
IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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 :
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Bureau of Election Services and :
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Respondents

**CARTER PETITIONERS' MEMORANDUM IN OPPOSITION TO THE
APPLICATION TO INTERVENE BY SENATORS COLLETT, MUTH,
STREET, AND WILLIAMS**

INTRODUCTION

Paying little heed to Pennsylvania law—indeed without even citing the rules governing intervention— State Senators Maria Collett, Katie J. Muth, Sharif Street, and Anthony H. Williams (“Proposed Intervenors”) seek leave to intervene in this proceeding. Proposed Intervenors relegate their grounds for intervention to three paragraphs in a brief otherwise devoted to arguments related to the merits of the underlying case. Critically, they fail to show how their legislative interests are affected by this proceeding, especially when this Court has already made clear it will not proceed to adopt new congressional plans for a whole month to give the political branches additional time to pass a map—the same time the Proposed Intervenors claim they need to pass one. At bottom, the Proposed Intervenors have not and cannot show that they have an interest in this case sufficient to justify intervention. For that reason and the reasons that follow, Petitioners respectfully request that the Court deny the application to intervene.

BACKGROUND

Once it became clear that Pennsylvania’s political branches would not timely approve a new Congressional map, the *Carter* Petitioners filed this action in the Commonwealth Court. As explained in their Petition, the General Assembly has failed to pass a reapportionment plan to remedy Petitioners’ constitutional injuries and, having now adjourned, is not poised to pass one anytime soon.

Since the *Carter* Petitioners filed this action, the Commonwealth’s political branches have not made further progress—instead, the impasse has only deepened. On December 28, 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. A (Letter From Governor Wolf to Speaker Cutler and Leader Benninghoff). That same day, Proposed Intervenors filed their motion seeking leave to intervene in this proceeding.

ARGUMENT

Intervention under Pennsylvania law is well-defined. An applicant must demonstrate a “legally enforceable interest” that may be affected by “the determination of [this] action.” Pa. R.C.P. 2327(4). Even where this element is satisfied, the Court may still deny intervention if Proposed Intervenors’ interests are already adequately represented in the litigation and if intervention would “unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.” Pa. R.C.P. 2329; *see also* *Wilson v. State Farm Mut. Auto. Ins. Co.*, 512 Pa. 486, 492, 517 A.2d 944, 947 (1986) (explaining, under Rules 2327 and 2329, “a mere prima facie basis for intervention is not enough . . .” and that Rule 2329 can otherwise preclude intervention to a party who has already shown a legally

enforceable interest).¹ Proposed Intervenors’ motion should be denied under either standard.

I. Proposed Intervenors have no legally enforceable interest in this action sufficient for intervention.

Proposed Intervenors have failed to demonstrate an interest that could serve as the basis for intervention. To determine whether a party has a “legally enforceable interest” for purposes of intervention, courts look to principles governing legal standing. *See Markham v. Wolf*, 635 Pa. 288, 297, 136 A.3d 134, 140 (2016) (“[W]hether Appellants were properly denied intervenor status . . . turns on whether they satisfy our standing requirements.”); *Application of Biester*, 487 Pa. 438, 443, 409 A.2d 848, 851 (1979) (vacating order granting intervention where applicant lacked standing to advance the actions). Therefore, “a mere general interest in the litigation, or an interest in the issue that is collateral to the basic issues in the cause, or an indirect economic interest or motive with respect to the litigation, is not

¹ Intervention is also appropriate where the proposed intervenors “could have joined as an original party in this action or could have been joined therein.” Pa. R.C.P. 2327(3). The Proposed Intervenors do not argue that intervention is appropriate under this provision. In any event, they could not have been joined in the original suit because they are not responsible for enforcing Pennsylvania’s unconstitutional electoral districts. *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). Moreover, Petitioners do not seek any relief from Proposed Intervenors. *Haber v. Monroe Cnty. Vocational-Technical Sch.*, 296 Pa. Super 54, 57, 442 A.2d 292, 294 (Pa. Super 1982) (explaining a party is not properly joined as a respondent if “no claim for relief is asserted against it in [the] complaint”).

a sufficient basis for intervention pursuant to [Rule 2327].” *Bauder v. Bauder*, No. 2012-40250 (Pa. D. & C. Mar. 17, 2014) (citing 7 Goodrich Am Ram 2d, § 2327:8).

When legislators seek to intervene in their official capacity under Rule 2327(4), as the Proposed Intervenors do here, they must demonstrate legislative standing to proceed. *See Markham*, 635 Pa. at 294-95; *see also Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Human Services*, 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)”). 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.” *Markham*, 635 Pa. at 305. The typical legislative standing cases, therefore, concern quo warranto actions challenging the authority of the executive to make appointments without the Senate’s consent, wherein legislative standing arises from the deprivation of “the individual right of each Senator to vote to confirm or reject nominees.” *Disability Rts. Pa. v. Boockvar*, 234 A.3d 390, 392 n.2 (Pa. 2020) (Wecht, J., concurring) (citing cases).

Here, Proposed Intervenors fail to even assert—much less demonstrate—the requisite interest for legislative standing. Instead, they claim to seek “to protect their

constitutional and legislative role in drawing and developing a reapportionment plan,” Mot. at 1, but they fail to adequately explain how that interest is credibly jeopardized here. Rather, Proposed Intervenors offer only that “having spent months collecting input from citizens and experts, and working to understand the communities of interest across the Commonwealth,” they “*expect* that they would submit a proposed map to this Court and otherwise participate in the tentatively schedule January 31 hearing.” Mot. at ¶ 24 (emphasis added). And they claim that “[a]bsent permitted intervention, the General Assembly and every member of the Senate Democratic Caucus would risk being eliminated entirely from a critical constitutional responsibility.” Mot. at ¶ 25.

Under Pennsylvania law, however, intervention is not an entitlement seized by anyone who believes themselves in possession of information relevant to a proceeding but is rather protection for those who possess legally enforceable interests that may be affected by the outcome of a proceeding. And the General Assembly and the Senate Democratic Caucus would not be stripped of constitutional responsibility absent intervention. For one thing, the General Assembly and these specific Proposed Intervenors cannot be “stripped” of their constitutional authority to redistrict when they failed to redistrict themselves. For another, Proposed Intervenors are not the “Senate Democratic Caucus” or the “General Assembly,” but

four state senators intervening on behalf of themselves as individual senators.² Denying their application, therefore, could not have the consequences they claim. Indeed, individual Legislators “cannot speak for the General Assembly as a whole, and therefore do not collectively represent that body’s legislative prerogatives,” *Disability Rts. Pa.*, 234 A.3d at 393-94 (Wecht, J., concurring), and therefore Proposed Intervenors should not be permitted to intervene under the pretense of doing just that. *See also id.* (explaining 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” (emphasis added)).

Proposed Intervenors may well have—or may well develop—a preferred map they would like this Court to consider. But “[t]he fact that the proceeding may, in some way, affect the proposed intervenor is not sufficient to invoke a ‘legally enforceable interest.’” *In re L.J.*, 450 Pa. Super. 685, 700, 691 A.2d 520, 527 (Pa. Super. 1997).

While redistricting is the province of the legislature in the first instance, even Proposed Intervenors concede that they do not have exclusive authority over the matter—as they acknowledge: “if the General Assembly and Governor fail to timely

² Further underscoring this point, on December 30, 2021, a large group of the Senate’s Democratic Caucus filed a separate application for intervention in this case.

approve a new congressional map, the Pennsylvania judiciary may eventually implement one.” Mot. at ¶ 17; *see also Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992). Petitioners’ request that this Court draw a constitutional congressional plan therefore does not encroach upon exclusive legislative authority or undermine Proposed Intervenors’ ability to conduct redistricting or to vote on proposed congressional maps. It merely seeks judicial intervention because the political branches have failed to timely act on redistricting. Proposed Intervenors and their colleagues remain free to meet their constitutional responsibilities. *See Mellow*, 530 Pa. at 48 (providing “notice that [court] would select a plan if the Legislature failed to act by February 11, 1992”).

The remainder of Proposed Intervenors’ application is devoted to challenging the basis for this Court’s role in the redistricting process. These arguments are irrelevant to the question of intervention by a party, *see Markham*, 635 Pa. at 294-95, and, in any event, take a rosy-eyed view of a hopelessly gridlocked effort.³

As Petitioners explain in their petition, the Legislature has gone into recess for the remainder of 2021 without passing a plan, and thus far the General Assembly and the Governor have taken irreconcilable approaches to redistricting, rendering it highly unlikely that the political branches will pass a plan by January 24, 2022, the

³ To the extent Proposed Intervenors intended these arguments to support their legislative standing, they fail for the reasons explained herein.

date the Department of State has previously identified as the last possible date a plan could be passed in time for the State’s 2022 primary elections. Pet. at ¶¶ 36-43. As such, it was entirely within this Court’s authority to set a tentative hearing date for January 31, 2022 in the event the political branches fail to meet their constitutional obligations, *Mellow*, 607 A.2d at 59 (approving court’s deadline to prevent “creat[ing] chaos” in the election calendar), especially when the Commonwealth lacks a congressional plan just weeks away from the first election deadlines.

II. Good cause exists to deny Proposed Intervenors’ Application.

Even if Proposed Intervenors could satisfy Rule 2327(4), this Court should still deny intervention because it would unduly delay and complicate the matter. Under Rule 2329, this Court may deny Proposed Intervenors’ application if their interests are already adequately represented in the litigation, or if the intervention would “unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.” Pa. R.C.P. 2329; *Wilson v. State Farm Mut. Auto. Ins. Co.*, 512 Pa. 486, 492, 517 A.2d 944, 947 (1986) (explaining, under Rules 2327 and 2329, “a mere prima facie basis for intervention is not enough . . .” and that Rule 2329 can otherwise preclude intervention to a party who has already shown a legally enforceable interest).

Allowing Proposed Intervenors to intervene, and thereby throwing open the doors to intervention by any party who claims an interest in redistricting, would

unnecessarily complicate and unduly a case that must be adjudicated expeditiously. *See E. Am. Transp. & Warehousing, Inc. v. Evans Conger Broussard & McCrea, Inc.*, No. 2187, 2002 WL 1803718, at *4 (Pa. Ct. Com. Pl. July 31, 2002) (denying intervention under Rule 2329(3) where there were already many parties in the case and allowing intervention “would unnecessarily delay and complicate” the case); *see also Erfer*, 568 Pa. at 132 (Pennsylvania Supreme Court ordered Commonwealth Court to hear redistricting claims on an expedited basis and produce findings of fact and conclusions of law within two weeks of the Court’s order). For this reason, too, the Court should deny their application under Rule 2329.

CONCLUSION

For these reasons, Petitioners respectfully request this Court deny Proposed Intervenors leave to intervene.

Dated: December 30, 2021

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** pro hac vice forthcoming*

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:

Kathleen Kotula
401 North Street, Room 301
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By PACFile eService:

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

Dated: December 30, 2021

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Exhibit A



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.

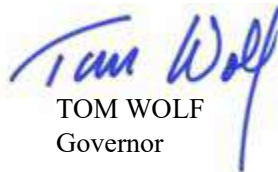
Finally, I have significant concern about the timeline for the final passage of this map. As Acting Secretary Degraffenreid noted in a June 28, 2021 letter to the leaders of the four legislative caucuses as well as the Chair of the Legislative Reapportionment Commission, the Department of State and county 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 24th. 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