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IN THE SUPREME COURT OF PENNSYLVANIA

CAROL ANN CARTER, MONICA PARRILLA, 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,	:	No. 7 MM 2022
v.	:	
LEIGH M. CHAPMAN, 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.	:	

ANSWER IN OPPOSITION TO EMERGENCY APPLICATION FOR EXTRAORDINARY RELIEF BY INTERVENOR-PETITIONERS GUY RESCHENTHALER, JEFFREY VARNER, RYAN COSTELLO, TOM MARINO, AND BUD SHUSTER

Intervenor-Petitioners Guy Reschenthaler, Jeffrey Varner, Ryan Costello, Tom Marino, and Bud Shuster, respectfully submit this Answer in Opposition to the Emergency Application for Extraordinary Relief filed by Carol Ann Carter, Monica Parrilla, 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 (the "*Carter* Petitioners"). This Court should **deny** the *Carter* Petitioners' Application for Extraordinary relief because, aside from stating the obvious—i.e., that the issue is one of public importance—they have failed to advance a coherent argument to justify the exercise of jurisdiction at this late juncture. To the contrary, rather than facilitating an expeditious resolution of this matter, the eleventh-hour request will disrupt the orderly administration of justice and saddle this Court with a task that it is ill-equipped to handle.

I. INTRODUCTION

On January 24, 2022, the parties in the underlying action submitted their proposed redistricting plans. Although different in many respects, nearly every proposal satisfied the threshold criterion of

equal population. But the plan devised by the *Carter* Petitioners did not. Accordingly, by the time the proceedings in the Commonwealth Court concluded, their map was essentially eliminated from consideration. Against this backdrop, the *Carter* Petitioners' latest entreaty to this Court is perhaps unsurprising. This Court, however, should not countenance their attempt to circumvent the orderly resolution of cases. In the end, because "far too much nuance is lost by treating every election matter as exigent and worthy of this Court's immediate resolution[,]" this Court should "honor the Commonwealth Court's traditional role as the court of original and original appellate jurisdiction for most election matters." *Kelly v. Commonwealth*, 240 A.3d 1255, 1263 (Pa. 2020) (*per curiam*) (Saylor, J., concurring and dissenting).

II. MATERIAL PROCEDURAL HISTORY

On December 21, 2021, Petitioners filed their first application for extraordinary relief, pressing the same arguments presented here—namely, that the January 24, 2022 "deadline" suggested by the Department of State was fast approaching and the political branches were unlikely to agree on a congressional redistricting plan in time. On

January 10, 2022, this Court declined to exercise jurisdiction. Importantly, under the Commonwealth Court's scheduling order that was in force at that time, the first day for holding evidentiary hearings was January 31, 2021.

The next day, Petitioners in the accompanying action, docketed at 465 MD 2021 (the "*Gressman* Petitioners"), filed an Application to Expedite. In response, the Carter Petitioners indicated their general agreement that the schedule established by the December 20, 2021 Order was unworkable and proposed a timetable that would, *inter alia*: (i) foreclose any evidentiary hearings; and (ii) require the Commonwealth Court to issue a decision by 5:00 p.m. on January 31, 2022. Notably, the January 31, 2022 deadline for issuing a decision was endorsed by several other parties, including Governor Wolf, the House Democratic Caucus, and the Senate Democratic Caucus.

In an order issued on January 14, 2022, the Commonwealth Court amended its previous scheduling order, further expedited proceedings, such that it would be able to issue a decision on January 31, 2022. On January 27 and 28, 2022, the Commonwealth Court held evidentiary hearings, receiving testimony from six experts, at least one of whom

testified during the evidentiary hearings that the Carter map—along with the proposal of the House Democratic Caucus—was the only one that failed to achieve minimum deviation. *See* N.T. 1/27/22 at 204:4-20 (Dr. DeFord); *see also id.* at 284:21-285:8 (Dr. DeFord).[1]

At the conclusion of those proceedings, the Commonwealth Court instructed the parties to submit post-trial briefs or proposed findings of fact and conclusions of law by 2:00 p.m. on January 29, 2022. Approximately two hours after all post-trial submissions had been timely filed, the *Carter* Petitioners filed the present request for extraordinary relief, arguing that three "recent developments" necessitate this Court's intervention. Specifically, rely on (i) the passage of the January 24, 2022 "deadline" for implementing a new congressional redistricting plan; (ii) Governor Wolf's January 26, 2022 veto of the redistricting legislation adopted by the General Assembly;

[1] *See* Report of Dr. Daryl DeFord, at ¶ 13 ("I evaluated each of the Proposed Plans to determine if they achieve the required zero-balancing. To do this, I used the Legislative Reapportionment Commission's Dataset #1. Using that dataset, I concluded that two of the Parties' Plans—***the Carter Plan*** and the House Democrats Plan—***contain slightly overpopulated districts and thus are not zero-balanced***." (emphasis added)); *see also* Report of Dr. Jonathan Rodden, at 21 (chart showing deviations from -1 to +1 in Carter Plan).

and (iii) the purported delays attendant in any appeal from the decision of the Commonwealth Court.

III. ARGUMENT

As developed below, this Court should decline to assume jurisdiction. *First*, the *Carter* Petitioners are unable to show that ***their*** right to relief is clear, which is a prerequisite to the exercise of extraordinary jurisdiction. *Second*, given the procedural posture of this matter, assuming plenary jurisdiction would not expedite proceedings, but rather, cause further delay. *Third*, the "developments" suggested by the *Carter* Petitioners are not an adequate basis for exercising jurisdiction.

A. The Carter Petitioners' right to relief is not only unclear, but foreclosed under the United States Constitution.

Above all else, the *Carter* Petitioners are unable to satisfy a basic component of the settled criteria for extraordinary relief. Specifically, while congressional redistricting is undoubtedly a matter of significant statewide concern, "[t]he presence of an issue of immediate public importance is not alone sufficient to justify extraordinary relief." *Cnty. of Berks ex rel. Baldwin v. Pennsylvania Lab. Rels. Bd.*, 678 A.2d 355,

359 (Pa. 1996) (quoting *Philadelphia Newspapers, Inc. v. Jerome*, 387 A.2d 425, 430 n. 11 (Pa. 1978)); *accord Rapaport v. Interstate Gen. Media, LLC*, 99 A.3d 528, 528-29 (Pa. 2014) (*per curiam*) (Castille, C.J., concurring) (agreeing that the issue was one of public importance, but joining the *per curiam* denial of an application for extraordinary relief because "the underlying issue of public interest warrants full development in discovery to provide necessary context for the constitutional issues"). Rather, as this Court has repeatedly cautioned, "[p]lenary jurisdiction is invoked sparingly and ***only*** in circumstances where the record clearly demonstrates the petitioners' rights." *Bd. of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 607 Pa. 104, 121 (Pa. 2010); *accord Philadelphia Newspapers, Inc.*, 387 A.2d at, 430 n. 11 ("As in requests for writs of prohibition and mandamus, we will not invoke extraordinary jurisdiction unless the record clearly demonstrates a petitioner's rights.").

Here, although the need for a new congressional redistricting plan is clear, the *Carter* Petitioners' right to have ***their*** proposed redistricting scheme implemented—which is the relief they seek—is not. To the contrary, while all parties can make colorable arguments

relative to the legality of their plan, the *Carter* Petitioners are one of two parties whose proposed redistricting map is facially infirm under the United States Constitution, as their plan has population deviation of greater than one and, thus, fails at its outset.[2]

B. Given the procedural posture of this matter, exercise of jurisdiction would not expedite proceedings and, in fact, may cause further delay and confusion.

Moreover, even if the *Carter* Petitioners' right to relief were clear, they have failed to show that intervention from this Court is necessary "to avoid the deleterious effects arising from delays incident to the ordinary process of law[,]" *In re Domitrovich*, 257 A.3d 702, 715 (Pa. 2021), or that assuming jurisdiction will "conserve judicial resources, [and] expedite the proceedings …." *Commonwealth v. Morris*, 771 A.2d 721, 731 (Pa. 2001). To the contrary, given that the Commonwealth Court has concluded all proceedings and a decision is imminent, assuming jurisdiction at this juncture will waste, rather than conserve judicial resources, and delay, rather than expedite proceedings. In

[2] Notably, mere hours before the proceedings in the Commonwealth Court were set to begin, the House Democratic Caucus submitted a filing in the Commonwealth Court objecting to its jurisdiction. Thus, the only parties who have sought to avoid a decision from the Commonwealth Court are those whose proposals are fundamentally defective under the United States Constitution.

terms of the purported delays in the appellate process that the *Carter* Petitioners decry, as this Court has admonished, "[t]he Rules of Appellate Procedure were adopted to insure the orderly and efficient administration of justice at the appellate level." *Stout v. Universal Underwriters Ins. Co*., 421 A.2d 1047, 1049 (Pa. 1980). These rules facilitate sharpened focus and promote a more developed exposition of the salient issues on appeal. *See, e.g.*, *Erie Ins. Exch. v. Bristol*, 160 A.3d 123, 127 (Pa. 2017) (*per curiam*) (Wecht, J., dissenting) (urging fealty to procedural dictates and cautioning that "[t]his is a court of review, not a tribunal unbounded by rules[,]" which "do[es] not sit ... dispensing justice according to considerations of individual expediency" (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 11. 1131 (1949) (Frankfurter, J., dissenting))).

In short, as this Court has explained in describing the contours of its King's Bench authority, which is closely intertwined with the power of extraordinary jurisdiction, exercise of its plenary jurisdiction is appropriate only in extraordinary circumstances. *See In re Bruno*, 101

A.3d 635, 683 (Pa. 2014).[3] Absent such extraordinary circumstances, invoking this Court's jurisdiction is inappropriate.

C. No new facts exist that would warrant assumption of jurisdiction.

The *Carter* Petitioners' new arguments in support of extraordinary relief also do not alter the analysis. With regard to the January 24, 2022 "deadline" for the implementation of a new redistricting plan, the *Carter* Petitioners' own submissions and the timing of their present application demonstrates that they do not genuinely believe that date has any significance. First, in their response to the Application to Expedite, the *Carter* Petitioners' suggested that the timeline proposed by the *Gressman* Petitioners was too aggressive and, thus, proposed that the Court issue a decision by 5:00 p.m. on

[3] Indeed, in separate concurring opinions, several current and former members of this Court cautioned against an expansive interpretation of the circumstances under which exercise of such jurisdiction was appropriate, emphasizing the need to show "extraordinary circumstances." *See id.* at 696 (Saylor, J., concurring) ("the Court of Judicial Discipline's role should be given primacy, and I find salience in the suggestion that any exercise of King's Bench authority on our part should occur only in "'extraordinary circumstances"'); *id.* at 699-700 (Baer, J., concurring) ("While I do not endeavor to define extraordinary circumstances or pronounce precise timeframes in the paradigm of the facts presented, or more broadly, I suggest that we coordinate the efforts of this Court and the CJD to utilize judicial resources in the best manner and avoid issuance of conflicting orders."); *id.* at 701 (Todd, J., concurring) (stressing the limitations on the Court's "King's Bench power in this constitutionally complex and delicate area to extraordinary circumstances").

January 31, 2022, which, they insisted "will allow for any appeal of that decision to be filed and resolved by the Supreme Court as quickly as possible and before candidates circulate their nomination papers." *Carter*, *et al*., App. to Expedite at 4. Second, the *Carter* Petitioners continued to participate in the proceedings before the Commonwealth Court, submitting two briefs, filing two expert reports, and partaking in extensive evidentiary hearings conducted over the course of two days. Finally, during the proceedings in the Commonwealth Court, the *Carter* Petitioners, were afforded an opportunity to seek detailed testimony from the Deputy Secretary Jonathan Marks regarding the election calendar and the feasibility of various changes in order to effectuate a new redistricting plan, yet declined. Having expressly given up the opportunity to ascertain this fact, the *Carter* Petitioners should not be permitted to rely on a conjectural and arbitrary deadline—drawn from an unsworn statement made in litigation that was terminated months ago.

The *Carter* Petitioners' reliance on Governor Wolf's veto of the redistricting legislation fares no better. To begin, the chief predicate of the *Carter* Petitioners' action, from its inception, was the assumption

that such an impasse would occur. Furthermore, the Governor's veto does not, as a constitutional matter, definitively foreclose any possibility of redistricting legislation, since a veto override remains possible (even if unlikely).

Finally, the *Carter* Petitioners' suggestion that the Court is well equipped to assume jurisdiction immediately merely because the Commonwealth Court has held an evidentiary hearing is without basis. This Court has long recognized the limitations on an appellate court's ability to review the "cold record," as distinguished from a factfinder's assessment of the evidence and testimony, which is based on firsthand observations and a more intimate knowledge of the parties and their claims.[4]

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[4] *See, e.g.*, *In re Adoption of S.P.*, 47 A.3d 817, 826 (Pa. 2012) ("We observed that, unlike trial courts, appellate courts are not equipped to make the fact-specific determinations on a cold record[.]"); *Com. ex rel. Spriggs v. Carson*, 368 A.2d 635, 639 (Pa. 1977) (explaining that fact-finders conclusions relative to testimony is entitled to deference because it is based upon observations and "qualities which cannot be divined from the mechanistic reading of a cold record"); *Hankin v. Goodman*, 432 Pa. 98, 103, 246 A.2d 658, 661 (1968) ("[A] realistic appreciation of the limitations of our position as an appellate court reading a cold record and a due respect for the fact finder lead us to conclude that we cannot say the disputed findings are incorrect as a matter of law"); *In re DiMarco's Est.*, 257 A.2d 849, 857 (Pa. 1969) (Roberts, J., dissenting) ("A very important reason why this Court should be reluctant to overturn findings made by a trier of fact is that we, viewing a cold record, simply are not in a position to evaluate witnesses compared with the judge who is present when their testimony is given."); *see also Brown v. Com.,*

D. Principles of equity militate against granting the Carter Petitioners relief.

In terms of the delays in resolving this action, much of it has been caused by the *Carter* Petitioners. Although examples abound, the most striking illustration is their lengthy submissions opposing intervention by the Democratic and Republican Caucuses of the General Assembly—while at the same time concurring in the Governor's intervention. Furthermore, despite proposing a schedule that would have afforded the Commonwealth Court until 5:00 p.m. on January 31, 2022 to issue a decision, which was largely adopted by the Court, the *Carter* Petitioners filed the present application on January 29, 2022. Finally, the Carter Petitioners expressly declined to probe the Department of State relative to the timeline for implementing a new redistricting plan, opting, instead, to continue proposing January 24, 2022 as a deadline.

IV. CONCLUSION

Accordingly, Congressman Guy Reschenthaler, Commissioner Jeffrey Varner, and Former Congressmen Ryan Costello, Tom Marino,

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Pennsylvania State Police, 502 A.2d 126, 129 (1985) ("Under the circumstances, working with only a cold record from the proceeding below, the Commissioner will usually not be in a position to render independent findings of fact.").

and Bud Shuster respectfully request that the Emergency Application for Extraordinary Relief presently before the Court be denied.

Respectfully submitted,

Dated: February 1, 2022

/s/ Matthew H. Haverstick

Matthew H. Haverstick (No. 85072)
Joshua J. Voss (No. 306853)
Shohin H. Vance (No. 323551)
Samatha G. Zimmer (No. 325650)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com
szimmer@kleinbard.com

Attorneys for Guy Reschenthaler, Jeffrey Varner, Ryan Costello, Tom Marino, and Bud Shuster