

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CAROL ANN CARTER; MONICA
PARRILLA; REBECCA
POYOUROWN; 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

ORIGINAL JURISDICTION

No. 464 M.D. 2021

v.

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

Respondents

SENATOR JAY COSTA, SENATE
DEMOCRATIC LEADER, SENATOR
VINCENT HUGHES, SENATOR
WAYNE FONTANA, SENATOR
JUDY SCHWANK, SENATOR LISA
BOSCOLA, SENATOR JAMES
BREWSTER, SENATOR AMANDA
CAPPELLETTI, SENATOR
CAROLYN COMITTA, SENATOR
MARTY FLYNN, SENATOR ART
HAYWOOD, SENATOR JOHN

KANE, SENATOR TIM KEARNEY,
SENATOR STEVE SANTARSIERO,
SENATOR NIKIL SAVAL,
SENATOR CHRISTINE
TARTAGLIONE, and SENATOR
LINDSEY WILLIAMS, in their
individual and official capacities

Proposed
Intervenor-
Petitioners

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

Petitioners

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No. 465 M.D. 2021

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PETITION TO INTERVENE OF SENATOR JAY COSTA, ET AL.

The members of the Democratic Caucus of the Senate of Pennsylvania (“Senate Democrats”) named below and on Attachment A appended hereto (collectively, “*Proposed Intervenors*”) submit the within Petition to Intervene in the above-captioned proceeding pursuant to Rule 106 of the Rules of Appellate Procedure and Rule 2327 of the Rules of Civil Procedure. State Senator Jay Costa is a member of the Senate of Pennsylvania representing the 43rd Senate District including Allegheny County. Senator Costa serves as Leader of the Senate Democrats. State Senator Vincent J. Hughes is a member of the Senate of Pennsylvania representing the 7th Senate District including Montgomery and Philadelphia Counties. Senator Hughes serves as the Democratic Chair of the Senate

Appropriations Committee. State Senator Wayne D. Fontana is a member of the Senate of Pennsylvania representing the 42nd Senate District including Allegheny County. Senator Fontana serves as Caucus Chair of the Senate Democratic Caucus.

Background

1. On December 17, 2021, the above-named Petitioners filed petitions for review instituting the above-captioned civil actions in this Honorable Court's original jurisdiction.

2. Therein, Petitioners, who are voters in some, but not all of, Pennsylvania Congressional districts,¹ alleged that Pennsylvania's existing Congressional districting plan is now malapportioned, rendering it illegal,² and that the General Assembly and Governor will not timely enact a districting plan into law that is properly apportioned.

3. Petitioners request relief in the form of, *inter alia*, a declaration that the existing districting plan is illegal, an injunction precluding Respondents and successors from using the plan in future elections, and this Honorable Court's adoption of a new districting plan that is appropriately apportioned. *Accord Mellow*

¹ The Petitioners are voters in 10 of Pennsylvania's 18 current Congressional districts.

² The Petitioners in *Carter* asserted violations of the Free and Equal Elections Clause of the Pennsylvania Constitution, Article I, Section 2 of the United States Constitution, and 2 U.S.C. § 2c. The Petitioners in *Gressman* asserted violations of the Free and Equal Elections Clause, of the guarantee of freedom of association set forth in Article I, Section 20 of the Pennsylvania Constitution, of the guarantee of equal protection inherent in Article I, Sections 1 and 26 of the Pennsylvania Constitution

v. Mitchell, 607 A.2d 204 (Pa. 1992) (adjudicating state legislators’ similar claims and granting similar relief).

4. On December 20, 2021, Petitioners’ actions were consolidated. *See Carter v. Degraffenreid*, 464 MD 2021 (Pa. Cmwlth. Consolidation Order filed Dec. 20, 2021); *Gressman v. Degraffenreid*, 465 MD 2021 (Pa. Cmwlth. Consolidation Order filed Dec. 20, 2021).

5. The same day, this Honorable Court issued a scheduling order “consistent with” *Mellow*, directing that:

- a. proposed intervenors file petitions to intervene by December 31, 2021;
- b. parties challenging proposed interventions file answers to petitions to intervene within 4 days of their filing;
- c. parties wishing to submit proposed Congressional districting plans do so by January 28, 2022;
- d. if the General Assembly and Governor do not adopt a redistricting plan by January 30, 2022, this Honorable Court will select a plan from those submitted; and
- e. in the event this Honorable Court is required to do so, the parties will proceed to a hearing on the matter, as well as on any revisions to the 2022 election schedule/calendar, on January 31, 2022.

See Carter, supra (Pa. Cmwlth. Scheduling Order filed Dec. 20, 2021); *Gressman, supra* (Pa. Cmwlth. Scheduling Order filed Dec. 20, 2021).

6. This Honorable Court also directed the Petitioners to serve a copy of the Scheduling Order upon the Senate Majority and Democratic Leaders, as well as the

House Majority and Democratic Leaders, apparently in part to advise them as to the deadline for intervention.

7. Proposed Intervenors Senator Jay Costa, Senate Democratic Leader, *et al.* now file this Petition for Intervention and offer the following in support thereof.

Petition to Intervene

8. Procedurally, Petitioners' civil actions in this Honorable Court's original jurisdiction are governed by the Rules of Civil Procedure. *See* Pa.R.A.P. 106 (noting that procedure in actions in this Honorable Court's original jurisdiction "shall be in accordance with the appropriate general rules applicable to practice and procedure in the courts of common pleas"); *see generally* Pa.R.Civ.P. 51 *et seq.*

9. Pursuant to those Rules,

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.Civ.P. 2327.

10. Procedurally, a petition to intervene must be made in the form of and verified in the manner of an initial pleading in a civil action, set forth the basis for intervention, and state the relief the petitioner seeks or the defense the petitioner seeks to demand. Pa.R.Civ.P. 2327(a).

11. Additionally, the petitioner must attach a copy of any pleading the petitioner intends to file if permitted to intervene or state in the petition that the petitioner adopts by reference in whole or in part certain named pleadings or parts of pleadings already filed. Pa.R.Civ.P. 2327(a).

12. Additionally, the petitioner must serve the petition on all parties to the action. Pa.R.Civ.P. 2327(b).

13. After the petition is filed,

[A]fter 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 action; or
- (2) the interest of the petitioner is already adequately represented; or
- (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass, or prejudice the trial or adjudication of the rights of the parties.

Pa.R.Civ.P. 2329.

Intervention Pursuant to Rule 2327(3)

14. As noted above, a person's intervention is warranted if "such person could have joined as an original party in the action or could have been joined therein."

15. This rule applies to persons who could have joined as plaintiffs. *See Goodrich Amram 2d § 2327:6* (citing, *inter alia*, *Appeal of Denny Bldg. Corp.*, 127 A.2d 724 (Pa. 1956) (permitting purchasers of homes to intervene in contractor's appeal from adverse administrative decision)).

16. "Persons may join as plaintiffs who assert any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common questions of law or fact affecting the rights to relief of all such persons will arise in the action." Pa.R.Civ.P. 2229.

17. "Parties may join . . . in the alternative although the cause of action asserted by or against any one or more of them is inconsistent with the cause of action asserted by . . . the others so joined." Pa.R.Civ.P. 2229.

18. All of Proposed Intervenors, in their individual capacities, like Petitioners, are voters in Pennsylvania Congressional districts.

19. Indeed, many of Proposed Intervenors are voters in Pennsylvania Congressional districts which Petitioners are *not*. For example, Proposed Intervenors

Senator Jay Costa is a voter in Pennsylvania's 18th Congressional District, and no Petitioner has identified himself or herself as a voter in that district.

20. Indeed, it is notable that in *Mellow*, state legislators like Proposed Intervenors were the plaintiffs who instituted the action and faced no challenge whatsoever to their capacity to maintain the action. *See generally Mellow, supra*.

21. Indeed, it is also notable that this Honorable Court's December 20 Scheduling Order directed the parties to serve the order upon state legislative majority and minority leaders, apparently in part to advise state legislators like Proposed Intervenors as to the deadlines for intervention. *See Carter, supra* (Pa. Cmwlth. Scheduling Order filed Dec. 20, 2021); *Gressman, supra* (Pa. Cmwlth. Scheduling Order filed Dec. 20, 2021).

22. Additionally, as noted above, this Honorable Court's December 20 Scheduling Order anticipates potential changes to the "2022 election schedule/calendar," *see Carter, supra* (Pa. Cmwlth. Scheduling Order filed Dec. 20, 2021); *Gressman, supra* (Pa. Cmwlth. Scheduling Order filed Dec. 20, 2021), which could impact all potential candidates in that election, including some of Proposed Intervenors.

23. Thus, Proposed Intervenors have at a minimum the same ability as Petitioners to pursue and litigate relief herein.

24. Moreover, Proposed Intervenors' and Petitioners' claims for said relief all arise out of the present lack of a properly apportioned Congressional districting plan.

25. Thus, they arise out of the same transaction, occurrence, or series of transactions or occurrences.

26. Moreover, upon information and belief, Proposed Intervenors' and Petitioners' claims for said relief will involve common legal challenges to the malapportioned plan, as well as, if this Honorable Court is ultimately obliged to adopt a new Congressional districting plan, common legal and factual questions about the propriety of some or other of the proposed plans.

27. Thus, common questions of law or fact affecting the rights to relief of all such persons will arise in the action.

28. Thus, Proposed Intervenors are presumptively entitled to intervene pursuant to Rule 2327(3).

Intervention Pursuant to Rule 2327(4)

29. In the alternative, as noted above, a person shall 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."

Pa.R.Civ.P. 2327(4).

30. Proposed Intervenors are incumbent state legislators.

31. In the context of legislators’ intervention in their official capacities, the question of whether a legislator has satisfied Rule 2327(4) does not principally depend upon whether the legislator has standing to initiate a complaint. *See Allegheny Reproductive Health Ctr. v. Pa. Dept. of Hum. Servs.*, 225 A.3d 902, 910-11 (Pa. Cmwlth. 2020) (permitting legislators to intervene in an action challenging legislative and administrative restrictions on appropriations for abortions as unconstitutional as interference with the legislature’s power of appropriation); *see also Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Cmwlth. 2019) (“[T]he inquiry to determine whether a party has standing to initiate litigation is different than the inquiry to determine whether a party can intervene”).

32. Indeed, while the test for standing to initiate a complaint requires a party to demonstrate “direct, immediate, and substantial interest in the subject matter of the controversy,” Rule 2327(4) permits a party to intervene if he or she demonstrates that a determination of the case will affect a “legally enforceable interest” of the party. *See Allegheny Reproductive Health Ctr.*, 225 A. 3d at 910-11 (“Simply, the test for standing to initiate litigation is not co-terminus with the test for intervention in existing litigation.”). As such, the principles of legislative standing are “relevant” to the question of whether a legislator has a “legally enforceable interest” under Rule 2327(4) and Proposed Intervenors do, indeed, adhere to these standards. *See id.* at 911.

33. “Legislators . . . are granted standing . . . when specific powers unique to their functions under the Constitution are diminished or interfered with.” *Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Cmwlth. 1976); *see also Fumo v. City of Phila.*, 972 A.2d 487, 501 (Pa. 2009) (“Legislators . . . have been permitted to bring actions based upon their special status where there was a discernable and palpable infringement on their authority as legislators.”); *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016) (“Standing exists . . . when a legislator’s direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, *see Wilt*, 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*”).

34. As detailed above, Petitioners would have this Honorable Court adopt a redistricting plan.

35. That power is constitutionally and legally committed to the General Assembly in the first instance pursuant to the United States Constitution’s Elections Clause, U.S. Const., art. I, § 4, cl. 1, and a federal statute requiring States to be redistricted “in the manner provided by the law thereof,” 2 U.S.C. § 2a. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737, 742-43 (Pa. 2018) (“*LWV I*”) (describing federal and state legal overlay committing the task to the General Assembly in the first instance).

36. The General Assembly satisfies that duty by passing a law in compliance with the Pennsylvania Constitution, Article II, Section 1 (providing the legislative power of the Commonwealth is vested in the Pennsylvania Senate and House of Representatives); Article III, Chapter A (relating to the procedure for passage of laws); and Article IV, Section 15 (providing for the General Assembly’s power to override the Executive’s veto).

37. Accordingly, Proposed Intervenors are required to cast a vote on a redistricting plan under the United States and Pennsylvania Constitutions, and a determination in this matter will directly impact the legal effect of any such vote cast by Proposed Intervenors.

38. Thus, Petitioners’ claim and request for relief would directly impact, diminish, and interfere with Proposed Intervenors’ legislative authority.

39. In any event, one of the *reasons* the power of redistricting is committed to the General Assembly in the first instance is that it is an inherently political process that presumes that constituents’ interests be furthered by their elected officials. *See League of Women Voters*, 178 A.3d at 831 (Saylor, J., dissenting) (noting “the appropriate litmus for judicial review of redistricting should take into account the inherently political character of the work of the General Assembly”); *accord also Holt v. Legislative Reapportionment Commn.*, 67 A.3d 1211, 1243-44 (Pa. 2013)

(Saylor, J., concurring) (making a similar point in the context of state legislative reapportionment).

40. Thus, Proposed Intervenors, in their official capacities, have a special, constitutionally committed authority and duty to represent their constituents' interests in the redistricting process that Petitioners' claims and proposed relief would directly impact, diminish or interfere with.

41. Indeed, it bears noting that in the last major litigation over Congressional redistricting, legislators were named as party-defendants. *See LWV I, supra* (naming the Senate President *Pro Tempore* and Speaker of the House of Representatives as party-defendants).

42. Thus, Proposed Intervenors satisfy the standards for legislative standing and, thus, have a legally enforceable interest at issue.

43. Additionally, it bears noting again that this Honorable Court's December 20 Scheduling Order anticipates potential changes to the "2022 election schedule/calendar." *See Carter, supra* (Pa. Cmwlth. Scheduling Order filed Dec. 20, 2021); *Gressman, supra* (Pa. Cmwlth. Scheduling Order filed Dec. 20, 2021).

44. Any changes to the 2022 elections schedule/calendar will affect all candidates who seek election in 2022, including several of the Proposed Intervenors.

45. Proposed Intervenors' interests in having the election law properly interpreted and enforced are legally enforceable interests. *Cf. City of McKeesport v. Fullard,*

364 A.2d 739, 742 & n.7 (Pa. Cmwlth. 1976) (noting it was “clear” candidate for mayor was free to intervene in appeal changing election schedule instead of filing a subsequent action in equity).

46. Thus, Proposed Intervenors, on this basis as well, are entitled to intervene pursuant to Pa.R.Civ.P. 2327(4).

Inadequacy of Representation by Other Parties

47. As detailed above, even if a proposed intervenor is presumptively entitled to intervene pursuant to Pa.R.Civ.P. 2327, intervention may nevertheless be denied if (1) the claim or defense of the petitioner is not in subordination to and in recognition of the action; or (2) the interest of the petitioner is already adequately represented; or; (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass, or prejudice the trial or adjudication of the rights of the parties. Pa.R.Civ.P. 2329.

48. Here, Proposed Intervenors do not intend to present any claim “not in subordination to and in recognition of the action.”

49. Here, the interests of Proposed Intervenors are not already adequately represented: as detailed *supra*, Proposed Intervenors, as state legislators, have an interest in protecting legislative authority and representing the interests of their constituents in the redistricting process, which may diverge from Petitioners’ interests.

50. Additionally, some of the Proposed Intervenors derive from Congressional districts wherein no current Petitioner has stated they reside. Given the political district-by-district tradeoffs likely to occur in fashioning any appropriate relief, voters from different districts have distinct and often competing interests.

51. Furthermore, the interests of Petitioners and Proposed Intervenors as it pertains to the administration and enforcement of the election calendar/schedule are dissimilar in scope and gravity.

52. Here, Proposed Intervenors have not unduly delayed in making application for intervention; rather, they have done so according to this Honorable Court's scheduling order; and, upon information and belief, their intervention will not unduly delay, embarrass, or prejudice the trial or adjudication of the rights of the currently named parties.

53. Thus, Proposed Intervenors are entitled to intervene notwithstanding Pa.R.Civ.P. 2329.

Adoption of Pleadings

54. Proposed Intervenors hereby adopt Petitioners' December 17, 2021 petitions for review, with the understanding that the intervening legislative adoption of a redistricting plan that is properly apportioned may render them moot, and with the understanding that the Proposed Intervenors may pursue different precise relief.

WHEREFORE, in light of the foregoing, Proposed Intervenors respectfully request that this Honorable Court enter an order granting the Petition to Intervene.

Respectfully submitted,

/s/ Marco S. Attisano

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Senator Jay Costa, et al.

VERIFICATION

I, Senator Jay Costa, hereby verify that the allegations set forth herein are true and correct to the best of my knowledge or information and belief and subject to the provisions of the Crimes Code relating to unsworn falsification to authorities.



SENATOR JAY COSTA

ATTACHMENT A – PROPOSED INTERVENORS

Attachment A

Additional Proposed Intervenors

Senator Judy Schwank
Senator Lisa Boscola
Senator James Brewster
Senator Amanda Cappelletti
Senator Carolyn Comitta
Senator Marty Flynn
Senator Art Haywood
Senator John Kane
Senator Tim Kearney
Senator Steve Santarsiero,
Senator Nikil Saval
Senator Christine Tartaglione
Senator Lindsey Williams

CERTIFICATION OF COMPLIANCE

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

Respectfully submitted,

/s/ Marco S. Attisano

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon the following persons in the following manners:

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