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IN THE SUPREME COURT OF PENNSYLVANIA

PHILIP T. GRESSMAN *et al.*,

Petitioners,

v.

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

Respondents.

No. 142 MM 2021

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

Respondents, Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania, and Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, submit this Response to Proposed Intervenors’ Opposition to Petitioners’ Application for Exercise of Extraordinary Relief or King’s Bench Power (“Opposition” or “Opp.”).¹

I. TO THE EXTENT THE COURT CONSTRUES PROPOSED INTERVENORS’ OPPOSITION AS AN APPLICATION TO INTERVENE IN THIS SUPREME COURT PROCEEDING, RESPONDENTS TAKE NO POSITION ON THAT REQUEST

Although the Opposition purports to be a brief opposing Petitioners’ application for exercise of extraordinary jurisdiction, it was electronically designated on PACFile as an “Application to Intervene.” In this regard, Respondents note that, although Proposed Intervenors have filed an application for leave to intervene in the consolidated Commonwealth Court actions below (which applications remain pending), they have not filed a separate application to intervene in this Supreme Court proceeding. To the extent this Court nonetheless construes the Opposition as an application for leave to intervene in this proceeding, Respondents take no position on that intervention request.

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

II. THIS COURT SHOULD EXERCISE EXTRAORDINARY JURISDICTION OVER THE CONSOLIDATED CASES BELOW

Proposed Intervenors agree that “the Commonwealth’s existing congressional district plan cannot be used in future elections” (Opp. at 1), and they concede that it “may prove difficult and important” for courts to “review[] proposed plans and fashion[] a remedy” (*id.* at 2 (emphasis omitted)). Nonetheless, Proposed Intervenors contend that these difficult and important issues are not “of immediate public importance” and thus do not warrant the Court’s exercise of extraordinary jurisdiction pursuant to 42 Pa. C.S. § 726. Their argument is fatally flawed in at least three ways.

First, it is simply not tenable to assert that the fundamental issue raised by this litigation—the constitutionality of every congressional district in the Commonwealth—is not of “public importance.” (Opp. at 1.) Common sense—and this Court’s exercise of extraordinary jurisdiction in two other congressional redistricting cases, *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), and *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018)—directly refutes Proposed Intervenors’ position. *See also Butcher v. Bloom*, 203 A.2d 556, 558 (Pa. 1964) (the Supreme Court granted a petition to exercise extraordinary jurisdiction over a challenge to the apportionment of the Pennsylvania House of Representatives and Senate).

Second, Proposed Intervenors use the wrong level of generality in analyzing whether the record clearly demonstrates Petitioners' rights. (Opp. at 9-10.) Proposed Intervenors argue that Petitioners' rights are not clearly established—and as a result the Court cannot exercise extraordinary jurisdiction—because 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.” (*Id.* at 9.) But the clearly established right at issue is not Petitioners' entitlement to a *particular* new map; it is the entitlement of Petitioners, and every Pennsylvanian, to new maps *generally*—maps that comport with the results of the 2020 Census and the protections embodied in the Pennsylvania and United States Constitutions, such as the right to free and equal elections and the “one person, one vote” principle.

Third, the Opposition relies heavily on the incorrect implication that this Court is incapable of resolving issues that are “fact-intensive.” (Opp. at 8.) In *Mellow*, this Court conducted a similar fact-intensive inquiry and developed a full evidentiary record when it implemented a new congressional district plan after the 1990 Census. Proposed Intervenors concede, as they must, that in *Mellow*, “a full evidentiary record was developed and trial proceedings were conducted before this Court adopted congressional redistricting remedies.” (Opp. at 2.) What Proposed Intervenors initially omit, however, is that in *Mellow*, “a full evidentiary record

was developed and trial proceedings were conducted” *after* this Court exercised extraordinary jurisdiction. *See* 607 A.2d at 206. Thus, *Mellow* provides a blueprint for how this Court can proceed after exercising extraordinary jurisdiction: it can designate a special master in the Commonwealth Court, who can hear evidence and then file his or her findings and recommendations for review by this Court. *Id.*²

Indeed, later in the Opposition, Proposed Intervenors acknowledge that:

[T]he *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.

(Opp. at 13.) Petitioners nonetheless urge the Court to ignore the *Mellow* precedent because, according to Petitioners’ assertion, “[t]he difference between the options in terms of time to finality is marginal at most[.]” (*Id.*). But given the extreme time constraints facing Respondents—whose primary concern is efficient, orderly, and organized election administration—every day counts. Moreover, exercising extraordinary jurisdiction allows this Court to ensure that it can issue a final decision on a new map on the timeline this Court deems necessary and appropriate. *See Mellow*, 607 A.2d at 206; *Butcher*, 203 A.2d at 558-59. It also avoids any

² The Court employed a similar process in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), when it reviewed the Pennsylvania Congressional Redistricting Act of 2011. *Id.* at 766 (describing exercise of extraordinary jurisdiction followed by “remand[] ... to the Commonwealth Court to ‘conduct all necessary and appropriate discovery, pre-trial and trial proceedings so as to create an evidentiary record on which Petitioners’ claims may be decided.’” (citation omitted)).

possibility of a scenario in which, if this Court were sitting merely as an appellate tribunal, it might feel constrained to remand an erroneous lower-court judgment for further proceedings, thus further delaying the issuance of a new map.

In sum, as this Court’s precedents illustrate, the argument for exercising extraordinary jurisdiction in these circumstances is substantial. And the disadvantages Proposed Intervenors purport to identify—articulated only in the most vague and general of terms—are illusory. To the extent the Court perceives the benefit of “two layers of review over the issues in this case” (Opp. at 14) (*i.e.*, a perspective in addition to those brought by the seven justices of this Court), it can obtain that benefit by requesting proposed findings and recommendations by a special master. A master can also “weed[] out” issues that are “not ... material or worthy of this Court’s review.” (*Id.* at 15.)

III. CONCLUSION

No matter how the issues raised in this litigation are ultimately resolved, one thing is clear: the judiciary must act quickly to protect Pennsylvanians’ voting rights and minimize disruption to the primary election process. Pennsylvania’s Constitution and statutes vest this Court, which will indisputably have the final word on any judicial redistricting decision, with the ability to ensure that protection by exercising plenary jurisdiction over this matter. Respondents respectfully

submit that, as it has done in previous redistricting cases, this Court should exercise that authority and grant the Application for Extraordinary Relief.

Respectfully submitted,

Dated: December 29, 2021

HANGLEY ARONCHICK SEGAL
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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: December 29, 2021

/s/ Robert A. Wiygul
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