

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 132 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,

vs.

Veronica Degraffenreid, 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.

**APPLICATION FOR LEAVE TO INTERVENE BY BRYAN CUTLER,
SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES;
KERRY BENNINGHOFF, MAJORITY LEADER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES; JAKE CORMAN,
PRESIDENT PRO TEMPORE OF THE PENNSYLVANIA SENATE; AND
KIM WARD, MAJORITY LEADER OF THE PENNSYLVANIA SENATE**

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** Pro Hac Vice application forthcoming*

Counsel for Proposed-Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives

Pursuant to Pennsylvania Rules of Appellate Procedure 106 and 1531(b) and Pennsylvania Rules of Civil Procedure 2326 through 2329, Bryan Cutler, Speaker of the Pennsylvania House of Representatives (“Speaker Cutler”); Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (“Leader Benninghoff” and, together with Speaker Cutler, the “House Leaders”); Jake Corman, President Pro Tempore of the Pennsylvania Senate (“President Corman”); and Kim Ward, Majority Leader of the Pennsylvania Senate (“Leader Ward” and, together with President Corman, the “Senate Leaders,” and together with the House Leaders, the “Proposed Intervenors”) hereby respectfully apply for leave to intervene in the above-captioned matter filed by Carol Ann Carter, *et al.* (“Petitioners”).

In support of this Application, the Proposed Intervenors respectfully submit:

- A. Proposed Intervenors are the highest-ranking officers and majority leaders of the Pennsylvania House of Representatives and Pennsylvania Senate, respectively, and have been authorized by the majority, Republican caucuses of their respective bodies to intervene to protect legislative interests. Pursuant to Article I, Section 4 of the United States Constitution, the General Assembly has been assigned the authority to set forth the “Times, Places, and Manner” of elections to Congress—including the authority to redistrict.

B. Petitioners, in their Petition for Review (their “Petition”), ask this Court to dilute, abrogate, impair, or abolish the prerogative of the General Assembly—led by the Proposed Intervenor—to enact a congressional redistricting plan for 2022 elections and beyond. And Petitioners ask this Court to do so almost a year before they assert a new plan is needed (March 2022) on the theory that the General Assembly and Governor will be unable to agree on a plan between now and then. Proposed Intervenor is entitled to intervene under Pa.R.C.P. 2327(3) and (4) to vindicate their enforceable interest to perform redistricting for the Commonwealth, an exclusively legislative function assigned to the General Assembly under the U.S. and Pennsylvania Constitutions.

C. A Memorandum of Law In Support of Petition to Intervene by Bryan Cutler, Speaker of the Pennsylvania House of Representatives; Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives; Jake Corman, President Pro Tempore of the Pennsylvania Senate; and Kim Ward, Majority Leader of the Pennsylvania Senate, which is being filed contemporaneously herewith and is incorporated by reference.

D. Proposed Preliminary Objections that Proposed Intervenor will file in this action if permitted to intervene, which are attached as **Exhibit “A”** and incorporated herein by reference.

E. A Proposed Order granting this Application, attached as **Exhibit “B.”**

F. Verifications, affirming the truth of the factual averments set forth in the Application, attached as **Exhibit “C.”**

WHEREFORE, the Proposed Intervenor respectfully request that the Court grant their Application for Leave to Intervene and allow Proposed Intervenor to intervene as Respondents in this action.

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Dated: June 1, 2021

/s/ Anthony R. Holtzman

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Respectfully submitted,

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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

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EXHIBIT A

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Pennsylvania Senate, as Intervenors, preliminarily object to the Petition for Review (“Petition”) that was filed in this action on April 26, 2021, and state as follows.

RELEVANT BACKGROUND

1. Petitioners brought this action to challenge Pennsylvania’s current congressional district plan.

2. Petitioners allege that, in light of the April 26, 2021 publication of the 2020 census apportionment numbers, the map is “unconstitutionally malapportioned.” Petition at ¶ 2. Petitioners make this allegation even though the apportionment number is only a statewide population count and the data required to complete redistricting (or even authoritatively establish malapportionment), the P.L. 94-171 redistricting data, may not be available until at least “mid to late August 2021.” Census Bureau, Press Release No. CB21-RTQ.09, Mar. 15, 2021, at <https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html>.

3. Petitioners contend that, as a result, “if a new congressional plan is not in place in a timely manner,” their constitutional rights will be infringed. Petition at ¶ 4.

4. Petitioners assert, in particular, that a new congressional districting plan must be enacted before March 2022 – the current statutory deadline for filing

nominating papers for candidates who wish to appear on the ballot for the Commonwealth's 2022 primary election. *Id.* at ¶ 31.

5. The General Assembly is the Legislature of this Commonwealth, *see* Pa. Const. art. II, § 1, and therefore has the authority and responsibility to create a new congressional district plan. This power and obligation is assigned and delegated to the General Assembly by Article I, Sections 2 and 4 of the United States Constitution, which establish that, “at the outset of a decade,” a state legislature must “redistrict[] pursuant to its decennial constitutional duty.” *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420 (2006).

6. Although Petitioners acknowledge this point, *see* Petition at ¶ 5, they claim that because the Pennsylvania Senate and House are controlled by Republicans, the Governor is a Democrat, and “Republican control of the General Assembly is not large enough to override a gubernatorial veto[,]” it is “extremely unlikely” that the legislative process will yield “a lawful congressional districting plan in time to be used during the upcoming 2022 election.” Petition at ¶ 29.

7. Petitioners allege, similarly, that “Governor Wolf and the Republican-controlled General Assembly have repeatedly conflicted over a broad range of policies,” that “Census delays have compressed the amount of time” for congressional redistricting to take place, and that, as a result, “the political branches

are highly likely to be at an impasse this cycle and to fail to enact a new congressional district plan.” *Id.* at ¶ 33.

8. In light of these allegations, Petitioners assert four causes of action, *see id.* at ¶¶ 34-53, and ask for (i) a declaration that the current congressional district plan is unconstitutional, (ii) an injunction against the plan’s continued implementation and enforcement, (iii) the Court to set a schedule and draft a new congressional district plan for the Commonwealth “by a date certain should the political branches fail to enact such plan by that time,” and (iv) the implementation of the new map “if the political branches fail to enact a plan by a date certain set by this Court.” Petition at Prayer for Relief.

STANDING

9. The entirety of this lawsuit is predicated on Petitioners’ supposition that because the General Assembly is controlled by one political party, the Governor is a member of another political party, and there has been “conflict” between these actors in the past, there is a “near certain[ty]” that Pennsylvania will not enact a new congressional district plan by March 2022 – *i.e.*, almost a year from now – which would harm them.

10. Petitioners acknowledge that “there is still time for the General Assembly and the Governor to enact a new congressional plan[.]” Petition at ¶ 9. Indeed, at this point, the discussion of the congressional district plan is premature

because the Census Bureau has not yet published the P.L. 94-171 redistricting data and has no plans to do so before “mid to late August 2021.” Historically this data has played a vital role in the redistricting process.

11. Furthermore, Petitioners do not address the legal presumption that public officials will act with regularity, in accordance with the law, and without violating the rights of citizens. *See, e.g., Albert v. Lehigh Coal and Navigation Co.*, 246 A.2d 840, 845 n.5 (Pa. 1968) (“There is a *prima facie* presumption of the regularity of the acts of public officials which exists until the contrary appears[.]”); *Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Cmwlth. Ct. 2010) (“We must presume the opposite, *i.e.*, that an agency will act in accordance with law.”); *Nason v. Commonwealth*, 494 A.2d 499, 502 (Pa. Cmwlth. Ct. 1985) (noting the “time honored presumption that public officials will perform their duties properly” and rejecting any presumption that “the State Treasurer will not fulfill his duty to disburse funds should that duty actually arise”).

12. Against this backdrop, it is plain that Petitioners have not plausibly alleged that they have sustained a present or imminent injury. They instead hypothesize that they *might* be injured at some point in the distant future. This type of speculative and prospective injury does not suffice to give Petitioners standing to prosecute this action. *See, e.g., Twp. of North Fayette v. Commonwealth*, 436 A.2d 243, 246 (Pa. Cmwlth. Ct. 1981) (township lacked standing to challenge DOT’s plan

for detouring traffic because “while the Township insists that dire consequences will result from DOT’s actions, in fact, nothing has happened”); *Strasburg Associates v. Newlin Twp.*, 415 A.2d 1014, 1017 (Pa. Cmwlth. Ct. 1980) (“we can find no reasonable grounds for standing where interests or injuries are hypothetical in nature”).

13. Similarly, Petitioners have not alleged the specific injuries that are necessary predicates for their substantive claims. Petitioners lack standing to bring the one-person, one-vote claims in Counts I and II because they identify no imminent election in which their votes are likely to be diluted. And, they have no ability to allege or prove that their votes will be diluted in the absence of the forthcoming census results, which will identify the standard of any dilution and show the true weight of their votes. Petitioners also lack standing to bring their statutory claim in Count II because, as outlined below, the result of a state body’s failure to redistrict is at-large elections, which are not dilutive. Petitioners, likewise, lack standing to assert the claim in Count IV because they do not identify any restriction or burden on their rights to associate and petition, nor could they do so: a redistricting plan does not restrict them from associating or petitioning or engaging in any other expressive activity.

RIPENESS

14. As explained above, as the predicate for their claims, Petitioners allege that *if* the General Assembly and Governor do not adopt a new congressional district plan by an arbitrary deadline, almost a year from now, constitutional violations will occur.

15. Petitioners are therefore acknowledging that their claims are tied to a substantial and temporally remote contingency. *See* Petition at ¶¶ 4 & 31.

16. Petitioners' claims, in other words, are based on a future state of affairs that, in fact, might never come into existence – and one that runs contrary to the presumption (noted above) that public officials will act with regularity and without violating the rights of citizens.

17. The claims are therefore unripe for disposition and this Court lacks jurisdiction to adjudicate them. *See, e.g., Gulnac v. South Butler County Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991) (“A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur[.]”); *Bliss Excavating Co. v. Luzerne County*, 211 A.2d 532, 534 (Pa. 1965) (vacating preliminary injunction and stating: “The action was patently premature and amounted merely to an attempt to obtain an advisory opinion.”); *South Whitehall Township v. Pennsylvania Department of Transportation*, 475 A.2d 166, 169 (Pa. Cmwlth. Ct. 1984) (“The events which might bring these parties into actual conflict

are thus too remote to justify our resolution of this dispute by declaratory judgment.”).

NON-JUSTICIABILITY

18. Under Article II, Section 1 of the Pennsylvania Constitution, the Commonwealth’s legislative power is vested exclusively in the General Assembly.

19. The General Assembly’s legislative power is not only exclusive, but also plenary. As a consequence, unless the Constitution says otherwise, the General Assembly has authority over and may enact legislation regarding any subject. *Commonwealth v. Keiser*, 16 A.2d 307, 310 (Pa. 1940) (“powers not expressly withheld from the Legislature inhere in it and this is especially so when the Constitution is not self-executing”); *Kotch v. Middle Coal Field Poor Dist.*, 197 A. 334, 338 (Pa. 1938) (“the General Assembly has jurisdiction of all subjects on which its legislation is not prohibited”).

20. Given that the Constitution does not impose a deadline to enact a congressional redistricting plan or otherwise address the timing of such an enactment, the General Assembly has exclusive and plenary power on that topic. *See Keiser*, 16 A.2d at 310; *Kotch*, 197 A. at 338.

21. The General Assembly has opted not to legislate on that topic yet—a rational choice, since the data that are necessary to craft such legislation are not available—and, as Petitioners observe, Pennsylvania law “does not set a deadline by

which congressional redistricting plans must be in place prior to the first congressional election following release of the Census.” Petition at ¶ 30.

22. The result is that, to the extent that Petitioners are asking this Court to establish such a deadline and adopt and implement its own congressional district map “if the political branches fail to enact a plan by [the] date certain set by this Court,” *see id.* at Prayer for Relief, they are asking for the Court to usurp the General Assembly’s exclusive legislative authority, in violation of the Separation of Powers doctrine.

23. Petitioners, in other words, are asking this Court to substitute its judgment for the General Assembly’s judgment with regard to the desirability of legislation.

24. In asking for the Court to adopt and implement its own congressional district map, moreover, Petitioners are asking the Court to usurp the General Assembly’s exclusive authority under Article I, Sections 2 and 4 of the United States Constitution. The Proposed Intervenors, who have been authorized to intervene by their respective Caucuses, submit that such usurpation is improper and unwarranted.

25. The Counts in the Petition are therefore non-justiciable and not claims upon which relief may be granted, and this Court lacks jurisdiction to adjudicate them. *See, e.g., Maurer v. Boardman*, 7 A.2d 466, 472-73 (Pa. 1939) (“There is no

appeal to the courts from the judgment of the legislature as to the wisdom or policy which the Commonwealth shall adopt.”).

**FAILURE TO OTHERWISE STATE A CLAIM UPON WHICH
RELIEF MAY BE GRANTED**

26. The Counts in the Petition are otherwise not claims upon which relief may be granted.

A. Petitioners’ One-Person, One-Vote Claims Fail on the Merits

27. Counts I and II allege violations of the one-person, one-vote principles of the U.S. and Pennsylvania Constitutions, contending that Pennsylvania’s current congressional redistricting plan is malapportioned. But those principles do not mandate constant, minute-by-minute updating of district lines to ensure precisely equal populations continuously. Rather, “[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years *leads to some imbalance in the population of districts toward the end of the decennial period.*” *Reynolds v. Sims*, 377 U.S. 533, 583 (1964) (emphasis added). The one-person, one-vote standard calls for only “a rational approach to readjustment of legislative representation” or, stated differently, a “reasonable plan for periodic revision.” *Id.* at 583.

28. The Petition does not allege that Pennsylvania lacks a rational approach to redistricting the Commonwealth's congressional districts. Instead, it alleges that the current districts are malapportioned. *See, e.g.*, Petition at ¶¶ 25–27. But that allegation simply describes the “imbalance...toward the end of the decennial period” that *Reynolds* deemed to be non-invidious. Following *Reynolds*, “courts have recognized that no constitutional violation exists when an outdated legislative map is used, so long as the defendants comply with a reasonably conceived plan for periodic reapportionment.” *Garcia v. 2011 Legislative Reapportionment Comm’n*, 938 F. Supp. 2d 542, 550 (E.D. Pa. 2013), *aff’d on other grounds* 559 F. App’x 128 (3d Cir. 2014); *see also, e.g., Pol. Action Conf. of Illinois v. Daley*, 976 F.2d 335, 341 (7th Cir. 1992); *Graves v. City of Montgomery*, 807 F. Supp. 2d 1096, 1109 (M.D. Ala. 2011); *French v. Boner*, 940 F.2d 659 (6th Cir. 1991) (unpublished); *Mac Govern v. Connolly*, 637 F. Supp. 111, 114 (D. Mass. 1986); *Cardona v. Oakland Unified Sch. Dist., California*, 785 F. Supp. 837, 842 (N.D. Cal. 1992).

29. The Petition does not allege, and cannot plausibly allege, that Pennsylvania lacks a reasonable plan of congressional redistricting.

30. Petitioners’ protestation that the congressional lines have not *already* been redrawn is a demand for the impossible. The census results that have historically played a vital role in the redistricting process have not yet been issued, a point the Petition obliquely concedes. *See* Petition at ¶¶ 22–23. A state does not

lack “a rational approach to readjustment,” *Reynolds*, 377 U.S. at 583, merely because the General Assembly lacks a time machine to obtain information that will not be issued for months. *Compare Pol. Action Conf. of Illinois*, 976 F.2d at 340 (criticizing plaintiffs’ objection to election under malapportioned districts where “[t]he census figures became available only two weeks before the...election. Redrawing Chicago’s ward for that election using the new census data was not possible.”).

31. Petitioners’ theory that court intervention is appropriate because the “political branches [are] divided between the two major parties,” Petition at ¶ 33, blames the public for its voting choices. Needless to say, a state does not lack “a rational approach to readjustment,” *Reynolds*, 377 U.S. at 583, merely because its voters send a bipartisan government to the state’s capital. As explained above, there is no basis in law for the courts to assume that duly elected officials will neglect their responsibilities before they have had an opportunity to fulfill them. Nor is there any basis in fact to assume that members of different parties are necessarily incapable of compromise. *See, e.g., Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 796 (2017) (recounting how the Virginia General Assembly in 2011 passed a redistricting plan “with broad support from both parties” during a time of divided government). To the extent that Petitioners allege otherwise, their assertions are not well-pleaded and, in deciding these preliminary objections, the Court should not

accept them as true. *See, e.g., Christ the King Manor v. Dep't of Pub. Welfare*, 911 A.2d 624, 633 (Pa. Cmwlth. Ct. 2006) (internal citation omitted) (at preliminary objection stage, court need not accept as true “unwarranted inferences, conclusions of law, argumentative allegations or expressions of opinion”).

32. Petitioners’ assertion that the current congressional plan will be diluted in “any future election,” Petition at ¶ 28, ignores that the plan is not yet dilutive and also confuses Pennsylvania’s right to 17 members in Congress beginning in January 2023 with its right to have 18 members in Congress now. *See also* Petition at ¶¶ 18–21 (explaining that Pennsylvania lost a seat in the recent apportionment, but failing to note that this change does not take effect until the 118th Congress). The Petition suggests that all future elections, including any special elections that take place prior to November 2022, should occur under a redistricting plan with 17 seats, lest Petitioners’ votes be diluted. But (as discussed further below) Pennsylvania is not obligated to switch over to a 17-seat system during the 117th Congress, to which it has lawfully sent 18 members, and more than a year-and-a-half before the 118th Congress takes session.

33. Petitioners’ demand for a court-imposed deadline, aside from raising a non-justiciable question (as discussed above), ignores that the one-person, one-vote doctrine does not impose any such deadline. Indeed, in cases where the law *has* imposed a deadline, courts have rejected one-person, one-vote claims *even where*

the deadline went unmet. See Clark v. Marx, 2012 WL 41926, at *10 (W.D. La. Jan. 9, 2012) (“[T]he City Council’s violation of its own Charter provision,” which set a redistricting deadline, “is not of constitutional concern”); *Garcia*, 938 F. Supp. 2d at 550–52. Because the one-person, one-vote principle is not offended when a redistricting authority violates a statutory redistricting deadline, the principle cannot plausibly be read to *itself* impose a deadline.

34. Even apart from these points, Petitioners are unable to allege or show a one-person, one-vote violation as of the next scheduled election *before* block-level census results (*i.e.*, P.L. 94-171 data) are released. Nor do they identify any election, or reasonable likelihood of election, until November 2022. Petitioners’ votes cannot be diluted more than a year and a half before the voting occurs. *See Garcia*, 559 Fed. App’x at 134–35 (finding no injury to voters where election at issue was not imminent). Nor will they go without representation before the next election. *Cf. Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1955 (2019) (“[D]elegates continue to represent the districts that elected them, even if their reelection campaigns will be waged in different districts.”).

35. Under Pennsylvania’s Free and Equal Elections Clause, none of the one-person, one-vote principles differs from the federal one-person, one-vote standard. Petitioners say that, in *League of Women Voters v. Com.*, 178 A.3d 737 (Pa. 2018), our Supreme Court afforded the Clause “the broadest interpretation.”

Petition at ¶ 45 (citing *League of Women Voters*, 178 A.3d at 814). But nothing in *League of Women Voters* suggests that there is a requirement for constant redistricting of the genre that *Reynolds* deemed to be impracticable. The case concerned partisan considerations in redistricting, not malapportioned districts. The case reaffirmed that the “primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature.” 178 A.3d at 821–22. It cannot be read to impose the types of absurd obligations that *Reynolds* eschewed but which Petitioners favor.

B. Petitioners’ Statutory Claim Fails on the Merits

36. Petitioners also invoke 2 U.S.C. § 2c, which provides that, “[i]n each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative...; there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled....” 2 U.S.C. § 2c. Petitioners erroneously theorize that “the *current* congressional district plan violates Section 2c’s requirement” because it “contains 18 districts,” whereas “Pennsylvania is *currently* allotted only 17 seats in the U.S. House.” Petition at ¶ 47.

37. But Pennsylvania is *currently* allotted 18 seats in the U.S. House. Right now, the 117th Congress is in session. In that Congress, Pennsylvania is entitled to 18 seats. Compare 2 U.S.C. § 2a(a) with *id.* § 2a(b) (making clear that the

reapportionment takes effect for the *next* Congress—*e.g.*, “Eighty-second” to “Eighty-third”—not immediately). “The reapportioned Congress will be the 118th, which convenes in January 2023.” Press Release, U.S. Census Bureau, 2020 Census Apportionment Results Delivered to the President (Apr. 26, 2021), at <https://www.census.gov/newsroom/press-releases/2021/2020-census-apportionment-results.html>; *see also* Congressional Research Service, Apportionment and Redistricting Following the 2020 Census at 2 (updated April 27, 2021) (“New apportionment applies at the start of the next Congress.”).

38. The release of apportionment results in April 2021 does not, under Section 2c, obligate Pennsylvania to instantaneously redistrict, as Petitioners suggest. The statute aligns the number of districts to the number of seats “in the...Congress” whose election is at issue. 2 U.S.C. § 2c. The mandate to redistrict under Section 2c has always been recognized to operate under the same timing principles that the Supreme Court has imposed under the one-person, one-vote doctrine. *See Branch v. Smith*, 538 U.S. 254, 268–69 (2003) (plurality opinion of Scalia, J.) (recounting historical purpose of Section 2c to respond to the “new era in which federal courts were overseeing efforts by badly malapportioned States to conform their congressional electoral districts to the constitutionally required one-person, one-vote standards”).

39. Finally, Petitioners fail to state a claim under Section 2c because a failure to redistrict under this provision would not “unlawfully dilute Petitioners’ votes.” Petition at ¶ 48. To the contrary, under Section 2c, if redistricting does not occur, the provisions of 2 U.S.C. § 2a(c) come into play and mandate at-large elections. *See Branch*, 538 U.S. at 271–722 (plurality opinion). And an at-large election is not dilutive of individual votes. *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

C. Petitioners’ Right-To-Petition Claim Fails on the Merits

40. Equally meritless is Petitioners’ allegation that they will experience an impingement on their rights to associate and petition.

41. Petitioners have identified neither a restriction nor a burden on these rights. “To begin, there are no restrictions on speech, association, or any other [expressive or petitioning] activities in the districting plans at issue. The [Petitioners] are free to engage in those activities no matter what the effect of a plan may be on their district.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019).

42. There is no authority to support Petitioners’ suggestion that electoral convenience, perhaps the convenience of knowing months before filing deadlines where congressional lines will fall, belongs among the rights of petitioning and association.

43. In any event, Pennsylvania has a compelling interest in limiting “the frequency of reapportionment,” including its “need for stability and continuity in the organization of the legislative system.” *Reynolds*, 377 U.S. at 583. And it has the highest imaginable interest in not having already redistricted—as Petitioners say is constitutionally required—because doing so would have been impossible. A state has a compelling interest, to say the least, in not being obligated to undertake actions that are impossible. Further, Pennsylvania has paramount interests in seeing its legislative actors afforded a reasonable opportunity to redistrict, given that the “primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature.” *League of Women Voters*, 178 A.3d at 821–22. “[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality,” whereas a court “possess[es] no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people’s name.” *Connor v. Finch*, 431 U.S. 407, 414–15 (1977). Even if the legislative process does not produce the instantaneous—indeed, *impossible*—results that Petitioners demand, the State has a paramount interest in letting that process run its course before seeing a court draw the congressional lines.

44. In short, the current redistricting plans do not place any burden on constitutional rights and they serve paramount state interests. Count IV, like Petitioners' other claims, fails on the merits.

D. All of Petitioners' Claims, Which Seek Judicial Usurpation of the General Assembly's Redistricting Authority in Contravention of Article I, Fail on the Merits

45. Petitioners' claims contravene, rather than seek to vindicate, the federal Constitution. Petitioners' demand for a ruling that the Commonwealth's General Assembly should have redistricted yesterday with data that do not exist is transparently a demand for a ruling that the General Assembly should not redistrict at all.

46. That demand, however, runs headlong into Article I, § 4, which provides that "[t]he Times, Places and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof" unless "Congress" should "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. Drawing congressional districts therefore "involves lawmaking in its essential features and most important aspect." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2667 (2015) (quotation marks omitted). The Elections Clause vests authority over Congressional elections in two bodies: (1) the state legislature and (2) Congress. State courts do not possess any of this delegated authority. *See Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020) (finding that state-court ordered alteration in state

election law likely violated analogous provision of Article II governing presidential elections).

47. Pennsylvania courts do not exercise a legislative function when they decide cases. *See Watson v. Witkin*, 22 A.2d 17, 23 (Pa. 1941) (“[T]he duty of courts is to interpret laws, not to make them.”). Petitioners, however, ask this Court to exercise a legislative function in enacting a redistricting plan before the legislative bodies of the Commonwealth have had a reasonable opportunity to do so. They further ask the Court to adopt a deadline, found nowhere in statute or the Commonwealth’s Constitution, and impose it as a law that would govern the General Assembly. That request is itself a request for the Court to usurp a legislative function. *See Carson*, 978 F.3d at 1060 (judicially invented deadline governing presidential elections amounted to usurpation).

48. Election laws that do not emanate from the General Assembly are *ultra vires*. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). If Petitioners have preferences for the redistricting process, their recourse is to the General Assembly (an act of petitioning that is freely available to them). This Court lacks the authority to, as Petitioners want, *become* the legislature of Pennsylvania. It therefore should dismiss this action.

CONCLUSION

Accordingly, the Petition for Review should be dismissed with prejudice.

Respectfully submitted,

May ___, 2021

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** Pro Hac Vice application forthcoming*

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Kerry Benninghoff, Majority Leader of the
Pennsylvania House of Representatives*

/s/ Anthony R. Holtzman

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EXHIBIT B

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CAROL ANN CARTER, *et al.*,

Petitioners,

v.

VERONICA DEGRAFFENRIED, in her official
capacity as the Acting Secretary of the
Commonwealth of Pennsylvania, *et al.*,

Respondents.

:
:
:
:
: Docket No. 132 M.D. 2021
:
:
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:
:

ORDER

AND NOW, this ____ day of _____, 2021, upon consideration of the Application for Leave to Intervene of the Speaker and Majority Leader of the Pennsylvania House of Representative and the President *pro tempore* and Majority Leader of the Pennsylvania Senate, and any response thereto, it is hereby ORDERED that (1) the request for leave to intervene is granted and (2) the Preliminary Objections that are attached to the Application as Exhibit A are deemed filed.

J.

EXHIBIT C

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VERIFICATION

I, Jake Corman, President *pro tempore* of the Pennsylvania Senate, depose and say, subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, that the factual allegations set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge, information, and belief.

Dated this 19 day of May, 2021.



JAKE CORMAN

President *pro tempore* of the Pennsylvania
Senate

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VERIFICATION

I, Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives, depose and say, subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, that the factual allegations set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge, information, and belief.

Dated this 14 day of May, 2021.


KERRY BENNINGHOFF
Majority Leader, House of Representatives

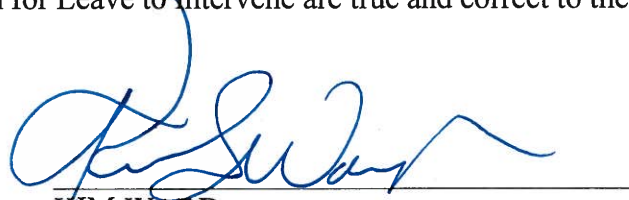
122042.000003 4833-5440-6121

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VERIFICATION

I, Kim Ward, Majority Leader of the Pennsylvania Senate, depose and say, subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, that the factual allegations set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge, information, and belief.

Dated this 29 day of May, 2021.



KIM WARD

Majority Leader of the Pennsylvania Senate

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VERIFICATION

I, Bryan D. Cutler, Speaker of the Pennsylvania House of Representatives, depose and say, subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, that the factual allegations set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge, information, and belief.

Dated this 14th day of May, 2021.



BRYAN D. CUTLER
Speaker of the House of Representatives

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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:

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Date: June 1, 2021

/s/ Anthony R. Holtzman
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 132 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,

vs.

Veronica Degraffenreid, 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.

**MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR
LEAVE TO INTERVENE BY BRYAN CUTLER, SPEAKER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES; KERRY
BENNINGHOFF, MAJORITY LEADER OF THE PENNSYLVANIA
HOUSE OF REPRESENTATIVES; JAKE CORMAN, PRESIDENT PRO
TEMPORE OF THE PENNSYLVANIA SENATE; AND KIM WARD,
MAJORITY LEADER OF THE PENNSYLVANIA SENATE**

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** Pro Hac Vice application forthcoming*

Counsel for Proposed-Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives

Bryan Cutler, Speaker of the Pennsylvania House of Representatives (“Speaker Cutler”); Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (“Leader Benninghoff” and, together with Speaker Cutler, the “House Leaders”); Jake Corman, President *pro tempore* of the Pennsylvania Senate (“President Corman”); Kim Ward, Majority Leader of the Pennsylvania Senate (“Leader Ward” and, together with President Corman, the “Senate Leaders” and, together with the House Leaders, the “Proposed Intervenors”) hereby file this Memorandum of Law supporting their Application for Leave to Intervene in the above-captioned matter filed by Carol Ann Carter, et al. (“Petitioners”).

The Proposed Intervenors satisfy the requirements for intervention under Pa.R.C.P. 2327 and seek to protect their exclusive authority, as legislators in the Pennsylvania General Assembly (the “General Assembly”) and as the leaders of the General Assembly as an institution, under Article I, Section 4 of the United States Constitution to prescribe the “Times, Places, and Manner” of congressional elections, and under the Pennsylvania Constitution to legislate and appropriate for elections in Pennsylvania, which Petitioners’ requested relief would usurp.

In support thereof, the Proposed Intervenors respectfully represent as follows:

I. BACKGROUND

1. The United States and Pennsylvania Constitutions vest the General Assembly with the authority to redistrict this Commonwealth’s congressional

districts. Specifically, Article I, Section 4 of the United States Constitution (the “Elections Clause”) provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof...” Pursuant to the Elections Clause, as a matter of federal law, “redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking.” *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 808 (2015). The Commonwealth’s legislative power is vested in the General Assembly. PA. CONST. ART. II, § 1.

2. As Petitioners concede (Pet. at ¶ 6), congressional districting plans are legislative enactments of the General Assembly, passed like any other legislation. The Pennsylvania Supreme Court has confirmed that the “primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature.” *League of Women Voters v. Com.*, 178 A.3d 737, 821–22 (Pa. 2018), citing *Butcher v. Bloom*, 216 A.2d 457, 458 (Pa. 1966) (identifying the General Assembly as “the organ of government with the primary responsibility for the task of apportionment”) and *Grove v. Emison*, 507 U.S. 25, 34 (1993) (“the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts”).

3. By statute, the Secretary of Commerce, on behalf of the United States Census Bureau, must deliver to the President the apportionment figures from the

decennial census by December 31 of the year in which the Census is taken, and must deliver redistricting data (known as P.L. 94-171 data)¹ to states by April 1 of the year after the year in which the Census is taken. 13 U.S.C. § 141. Apportionment data is used to allocate House of Representatives seats to the States, and redistricting data is used by state legislatures or other redistricting authorities to draw representational districts.

4. This year's Census results, however, have been and continue to be delayed. The apportionment results were delivered on April 26, 2021, and the Census Bureau has announced an intention to deliver "a legacy format summary redistricting data file to all states by mid-to-late August 2021." Census Bureau, Press Release No. CB21-RTQ.09, Mar. 15, 2021, at <https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html>. This latter data file is a necessary part of the redistricting process, used by redistricting authorities to construct electoral districts of approximately equal population, as the Constitution requires.

5. Unlike in some states, there is no express deadline set forth in Pennsylvania's Constitution or statutes by which the Commonwealth must enact a

¹ The redistricting data consists of population counts for every census block in each state as of the decennial census date (April 1, 2020). Apportionment numbers are simply statewide population counts and, unlike the granular redistricting data, offer no insight about how the population is distributed within the state.

new congressional district plan following the publication of a new census. While Petitioners allude to the Census delay's potential impact on the 2022 primary calendar, in past decennial redistricting cycles, districting plans were passed at the end of the year that followed when decennial census data were published. For example, the 2011 congressional plan was enacted on December 22, 2011, *League of Women Voters*, 178 A.3d at 743, and the 2001 congressional plan was enacted on January 7, 2002. *See Erfer v. Com.*, 794 A.2d 325, 348 (Pa. 2002), overruled on other grounds by *League of Women Voters*. Hence, Census delays do not necessarily impede the General Assembly's legal authority to enact a districting plan.

6. Based on pure speculation that the General Assembly and Governor might prove unable to enact a congressional districting plan in the future, Petitioners filed their Petition for Review ("Petition") on April 26, 2021, asking this Court to declare the current plan unconstitutional, to enjoin the Respondents from conducting elections under that plan, and to craft a new congressional plan for the Commonwealth if "the political branches fail to enact a plan by a date certain set by this Court." (Pet. at 21) (Prayer for Relief). Oddly, Petitioners have sought this extraordinary relief months before availability of the redistricting data that anyone—the "political branches," this Court, or the Petitioners themselves—will need to develop a congressional districting plan.

7. Speaker Cutler is a duly elected, qualified, and serving Member of the House of Representatives from the 100th House District, and is also the duly elected Speaker of the House of Representatives and in such capacity is the presiding officer of that body.

8. Leader Benninghoff is a duly elected, qualified, and serving Member of the House of Representatives from the 171st House District, and is also the duly elected Majority Leader of the House of Representatives and, in such capacity, leads the Republican Caucus of the House of Representatives (the “House Republican Caucus”). The House Republican Caucus consists of 111 out of 203 Members of the House. As of about June 7, 2021, the House Republican Caucus will consist of 113 Members of the House, given recent results of special elections.

9. President Corman is a duly elected, qualified, and serving Member of the Senate from the 34th Senatorial District, and is also the duly elected President *pro tempore* of the Senate. In such capacity, he is the highest-ranking officer of the Senate and presides over that body in the absence of the Lieutenant Governor. *See* Pa. Const. art. II, § 9.

10. Leader Ward is a duly elected, qualified, and serving Member of the Senate from the 39th Senatorial District, and is also the duly elected Majority Leader of the Senate and, in such capacity, leads the Republican Caucus of the Senate (the “Senate Republican Caucus”). The Senate Republican Caucus currently consists of

28 out of 48 Members of the Senate (with two seats being vacant): 27 Republican Senators and 1 independent Senator who caucuses with the Republicans. As of June 9, 2021, the Senate Republican Caucus will consist of 29 out of 50 Members of the Senate: 28 Republican Senators and 1 independent Senator who caucuses with the Republicans.

11. As **Exhibit “A”** to this Petition, the Proposed Intervenor respectfully submit Preliminary Objections that they seek to file in this case.

II. THE PROPOSED INTERVENORS HAVE A RIGHT TO INTERVENE

12. Under Pennsylvania law, a party has an absolute right to intervene in an action if it falls within one of the categories enumerated in Pa.R.C.P. 2327. *See id.*; Pa.R.C.P. 2329; *see also Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. 1999).

13. The grant of intervention is mandatory where the intervenor meets any one of the four criteria set forth in Pa.R.C.P. 2327. *Larock*, 740 A.2d at 313 (“if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary . . .”) (internal citations omitted).

14. Here, two independent bases exist to support the Proposed Intervenor’s right to intervene. First, Pa.R.C.P. 2327(3) provides that a party must be permitted to intervene if it “could have joined as an original party in the action or could have been joined therein.” *Id.* Second, Pa.R.C.P. 2327(4) provides that a party must be

permitted to intervene if “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.” *Id.*

15. Pennsylvania courts have established “that 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.” *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Commw. Ct. 2019). Indeed, “[s]tanding to file a formal complaint requires the moving party to have a direct, immediate, and substantial interest in the subject matter of the controversy. . . . Conversely, a person seeking to intervene in a proceeding need have only an ‘interest of such nature that participation . . . may be in the public interest.’” *Id.* at 1288-1289 (citation omitted).

16. Moreover, the Proposed Intervenor are the presiding officers of both Houses of the General Assembly and intervene to protect the official, individual, and/or institutional interests described in this memorandum. As this Court held just last year, “there is a difference between personal standing and legislative standing,” and a legislator “may be able to initiate litigation in his legislative capacity, where the legislator can demonstrate an injury to his ability ‘to act as a legislator.’” *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep’t of Human Servs.*, 225 A.3d 902, 909 (Pa. Commw. Ct. 2020). These principles of legislative standing are relevant to whether a legally enforceable interest exists. *Id.* at 902.

17. Because the Proposed Intervenors have legally enforceable interests at play and could have been original parties to this case, they must be permitted to intervene as of right under both Pa.R.C.P. 2327 (3) and (4).

A. Determination of This Action Will Affect the Proposed Intervenors' Enforceable Interest in Vindicating and Protecting Their Exclusive Interest and Right to Legislate Redistricting and Election laws, which Petitioners Seek to Divest.

18. The Proposed Intervenors unquestionably have an enforceable interest in defending the constitutional authority of Pennsylvania's legislative actors to prescribe the "Times, Places, and Manner of holding elections for Senators and Representatives," U.S. CONST. ART. I, § 4, which includes the authority to enact congressional districting plans. *League of Women Voters*, 178 A.3d at 821–22. This action seeks to dilute, abrogate, impair, or abolish that constitutional prerogative. Petitioners ask the Court to take control over the congressional redistricting process before Proposed Intervenors even have the necessary tools to complete that process or else to impose unreasonable, restrictive deadlines on Proposed Intervenors' constitutional prerogative without any basis in law for doing so.

19. This enforceable interest satisfies Pa.R.C.P. 2327 and, accordingly, Proposed Intervenors have the right to intervene. Pennsylvania law affirms the exclusive authority of Pennsylvania's legislators to engage in congressional redistricting, and that authority lies at the heart of this case.

20. The Proposed Intervenors have an enforceable interest warranting intervention, and can “initiate litigation in [their] legislative capacity, where the legislator can demonstrate an injury to his ability ‘to act as a legislator.’” *Allegheny Reprod. Health Ctr.*, 225 A.3d at 909, citing *Sunoco Pipeline L.P.*, 217 A.3d at 1288.

21. In *Fumo v. City of Philadelphia*, the Supreme Court of Pennsylvania found that a city’s issuance of a license for the construction of a casino on a Pennsylvania river invaded the General Assembly’s exclusive authority to regulate submerged lands. 972 A.2d 487, 501–03 (Pa. 2009). In relevant part, the *Fumo* court held that six state legislators had legislative standing to “seek redress for an alleged usurpation of their authority as members of the General Assembly,” to “vindicate a power that only the General Assembly has,” and to “ask that this Court uphold their right as legislators to cast a vote or otherwise make a decision on licensing the use of the Commonwealth’s submerged lands.” *Id.* at 502.

22. This petition presents a stronger case for intervention. Regulating the times, places, and manner of congressional elections in Pennsylvania—a task that includes redistricting legislation—is an exclusive legislative function, not only under Pennsylvania law, but also under the U.S. Constitution. *See, e.g.*, U.S. CONST. ART. I, § 4; PA. CONST. ART. II, § 1; *League of Women Voters*, 178 A.3d at 821–22; *Butcher*, 216 A.2d at 458; *Arizona State Legislature*, 576 U.S. at 808; *Grove*, 507 U.S. at 34.

23. The power to redistrict is part of the General Assembly’s overall power to regulate elections. More than a century ago, the Supreme Court of Pennsylvania acknowledged that “[t]he power to regulate elections is a legislative one, and has been exercised by the general assembly since the foundation of the government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914), citing *Patterson v. Barlow*, 60 Pa. 54, 75 (1869). The primacy of the General Assembly in the area of elections is manifest. See *In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014) (“[s]ubject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania”). For that reason, “the judiciary should act with restraint, in the election arena, subordinate to express statutory directives.” *Id.*

24. Indeed, twice in the past year the Pennsylvania Supreme Court has granted legislative leadership leave to intervene in litigation concerning election statutes. In *Crossey v. Boockvar*, 239 A.3d 14, 15 n.4 (Pa. 2020) (per curiam), the Pennsylvania Supreme Court granted leave to intervene to the House and Senate presiding officers in a case challenging the constitutionality of an election bill, Act 77. Likewise, in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 354 (Pa. 2020), the Pennsylvania Supreme Court granted leave to intervene to the Senate’s then-President *pro tempore* and its then-Majority Leader in another action seeking relief directed to Act 77.

25. Petitioners seek, in pertinent part, a declaratory judgment finding the Commonwealth's current congressional district plan unconstitutional, an injunction prohibiting Respondents from "implementing, enforcing, or giving any effect to" that plan, and an order to "implement a new congressional district plan...if the political branches fail to enact a plan by a date certain set by this Court." (Pet. at 21) (Prayer for Relief). These requests directly seek to divest the Proposed Intervenor's exclusive authority to determine the times, places, and manner of holding congressional elections under U.S. Const. Art. I, § 4, and to transfer that authority to this Court. The Commonwealth's legislative actors have had no opportunity to engage in redistricting, the Census figures necessary to do so do not exist and will not exist for some time, and there is no deadline in law for redistricting to occur. Nor is there basis in law for an injunction against the prior redistricting plan, when it is not yet unconstitutional and where Pennsylvania is entitled to 18 seats in the current Congress, not the 17 seats it will be entitled to beginning in January 2023. In these circumstances, Petitioners' demand is nothing short of a demand to bypass the General Assembly entirely and transfer complete redistricting authority to the courts.

26. The circumstances here are not one "akin to a general grievance about the correctness of governmental conduct..." *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016). The Proposed Intervenor does not seek "to offer evidence and argument with respect to the intent of the General Assembly in enacting [the law] [or] to the

procedure by which [it] was adopted.” *Robinson Twp. v. Com.*, 84 A.3d 1054, 1055 (2014). Rather, Proposed Intervenor propose to intervene in this action to defend their unique, legislative interests and their vested, exclusive authority to conduct congressional redistricting in the Commonwealth. Indeed, the primary law at issue—the forthcoming redistricting plan—has yet to be enacted. The question in this case is not what the General Assembly did in the past, but whether Pennsylvania’s legislators will maintain that authority in the future and whether the courts will place onerous, extra-legal conditions on that authority.

27. Thus, determination of this action necessarily and directly affects the Proposed Intervenor’s legally enforceable interests, and Proposed Intervenor therefore have a right to intervene. *Fumo*, 972 A.2d at 502 (“the claim reflects the state legislators’ interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, falls within the realm of the type of claim that legislators, qua legislators, have standing to pursue.”).

B. The Proposed Intervenor Could Have Joined as an Original Party in the Action or Could Have Been Joined Herein.

28. Pennsylvania courts recognize that parties with special interests implicated by an action could have been joined as original parties. *See, e.g., Appeal of Denny Bldg. Corp.*, 127 A.2d 724, 729 (1956) (finding intervention appropriate when parties “have an obvious special interest apart from that of the general public which would certainly have justified their joining as original parties in the action”);

Harrington v. Philadelphia City Emps. Fed. Credit Union, 364 A.2d 435, 441 (Pa. Super. 1976) (recognizing that candidates “could have been an original party or could have been joined in the action . . . [because they] had interests which would be drastically affected by the outcome of the equity action”).

29. Further, 42 Pa.C.S. § 7540(a) provides that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”

30. The Proposed Intervenors, as the parties to whom the constitutional authority to redistrict has been assigned, have a special interest in this action. The action seeks to divest—or, at a minimum, significantly impair—the Proposed Intervenors’ authority to conduct congressional redistricting for the Commonwealth for the 2022 elections and beyond.

31. Moreover, the Proposed Intervenors could have joined as original parties in this action. In fact, it is not uncommon for the presiding officers of the House and Senate—like Speaker Cutler and President Corman—to be named as original parties in cases challenging the constitutionality of, and seeking to alter, redistricting plans enacted by the General Assembly. For example, in both *League of Women Voters* and *Erfer*, the then-presiding officers of the General Assembly were named as original parties, including former Speaker Mike Turzai and former

President *pro tempore* Joseph Scarnati III in *League of Women Voters*, and former Speaker Matthew Ryan and then-Lieutenant Governor and President of the Senate, Robert Jubelirer in *Erfer*. Further, in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), an action brought to seek judicial intervention to draft a congressional districting plan when the General Assembly and Governor reached an impasse and failed to pass such a plan, the petitioners were eight Members of the Senate and thus original parties. *Id.* at 205.²

32. The Proposed Intervenors could have joined as original parties in this action, and, as these cases show, typically at least the General Assembly's presiding officers are joined. The instant action seeks a declaratory judgment and injunctive relief imposing improper restraints upon, and usurping, the exclusive domain of the General Assembly. If granted, the relief sought will directly impact the Proposed Intervenors' authority and interest as legislators and the official, institutional, and other interests they are further authorized to represent. Therefore, the Proposed Intervenors are entitled to intervene here as a matter of right.

² Notably, *Mellow* was not filed until January 28, 1992, which was the first day on which nominating petitions for the U.S. House could begin circulating that year. 607 A.2d at 205.

C. There Is No Reason To Refuse the Petition to Intervene.

33. The Proposed Intervenor has shown entitlement to intervention in this case. Given this showing, Pa.R.C.P. 2329 provides only three reasons that could justify refusal of intervention. None applies.

34. First, Pa.R.C.P. 2329(1) permits refusal of intervention if “the claim or defense of the petitioner is in subordination to and in recognition of the propriety of the action,” which has been interpreted to mean that an “intervenor cannot question supported findings of fact made prior to the intervention” and that “an intervenor must take the suit as he finds it.” *Com. ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867, 870 (Pa. 1950). There are no subordination concerns here, given the early stage of this litigation.

35. Second, Pa.R.C.P. 2329(2) permits a court to refuse an application for intervention if “the interest of the petitioner is already adequately represented.” Here, Proposed Intervenor seeks to vindicate rights and interests held by themselves and their members in their capacity as legislators. Their interests are not already adequately represented by any Respondent in the case, as the originally named Respondents are simply responsible for election administration and do not possess the interest in drafting and passing congressional districting plans that Petitioner’s Petition seeks to impair or abrogate. *See Shapp*, 391 A.2d at 608 (holding that “[s]urely, the defense of legislation adopted by the General Assembly must be within

the authority of its elected leaders”). After all, “an executive branch agency is simply not in a position to represent Proposed Intervenors’ interest in the exercise of legislative power under Article III of the Pennsylvania Constitution.” *Allegheny Reprod. Health Ctr.*, 225 A.3d at 913. Petitioners practically concede this point in alleging repeatedly that the divided government—where the legislative chambers are controlled by Republicans and the Governor is a Democrat—is categorically incapable of compromise. Petitioners cannot, after making this allegation, claim the Democratic Secretary of State or the Director of Elections represents Proposed Intervenors’ interests.

36. Finally, Pa.R.C.P. 2329(3) permits refusal of intervention where “the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.” No such concern exists here. The Proposed Intervenors promptly filed this application for leave to intervene at the earliest stages of the litigation, before any substantive proceedings took place. The Proposed Intervenors’ participation in this case will simplify this action and is necessary as they will bring before the Court arguments and law that otherwise would not be present.

37. In summary, there is no basis allowing for refusal of the Proposed Intervenors’ right to intervene into this case.

WHEREFORE, for the foregoing reasons, the Proposed Intervenor respectfully request that the Court grant their Application for Leave to Intervene and enter the proposed order attached to it as **Exhibit “B,”** thereby granting the Application.

Dated: June 1, 2021

Respectfully submitted,

/s/ Anthony R. Holtzman

K&L GATES LLP

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** Pro Hac Vice application forthcoming*

Counsel for Proposed-Intervenor Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives

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

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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:

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Date: June 1, 2021

/s/ Anthony R. Holtzman
Anthony R. Holtzman

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Ann Carter; Monica Parrilla; : 132 MD 2021
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

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

PROOF OF SERVICE

I hereby certify that this 1st day of June, 2021, I have served the attached document(s) to the persons on the date(s) and
in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

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Petitioner Carol Ann Carter
Petitioner Janet Temin
Petitioner Lee Cassanelli
Petitioner Lynn Wachman
Petitioner Mary Ellen Balchunis
Petitioner Maya Fonkeu
Petitioner Michael Guttman
Petitioner Monica Parrilla
Petitioner Rebecca Poyourow
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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(Continued)

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Petitioner Lee Cassanelli
Petitioner Lynn Wachman
Petitioner Mary Ellen Balchunis
Petitioner Maya Fonkeu
Petitioner Michael Guttman
Petitioner Monica Parrilla
Petitioner Rebecca Poyourow
Petitioner Roseanne Milazzo
Petitioner Stephanie McNulty
Petitioner Susan Cassanelli
Petitioner Tom DeWall
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Petitioner Michael Guttman
Petitioner Monica Parrilla
Petitioner Rebecca Poyourow
Petitioner Roseanne Milazzo
Petitioner Stephanie McNulty
Petitioner Susan Cassanelli
Petitioner Tom DeWall
Petitioner William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Petitioner Michael Guttman
Petitioner Monica Parrilla
Petitioner Rebecca Povcurow
Petitioner Roseanne Milazzo
Petitioner Stephanie McNulty
Petitioner Susan Cassanelli
Petitioner Tom DeWall
Petitioner William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Petitioner Stephanie McNulty
Petitioner Susan Cassanelli
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Possible Intervenor Kerry Benninghoff

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ Anthony Richard Holtzman

(Signature of Person Serving)

Person Serving: Holtzman, Anthony Richard
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Representing: Possible Intervenor Corman, Jake
Possible Intervenor Ward, Kim

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