

RECEIVED
COMMONWEALTH COURT
OF PENNSYLVANIA

2022 JAN 12 AM 11:49

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 464 M.D. 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 Balchunis; 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.

No. 465 M.D. 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,

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.

ANSWER OF PROPOSED REPUBLICAN LEGISLATOR INTERVENORS¹
TO PETITIONERS' APPLICATIONS FOR EXPEDITED REVIEW

On December 20, 2021, only one business day after Petitioners filed their Petitions for Review on Friday, December 17, 2021, this Court established an expedited schedule in this case. At that time, Petitioners could have asked the Court to further expedite the schedule. They did not do so. Instead, they chose to file separate Applications for Extraordinary Relief in the Pennsylvania Supreme Court, asking that Court to assume King's Bench power or exercise extraordinary jurisdiction.

Now, 25 days after commencing this action and 22 days after the Court entered its scheduling order, Petitioners demand further expedition of the already expedited scheduling order. They make this demand not in response to new circumstances or an unforeseen emergency, but rather because they did not succeed in their attempt to get the Pennsylvania Supreme Court to assume original jurisdiction of this action. Their Applications for Expedited Review ("Applications") should be denied because further expedition would prejudice the

¹ 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 "Republican Legislative Proposed Intervenors").

Proposed Republican Legislator Intervenors—and all other proposed intervenors and parties-in-interest—by upsetting their settled expectations of the deadlines in this action and impairing their ability to participate in the remedial process.

To begin, neither set of Petitioners has proposed to meaningfully advance the date on which this Court would adopt a remedial plan (which is the date that matters for election-administration purposes). The *Carter* Petitioners still contemplate that the Court would hold a hearing on January 31, 2022 (the currently scheduled hearing date), and the *Gressman* Petitioners propose for the Court to adopt a remedial plan only seven days earlier, on January 24, 2022. Yet to make such an adjustment—or no adjustment—to the end date, Petitioners propose to truncate the period for the submission of remedial plans by seven (*Carter*) or fourteen (*Gressman*)² days from the current deadline of January 28, 2022. Notably, if granted by this Court, the *Gressman* Application would make proposed plans due on January 14, giving Proposed Republican Legislator Intervenors less than 72 hours to propose a plan with any supporting expert report, despite the fact that the Court’s original scheduling order, entered weeks ago, provides until January 28, 2022. In addition,

² While Petitioners have asserted that, if various proposed intervenors are permitted to participate in this litigation as parties, their participation would create delay and inefficiency, here they are the ones who have needlessly multiplied and complicated these proceedings by filing *two* Applications that seek *different, inconsistent* changes to the case-management schedule. Their failure to coordinate has now required the undersigned and other proposed intervenors to prepare this response on less than 24 hours’ notice in an already expedited proceeding.

it ignores that the Court's original order provides that the General Assembly and the Governor would have until January 30, 2022 to reach an agreement on a congressional redistricting plan. Petitioners' proposed relief would truncate the legislative process. While Petitioners claim it is now impossible for the General Assembly to pass a redistricting plan by January 30, that is not true. Session days are not immutable and the General Assembly can add session days as necessary. Further, the Senate has five session days (January 18, 19, 24, 25, and 26) already scheduled before January 30, and the House has three session days (January 24, 25, and 26). The time has not expired for a plan to pass the legislature.

Petitioners' Applications should be denied in their entirety, and this Court should move forward under the case management schedule that it adopted in its December 20, 2021 Order. The Proposed Republican Legislator Intervenors disagree with Petitioners' position that an evidentiary hearing is unnecessary. (*Gressman* Application, 1.) Given the expedited nature of these proceedings, it is important to have the transparency and truth-seeking that comes from an adversarial evidentiary hearing – although, as explained below, the Proposed Republican Legislator Intervenors believe that the hearing should involve only testimony by expert witnesses. Thus, in support of their opposition to Petitioners' Applications, the Proposed Republican Legislator Intervenors respectfully state as follows:

1. Petitioners filed their Petitions for Review on December 17, 2021, 25 days before (belatedly) filing their Applications to further expedite the schedule in this case.

2. On December 21, 2021, the day after this Court established an expedited schedule, Petitioners filed applications in the Pennsylvania Supreme Court, asking that court to exercise extraordinary jurisdiction or King’s Bench power over this action and then – by January 24, 2022 – consider applications to intervene, review redistricting plans for the entire Commonwealth, hear oral argument on the proposed plans, and render a decision on those plans.

3. Petitioners chose to ask the Supreme Court to exercise extraordinary jurisdiction, or King’s Bench power, rather than promptly pursuing any remedies from this Court.

4. On January 10, 2022, the Supreme Court denied Petitioners’ applications. Order, *Gressman v. Degraffenreid*, No. 142 MM 2021 (Pa. Jan. 10, 2022); Order, *Carter v. Degraffenreid*, No. 141 MM 2021 (Pa. Jan. 20, 2022).

5. Petitioners now incorrectly and misleadingly suggest that the Supreme Court’s Order “impliedly recognized . . . [that] this Court’s December 20 scheduling order would effectively deny the parties any opportunity . . . to appeal this Court’s judgment” and that their unrealistic and unwarranted case schedule must therefore be adopted. (*Gressman* Application, 1-2.)

6. In reality, the schedule that this Court set in its December 20, 2021 Order was and remains both feasible and reasonable. Indeed, this Court was well aware of the election deadlines when it set its schedule, and nothing has changed.

7. Petitioners, however, seek another bite at the apple. And so, the day after the Supreme Court denied their requests for relief, they filed their Applications for Expedited Review (the “Applications”), asking this Court to further expedite its schedule and render a decision on a congressional district map by no later than January 24, 2022 (*Gressman*) or January 31, 2022 (*Carter*).

8. Despite the fact that, for weeks, Petitioners have been contending (to the Pennsylvania Supreme Court) that a map must be in place by January 24, 2022 – a contention that is based solely upon a representation that Respondents made and not a deadline that is set forth in any Pennsylvania statute³ – they did not seek further

³ In their Application, the Carter Petitioners, quoting the Respondents, say that ““the Department of State and county boards of elections require some lead time prior to the circulation of nomination petitions – normally about three weeks – to allow them to update the Statewide Uniform Registry of Electors (SURE) system, provide timely notice to candidates, and otherwise implement the new congressional districts.”” (Carter Application at ¶ 4). Of course, as Petitioners have conceded, COVID-related Census delays have resulted in practical limitations on the amount of time for the General Assembly to undertake congressional redistricting. The circumstances at hand, in other words, are not “normal” ones, and the General Assembly’s constitutional prerogative to engage in redistricting therefore should not be undermined simply so that election administration agencies get a “normal” or “preferred” amount of time to implement congressional districts. Like the General Assembly and other stakeholders, those agencies must adapt to the unusual circumstances at hand.

expedition of this Court's schedule until *after* the Pennsylvania Supreme Court denied their Applications for Extraordinary Jurisdiction or King's Bench power.

9. Petitioners are seeking to further expedite an already compressed case management schedule when, given the importance of this matter, the Court, parties, and other stakeholders need as much time as possible to consider the complex factual and legal issues at bar.

10. This Court has already ordered that proposed congressional reapportionment plans must be submitted by January 28, 2022. Proposed Republican Legislator Intervenors are prepared to submit a plan by that deadline. Petitioners are now seeking to accelerate that deadline by either one or two weeks, with virtually no notice, even though they chose to spend the weeks after the Court issued its December 20, 2021 Order pursuing a different form of remedy in a different court.

11. Moreover, such acceleration of the deadlines would interfere with the Court's existing directive that the General Assembly and Governor have until January 30, 2022 to enact a plan before the Court will intervene and adopt one. It is still the prerogative of the General Assembly to enact a congressional redistricting plan in the first instance, and this Court's adopted schedule appropriately accounts for that constitutional right.

12. The Proposed Republican Legislator Intervenors submit that this Court is presented with a variety of competing interests and will have a limited amount of time to resolve the legal and factual issues at bar. With that reality in mind, Proposed Republican Legislator Intervenors are prepared to comply with any deadlines that this Court puts in place, but the Court's prior decision-making, the need to fully develop the factual record in this case, and the fact that the legislative process is ongoing, all militate in favor of permitting this Court's prior order to stand.

13. The Proposed Republican Legislator Intervenors further submit that, contrary to what Petitioners suggest, submitting proposed maps and expert reports in lieu of an evidentiary hearing would not be an appropriate approach. Rather, an evidentiary hearing is necessary to create an appropriate record for the Pennsylvania Supreme Court's ultimate review. The hearing can and should be limited to expert testimony, and that testimony can be limited in time given the expedited nature of this case. Such a hearing is still feasible and necessary given the expedited nature of this matter and given the public importance of the issues at stake and the further judicial review that will take place.

14. However, if the Court were inclined to grant Petitioners' request to forgo an evidentiary hearing (and it should not) the Court should, at a minimum, ensure that interested stakeholders like the Proposed Republican Legislator Intervenors are allowed to intervene and provide argument on the proposed maps.

WHEREFORE, for the foregoing reasons, the Proposed Republican Legislator Intervenors respectfully request that the Court deny Petitioners' Applications for Expedited Review and proceed under the case management schedule that is set forth in the Court's December 20, 2021 Order.

Dated: January 12, 2022

Respectfully submitted,

/s/ Anthony R. Holtzman

K&L GATES LLP

Anthony R. Holtzman (PA No. 200053)
17 North Second St., 18th Floor
Harrisburg, PA 17101-1507
(717) 231-4570 / Fax (717) 231-4501
Anthony.Holtzman@klgates.com

*Counsel for Proposed Intervenors Jake
Corman, President Pro Tempore of the
Pennsylvania Senate, and Kim Ward,
Majority Leader of the Pennsylvania
Senate*

/s/ Jeffrey Duffy

BAKER & HOSTETLER, LLP

Jeffrey Duffy (PA No. 081670)
BNY Mellon Center
1735 Market Street, Suite 3300
Philadelphia, PA 19103
(215) 568-3100 / Fax (215) 568-3439
jduffy@bakerlaw.com

Patrick T. Lewis (OH No. 0078314)*
127 Public Square, Suite 2000
Cleveland, OH 44114
(216) 621-0200 / Fax (216) 696-0740
plewis@bakerlaw.com

Robert J. Tucker (OH No. 0082205)*
200 Civic Center Drive, Suite 1200
Columbus, OH 43215
(614) 462-2680 / Fax (614) 462-2616
rtucker@bakerlaw.com

James G. Mann (PA 85810)
jmann@pahousegop.com
Pennsylvania House of Representatives
Republican Caucus
Main Capitol Building, Suite B-6
P.O. Box 202228
Harrisburg, PA 17120-2228
Telephone: 717.783.1510

** 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*

CERTIFICATE OF COMPLIANCE

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

/s/ Anthony R. Holtzman

Anthony R. Holtzman

CERTIFICATE OF SERVICE

I hereby certify that, on January 12, 2022, pursuant to the Court's instructions, I caused a copy of the foregoing filing to be served on all counsel of record via the following e-mail address: CommCourtFiling@pacourts.us

/s/ Anthony R. Holtzman

Anthony R. Holtzman