Elections represents Proposed Intervenors’ interests.

40. Finally, Pa.R.Civ.P. 2329(3) permits a refusal of intervention where “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.” No such concern exists here. The Proposed Intervenors filed their Application just ten days after the filing of the Petition and well before this Court’s scheduled deadline of December 31 to intervene. The Proposed Intervenors’ participation in this case will simplify this action and is necessary, as they will bring before the Court arguments and law that otherwise would not be present.

41. In summary, there is no basis for refusing the Proposed Intervenors’ request to intervene in these matters.

**WHEREFORE**, for the foregoing reasons, the Proposed Intervenors respectfully request that the Court grant their Application for Leave to Intervene and enter the proposed order attached to it as **Exhibit “C,”** thereby granting the Application.

Dated: December 27, 2021

Respectfully submitted,

/s/ Anthony R. Holtzman

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*Counsel for Proposed-Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives*

## CERTIFICATION OF COMPLIANCE

I hereby 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.

/s/ Anthony R. Holtzman  
Anthony R. Holtzman



# **Appendix 1**

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. :

No. 132 M.D. 2021  
Held: August 24, 2021

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 :

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE WOJCIK

Filed: September 2, 2021

Petitioners<sup>1</sup> filed a petition for review (Petition) addressed to this  
Court's original jurisdiction. The Petition seeks, among other things, a

declaration

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<sup>1</sup> Petitioners are Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael

that the Commonwealth of Pennsylvania’s 2018 congressional district map is unconstitutional and may not be used for the 2022 election year. Currently, the Court considers three applications for leave to intervene. Speaker of the Pennsylvania House of Representatives Bryan Cutler; Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff; President Pro Tempore of the Pennsylvania Senate Jake Corman; and Majority Leader of the Pennsylvania Senate Kim Ward (collectively, Legislators) filed the first application for leave to intervene. The Republican Party of Pennsylvania and Individual Republican Voters<sup>2</sup> (collectively, Republican Party) filed the second application for leave to intervene, and Voters of the Commonwealth of Pennsylvania (Voters of Commonwealth)<sup>3</sup> filed the third

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Guttman, Maya Fonkeu; Brady Hill; Mary Ellen Balchunis, Tom DeWall, Stephanie McNulty, and Janet Temin. Each named petitioner is a United States citizen and registered voter in Pennsylvania and intends to advocate and vote for Democratic candidates. *Id.*

<sup>2</sup> The application for leave to intervene identifies the following individuals as proposed intervenors: Patricia K. Poprik, David Torres, Billy Lanzilotti, Nancy Becker, Michael D. Straw, James Depp, Joseph P. Vichot, Justin Behrens, Thomas Whitehead, Lee Becker, Louis Capozzi, Kirk Radanovic, Paul Nyman, James McGuire, Jr., Kristine L. Eng, Donna Cosmello, James Foreman, David Ball, James Vasilko, Lynne Ryan, Cynthia Kirk, Daryl Metcalfe, Luke Negron, Sue Ann Means, Reverend Todd Johnson, Michael Harvey, and Louisa Gaughen. *See Appl. for Leave to Intervene by Proposed Intervenors the Republican Party of Pennsylvania and Individual Republican Voters*, ¶¶ 2-28. The application provides each proposed intervenor’s congressional district number; any position within the Republican Party that he or she may hold or has held in the past; where applicable, an indication of whether the individual is considering running for public office; and the individual’s participation in the election process whether it be volunteering/advocating for a Republican candidate or intent to vote for Republican candidates.

<sup>3</sup> “Voters of the Commonwealth of Pennsylvania” is not an organization but rather is used to generally refer to the named proposed intervenors in the application. The application is brought on behalf of Haroon Bashir, Vallerie Biancaniello, Debra A. Biro, Tegwyn Hughes, James D. Bee, Richard L. Lawson, David Dillon, Rico Timothy Elmore, Barbara Steinour, James Curtis Jarrett, Jeffrey Wenk, and Donald Beishl, Jr. *See Appl. for Leave to Intervene by Voters of the Commonwealth of Pennsylvania*, ¶¶ 10-21. The application identifies the voter by name, general area of residency and congressional district number, as well as the individual’s intention in voting in the 2022 elections. *Id.* Each allegation also indicates that the proposed intervenor voted for his/her General Assembly representatives with the expectation that the representatives would have the authority to enact a new congressional district map based on the 2020 Census data.

application. All proposed intervenors seek to be aligned with Respondents Veronica Degraffenreid, Acting Secretary of the Commonwealth of Pennsylvania, and Jessica Mathis, Director for the Pennsylvania Bureau of Election Services and Notaries (collectively, Secretary). Petitioners oppose all three applications, while the Secretary opposes only the applications of the Republican Party and Voters of Commonwealth. After hearing held August 24, 2021 and argument on the issue, we grant Legislators' application but deny the applications of the Republican Party and Voters of Commonwealth based on our conclusion that they lack a legally enforceable interest in the Petition and that they could not be named as original parties to the action.

#### **I. Petition for Review**

The Petition provides details regarding the results of the 2020 Census, the dates by which the United States (U.S.) Secretary of Commerce must provide the President of the United States and the states with the apportionment data, and the effect of the Covid-19 pandemic on the delivery of that data. The Petition further explains that, while the Commonwealth's population increased from the last decennial census, the 2020 Census shows that the Commonwealth will lose a representative seat in the U.S. House of Representatives. Starting with the upcoming 2022 elections, the Commonwealth will have 17 representatives in the House of Representatives, one fewer than the current 18 representatives. The Commonwealth's congressional district map must be redrawn to accommodate for the loss of a seat in the House of Representatives.

Petitioners claim that the Commonwealth's current congressional districts are malapportioned due to shifts in population within the Commonwealth.

They believe that the congressional districts in which they live are overpopulated, while other districts are underpopulated, and that, consequently, their votes for members of the U.S. House of Representatives are diluted.

The Petition observes that Pennsylvania law does not set a deadline by which a new congressional district map must be put in place prior to the first congressional election following a census. According to Petitioners, it is in the best interest of voters, candidates, and the Commonwealth's entire electoral apparatus to have a new, final congressional district map in place prior to February 15, 2022, the date on which candidates may begin collecting signatures for placement on the primary election ballot.

The Petition informs that the Commonwealth's current congressional district map was drawn by the Pennsylvania Supreme Court in *League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083 (Pa. 2018), after the Republican-controlled General Assembly and Democratic Governor failed to agree upon a new congressional district map following the Supreme Court's invalidation of the Commonwealth's 2011 congressional district map. The current political climate has not changed since 2018, as Republican representatives maintain the majority in both houses of the General Assembly and Governor Tom Wolf is a Democrat. For these reasons, Petitioners contend that it is unlikely that the "political branches" of the government will agree upon a new congressional district map.

Petitioners allege that the current congressional district map violates: (1) article I, section 5 of the Pennsylvania Constitution (free and equal elections

clause);<sup>4</sup> (2) 2 U.S.C. §2c (relating to districting for House of Representatives);<sup>5</sup> (3) article I, section 20 of the Pennsylvania Constitution (relating to right to petition);<sup>6</sup> and (4) Article I, Section 2 of the U.S. Constitution (relating to qualifications for member of the House of Representatives).<sup>7</sup> Petitioners seek a declaration that the

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<sup>4</sup> Article I, section 5 of the Pennsylvania Constitution, PA. CONST. art. I, § 5, states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”

<sup>5</sup> 2 U.S.C. §2c provides:

In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

<sup>6</sup> Article I, section 20 of the Pennsylvania Constitution, PA. CONST. art. I, § 20, provides: “The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.”

<sup>7</sup> Article I, Section 2 of the U.S. Constitution, U.S. CONST. art. I, § 2, provides:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and

Commonwealth's current congressional district map violates the above constitutional provisions; an injunction enjoining the Secretary, her agents, officers, employees, and successors from implementing, enforcing, or giving effect to the 2018 congressional district map; establishment of a schedule that will enable the Court to adopt and implement a new congressional district map by a date certain should the political branches fail to enact such a map by that time; implementation of a new congressional district map that complies with the U.S. and Pennsylvania Constitutions in the event that the political branches do not enact a new map by a date certain; an award of attorneys' fees, costs, and disbursements; and an award of any other relief the Court deems just and proper.

## **II. Applications for Leave to Intervene**

### **A. Standards for Intervention**

Although this matter was filed in the Court's original jurisdiction, the right to intervene is governed by Pennsylvania Rules of Civil Procedure Nos. 2326-

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within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

2350. Rule No. 2327, titled “Who May Intervene,” provides in relevant part and as asserted by the proposed intervenors:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if

.....

(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. No. 2327.<sup>8</sup>

Rule No. 2329, titled “Action of Court on Petition,” declares:

Upon the filing of the petition and after hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if

(1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or

(2) the interest of the petitioner is already adequately represented; or

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<sup>8</sup> Pursuant to Pennsylvania Rule of Civil Procedure No. 2328(a), the proposed intervenors attached to their respective applications for leave to intervene copies of the pleading that they would file if permitted to intervene. Each group of proposed intervenors would file preliminary objections to the Petition. Pa. R.C.P. No. 2328(a).



(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.C.P. No. 2329.

The determination of whether a proposed intervenor has a “legally enforceable interest” calls for “a careful exercise of discretion and consideration of all the circumstances involved,” *Realen Valley Forge Greenes Associates v. Upper Merion Township Zoning Hearing Board*, 941 A.2d 739, 744 (Pa. Cmwlth. 2008) (citations omitted), because the exact boundaries of the “legally enforceable interest” limitation in Rule No. 2327(4) are not clear. *Id.* Nevertheless, an applicant for intervention must have some right, either legal or equitable, that will be affected by the proceedings. *See generally Keener v. Zoning Hearing Board of Millcreek Township*, 714 A.2d 1120, 1122 (Pa. Cmwlth. 1998).

At this point, it is important to note that although we summarize the applications for leave to intervene, the Court has considered the entirety of the applications and supporting briefs, the law cited therein, the replies to Petitioners’ and the Secretary’s opposition to the intervention applications, and the arguments, testimony and exhibits presented at the August 24, 2021 hearing in our determination of whether to grant intervention in this case.

## **B. Legislators’ Application**

Legislators’ application for leave to intervene asserts that the named legislators are the highest-ranking members of their respective chambers, that the Republican Caucuses of their chambers have authorized them to seek intervention, and that the U.S. Constitution empowers the General Assembly to establish the time, place, and manner of elections to Congress, which includes the authority to redistrict.

See U.S. CONST. art. I, § 4 (stating that the time, place and manner of elections are left to the states' legislatures). Legislators seek to intervene pursuant to Pa. R.C.P. No. 2327(3) and (4) to vindicate their authority to redistrict the Commonwealth.

Legislators' memorandum in support of their application expands upon the reasons why they should be permitted to intervene. They first claim that they could have been named as original parties to the action or could have been joined therein because they have a special interest in the action.<sup>9</sup> That special interest is Petitioners' alleged desire to divest Legislators of their constitutional authority to conduct congressional redistricting. Legislators also claim that their participation is required by the Declaratory Judgments Act,<sup>10</sup> which mandates that all persons who have or claim any interest that would be affected by a declaration be made parties to the action, and that absent their participation, no declaration may prejudice their rights. 42 Pa. C.S. § 7540(a). Legislators also claim a legally enforceable interest in defending their constitutional authority to prescribe the time, place, and manner of holding elections, which includes the authority to enact congressional district maps. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 808 (2015) ("redistricting is a legislative function, to be performed in

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<sup>9</sup> Legislators claim that they could have been joined as original parties because it is not uncommon for the courts to allow legislators to intervene in actions challenging the constitutionality of, or seeking to alter, redistricting plans. We reject such a blanket assertion. The cases upon which Legislators rely involved legislator participation *after* a redistricting plan was implemented and later challenged.

We also reject any reliance on *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Cmwlth. 2019), as supporting the right to intervene based on a special interest. *Sunoco* addressed standing to *initiate* formal complaints before the Pennsylvania Public Utility Commission and did not directly involve the issue of intervention in formal complaint proceedings. Regardless, the Commission's regulations provide the standards upon which intervention may be granted. There is no statutory or regulatory law addressing intervention in cases such as the one currently before the Court.

<sup>10</sup> 42 Pa. C.S. §§ 7531-7541.

accordance with the State's prescriptions for lawmaking . . ."). They claim that Petitioners asked the Court to take over this process even before the General Assembly has the necessary tools to redistrict and to impose unreasonable deadlines.

The law is well settled as to legislator standing when seeking to intervene. In *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016), legislators sought to intervene in an action challenging an executive order that authorized direct care workers to organize. This Court denied the legislators' application for leave to intervene, which the Supreme Court affirmed. In doing so, the Supreme Court identified the requirements for legislator standing.

Standing exists only when the legislator's direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, *see* [*Wilt v. Beal*, 363 A.2d 876 (Pa. Cmwlth. 1976)], or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator, *see* [*Fumo v. City of Philadelphia*, 972 A.2d 487 [Pa. 2009),] (finding standing due to alleged usurpation of legislators' authority to vote on licensing).

Conversely, a legislator lacks standing

where he or she has an indirect and less substantial interest in conduct outside the legislative forum which is unrelated to the voting or approval process, and akin to a general grievance about the correctness of governmental conduct, resulting in the standing requirements being unsatisfied.

*Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 225 A.3d 902 (Pa. Cmwlth. 2020)<sup>11</sup> (quoting *Markham*, 136 A.3d at 145).

The Supreme Court has held that

members of the General Assembly have sufficient interest to participate in legal action in their official capacity and based upon their special status “where there [i]s a discernable and palpable infringement on their authority as legislators.” A legislator’s legal interest has been recognized “to protect [the] legislator’s right to vote on legislation” and “in actions alleging a diminution or deprivation of the legislator’s . . . power or authority.” But, a legislator has no legal interest “in actions seeking redress for a general grievance about the correctness of government conduct.”

*Robinson Township v. Commonwealth*, 84 A.3d 1054, 1054 (Pa. 2014) (alterations in original; citations omitted) (affirming Commonwealth Court order denying legislators intervention in action challenging constitutionality of amendments to the Oil and Gas Act<sup>12</sup>). The principles of legislator standing are therefore relevant to the issue of whether the putative intervenor has demonstrated the legally enforceable interest required of Pa. R.C.P. No. 2327(4).

We disagree with Petitioners’ claims that Legislators lack a legally enforceable interest in this matter because the Petition does not seek to deprive Legislators of their authority to redistrict the congressional district map and that

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<sup>11</sup> The opinion appearing at 225 A.3d 902 (Pa. Cmwlth. 2020), addresses legislator standing. Thereafter, on March 26, 2021, the Court issued an order sustaining the respondents’ preliminary objections and dismissing the petition for review. The petitioners filed an appeal to the Supreme Court, which remains pending. *See Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services* (Pa. Cmwlth., No. 26 M.D. 2019, filed March 26, 2021), *appeal pending*, (Pa., No. 26 MAP 2021).

<sup>12</sup> 58 Pa. C.S. §§ 3201-3274.

Legislators are mischaracterizing the Petition as such. Among other things, the Petition seeks an order establishing a date certain by which the Court will take control of the redistricting process should the General Assembly and Governor fail to act. Pennsylvania law, however, does not establish a date by which a new congressional district map must be put in place. While Petitioners correctly cite *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), for the proposition that there is nothing in the law prohibiting the court from establishing a deadline for enactment of a new congressional map, it is noteworthy that the petitioners in *Mellow* were eight senators who sought nearly the same relief as that sought here, and several members of the state House of Representatives and Senate were permitted to intervene. When the Supreme Court exercised plenary jurisdiction in *Mellow* and appointed a judge of this Court as master to conduct hearings and report to the Supreme Court, Judge Craig directed that the parties, including intervenors, submit their proposed congressional district plans by a date certain.

At this juncture, it is not known how the redistricting process will proceed. But it seems clear that Legislators' ability to legislate would be impaired if the Court imposes a deadline on the General Assembly and the Governor to put in place a new congressional district map and takes control of the redistricting process. Likewise, Legislators would have a legally enforceable interest in the submission of a proposed plan for the Court's consideration if called upon to draw a new congressional district map, as in the *Mellow* case.

We therefore grant Legislators' application for leave to intervene. They have a legally enforceable interest because Pennsylvania law does not prescribe the date by which a new congressional district map must be put in place and because they, as members of the General Assembly, have the constitutional authority to

establish the time, place, and manner of elections, which includes the authority to redistrict. *Arizona State Legislature*. Any potential infringement of that right may diminish or deprive Legislators of their ability to act as legislators.

### **C. Republican Party's Application and Voters of Commonwealth's Application**

We next consider the applications for leave to intervene filed by the Republican Party and Voters of Commonwealth. Both applications claim that the Republican Party, including the individual Party Voters, and Voters of Commonwealth could have been named as original parties. We disagree. Clearly, the Republican Party, the individual Republican Voters, and Voters of Commonwealth could not be joined as petitioners because they oppose Petitioners' requested relief. Similarly, they could not be joined as respondents because Petitioners' claims do not affect their liabilities. *See* Pa. R.C.P. No. 2229(b) ("A [petitioner] may join as [respondents] persons against whom the [petitioner] asserts any right to relief . . . in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact *affecting the liabilities of all such persons* will arise in the action.") (emphasis added).<sup>13</sup> This factor militates against granting the Republican Party's and Voters of Commonwealth's applications for leave to intervene.

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<sup>13</sup> The Republican Party notes that the Court has permitted intervention in other cases, specifically *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5 (Pa. 2018). There, the Supreme Court noted that a judge of this Court, acting as master, permitted certain Republican voters, who included announced or potential candidates for Congress and other active members of the Republican Party, to intervene. The Court did not state the basis upon which intervention was granted, and our review of this Court's docket in *League of Women Voters* (Pa. Cmwlth., No. 261 M.D. 2017), indicates that the Court's order did not set forth its reasons for granting intervention.

We now address whether the Voters of Commonwealth or the Republican Party has shown a legally enforceable interest. For its part, the Voters of Commonwealth claim that they seek to intervene to preserve the existing framework that the General Assembly and Governor have until the first day to circulate nomination petitions to implement a new congressional district map. They claim that they are “mirror images” of Petitioners because they intend to advocate on behalf of Republican candidates in 2022. Voters of Commonwealth suggest that if the Court grants Petitioners the relief requested, such relief would curtail the ability of the Republican-controlled General Assembly to represent their interests. This would diminish or nullify their votes and would take away local officials’ constitutional duty to redistrict the Commonwealth. Local officials are more familiar with their constituents than Supreme Court jurists.

Voters of Commonwealth suggest that they have a special interest that allows them to intervene, that being that this matter may be of public interest. They allege an inalienable right to express and present their concerns regarding drawing of the congressional district map, and if this Court imposes a date certain by which the political branches must act or takes over the redistricting process, the General Assembly will be divested of its authority to draw the new map.<sup>14</sup> A court drawing

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<sup>14</sup> The Court admitted Voters of Commonwealth Exhibit 1, which contains the Affidavits of Tegwyn Hughes, Debra A. Biro, James Curtis Jarrett, James D. Bee, and Jeffrey Wenk, subject to Petitioners’ and the Secretary’s objections to the legal conclusions stated within the affidavits. The Affidavits largely echo the averments in the application for leave to intervene and are uniform for the most part. The affiants attest to their residency, registration as qualified electors in the Commonwealth, regularity in voting, voting with the expectation that their representatives would engage in the redistricting process based on the 2020 Census and ability to contact their representatives, and their intention in contacting their representatives relating to the new congressional district map. Each affiant states that he/she has an interest in the contours of his/her congressional districts and an inalienable right to express to his/her representatives concerns regarding redistricting under the First Amendment, U.S. CONST. amend. I. Further, affiants state that the Secretary does not have authority regarding redistricting and therefore does not represent the affiants’ interest.

the congressional district map will turn a legislative process into a judicial one, according to Voters of Commonwealth. Finally, newly enacted redistricting maps have been subject to voter challenges.

As for a legally enforceable interest, the Republican Party argues that it has an interest in expanding its power within the Commonwealth government and that redistricting is fundamentally about political power. It maintains that it has a legally enforceable interest in (1) the allocation of its resources, (2) advocating for its interest and that of its members in areas that are bipartisan, (3) who draws the new congressional district map, that being the Republican-controlled General

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They conclude that they have a substantial and particularized interest in preserving the existing framework that the General Assembly and the Governor have until the first day to circulate nomination petitions to implement a new district plan. Petitioners' requested relief would deprive them of their ability to contact their legislators regarding redistricting, thus nullifying their vote for a representative. Further, Petitioners' request that the Court invalidate the current congressional map would deprive affiants of their right to representation should a special election be needed in their district.

The Court also permitted Voters of Commonwealth to provide an additional exhibit after the proceedings, which Voters filed on August 26, 2021. Voters filed a supplemental affidavit in support of the Voters' application for leave to intervene by Vallerie Biancanello. The affidavit is the same as those presented in Voters of Commonwealth Exhibit 1. The Secretary promptly responded, indicating that she does not object to the affidavit on hearsay grounds or the Court's consideration of the affidavit in lieu of live testimony, but she does object to the legal conclusions stated therein. Petitioners object on the same basis as the Secretary.

Upon review, we sustain the objections to the legal conclusions stated within each affidavit, including that: (1) the affiant has a substantial and particularized interest in preserving the existing framework; (2) the requested relief would have the effect of preventing the affiant from being able to interact with the elected representatives regarding redistricting and nullifies the affiants' votes in the 2020 election; (3) if the Court grants the requested relief, the General Assembly will be deprived of its authority to draw new congressional districts and deprive the affiant of his/her ability to provide input to his/her representative thus infringing on the affiant's free speech rights; (4) the affiants' votes would be nullified and their interests of having their representatives exercise their full scope of constitutional duties with respect to redistricting would be infringed; and (5) the affiants could be deprived of their right to representation if the current map is declared unconstitutional and a special election must take place before a new map is enacted. In sustaining the objections to the Exhibits, we did not consider the stated conclusions in our disposition of this matter.



Assembly or the Justices of the Supreme Court, who are mostly Democrats, (4) a change in the environment in how rival parties defend their concrete interests, (5) recruiting of candidates, (6) risk of confusion to voters, and (7) associational interests.<sup>15</sup> *See* PA. CONST. art. I, § 20 (“The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested

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<sup>15</sup> The Republican Party presented the testimony of Angela Alleman, Executive Director of the Pennsylvania GOP. Mrs. Alleman oversees all operations of the Party. She explained her concerns if the Supreme Court draws the congressional district map, including the removal of power to do so by the General Assembly, the Party’s ability to work with its legislators to influence the map but inability to advocate before the Supreme Court, and the Party’s diversion of funds to have experts prepare and analyze any map drawn by the Supreme Court. She believes that it is unfair to create a deadline for the General Assembly to act, especially when it is not clear when the 2020 Census data will be available. Mrs. Alleman stated that the uncertainty of the congressional district map affects candidate recruitment and makes it impossible for incumbents to know whether their districts will be realigned and the possibility that if realigned, whether the incumbent will be running against another incumbent. She acknowledged that regardless of who draws the new congressional district map, the Republican Party will have to spend money to educate voters, and for “get out and vote” campaigns. Mrs. Alleman agreed that Republican Party members may speak to their legislators regardless of who draws the map, and that the Republican Party has no power to make the General Assembly do what the Party wants. For Mrs. Alleman, the issue with the Petition is the request for a deadline by which the General Assembly and Governor must act and the allocation of the Party’s resources depending on who draws the congressional district map. She believes that if the General Assembly draws the map, the Republican legislators will negotiate the best possible map for the Party. Expenses the Republican Party would incur if the Supreme Court draws the map include legal fees, including fees for intervening in this action, expert fees for analyzing and preparing maps, and the diversion of the Party’s resources. The Court finds Mrs. Alleman’s testimony credible but not persuasive on the issue of whether the Republican Party has a legally enforceable interest.

The Court admitted 12 affidavits of the individual Republican Party members: Nancy Becker, James Depp, Thomas Whitehead, Louis Capozzi, Kirk Radanovic, Kristine L. Eng, David Ball, James Vaillko, Daryl Metcalfe, Sue Ann Means, and Michael Harvey, and Justin Behrens. The affidavits are substantially the same and attest that the affiant is a U.S. citizen and registered voter in Pennsylvania; the district in which the affiant resides; the affiant’s participation in the election-related/Republican Party activities; the affiant is a long-time supporter of the Republican party; and that Petitioners’ and the Secretary are affiliated with the affiant’s political opponents, and that, therefore, they will not advocate for a congressional district map that represents the affiant’s interest as a supporter and/or official of the Republican Party. The affidavits also attest to the affiant’s resources invested in advocating on behalf of the Republican Party, including activities that may be affected by the Supreme Court’s drawing of the congressional district map.

with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.”).

First, the Court rejects the Voters of Commonwealth and the Republican Party’s argument that because they have a special interest in the matter, they are permitted to intervene. Both proposed intervenors rely on *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Cmwlth. 2019), but in that case, the primary issue was whether a senator had standing, either as a legislator or as a private citizen, to initiate a formal complaint with the Pennsylvania Public Utility Commission; the question of intervention was not at issue in *Sunoco*. The brief discussion of intervention was limited to distinguishing between standing to initiate a formal complaint and standing to intervene, which the Commission’s regulations expressly address. Years ago, in *Application of Biester*, 409 A.2d 848 (Pa. 1979), our Supreme Court established the standards for intervention. In *Biester*, a taxpayer sought to intervene in an action seeking to impanel a statewide investigative grand jury. The Court, after initially allowing the taxpayer to intervene, later vacated its order granting intervention. The Court determined that to intervene, the taxpayer must meet the “substantial, direct, and immediate” test set forth in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). That standard remains the law in this Commonwealth. *Markham*, 136 A.3d at 139 (“in order to intervene, individuals must have standing, Pa. R.C.P. [No.] 2327(3), (4), and to establish standing, one must have an interest that is substantial, direct[,] and immediate”). To have a substantial interest, the proposed intervenor’s concern in the outcome of the action must surpass “the common interest of all citizens in procuring obedience to the law.” *Markham*, 136 A.3d at 140. An interest is direct if the matter will cause

harm to the party's interest, and the concern is immediate "if that causal connection is not remote or speculative." *Id.*

We conclude that the Voters of Commonwealth and individual Republican Voters fail to meet the "substantial, direct, and immediate" test. Neither the individual Republican Voters, regardless of political interest, or Voters of Commonwealth have an interest that surpasses the interest of all qualified and registered voters in the Commonwealth. Based on the preliminary 2020 Census data, the Commonwealth will lose a seat in the U.S. House of Representatives and thus our current congressional district map must be redrawn. As counsel for Voters of Commonwealth stated, the current congressional district map is malapportioned across the state. *Every elector*, therefore, has an interest in redrawing a congressional district map that meets constitutional standards. Thus, the individual Republican Voters and Voters of Commonwealth do not have a substantial interest that surpasses the common interest of all citizens.<sup>16</sup>

The Republican Party, identified as non-profit organization, has no legally enforceable interest either. Based on our review, it appears that the Republican Party is complaining about what role it may play in the redistricting process, a role that is not protected by law. Redistricting, however, is fundamentally about protecting the one-person one-vote principle, that is, all votes have equal power as near as possible. *See Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711, 739 (Pa. 2012). The

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<sup>16</sup> We further disagree that Voters of Commonwealth are the "mirror image" of Petitioners because they will advocate for Republican candidates in 2022, whereas, Petitioners allege, they will advocate for Democratic candidates. Petitioners allege that the congressional districts in which they live are overpopulated as evidenced by the 2020 Census and, thus, their voting power is diluted. *See Voters of Commonwealth, Appl. for Leave to Intervene*, ¶¶ 10-21. Voters of Commonwealth do not speculate how their congressional districts may be affected by redistricting.

activities of the Republican Party, and how the Party allocates its resources, do not constitute a legally enforceable interest in how the congressional district map is determined and by whom. The case law cited by the Republican Party does not stand for the proposition that the asserted interests constitute legally enforceable interests sufficient to confer standing to intervene. The case law cited by the Secretary, rather, suggests otherwise and is more persuasive. *Cf. Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018) (recognizing that under the U.S. Supreme Court’s precedent, achieving a party majority in the legislature is a collective political interest, not an individual legal interest recognized by law); *see also Pennsylvania Voters Alliance v. Centre County*, 496 F. Supp. 3d 861, 868 (M.D. Pa. 2020) (recognizing that “‘statewide harm’ to a voter’s interest in ‘collective representation in the legislature’” or “in ‘influencing the legislature’s overall composition and policymaking’” is insufficient to support standing under Article III of the U.S. Constitution, U.S. CONST. art. III; “[t]o the extent that the latter interest is recognized, it is ‘embodied in [an individual’s] right to vote for [his or her] representative’”) (quoting *Gill*, 138 S. Ct. at 1931); *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002) (recognizing that Democratic committee lacked standing to challenge reapportionment plan because it was not an entity authorized to exercise the right to vote), *abrogated on other grounds by League of Women Voters*, 178 A.3d 737.

Moreover, we conclude that the Republican Party’s, individual Republican Voters,’ and Voters of Commonwealth’s claimed interests are speculative and not immediate. The U.S. Census Bureau has released the redistricting data to the states, with the final redistricting data toolkit to be delivered by September 30, 2021. *See* <https://www.census.gov/programs-surveys/decennial-census/decade/2020/2020-census-results.html> (last visited August 30, 2021).

Therefore, our General Assembly can begin the process of moving forward with a new congressional district plan based on the Census data received. There is nothing preventing the Voters of Commonwealth, the individual Republican Voters, and the Republican Party from exercising their First Amendment and associational rights to make their positions known to their respective legislators.

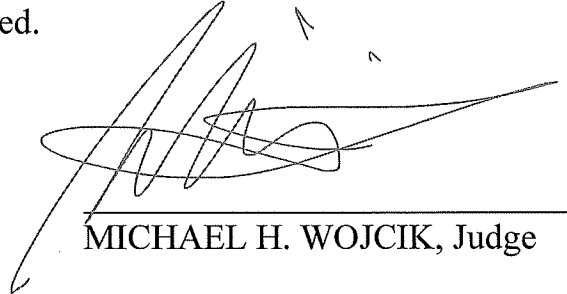
Because we conclude that the Republican Party, the individual Republican Voters, and Voters of Commonwealth have failed to show that they have legally enforceable interests in these proceedings, we deny their applications for leave to intervene.

### **III. Conclusion**

The General Assembly and the Governor are vested with authority to draw a new congressional district map. Pennsylvania law, however, does not provide a date by which they must act. The relief that Petitioners seek, the setting of a deadline by which the political branches must act, or taking control of the redistricting process, potentially infringes upon that authority. Accordingly, Legislators have shown a legally enforceable interest entitling them to intervene in this matter. *Markham; Allegheny Reproductive Health Center*; Pa. R.C.P. No. 2327(4).

Conversely, the Republican Party and Voters of Commonwealth have failed to demonstrate that they could be joined as original parties to the action or that they have a legally enforceable interest that would entitle them to intervene in this matter. Pa. R.C.P. No. 2327(3), (4).

Accordingly, the application for leave to intervene filed by Legislators is granted, and the applications for leave to intervene filed by the Republican Party and Voters of Commonwealth are denied.



MICHAEL H. WOJCIK, Judge

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. :

No. 132 M.D. 2021

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 :

**ORDER**

NOW 2<sup>nd</sup> day of September, 2021, upon consideration of the Applications for Leave to Intervene filed on behalf of (1) Speaker of the Pennsylvania House of Representatives Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff, President Pro Tempore of the Pennsylvania Senate Jake Corman, and Majority Leader of the Pennsylvania Senate Kim Ward (collectively, Legislators); (2) the Republican Party of Pennsylvania and Individual Republican Voters (collectively, Republican Party); and (3) Voters of the

Commonwealth of Pennsylvania (Voters of Commonwealth), and after hearing and argument on the issue, it is hereby ordered as follows.

Legislators' Application for Leave to Intervene is **GRANTED**. The Prothonotary shall accept for filing Legislators' Preliminary Objections to the Petition for Review, attached to Legislators' June 1, 2021 Application for Leave to Intervene.

Respondents<sup>1</sup> shall file and serve their brief in support of their preliminary objections (4 copies) within 14 days of the exit date of this order.

Legislators shall file and serve their brief in support of their preliminary objections (4 copies) within 14 days of the exit date of this order. Petitioners shall file and serve their brief in opposition to Legislators' preliminary objections within 14 days of service of Legislators' brief. Upon completion of the briefing schedule, the Prothonotary shall list the preliminary objections on the appropriate argument list.

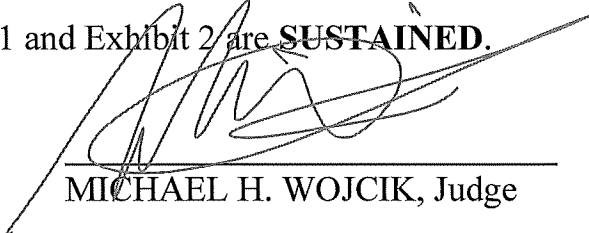
The Applications for Leave to Intervene filed by the Republican Party and the Voters of the Commonwealth are **DENIED**. The Republican Party's Application for Extraordinary Relief, attached to its Application for Leave to Intervene, is **DISMISSED AS MOOT**.

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<sup>1</sup> Although Respondents filed preliminary objections, it appears that they have not filed their brief in support thereof. Petitioners, however, filed their brief in opposition to Respondents' preliminary objections on August 2, 2021.



Voters of the Commonwealth Exhibits 1 and 2 are admitted to the record. Petitioners' and Respondents' objections to the legal conclusions in the Voters of the Commonwealth's Exhibit 1 and Exhibit 2 are **SUSTAINED**.



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MICHAEL H. WOJCIK, Judge

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

**Service by PACFile eService as follows:**

All counsel of record

Date: December 27, 2021

/s/ Anthony R. Holtzman  
Anthony R. Holtzman

# **Exhibit B**



**PER CURIAM**

**ORDER**

AND NOW, this 20th day of December, 2021, in consideration of the petitions for review filed in the above-consolidated actions, which are addressed to this Court's original jurisdiction, and consistent with the process established in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), it is hereby ORDERED:

1. Any applications to intervene, *see* Pa. R.A.P. 1531(b), shall be filed by December 31, 2021. Answers thereto shall be due within four (4) days of the date the application to intervene is filed.

2. Any party to this proceeding who wishes to submit to the Court for its consideration a proposed 17-district congressional reapportionment plan consistent with the results of the 2020 Census shall file the proposed plan by January 28, 2022.

3. If the General Assembly and the Governor fail to enact a congressional reapportionment plan by January 30, 2022, the Court will select a plan from those plans timely filed by the parties.

4. In the event the Court must select a congressional reapportionment plan, the Court will hold a final hearing beginning on January 31, 2022, to receive evidence and consider all timely filed proposed plans. The Court will also consider revisions to the 2022 election schedule/calendar as part of the hearing. The hearing will begin at 9:30 a.m. in Courtroom 3001 of the Pennsylvania Judicial Center, Harrisburg, PA. It shall be the responsibility of Petitioners to secure the services of a court reporter(s) throughout the duration of the hearing.

5. Consistent with the authority granted to the General Assembly under the Elections Clause of the United States Constitution, art. I, § 4, cl. 1, Petitioners are hereby directed to serve immediately a copy of this Order on the Pennsylvania Senate Majority and Democratic Leaders and on the Pennsylvania House of Representatives Majority and Democratic Leaders and file proof of service with this Court.

# **Exhibit C**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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No. 132 MD 2021

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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 Bachunis; Tom DeWall; Stephanie McNulty; and Janet Temin,

Petitioners,

vs.

Veronica Degraffenreid, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

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**MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE BY 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**

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*Counsel for Proposed-Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives*

Bryan Cutler, Speaker of the Pennsylvania House of Representatives (“Speaker Cutler”); Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (“Leader Benninghoff” and, together with Speaker Cutler, the “House Leaders”); Jake Corman, President *pro tempore* of the Pennsylvania Senate (“President Corman”); Kim Ward, Majority Leader of the Pennsylvania Senate (“Leader Ward” and, together with President Corman, the “Senate Leaders” and, together with the House Leaders, the “Proposed Intervenors”) hereby file this Memorandum of Law supporting their Application for Leave to Intervene in the above-captioned matter filed by Carol Ann Carter, et al. (“Petitioners”).

The Proposed Intervenors satisfy the requirements for intervention under Pa.R.C.P. 2327 and seek to protect their exclusive authority, as legislators in the Pennsylvania General Assembly (the “General Assembly”) and as the leaders of the General Assembly as an institution, under Article I, Section 4 of the United States Constitution to prescribe the “Times, Places, and Manner” of congressional elections, and under the Pennsylvania Constitution to legislate and appropriate for elections in Pennsylvania, which Petitioners’ requested relief would usurp.

In support thereof, the Proposed Intervenors respectfully represent as follows:

## **I. BACKGROUND**

1. The United States and Pennsylvania Constitutions vest the General Assembly with the authority to redistrict this Commonwealth’s congressional

districts. Specifically, Article I, Section 4 of the United States Constitution (the “Elections Clause”) provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof...” Pursuant to the Elections Clause, as a matter of federal law, “redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking.” *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 808 (2015). The Commonwealth’s legislative power is vested in the General Assembly. PA. CONST. ART. II, § 1.

2. As Petitioners concede (Pet. at ¶ 6), congressional districting plans are legislative enactments of the General Assembly, passed like any other legislation. The Pennsylvania Supreme Court has confirmed that the “primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature.” *League of Women Voters v. Com.*, 178 A.3d 737, 821–22 (Pa. 2018), citing *Butcher v. Bloom*, 216 A.2d 457, 458 (Pa. 1966) (identifying the General Assembly as “the organ of government with the primary responsibility for the task of apportionment”) and *Grove v. Emison*, 507 U.S. 25, 34 (1993) (“the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts”).

3. By statute, the Secretary of Commerce, on behalf of the United States Census Bureau, must deliver to the President the apportionment figures from the

decennial census by December 31 of the year in which the Census is taken, and must deliver redistricting data (known as P.L. 94-171 data)<sup>1</sup> to states by April 1 of the year after the year in which the Census is taken. 13 U.S.C. § 141. Apportionment data is used to allocate House of Representatives seats to the States, and redistricting data is used by state legislatures or other redistricting authorities to draw representational districts.

4. This year’s Census results, however, have been and continue to be delayed. The apportionment results were delivered on April 26, 2021, and the Census Bureau has announced an intention to deliver “a legacy format summary redistricting data file to all states by mid-to-late August 2021.” Census Bureau, Press Release No. CB21-RTQ.09, Mar. 15, 2021, at <https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html>. This latter data file is a necessary part of the redistricting process, used by redistricting authorities to construct electoral districts of approximately equal population, as the Constitution requires.

5. Unlike in some states, there is no express deadline set forth in Pennsylvania’s Constitution or statutes by which the Commonwealth must enact a

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<sup>1</sup> The redistricting data consists of population counts for every census block in each state as of the decennial census date (April 1, 2020). Apportionment numbers are simply statewide population counts and, unlike the granular redistricting data, offer no insight about how the population is distributed within the state.

new congressional district plan following the publication of a new census. While Petitioners allude to the Census delay's potential impact on the 2022 primary calendar, in past decennial redistricting cycles, districting plans were passed at the end of the year that followed when decennial census data were published. For example, the 2011 congressional plan was enacted on December 22, 2011, *League of Women Voters*, 178 A.3d at 743, and the 2001 congressional plan was enacted on January 7, 2002. *See Erfer v. Com.*, 794 A.2d 325, 348 (Pa. 2002), overruled on other grounds by *League of Women Voters*. Hence, Census delays do not necessarily impede the General Assembly's legal authority to enact a districting plan.

6. Based on pure speculation that the General Assembly and Governor might prove unable to enact a congressional districting plan in the future, Petitioners filed their Petition for Review ("Petition") on April 26, 2021, asking this Court to declare the current plan unconstitutional, to enjoin the Respondents from conducting elections under that plan, and to craft a new congressional plan for the Commonwealth if "the political branches fail to enact a plan by a date certain set by this Court." (Pet. at 21) (Prayer for Relief). Oddly, Petitioners have sought this extraordinary relief months before availability of the redistricting data that anyone—the "political branches," this Court, or the Petitioners themselves—will need to develop a congressional districting plan.

7. Speaker Cutler is a duly elected, qualified, and serving Member of the House of Representatives from the 100th House District, and is also the duly elected Speaker of the House of Representatives and in such capacity is the presiding officer of that body.

8. Leader Benninghoff is a duly elected, qualified, and serving Member of the House of Representatives from the 171st House District, and is also the duly elected Majority Leader of the House of Representatives and, in such capacity, leads the Republican Caucus of the House of Representatives (the “House Republican Caucus”). The House Republican Caucus consists of 111 out of 203 Members of the House. As of about June 7, 2021, the House Republican Caucus will consist of 113 Members of the House, given recent results of special elections.

9. President Corman is a duly elected, qualified, and serving Member of the Senate from the 34th Senatorial District, and is also the duly elected President *pro tempore* of the Senate. In such capacity, he is the highest-ranking officer of the Senate and presides over that body in the absence of the Lieutenant Governor. *See* Pa. Const. art. II, § 9.

10. Leader Ward is a duly elected, qualified, and serving Member of the Senate from the 39th Senatorial District, and is also the duly elected Majority Leader of the Senate and, in such capacity, leads the Republican Caucus of the Senate (the “Senate Republican Caucus”). The Senate Republican Caucus currently consists of

28 out of 48 Members of the Senate (with two seats being vacant): 27 Republican Senators and 1 independent Senator who caucuses with the Republicans. As of June 9, 2021, the Senate Republican Caucus will consist of 29 out of 50 Members of the Senate: 28 Republican Senators and 1 independent Senator who caucuses with the Republicans.

11. As **Exhibit “A”** to this Petition, the Proposed Intervenors respectfully submit Preliminary Objections that they seek to file in this case.

## **II. THE PROPOSED INTERVENORS HAVE A RIGHT TO INTERVENE**

12. Under Pennsylvania law, a party has an absolute right to intervene in an action if it falls within one of the categories enumerated in Pa.R.C.P. 2327. *See id.*; Pa.R.C.P. 2329; *see also Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. 1999).

13. The grant of intervention is mandatory where the intervenor meets any one of the four criteria set forth in Pa.R.C.P. 2327. *Larock*, 740 A.2d at 313 (“if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary . . .”) (internal citations omitted).

14. Here, two independent bases exist to support the Proposed Intervenors’ right to intervene. First, Pa.R.C.P. 2327(3) provides that a party must be permitted to intervene if it “could have joined as an original party in the action or could have been joined therein.” *Id.* Second, Pa.R.C.P. 2327(4) provides that a party must be

permitted to intervene if “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.” *Id.*

15. Pennsylvania courts have established “that the inquiry to determine whether a party has standing to initiate litigation is different than the inquiry to determine whether a party can intervene in existing litigation.” *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Commw. Ct. 2019). Indeed, “[s]tanding to file a formal complaint requires the moving party to have a direct, immediate, and substantial interest in the subject matter of the controversy. . . . Conversely, a person seeking to intervene in a proceeding need have only an ‘interest of such nature that participation . . . may be in the public interest.’” *Id.* at 1288-1289 (citation omitted).

16. Moreover, the Proposed Intervenors are the presiding officers of both Houses of the General Assembly and intervene to protect the official, individual, and/or institutional interests described in this memorandum. As this Court held just last year, “there is a difference between personal standing and legislative standing,” and a legislator “may be able to initiate litigation in his legislative capacity, where the legislator can demonstrate an injury to his ability ‘to act as a legislator.’” *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep’t of Human Servs.*, 225 A.3d 902, 909 (Pa. Commw. Ct. 2020). These principles of legislative standing are relevant to whether a legally enforceable interest exists. *Id.* at 902.



17. Because the Proposed Intervenors have legally enforceable interests at play and could have been original parties to this case, they must be permitted to intervene as of right under both Pa.R.C.P. 2327 (3) and (4).

A. **Determination of This Action Will Affect the Proposed Intervenors' Enforceable Interest in Vindicating and Protecting Their Exclusive Interest and Right to Legislate Redistricting and Election laws, which Petitioners Seek to Divest.**

18. The Proposed Intervenors unquestionably have an enforceable interest in defending the constitutional authority of Pennsylvania's legislative actors to prescribe the "Times, Places, and Manner of holding elections for Senators and Representatives," U.S. CONST. ART. I, § 4, which includes the authority to enact congressional districting plans. *League of Women Voters*, 178 A.3d at 821–22. This action seeks to dilute, abrogate, impair, or abolish that constitutional prerogative. Petitioners ask the Court to take control over the congressional redistricting process before Proposed Intervenors even have the necessary tools to complete that process or else to impose unreasonable, restrictive deadlines on Proposed Intervenors' constitutional prerogative without any basis in law for doing so.

19. This enforceable interest satisfies Pa.R.C.P. 2327 and, accordingly, Proposed Intervenors have the right to intervene. Pennsylvania law affirms the exclusive authority of Pennsylvania's legislators to engage in congressional redistricting, and that authority lies at the heart of this case.

20. The Proposed Intervenors have an enforceable interest warranting intervention, and can “initiate litigation in [their] legislative capacity, where the legislator can demonstrate an injury to his ability ‘to act as a legislator.’” *Allegheny Reprod. Health Ctr.*, 225 A.3d at 909, citing *Sunoco Pipeline L.P.*, 217 A.3d at 1288.

21. In *Fumo v. City of Philadelphia*, the Supreme Court of Pennsylvania found that a city’s issuance of a license for the construction of a casino on a Pennsylvania river invaded the General Assembly’s exclusive authority to regulate submerged lands. 972 A.2d 487, 501–03 (Pa. 2009). In relevant part, the *Fumo* court held that six state legislators had legislative standing to “seek redress for an alleged usurpation of their authority as members of the General Assembly,” to “vindicate a power that only the General Assembly has,” and to “ask that this Court uphold their right as legislators to cast a vote or otherwise make a decision on licensing the use of the Commonwealth’s submerged lands.” *Id.* at 502.

22. This petition presents a stronger case for intervention. Regulating the times, places, and manner of congressional elections in Pennsylvania—a task that includes redistricting legislation—is an exclusive legislative function, not only under Pennsylvania law, but also under the U.S. Constitution. *See, e.g.*, U.S. CONST. ART. I, § 4; PA. CONST. ART. II, § 1; *League of Women Voters*, 178 A.3d at 821–22; *Butcher*, 216 A.2d at 458; *Arizona State Legislature*, 576 U.S. at 808; *Grove*, 507 U.S. at 34.

23. The power to redistrict is part of the General Assembly’s overall power to regulate elections. More than a century ago, the Supreme Court of Pennsylvania acknowledged that “[t]he power to regulate elections is a legislative one, and has been exercised by the general assembly since the foundation of the government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914), citing *Patterson v. Barlow*, 60 Pa. 54, 75 (1869). The primacy of the General Assembly in the area of elections is manifest. *See In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014) (“[s]ubject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania”). For that reason, “the judiciary should act with restraint, in the election arena, subordinate to express statutory directives.” *Id.*

24. Indeed, twice in the past year the Pennsylvania Supreme Court has granted legislative leadership leave to intervene in litigation concerning election statutes. In *Crossey v. Boockvar*, 239 A.3d 14, 15 n.4 (Pa. 2020) (per curiam), the Pennsylvania Supreme Court granted leave to intervene to the House and Senate presiding officers in a case challenging the constitutionality of an election bill, Act 77. Likewise, in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 354 (Pa. 2020), the Pennsylvania Supreme Court granted leave to intervene to the Senate’s then-President *pro tempore* and its then-Majority Leader in another action seeking relief directed to Act 77.

25. Petitioners seek, in pertinent part, a declaratory judgment finding the Commonwealth’s current congressional district plan unconstitutional, an injunction prohibiting Respondents from “implementing, enforcing, or giving any effect to” that plan, and an order to “implement a new congressional district plan...if the political branches fail to enact a plan by a date certain set by this Court.” (Pet. at 21) (Prayer for Relief). These requests directly seek to divest the Proposed Intervenors’ exclusive authority to determine the times, places, and manner of holding congressional elections under U.S. Const. Art. I, § 4, and to transfer that authority to this Court. The Commonwealth’s legislative actors have had no opportunity to engage in redistricting, the Census figures necessary to do so do not exist and will not exist for some time, and there is no deadline in law for redistricting to occur. Nor is there basis in law for an injunction against the prior redistricting plan, when it is not yet unconstitutional and where Pennsylvania is entitled to 18 seats in the current Congress, not the 17 seats it will be entitled to beginning in January 2023. In these circumstances, Petitioners’ demand is nothing short of a demand to bypass the General Assembly entirely and transfer complete redistricting authority to the courts.

26. The circumstances here are not one “akin to a general grievance about the correctness of governmental conduct...” *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016). The Proposed Intervenors do not seek “to offer evidence and argument with respect to the intent of the General Assembly in enacting [the law] [or] to the

procedure by which [it] was adopted.” *Robinson Twp. v. Com.*, 84 A.3d 1054, 1055 (2014). Rather, Proposed Intervenors propose to intervene in this action to defend their unique, legislative interests and their vested, exclusive authority to conduct congressional redistricting in the Commonwealth. Indeed, the primary law at issue—the forthcoming redistricting plan—has yet to be enacted. The question in this case is not what the General Assembly did in the past, but whether Pennsylvania’s legislators will maintain that authority in the future and whether the courts will place onerous, extra-legal conditions on that authority.

27. Thus, determination of this action necessarily and directly affects the Proposed Intervenors’ legally enforceable interests, and Proposed Intervenors therefore have a right to intervene. *Fumo*, 972 A.2d at 502 (“the claim reflects the state legislators’ interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, falls within the realm of the type of claim that legislators, qua legislators, have standing to pursue.”).

**B. The Proposed Intervenors Could Have Joined as an Original Party in the Action or Could Have Been Joined Herein.**

28. Pennsylvania courts recognize that parties with special interests implicated by an action could have been joined as original parties. *See, e.g., Appeal of Denny Bldg. Corp.*, 127 A.2d 724, 729 (1956) (finding intervention appropriate when parties “have an obvious special interest apart from that of the general public which would certainly have justified their joining as original parties in the action”);

*Harrington v. Philadelphia City Emps. Fed. Credit Union*, 364 A.2d 435, 441 (Pa. Super. 1976) (recognizing that candidates “could have been an original party or could have been joined in the action . . . [because they] had interests which would be drastically affected by the outcome of the equity action”).

29. Further, 42 Pa.C.S. § 7540(a) provides that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”

30. The Proposed Intervenors, as the parties to whom the constitutional authority to redistrict has been assigned, have a special interest in this action. The action seeks to divest—or, at a minimum, significantly impair—the Proposed Intervenors’ authority to conduct congressional redistricting for the Commonwealth for the 2022 elections and beyond.

31. Moreover, the Proposed Intervenors could have joined as original parties in this action. In fact, it is not uncommon for the presiding officers of the House and Senate—like Speaker Cutler and President Corman—to be named as original parties in cases challenging the constitutionality of, and seeking to alter, redistricting plans enacted by the General Assembly. For example, in both *League of Women Voters* and *Erfer*, the then-presiding officers of the General Assembly were named as original parties, including former Speaker Mike Turzai and former

President *pro tempore* Joseph Scarnati III in *League of Women Voters*, and former Speaker Matthew Ryan and then-Lieutenant Governor and President of the Senate, Robert Jubelirer in *Erfer*. Further, in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), an action brought to seek judicial intervention to draft a congressional districting plan when the General Assembly and Governor reached an impasse and failed to pass such a plan, the petitioners were eight Members of the Senate and thus original parties. *Id.* at 205.<sup>2</sup>

32. The Proposed Intervenors could have joined as original parties in this action, and, as these cases show, typically at least the General Assembly's presiding officers are joined. The instant action seeks a declaratory judgment and injunctive relief imposing improper restraints upon, and usurping, the exclusive domain of the General Assembly. If granted, the relief sought will directly impact the Proposed Intervenors' authority and interest as legislators and the official, institutional, and other interests they are further authorized to represent. Therefore, the Proposed Intervenors are entitled to intervene here as a matter of right.

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<sup>2</sup> Notably, *Mellow* was not filed until January 28, 1992, which was the first day on which nominating petitions for the U.S. House could begin circulating that year. 607 A.2d at 205.

**C. There Is No Reason To Refuse the Petition to Intervene.**

33. The Proposed Intervenors have shown entitlement to intervention in this case. Given this showing, Pa.R.C.P. 2329 provides only three reasons that could justify refusal of intervention. None applies.

34. First, Pa.R.C.P. 2329(1) permits refusal of intervention if “the claim or defense of the petitioner is in subordination to and in recognition of the propriety of the action,” which has been interpreted to mean that an “intervenor cannot question supported findings of fact made prior to the intervention” and that “an intervenor must take the suit as he finds it.” *Com. ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867, 870 (Pa. 1950). There are no subordination concerns here, given the early stage of this litigation.

35. Second, Pa.R.C.P. 2329(2) permits a court to refuse an application for intervention if “the interest of the petitioner is already adequately represented.” Here, Proposed Intervenors seek to vindicate rights and interests held by themselves and their members in their capacity as legislators. Their interests are not already adequately represented by any Respondent in the case, as the originally named Respondents are simply responsible for election administration and do not possess the interest in drafting and passing congressional districting plans that Petitioners’ Petition seeks to impair or abrogate. *See Shapp*, 391 A.2d at 608 (holding that “[s]urely, the defense of legislation adopted by the General Assembly must be within



the authority of its elected leaders”). After all, “an executive branch agency is simply not in a position to represent Proposed Intervenors’ interest in the exercise of legislative power under Article III of the Pennsylvania Constitution.” *Allegheny Reprod. Health Ctr.*, 225 A.3d at 913. Petitioners practically concede this point in alleging repeatedly that the divided government—where the legislative chambers are controlled by Republicans and the Governor is a Democrat—is categorically incapable of compromise. Petitioners cannot, after making this allegation, claim the Democratic Secretary of State or the Director of Elections represents Proposed Intervenors’ interests.

36. Finally, Pa.R.C.P. 2329(3) permits refusal of intervention where “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.” No such concern exists here. The Proposed Intervenors promptly filed this application for leave to intervene at the earliest stages of the litigation, before any substantive proceedings took place. The Proposed Intervenors’ participation in this case will simplify this action and is necessary as they will bring before the Court arguments and law that otherwise would not be present.

37. In summary, there is no basis allowing for refusal of the Proposed Intervenors’ right to intervene into this case.

**WHEREFORE**, for the foregoing reasons, the Proposed Intervenors respectfully request that the Court grant their Application for Leave to Intervene and enter the proposed order attached to it as **Exhibit “B,”** thereby granting the Application.

Dated: June 1, 2021

Respectfully submitted,

/s/ Anthony R. Holtzman

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*\* Pro Hac Vice application forthcoming*

*Counsel for Proposed-Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives*

## CERTIFICATION OF COMPLIANCE

I hereby 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.

/s/ Anthony R. Holtzman  
Anthony R. Holtzman

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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Date: June 1, 2021

/s/ Anthony R. Holtzman  
Anthony R. Holtzman

# **Exhibit D**

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. :

No. 132 M.D. 2021  
Held: August 24, 2021

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 :

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE WOJCIK

Filed: September 2, 2021

Petitioners<sup>1</sup> filed a petition for review (Petition) addressed to this  
Court's original jurisdiction. The Petition seeks, among other things, a

declaration

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<sup>1</sup> Petitioners are Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael

that the Commonwealth of Pennsylvania’s 2018 congressional district map is unconstitutional and may not be used for the 2022 election year. Currently, the Court considers three applications for leave to intervene. Speaker of the Pennsylvania House of Representatives Bryan Cutler; Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff; President Pro Tempore of the Pennsylvania Senate Jake Corman; and Majority Leader of the Pennsylvania Senate Kim Ward (collectively, Legislators) filed the first application for leave to intervene. The Republican Party of Pennsylvania and Individual Republican Voters<sup>2</sup> (collectively, Republican Party) filed the second application for leave to intervene, and Voters of the Commonwealth of Pennsylvania (Voters of Commonwealth)<sup>3</sup> filed the third

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Guttman, Maya Fonkeu; Brady Hill; Mary Ellen Balchunis, Tom DeWall, Stephanie McNulty, and Janet Temin. Each named petitioner is a United States citizen and registered voter in Pennsylvania and intends to advocate and vote for Democratic candidates. *Id.*

<sup>2</sup> The application for leave to intervene identifies the following individuals as proposed intervenors: Patricia K. Poprik, David Torres, Billy Lanzilotti, Nancy Becker, Michael D. Straw, James Depp, Joseph P. Vichot, Justin Behrens, Thomas Whitehead, Lee Becker, Louis Capozzi, Kirk Radanovic, Paul Nyman, James McGuire, Jr., Kristine L. Eng, Donna Cosmello, James Foreman, David Ball, James Vasilko, Lynne Ryan, Cynthia Kirk, Daryl Metcalfe, Luke Negron, Sue Ann Means, Reverend Todd Johnson, Michael Harvey, and Louisa Gaughen. *See* Appl. for Leave to Intervene by Proposed Intervenors the Republican Party of Pennsylvania and Individual Republican Voters, ¶¶ 2-28. The application provides each proposed intervenor’s congressional district number; any position within the Republican Party that he or she may hold or has held in the past; where applicable, an indication of whether the individual is considering running for public office; and the individual’s participation in the election process whether it be volunteering/advocating for a Republican candidate or intent to vote for Republican candidates.

<sup>3</sup> “Voters of the Commonwealth of Pennsylvania” is not an organization but rather is used to generally refer to the named proposed intervenors in the application. The application is brought on behalf of Haroon Bashir, Vallerie Biancaniello, Debra A. Biro, Tegwyn Hughes, James D. Bee, Richard L. Lawson, David Dillon, Rico Timothy Elmore, Barbara Steinour, James Curtis Jarrett, Jeffrey Wenk, and Donald Beishl, Jr. *See* Appl. for Leave to Intervene by Voters of the Commonwealth of Pennsylvania, ¶¶ 10-21. The application identifies the voter by name, general area of residency and congressional district number, as well as the individual’s intention in voting in the 2022 elections. *Id.* Each allegation also indicates that the proposed intervenor voted for his/her General Assembly representatives with the expectation that the representatives would have the authority to enact a new congressional district map based on the 2020 Census data.



application. All proposed intervenors seek to be aligned with Respondents Veronica Degraffenreid, Acting Secretary of the Commonwealth of Pennsylvania, and Jessica Mathis, Director for the Pennsylvania Bureau of Election Services and Notaries (collectively, Secretary). Petitioners oppose all three applications, while the Secretary opposes only the applications of the Republican Party and Voters of Commonwealth. After hearing held August 24, 2021 and argument on the issue, we grant Legislators' application but deny the applications of the Republican Party and Voters of Commonwealth based on our conclusion that they lack a legally enforceable interest in the Petition and that they could not be named as original parties to the action.

#### **I. Petition for Review**

The Petition provides details regarding the results of the 2020 Census, the dates by which the United States (U.S.) Secretary of Commerce must provide the President of the United States and the states with the apportionment data, and the effect of the Covid-19 pandemic on the delivery of that data. The Petition further explains that, while the Commonwealth's population increased from the last decennial census, the 2020 Census shows that the Commonwealth will lose a representative seat in the U.S. House of Representatives. Starting with the upcoming 2022 elections, the Commonwealth will have 17 representatives in the House of Representatives, one fewer than the current 18 representatives. The Commonwealth's congressional district map must be redrawn to accommodate for the loss of a seat in the House of Representatives.

Petitioners claim that the Commonwealth's current congressional districts are malapportioned due to shifts in population within the Commonwealth.

They believe that the congressional districts in which they live are overpopulated, while other districts are underpopulated, and that, consequently, their votes for members of the U.S. House of Representatives are diluted.

The Petition observes that Pennsylvania law does not set a deadline by which a new congressional district map must be put in place prior to the first congressional election following a census. According to Petitioners, it is in the best interest of voters, candidates, and the Commonwealth's entire electoral apparatus to have a new, final congressional district map in place prior to February 15, 2022, the date on which candidates may begin collecting signatures for placement on the primary election ballot.

The Petition informs that the Commonwealth's current congressional district map was drawn by the Pennsylvania Supreme Court in *League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083 (Pa. 2018), after the Republican-controlled General Assembly and Democratic Governor failed to agree upon a new congressional district map following the Supreme Court's invalidation of the Commonwealth's 2011 congressional district map. The current political climate has not changed since 2018, as Republican representatives maintain the majority in both houses of the General Assembly and Governor Tom Wolf is a Democrat. For these reasons, Petitioners contend that it is unlikely that the "political branches" of the government will agree upon a new congressional district map.

Petitioners allege that the current congressional district map violates: (1) article I, section 5 of the Pennsylvania Constitution (free and equal elections

clause);<sup>4</sup> (2) 2 U.S.C. §2c (relating to districting for House of Representatives);<sup>5</sup> (3) article I, section 20 of the Pennsylvania Constitution (relating to right to petition);<sup>6</sup> and (4) Article I, Section 2 of the U.S. Constitution (relating to qualifications for member of the House of Representatives).<sup>7</sup> Petitioners seek a declaration that the

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<sup>4</sup> Article I, section 5 of the Pennsylvania Constitution, PA. CONST. art. I, § 5, states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”

<sup>5</sup> 2 U.S.C. §2c provides:

In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

<sup>6</sup> Article I, section 20 of the Pennsylvania Constitution, PA. CONST. art. I, § 20, provides: “The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.”

<sup>7</sup> Article I, Section 2 of the U.S. Constitution, U.S. CONST. art. I, § 2, provides:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and

Commonwealth's current congressional district map violates the above constitutional provisions; an injunction enjoining the Secretary, her agents, officers, employees, and successors from implementing, enforcing, or giving effect to the 2018 congressional district map; establishment of a schedule that will enable the Court to adopt and implement a new congressional district map by a date certain should the political branches fail to enact such a map by that time; implementation of a new congressional district map that complies with the U.S. and Pennsylvania Constitutions in the event that the political branches do not enact a new map by a date certain; an award of attorneys' fees, costs, and disbursements; and an award of any other relief the Court deems just and proper.

## **II. Applications for Leave to Intervene**

### **A. Standards for Intervention**

Although this matter was filed in the Court's original jurisdiction, the right to intervene is governed by Pennsylvania Rules of Civil Procedure Nos. 2326-

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within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

2350. Rule No. 2327, titled “Who May Intervene,” provides in relevant part and as asserted by the proposed intervenors:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if

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(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. No. 2327.<sup>8</sup>

Rule No. 2329, titled “Action of Court on Petition,” declares:

Upon the filing of the petition and after hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if

(1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or

(2) the interest of the petitioner is already adequately represented; or

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<sup>8</sup> Pursuant to Pennsylvania Rule of Civil Procedure No. 2328(a), the proposed intervenors attached to their respective applications for leave to intervene copies of the pleading that they would file if permitted to intervene. Each group of proposed intervenors would file preliminary objections to the Petition. Pa. R.C.P. No. 2328(a).

(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.C.P. No. 2329.

The determination of whether a proposed intervenor has a “legally enforceable interest” calls for “a careful exercise of discretion and consideration of all the circumstances involved,” *Realen Valley Forge Greenes Associates v. Upper Merion Township Zoning Hearing Board*, 941 A.2d 739, 744 (Pa. Cmwlth. 2008) (citations omitted), because the exact boundaries of the “legally enforceable interest” limitation in Rule No. 2327(4) are not clear. *Id.* Nevertheless, an applicant for intervention must have some right, either legal or equitable, that will be affected by the proceedings. *See generally Keener v. Zoning Hearing Board of Millcreek Township*, 714 A.2d 1120, 1122 (Pa. Cmwlth. 1998).

At this point, it is important to note that although we summarize the applications for leave to intervene, the Court has considered the entirety of the applications and supporting briefs, the case law cited therein, the replies to Petitioners’ and the Secretary’s opposition to the intervention applications, and the arguments, testimony and exhibits presented at the August 24, 2021 hearing in our determination of whether to grant intervention in this case.

## **B. Legislators’ Application**

Legislators’ application for leave to intervene asserts that the named legislators are the highest-ranking members of their respective chambers, that the Republican Caucuses of their chambers have authorized them to seek intervention, and that the U.S. Constitution empowers the General Assembly to establish the time, place, and manner of elections to Congress, which includes the authority to redistrict.

See U.S. CONST. art. I, § 4 (stating that the time, place and manner of elections are left to the states' legislatures). Legislators seek to intervene pursuant to Pa. R.C.P. No. 2327(3) and (4) to vindicate their authority to redistrict the Commonwealth.

Legislators' memorandum in support of their application expands upon the reasons why they should be permitted to intervene. They first claim that they could have been named as original parties to the action or could have been joined therein because they have a special interest in the action.<sup>9</sup> That special interest is Petitioners' alleged desire to divest Legislators of their constitutional authority to conduct congressional redistricting. Legislators also claim that their participation is required by the Declaratory Judgments Act,<sup>10</sup> which mandates that all persons who have or claim any interest that would be affected by a declaration be made parties to the action, and that absent their participation, no declaration may prejudice their rights. 42 Pa. C.S. § 7540(a). Legislators also claim a legally enforceable interest in defending their constitutional authority to prescribe the time, place, and manner of holding elections, which includes the authority to enact congressional district maps. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 808 (2015) ("redistricting is a legislative function, to be performed in

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<sup>9</sup> Legislators claim that they could have been joined as original parties because it is not uncommon for the courts to allow legislators to intervene in actions challenging the constitutionality of, or seeking to alter, redistricting plans. We reject such a blanket assertion. The cases upon which Legislators rely involved legislator participation *after* a redistricting plan was implemented and later challenged.

We also reject any reliance on *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Cmwlth. 2019), as supporting the right to intervene based on a special interest. *Sunoco* addressed standing to *initiate* formal complaints before the Pennsylvania Public Utility Commission and did not directly involve the issue of intervention in formal complaint proceedings. Regardless, the Commission's regulations provide the standards upon which intervention may be granted. There is no statutory or regulatory law addressing intervention in cases such as the one currently before the Court.

<sup>10</sup> 42 Pa. C.S. §§ 7531-7541.

accordance with the State’s prescriptions for lawmaking . . .”). They claim that Petitioners asked the Court to take over this process even before the General Assembly has the necessary tools to redistrict and to impose unreasonable deadlines.

The law is well settled as to legislator standing when seeking to intervene. In *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016), legislators sought to intervene in an action challenging an executive order that authorized direct care workers to organize. This Court denied the legislators’ application for leave to intervene, which the Supreme Court affirmed. In doing so, the Supreme Court identified the requirements for legislator standing.

Standing exists only when the legislator’s direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, *see* [*Wilt v. Beal*, 363 A.2d 876 (Pa. Cmwlth. 1976)], or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator, *see* [*Fumo v. City of Philadelphia*, 972 A.2d 487 [Pa. 2009),] (finding standing due to alleged usurpation of legislators’ authority to vote on licensing).

Conversely, a legislator lacks standing

where he or she has an indirect and less substantial interest in conduct outside the legislative forum which is unrelated to the voting or approval process, and akin to a general grievance about the correctness of governmental conduct, resulting in the standing requirements being unsatisfied.



*Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 225 A.3d 902 (Pa. Cmwlth. 2020)<sup>11</sup> (quoting *Markham*, 136 A.3d at 145).

The Supreme Court has held that

members of the General Assembly have sufficient interest to participate in legal action in their official capacity and based upon their special status “where there [i]s a discernable and palpable infringement on their authority as legislators.” A legislator’s legal interest has been recognized “to protect [the] legislator’s right to vote on legislation” and “in actions alleging a diminution or deprivation of the legislator’s . . . power or authority.” But, a legislator has no legal interest “in actions seeking redress for a general grievance about the correctness of government conduct.”

*Robinson Township v. Commonwealth*, 84 A.3d 1054, 1054 (Pa. 2014) (alterations in original; citations omitted) (affirming Commonwealth Court order denying legislators intervention in action challenging constitutionality of amendments to the Oil and Gas Act<sup>12</sup>). The principles of legislator standing are therefore relevant to the issue of whether the putative intervenor has demonstrated the legally enforceable interest required of Pa. R.C.P. No. 2327(4).

We disagree with Petitioners’ claims that Legislators lack a legally enforceable interest in this matter because the Petition does not seek to deprive Legislators of their authority to redistrict the congressional district map and that

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<sup>11</sup> The opinion appearing at 225 A.3d 902 (Pa. Cmwlth. 2020), addresses legislator standing. Thereafter, on March 26, 2021, the Court issued an order sustaining the respondents’ preliminary objections and dismissing the petition for review. The petitioners filed an appeal to the Supreme Court, which remains pending. See *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services* (Pa. Cmwlth., No. 26 M.D. 2019, filed March 26, 2021), *appeal pending*, (Pa., No. 26 MAP 2021).

<sup>12</sup> 58 Pa. C.S. §§ 3201-3274.

Legislators are mischaracterizing the Petition as such. Among other things, the Petition seeks an order establishing a date certain by which the Court will take control of the redistricting process should the General Assembly and Governor fail to act. Pennsylvania law, however, does not establish a date by which a new congressional district map must be put in place. While Petitioners correctly cite *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), for the proposition that there is nothing in the law prohibiting the court from establishing a deadline for enactment of a new congressional map, it is noteworthy that the petitioners in *Mellow* were eight senators who sought nearly the same relief as that sought here, and several members of the state House of Representatives and Senate were permitted to intervene. When the Supreme Court exercised plenary jurisdiction in *Mellow* and appointed a judge of this Court as master to conduct hearings and report to the Supreme Court, Judge Craig directed that the parties, including intervenors, submit their proposed congressional district plans by a date certain.

At this juncture, it is not known how the redistricting process will proceed. But it seems clear that Legislators' ability to legislate would be impaired if the Court imposes a deadline on the General Assembly and the Governor to put in place a new congressional district map and takes control of the redistricting process. Likewise, Legislators would have a legally enforceable interest in the submission of a proposed plan for the Court's consideration if called upon to draw a new congressional district map, as in the *Mellow* case.

We therefore grant Legislators' application for leave to intervene. They have a legally enforceable interest because Pennsylvania law does not prescribe the date by which a new congressional district map must be put in place and because they, as members of the General Assembly, have the constitutional authority to

establish the time, place, and manner of elections, which includes the authority to redistrict. *Arizona State Legislature*. Any potential infringement of that right may diminish or deprive Legislators of their ability to act as legislators.

### **C. Republican Party’s Application and Voters of Commonwealth’s Application**

We next consider the applications for leave to intervene filed by the Republican Party and Voters of Commonwealth. Both applications claim that the Republican Party, including the individual Party Voters, and Voters of Commonwealth could have been named as original parties. We disagree. Clearly, the Republican Party, the individual Republican Voters, and Voters of Commonwealth could not be joined as petitioners because they oppose Petitioners’ requested relief. Similarly, they could not be joined as respondents because Petitioners’ claims do not affect their liabilities. *See* Pa. R.C.P. No. 2229(b) (“A [petitioner] may join as [respondents] persons against whom the [petitioner] asserts any right to relief . . . in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact *affecting the liabilities of all such persons* will arise in the action.”) (emphasis added).<sup>13</sup> This factor militates against granting the Republican Party’s and Voters of Commonwealth’s applications for leave to intervene.

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<sup>13</sup> The Republican Party notes that the Court has permitted intervention in other cases, specifically *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5 (Pa. 2018). There, the Supreme Court noted that a judge of this Court, acting as master, permitted certain Republican voters, who included announced or potential candidates for Congress and other active members of the Republican Party, to intervene. The Court did not state the basis upon which intervention was granted, and our review of this Court’s docket in *League of Women Voters* (Pa. Cmwlth., No. 261 M.D. 2017), indicates that the Court’s order did not set forth its reasons for granting intervention.

We now address whether the Voters of Commonwealth or the Republican Party has shown a legally enforceable interest. For its part, the Voters of Commonwealth claim that they seek to intervene to preserve the existing framework that the General Assembly and Governor have until the first day to circulate nomination petitions to implement a new congressional district map. They claim that they are “mirror images” of Petitioners because they intend to advocate on behalf of Republican candidates in 2022. Voters of Commonwealth suggest that if the Court grants Petitioners the relief requested, such relief would curtail the ability of the Republican-controlled General Assembly to represent their interests. This would diminish or nullify their votes and would take away local officials’ constitutional duty to redistrict the Commonwealth. Local officials are more familiar with their constituents than Supreme Court jurists.

Voters of Commonwealth suggest that they have a special interest that allows them to intervene, that being that this matter may be of public interest. They allege an inalienable right to express and present their concerns regarding drawing of the congressional district map, and if this Court imposes a date certain by which the political branches must act or takes over the redistricting process, the General Assembly will be divested of its authority to draw the new map.<sup>14</sup> A court drawing

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<sup>14</sup> The Court admitted Voters of Commonwealth Exhibit 1, which contains the Affidavits of Tegwyn Hughes, Debra A. Biro, James Curtis Jarrett, James D. Bee, and Jeffrey Wenk, subject to Petitioners’ and the Secretary’s objections to the legal conclusions stated within the affidavits. The Affidavits largely echo the averments in the application for leave to intervene and are uniform for the most part. The affiants attest to their residency, registration as qualified electors in the Commonwealth, regularity in voting, voting with the expectation that their representatives would engage in the redistricting process based on the 2020 Census and ability to contact their representatives, and their intention in contacting their representatives relating to the new congressional district map. Each affiant states that he/she has an interest in the contours of his/her congressional districts and an inalienable right to express to his/her representatives concerns regarding redistricting under the First Amendment, U.S. CONST. amend. I. Further, affiants state that the Secretary does not have authority regarding redistricting and therefore does not represent the affiants’ interest.

the congressional district map will turn a legislative process into a judicial one, according to Voters of Commonwealth. Finally, newly enacted redistricting maps have been subject to voter challenges.

As for a legally enforceable interest, the Republican Party argues that it has an interest in expanding its power within the Commonwealth government and that redistricting is fundamentally about political power. It maintains that it has a legally enforceable interest in (1) the allocation of its resources, (2) advocating for its interest and that of its members in areas that are bipartisan, (3) who draws the new congressional district map, that being the Republican-controlled General

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They conclude that they have a substantial and particularized interest in preserving the existing framework that the General Assembly and the Governor have until the first day to circulate nomination petitions to implement a new district plan. Petitioners' requested relief would deprive them of their ability to contact their legislators regarding redistricting, thus nullifying their vote for a representative. Further, Petitioners' request that the Court invalidate the current congressional map would deprive affiants of their right to representation should a special election be needed in their district.

The Court also permitted Voters of Commonwealth to provide an additional exhibit after the proceedings, which Voters filed on August 26, 2021. Voters filed a supplemental affidavit in support of the Voters' application for leave to intervene by Vallerie Biancaniello. The affidavit is the same as those presented in Voters of Commonwealth Exhibit 1. The Secretary promptly responded, indicating that she does not object to the affidavit on hearsay grounds or the Court's consideration of the affidavit in lieu of live testimony, but she does object to the legal conclusions stated therein. Petitioners object on the same basis as the Secretary.

Upon review, we sustain the objections to the legal conclusions stated within each affidavit, including that: (1) the affiant has a substantial and particularized interest in preserving the existing framework; (2) the requested relief would have the effect of preventing the affiant from being able to interact with the elected representatives regarding redistricting and nullifies the affiants' votes in the 2020 election; (3) if the Court grants the requested relief, the General Assembly will be deprived of its authority to draw new congressional districts and deprive the affiant of his/her ability to provide input to his/her representative thus infringing on the affiant's free speech rights; (4) the affiants' votes would be nullified and their interests of having their representatives exercise their full scope of constitutional duties with respect to redistricting would be infringed; and (5) the affiants could be deprived of their right to representation if the current map is declared unconstitutional and a special election must take place before a new map is enacted. In sustaining the objections to the Exhibits, we did not consider the stated conclusions in our disposition of this matter.

Assembly or the Justices of the Supreme Court, who are mostly Democrats, (4) a change in the environment in how rival parties defend their concrete interests, (5) recruiting of candidates, (6) risk of confusion to voters, and (7) associational interests.<sup>15</sup> *See* PA. CONST. art. I, § 20 (“The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested

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<sup>15</sup> The Republican Party presented the testimony of Angela Alleman, Executive Director of the Pennsylvania GOP. Mrs. Alleman oversees all operations of the Party. She explained her concerns if the Supreme Court draws the congressional district map, including the removal of power to do so by the General Assembly, the Party’s ability to work with its legislators to influence the map but inability to advocate before the Supreme Court, and the Party’s diversion of funds to have experts prepare and analyze any map drawn by the Supreme Court. She believes that it is unfair to create a deadline for the General Assembly to act, especially when it is not clear when the 2020 Census data will be available. Mrs. Alleman stated that the uncertainty of the congressional district map affects candidate recruitment and makes it impossible for incumbents to know whether their districts will be realigned and the possibility that if realigned, whether the incumbent will be running against another incumbent. She acknowledged that regardless of who draws the new congressional district map, the Republican Party will have to spend money to educate voters, and for “get out and vote” campaigns. Mrs. Alleman agreed that Republican Party members may speak to their legislators regardless of who draws the map, and that the Republican Party has no power to make the General Assembly do what the Party wants. For Mrs. Alleman, the issue with the Petition is the request for a deadline by which the General Assembly and Governor must act and the allocation of the Party’s resources depending on who draws the congressional district map. She believes that if the General Assembly draws the map, the Republican legislators will negotiate the best possible map for the Party. Expenses the Republican Party would incur if the Supreme Court draws the map include legal fees, including fees for intervening in this action, expert fees for analyzing and preparing maps, and the diversion of the Party’s resources. The Court finds Mrs. Alleman’s testimony credible but not persuasive on the issue of whether the Republican Party has a legally enforceable interest.

The Court admitted 12 affidavits of the individual Republican Party members: Nancy Becker, James Depp, Thomas Whitehead, Louis Capozzi, Kirk Radanovic, Kristine L. Eng, David Ball, James Vailko, Daryl Metcalfe, Sue Ann Means, and Michael Harvey, and Justin Behrens. The affidavits are substantially the same and attest that the affiant is a U.S. citizen and registered voter in Pennsylvania; the district in which the affiant resides; the affiant’s participation in the election-related/Republican Party activities; the affiant is a long-time supporter of the Republican party; and that Petitioners’ and the Secretary are affiliated with the affiant’s political opponents, and that, therefore, they will not advocate for a congressional district map that represents the affiant’s interest as a supporter and/or official of the Republican Party. The affidavits also attest to the affiant’s resources invested in advocating on behalf of the Republican Party, including activities that may be affected by the Supreme Court’s drawing of the congressional district map.

with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.”).

First, the Court rejects the Voters of Commonwealth and the Republican Party’s argument that because they have a special interest in the matter, they are permitted to intervene. Both proposed intervenors rely on *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Cmwlth. 2019), but in that case, the primary issue was whether a senator had standing, either as a legislator or as a private citizen, to initiate a formal complaint with the Pennsylvania Public Utility Commission; the question of intervention was not at issue in *Sunoco*. The brief discussion of intervention was limited to distinguishing between standing to initiate a formal complaint and standing to intervene, which the Commission’s regulations expressly address. Years ago, in *Application of Biester*, 409 A.2d 848 (Pa. 1979), our Supreme Court established the standards for intervention. In *Biester*, a taxpayer sought to intervene in an action seeking to impanel a statewide investigative grand jury. The Court, after initially allowing the taxpayer to intervene, later vacated its order granting intervention. The Court determined that to intervene, the taxpayer must meet the “substantial, direct, and immediate” test set forth in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). That standard remains the law in this Commonwealth. *Markham*, 136 A.3d at 139 (“in order to intervene, individuals must have standing, Pa. R.C.P. [No.] 2327(3), (4), and to establish standing, one must have an interest that is substantial, direct[,] and immediate”). To have a substantial interest, the proposed intervenor’s concern in the outcome of the action must surpass “the common interest of all citizens in procuring obedience to the law.” *Markham*, 136 A.3d at 140. An interest is direct if the matter will cause

harm to the party’s interest, and the concern is immediate “if that causal connection is not remote or speculative.” *Id.*

We conclude that the Voters of Commonwealth and individual Republican Voters fail to meet the “substantial, direct, and immediate” test. Neither the individual Republican Voters, regardless of political interest, or Voters of Commonwealth have an interest that surpasses the interest of all qualified and registered voters in the Commonwealth. Based on the preliminary 2020 Census data, the Commonwealth will lose a seat in the U.S. House of Representatives and thus our current congressional district map must be redrawn. As counsel for Voters of Commonwealth stated, the current congressional district map is malapportioned across the state. *Every elector*, therefore, has an interest in redrawing a congressional district map that meets constitutional standards. Thus, the individual Republican Voters and Voters of Commonwealth do not have a substantial interest that surpasses the common interest of all citizens.<sup>16</sup>

The Republican Party, identified as non-profit organization, has no legally enforceable interest either. Based on our review, it appears that the Republican Party is complaining about what role it may play in the redistricting process, a role that is not protected by law. Redistricting, however, is fundamentally about protecting the one-person one-vote principle, that is, all votes have equal power as near as possible. *See Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711, 739 (Pa. 2012). The

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<sup>16</sup> We further disagree that Voters of Commonwealth are the “mirror image” of Petitioners because they will advocate for Republican candidates in 2022, whereas, Petitioners allege, they will advocate for Democratic candidates. Petitioners allege that the congressional districts in which they live are overpopulated as evidenced by the 2020 Census and, thus, their voting power is diluted. *See Voters of Commonwealth, Appl. for Leave to Intervene*, ¶¶ 10-21. Voters of Commonwealth do not speculate how their congressional districts may be affected by redistricting.



activities of the Republican Party, and how the Party allocates its resources, do not constitute a legally enforceable interest in how the congressional district map is determined and by whom. The case law cited by the Republican Party does not stand for the proposition that the asserted interests constitute legally enforceable interests sufficient to confer standing to intervene. The case law cited by the Secretary, rather, suggests otherwise and is more persuasive. *Cf. Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018) (recognizing that under the U.S. Supreme Court’s precedent, achieving a party majority in the legislature is a collective political interest, not an individual legal interest recognized by law); *see also Pennsylvania Voters Alliance v. Centre County*, 496 F. Supp. 3d 861, 868 (M.D. Pa. 2020) (recognizing that “‘statewide harm’ to a voter’s interest in ‘collective representation in the legislature’” or “in ‘influencing the legislature’s overall composition and policymaking’” is insufficient to support standing under Article III of the U.S. Constitution, U.S. CONST. art. III; “[t]o the extent that the latter interest is recognized, it is ‘embodied in [an individual’s] right to vote for [his or her] representative’”) (quoting *Gill*, 138 S. Ct. at 1931); *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002) (recognizing that Democratic committee lacked standing to challenge reapportionment plan because it was not an entity authorized to exercise the right to vote), *abrogated on other grounds by League of Women Voters*, 178 A.3d 737.

Moreover, we conclude that the Republican Party’s, individual Republican Voters,’ and Voters of Commonwealth’s claimed interests are speculative and not immediate. The U.S. Census Bureau has released the redistricting data to the states, with the final redistricting data toolkit to be delivered by September 30, 2021. *See* [https://www.census.gov/programs-surveys/decennial-census/decade/2020/2020-census results.html](https://www.census.gov/programs-surveys/decennial-census/decade/2020/2020-census%20results.html) (last visited August 30, 2021).

Therefore, our General Assembly can begin the process of moving forward with a new congressional district plan based on the Census data received. There is nothing preventing the Voters of Commonwealth, the individual Republican Voters, and the Republican Party from exercising their First Amendment and associational rights to make their positions known to their respective legislators.

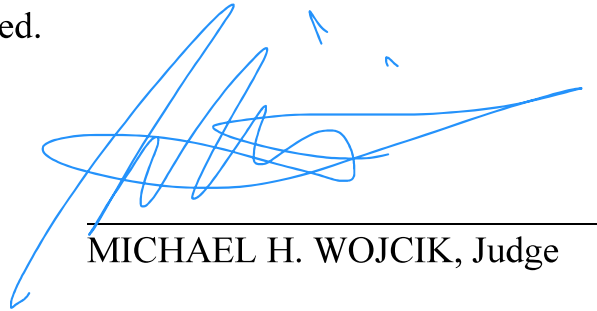
Because we conclude that the Republican Party, the individual Republican Voters, and Voters of Commonwealth have failed to show that they have legally enforceable interests in these proceedings, we deny their applications for leave to intervene.

### **III. Conclusion**

The General Assembly and the Governor are vested with authority to draw a new congressional district map. Pennsylvania law, however, does not provide a date by which they must act. The relief that Petitioners seek, the setting of a deadline by which the political branches must act, or taking control of the redistricting process, potentially infringes upon that authority. Accordingly, Legislators have shown a legally enforceable interest entitling them to intervene in this matter. *Markham; Allegheny Reproductive Health Center*; Pa. R.C.P. No. 2327(4).

Conversely, the Republican Party and Voters of Commonwealth have failed to demonstrate that they could be joined as original parties to the action or that they have a legally enforceable interest that would entitle them to intervene in this matter. Pa. R.C.P. No. 2327(3), (4).

Accordingly, the application for leave to intervene filed by Legislators is granted, and the applications for leave to intervene filed by the Republican Party and Voters of Commonwealth are denied.



MICHAEL H. WOJCIK, Judge

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. :

No. 132 M.D. 2021

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 :

**ORDER**

NOW 2<sup>nd</sup> day of September, 2021, upon consideration of the Applications for Leave to Intervene filed on behalf of (1) Speaker of the Pennsylvania House of Representatives Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff, President Pro Tempore of the Pennsylvania Senate Jake Corman, and Majority Leader of the Pennsylvania Senate Kim Ward (collectively, Legislators); (2) the Republican Party of Pennsylvania and Individual Republican Voters (collectively, Republican Party); and (3) Voters of the

Commonwealth of Pennsylvania (Voters of Commonwealth), and after hearing and argument on the issue, it is hereby ordered as follows.

Legislators' Application for Leave to Intervene is **GRANTED**. The Prothonotary shall accept for filing Legislators' Preliminary Objections to the Petition for Review, attached to Legislators' June 1, 2021 Application for Leave to Intervene.

Respondents<sup>1</sup> shall file and serve their brief in support of their preliminary objections (4 copies) within 14 days of the exit date of this order.

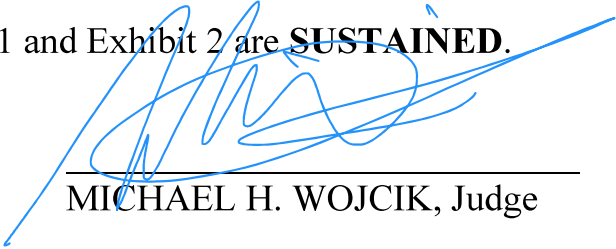
Legislators shall file and serve their brief in support of their preliminary objections (4 copies) within 14 days of the exit date of this order. Petitioners shall file and serve their brief in opposition to Legislators' preliminary objections within 14 days of service of Legislators' brief. Upon completion of the briefing schedule, the Prothonotary shall list the preliminary objections on the appropriate argument list.

The Applications for Leave to Intervene filed by the Republican Party and the Voters of the Commonwealth are **DENIED**. The Republican Party's Application for Extraordinary Relief, attached to its Application for Leave to Intervene, is **DISMISSED AS MOOT**.

---

<sup>1</sup> Although Respondents filed preliminary objections, it appears that they have not filed their brief in support thereof. Petitioners, however, filed their brief in opposition to Respondents' preliminary objections on August 2, 2021.

Voters of the Commonwealth Exhibits 1 and 2 are admitted to the record. Petitioners' and Respondents' objections to the legal conclusions in the Voters of the Commonwealth's Exhibit 1 and Exhibit 2 are **SUSTAINED**.



---

MICHAEL H. WOJCIK, Judge

# **Exhibit E**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

CAROL ANN CARTER, <i>et al.</i> ,	:	
	:	
Petitioners,	:	
	:	
v.	:	Docket No. 132 M.D. 2021
	:	
VERONICA DEGRAFFENRIED, in her official	:	
capacity as the Acting Secretary of the	:	
Commonwealth of Pennsylvania, <i>et al.</i> ,	:	
	:	
Respondents.	:	

**BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS OF THE  
SPEAKER AND MAJORITY LEADER OF  
THE PENNSYLVANIA HOUSE OF REPRESENTATIVES  
AND THE PRESIDENT *PRO TEMPORE* AND MAJORITY LEADER OF  
THE PENNSYLVANIA SENATE**

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## INTRODUCTION

The predicate for all four claims in the Petition for Review is Petitioners' allegation that *if* the General Assembly and Governor do not adopt a new congressional district plan by an arbitrary deadline, almost six months from now, constitutional and statutory violations will occur. Petitioners, in other words, do not allege that they have sustained a present or imminent injury. They instead hypothesize that they *might* be injured at some point in the distant future. This type of speculative and prospective injury does not suffice to give Petitioners standing to prosecute this action. They are not free to sue nearly a year in advance of their own arbitrary deadline, simply to reserve their place in line to be the lead petitioners if future impasse litigation becomes necessary.

The lack of a present or imminent injury also helps to illustrate that Petitioners' claims are not ripe for disposition. The claims are based on a temporally remote state of affairs that, as Petitioners concede, might never come into existence – and that runs contrary to the presumption that public officials will act with regularity and without violating the rights of citizens. The claims are therefore unripe and the Court lacks jurisdiction to adjudicate them. *See Carter v. Virginia State Board of Elections*, 2011 WL 665408 at \*2 (W.D. Va. Feb. 15, 2011) (dismissing as unripe a lawsuit in which plaintiffs alleged that Virginia's

legislative district plans were malapportioned following a new census, where the suit was filed four months before the scheduled primary election).

The claims, in addition, are not justiciable. Because federal law and the Pennsylvania Constitution do not impose a deadline to enact a congressional district plan or otherwise address the timing of such an enactment, the General Assembly has exclusive and plenary power on that topic. And, to date, the General Assembly has chosen not to legislate on that topic. The result is that, to the extent that Petitioners are asking the Court to establish a redistricting deadline and adopt and implement its own congressional district map “if the political branches fail to enact a plan by [the] date certain set by this Court,” *see* Petition for Review at Prayer for Relief, they are asking the Court to usurp the General Assembly’s exclusive legislative authority. In asking the Court to adopt and implement its own congressional district map, moreover, Petitioners are asking it to usurp the General Assembly’s exclusive authority under Article I, Sections 2 and 4 of the United States Constitution. Indeed, in permitting the Legislative Leaders to intervene in this matter, this Court recognized that Petitioners’ requested relief would “impair[]” the “Legislators’ ability to legislate” on redistricting. Slip Op. (Sep. 2, 2021) at 12. If the Court were to usurp the General Assembly’s authority in either of these ways, it would violate the Separation of Powers doctrine.



And the Counts in the Petition otherwise fail to state claims upon which relief may be granted. Counts I and II allege a violation of the “one-person, one-vote” principles of the United States and Pennsylvania Constitutions, which require districts to be as nearly equal in population as practicable. While this principle requires states to have a rational approach to readjustment of legislative representation, it does *not* compel states to complete redistricting immediately upon the publication of a new decennial census. Rather, it is expected—and uncontroversial—that at the end of a decade, there will be some imbalance of population while the census results are being addressed through a redistricting process, and the imbalance does not offend one-person, one-vote. In fact, the Pennsylvania Supreme Court itself ordered that General Assembly elections in 2012 be held under the 2001 plan, after it had sustained objections to the 2011 Legislative Reapportionment Commission’s plan, until such time as a new plan was passed and it approved the new plan. *See Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711, 719-21 (Pa. 2012) (“Holt I”).

Count III, claiming a violation of 2 U.S.C. § 2c, also lacks merit. Petitioners contend that the reduction in Pennsylvania’s apportionment for the next Congress (the 118th Congress) by one seat (from 18 to 17) renders the current redistricting plan illegal. But the current plan applies to the current, 117th Congress, to which Pennsylvania has been apportioned 18 seats. Furthermore, the pertinent statutory

scheme includes a fail-safe provision, 2 U.S.C. § 2a(c)(5), which provides that upon the failure of a state to redistrict in time for the next Congress following the reduction in a state’s apportionment, the state’s delegation will be elected at-large—an election method that is not dilutive.

Finally, in Count IV, Petitioners claim that the current redistricting plan violates the right to petition as guaranteed by Article I, Section 20 of the Pennsylvania Constitution. But, by definition, a redistricting plan does not impair the right to petition the government, or other associational rights. Not surprisingly, then, the Petition does not plausibly identify any redistricting plan that has impaired any such rights.

## **STATEMENT OF SCOPE AND STANDARD OF REVIEW**

### **I. SCOPE OF REVIEW**

“In ruling on preliminary objections, the courts must accept as true all well-pled allegations of material fact as well as all inferences reasonably deducible from the facts. However, unwarranted inferences, conclusions of law, argumentative allegations or expressions of opinion need not be accepted.” *Christ the King Manor v. Dep’t of Pub. Welfare*, 911 A.2d 624, 633 (Pa. Cmwlth. Ct. 2006) (internal citation omitted).

## II. STANDARD OF REVIEW

Preliminary objections should be sustained “in cases clear and free from doubt that the facts pleaded...are legally insufficient to establish a right to relief.”

*Werner v. Zazyczny*, 681 A.2d 1331, 1335 (Pa. 1996).

### STATEMENT OF QUESTIONS INVOLVED

Each of the four claims in the Petition is predicated on the allegation that *if* the General Assembly and Governor do not adopt a new congressional district plan by an arbitrary and remote deadline (almost six months from now), constitutional and statutory violations will occur. This allegation gives rise to the following questions:

1. Whether Petitioners lack standing to litigate their claims because they do not allege that they have sustained a present or imminent injury but instead hypothesize that they *might* be injured at some point in the distant future.

2. Whether Petitioners’ claims are unripe because they are based on a future state of affairs that might never come into existence and one that, at the same time, runs contrary to the presumption that public officials will act with regularity and without violating the rights of citizens.

3. Whether the Counts in the Petition are non-justiciable because they call for the Court to substitute its policy judgment for the General Assembly’s

policy judgment with regard to (i) whether there should be a deadline for the enactment of a new congressional district plan and (ii) the content of that plan.

4. Whether Counts I and II (one person, one vote) otherwise fail to state a claim upon which relief may be granted because the one-person, one-vote principle only requires a state to have “a rational approach to readjustment of legislative representation,” *Reynolds v. Sims*, 377 U.S. 533, 583 (1964), the Commonwealth undisputedly has a rational approach to congressional redistricting, and any end-of-decade “imbalance” in district populations while the General Assembly creates the redistricting plan does not itself offend the principle.

5. Whether Count III (2 U.S.C. § 2c) otherwise fails to state a claim upon which relief may be granted because nothing in that statute compels a state to redistrict the moment that new census data comes out.

6. Whether Count IV (right-to-petition) otherwise fails to state a claim upon which relief may be granted because Petitioners have not plausibly alleged that Pennsylvania’s redistricting plan unconstitutionally impairs their Article I, Section 20 petition rights.

*Suggested Answer to Each:* Yes.

## STATEMENT OF THE CASE

### I. RELEVANT PROCEDURAL HISTORY

On April 26, 2021, Petitioners filed their Petition for Review (“Petition”). In doing so, they named as Respondents the Acting Secretary of the Commonwealth and the Director for the Bureau of Election Services and Notaries, a division of the Pennsylvania Department of State (collectively, the “Named Respondents”).

On June 1, 2021, the Speaker and Majority Leader of the Pennsylvania House of Representatives and the President *pro tempore* and Majority Leader of the Pennsylvania Senate (collectively, the “Legislative Leaders”) filed an application for leave to intervene, which was coupled with preliminary objections that they proposed to file if this Court granted the application.

On July 1, 2021, the Named Respondents filed preliminary objections to the Petition for Review. On August 2, 2021, Petitioners filed an answer and memorandum in opposition to the Named Respondents’ preliminary objections.

On August 24, 2021, the Court held a hearing on the Legislative Leaders’ application for leave to intervene. On September 2, 2021, the Court granted the application and directed the Prothonotary to accept the Legislative Leaders’ preliminary objections. It also directed the Named Respondents and Legislative Leaders to file and serve briefs in support of their respective preliminary objections “within 14 days of the exit date of this order.”

The Legislative Leaders now submit this brief in support of their preliminary objections.

## **II. RELEVANT FACTS**

According to Petitioners, they brought this action to challenge Pennsylvania’s current congressional district plan. *See* Petition at ¶ 1. They allege that, in light of the April 26, 2021 publication of the 2020 census apportionment numbers, the map is “unconstitutionally malapportioned.” *Id.* at ¶ 2. Petitioners contend that, as a result, “if a new congressional plan is not in place in a timely manner,” their constitutional rights will be infringed. *Id.* at ¶ 4. They assert, in particular, that a new congressional districting plan must be enacted before March 2022 – the current statutory deadline for filing nominating papers for candidates who wish to appear on the ballot for the Commonwealth’s 2022 primary election. *Id.* at ¶ 31.

The General Assembly is the Legislature of this Commonwealth, *see* Pa. Const. art. II, § 1, and therefore has the authority and responsibility to create a new congressional district plan. This power and obligation is assigned and delegated to the General Assembly by Article I, Sections 2 and 4 of the United States Constitution, pursuant to which the “legislative branch plays the primary role in congressional redistricting.” *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006).

Although Petitioners acknowledge this point, *see* Petition at ¶ 5, they claim that because the Pennsylvania Senate and House are controlled by Republicans, the Governor is a Democrat, and “Republican control of the General Assembly is not large enough to override a gubernatorial veto[,]” it is “extremely unlikely” that the legislative process will yield “a lawful congressional districting plan in time to be used during the upcoming 2022 election.” *Id.* at ¶ 29. Petitioners allege, similarly, that “Governor Wolf and the Republican-controlled General Assembly have repeatedly conflicted over a broad range of policies,” that “Census delays have compressed the amount of time” for congressional redistricting to take place, and that, as a result, “the political branches are highly likely to be at an impasse this cycle and to fail to enact a new congressional district plan.” *Id.* at ¶ 33.<sup>1</sup>

In light of these allegations, Petitioners assert four causes of action: (1) violation of Article I, Section 5 of the Pennsylvania Constitution, (2) violation of Article I, Section 2 of the United States Constitution, (3) violation of 2 U.S.C. § 2c, and (4) violation of Article I, Section 20 of the Pennsylvania Constitution. *See id.*

---

<sup>1</sup> Petitioners’ allegations that the legislative process is highly unlikely to result in a timely congressional district plan are speculative and constitute argumentative allegations and expressions of opinion and, therefore, the Court should not accept them as true for purposes of deciding the Legislative Leaders’ preliminary objections. *See Christ the King Manor*, 911 A.2d at 633. As the Court noted when it granted the Legislative Leaders’ application for leave to intervene, “[a]t this juncture, it is *not known* how the redistricting process will proceed.” Slip Op. (Sept. 2, 2021) at 12 (emphasis added).

at ¶¶ 34-53. As relief, they ask for (i) a declaration that the current congressional district plan is unconstitutional, (ii) an injunction against the plan's continued implementation and enforcement, (iii) the Court to set a schedule and draft a new congressional district plan for the Commonwealth "by a date certain should the political branches fail to enact such plan by that time," and (iv) the implementation of the new map "if the political branches fail to enact a plan by a date certain set by this Court." *Id.* at Prayer for Relief.

### **SUMMARY OF THE ARGUMENT**

All of Petitioners' claims are premised on their supposition that, months down the road, Pennsylvania's legislative process will fail to produce a timely new congressional district plan for the Commonwealth, which will result in constitutional and statutory violations. Because Petitioners do not allege that they have sustained a present or imminent injury, and instead speculate about what might happen in the distant future, they lack standing to prosecute their claims. The claims, in addition, are not ripe for disposition because they are based on a future state of affairs that might never come into existence and one that runs contrary to the presumption that public officials will act with regularity, lawfully, and without impeding the rights of citizens. What is more, Petitioners' claims are non-justiciable. By asking the Court to establish a redistricting deadline and adopt and implement its own congressional district map "if the political branches fail to



enact a plan by [the] date certain set by this Court,” *see* Petition for Review at Prayer for Relief, Petitioners are asking the Court to usurp the General Assembly’s exclusive legislative authority in multiple ways, in violation of the Separation of Powers doctrine.

Even apart from these procedural and substantive defects, Petitioners’ claims are not claims upon which relief may be granted. Their one-person, one-vote claims (Counts I and II) fail to allege a violation of that venerable legal principle, since Pennsylvania has a rational approach to periodic congressional redistricting. And Petitioners have failed to plead a cognizable claim for a violation of 2 U.S.C. § 2c (Count III) or of Article I, Section 20 of the Pennsylvania Constitution (Count IV), neither of which compel the General Assembly to redistrict the Commonwealth immediately upon publication of a new decennial census.

The Petition for Review should be dismissed.

## **ARGUMENT**

### **I. PETITIONERS LACK STANDING TO LITIGATE THEIR CLAIMS**

Petitioners do not allege that they have sustained a present or imminent, legally-cognizable injury. The result is that they lack standing to litigate their claims.

As a general rule, a party has standing to challenge a governmental action only if the party has a substantial, direct, and immediate interest in the matter.

*Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975); see also *Commonwealth v. J.H.*, 759 A.2d 1269, 1271 (Pa. 2000). The party’s interest is “substantial” if the interest has “substance – there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” *Wm. Penn*, 346 A.2d at 282; see also *J.H.*, 759 A.2d at 1271. As a corollary, “we can find no reasonable grounds for standing where interests or injuries are hypothetical in nature.” *Strasburg Associates v. Newlin Twp.*, 415 A.2d 1014, 1017 (Pa. Cmwlth. Ct. 1980). The party’s interest in the matter is “direct” if there is “causation of the harm to his interest by the matter of which he complains.” *Wm. Penn*, 346 A.2d at 282. And, the party’s interest in the matter is “immediate” if there is a “sufficiently close causal connection between the challenged action and the asserted injury.” *Id.* at 286.

The entirety of this lawsuit hinges on Petitioners’ *assumption* that because the General Assembly is controlled by one political party, the Governor is a member of another political party, and there has been “conflict” between these actors in the past, there is a high likelihood that Pennsylvania will not enact a new congressional district plan by March 2022 – *i.e.*, almost six months from now – and that such a failure would harm Petitioners.

But Petitioners acknowledge that “there is still time for the General Assembly and the Governor to enact a new congressional plan[.]” Petition at ¶ 9. And, at the same time, they ignore the legal presumption that public officials will act with regularity, in accordance with the law, and without violating the rights of citizens.<sup>2</sup> See, e.g., *Albert v. Lehigh Coal and Navigation Co.*, 246 A.2d 840, 845 n.5 (Pa. 1968) (“There is a *prima facie* presumption of the regularity of the acts of public officials which exists until the contrary appears[.]”); *Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Cmwlth. Ct. 2010) (“We must presume the opposite, *i.e.*, that an agency will act in accordance with law.”); *Nason v. Commonwealth*, 494 A.2d 499, 502 (Pa. Cmwlth. Ct. 1985) (noting the “time honored presumption that public officials will perform their duties properly” and rejecting any presumption that “the State Treasurer will not fulfill his duty to disburse funds should that duty actually arise”).

Against this backdrop, it is plain that Petitioners do not allege that they have sustained a present or imminent injury. They instead hypothesize that they *might* be injured at some point in the distant future. Indeed, as this Court explained in granting the Legislative Leaders’ application for leave to intervene, “[a]t this

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<sup>2</sup> In alleging that the General Assembly and Governor are highly likely to reach an impasse on a new congressional district plan, Petitioners are making argumentative allegations and expressing opinions and, therefore, the Court should not accept those allegations as true for purposes of deciding the Legislative Leaders’ preliminary objections. See footnote 1, *supra*.

juncture, it is *not known* how the redistricting process will proceed.” Slip Op. (Sept. 2, 2021) at 12 (emphasis added). Petitioners are therefore alleging a speculative and prospective injury, which does not suffice to give them standing to prosecute this action. *See, e.g., Twp. of North Fayette v. Commonwealth*, 436 A.2d 243, 246 (Pa. Cmwlth. Ct. 1981) (township lacked standing to challenge DOT’s plan for detouring traffic because “while the Township insists that dire consequences will result from DOT’s actions, in fact, nothing has happened”); *Strasburg Associates*, 415 A.2d at 1017 (“we can find no reasonable grounds for standing where interests or injuries are hypothetical in nature”).

Because Petitioners lack standing to prosecute their claims, the Petition should be dismissed.

## **II. THIS MATTER IS NOT RIPE FOR DISPOSITION**

The Counts in the Petition are predicated on the occurrence of events that have not occurred and might never occur. This matter is therefore not ripe for disposition.

Under the ripeness doctrine, “[w]here no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained.” *Cherry v. City of Philadelphia*, 692 A.2d 1082, 1085 (Pa. 1997); *see also Borough of Marcus Hook v. Pennsylvania Mun. Ret. Bd.*, 720 A.2d 803, 804 (Pa. Cmwlth. Ct. 1998) (a court may not “decide issues that do not determine the resolution of an actual case

or controversy”). “In deciding whether the doctrine of ripeness bars our consideration of a declaratory judgment action, we consider [1] whether the issues are adequately developed for judicial review and [2] what hardships the parties will suffer if review is delayed.” *Twp. of Derry v. Pennsylvania Dep't of Labor and Indus.*, 932 A.2d 56, 57-58 (Pa. 2007) (internal quotations omitted); *see also City Council of Philadelphia v. Commonwealth*, 806 A.2d 975, 978 (Pa. Cmwlth. Ct. 2002) (same).

Rooted in the first part of this test is the principle that “[o]nly where there is a real controversy may a party obtain a declaratory judgment. A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.” *Gulnac v. South Butler County Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991) (internal citations omitted); *see also City of Philadelphia v. Philadelphia Transp. Co.*, 171 A.2d 768, 770 (Pa. 1961) (“Declaratory judgment will not lie to determine rights in anticipation of an event uncertain of occurrence.”). The same principles apply to injunctions. *See Brown v. Commonwealth*, 673 A.2d 21, 23 (Pa. Cmwlth. Ct. 1996) (“*Any action...* may not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.”)

(emphasis added) (citing *Gulnac*); see also *Bliss Excavating Co. v. Luzerne County*, 211 A.2d 532, 534 (Pa. 1965) (vacating preliminary injunction and stating: “The action was patently premature and amounted merely to an attempt to obtain an advisory opinion.”). Put differently, a court may not issue a declaratory judgment or an injunction with regard to a future state of affairs that might never come into existence and that, as a result, might never give rise to a live controversy.

Here, as the predicate for their claims, Petitioners allege that *if* the General Assembly and Governor do not adopt a new congressional district plan by an arbitrary deadline, almost six months from now, constitutional and statutory violations will occur. Petitioners are therefore acknowledging that their claims are tied to a temporally remote contingency. See Petition at ¶¶ 4 & 31. The claims, in other words, are based on a future state of affairs that, in fact, might never come into existence – and one that runs contrary to the presumption (noted above in Argument Part I) that public officials will act with regularity, lawfully, and without violating the rights of citizens. As this Court observed in granting the Legislative Leaders’ application for leave to intervene, “[a]t this juncture, it is *not known* how the redistricting process will proceed.” Slip Op. (Sept. 2, 2021) at 12 (emphasis added). Simply put, “[t]he events which might bring these parties into actual conflict are thus too remote to justify our resolution of this dispute by declaratory

judgment.” *South Whitehall Township v. Pennsylvania Department of Transportation*, 475 A.2d 166, 169 (Pa. Cmwlth. Ct. 1984); *see also Alaica v. Ridge*, 784 A.2d 837, 843 (Pa. Cmwlth. Ct. 2001) (claims were unripe where “plaintiffs challenge the constitutionality of the EEA based on what might happen in their districts, not what necessarily will happen or what has happened”).

For this reason, in *Carter v. Virginia State Board of Elections*, 2011 WL 665408 (W.D. Va. Feb. 15, 2011), a Virginia court dismissed as unripe a similar lawsuit, which was filed fast on the heels of the release of the 2010 census. There, the plaintiffs claimed that the 2010 census data showed that Virginia’s Senate districts were malapportioned. They sought functionally the same relief that Petitioners seek here: “(i) an injunction barring defendants from holding elections under the current Senate redistricting plan, which was enacted in 2001; (ii) an order setting deadlines for the General Assembly and governor to enact a plan based on the new Census data; and, (iii) should the requested deadlines be missed, they ask the court to impose a redistricting plan.” *Id.* at \*1 (internal citation omitted). The court dismissed the case, noting that the 2010 census data had only recently been released, that it was “unaware of any official timetable for the 2011 redistricting[,]” and that “there are no scheduled Virginia Senate elections until the primary, currently planned for June 14, 2011,” which was four months away. *Id.* at \*2. The court therefore concluded that, “[a]s plaintiffs have alleged no immediate

harm, and their claims are contingent on future uncertainties, this case is not ripe for review.” *Id.*

Here, likewise, Petitioners have alleged no immediate harm (because they allege that they might be harmed only if, almost six months from now, the Pennsylvania legislative process does not produce a new congressional district plan) and their claims are contingent on future uncertainties (namely, the possibility that the General Assembly and Governor will not enact a new plan on that timeline). Like the *Carter* case, therefore, “this case is not ripe for review.”

Petitioners’ claims are unripe for disposition and this Court lacks jurisdiction to adjudicate them.

### **III. PETITIONERS’ STANDING AND RIPENESS ARGUMENTS ARE MISPLACED**

In their memorandum in opposition to the Named Respondents’ preliminary objections, Petitioners argue that they have standing to prosecute their claims and that their claims are ripe. In doing so, they rely heavily on the Eastern District of Wisconsin’s decision in *Arrington v. Elections Board*, 173 F.Supp.2d 856 (E.D. Wis. 2001). *See* Petitioners’ Memorandum in Opposition to Respondents’ Preliminary Objections (“Petitioners’ Memorandum”) at 11-19. They also reference certain orders that the Minnesota Supreme Court issued in two pending “impasse” lawsuits. *See id.* at 11-12. Petitioners’ approach is misguided.



The decision in *Arrington* is inapposite, as a threshold matter, because it involved a federal trial court's application of federal standing and ripeness principles, while the Legislative Leaders' preliminary objections implicate questions of standing and ripeness under Pennsylvania law. *See, e.g., In re Hickson*, 821 A.2d 1238, 1243 n.5 (Pa. 2003) ("State courts, however, are not governed by Article III and are thus not bound to adhere to the federal definition of standing.").

And *Arrington* is otherwise not persuasive here. The plaintiffs there were voters who sought a declaration that Wisconsin's then-current congressional district plan was unconstitutionally malapportioned, an injunction that would bar the use of that plan in connection with future elections, and, "in the absence of subsequent action by state legislators, the institution of a judicially-crafted redistricting plan." 173 F.Supp.2d at 858. In concluding that the voters had standing to litigate the action, the court noted that a plaintiff generally has standing "if he is in imminent danger of suffering an injury the court is capable of preventing[.]" and the voters, for their part, had alleged "a realistic threat of imminent injury to their voting rights[.]" *Id.* at 861 & 862. In concluding that the action was ripe, the court noted that, under federal law, "contingent future events generally do not deprive courts of jurisdiction" and that, "[w]hile injury is by no means certain, the [voters'] fear of injury is realistic." *Id.* at 863 & 866. The court

later observed, however, that it should “refrain from initiating redistricting proceedings” until the “appropriate state bodies have attempted – and failed – to do so on their own[.]” and therefore it stayed the action for a period of months. *Id.* at 867.

Under Pennsylvania law, by contrast, it is *not* the rule that “contingent future events generally do not deprive courts of jurisdiction.” To the contrary, as explained above in Argument Part II, Pennsylvania law establishes that an action, “including a declaratory judgment action, may not be employed to determine rights in anticipation of events which may never occur[.]” *Brown*, 673 A.2d at 23. And, as also explained above, Petitioners’ claims fall squarely into this category because they are based on events which may never occur, namely, the failure of the General Assembly and Governor to adopt a new congressional district plan before a point in time that is months down the road. Petitioners’ claims should therefore be dismissed.

More fundamental, however, is that the *Arrington* decision is internally inconsistent and therefore lacks persuasive value. If the voters there had actually alleged “a realistic threat of *imminent* injury to their voting rights” and their claims were actually ripe for disposition, there would not have been a basis for the court to stay its hand so that the “appropriate state bodies” could continue with their congressional redistricting efforts. And yet the court took precisely that action. As

Judge Easterbrook therefore explained in his dissenting opinion, “reserving a place in line is not a proper reason to invoke the judicial power. We should dismiss this complaint and make it clear that no replacement will be received until there is a real controversy (which by entering a stay my colleagues imply could not happen before [the stay ends]).” 173 F.Supp.2d at 869.

This reasoning applies with equal force here. Petitioners’ claims are based on a future state of affairs that, in fact, might never come into existence. The claims also ignore the presumption that public officials will act with regularity, lawfully, and without violating the rights of citizens. Petitioners’ desire to “reserve[e] a place in line” in case they might need it one day does not give them standing or make their claims ripe. *See also Carter*, 2011 WL 665408 at \*2.

Finally, the Legislative Leaders note that Pennsylvania courts have been able to move swiftly to implement remedial congressional districting plans, which further undermines Petitioners’ demand for immediate, premature relief. In *Mellow v. Mitchell*, 607 A.2d 204, 205 (Pa. 1992), for example, eight Democratic state senators brought an action on January 28, 1992, the first day to circulate nominating petitions that year, asking the Court to create a new congressional district plan due to an impasse. On March 10, 1992, only 42 days after the lawsuit was filed, the Pennsylvania Supreme Court adopted a remedial plan. *Id.* at 206. Similarly, in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa.

2018), the Pennsylvania Supreme Court, on January 22, 2018, struck down the 2011 congressional district plan. *Id.* at 825. On February 19, 2018, just 28 days later, the court adopted a remedial plan. *League of Women Voters v. Com.*, 181 A.3d 1083 (Pa. 2018).

Here, there remains ample time for the General Assembly and Governor to adopt a new congressional district plan. And certainly there is no reason for this Court to abrogate the General Assembly’s plenary authority *now*, just to allow a select group of Democratic Party-allied voters to reserve their place in line to serve as petitioners in the event that, some months from now, an impasse claim becomes ripe.

Petitioners separately point to several orders that the Minnesota Supreme Court issued in two pending impasse lawsuits. According to Petitioners, these orders show that “the Minnesota Supreme Court has already put the gears of judicial redistricting into motion under similar circumstances” to what they allege in their Petition for Review. Petitioners’ Memorandum at 11. But, while Petitioners describe some of the orders, they do not point to anything in the orders – let alone any opinion from the Minnesota Supreme Court – that contains any analysis of relevance to the standing and ripeness issues at hand. The orders, in other words, amount to a red herring. In any event, Minnesota law, of course, does not apply here.

#### IV. THE COUNTS IN THE PETITION ARE NOT JUSTICIABLE

Separately, the Counts in the Petition are non-justiciable because they call for the 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.

Under Article II, Section 1 of the Pennsylvania Constitution, the Commonwealth's legislative power is vested exclusively in the General Assembly. *See* Pa. Const. art. II, § 1. The General Assembly's legislative power is not only exclusive, but also plenary. As a consequence, unless federal law or the Pennsylvania Constitution says otherwise, the General Assembly has authority over and may enact legislation regarding any subject. *Luzerne County v. Morgan*, 107 A. 17, 17 (Pa. 1919) ("The legislature may do whatever it is not forbidden to do by the federal or state Constitutions."); *see also Commonwealth v. Keiser*, 16 A.2d 307, 310 (Pa. 1940) ("powers not expressly withheld from the Legislature inhere in it, and this is especially so when the Constitution is not self-executing"); *Kotch v. Middle Coal Field Poor Dist.*, 197 A. 334, 338 (Pa. 1938) ("the General Assembly has jurisdiction of all subjects on which its legislation is not prohibited"). In this regard, our Supreme Court has cautioned that "[t]he Constitution has given us a list of the things which the Legislature may not do. If we extend that list, we alter the instrument; we become ourselves the aggressors,

and violate both the letter and spirit of the organic law as grossly as the Legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar.” *Russ v. Commonwealth*, 60 A. 169, 172 (Pa. 1905).

Given that federal law and the Pennsylvania Constitution do not impose a deadline to enact a congressional redistricting plan or otherwise address the timing of such an enactment, the General Assembly has exclusive and plenary power on that topic. *See Luzerne County*, 107 A. at 17. And, to date, the General Assembly has opted *not* to legislate on that topic. As Petitioners acknowledge, Pennsylvania law “does not set a deadline by which congressional redistricting plans must be in place prior to the first congressional election following release of the Census.” Petition at ¶ 30. The result is that, to the extent that Petitioners are asking this Court to establish such a deadline and adopt and implement its own congressional district map “if the political branches fail to enact a plan by [the] date certain set by this Court,” *see id.* at Prayer for Relief, they are asking for the Court to usurp the General Assembly’s exclusive legislative authority. Petitioners, in other words, are asking this Court to substitute its judgment for the General Assembly’s judgment with regard to the desirability of legislation. If the Court were to do so, it would violate the Separation of Powers doctrine. *See, e.g., Glenn Johnston, Inc. v. Commonwealth, Dep’t of Revenue*, 726 A.2d 384, 388 (Pa. 1999) (“policy

determinations, however, are within the exclusive purview of the legislature, and it would be a gross violation of the separation of powers doctrine for us to intrude into that arena”); *Commonwealth v. Hicks*, 466 A.2d 613, 615 n.4 (Pa. 1983) (“It is, of course, improper for a court to substitute its policy judgment for that of the Legislature.”); *Mayhugh v. Coon*, 331 A.2d 452, 456 (Pa. 1975) (“The court’s function is to interpret legislative enactments and not to promulgate them.”); *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 199 A.2d 266, 267 (Pa. 1964) (“It is not for us to enunciate public policy. That responsibility rests with the legislature and is for that body alone to resolve.”).

In asking for the Court to adopt and implement its own congressional district map, moreover, Petitioners are asking the Court to usurp the General Assembly’s exclusive authority under Article I, Sections 2 and 4 of the United States Constitution. As the U.S. Supreme Court has stressed, under Article I, Section 4, congressional “redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking.” *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 808 (2015). Pennsylvania’s legislative power (and therefore its power to engage in congressional redistricting) is vested exclusively in the General Assembly, as noted above. Therefore, if the Court were to undertake congressional redistricting on its own, it would be

performing the General Assembly’s lawmaking function and would therefore contravene the Separation of Powers doctrine.

As a result, the Counts in the Petition are non-justiciable and not claims upon which relief may be granted, and this Court lacks jurisdiction to adjudicate them. *See, e.g., Maurer v. Boardman*, 7 A.2d 466, 472-73 (Pa. 1939) (“There is no appeal to the courts from the judgment of the legislature as to the wisdom or policy which the Commonwealth shall adopt.”).

**V. THE COUNTS IN THE PETITION DO NOT OTHERWISE STATE CLAIMS UPON WHICH RELIEF MAY BE GRANTED**

The Counts in the Petition should be dismissed in light of the various procedural and substantive defects that are discussed above. But if the Court does not dismiss them on those grounds, it should dismiss them because they do not otherwise state claims upon which relief may be granted.

**A. Counts I and II (One Person, One Vote)**

Counts I and II allege violations of the “one-person, one-vote” principles of the U.S. and Pennsylvania Constitutions and do so based on a theory that the release of 2020 census data makes Pennsylvania’s current congressional redistricting plan unconstitutionally malapportioned. This theory is wrong.

Equal Protection does not demand a constant, minute-by-minute updating of district lines to ensure precisely equal populations. Rather, compliance with the one-person, one-vote standard is process-driven, requiring states to have only “a



rational approach to readjustment of legislative representation” or, stated differently, a “reasonable plan for periodic revision.” *Reynolds v. Sims*, 377 U.S. 533, 583 (1964). This process-driven standard recognizes that “[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years *leads to some imbalance in the population of districts toward the end of the decennial period.*” *Id.* (emphasis added).

The Petition does not allege that Pennsylvania lacks a rational approach to redistricting the Commonwealth’s congressional districts. Rather, it alleges that the current districts are malapportioned, *see, e.g.*, Petition at ¶¶ 25–27, which is merely a description of the “imbalance...toward the end of the decennial period” that *Reynolds* deemed to be non-invidious. Following *Reynolds*, “courts have recognized that no constitutional violation exists when an outdated legislative map is used, so long as the defendants comply with a reasonably conceived plan for periodic reapportionment.” *Garcia v. 2011 Legislative Reapportionment Comm’n*, 938 F. Supp. 2d 542, 550 (E.D. Pa. 2013), *aff’d on other grounds* 559 F. App’x 128 (3d Cir. 2014); *see also, e.g., Pol. Action Conf. of Illinois v. Daley*, 976 F.2d 335, 341 (7th Cir. 1992); *Graves v. City of Montgomery*, 807 F. Supp. 2d 1096, 1109 (M.D. Ala. 2011); *French v. Boner*, 940 F.2d 659 (6th Cir. 1991) (unpublished); *Mac Govern v. Connolly*, 637 F. Supp. 111, 114 (D. Mass. 1986);

*Cardona v. Oakland Unified Sch. Dist., California*, 785 F. Supp. 837, 842 (N.D. Cal. 1992).<sup>3</sup>

At the time when the Petition was filed, Petitioners complained that the congressional lines were not *already* redrawn, which was effectively a demand for the impossible. At the time, the census results that have historically played a vital role in the redistricting process had not yet been issued, a point the Petition obliquely concedes. *See* Petition at ¶¶ 22–23. A state does not lack “a rational approach to readjustment,” *Reynolds*, 377 U.S. at 583, merely because the General Assembly lacks a time machine that it can use to obtain information that will not be issued for months. *Compare Pol. Action Conf. of Illinois*, 976 F.2d at 340 (criticizing plaintiffs’ objection to election under malapportioned districts where “[t]he census figures became available only two weeks before the...election.

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<sup>3</sup> As an example of this principle, on January 25, 2012, the Pennsylvania Supreme Court struck down the 2011 Legislative Reapportionment Commission’s initial General Assembly apportionment plans and remanded to the LRC to draw new plans. *Holt I*, 38 A.3d at 719–21. The Court ordered that the prior decade’s plans, the 2001 plans, would “be used in all forthcoming elections to the General Assembly until the next constitutionally mandated reapportionment shall be approved.” *Id.* The associated delay meant the 2012 General Assembly elections proceeded under the prior decade’s plan, a resolution the Pennsylvania Supreme Court found acceptable, *see Holt v. 2011 Legislative Reapportionment Comm’n*, 67 A.3d 1211, 1216 (Pa. 2013) (“Holt II”), and that a federal court found did not violate *Reynolds*. *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 592–93 (E.D. Pa. 2012).

Redrawing Chicago’s ward for that election using the new census data was not possible.”).<sup>4</sup>

Indeed, Petitioners have yet to identify a redistricting deadline that the General Assembly has failed to meet. And even if they had identified such a deadline, strict compliance with a state-law redistricting deadline is not required to comply with one-person, one-vote. In cases where state law *has* imposed a deadline to complete redistricting (which is *not* the case with Pennsylvania’s Constitution and statutes), courts have rejected one-person, one-vote claims *even where the deadline went unmet*. See *Clark v. Marx*, 2012 WL 41926, at \*10 (W.D. La. Jan. 9, 2012) (“[T]he City Council’s violation of its own Charter provision,” which set a redistricting deadline, “is not of constitutional concern”); *Garcia*, 938 F. Supp. 2d at 550–52.<sup>5</sup> Because the one-person, one-vote principle is not offended when a redistricting authority violates a statutory redistricting deadline, the principle cannot plausibly be read to *itself* impose a deadline for the Commonwealth to redistrict.

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<sup>4</sup> It is true that census results were published on August 12, 2021, and the nonpartisan Pennsylvania Legislative Data Processing Center is presently processing that data for the General Assembly’s use in redistricting. The Legislative Leaders anticipate that the General Assembly will imminently receive this data for redistricting uses. But these developments do not impact Petitioners’ claims, which are no more ripe today than when they filed the Petition in April 2021.

<sup>5</sup> *Holt I*, dealing with state legislative reapportionment, involved a reapportionment process that exceeded the deadline. *Holt I*, 38 A.3d at 716.

Petitioners’ theory that this Court’s intervention is appropriate because the “political branches [are] divided between the two major parties,” Petition at ¶ 33, blames the public for its voting choices. Needless to say, a state does not lack “a rational approach to readjustment,” *Reynolds*, 377 U.S. at 583, merely because its voters send a bipartisan government to the state’s capitol. As explained above, there 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. Instead, the opposite presumption applies. Nor is there any basis in fact to assume that members of different parties are necessarily incapable of compromise. *See, e.g., Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 796 (2017) (recounting how the Virginia General Assembly in 2011 passed a redistricting plan “with broad support from both parties” during a time of divided government). To the extent that Petitioners allege otherwise, their assertions are not well-pleaded and, in deciding the Legislative Leaders’ preliminary objections, the Court should not accept them as true. *See, e.g., Christ the King Manor v. Dep’t of Pub. Welfare*, 911 A.2d 624, 633 (Pa. Cmwlth. Ct. 2006) (internal citation omitted) (at preliminary objection stage, court need not accept as true “unwarranted inferences, conclusions of law, argumentative allegations or expressions of opinion”).

Petitioners’ assertion that the current congressional plan will be diluted in “any future election,” Petition at ¶ 28, ignores that the plan is not yet dilutive and

also confuses Pennsylvania’s right to 17 members in Congress, which will take effect in January 2023, with its right to have 18 members in Congress now. *See also* Petition at ¶¶ 18–21 (explaining that Pennsylvania lost a seat in the recent apportionment, but failing to note that this change does not take effect until the 118th Congress). The Petition suggests that all future elections, including any special elections that take place prior to November 2022, should occur under a redistricting plan with 17 seats, lest Petitioners’ votes be diluted. But (as discussed further below) Pennsylvania is not obligated to switch over to a 17-seat system during the 117th Congress, to which it has lawfully sent 18 members, and more than a year before the 118th Congress takes session.

Even apart from these points, Petitioners’ votes cannot be diluted at a time that is long before the voting occurs. *See Garcia*, 559 Fed. App’x at 134–35 (finding no injury to voters where election at issue was not imminent). Nor will they go without representation before the next election. *Cf. Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1955 (2019) (“[D]elegates continue to represent the districts that elected them, even if their reelection campaigns will be waged in different districts.”).

Pennsylvania’s Free and Equal Elections Clause does not change any of this one-person, one-vote analysis. Petitioners say that, in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), the Pennsylvania Supreme Court

afforded the Clause “the broadest interpretation.” Petition at ¶ 45 (citing *League of Women Voters*, 178 A.3d at 814). But nothing in *League of Women Voters* suggests that there is a requirement for constant redistricting of the genre that *Reynolds* deemed to be impracticable and unnecessary. The case concerned partisan considerations in redistricting, not malapportioned districts. The case reaffirmed that the “primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature.” 178 A.3d at 821–22. It cannot be read to impose the types of absurd obligations that *Reynolds* eschewed but which Petitioners favor.

For all of these reasons, Counts I and II fail to state a claim and should be dismissed.

**B. Count III (2 U.S.C. § 2c)**

Count III of the Petition alleges a violation of 2 U.S.C. § 2c, which provides that, “[i]n each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative..., there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled....” 2 U.S.C. § 2c. Petitioners theorize that “the *current* congressional district plan violates Section 2c’s requirement” because it “contains 18 districts,” whereas “Pennsylvania is *currently* allotted only 17 seats in the U.S. House.” Petition at ¶ 47. This reasoning is misguided.

Pennsylvania, in fact, is *currently* allotted 18 seats in the U.S. House. Right now, the 117th Congress is in session. In that Congress, Pennsylvania is entitled to 18 seats. *Compare* 2 U.S.C. § 2a(a) *with id.* § 2a(b) (making clear that the reapportionment takes effect for the *next* Congress—*e.g.*, “Eighty-second” to “Eighty-third”—not immediately). “The reapportioned Congress will be the 118th, which convenes in January 2023.” Press Release, U.S. Census Bureau, 2020 Census Apportionment Results Delivered to the President (Apr. 26, 2021), at <https://www.census.gov/newsroom/press-releases/2021/2020-census-apportionment-results.html>; *see also* Congressional Research Service, Apportionment and Redistricting Following the 2020 Census at 2 (updated April 27, 2021) (“New apportionment applies at the start of the next Congress.”).

The release of apportionment results in April 2021 does not, under Section 2c, obligate Pennsylvania to instantaneously redistrict, as Petitioners suggest. The statute aligns the number of districts to the number of seats “in the...Congress” whose election is at issue. 2 U.S.C. § 2c. The mandate to redistrict under Section 2c has always been recognized to operate under the same timing principles that the Supreme Court has established for the one-person, one-vote doctrine. *See Branch v. Smith*, 538 U.S. 254, 268–69 (2003) (plurality opinion of Scalia, J.) (recounting historical purpose of Section 2c to respond to the “new era in which federal courts were overseeing efforts by badly malapportioned States to conform their

congressional electoral districts to the constitutionally required one-person, one-vote standards”).

Finally, Petitioners fail to state a claim under Section 2c because a failure to redistrict under that provision would not “unlawfully dilute Petitioners’ votes.” Petition at ¶ 48. To the contrary, under Section 2c, if redistricting does not occur, the so-called “failsafe” provisions of 2 U.S.C. § 2a(c) come into play and mandate at-large elections. *See Branch*, 538 U.S. at 271–722 (plurality opinion). An at-large election is not dilutive of individual votes. *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

### **C. Count IV (Right-to-Petition)**

Finally, Count IV of the Petition alleges a violation of Petitioners’ right to petition as guaranteed by Article I, Section 20 of the Pennsylvania Constitution. Petition at ¶ 50, *citing* Pa. Const. art. I, § 20. But the Petition fails to identify any burden on Petitioners’ rights to associate and petition.

A redistricting plan is a map—not legislation impacting associational or other expressive conduct. As the U.S. Supreme Court has held, “there are no restrictions on speech, association, or any other [expressive or petitioning] activities in the districting plans at issue. The [Petitioners] are free to engage in those activities no matter what the effect of a plan may be on their district.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019). There is no authority to support



Petitioners’ suggestion that the rights of petitioning and association include the concept of electoral convenience, perhaps the convenience of knowing months before certain filing deadlines where congressional lines will fall.

In any event, Pennsylvania has a compelling interest in limiting “the frequency of reapportionment,” including its “need for stability and continuity in the organization of the legislative system.” *Reynolds*, 377 U.S. at 583. And it has the highest imaginable interest in not having already redistricted—as Petitioners say is constitutionally required—because doing so would have been impossible. A state has a compelling interest, to say the least, in not being obligated to undertake actions that are impossible. Further, Pennsylvania has paramount interests in seeing its legislative actors afforded a reasonable opportunity to redistrict, given that the “primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature.” *League of Women Voters*, 178 A.3d at 821–22. “[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality,” whereas a court “possess[es] no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people’s name.” *Connor v. Finch*, 431 U.S. 407, 414–15 (1977). Even if the legislative process does not produce the instantaneous—indeed, *impossible*—results that Petitioners demand, the State has

a paramount interest in letting that process run its course before seeing a court draw the congressional lines.

In short, the current redistricting plan does not place any burden on the right to petition and it serves paramount state interests. Count IV, like Petitioners' other claims, fails on the merits and should be dismissed.

## CONCLUSION

For the reasons stated above, the Legislative Leaders respectfully request that this Court sustain their preliminary objections and dismiss this matter with prejudice.

Respectfully submitted,

September 16, 2021

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## **CERTIFICATE OF WORD COUNT**

I hereby certify that, based on the word count feature of Microsoft Word 2016, the foregoing brief complies with the word-count limit described in Pennsylvania Rule of Appellate Procedure 2135(a)(1).

/s/ Anthony R. Holtzman  
Anthony R. Holtzman

## **CERTIFICATION OF COMPLIANCE**

I hereby 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.

/s/ Anthony R. Holtzman  
Anthony R. Holtzman

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I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

**Service by PACFile eService as follows:**

All counsel of record

Date: September 16, 2021

/s/ Anthony R. Holtzman  
Anthony R. Holtzman

# **Exhibit F**





COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF THE GOVERNOR

December 28, 2021

The Honorable Bryan Cutler  
Speaker  
Pennsylvania House of Representatives

The Honorable Kerry Benninghoff  
Majority Leader  
Pennsylvania House of Representatives

Dear Speaker Cutler and Leader Benninghoff:

I write to publicly share my review of the House Bill 2146, Printer's Number 2541 map passed by the House State Government Committee on December 15 by a 14-11 vote, with one Republican member joining Democrats in opposing approval of the map. Before and after that vote, I have been asked to negotiate a map with Republicans behind the scenes. Instead of conducting negotiations in this way, I intend to provide my review of proposed maps in a public forum, so that members of the General Assembly, as well as the public, can understand my evaluation process.

Earlier this year, in preparation for the redistricting cycle now fully under way in Harrisburg, I convened a Pennsylvania Redistricting Advisory Council made up of six members with expertise in redistricting, political science and mapmaking, to establish a set of Principles to help guide my review of maps considered and ultimately passed by the General Assembly.

The Council met numerous times, and subsequently held a series of eight in-person public listening sessions across the state, as well as a virtual public listening session, to take [public feedback](#) on the Principles and the redistricting process. The [Principles](#) were finalized and made public in late November and consist of guidance for compliance with legal requirements, such as ensuring that population deviations between districts comply with the Constitution, as well as guidance to ensure that communities of interest are maintained, representation is fair, and that the public can participate meaningfully in the process.

The House Bill 2146, Printer's Number 2541 map does not comply with the Principles outlined by the Redistricting Advisory Council. First, the difference in population between the largest and smallest district in the HB 2146 map is nearly 9,000 people. While I believe that perfect population equality should be balanced with other goals such as maintaining communities of interest, the deviation in the HB 2146 map may be successfully challenged as unconstitutional.

This significant population deviation is the result of last-minute changes made to the map submitted to the House State Government Committee by Lehigh County resident Amanda Holt and selected by Chairman Grove. The deviation among districts in Holt's submitted map was 1 person.

When Republican members of the House State Government Committee objected to aspects of the Holt map, Chairman Grove quickly abandoned the pretext of a citizen-selected map and redrew lines in ways that completely undermine the principles that motivated Holt's map in the first place. The result is a highly skewed map.

Second, the revised map splits multiple communities of interest, including splits in Luzerne, Dauphin, Philadelphia and Chester counties that do not appear to be motivated by compelling legal principles, but rather by a desire to make districts more favorable to Republican candidates.

Third, the Council also recommended that I review proposed maps to determine whether their expected performance is proportional to statewide voter preference. The HB 2146 map falls short on this basic measure of partisan fairness, giving a structural advantage to Republican candidates that far exceeds the party's voter support. A comparison of the HB 2146 map to prior election results and to neutrally drawn maps, using rigorous mathematical methodology, has demonstrated that the HB 2146 map would consistently deliver a disproportionate number of seats to Republican candidates when compared with Pennsylvania voters' preferences. This appears to be the result of intentional line-drawing choices that favor Republican candidates.

Fourth, the manner in which Chairman Grove has conducted the recent steps of this crucial process has been disgraceful. Despite his promise to conduct the "most open and transparent congressional redistricting process in PA history," it is not clear that he consulted with even the Republican members of his own Committee prior to selecting the Holt map -- much less the Democratic members, who have been completely cut out of the process. And despite Chairman Grove's attempt to make up a narrative as he goes, there is no explanation for the changes that were made, beyond the fact that some of them seem to correlate with complaints aired by members of his Committee when the original map was released.

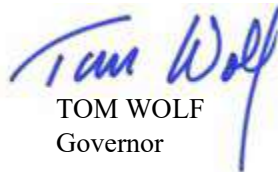
Finally, I have significant concern about the timeline for the final passage of this map. As Acting Secretary Degraffenreid noted in a June 28, 2021 letter to the leaders of the four legislative caucuses as well as the Chair of the Legislative Reapportionment Commission, the Department of State and county boards of elections have historically needed at least three weeks to prepare the Statewide Uniform Registry of Electors ("SURE") to facilitate the nomination petition process, which is statutorily mandated to begin on February 15, 2022.

As a result, the Acting Secretary urged in June that it "would be ideal for the Department to receive an approved final legislative reapportionment plan that has the force of law no later than January 24, 2022." Both the House and Senate currently have four voting session days scheduled in January 2022, including the 24<sup>th</sup>. This is an extraordinarily compressed schedule for passage of a congressional map, presentment for my review, and resolution of any legal challenges which may be brought, and further increases my concerns about the transparency with which this process is being conducted. It is not clear why the General Assembly did not move the process along more quickly despite an abundance of time to do so.

In sum, the people of Pennsylvania are looking for a fair election map drawn in an open and honest way. They neither want nor deserve a map drawn by self-serving politicians looking to feather their own nests along with those of their political friends. They deserve better and so does our democracy.

When it comes to drawing election maps, the Constitution invites us to do what we can to make sure the election process is a fair one. It is not an invitation to make cynical deals aimed at diminishing the importance of the vote. It is a recurring test of our commitment to the core principles of a healthy democracy. It is a test that HB 2146 fails.

Sincerely,



TOM WOLF  
Governor

CC: The Honorable Joanna McClinton, Democratic Leader, Pennsylvania House of Representatives  
The Honorable Seth Grove, Chair, House State Government Committee  
The Honorable Scott Conklin, Democratic Chair, House State Government Committee

**IN THE SUPREME COURT OF PENNSYLVANIA**

Carol Ann Carter, Monica Parrilla, Rebecca : 141 MM 2021  
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

**PROOF OF SERVICE**

I hereby certify that this 29th day of December, 2021, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

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*/s/ Edward David Rogers*

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