

**IN THE SUPREME COURT OF PENNSYLVANIA**

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No. 7 MM 2022

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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 Bachunis; Tom DeWall; Stephanie McNulty; and Janet Temin,

Petitioners,

vs.

Leigh M. Chapman, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

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**JOINT OPPOSITION OF HOUSE REPUBLICAN INTERVENORS BRYAN CUTLER, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND KERRY BENNINGHOFF, MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND SENATE REPUBLICAN INTERVENORS JAKE CORMAN, PRESIDENT PRO TEMPORE OF THE PENNSYLVANIA SENATE, AND KIM WARD, MAJORITY LEADER OF THE PENNSYLVANIA SENATE TO *CARTER* PETITIONERS' EMERGENCY APPLICATION FOR EXTRAORDINARY JURISDICTION**

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The Petitioners in this consolidated redistricting action first asked this Court to assume extraordinary jurisdiction over the action on December 21, 2021, only four days after they commenced it. *See Application, Carter v. Chapman*, 141 MM 2021 (the “2021 Application”). At that time, the Commonwealth Court had scheduled a trial to begin on January 31, 2022, and had directed the filing of proposed congressional redistricting plans on January 28, 2022. The 2021 Application asserted that a judgment was needed before January 24, 2022. *Id.* at 8-9. This Court denied that application on January 10, 2022 and did so with the recognition that, under the current schedule, a judgment would not be rendered by January 24, 2022. Four days later, on January 14, 2022, the Commonwealth Court entered a *further* expedited scheduling order, scheduling a trial for January 27-28, 2022 and directing proposed plans to be filed by January 24, 2022.

Last week, the parties and several *amici* worked feverishly to exchange briefs and expert reports, and participated in the trial in Commonwealth Court on January 27-28, 2022. Proposed findings of fact and conclusions of law were filed at 2:00 p.m. on Saturday, January 29, 2022. Less than 24 hours after that trial concluded, and approximately one hour after *Carter* Petitioners filed their post-trial submission, they came to this Court asking it, *once again*, to take extraordinary jurisdiction. Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives

(“House Republican Intervenors”), and Intervenors Jake Corman, President Pro Tempore of the Pennsylvania Senate and Kim Ward, Majority Leader of the Pennsylvania Senate (“Senate Republican Intervenors”), oppose that request for relief.<sup>1</sup>

**A. No New “Developments” Justify This Court Exercising Extraordinary Jurisdiction Now.**

*Carter* Petitioners assert that such extraordinary relief is warranted due to so-called recent “developments,” but none of the cited developments are, in fact, developments at all.

*First*, *Carter* Petitioners claim that the January 24, 2022 deadline by which the Acting Secretary and Director for the Pennsylvania Bureau of Election Services and Notaries claimed to need a map has now passed. This is not a development. January 24, 2022 was an arbitrary deadline, not one found in Pennsylvania’s Constitution or any statute. This point is amplified by a concession that counsel for the Secretary of the Commonwealth made during closing arguments at trial: the state could likely be prepared within *two weeks* of a map being available. Tr. 1095:6-14.

More importantly, when this Court denied Petitioners’ 2021 Application on January 10, 2022, the Commonwealth Court had already issued its scheduling order,

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<sup>1</sup> The House Republican Intervenors and Senate Republican Intervenors are separately represented parties, but file this joint Answer in the interest of time and expediency. In so doing, they do not waive any right to file separate briefing or applications in this Court.

which set January 28, 2022 as a deadline to submit maps and scheduled an evidentiary hearing for January 31. Thus, it was clear then that a map would not be in place by the claimed January 24 deadline. Nothing has changed. In fact, since that time, the Commonwealth Court *further expedited* proceedings and conducted the trial on January 27-28, 2022. The parties have submitted proposed findings of fact to the Commonwealth Court. The record is complete and the Commonwealth Court will issue its decision imminently.

*Second*, *Carter* Petitioners assert “there is no longer any prospect that the legislative process will timely yield a final map” because the Governor vetoed H.B. 2146 on January 26, 2022. They contend that the adoption of a congressional map will fall to the judiciary. But that is exactly why the Commonwealth Court has held expedited proceedings. The entire purpose of this expedited litigation was to ensure that a map could be timely adopted if the General Assembly and Governor could not agree on a map. The Governor’s veto of H.B. 2146 is not something that was unanticipated. Although the House and Senate Legislative Intervenors were hopeful that the Governor would sign a congressional redistricting plan that adhered to traditional redistricting criteria and that was politically fair, the Governor openly stated that he would veto H.B. 2146 if it was passed.<sup>2</sup> Thus, the Governor’s veto on

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<sup>2</sup> See <https://www.spotlightpa.org/news/2022/01/pennsylvania-redistricting-congressional-map-final-passage-tom-wolf/>

January 26, 2022 is not a development that warrants the exercise of extraordinary jurisdiction.

*Third*, *Carter* Petitioners assert that there is no reason for this Court to wait for an appeal from the Commonwealth Court’s decision. This again is no new development and amounts to the same argument this Court previously rejected. When this Court denied the Petitioners’ 2021 Application, this Court was well aware that the Commonwealth Court would conduct a trial, create a record, and issue an opinion and decision that could be appealed to this Court—just like what Pennsylvania’s lower courts do every day in thousands of cases each year. The Commonwealth Court has moved expeditiously and done precisely what the parties and this Court contemplated it would do—and it has done so on an even faster timeline than originally planned.

Reversing course deep into the eleventh hour of these proceedings, and assuming extraordinary jurisdiction of this case at this phase, will not speed the case up, either.<sup>3</sup> In *Mellow* and *League of Women Voters*, this Court did assume

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<sup>3</sup> *Carter* Petitioners suggest (at 5) that the Commonwealth Court indicated in its scheduling order that it would not rule until “next week.” But that is not a fair characterization of the scheduling order, which indicated the court would rule if the General Assembly had not passed a plan by January 30. *See App. at Ex. C, ¶ 12*. The trial concluded on Friday, January 28, and proposed findings of fact and conclusions of law were filed at 2:00 p.m. on Saturday, January 29. Nowhere in the scheduling order or elsewhere has the Commonwealth Court given an indication it would take until the week of February 7 to rule, and the fact the Commonwealth Court required

extraordinary jurisdiction—but then empaneled a Commonwealth Court judge to act as a master to try the case and issue a report and recommendation, which in turn was brought up to this Court and litigated. *See, e.g., Mellow v. Mitchell*, 607 A.2d 204, 206 (Pa. 1992); *League of Women Voters v. Com.*, 178 A.3d 737, 766-767 (Pa. 2018). This Court would likely need to follow that same path here, only with the attendant delay of entering the administrative orders necessary to appoint the judge and for the judge to familiarize himself or herself with the record and issue a report and recommendation. And for what? The Commonwealth Court has already created the record that would be generated through any special-master proceedings and it is prepared to imminently issue a judgment.

The better course at this late stage is to allow the Commonwealth Court to finish its work and issue its judgment. After all, the Commonwealth Court has created the factual record, spent significant time analyzing the issues, and viewed first-hand the copious scientific and lay evidence submitted during the trial. It is best positioned to evaluate that record and quickly enter judgment in the first instance. That court's judgment can be quickly appealed, briefed, and argued on an expedited basis. Further, the Commonwealth Court's decision will likely significantly narrow

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proposed findings and conclusions less than one calendar day after the conclusion of trial indicates that court plans to rule expeditiously.

the issues in dispute, allowing this Court to focus on the issues that emerge as the most important in the case—a goal the appellate process is designed to achieve.

**B. *Carter* Petitioners Have Not Demonstrated A Clear Entitlement To The Relief They Seek.**

Furthermore, *Carter* Petitioners have *still* not satisfied the requirements for extraordinary jurisdiction before this Court. This Court “will not invoke extraordinary jurisdiction unless the record clearly demonstrates a petitioner’s rights.” *Cty. of Berks ex rel. Baldwin v. Pennsylvania Labor Relations Bd.*, 678 A.2d 355, 359 (Pa. 1996) (citation omitted). Here, the *Carter* Petitioners submitted one plan to the Commonwealth Court—but so did the *Gressman* Petitioners in Case No. 465 M.D. 2021 (who did not join *Carter* Petitioners in seeking extraordinary jurisdiction this time around), so did Governor Wolf, so did the Senate Democratic Caucus (who submitted *two* maps), so did the House Democratic Caucus, so did the undersigned Intervenors, and so did several *amici*. Some 14 plans in all have been proposed, most with expert reports and other analyses to support the submissions.

*Carter* Petitioners have, in short, *not* established a clear right to the adoption of *their* plan. This is the opposite of a case where “there is no factual dispute” and the matter of great public importance rests on an issue of “law” that can be resolved “on the pleadings.” *Bd. of Revision and Taxes, Cty. of Philadelphia v. City of Philadelphia* 4 A.3d 610, 621 (Pa. 2010). This case is highly fact-intensive, and resolution of the legal and factual issues in this case is one best entrusted to the

discretion of the trial court in the first instance, with this Court exercising appellate jurisdiction over the Commonwealth Court’s ultimate judgment.

**C. Declining To Exercise Extraordinary Jurisdiction Helps to Promote Public Confidence In The Judiciary**

Finally, declining to exercise extraordinary jurisdiction at this time would promote public confidence in the judiciary. In deciding whether to assume extraordinary jurisdiction, this Court properly considers whether the exercise of such jurisdiction will “promote confidence in the authority and integrity of our state and local institutions.” *Bd. of Revision of Taxes*, 4 A.3d at 620. Here, the Court declined the Petitioners’ 2021 Application and thereby entrusted this case to the Commonwealth Court to render judgment.

Absolutely *nothing* in *Carter* Petitioners’ new application raises legitimate changed circumstances or questions the fundamental fairness or the timeliness of the Commonwealth Court’s proceedings. It appears *Carter* Petitioners simply lay in wait for the Commonwealth Court to conclude the trial and receive the parties’ proposed findings of fact and conclusions of law—and only *then* did they spring the “trap” by filing this application. These facts and circumstances reveal *Carter* Petitioners’ application as a blatant attempt at forum-shopping—one filed *after* the trial concluded.

If the Court now changes its mind and assumes extraordinary jurisdiction *after* the trial and shortly before judgment, the move will likely be widely perceived in



two ways that undermine public confidence in the judiciary. First, it will likely be perceived as a rebuke of the Commonwealth Court judge who has worked tirelessly over the past several weeks to manage a very complex and fast-moving matter and to conduct a trial under these extraordinary circumstances. Second, the public will presumably not understand what “changed circumstances” legitimately justified such a dramatic, eleventh-hour about-face (because *Carter* Petitioners have failed to identify any).

In the end, it remains preferable for this Court to permit the Commonwealth Court to proceed to judgment and for this Court to subsequently exercise appellate review over that judgment. Doing so would allow the normal appellate review process to play out (albeit in an expedited fashion), which allows the usual two layers of review over the issues in this case (one in Commonwealth Court and one in this Court) that the public expects. If this Court assumes jurisdiction of the case now, the public will see the Court take the case away from the judge who tried it, then issue its own findings of fact and conclusions of law and then simultaneously adopt a remedy. This result would leave no room for additional oversight and review, except

in the event of a colorable violation of federal law. Preservation of public confidence weighs against the exercise of extraordinary jurisdiction now.<sup>4</sup>

For all these reasons, *Carter* Petitioners' Application for Extraordinary Jurisdiction should be denied.

Dated: February 1, 2022

Respectfully submitted,

/s/ Anthony R. Holtzman

/s/ Jeffry Duffy

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<sup>4</sup> Normal appellate review of the issues in this case will enhance the appearance of fairness, due process, and integrity, all values that are central to the Judiciary and the *League of Women Voters* decision itself.

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## CERTIFICATION OF COMPLIANCE

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

/s/ Anthony R. Holtzman  
Anthony R. Holtzman

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

**Service by PACFile eService as follows:**

All counsel of record

Date: February 1, 2022

/s/ Anthony R. Holtzman  
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