IN COMMONWEALTH COURT OF PENNSYLVANIA

CAROL ANN CARTER; MONICA PARRILLA; REBECCA POUYOUROW; 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,	:	**CASES CONSOLIDATED**
V.	:	No. 464 M.D. 2021
VERONICA DEGRAFFENREID, IN HER OFFICIAL CAPACITY AS THE ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; JESSICA MATHIS, IN HER OFFICIAL CAPACITY AS DIRECTOR FOR THE PENNSYLVANIA BUREAU OF ELECTION SERVICES AND NOTARIES, Respondents.	:	
PHILIP T. GRESSMAN; RON Y. DONAGI; KRISTOPHER R. TAPP; PAMELA GORKIN; DAVID P. MARSH; JAMES L. ROSENBERGER; AMY MYERS; EUGENE BOMAN; GARY GORDON; LIZ MCMAHON; TIMOTHY G. FREEMAN; AND GARTH ISAAK, Petitioners,	:	No. 465 MD 2021
V.	:	
VERONICA DEGRAFFENREID, IN HER OFFICIAL CAPACITY AS THE ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; JESSICA MATHIS, IN	:	

HER OFFICIAL CAPACITY AS DIRECTOR :
FOR THE PENNSYLVANIA BUREAU OF :
ELECTION SERVICES AND NOTARIES, :
Respondents. :

ANSWER TO PETITIONERS' APPLICATION FOR AN ACCELERATED SCHEDULE PURSUANT TO PA.R.A.P. 123

Proposed Intervenors Guy Reschenthaler, Jeffrey Varner, Tom Marino, Ryan Costello, and Bud Shuster submit this response in opposition to the Petitioners' Application for Expedited Review. As explained in greater detail below, while modest adjustments and additions to this Court's December 20, 2021 Scheduling Order may be warranted, the timetable Petitioners propose is neither feasible, nor necessary. To the contrary, their eleventh-hour request—submitted without conferring with any of the other parties or participants in contravention of the Rules of Appellate Procedure 3707[1]—asks this

[1] Subject to certain exceptions not presently applicable, Rule 3707 provides that:

> Prior to filing an application or a motion with the Court, a party shall confer with all counsel of record and any unrepresented parties to determine their position. Applications and motions shall include a paragraph indicating whether the other parties concur with the relief sought. If the other party does not respond to an inquiry regarding concurrence within a reasonable time, the party filing the application or motion shall set forth in detail the efforts made to obtain a response and that no response was received.

Pa.R.App.P. 3707.

Court to replace the sound framework drawn from *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), with one that portends significant constitutional and procedural infirmities.

I. Introduction and Summary of the Argument.

On December 17, 2021, Petitioners commenced these consolidated actions in this Court's original jurisdiction, requesting implementation of a court-ordered congressional redistricting plan. The very next business day, December 20, 2021, this Court entered a Scheduling Order establishing a reasonably expedited timeline. Seemingly dissatisfied with that schedule, however, Petitioners sought extraordinary relief in the State Supreme Court. Yet, despite being aware of that timeframe, for over three weeks, Petitioners took no action to expedite resolution in this Court. Instead, Petitioners' only filings during that time were submissions opposing participation by certain sets of intervenors—while supporting intervention by others.

Unsurprisingly, on January 10, 2022, the State Supreme Court denied Petitioners' request for extraordinary relief, prompting them to submit the present Application. In essence, Petitioners now ask this Court to adopt the same untenable schedule the Supreme Court largely

rejected.[2] As set forth below, this Court should decline to do so for at least four reasons. Furthermore, because adopting a congressional redistricting plan based entirely on legal arguments and untested expert testimony is inconsistent with due process and the goals of transparency, it should be rejected.

II. Petitioners' proposed timeline is untenable.

First, Petitioners' proposed accelerated schedule is unsustainable because it does not provide any of the proposed intervenors—who remain uncertain about their party-status—with enough time to effectively represent their clients' interests. Even if the Court were to dispose of all pending intervention requests by tomorrow morning (*i.e.*, January 12, 2022), they would be afforded a mere two days to submit a proposed plans—together with a detailed supporting brief and an expert report. That timeline is utterly unrealistic—regardless of the amount of

[2] To the extent Petitioners suggest that the Supreme Court's *per curiam* order should be interpreted as an endorsement of their expedited schedule, that argument lacks merit. To the contrary, the absence of any elaboration in that *per curiam* order suggests that, at this juncture, any adjustments are unnecessary. Indeed, had any of the five justices who joined the order shared the concerns expressed by Petitioners, it is reasonable to assume that they would have submitted a concurring statement to that effect. Such statements routinely accompany *per curiam* orders where the justices wish to provide further explanation. At most, therefore, the order merely indicates that it should be interpreted as foreclosing any adjustments to the schedule previously established by this Court.

resources and attorneys that a party could devote to a matter. In short, Petitioners' proposed schedule would exclude every other party with a legitimate and important interest from the process.

Second, as every party and proposed intervenor has acknowledged at some point, congressional redistricting is a task that is ordinarily left to the legislature. While an impasses may sometimes necessitate judicial involvement, it is beyond peradventure that the legislative branch must be afforded every reasonably opportunity to effectuate such a plan through the political process. The schedule adopted in the December 20, 2021 Order properly balances the need for expedited consideration against the deference that must be afforded to a coequal branch of government.

Third, and relatedly, Petitioners insist that "there is no prospect that the General Assembly will pass a final congressional plan and the Governor will sign that plan into law before preparations for the primary election must begin" because "only two session days remain before Respondents' January 24, 2022 deadline." But this argument is based on two false premises.

As an initial matter, while only two session days will are ***currently*** scheduled, the Speaker of the House has significant discretion to add session days (including weekends) and exercises that power routinely—particularly during final phases of negotiations concerning politically sensitive matters.

Furthermore, Petitioners' January 24, 2022 "deadline" is drawn from an unverified (*i.e.*, unsworn) pleading submitted by the Department in *Carter v. Degraffenreid*, *see* Prelim. Obj's., 132 MD 2021 (Pa. Cmwlth. July 1, 2021). But these unsworn statements cannot possibly bear the weight that Petitioners purport to place on it. *See id.* Thus, the January 24, 2022 "deadline" is nothing more than a rough estimate made in a document submitted by the attorneys for the Department of State in prior litigation.

Indeed, the litigation in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) belies the notion that January 24, 2022 is an insurmountable deadline. Specifically, reciting ***sworn*** testimony submitted by Respondent Mathis's predecessor, then-Judge Brobson of this Court (serving as fact-finder for the Supreme Court) noted that, according to the Department "[t]hrough a combination of

internal administrative adjustments and court-ordered date changes, it would be possible to hold the primary election on the scheduled May 15, 2018 date even if a new congressional districting plan is not put into place until on or before February 20, 2018." Recommended Findings of Fact and Conclusions of Law, 12/29/2017, at ¶ 448. Ultimately, a binding congressional map was not promulgated until February 19, 2018, when the State Supreme Court issued an order adopting its own plan. *See League of Women Voters of Pennsylvania v. Commonwealth,* , 181 A.3d 1083 (Pa. 2018) (*per curiam*). And, although certain adjustments were made to the election calendar by Court order (such as changes to the first and last day for circulating and filing petitions, deadlines for lodging challenges, etc.), consistent with the sworn testimony of then-Commissioner Jonathan Marks, the Department of State was able to hold the May Primary Election as scheduled.[3]

[3] Similarly, in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), which involved an impasse between the General Assembly and the Governor similar to the one Petitioners portend here, the Court adopted a congressional redistricting plan and simultaneously made various adjustments to the election calendar to afford the Department adequate opportunity to implement the plan.

In short, therefore, the Department of State has ably instituted a binding congressional map on much shorter notice than the alleged January 24, 2022 deadline.[4]

Fourth, the short history of this litigation weighs against the accelerated schedule Petitioners propose. Specifically, for over three weeks, Petitioners have made no effort expedite proceedings in ***this*** Court.[5] Indeed, despite being required to do so under Pa.R.App.P. 3707, Petitioners have not consulted with any of the parties—let alone proposed intervenors—regarding their proposal.

III. <u>This Court should decline to dispose of this action without holding any hearings or subjecting expert witnesses to cross-examination.</u>

Next, Petitioners' request to forego any hearing and submit this matter entirely on the briefs and legal argument is similarly untenable and, indeed, implicates serious constitutional concerns. Adopting a congressional map without any opportunity to develop and probe the

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[4] Notably, the primary election this year will take place on May 17, which is two days later than in 2018.

[5]The fact that Petitioners sought extraordinary relief form the Supreme Court does not cure their failure in this respect, since the mere filing of such a request does not stay or alter the trajectory of proceedings below. And, in any event, given that the State Supreme Court routinely declines to exercise extraordinary jurisdiction even in cases of immense public import, it was incumbent upon Petitioners to proceed with all reasonable speed in ***this*** forum—just as this Court has done since the commencement of these actions.

facts and opinions on which the proposed redistricting plan is predicates is unprecedented and, in fact, Petitioners are unable to cite any authority that would support such a process.[6] Moreover, receiving expert evidence without any right of cross-examination is anathema to the judicial system and raises the specter of significant due process concerns.[7] Indeed, in his erudite concurring and dissenting opinion *League of Women Voters*, now-Chief Justice Baer noted that merely affording the parties an opportunity to submit a map and supporting briefs does not "comport[] with due process ***absent their ability to respond to alternative plans, potentially by submitting additional evidence or cross-examining witnesses.***" *League of Women Voters*, 178 A.3d at 830 (Baer, J., concurring and dissenting). As he explained, to pass constitutional muster the underlying evidence should be "subjected to the rigors of evidentiary challenges either for

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[6] Petitioners' reliance on the process established in Minnesota is misplaced. Specifically, while the Court did not receive expert evidence in judicial proceedings, the five-judge panel created by the Minnesota Supreme Court held public hearings over the course of several months, receiving testimony from citizens throughout the state as early as the summer of 2021, thereby enabling it to receive sufficient facts to make an informed decision. In this respect, the panel in Minnesota served a function more akin to redistricting commission than a court.

[7] In this regard, Proposed Intervenors do not oppose an order limiting the number of witnesses who can testify, or even the type of testimony it will accept (*i.e.*, expert testimony).

admissibility or accuracy, as tested through cross-examination." *Id.* at 831. Petitioners proposal is precisely the type of process that lacks transparence and offends due process, which Chief Justice Baer cautioned against. *See id.* (further noting the "lack of transparency" attendant in such an approach and cautioning that courts must "provide the parties and the public constitutionally-mandated due process by allowing an opportunity to object to any plan that the Court may adopt").

Finally, Proposed Intervenors emphasize, once again, that their submission should not be construed as resistance to all measures that would accelerate these proceedings. Instead, Proposed Intervenors ask this Court to refrain from accelerating these proceedings—particularly since the various proposed intervenors remain uncertain about their party status—based solely on the arbitrary January 24, 2022 deadline that would effectively deprive the parties of the opportunity to present sufficient advocacy and supporting facts.

For the foregoing reasons, Proposed Intervenors respectfully request that this Court deny Petitioners application for an accelerated

schedule, and instead, if necessary, amend its December 20, 2021 Order to provide a more reasonably accelerated schedule.

Respectfully submitted,

Dated: January 5, 2022

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