



prospective candidates for reelection in 2022. Further Senators Street and Williams represent two minority-majority voting districts in the City of Philadelphia.

As Petitioners are ostensibly pushing to usurp constitutionally authorized legislative powers, the Proposed Democratic Senator Intervenors seek to intervene in this action to protect their constitutional and legislative role and authority as well as the interests of their constituents. Intervention is necessary not only to protect those legally enforceable interests, but also because none of the current parties can adequately protect those legal interests.

#### **I. FACTUAL BACKGROUND**

On December 17, 2021, Petitioners in the above-referenced actions filed a Petition for Review challenging Pennsylvania's lack of constitutional congressional district boundaries for the 2022 election cycle. Petitioners ask this Court to, among other things, (1) declare unconstitutional Pennsylvania's current congressional district plan, which is malapportioned due to population shifts and census data that reduces Pennsylvania's congressional delegation from 18 to 17; (2) enjoin the Secretary of State and other respondents from using the current plan in any future elections; and (3) adopt a new congressional district plan that adheres to the constitutional requirement of one-person, one-vote because they believe that the General Assembly and the Governor will not timely act to do so.

On December 22, 2021, this Court directed any proposed intervenors to file applications to intervene by December 31, 2021. The Proposed Senate Democratic Intervenors timely filed an Application for Intervention.

## **II. STANDARD FOR INTERVENTION**

In original jurisdiction proceedings, intervention is governed by Rule 1531(b) of the Pennsylvania Rules of Appellate Procedure. Rule 1531(b) states:

A person named as a respondent in an original jurisdiction petition for review who desires to intervene in a proceedings under this chapter may seek leave to intervene by filing an application for leave to intervene by filing an application for leave to intervene (with proof of service on all parties to the matter) with the prothonotary of the court. The application shall contain a concise statement of the interest of the applicant and the grounds upon which intervention is sought.

210 Pa. Code § 1531(b)

“The right to intervention should be accorded to anyone having an interest of his own which no other party on the record is interested in protecting.” *Keener v. Zoning Hearing Bd. of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw. Ct. 1998) (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty.*, 44 A.2d 250 (Pa. 1945)).

The standards for intervention under Pennsylvania Rules of Civil Procedure 2326 to 2329 apply to an original jurisdiction petition for review because Pennsylvania Rule of Appellate Procedure 106 (“Original Jurisdiction Matters”) applies the “general rules” for practice in the courts of common pleas—namely, the

Rules of Civil Procedure—“so far as they may be applied.”

The Pennsylvania Rule of Civil Procedure 2327(4) is permissive and states:

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 . . . *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(4) (emphasis added).

If the determination may affect the intervenor’s legally enforceable interest, and no exception applies, approving intervention is mandatory, not discretionary. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

Courts look to principles governing legal standing when determining whether a party has a “legally enforceable interest” sufficient to intervene. *See Markham v. Wolf*, 635 Pa. 288, 297 (2016). And when legislators seek to intervene in their official capacity under Rule 2327(4), they must demonstrate legislative standing to proceed. *Id.* at 294-95. Legislative standing exists 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).

Also, the Court may, in its discretion, allow intervention even if it determines that one of the Rule 2329 exceptions applies. *See* Pa. R.C.P. 2329. Rule 2329 provides three exceptions for when a court may refuse an application for intervention:

[I]f (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 (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. 2329.

### **III. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE IN THIS ACTION**

This Court should grant the Proposed Democratic Senator Intervenors' Application for Intervention because the Court's determination of this action may affect the Proposed Democratic Senator Intervenors' constitutional and legislative interests, no exception applies under the Pennsylvania Rule of Civil Procedure 2329, and the Proposed Democratic Senator Intervenors' participation in this case will aid the Court's deliberation of the issues therein.<sup>1</sup>

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<sup>1</sup> Proposed Democratic Senator Intervenors are also entitled to intervention pursuant to Rule 2327(3) because they "could have joined as an original party in the action." Pa. R.C.P. 2327(3). The Rule permits individuals who could have joined as plaintiffs to intervene. The joinder rule also permits individuals to intervene if they 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

**A. As Members Of The Senate State Government Committee,  
Proposed Democratic Senator Intervenors Have A Substantial  
Interest In This Action.**

As this Court is aware, Article 1, Section 2 of the United State Constitution requires that a census be taken every 10 years for the purpose of apportioning the United States House of Representatives. The Constitution delegates that task to state legislatures. U.S. Const. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each *State by the Legislature thereof.*”) (emphasis added). Consistent with Pennsylvania’s constitution, Pennsylvania’s congressional districts are drawn by the state legislature as an act, subject to veto by the Governor. Pa. Const. Art. III, § 4, Pa. Const. Art. IV, § 15.

As with all acts, the Congressional redistricting plan starts in one house in committee, is finally adopted, moves to the other body where it moves through

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all such persons will arise in the action.” Pa. R.C.P. 2229. Therefore, a party with standing to pursue the plaintiffs’ claims or a factually or legally related claim is entitled to intervene even if the party’s claim is inconsistent with the plaintiffs’. Here, the Proposed Democratic Senator Intervenors, in their individual capacities, have a right to intervene as voters to protect their constitutional rights and several, who are likely to be candidates in the 2022 legislative elections, are entitled to intervene to protect their rights regarding the correct interpretation and enforcement of the law governing those elections. Moreover, Proposed Democratic Senator Intervenors’ and Petitioners’ claims arise “out of the same transaction, occurrence, or series of transactions or occurrences,” the lack of a properly apportioned redistricting plan. Accordingly, Proposed Democratic Senator Intervenors are presumptively entitled to intervene pursuant to Rule 2723(3).

committee, and eventually, after both bodies concur in language, is presented to the Governor for his signature. If the legislation is vetoed it is, of course, subject to a potential override by the Governor.

In August 2021, the United State Secretary of Commerce delivered census-block results of the 2020 Census to the Pennsylvania Governor and legislative leaders. The census data confirmed that Pennsylvania will be allocated only 17 Members in the next Congress, one fewer than currently allotted. The data was further processed and only in a form that would support commencement of the mapmaking process in late-October 2021.

Because of the delay in the census caused by the pandemic, the entire process has been truncated in 2021-22. However, it is the intention of the Proposed Democratic Senator Intervenors, and their colleagues in the Legislature to seek to adopt such legislation in time for presentation to the Governor for signature in January, and in any event, no later than February 7, subject to theoretical changes to the election timeline, discussed below.

If for some unforeseen reason mapmaking is unduly delayed, the General Assembly has within its authority to delay the May, 2022 primary and thereby extend the deadline for a map. Although such a delay is not currently desired by the Proposed Democratic Senator Intervenors or, to their knowledge, their colleagues, a postponed primary was adopted in the 2020 cycle and could be adopted again.

Notwithstanding the facts on the ground, or the language of the relevant Constitutions, Petitioners now seek, as they have sought for almost a year, to prematurely shift the power to draw the maps from the constitutionally designated authority because of their desire that Pennsylvania courts become mapmakers.

In so doing, Petitioners seek to interfere with and circumvent the responsibilities and duties of the General Assembly, and specifically the official work and authority of the Senate State Government Committee, of which Proposed Democratic Senator Intervenors are members. That is, the Proposed Democratic Senator Intervenors' direct and substantial interests in their ability to participate in the voting process is potentially negatively impacted by this action and they will suffer a concrete impairment or deprivation of their power and authority to act as legislators.

Separately, Senators Street and Williams represent two minority-majority voting districts in the City of Philadelphia and thus have an additional interest of ensuring new congressional maps do not result in minority vote dilution. "The primary tool of preventing minority voting dilution is Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973." *Mellow v. Mitchell*, 530 Pa. 44, 54 (Pa. 1992). Specifically, Section 2(a) prohibits any state law or practice which "results in a denial or abridgment of the right . . . to vote on account of race." 42 U.S.C. § 1973(a). Consistent with Section 2 of the Voting Rights Act, Senators Street and Williams

have an interest in ensuring their constituents' votes are not diluted as a result of altered congressional district boundaries in the 2022 congressional map.

As a matter of record, the Senate State Government Committee *on a bipartisan basis* has already run the most open, inclusive, and transparent mapmaking process in Pennsylvania history. There have been myriad public sessions across the state, and in the virtual world, to solicit public input. Together with non-governmental bodies, the Senate State Government Committee has heard from hundreds of Pennsylvania citizens working together to create a process that builds confidence in the electoral system and that will yield an improved final product for Pennsylvania voters.

It is well-settled that the “initial and preferred path [regarding drawing congressional maps is through] legislative and executive action.” *League of Women Voters v. Commonwealth*, 178 A. 3d 737, 821 (Pa. 2018). However, if the General Assembly and Governor fail to approve a new congressional map, the Pennsylvania judiciary may implement one. *See Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992).

That is, the Proposed Democratic Senator Intervenors recognize and understand that courts may, in the most extraordinary circumstance, play a role in enacting a congressional reapportionment plan, ***but*** the court's role is one of last resort. It may be utilized only if the General Assembly and the Governor truly fail to adopt a reapportionment plan. *League of Women Voters of Pa.*, 178 A.3d at 822

("[I]f the legislature and executive timely enact a remedial plan and submit it to our Court, our role in this matter concludes, unless and until the constitutionality of the new plan is challenged.").

Petitioners' claims are simply and demonstrably premature, and seek to circumvent the constitutional and legislative power of the Proposed Democratic Senator Intervenors, as well as the General Assembly as a whole. The undisputed fact is that the General Assembly remains in a deliberative process has not yet failed to produce a new congressional map in sufficient time for the May 2022 primary, nor has there been a gubernatorial impasse.

Rather, consistent with its constitutional authority, the General Assembly is in the process of drawing Pennsylvania's 17-Member congressional map. On December 15, 2021, the House State Government Committee approved House Bill 2146. Further, the Senate State Government Committee is in the process of drawing Pennsylvania's congressional map and the Proposed Democratic Senator Intervenors are actively participating in that process.

The constitutionally-authorized process of developing a reapportionment plan is working as intended and the Proposed Democratic Senator Intervenors are playing an active role in that process. Proposed Democratic Senator Intervenors believe a new congressional map will be enacted by this Court's deadline of January 30, 2022,

eliminating the need for a hearing or for this Court to select a reapportionment plan submitted by interested parties.

If, however, this does not occur, the Proposed Democratic Senator Intervenors, as the lead members of the Senate Democratic Caucus on this issue, expect that they would submit a proposed map to this Court and otherwise participate in the tentatively scheduled January 31 hearing. Otherwise, the Senate Government Committee including the four proposed intervenors here, would risk being eliminated entirely from a critical constitutional and legislative responsibility.<sup>2</sup>

**B. There Is No Basis To Refuse The Proposed Democratic Senator Intervenors' Application For Intervention.**

As noted above, Pennsylvania Rule of Civil Procedure 2329 provides that an application for intervention may be refused if: (1) petitioner's "claim or defense is not in subordination to and in recognition of the propriety of the action"; (2) petitioner's interest is already adequately represented; (3) "the petitioner has unduly

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<sup>2</sup> Separately, this Court's December 22, 2021 Per Curiam Order states that it will "consider revisions to the 2022 election schedule/calendar as part of the [January 31, 2022 hearing]." The United States Constitution vests in the Pennsylvania legislature the right to enact the times, places, and manner of holding elections under the Constitution's Elections Clause. U.S. Const. art. I, § 4. It is the General Assembly—and not the judiciary—that has the primary authority to revise or change to the 2022 election schedule. While recognizing that the Court has, in extraordinary situations, the ability to modify the election calendar (*see e.g., Fagan v. Smith*, 41 A.3d 816 (Pa. 2012)), that authority should be utilized only where strictly necessary. The General Assembly's Constitutional authority to revise the time, places, and manner of elections provides an additional legislative interest that justifies intervention in this action.

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.”

None of these factors applies to the Proposed Democratic Senator Intervenors. First, the Proposed Democratic Senator Intervenors’ defense in this action is in subordination to and in recognition of the action’s propriety. *See* Pa. R.C.P. No. 2329(1).

Second, no existing party adequately represents the interests of the Proposed Democratic Senator Intervenors particularized interests. *See* Pa. R.C.P. No. 2329(2). Neither party represents Proposed Democratic Senator Intervenors’ legislative interest as members of one of the committees constitutional and legislatively charged with developing the new congressional map.

Third, the Proposed Democratic Senator Intervenors have not unduly delayed submitting their application to intervene in this action. *See* Pa. R.C.P. No. 2329(3). Indeed, Proposed Democratic Senator Intervenors submitted their Application to Intervene three days *before* the Court’s deadline to do so. The Proposed Democratic Senator Intervenors intervention will not cause any undue delay, embarrassment, or prejudice to any party, but will aid the Court in resolving the important legal and factual questions before it.

**IV. CONCLUSION**

For the reasons set forth above, the Proposed Democratic Senator Intervenors' respectfully request that the Court grant their Application for Intervention.

Dated: January 5, 2022

Respectfully submitted,

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**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.

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