

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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No. 464 MD 2021

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Carol Ann Carter; Monica Parrilla; Rebecca Poyourow; William Tung; Roseanne Milazzo; Burt Siegel; Susan Cassanelli; Lee Cassanelli; Lynn Wachman; Michael Guttman; Maya Fonkeu; Brady Hill; Mary Ellen Bachunis; Tom DeWall; Stephanie McNulty; and Janet Temin,

Petitioners,

v.

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

Respondents.

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No. 465 MD 2021 (consolidated at No. 464 MD 2021)

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

Petitioners,

v.

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

Respondents.

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**ANSWER OF  
VOTERS OF THE COMMONWEALTH OF PENNSYLVANIA TO  
PETITIONERS' APPLICATIONS FOR EXPEDITED REVIEW**

In their Applications for Expedited Review (the “Applications”), the Petitioners get it backwards. There is nothing sacrosanct about the date for candidates to begin circulating nominating petitions, or other aspects of the 2022 primary election schedule. As implicitly noted in the Court’s December 20, 2021, Order,<sup>1</sup> the 2022 primary election schedule can be revised. Further, cross-examination and some form of an evidentiary record is necessary both to assure the public that the Court has an accurate and reliable basis for its selection of a new congressional districting plan. For a decennial exercise of such constitutional import, it is far more important for the Court to get this right than to do it quickly. Accordingly, the Applications should be denied. To the extent the Court is inclined to grant one of the Applications, the Proposed Voter Intervenors submit that the Carter Petitioners’ proposed schedule is far preferable to the Gressman Petitioners’ proposal. Regardless, the Proposed Voter Intervenors are ready and able to adhere to whatever schedule the Court establishes.

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<sup>1</sup> “The Court will also consider revisions to the 2022 election schedule/calendar as part of the hearing.” *Id.*

## I. Expediting the Court's Schedule Is Not Necessary.

There is no need for the Court to expedite the schedule it established in its December 20 Order. To the extent additional time is required for appellate review, the Court has the power to amend the primary election schedule. That is precisely what happened 20 years ago, the last time the General Assembly and Governor failed to enact a congressional reapportionment plan. *See Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992). In *Mellow*, the petitioners filed an equity action with this Court on January 28, 1992, the first day for circulating nomination petitions for election to Congress. *Id.* at 205. After finding that the existing apportionment plan was unconstitutional, this Court ordered final hearings to begin on February 13, 1992, just 6 days before the then-existing deadline to file nomination petitions. *Id.* This Court then issued findings, a recommended decision, and a proposed election schedule on February 24, 1992, nearly a week after nomination petitions were originally due. *Id.* at 206. The Pennsylvania Supreme Court then adopted the Commonwealth Court's proposed election schedule. *Id.* at 211.

Discontent with commencing this action 60 days before nomination petitions can be circulated (and likewise 60 days earlier in the election schedule than the petitioners commenced their action in *Mellow*),<sup>2</sup> the Petitioners now ask the Court

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<sup>2</sup> Indeed, the Carter Petitioners originally sought the same relief they seek here in April 2021, more than 9 months before nominating petitions can be circulated. *See Carter, et al. v. Degraffenreid, et al.*, No. 132 MD 2021 (“*Carter I*”).

to further truncate the schedule it established last month. Concomitantly, the relief sought in Petitioners' Applications would further deprive the General Assembly and Governor of the opportunity to enact a new congressional districting plan.<sup>3</sup> Given the Court's successful implementation of a process in *Mellow* that did not require infringing upon the time for the General Assembly to adopt a congressional reapportionment plan, the Petitioners' proposals are inappropriate.

The current schedule—requiring parties to submit congressional reapportionment plans by January 28 and scheduling a final hearing to take place on January 31—affords this Court plenty of time to select a congressional reapportionment plan. It is possible that no party appeals this Court's decision, and the 2022 primary election can proceed as scheduled, or with minimal revision. And if a party appeals, the Pennsylvania Supreme Court would have the power to revise the primary election schedule.

## **II. An Evidentiary Hearing Will Facilitate Transparency.**

While there is no dispute that the current congressional map cannot be used for the 2022 election, the evidentiary hearing scheduled by the Court still serves an

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<sup>3</sup> In *Carter I*, the Court dismissed the Petition for Review on standing and ripeness grounds. Although the Court has not provided clear guidance regarding when the claims at issue here have ripened, accelerating the schedule such that parties are submitting maps even earlier than the first day to circulate nomination petitions calls into question whether this Court even would have jurisdiction to hear the matter.

important purpose. Without discovery or an evidentiary hearing, the parties will have no opportunity to establish how the submitted maps were drawn and what extraneous considerations played a role in the parties' submissions. The absence of an evidentiary record will leave the Court little foundation from which to select the new reapportionment plan.

Just three years ago, now-Chief Justice Baer highlighted the importance of transparency in the process the Court uses to adopt a congressional redistricting plan. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 825 (Pa. 2017) (Baer, J., concurring and dissenting). There, he noted that the Pennsylvania Supreme Court's orders whether it would adopt a plan: (1) based on the evidentiary record developed in the Commonwealth Court," (2) "based upon additional evidence submitted by the parties," or (3) "from sources extrinsic to the record ... which have not been subjected to the rigors of evidentiary challenges either for admissibility or accuracy, as tested through cross-examination." *Id.* at 830–31. Justice Baer "object[ed] to the lack of transparency of this process and urge[d] the Supreme Court to provide the parties and the public constitutionally-mandated due process by allowing an opportunity to object to any plan the Court may adopt." *Id.* at 831.

The Petitioners' suggested approach of completely eliminating both discovery and an evidentiary hearing compounds Justice Baer's transparency concerns. Their proposed approach would result in the complete absence of an evidentiary record,

leaving the Court to select a new congressional map in the judicial equivalent of a smoke-filled backroom. The parties and all Pennsylvania voters deserve a process that assures the Court will select a congressional map based on credible and accurate evidence. This requires an opportunity for cross-examination, either via discovery or an evidentiary hearing.

### **III. The Applications Are a Ploy to Defeat Intervention.**

The Court has not yet ruled on the Proposed Voter Intervenors' application for leave to intervene, or on several other applications for leave to intervene. The Proposed Voter Intervenors have committed to the Court that they will adhere to whatever schedule the Court imposes. As this commitment eliminates Rule 2329(3)'s "undue delay" exception to mandatory intervention, the Petitioners seek to preclude the Proposed Voter Intervenors' involvement by having the Court adjust the deadline to submit congressional reapportionment maps to a date that may precede the Court's decision on the applications to intervene. The Petitioners' Applications—along with the Carter Petitioners' previous rush to the courthouse in *Carter I*—suggest the Petitioners are intent on being the only parties permitted to draw the new congressional map. Given the grave importance of the Proposed Voter Intervenors' right to submit their own map, this tactic schedule should be rejected.

In the same vein, if the Court is inclined to adopt one of the proposed expedited schedules submitted by the Petitioners, the Carter Petitioners' proposed

schedule is the superior of the two. The Carter Petitioners' deadline for parties to submit maps affords this Court additional time to resolve the pending applications for leave to intervene.

#### **IV. Conclusion**

Regardless of the schedule the Court adopts, the Proposed Voter Intervenors are prepared to meet all deadlines in this matter. But the Petitioners' Applications for Expedited Review are based on the faulty premise that the existing primary election schedule must remain untouched. This is simply not so, and ignores precedent established in *Mellow*, the last time a congressional reapportionment plan was not enacted via the legislative process.

The process of adopting a new congressional districting plan—regardless of whether it is done by the General Assembly or the Court—is highly contentious and politically charged. Petitioners' suggestion to completely eliminate discovery and an evidentiary hearing will frustrate the need for transparency needed to assure the parties and the public that the new map will be selected based upon credible, accurate evidence. Absent some form of evidentiary record, this Court will have no reliable basis from which to select the new map.

The Petitioners' proposed schedules appear designed primarily to deprive the Proposed Voter Intervenors and others from having an opportunity to participate in this action. To the extent the Court elects to expedite the schedule, the Carter

Petitioners' proposed schedule is the better of the two because it affords the Court more time to resolve the pending applications to intervene.

WHEREFORE, the Proposed Voter Intervenors respectfully request that this Honorable Court deny the Petitioners' Applications for Expedited Review, or in the alternative, adopt the Carter Petitioners' proposed schedule.

Respectfully submitted,

**GALLAGHER GIANCOLA LLC**

Dated: January 12, 2022

/s/ Kathleen A. Gallagher

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**CERTIFICATE OF COMPLIANCE  
WITH PUBLIC ACCESS POLICY**

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

**GALLAGHER GIANCOLA LLC**

Dated: January 12, 2022

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

Russell D. Giancola

**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2022, I caused a true and correct copy of the foregoing **Answer to Petitioners' Applications for Expedited Review**, to be filed via the Court's PAC File System and email, on the following:

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**GALLAGHER GIANCOLA LLC**

Dated: January 12, 2022

/s/ Kathleen A. Gallagher  
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## Nancy Garrett

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**To:** Comm Court Filing  
**Cc:** Kathleen Gallagher; Imadduri@elias.law; cford@elias.law; jjasrasaria@elias.law; 'rogerse@ballardspahr.com'; 'prattm@ballardspahr.com'; 'clarkr@ballardspahr.com'; 'mcdonaldm@ballardspahr.com'; 'ortp@ballardspahr.com'; AKhanna@perkinscoie.com; mgordon@perkinscoie.com; SHirsch@jenner.com; JAmunson@jenner.com; TJohnson@jenner.com; LHarrison@jenner.com; CLally@jenner.com; kwatterson@reedsmith.com; dmisour@reedsmith.com; AOtterberg@jenner.com; smclure@reedsmith.com; Wiygul, Robert A.; Hill, John B.; Nancy Garrett  
**Subject:** Carter v. Degraffenreid, No. 464 MD 2021; Gressman v. Degraffenreid, No. 465 MD 2021 (consolidated with No. 464 MD 2021)  
**Attachments:** Voter COP Answer to Applications for Expedited Review.pdf

**CAUTION: This is an external email. Please think before you click on an attachment or link!**

To the Prothonotary:

Please find attached the Answer of Proposed Intervenors Voters of the Commonwealth of Pennsylvania to the Petitioners' Applications for Expedited Review. Consistent with Ms. Garrett's email of 5:27 pm yesterday, we are submitting our answer via email because we cannot electronically file it.

If you have any questions, please feel free to contact Kathy Gallagher or me.

Best regards,

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