

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

7 MM 2022

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; MARYELLEN BALCHUNIS;
TOM DEWALL; STEPHANIE MCNULTY; and JANET TEMIN,
Petitioners,

v.

LEIGH M. CHAPMAN, 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

**RESPONSE OF THE SENATE DEMOCRATIC CAUCUS INTERVENORS
IN SUPPORT OF THE CARTER PETITIONERS' APPLICATON FOR
EXTRAORDINARY RELIEF UNDER 42 PA.C.S. § 726 AND PA.R.A.P.
3309**

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I. BACKGROUND

This matter arises from the Carter Petitioners' December 17, 2021 petition for review in the Commonwealth Court which seeks, *inter alia*, the judicial adoption of a remedial Congressional redistricting plan. *See Carter v. Chapman*, 464 M.D. 2021 (Pa. Cmwlth. filed Dec. 17, 2021). On January 27 and 28, 2022, the parties proceeded to a two-day trial before a single Commonwealth Court judge, the Honorable Patricia McCullough, whose decision is pending. As part of the trial, the parties offered their positions on adjusting the date of the 2022 Primary Election, currently scheduled for May 17, 2022, and related dates of the pre-primary calendar.

Subsequently, on January 29, 2022, the Carter Petitioners filed with this Court an Emergency Application for Extraordinary Relief under 42 PA. C.S. § 726 and PA R.A.P 3309 (the "Application"), which asks this Court to take immediate extraordinary jurisdiction over this matter.

On January 31, 2022, this Court issued a temporary stay of the proceedings in Commonwealth Court until the Application is resolved. *See generally* January 31, 2022 Order.

With this response, the Senate Democratic Caucus Intervenors join the Carter Petitioners in their Application and offer the following supplementary reasons for granting the relief requested.

II. ADDITIONAL REASONS FOR GRANTING PETITIONERS' REQUESTED RELIEF

A. THIS COURT HAS THE EXCLUSIVE POWER TO ENACT A REMEDIAL MAP.

In the context of redistricting matters, the Commonwealth Court may take evidence and issue recommendations to this Court. However only this Court should have the authority to enact any particular map. The Senate Democratic Caucus Intervenors took this position at trial. *See* January 27, 2022 Tr. at 72, 79.

This exclusive responsibility arises out of the unique circumstances that occur when this Court must undertake the creation of a legislative map, where the entities originally designated to perform that function—here the Governor and the General Assembly—fail to do so. Because the basic operations of government mandate that a legislative map exist, the Supreme Court must serve not merely as an adjudicator of facts, but as a surrogate for undertaking a vital function assigned to the other branches of government either directly or through a commission. This unique authority is reflected in Article II, Section 17 of the Pennsylvania Constitution. This Constitutional provision vests this Court with the exclusive jurisdiction over direct appeals from actions of the Legislative Reapportionment Commission (the “LRC”), bypassing review by the Commonwealth Court, which typically has jurisdiction over appeals from the decisions of governmental agencies. Pa. Const. art. II § 17(c). Significantly, in the event that the LRC fails to file a final plan, the Constitution

explicitly provides that “the Supreme Court shall immediately proceed on its own motion to reapportion the Commonwealth.” Pa. Const. art. II § 17(h). This Constitutional provision underscores the exclusive nature of the Supreme Court’s jurisdiction over final, enacted maps.

Although the authority to develop a Congressional map in the event that the legislative and executive branches fail to reach agreement is not explicitly set forth in the Pennsylvania Constitution, historical practice provides further support for the Court’s unique and exclusive authority. *See Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). In *Mellow*, a lawsuit was filed in the Commonwealth Court, which directed the parties to submit proposed maps from which the court would select in the event that the General Assembly failed to enact a Congressional reapportionment plan by the required date. *Mellow*, 607 A.2d at 205. The General Assembly so failed, and thus, on the following day, this Court assumed plenary jurisdiction over the matter. *Id.* at 206. The Court appointed the Commonwealth Court’s President Judge as Special Master to take evidence relating to the various maps and methodology for developing the maps. However, this Court directly enacted the final map and established the revised election calendar. *Id.* at 206, 211.

Similarly, in *League*, utilizing the Commonwealth Court’s extensive factfinding, this Court ordered that the 2011 Congressional Map was

unconstitutional. It held that if the Governor and General Assembly “did not enact a remedial plan” by the specified date, this Court would choose a remedial plan.” *League*, 178 A.3d at 741. This Court, and not the Commonwealth Court, chose the final, enacted plan.

The Constitutional provisions and this Court’s precedent establish that this Court has exclusive jurisdiction to select—or create—a Congressional redistricting plan now that the political process has conclusively failed. Once the Governor and the General Assembly fail to act, no authority exists to vest a single judge with such a role. Clearly, the Pennsylvania Constitution recognizes the Supreme Court’s unique authority to undertake the extraordinary role of developing the maps for the Commonwealth. No one disputes that the 2018 Map, with 18 districts instead of 17, as now required, is no longer valid, and thus this Court respectfully should accept its vital role in ensuring the appropriate representation of Pennsylvania citizens in the United States House of Representatives.

B. CIRCUMSTANCES SURROUNDING THE LEGISLATIVE REAPPORTIONMENT COMMISSION AND ACT 77 CONTRIBUTE TO THE NEED FOR EXTRAORDINARY RELIEF HERE.

The litigation over the Congressional maps is not occurring in a vacuum. In addition to the proceedings before the Commonwealth Court in *Carter*, the Commonwealth Court also heard argument and issued opinions and orders in *McLinko v. Commonwealth*, No. 244 MD 2021 and *Bonner v. DeGraffenreid*, No.

293 MD 2021 (consolidated), which considered the validity of Act 77's no-excuse mail-in voting provisions. With its decision in that consolidated matter, issued on January 29, 2022, the Commonwealth Court determined that Act 77 is unconstitutional and invalid. That same day, the Commonwealth and Secretary of the Commonwealth filed their notice of appeal of the lower court's decision to this Court, which had the effect of automatically staying the Commonwealth Court's order. *See McLinko v. Com.*, 14 MAP 2022; *Bonner v. Chapman*, 15 MAP 2022. The *McLinko* and *Bonner* Petitioners have now asked the Commonwealth Court to lift the automatic stay while the appeal of the *McLinko* decision is pending before this Court. *See McLinko*, 244 M.D. 2021 (application filed Jan. 31, 2022); *Bonner*, 293 M.D. 2022 (application filed Jan. 31, 2022).

The outcome of the *McLinko* litigation is essential to providing the Secretary of State with fundamental guidance as to how to administer the 2022 Primary Election. It thus necessarily intertwines with decisions regarding the Congressional redistricting plan.

Further complicating this picture is the status of the LRC's efforts at adopting a state legislative reapportionment plan. The Senate Democratic Caucus is well positioned to inform this Court about the status of those proceedings, as its leader, Senator Jay Costa, serves as a Commissioner on the LRC. As of this date, February 1, 2022, the LRC has not agreed to a final plan, approving a new set of maps for the

State House and State Senate. Even assuming that the LRC votes on a final plan this week, that plan is subject to a mandatory 30-day appeal period. Pa. Const. art. II, § 17(d).

Even if this Court sets an expedited briefing and argument schedule on any legal challenges that might be forthcoming for the state legislative maps, the earliest this Court could reasonably reach a final decision would be mid-March, 2022. Deputy Secretary of State Jonathan Marks has indicated that the Department of State requires, at a minimum, two weeks from the final enactment to prepare to administer the 2022 Primary Election (with the addition of staff and increased staff hours). Affidavit of Jonathan Marks, ¶ 15.¹ It thus may well be early April before nominating petitions can begin to be circulated. This delay, in combination with the *McLinko* appeal over mail-in voting, creates a great deal of uncertainty as to how the Department of State can ensure the 2022 Primary Election is timely, orderly, and efficient.

To highlight that uncertainty, driven directly by the 30-day appeal period that must follow the LRC's approval of a final plan, and the related time for briefing, argument, and consideration, the nominating petition period, which is now scheduled from February 15th to March 8th per the Election Code, and the one-week period for objections to these petitions will have come and gone before this Court

¹ The Marks Affidavit is attached to this submission as Exhibit 1.

can even begin to consider the likely appeals related to the LRC action. The Senate Democratic Caucus will have 25 members or potential members who will be in a complete state of uncertainty as to whether to commence petition gathering under the soon-to-expire map, or whether to wait for some other map to be enacted. Further, candidates for 203 State House seats will face similar uncertainty. And, of course, the Congressional map, which requires a reduction from 18 seats to 17 seats, will present similar problems for candidates or potential candidates.

Collectively, these circumstances create significant and serious confusion as to how the Secretary of State is to administer the 2022 Primary Election, currently scheduled for May 17th, 2022 and the 13-week schedule that precedes the Primary Election. In considering this complicated question, the Commonwealth Court took action that indicated that it was simply unable to fully and appropriately consider these complex scheduling issues. The lower court accepted the Affidavit of Deputy Secretary of State Jonathan Marks as evidence concerning the Secretary's timeline requirements for election administration, but refused to consider paragraphs 18-26, which contained information concerning the LRC's timeline and other litigation pending in Commonwealth Court over the primary calendar.² January 28, 2022 Tr. at 1022-23. The Commonwealth Court literally chose to strike those paragraphs and

² See *David et al. v. Chapman et al.*, No. 22 M.D. 2022 (Pa. Commw. Ct.) (involving freestanding request to delay the 2022 Primary Election).

view the issues of timing in isolation. The Commonwealth Court's consideration of issues surrounding the 2022 Primary Election and pre-primary calendar will necessarily be devoid of crucial facts involving the LRC and the *McLinko* appeal.

Whether the Commonwealth Court chooses to consider the inter-related matters or not, it simply has no way of knowing how this Court will handle the LRC appeals, the *McLinko* appeals, and any potential appeals involving any decision that the Commonwealth Court may issue in respect to the Congressional maps. To not consider these factors together will create tremendous confusion not just for the Secretary of State, but for all candidates and voters. At this point, it is unclear what the district lines will be for all federal and state legislative districts throughout the Commonwealth. It is unclear when candidates will be able to begin circulating nominating petitions. It is unclear whether there will be two different primaries, with two different dates, petition periods, and calendars. The Commonwealth Court has no jurisdiction over the proceedings before the LRC; rather, those issues are before only this Court, so only this Court can consider all the pertinent factors and determine to what extent the 2022 Primary Election schedule must change.

Accordingly, given the fact that this Court will have final say in all of the foregoing disputes, this Court is best positioned to consider all of these extraordinary circumstances at once and to adopt a clear and final resolution to them all to aid in the expeditious and deliberate administration of the 2022 Primary Election.

Regardless of the reasons that brought us to this point, the Pennsylvania Supreme Court is the only institution that can provide clarity to our election process. For that reason, the Senate Democratic Caucus respectfully urges this Court to grant the relief sought by the Carter Petitioners.

III. CONCLUSION

Based on the foregoing, the Pennsylvania Democratic Caucus Intervenors urge this Court to grant the Carter Petitioners' Application and to take extraordinary jurisdiction over this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via PACfile, this 1st day of February, 2022, upon the following parties and in the manner indicated below:

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LEIGH M. CHAPMAN, in her official capacity as
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JESSICA MATHIS, in her official capacity as Director for
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Respondents.

No. 464 MD 2021

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Services and Notaries,

Respondents.

No. 465 MD 2021

AFFIDAVIT OF JONATHAN MARKS

Jonathan Marks, being duly sworn, deposes and says:

1. I am the Deputy Secretary for Elections and Commissions for the Commonwealth's Department of State (the "Department").
2. I was appointed to the position of Deputy Secretary for Elections and Commissions in February 2019.
3. I have been with the Department since 1993.
4. Prior to being appointed Deputy Secretary for Elections and Commissions in 2019, I served as Commissioner of the Bureau of Commissions, Elections and Legislation (the "Bureau") starting in October 2011.

5. From 2008 to 2011, I served as the Chief of the Division of the Statewide Uniform Registry of Electors.

6. Prior to that, from 2004 to 2008, I served as the Chief of the Division of Elections and Precinct Data with the Bureau.

7. In my current role, I am responsible for overseeing the day-to-day operations of election administration within the Department.

8. Since I became the Commissioner of the Bureau in 2011, I have supervised the administration of the Department's duties in more than 20 regularly-scheduled elections and over 50 special elections.

9. The next congressional primary is scheduled for May 17, 2022.

10. The current timeline of deadlines leading up to the May 17, 2022 primary is as follows:

- a. The first day before the primary election to circulate and file nomination petitions is February 15, 2022. (*See* 25 P.S. § 2868.)
- b. The last day before the primary election to circulate and file nomination petitions is March 8, 2022. (*See* 25 P.S. § 2868.)
- c. The first day before the primary election to circulate and file nomination papers is March 9, 2022. (*See* 25 P.S. § 2913(b).)

- d. The last day before the primary election for candidates who filed nomination petitions to withdraw their candidacy is March 23, 2022. (*See* 25 P.S. § 2874.)
- e. The last day before the primary election for the County Boards of Elections to send remote military-overseas absentee ballots is March 28, 2022. (*See* 25 Pa.C.S. § 3508(b)(1).)
- f. The last day before the primary election for the County Boards of Elections to send all remaining military-overseas absentee ballots is April 1, 2022. (*See* 52 U.S.C. § 20302(a)(8)(A); 25 Pa.C.S. § 3508(a)(1).)
- g. The last day before the primary election for voters to register is May 2, 2022. (*See* 25 P.S. § 3071.)
- h. The last day before the primary election to apply for a mail-in or civilian absentee ballot is May 10, 2022. (*See* 25 P.S. § 3146.2a(a).)
- i. The last day for County Boards of Elections to receive voted mail-in and civilian absentee ballots for the primary election is May 17, 2022. (*See* 25 P.S. § 3146.6(a).)
- j. Pennsylvania's 2022 general primary election is scheduled for May 17, 2022. (*See* 25 P.S. § 2753(a).)

- k. The last day for County Boards of Elections to receive voted military-overseas ballots for the primary election is May 24, 2022. (*See* 25 Pa.C.S. § 3511(a).)
- l. The last day to circulate and file nomination papers for the general election is August 1, 2022. (*See* Consent Decree, *Hall v. Davis*, No. 84-1057 (E.D. Pa. June 14, 1984).)
- m. The last day for candidates who were nominated by nomination papers to withdraw their candidacy for the general election is August 8, 2022. (*See* 25 P.S. § 2938(b).)
- n. The last day for candidates who were nominated at the primary to withdraw their candidacy for the general election is August 15, 2022. (*See* 25 P.S. § 2938(a).)
- o. The last day before the general election for the County Boards of Elections to send remote military-absentee ballots is August 30, 2022. (*See* 25 Pa.C.S. § 3508(b)(1).)
- p. The last day before the general election for the County Boards of Elections to send all remaining military-overseas absentee ballots is September 23, 2022. (*See* 52 U.S.C. § 20302(a)(8)(A); 25 Pa.C.S. § 3508(a)(1).)

- q. The last day before the general election for voters to register is October 24, 2022. (*See* 25 P.S. § 3071.)
 - r. The last day before the general election for voters to apply for a mail-in or civilian absentee ballot is November 1, 2022. (*See* 25 P.S. § 3146.2a(a).)
 - s. The last day before the general election for County Boards of Elections to receive voted mail-in and civilian absentee ballots is November 8, 2022. (*See* 25 P.S. § 3146.6(a).)
 - t. Pennsylvania’s 2022 general election is scheduled for November 8, 2022. (*See* Pa. Const. Art. VII, § 2; 25 P.S. § 2751.)
 - u. The last day for County Boards of Elections to receive voted military-overseas ballots for the general election is November 15, 2022. (*See* 25 Pa.C.S. § 3511(a).)
11. All of the deadlines set forth above are required by federal or state law.
12. The current elections schedule gives the Counties ten weeks to prepare for the primary election, between (a) the last date before the primary election for circulating and filing nomination petitions (currently March 8); and (b) the primary election date (May 17).

13. Based on my experience, the Counties could fully prepare for the congressional primary election in eight weeks.

14. As noted above, the earliest deadline on the current election calendar is February 15, 2022, the first day for circulating and filing nomination petitions. *See supra*, ¶ 10(a).

15. Ideally, the Department would have at least three weeks of preparation time before the first date for circulating and filing nomination petitions to ensure efficient election administration, allow for timely notice to candidates, and permit proper implementation of the new congressional districts. In particular, the Department needs sufficient time prior to the start of nomination petition filing to update its Elections and Campaign Finance system, and the Counties need sufficient time to update the Statewide Uniform Registry of Electors (“SURE”) system, to reflect the new congressional map.

16. However, with the addition of staff and increased staff hours, it would be possible for the Department to complete its preparations for the congressional election in two weeks instead of three.

17. Should the Court determine that it is necessary to modify existing deadlines, the Department will make every effort to comply with any schedule that the Court puts in place.

18. It should be noted, however, that the General Assembly election process has been significantly delayed, and it appears inevitable that the calendar for the legislative elections will also require modification.

19. Specifically, after the belated transmission of census data from the U.S. Commerce Department last summer, the Legislative Reapportionment Commission (“LRC”) conducted public hearings and prepared a legislative redistricting plan, but has not yet adopted a final plan. Moreover, while the LRC is expected to adopt a final plan in the near future, challenges to the final plan may be filed with the Supreme Court of Pennsylvania during the ensuing 30 days. In the past, these challenges have taken weeks, at a minimum, to resolve.

20. In fact, litigation regarding the legislative election has already been filed, even before the LRC has adopted a final redistricting plan. On January 20, 2022, a lawsuit was filed with this Court seeking to enjoin the 2022 legislative election from running on the prior malapportioned districts, and also seeking adjustments to the legislative election calendar. *See David et al. v. Chapman et al.*, No. 22 M.D. 2022 (Pa. Commw. Ct.).

21. The LRC’s final plan will assume the force of law only after the Supreme Court has finally ruled against all appeals (or after the last day for filing an appeal has passed with no appeal taken).

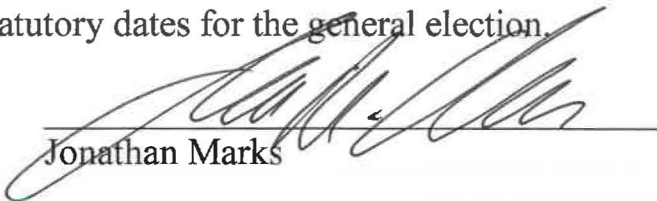
22. It is the Department's strongly-held preference that any decision about the Congressional primary be made in consideration of the legislative election timeline.

23. For administrative and cost-saving reasons, the Department prefers consistent deadlines for all races leading up to the primaries.

24. As a result of the delays in the legislative election process, it is also possible that postponement of the primary election for General Assembly seats may be necessary.

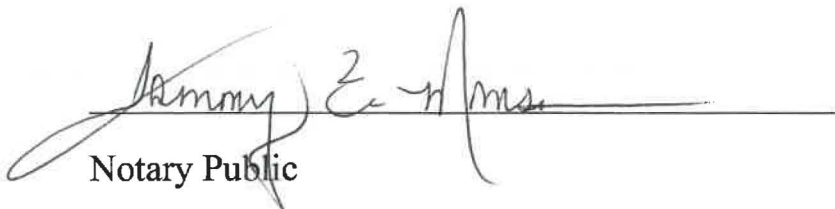
25. Should any court determine that postponing a primary is necessary, for administrative and cost-saving reasons, the Department's preferred option would be postponement of the primary elections for all offices.

26. Up to a point, it is possible to postpone the primary elections for all races and not interfere with other statutory dates for the general election.


Jonathan Marks

Sworn to and subscribed before me

This 28th day of January, 2022


Notary Public

Commonwealth Of Pennsylvania - Notary Seal
Tammy E. Morrison, Notary Public
Dauphin County
My Commission Expires March 31, 2023
Commission Number 1261526