

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 COMMITTA, 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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Petitioners

**MEMORANDUM OF LAW IN SUPPORT OF PETITION TO
INTERVENE OF SENATOR JAY COSTA, ET AL.**

The Democratic Senators named below and on Attachment A appended hereto (collectively, “*Proposed Intervenors*”) submit the within Memorandum of Law In Support of their previously filed 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. State Senator Judy Schwank is a member of the Senate of Pennsylvania representing the 11th Senate District including Berks County. Senator Schwank serves as Caucus Administrator.

Introduction

In their previously filed Petition to Intervene, Proposed Intervenors set forth several bases for intervention in this action seeking the judicial adoption of a Congressional redistricting plan. In their individual capacities, Proposed Intervenors are voters in Pennsylvania Congressional districts who have constitutional rights that this action will adjudicate and which a remedial redistricting plan will impact. They are also among the numerous candidates for elective office whose reliance on extant election law and the extant election calendar this action may disrupt. And in their official capacities, they are legislators who have a right and duty to represent their constituents' interests in negotiating and adopting a redistricting plan, which right and duty this action may effectively discontinue. Moreover, Proposed Intervenors explained that Petitioners' interests and their own are almost certain to diverge, if not earlier, when this Honorable Court adopts a remedial redistricting plan, and that they have not belatedly sought intervention. Thus, Proposed Intervenors have demonstrated that they are entitled to intervention.

In their response, the Petitioners in *Carter* (hereinafter “Carter Petitioners”) incorporate by reference arguments advanced in answers to other legislators’ petitions to intervene, which, in turn, appear to argue that legislators are somehow barred from bringing actions such as this one, and that legislators’ right and duty to represent their constituents in adopting a redistricting plan, in the event of a political impasse, somehow evaporates. Respectfully, Carter Petitioners’ arguments in this regard are in part nonresponsive to Proposed Intervenors’ application, and, in any event, lack merit: legislators are not barred by virtue of being elected officials from bringing actions to vindicate their constitutional rights and their right to redistrict does not evanesce when they are alleged to have dithered in exercising it.

Background

This matter arises initially from Petitioners’ December 17, 2021 petitions for review instituting the above-captioned civil actions in this Honorable Court’s original jurisdiction. Therein, Petitioners, who are voters in some, but not all of, Pennsylvania’s Congressional districts,¹ alleged that Pennsylvania’s existing Congressional districting plan is now malapportioned, rendering it illegal,² and that

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 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

the General Assembly and Governor will not timely enact a districting plan into law that is properly apportioned. 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 v. Mitchell*, 607 A.2d 204 (Pa. 1992) (adjudicating state legislators’ similar claims and granting similar relief). 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). 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

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

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

On December 30, 2021, Proposed Intervenors filed a Petition to Intervene, setting forth the allegations and arguments further detailed below. *See generally Carter, supra* (Petition to Intervene of Senator Jay Costa, et al. filed Dec. 30, 2021); *Gressman, supra* (Pa. Cmwlth. Petition to Intervene of Senator Jay Costa, et al. filed Dec. 30, 2021). On January 3, 2022, Carter filed an answer thereto (and in response to another proposed intervenor), in which Carter Petitioners incorporate by reference arguments advanced in answers to other legislators' petitions to intervene as further detailed below. *See generally Carter, supra* (Carter Petitioners' Response to the Applications to Intervene Filed by Members of the Democratic Caucus of the Pennsylvania Senate and the Leader of the Democratic Caucus of the Pennsylvania House of Representatives filed Jan. 3, 2022) ("Response"). Finally, last evening,

January 4, 2022, this Honorable Court entered an order directing, *inter alia*, that Proposed Intervenors file a memorandum in support of their petitions to intervene by 5:00 p.m. today. *See Carter, supra* (Order filed Jan. 4, 2022); *Gressman, supra* (Order filed Jan. 4, 2022). Proposed Intervenors now file this Memorandum of Law In Support of their Petition to Intervene.

General Legal Standard

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.* Intervention is governed by Chapter 2320 of those Rules. *See* Pa.R.Civ.P. 2326 *et seq.* Pursuant to that Chapter, as pertinent herein

“[a]t 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. Additionally, 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). 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). Finally, the petitioner must serve the petition on all parties to the action. Pa.R.Civ.P. 2327(b).

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)

First, Proposed Intervenors “could have joined as an original party in the action” and are thus entitled to intervene pursuant to Pa.R.Civ.P. 2327(3). Preliminarily, it is black-letter law that the rule permits individuals who could have joined as plaintiffs to intervene. *See generally* Goodrich Amram 2d § 2327:6 (citing *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). Indeed, the rule 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 all such persons will arise in the action.” Pa.R.Civ.P. 2229. And it permits individuals to intervene “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. Thus, a party with standing to pursue the plaintiffs’ claim or a factually or legally related to claim is entitled to intervene even the party’s claim is inconsistent with the plaintiffs’.

Applying the foregoing principles, Proposed 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. First, all of Proposed Intervenors, like Petitioners, are registered voters in Pennsylvania Congressional districts, and, as such, have an equal right to challenge legal deprivations of their constitutional rights as voters in the context of elections. *Cf. League of Women Voters v. Commonwealth*, 178 A.3d 737, 742 (Pa. 2018) (“*LWV P*”) (involving 18 voters’ challenge to 2011 Congressional redistricting plan as violative of their constitutional rights to, *inter alia*, free and equal elections).³ Indeed, it is notable that during the last round of redistricting “impasse” litigation, 8 state legislators, in their individual and official capacities, were the petitioners who instituted the action, and faced absolutely no challenge whatsoever to their capacity to maintain the action. *See generally Mellow*, 607 A.2d at 204 (naming Senators Robert J. Mellow, J. William Lincoln, Leonard Bodack, Michael A. O’Pake, Patrick J. Stapleton, Jeanette F. Reibman, Vincent J. Fumo, and H. Craig Lewis, as petitioners who instituted the action). Moreover, numerous other state and federal legislators and freestanding “groups” of voters were permitted to intervene, *see id.* at 213 (naming

³ Indeed, many of Proposed Intervenors are voters in Pennsylvania Congressional districts which Petitioners are *not*. For example, Proposed Intervenor 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. For the Court’s edification, Proposed Intervenors have attached a demonstrative aid showing, *inter alia*, the Petitioners and the Proposed Intervenors’ home Congressional districts hereto as Attachment B.

Representatives Robert W. O'Donnell, H. William DeWeese, Allen G. Kukovich, Dwight Evans, Frank Oliver, Thomas Michlovic, Gordon Linton, Harold James, and Senators F. Joseph Loeper, Robert C. Jubelirer, D. Michael Fisher, Charles Lemmond, Hank Salvatore, and Noah Wenger, Congressmen Joseph M. McDade and John P. Murtha, and a four groups of "persons concerned with maintaining congressional district configurations" with respect to particular geographic areas). And, indeed, concomitantly, 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. Cmwlt. Scheduling Order filed Dec. 20, 2021); *Gressman, supra* (Pa. Cmwlt. Scheduling Order filed Dec. 20, 2021). In short, Proposed Intervenors, no less than Petitioners, have an interest in vindicating their constitutional rights in the redistricting process.

Moreover, several of Proposed Intervenors are incumbent state legislators who will be candidates in the upcoming 2022 legislative elections. Thus, and particularly inasmuch as this Honorable Court's December 20 Scheduling Order anticipates potential changes to the "2022 election schedule/calendar," *see Carter, supra* (Pa. Cmwlt. Scheduling Order filed Dec. 20, 2021); *Gressman, supra* (Pa. Cmwlt. Scheduling Order filed Dec. 20, 2021), which could impact all potential candidates in that election, those particular Proposed Intervenors would plainly have

been free to join as plaintiffs in part to protect their unique interest in the proper and timely administration of the 2022 elections. *Accord* Pa.R.Civ.P. 2229 (permitting intervention “although the cause of action asserted by or against any one or more of them is inconsistent with the cause of action asserted by . . . others”); *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).

Carter Petitioners’ apparent arguments to the contrary are not persuasive. As noted, in their response to Proposed Intervenors Petition to Intervene, Carter Petitioners merely incorporate arguments raised in responses to other proposed intervenors’ petitions for intervention. *See* Response, 1/3/22, at 2 (“Last week, the *Carter* Petitioners opposed the applications to intervene by Pennsylvania’s Legislative Leaders and by a separate set of Democratic State Senators. The *Carter* Petitioners stand by those oppositions and believe the reasons to deny intervention to those legislators apply equally to the present applications.”). However, none of their arguments in those responses are responsive to Proposed Intervenors argument herein. *See* Carter Petitioners’ Memorandum in Opposition to the Legislators’ Application to Intervene, 12/30/21, at 6-10 (arguing against proposed intervenors’ argument that they could have been joined *as respondents*); *see also id.* at 9 (“[T]he Legislators do not seek to intervene here as Petitioners.”); Carter Petitioners’

Memorandum in Opposition to the Application to Intervene by Senators Collett, Muth, Street, and Williams, 12/30/21, at 5 (characterizing proposed intervenors as not arguing that they are entitled to intervene pursuant to Rule 2327(3) and arguing in the subjunctive that they would not be entitled to intervene as *respondents*). Indeed, the incorporated-by-reference arguments explicitly recognize that Proposed Intervenors, as voters, are proper petitioners herein. *See* Carter Petitioners’ Memorandum in Opposition to the Legislators’ Application to Intervene, 12/30/21, at 9 (arguing that “only voters . . . have a direct interest in redistricting litigation sufficient for standing”).

In short, Proposed Intervenors, in their individual capacities, have at least an equal ability as Petitioners, to bring this action and seek a remedial plan, and the Carter Petitioners have provided, and can provide, no meaningful argument to the contrary.

Turning to the remaining requirements of Rule 2327(3), it appears beyond cavil that Proposed Intervenors’ and Petitioners’ claims arise “out of the same transaction, occurrence, or series of transactions or occurrences” – *i.e.*, the lack of a properly apportioned redistricting plan – and will involve “common questions of law or fact affecting the rights to relief of all such persons will arise in the action” – *i.e.*, common legal challenges to the current malapportioned plan and, in the event this Honorable Court is obliged to adopt a remedial plan, common legal and factual

questions about the legal propriety of some or other of the proposed plans. Pa.R.Civ.P. 2327(3). Thus, Proposed Intervenors are presumptively entitled to intervene pursuant to Rule 2723(3).

Intervention Pursuant to Rule 2327(4)

Second, Proposed Intervenors, in their official capacities, should be permitted to intervene because “the determination of [this] action may affect [a] legally enforceable interest of [theirs].” Pa.R.Civ.P. 2327. As noted above, Proposed Intervenors are all incumbent state legislators. 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, 910-911 (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.”). 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 may 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.”). That said, 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. “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*”).

Applying those principles herein, as detailed above, Petitioners would have this Honorable Court adopt a remedial redistricting plan. However, the power and duty to adopt a redistricting plan 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 P*”) (describing federal and state legal overlay committing the task to the General Assembly in the first instance). In Pennsylvania, the General Assembly exercises that right and 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). Thus, Proposed Intervenors are all entitled to, and obliged to, cast a vote to enact a redistricting plan under the United States and Pennsylvania Constitutions. Plainly, Petitioners’ request that this Honorable Court adopt a remedial plan would not only “negatively impact” Proposed Intervenors’ “direct and substantial interest in [their] ability to participate in the voting process” but also “impair” or “deprive” them of the power and duty to adopt a redistricting plan.

Relatedly, one of the *reasons* the power and right to redistrict is committed to the General Assembly in the first instance is that it is an inherently political process that takes into count multifarious factors, including complex issues of

representational equity and political geography, that presumes that constituents' interests be furthered by their chosen elected officials. *See LWV I*, 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). Thus, Proposed Intervenors, in their official capacities, have a special, constitutionally committed authority and duty to bring their knowledge and their constituents' interests to bear in the redistricting process. Obviously, Petitioners' request that this Honorable Court adopt a remedial plan, to say nothing of Carter Petitioners' present efforts to bar Proposed Intervenors from intervention, would negatively impact, interfere with, and diminish that right and duty. 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).

Finally, it bears noting that a political party caucus is one of two constituencies that comprise the Senate, and, as the Pennsylvania Constitution explicitly recognizes, the two caucuses operate as party of their chamber through their leaders. *Precision Mktg., Inc. v. Com., Republican Caucus of the Sen. Of PA/AKA Sen of PA*

Republican Caucus, 78 A.3d 667, 672 (Pa. Cmwlth. 2013). The Senate Democratic Caucus is an integral part of the Pennsylvania Senate and House of Representatives, and, therefore, the General Assembly. *See id.* at 675. Additionally, Proposed Intervenors are 16 of the 20 currently seated and sworn members of the Senate Democratic Caucus, four of which are in Caucus leadership as the Democratic Leader, Democratic Chair of the Senate Appropriations Committee, Caucus Chair, and Democratic Caucus Administrator. Caucus leadership is responsible for setting Caucus policy priorities and positions and coordinating the daily legislative and administrative functions of the Caucus. *See id.* at 672-73. Thus, Proposed Intervenors are an integral part of the Pennsylvania Senate and General Assembly.

Again, the Carter Petitioners' apparent arguments to the contrary are not persuasive. As noted, in their response to Proposed Intervenors Petition to Intervene, Carter Petitioners merely incorporate arguments raised in responses to other proposed intervenors' petitions for intervention. *See* Response, 1/3/22, at 2 ("Last week, the *Carter* Petitioners opposed the applications to intervene by Pennsylvania's Legislative Leaders and by a separate set of Democratic State Senators. The *Carter* Petitioners stand by those oppositions and believe the reasons to deny intervention to those legislators apply equally to the present applications.").

In those filings, the Carter Petitioners argue that Proposed Intervenors lack legislative standing because, although they have the right and authority to redistrict in the first instance, they have not, in their view, timely exercised that right, and, in any event, may continue to try to do so before this Honorable Court adopts a remedial plan. *See, e.g.*, Carter Petitioners’ Memorandum in Opposition to the Legislators’ Application to Intervene, 12/30/21, at 12-13; Carter Petitioners’ Memorandum in Opposition to the Application to Intervene by Senators Collett, Muth, Street, and Williams, 12/30/21, at 6-10. The Carter Petitioners’ argument in this regard is too clever by half. Indeed, it implicitly acknowledges that legislators would *ordinarily* have a right to intervene in actions involving redistricting,⁴ and

⁴ The Carter Petitioners also suggest that Proposed Intervenors must obtain the consent of the General Assembly to intervene, relying on non-binding opinions interpreting *Va. House of Delegates v. Bethune-Hill*, ___ U.S. ___, 139 S.Ct. 1945 (2019), which they cite for the proposition that a legislator lacks standing to appeal a redistricting plan as compared to a legislature itself. Putting aside for the moment that said opinions are not pronouncements of Pennsylvania law, which has steadfastly considered whether a particular legislator’s official duties are negatively impacted, the High Court’s decision in *Va. House of Delegates* merely held that, for purposes of the federal standing inquiry, a single legislative chamber lacks the authority to assert the entire body’s interests. *See Va. House of Delegates*, 139 S.Ct. at 1953-54. Here, Proposed Intervenors seek to protect their own, albeit official, interests as intervenors, as, notably, the House of Delegates was permitted to do in state court. *See id.* at 1949-50 (“The Virginia House of Delegates and its Speaker . . . intervened as defendants and carried the laboring oar in urging the constitutionality of the challenged districts at a bench trial[.]” In short, whatever the musings of one or more jurists as to what the impact of *Bethune-Hill* should be in the future, the law at present is that legislators are entitled to intervene to protect their own official interests.

argues that it expires at some evanescent point in time. However, Carter Petitioners omit that there is absolutely no legal deadline by which the General Assembly must enact a redistricting plan, and, in any event, there is certainly no deadline triggered by when a group of voters determines and alleges that the General Assembly has not acted swiftly enough. Thus, even by the Carter Petitioners' logic, Proposed Intervenors continue to have a right and duty that this Honorable Court's decision herein will likely affect.

Thus, Proposed Intervenors satisfy the standards for legislative standing and, thus, have a legally enforceable interest at issue such that they are presumptively entitled to intervene pursuant to Rule 2327(4).

Inadequacy of Representation by Other Parties

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.

Here, Proposed Intervenors do not intend to present any claim "not in subordination to and in recognition of the action." *Id.*

Moreover, the interests of Proposed Intervenors are not already adequately represented. First, as detailed above, some of Proposed Intervenors, in their individual capacities, 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. Indeed, voters from different districts are likely to have vastly different interests as it pertains to virtually all appropriate redistricting factors. For example, voters who live in underpopulated districts exercise greater individual political power in selecting representatives as compared to overpopulated districts, and voters from particular cultural, demographic, geographic, or other communities of interest are likely to feel different than others about the extent to which a redistricting plan should seek to further the representational goals of the Voting Rights Act and the appropriate placement of necessary district and political subdivision splits. And each voter is uniquely interested in avoiding the dilution of his or her vote, in particular. Indeed, each voter's interest in protecting his or her constitutional rights in the redistricting process is discrete.

Additionally, as referred to above, several of Proposed Intervenors are incumbent state legislators who will be candidates in the upcoming 2022 legislative elections. Thus, and particularly inasmuch as 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, those particular Proposed Intervenors plainly have a far more palpable, and potentially distinct interest, in ensuring an orderly and legal administration of the 2022 election.

But in the main, Proposed Intervenors as legislators plainly have interests that Petitioners, who have no constituencies at all, do not. As noted above, one of the *reasons* the power and right to redistrict is committed to the General Assembly in the first instance is that it is an inherently political process that takes into count multifarious factors, including complex issues of representational equity and political geography, that presumes that constituents’ interests be furthered by their chosen elected officials. *See LWVI*, 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). Thus, Proposed Intervenors, in their official capacities, have a special, constitutionally committed authority and duty to bring their knowledge and their constituents’ interests to bear in the redistricting process. Here, Proposed

Intervenors bring to bear their knowledge and experience with Pennsylvania's complicated patchwork of communities of interest and their representation. Indeed, Proposed Intervenors represent hundreds of constituent cultural, demographic, and geographic groups that must necessarily be implicate in political trade-offs in the adoption of any remedial plan. In particular focus, for example, two of Proposed Intervenors represent majority-demographic-minority Senate Districts, and, thus, are highly likely to promote significant efforts to adopt similar districts in any remedial plan. Similarly, each of Proposed Intervenors represents cultural blocs and political subdivisions that plainly have an interest in protecting their interests in the redistricting process. *Accord Mellow*, 607 A.2d at 204, 213 (noting purpose of intervention was to provide community representation). Thus, it is, or should be, beyond peradventure that Proposed Intervenors interest are not already adequately represented by Petitioners.

Finally, 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.

The Carter Petitioners' arguments to the contrary, again, are unpersuasive. As noted, in their response to Proposed Intervenors Petition to Intervene, Carter

Petitioners merely incorporate arguments raised in responses to other proposed intervenors' petitions for intervention. *See* Response, 1/3/22, at 2 (“Last week, the *Carter* Petitioners opposed the applications to intervene by Pennsylvania’s Legislative Leaders and by a separate set of Democratic State Senators. The *Carter* Petitioners stand by those oppositions and believe the reasons to deny intervention to those legislators apply equally to the present applications.”). The only apparently relevant argument is that permitting intervention will slow the adjudicatory process. *See* Carter Petitioners’ Memorandum in Opposition to the Application to Intervene by Senators Collett, Muth, Street, and Williams, 12/30/21, at 10-11 (characterizing proposed intervenors as not arguing that they are entitled to intervene pursuant to Rule 2327(3) and arguing in the subjunctive that they would not be entitled to intervene as *respondents*). Respectfully, the Carter Petitioners’ boilerplate assertion of delay is not sufficient reason to deny proper intervenors the right to intervene, particularly, where, as here, this Honorable Court has demonstrated it is more than able to expedite the adjudicative process.

Conclusion

At bottom, Proposed Intervenors, in their individual and official capacities, have real, significant rights and interests that they should be permitted to protect herein, and the Carter Petitioners’ arguments that they, and, somehow, only they, are entitled to litigate their constitutional rights, and that legislators’ interests in

redistricting end when they, in the Carter Petitioners' view, have waited too long to protect them, should be rejected.

Respectfully submitted,

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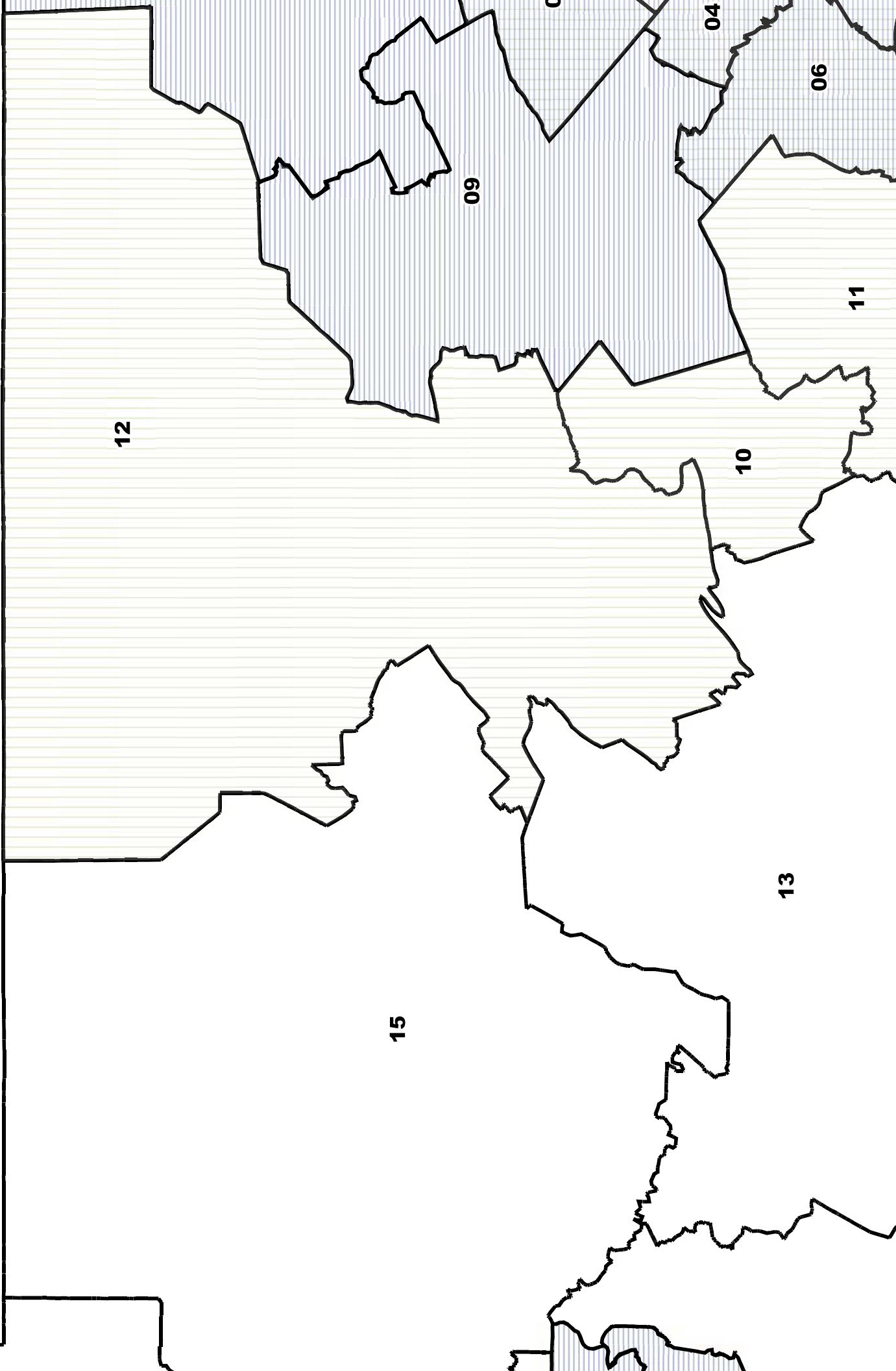
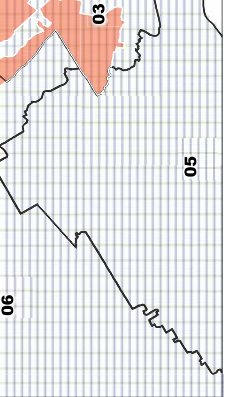
ATTACHMENT A – PROPOSED INTERVENORS

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

**ATTACHMENT B – MAP OF PETITIONERS’ AND PROPOSED
INTERVENORS HOME CONGRESSIONAL DISTRICTS**



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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