

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 464 MD 2021

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,

v.

Veronica Degraffenreid, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Matthis, in Her Acting Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

No. 465 MD 2021

Philip T. Gressman; Ron Y. Donagi; Kristopher R. Tapp; Pamela A. Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahon; Timothy G. Feeman; and Garth Isaak,

Petitioners,

v.

Veronica Degraffenreid, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Matthis, in Her Acting Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF VOTERS OF THE
COMMONWEALTH OF PENNSYLVANIA’S
APPLICATION FOR LEAVE TO INTERVENE**

Haroon Bashir, Valerie Biancaniello, Tegwyn Hughes, and Jeffrey Wenk (collectively, the “Proposed Voter Intervenors”) hereby file this Memorandum of Law in support of their Application for Leave to Intervene in this consolidated action, and in support, state as follows:

I. INTRODUCTION AND SUMMARY

By establishing a procedure for parties to this action—but no one else—to submit proposed congressional redistricting plans and by announcing that the Court will select one of the submitted plans, the Court has bestowed an important right on the litigants that it cannot deny to the Proposed Voter Intervenors. The Pennsylvania Supreme Court has long recognized that “the right to vote is personal’ and ‘the rights sought to be vindicated in a suit challenging an apportionment scheme are ‘personal and individual.’” *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 994–95 (Pa. 2002) (quoting *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964)). In that vein, the Proposed Voter Intervenors have a “personal and individual” interest in submitting a congressional map of their own, an interest that cannot be adequately represented by any of the current parties. This is particularly true with respect to the

Carter Petitioners¹ who dispute the Proposed Voter Intervenors’ right to intervene here: the Carter Petitioners have previously admitted they intend to advocate and vote for Democratic candidates in the upcoming 2022 primary and general elections. The Proposed Voter Intervenors, however, are the “mirror-image” of the Carter Petitioners, as they intend to advocate and vote for Republican candidates in the upcoming 2022 primary and general elections.

Less than 3 months ago, this Court held that the Carter Petitioners lacked standing to pursue an action to impose a deadline for the General Assembly to draw a congressional map and to have this Court draw a new map if that deadline was not met. *See Carter, et al. v. DeGraffenreid*, No. 132 MD 2021 (“*Carter I*”). Also in *Carter I*, this Court held that the Proposed Voter Intervenors lacked standing, holding in part that the Proposed Voter Intervenors lacked “an interest that surpasses the interest of all qualified and registered voters in the Commonwealth,” and that, because “the current congressional district map is malapportioned across the state,” “[e]very elector, therefore, has an interest in redrawing a congressional map that meets constitutional standards.”

¹ The Proposed Voter Intervenors will refer to the petitioners in *Carter, et al. v. Degraffenreid*, No. 464 MD 2021 as the “Carter Petitioners” and the petitioners in *Gressman, et al. v. Degraffenreid*, No. 465 MD 2021 as the “Gressman Petitioners.” They will collectively be referred to as “Petitioners.”

Despite the Court holding in *Carter I* that all voters lacked standing, the Carter Petitioners now return to this Court, seeking the same relief they sought in *Carter I*. The current schedule outlined by the Court does not appear to provide an opportunity for the standing of the Carter Petitioners or the Gressman Petitioners to be evaluated. To the extent the Court now finds that these Petitioners have standing, so too do the Proposed Voter Intervenors.

If the Proposed Voter Intervenors are not permitted to intervene, the Carter Petitioners—who previously pleaded that they “intend to advocate and vote for Democratic candidates in the upcoming 2022 primary and general elections”—will be permitted to submit a proposed congressional map, but registered voters in those same districts who intend to advocate and vote for Republican candidates in the upcoming 2022 primary and general elections will be shut out.

II. BACKGROUND

A. Proposed Voter Intervenors

Proposed Voter Intervenor Haroon Bashir resides in Philadelphia County, Pennsylvania, is registered to vote in Pennsylvania, and consistently votes in each election. Mr. Bashir intends to advocate and vote for Republican candidates in the upcoming 2022 primary and general elections. Mr. Bashir resides in the 2nd

Congressional District, which the 2020 Census Redistricting Data demonstrates will be malapportioned beginning with the 118th United States Congress.

Proposed Voter Intervenor Valerie Biancaniello resides in Delaware County, Pennsylvania, is registered to vote in Pennsylvania, and consistently votes in each election. Ms. Biancaniello intends to advocate and vote for Republican candidates in the upcoming 2022 primary and general elections. Ms. Biancaniello resides in the 5th Congressional District, which the 2020 Census Redistricting Data demonstrates will be malapportioned beginning with the 118th United States Congress.

Proposed Voter Intervenor Tegwyn Hughes resides in Northampton County, Pennsylvania, is registered to vote in Pennsylvania, and consistently votes in each election. Ms. Hughes intends to advocate and vote for Republican candidates in the upcoming 2022 primary and general elections. Ms. Hughes resides in the 7th Congressional District, which the 2020 Census Redistricting Data demonstrates will be malapportioned beginning with the 118th United States Congress.

Proposed Voter Intervenor Jeffrey Wenk resides in Allegheny County, Pennsylvania, is registered to vote in Pennsylvania, and consistently votes in each election. Mr. Wenk intends to advocate and vote for Republican candidates in the upcoming 2022 primary and general elections. Mr. Wenk resides in the 18th

Congressional District, which the 2020 Census Redistricting Data demonstrates will be malapportioned beginning with the 118th United States Congress.

B. Procedural History

Both the Carter Petitioners and the Gressman Petitioners commenced actions on December 17, 2021, by filing the Petitions for Review addressed to the Court’s original jurisdiction. On December 20, 2021, this Court entered an order consolidating the two actions. Also on December 20, 2021, this Court entered an order:

- a. setting a deadline of December 31, 2021 for applications to intervene to be filed;
- b. setting a deadline of January 28, 2022 for any party “to submit to the Court for its consideration a proposed 17-district congressional reapportionment plan consistent with the result of the 2020 Census”;
- c. noting that “[i]f the General Assembly and the Governor fail to enact a congressional reapportionment plan by January 30, 2022, the Court will select a plan from those plans timely filed by the parties”;
and
- d. scheduling a final hearing to take place on January 31, 2022.

On December 21, 2021, the Petitioners filed with the Pennsylvania Supreme Court separate Applications for the Exercise of Extraordinary Jurisdiction or King’s

Bench Power (the “King’s Bench Applications”). *See* 141 MM 2021; 142 MM 2021.

On December 27, 2021, the Respondents filed Answers to the King’s Bench Applications. Also on December 27, 2021, the leadership of both houses of the General Assembly filed Applications to Intervene with the Pennsylvania Supreme Court. Between December 27, 2021 and December 31, 2021, several other individuals—including other voters and elected representatives—have sought leave to intervene. To date, the Respondents have not filed a response to either Petition for Review.

III. STANDARD FOR INTERVENTION

In an original jurisdiction petition for review, a nonparty may file an application for leave to intervene. Pa. R.A.P. 1531(b). “The right to intervention should be accorded to anyone having an interest of his own which no other party on the record is interested in protecting.” *Keener v. Zoning Hearing Bd. of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw. Ct. 1998) (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty.*, 44 A.2d 250 (Pa. 1945)).

Pennsylvania law affords a party an absolute right to intervene in an action if the party can satisfy any one of the categories specified in Pa. R. Civ. P. 2327. Pa. R. Civ. P. 2329; *see also Larock v. Sugarloaf Township Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. 1999). The standards for intervention under

Pennsylvania Rules of Civil Procedure 2326 through 2329 apply to an original jurisdiction petition for review because Pennsylvania Rule of Appellate Procedure 106 applies the “general rules” for practice in the courts of common pleas—namely, the Rules of Civil Procedure—“so far as they may be applied.”

Voter Intervenors seek to intervene under Pennsylvania Rule of Civil Procedure 2327(3) and (4), which provide in pertinent part:

At 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.C.P. No. 2327(3), (4) (emphasis added); *see also Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Human Servs.*, No. 26 M.D. 2019, 2020 Pa. Commw. LEXIS 104, 2020 WL 424866, at *5 (Pa. Commw. Ct. Jan. 28, 2020) (“Pennsylvania Rule of Civil Procedure No. 2327(4) . . . permits intervention where the determination ‘*may affect any legally enforceable interest*’ of a proposed intervenor.” (quoting Pa. R.C.P. No. 2327(4) and emphasis in original)).

If the determination may affect the intervenor’s legally enforceable interest, and no exception applies, approving intervention is mandatory, not discretionary. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw.

1999). Moreover, the Court may, in its discretion, allow intervention even if it determines that one of the Rule 2329 exceptions applies. *See* Pa. R.C.P. 2329 (instructing that “an application for intervention *may* be refused” if an exception applies (emphasis added)); *see also* 7 Goodrich Amram 2d § 2329:7 (“Even though the petitioner’s interest is adequately represented in the pending action, this fact does not mandate the refusal of intervention since the refusal of intervention on the ground of the adequacy of the representation is permissive in nature.”).

The Court should grant the Proposed Voter Intervenors’ application to intervene because the Court’s determination of this action may affect the Voter Intervenors’ legally enforceable interests, no exception applies under Pennsylvania Rule of Civil Procedure 2329, and the Voter Intervenors’ participation will aid the Court. Further, the Voter Intervenors could have joined as original parties in this action.

IV. BASIS FOR PROPOSED INTERVENTION

A. The Proposed Voter Intervenors Could Have Joined as Original Parties in This Consolidated Action

The Proposed Voter Intervenors, like the Carter Petitioners and the Gressman Petitioners, could have been joined as original parties in this consolidated action. The Proposed Voter Intervenors, like the Carter Petitioners and the Gressman Petitioners, reside in malapportioned congressional districts. Indeed, as noted by this Court, “the current congressional district map is malapportioned across the

state” and “[e]very elector, therefore, has an interest in redrawing a congressional district map that meets constitutional standards.”

Given the Court’s ruling in *Carter I* that the Proposed Voter Intervenors and the Carter Petitioners lacked standing, it is not clear whether *any* elector has standing in this action. But the procedure outlined in the Court’s December 20 Order does not address whether and under what circumstances the standing of the Carter Petitioners or the Gressman Petitioners will be evaluated. To the extent the Carter Petitioners and Gressman Petitioners have standing, so do the Proposed Voter Intervenors. Indeed, as reflected in the proposed Petition for Review, attached hereto as Exhibit B to their Application, the Proposed Voter Intervenors could have commenced a separate action; Proposed Voter Intervenors seek to intervene here because the Court has already scheduled a hearing and procedure for selecting a new map; and a separate action would almost certainly be consolidated with the existing actions.

B. The Proposed Voter Intervenors Have Substantial Interests in This Action

The Proposed Voter Intervenors have a substantial and particularized interest in preserving the existing framework under which the General Assembly and

Governor have until the first day to circulate nominating petitions for Congress to implement a redistricting plan.

Courts have recognized the importance of allowing intervention by parties as “direct counterparts” of the party seeking relief, particularly in litigation concerning election laws. For example, in *Democratic National Committee v. Bostelmann*, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 54269, 2020 WL 1505640 (W.D. Wisc. Mar. 28, 2020), the district court permitted the Republican National Committee and the Republican Party of Wisconsin to intervene in an action brought by the Democratic National Committee and Democratic Party of Wisconsin, in which the latter sought to enjoin the enforcement of certain election laws. *Id.* at *14–*15. Similarly, in *NAACP Minnesota-Dakotas Area State Conf. v. Minn. Secretary of State*, the court held “[c]learly, if the Plaintiffs in this case were the opposing committees for President or the Democratic National Committee in general, there would be no doubt that the Committees would be entitled to intervention as a matter of right, as ‘mirror image’ parties.” No. 62-cv-20-3625, 2020 Minn. Dist. LEXIS 457, at *14 (Minn. 2d D. Aug. 3, 2020).

Likewise, in *Builders Ass’n of Greater Chicago v. City of Chicago*, the court allowed an association of contractors to intervene in an action brought by a builder’s association because their interests were the mirror image of each other: the plaintiff claimed that its members were being injured by a procurement program, while the

intervenors claimed that its members would be injured by the program's invalidation. 170 F.R.D. 435, 440 (N.D. Ill. 1996).

Just three years ago, this Court, acting as a special master, permitted Republican voters to intervene in redistricting litigation commenced by Democratic voters. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5 (Pa. 2018). There is no principled reason to take a different approach here. The Proposed Voter Intervenors are unquestionably the “mirror-image” of the Carter Petitioners: the Carter Petitioners have previously averred that they are Pennsylvania registered voters who “intend to advocate and vote for Democratic candidates in the upcoming 2022 primary and general elections,” Ex. Voter-1 ¶ 11, while the Proposed Voter Intervenors intend to advocate and vote for Republican candidates in the upcoming 2022 primary and general elections.

The Court has already put into motion a procedure by which parties may submit proposed congressional reapportionment plans, one of which this Court will select if the General Assembly and Governor fail to enact a congressional reapportionment plan. To the extent the Carter Petitioners and Gressman Petitioners have established a “substantial, direct, and immediate” interest in this litigation, so too have the Proposed Voter Intervenors. But the Carter Petitioners intend to advocate and vote for Democratic candidates in the upcoming 2022 primary and

general elections—the exact opposite of what the Proposed Voter Intervenors intend to do.²

As the mirror-image of the Carter Petitioners, the Proposed Voter Intervenors have established a substantial interest in this litigation that requires they be granted leave to intervene.

C. The Proposed Voter Intervenors’ Interest Cannot Be Adequately Represented by Other Parties

Although intervention may be refused if a petitioner’s interest is adequately represented, such cannot be the case in the redistricting context. The Supreme Court has noted that “the right to vote is personal’ and ‘the rights sought to be vindicated in a suit challenging an apportionment scheme are ‘personal and individual.’” *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 994–95 (Pa. 2002) (quoting *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964)). Thus, no two voters have precisely the same interest in cases such as this.

² In addition, intervention is appropriate under Pa.R.C.P. 2327(4). As held by this Court in *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Commw. 2019), “the inquiry to determine whether a party has standing to initiate litigation is different than the inquiry to determine whether a party can intervene in existing litigation.” An individual seeking to intervene in an action need only establish “an interest of such nature that participation ... may be in the public interest.” *Id.* at 1288–89. As the interests of Proposed Voter Intervenors are of such nature that their participation in this matter may be in the public interest, their intervention is mandatory pursuant to Pa. R.C.P. 2327(4). See *Larock v. Sugarloaf Township Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. 1999).

Any redistricting plan, regardless of how it is drawn, necessarily reflects the policy preferences of the drafter. Even when a drafter purports to use only “neutral” or “traditional” criteria for drawing redistricting plan, *someone* must decide which of the nearly countless iterations of possible maps will be submitted to the Court. Given the divergent party affiliation and preference of the Carter Petitioners, it is clear that they cannot adequately represent the interests of the Proposed Voter Intervenors. Our Founders readily observed the political nature of redistricting, noting that whoever draws the district maps might “mould their regulations as to favor the candidates they wished to succeed.” 2 Records of the Federal Convention of 1787, at 241 (Max Farrand ed. 1911). More recently, the Pennsylvania Supreme Court in *League of Women Voters* appeared to acknowledge that it is impossible to weed out partisan intent and other “extraneous” considerations; the constitutional question it answered was merely whether “traditional redistricting criteria” have been subordinated to other considerations. *See League of Women Voters*, 178 A.3d at 817 (noting that “other factors have historically played a role in drawing of legislative maps, and holding that Article I, Section 5 of the Pennsylvania Constitution is violated only when “neutral criteria have been subordinated”).

The maps that are submitted to the Court will reflect certain policy preferences of the parties: for example, which communities of interest remain intact (and even what communities of interest should be recognized) and which municipalities and

counties should be split. Even if agreement could be reached on such items, vastly different maps could generate the same compactness scores while maintaining contiguity and equal population. *Someone* must choose which map to submit. The Carter Petitioners appear to suggest that only they should have this right. But given the “personal and individual” nature of the rights involved, there is no reason to believe that the Carter Petitioners or anyone else could adequately represent the interests of the Proposed Voter Intervenors.

The Carter Petitioner’s suggestion that the only legitimate interest is in obtaining a constitutional map ignores the obvious: countless maps could be constitutional. The Court’s December 20 Order has already granted some voters—the Carter Petitioners and the Gressman Petitioners—the right to exercise their own policy preferences in deciding which maps to submit. Failing to afford the same opportunity to the few other voters who seek leave to intervene would constitute a deprivation of equal protection under the United States and Pennsylvania Constitutions.

The last time a Pennsylvania Court adopted a congressional districting plan, Justice Baer objected to the lack of transparency of the process. *See League of Women Voters*, 178 A.3d at 831 (Baer, J., concurring and dissenting). Court adoption of a plan stands in stark contrast to the comparably open legislative process. For example, during the legislative process, voters may contact their representative

and senator to provide their input regarding maps under consideration. The public may also provide comments or maps of their own via the Public Comment Portal, <https://portal.pennsylvania-mapping.org/#gallery>. But the procedure outlined by the Court does not appear to allow for public comment. Thus, the only means by which interested citizens can have their voices be heard during the process of adopting a new congressional district plan is to grant such voters the opportunity to intervene.

Simply stated, no party—least of all the “mirror-image” Carter Petitioners—can adequately represent the interest of the Proposed Voter Intervenors to submit a map of their choosing. Accordingly, they must be granted leave to intervene.

D. The Proposed Voter Intervenors’ Intervention Will Not Unreasonably Complicate or Delay This Case

The Proposed Voter Intervenors have not unduly delayed the submission of their application to intervene in this action, which remains in its infancy. The Petitions for Review were filed on December 17, 2021. This Court set a deadline of December 31, 2021 for applications to intervene to be filed. The Respondents have not yet filed a responsive pleading to the Petitions for Review. The Proposed Voter Intervenors are fully prepared to participate in the hearing scheduled for January 31, 2022. The Proposed Voter Intervenors have not and will not seek an extension to any of the Court’s deadlines.

The Carter Petitioners fail to explain how the mere inclusion of Proposed Voter Intervenors’ proposed redistricting plan will “unnecessarily delay and

complicate” the case. Indeed, the Carter Petitioners offer no standard for the Court to use to determine how many parties or proposed maps is too many. Rather, it appears the Carter Petitioners believe any map beyond their own is too many. Thus, there is no basis to deny intervention under Rule 2329(3).

V. CONCLUSION

For the reasons set forth above, the Proposed Voter Intervenors respectfully request that this Honorable Court enter an Order granting the Proposed Application to Intervene in this matter together with any other relief the Court deems to be appropriate or necessary.

Respectfully submitted,

GALLAGHER GIANCOLA LLC

Dated: January 5, 2022

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**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

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

GALLAGHER GIANCOLA LLC

Dated: January 5, 2022

/s/ Russell D. Giancola
Kathleen A. Gallagher
Russell D. Giancola

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2022, I caused a true and correct copy of the foregoing **Memorandum of Law in Support of Application for Leave to Intervene by Voters of the Commonwealth of Pennsylvania**, to be filed via the Court's PAC File System and email, on the following :

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GALLAGHER GIANCOLA LLC

Dated: January 5, 2022

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