

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

<p>CAROL ANN CARTER, <i>et al.</i>,</p> <p>Petitioners,</p> <p>v.</p> <p>VERONICA DEGRAFFENREID, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania, <i>et al.</i>,</p> <p>Respondents.</p>	<p>No. 132 MD 2021</p>
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**APPLICATION FOR LEAVE TO INTERVENE BY VOTERS OF THE  
COMMONWEALTH OF PENNSYLVANIA**

Pursuant to Pennsylvania Rules of Appellate Procedure 106 and 1531(b) and Pennsylvania Rules of Civil Procedure 2326 through 2329, Proposed Voter Intervenors, each of whom are citizens of and registered consistent voters in the Commonwealth of Pennsylvania (“Proposed Voter Intervenors”) respectfully submit this Application for Leave to Intervene in the above captioned matter filed by Petitioners.

**I. PRELIMINARY STATEMENT**

1. The Petitioners seek to further truncate what may already be the shortest ever timeframe for the General Assembly and Governor to implement a redistricting plan following the decennial census.

2. Bemoaning the split control of the legislative and executive branches by the Republican and Democratic Parties, Petitioners invite the Court to simply assume that compromise will be impossible and to cut out the political bodies designed by the United States and Pennsylvania Constitutions to do the work of redistricting.

3. The Petition for Review is not only premature, but it also requests relief that cannot be afforded: a new congressional map is not needed until the first day to circulate nominating petitions (February 15, 2022, *see* 25 P.S. § 2868). The elected representatives mandated by the Constitution to draw the congressional map must be afforded a full opportunity to do so.

4. The Proposed Voter Intervenors are comprised of individuals who have invested significant time, resources, and effort to support and recruit Republican congressional candidates.

5. Equally important, however, these Proposed Voter Intervenors voted in the 2020 election, whereby they elected representatives to the Pennsylvania House of Representatives and Senate. The Proposed Voter Intervenors' duly elected representatives are tasked under the United States and Pennsylvania Constitutions with implementing the new congressional redistricting plan.

6. The relief sought by the Petitioners would substantially deprive the Proposed Voter Intervenors of their material interest in having their local, duly elected representatives act on their behalf in drawing the new congressional lines.

7. Instead, the Petitioners would have the Court prematurely subvert the legislative process which has successfully redrawn nearly every congressional map in Pennsylvania.

8. In so doing, the Petitioners would replace “the institution that is by far the best suited to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality” (the General Assembly) with an institution that “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), to the Proposed Voter Intervenors’ detriment.

9. The Proposed Voter Intervenors thus request leave of Court to oppose the relief sought by the Petitioners and defend their interest in having their state Representatives and Senators represent their interests when attempting to implement a new congressional redistricting plan.

## **II. BACKGROUND**

### **A. Proposed Voter Intervenors**

10. Proposed Voter Intervenor Haroon Bashir resides in Philadelphia, Pennsylvania, and is a registered Pennsylvania voter who consistently votes in each election. Mr. Bashir voted for his State Representative and Senator with the expectation that as members of the Pennsylvania General Assembly, they would have the authority to enact a new congressional redistricting plan based on the 2020 census data. Mr. Bashir resides in the 2<sup>nd</sup> Congressional District and intends to vote in the 2022 elections as well.

11. Proposed Voter Intervenor Vallerie Biancaniello resides in Broomall, Pennsylvania, and is a registered Pennsylvania voter who consistently votes in each election. Ms. Biancaniello voted for her State Representative and Senator with the expectation that as members of the Pennsylvania General Assembly, they would have the authority to enact a new congressional redistricting plan based on the 2020 census data. Ms. Biancaniello resides in the 5<sup>th</sup> Congressional District and intends to vote in the 2022 elections as well.

12. Proposed Voter Intervenor Debra A. Biro resides in Nazareth, Pennsylvania, and is a registered Pennsylvania voter who consistently votes in each election. Ms. Biro voted for her State Representative and Senator with the expectation that as members of the Pennsylvania General Assembly, they would

have the authority to enact a new congressional redistricting plan based on the 2020 census data. Ms. Biro resides in the 7<sup>th</sup> Congressional District and intends to vote in the 2022 elections as well.

13. Proposed Voter Intervenor Tegwyn Hughes resides in Bangor, Pennsylvania, and is a registered Pennsylvania voter who consistently votes in each election. Ms. Hughes voted for her State Representative and Senator with the expectation that as members of the Pennsylvania General Assembly, they would have the authority to enact a new congressional redistricting plan based on the 2020 census data. Ms. Hughes resides in the 7<sup>th</sup> Congressional District and intends to vote in the 2022 elections as well.

14. Proposed Voter Intervenor James D. Bee resides in Johnstown, Pennsylvania, and is a registered Pennsylvania voter who consistently votes in each election. Mr. Bee voted for his State Representative and Senator with the expectation that as members of the Pennsylvania General Assembly, they would have the authority to enact a new congressional redistricting plan based on the 2020 census data. Mr. Bee resides in the 13<sup>th</sup> Congressional District and intends to vote in the 2022 elections as well.

15. Proposed Voter Intervenor Richard L. Lawson resides in Finleyville, Pennsylvania, and is a registered Pennsylvania voter who consistently votes in each election. Mr. Lawson voted for his State Representative and Senator with the

expectation that as members of the Pennsylvania General Assembly, they would have the authority to enact a new congressional redistricting plan based on the 2020 census data. Mr. Lawson resides in the 14<sup>th</sup> Congressional District and intends to vote in the 2022 elections as well.

16. Proposed Voter Intervenor David Dillon resides in North Cambria, Pennsylvania, and is a registered Pennsylvania voter who consistently votes in each election. Mr. Dillon voted for his State Representative and Senator with the expectation that as members of the Pennsylvania General Assembly, they would have the authority to enact a new congressional redistricting plan based on the 2020 census data. Mr. Dillon resides in the 15<sup>th</sup> Congressional District and intends to vote in the 2022 elections as well.

17. Proposed Voter Intervenor Rico Timothy Elmore resides in Rochester, Pennsylvania, and is a registered Pennsylvania voter who consistently votes in each election. Mr. Elmore voted for his State Representative and Senator with the expectation that as members of the Pennsylvania General Assembly, they would have the authority to enact a new congressional redistricting plan based on the 2020 census data. Mr. Elmore resides in the 17<sup>th</sup> Congressional District and intends to vote in the 2022 elections as well.

18. Proposed Voter Intervenor Barbara Steinour resides in Sewickley, Pennsylvania, and is a registered Pennsylvania voter who consistently votes in each

election. Ms. Steinour voted for her State Representative and Senator with the expectation that as members of the Pennsylvania General Assembly, they would have the authority to enact a new congressional redistricting plan based on the 2020 census data. Ms. Steinour resides in the 17<sup>th</sup> Congressional District and intends to vote in the 2022 elections as well.

19. Proposed Voter Intervenor James Curtis Jarrett resides in Pittsburgh, Pennsylvania, and is a registered Pennsylvania voter who consistently votes in each election. Mr. Jarrett voted for his State Representative and Senator with the expectation that as members of the Pennsylvania General Assembly, they would have the authority to enact a new congressional redistricting plan based on the 2020 census data. Mr. Jarrett resides in the 18<sup>th</sup> Congressional District and intends to vote in the 2022 elections as well.

20. Proposed Voter Intervenor Jeffrey Wenk resides in Upper St. Clair, Pennsylvania, is a registered Pennsylvania voter who consistently votes in each election. Mr. Wenk voted for his State Representative and Senator with the expectation that as members of the Pennsylvania General Assembly, they would have the authority to enact a new congressional redistricting plan based on the 2020 census data. Mr. Wenk resides in the 18<sup>th</sup> Congressional District and intends to vote in the 2022 elections as well.

21. Proposed Voter Intervenor Donald Beishl, Jr. resides in Langhorne, Pennsylvania, is a registered Pennsylvania voter who consistently votes in each election. Mr. Beishl voted for this State Representative and Senator with the expectation that as members of the Pennsylvania General Assembly, they would have the authority to enact a new congressional redistricting plan based on the 2020 census data. Mr. Beishl resides in the 1<sup>st</sup> Congressional District and intends to vote in the 2022 elections as well.

22. The Elections Clause of the United States Constitution grants to the Legislatures of each state the power to prescribe the “Times, Places and Manner of holding Elections for Senators and Representatives.” *See* U.S. CONST. art. I § 4. Thus, under the Elections Clause, the Pennsylvania General Assembly alone is vested with the obligation to redistrict the Commonwealth.

23. Article VII of the Pennsylvania Constitution vests “every citizen” possessing the required qualifications, to vote in “all elections” to exercise this inalienable right by electing to office, *inter alia*, his or her representatives to the U.S. Congress and the Pennsylvania General Assembly, with the expectation that each will perform its constitutionally mandated roles in accordance with the separation of powers of each branch of government. PA. CONST. art. VII, § 2.

24. Inherent in any “free and equal election” is the possibility that the people’s lawful exercise of their vote may result in the various branches of



government being politically split with the legislative branch controlled by one political party, and the executive branch controlled by another.

25. Such a result, however, is the constitutionally permissible result of a free election and does not divest either branch of the obligation to carry out its constitutionally mandated duties.

26. Nor does a split in control of the various branches of government invest the judiciary with the right to usurp the authority and function of either the legislative or executive branches. To do so would nullify each vote cast for each legislator as well as governor and would consign to the judiciary authority which it was not elected to hold and is not, except in highly limited circumstances not present here, constitutionally empowered to carry out.

27. Yet, that is exactly the result Petitioners seek. This action is predicated upon Petitioners' speculation that a Republican-controlled General Assembly and a Democratic Governor with veto power "are highly likely to be at an impasse this cycle and to fail to enact a new congressional plan." Petition ¶ 33. From that premise, and before the General Assembly even has the Census data required to enact a new congressional plan, Petitioners seek to divest both the General Assembly and the Governor of the opportunity to carry out the constitutional duties for which the voters of the Commonwealth elected them. Petitioners' requested relief would nullify the choice of the voters of Pennsylvania, including those of the Proposed

Voter Intervenor Votes, who in November 2020 once again elected a Republican majority to both chambers of the Pennsylvania General Assembly, denying the voters of their right to representation in the matter of redistricting.

### **B. Procedural History**

28. The Petitioners commenced this action on April 26, 2021, by filing the Petition addressed to the Court's original jurisdiction.

29. To date, the Respondents have not filed a response to the Petition; the Court extended the Respondents' response deadline to July 1, 2021.

### **III. STANDARD FOR INTERVENTION**

30. In an original jurisdiction petition for review, a nonparty may file an application for leave to intervene. Pa. R.A.P. 1531(b).

31. "The right to intervention should be accorded to anyone having an interest of his own which no other party on the record is interested in protecting." *Keener v. Zoning Hearing Bd. of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw. Ct. 1998) (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty.*, 44 A.2d 250 (Pa. 1945)).

32. Pennsylvania law affords a party an absolute right to intervene in an action if the party can satisfy any one of the categories specified in Pa. R. Civ. P. 2327. Pa. R. Civ. P. 2329; *see also Larock v. Sugarloaf Township Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

33. The standards for intervention under Pennsylvania Rules of Civil Procedure 2326 through 2329 apply to an original jurisdiction petition for review because Pennsylvania Rule of Appellate Procedure 106 applies the “general rules” for practice in the courts of common pleas—namely, the Rules of Civil Procedure—“so far as they may be applied.”

34. Voter Intervenors seek to intervene under Pennsylvania Rule of Civil Procedure 2327(3) and (4), which provide in pertinent part:

At any time during the pendency of an action, a person not a party thereto *shall be permitted to intervene therein*, subject to these rules *if*

(3) such person could have joined as an original party in the action or could have been joined therein; or

(4) *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.

Pa. R.C.P. No. 2327(3), (4) (emphasis added); *see also Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Human Servs.*, No. 26 M.D. 2019, 2020 Pa. Commw. LEXIS 104, 2020 WL 424866, at \*5 (Pa. Commw. Ct. Jan. 28, 2020) (“Pennsylvania Rule of Civil Procedure No. 2327(4) . . . permits intervention where the determination ‘*may affect any legally enforceable interest*’ of a proposed intervenor.” (quoting Pa. R.C.P. No. 2327(4) and emphasis in original)).

35. If the determination may affect the intervenor’s legally enforceable interest, and no exception applies, approving intervention is mandatory, not

discretionary. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

36. Moreover, the Court may, in its discretion, allow intervention even if it determines that one of the Rule 2329 exceptions applies. *See* Pa. R.C.P. 2329 (instructing that “an application for intervention *may* be refused” if an exception applies (emphasis added)); *see also* 7 Goodrich Amram 2d § 2329:7 (“Even though the petitioner’s interest is adequately represented in the pending action, this fact does not mandate the refusal of intervention since the refusal of intervention on the ground of the adequacy of the representation is permissive in nature.”).

37. The Court should grant the Voter Intervenors’ application to intervene because the Court’s determination of this action may affect the Voter Intervenors’ legally enforceable interests, no exception applies under Pennsylvania Rule of Civil Procedure 2329, and the Voter Intervenors’ participation will aid the Court. Further, the Voter Intervenors could have joined as original parties in this action.

#### **IV. BASIS FOR PROPOSED INTERVENTION**

##### **A. The Voter Intervenors Have Substantial Interests in This Action**

38. The Voter Intervenors have a substantial and particularized interest in preserving the existing framework under which the General Assembly and Governor have until the first day to circulate nominating petitions for Congress to implement a redistricting plan.

39. Courts in Pennsylvania have permitted Republican voters to intervene in challenges to the laws governing Pennsylvania’s elections. *See League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 741 n.5 (Pa. 2018).

40. Courts have recognized that intervention is “uniquely” appropriate where the proposed intervenor represents the “‘mirror-image’ interests of the plaintiffs” who brought the lawsuit. *Democratic Nat’l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 76765, 2020 WL 1505640, at \*5 (W.D. Wis. Mar. 28, 2020) (quoting *Builders Ass’n of Greater Chicago v. Chicago*, 170 F.R.D. 435, 441 (N.D. Ill. 1996)).

41. Proposed Voter Intervenors represent the “mirror-image” of the Petitioners insofar as the Petitioners aver that they are Pennsylvania registered voters who “intend to advocate and vote for Democratic candidates in the upcoming 2022 primary and general elections,” Pet. ¶ 11, while the Proposed Voter Intervenors intend to advocate and vote for Republican candidates in the upcoming 2022 primary and general elections.

42. Unlike the Petitioners, however, the Proposed Voter Intervenors seek to preserve not only the existing deadline for Pennsylvania’s legislative and executive branches to redraw the congressional map, but to seek to preserve their own rights to representation in the redistricting process.

43. Indeed, if the Petitioners' requested relief is granted, it will result in the curtailing of the ability of the duly elected Republican-majority General Assembly, the sole branch of government in Pennsylvania which is constitutionally mandated to redistrict the Commonwealth and comprised of representatives elected by the Proposed Voter Intervenors, to represent the Proposed Voter Intervenors' interests in implementing a congressional redistricting plan. Instead, this power would be placed in the hands of the judiciary, where elected Democrat Justices hold a substantial majority in the Supreme Court.

44. Petitioner's requested relief would have the effect of diminishing or nullifying the effect of the Proposed Voter Intervenors' votes for their state representatives and senators in the 2020 election, taking away the constitutionally mandated duty of redistricting from the local officials with more intimate familiarity with the constituents and their interests and putting it in the hands of statewide-elected judges who are ill-suited to the task of redistricting. *See Connor v. Finch*, 431 U.S. 407 (1977).

45. As held by this Court in *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Commw. 2019), "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." An individual seeking to intervene in an action need

only establish “an interest of such nature that participation ... may be in the public interest.” *Id.* at 1288–89.

46. As the interests of Proposed Voter Intervenors are of such nature that their participation in this matter may be in the public interest, their intervention is mandatory pursuant to Pa. R.C.P. 2327(4). *See Larock v. Sugarloaf Township Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. 1999).

47. The Proposed Voter Intervenors voted for their legislators in the Pennsylvania General Assembly. In doing so, each Proposed Voter Intervenor is guaranteed representation in the General Assembly with respect to all matters within its Article III powers, including but not limited to, the enactment of legislation. PA. CONST. art. III, § 1.

48. Insofar as the enactment of a new congressional redistricting plan is primarily a legislative function, and as each of the Proposed Voter Intervenors and the public at large has an interest in the contours of their congressional districts, each of the Proposed Voter Intervenors has the inalienable right to express to his or her State Senator or Representative, his or her concerns or input regarding the drawing of the various congressional districts.

49. The Pennsylvania Supreme Court recently acknowledged that “it becomes the judiciary’s role to determine the appropriate redistricting plan” only when “the legislature is unable or chooses not to act.” *League of Women Voters v.*

*Commonwealth*, 178 A.3d 737, 821–22 (Pa. 2018); *see also* Pet. ¶ 5 (quoting *League of Women Voters*). But here, the Petitioners are attempting to sidestep this precondition by further restricting the General Assembly’s time to determine a redistricting plan. Indeed, the official redistricting data from which a new redistricting plan will be prepared will not be released until August 16.

50. If Petitioners are successful in this litigation, the Pennsylvania General Assembly will be divested of its authority to draw the new congressional districts and the process will become a judicial process, not the constitutionally mandated legislative process. Resultantly, Proposed Voter Intervenors will be deprived of their right to representation in the drawing of the new plan as the authority to do so will be transferred to the judiciary who are not the duly elected representatives for Proposed Voter Intervenors and to whom Proposed Voter Intervenors have no ability to provide their input, thus depriving Proposed Voter Intervenors and the public at large of their right to representation in this crucial legislative process.

51. As such, the votes cast by Proposed Voter Intervenors and indeed Pennsylvania voters at large who in November 2020 elected a Republican-led majority to both chambers of the Pennsylvania General Assembly would be nullified with respect to the redistricting process.

52. Further, a newly enacted redistricting plan is subject to legal challenges by the citizens of the Commonwealth. *See, e.g., League of Women Voters of Pa. v.*



*Commonwealth*, 178 A.3d 737 (Pa. 2018). If the Court is permitted to act as a quasi-General Assembly and draws the new congressional map on its own, the due process rights of Proposed Voter Intervenors to challenge the Court-drawn plan may be severely limited.

**B. There Is No Basis to Refuse the Voter Intervenors' Application for Leave to Intervene**

53. Pennsylvania Rule of Civil Procedure 2329 provides that an application for intervention may be refused if: (1) the petitioner's claim or defense "is not in subordination to and in recognition of the propriety of the action"; (2) the petitioner's interest is already adequately represented; or (3) "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."

54. None of these factors applies to the Proposed Voter Intervenors.

55. First, the Proposed Voter Intervenors' defense in this action is in subordination to and in recognition of the action's propriety.

56. Second, no existing party adequately represents the Proposed Voter Intervenors' particularized interests. *See* Pa. R.C.P. No. 2329(2). The Respondents, the Acting Secretary of the Commonwealth of Pennsylvania and the Director of the Pennsylvania Bureau of Election Services and Notaries, are political appointees who do not represent the Proposed Voter Intervenors' interests in this case. The Respondents are participating in this action in their official capacity, and thus do not

represent the unique interests of the Proposed Voter Intervenor, who voted for Republican local officials in the 2020 election to represent their interests in the redistricting process and who will be expending time, effort, and resources in the 2022 congressional elections. The Respondents do not share the same interest with Proposed Voter Intervenor who seek to protect their individual right to vote, to have that vote counted and to protect their individual rights to representation in the redistricting process.

57. Third, the Proposed Voter Intervenor has not unduly delayed the submission of their application to intervene in this action, which remains in its infancy. The Respondents have not yet filed a responsive pleading to the Petition (that deadline having been extended to July 1). No briefing schedule has been set for the other Proposed Voter Intervenor's applications to intervene or the preliminary objections they intend to file. Thus, the Proposed Voter Intervenor's intervention will not cause any undue delay, embarrassment, or prejudice to any party, but their intervention will aid the court in resolving the important legal and factual questions before it.

## **V. CONCLUSION**

58. For the reasons set forth above, the Voter Intervenor has a clear right to intervene in this case challenging important state laws governing the redistricting of Pennsylvania's congressional seats.

59. Proposed Voter Intervenor seek to intervene as Respondents in this action and will assert various defenses to the Petition but will not raise claims against Respondents.

60. If granted leave to intervene, Proposed Voter Intervenor intend to file the Preliminary Objections attached as Exhibit A.

WHEREFORE, Proposed Voter Intervenor respectfully request that this Honorable Court enter an Order granting the Proposed Application to Intervene in this matter together with any other relief the Court deems to be appropriate or necessary.

Respectfully submitted,

**GALLAGHER GIANCOLA LLC**

Dated: June 18, 2021

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

PA #37950

[kag@glawfirm.com](mailto:kag@glawfirm.com)

Russell D. Giancola

PA #200058

[rdg@glawfirm.com](mailto:rdg@glawfirm.com)

3100 Koppers Building

436 Seventh Avenue

Pittsburgh, PA 15219

412.717.1900 (Phone)

412.717.1901 (Fax)

*Counsel for Intervenor-Respondents  
Haroon Bashir, Vallerie Biancaniello,  
Debra A. Biro, Tegwyn Hughes, James  
D. Bee, Richard L. Lawson, David  
Dillon, Rico Timothy Elmore, Barbara  
Steinour, James Curtis Jarrett, Jeffrey  
Wenk, and Donald W. Beishl, Jr.*

# **Exhibit A**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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**NOTICE TO PLEAD**

To Petitioner:

You are hereby notified to file a written response to the enclosed preliminary objections within thirty (30) days from service hereof or a judgment may be entered against you.

Dated: June 18, 2021

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

Russell D. Giancola

**Gallagher Giancola LLC**

*Counsel for Intervenor-Respondents  
Haroon Bashir, Vallerie Biancaniello,  
Debra A. Biro, Tegwyn Hughes, James  
D. Bee, Richard L. Lawson, David  
Dillon, Rico Timothy Elmore, Barbara  
Steinour, James Curtis Jarrett, Jeffrey  
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**VOTER RESPONDENTS' PRELIMINARY OBJECTIONS  
TO PETITION FOR REVIEW**

Pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure,  
Intervenor-Respondents Haroon Bashir, Vallerie Biancaniello, Debra A. Biro,  
Tegwyn Hughes, James D. Bee, Richard L. Lawson, David Dillon, Rico Timothy  
Elmore, Barbara Steinour, James Curtis Jarrett, Jeffrey Wenk, and Donald Beishl,



Jr. (“Voter Respondents”) file these Preliminary Objections to the Petition for Review (“Petition”), and state as follows:

## **I. PRELIMINARY STATEMENT**

When the General Assembly and Governor face an unprecedentedly short timeframe to draw a new congressional map, the Petitioners ask the Court to further shorten their time by imposing arbitrary and legally unsupported deadlines to remedy alleged harms that may never come to fruition. The Petitioners have jumped the gun, rushing to the Court with a proposed remedy for a problem that might—but might not—arise in the future. The claims set forth in the Petition are unripe for two reasons: (1) Petitioners assume that the Republican-controlled General Assembly and the Democratic Governor are incapable of reaching a compromise before the deadline to circulate nomination petitions and (2) Petitioner’s allegations regarding the shift in population within Pennsylvania are based upon the American Community Survey, a 2019 estimate which cannot be used to achieve population equality in congressional redistricting. And Petitioner’s proposed remedy is fashioned from whole cloth: the Court cannot impose an earlier deadline to complete the redistricting process (or any part of same) when no constitutional or statutory provision so permits.

Rather than litigate Petitioners' unripe claims or entertain their request to exercise powers it lacks, the Court should dismiss the Petition for Review and allow the legislative process to run its course.

## **II. PRELIMINARY OBJECTIONS**

1. Pennsylvania Rule of Civil Procedure 1028(a) provides that “[p]reliminary objections may be filed by any party to any pleading” based upon grounds including “failure of a pleading to conform to law” and “legal insufficiency of a pleading (demurrer).” Pa. R. Civ. P. 1028(a)(2), (4).

2. Rule 1028 is applicable to this original jurisdiction matter pursuant to Pennsylvania Rule of Appellate Procedure 106. *See also* Pa. R.A.P. 1516(b) (providing for the filing of preliminary objections in response to a petition for review addressed to the Court’s original jurisdiction).

### **A. Petitioners Lack Standing, Pa. R.C.P. 1028(a)(4)**

3. Voter Respondents hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

4. “[A] party has standing where that party is ‘aggrieved.’” *Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002) (citing *In re T.J.*, 739 A.2d 478, 481 (Pa. 1999)).

5. “For a party to be aggrieved, it must have: 1) a substantial interest in the subject matter of the litigation; 2) the party’s interest must be direct; and 3) the

interest must be immediate and not a remote consequence of the action.” *Id.* (quoting *In re T.J.*, 739 A.2d at 481); accord *Albert*, 790 A.2d at 994–95.

6. “A ‘substantial interest’ is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law.” *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003).

7. “A ‘direct’ interest requires a showing that the matter complained of caused harm to the party’s interest.” *Id.* “An ‘immediate’ interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it.” *Id.*

8. The Petitioners’ interest in this litigation is neither direct nor immediate. The Petitioners’ action relates to the composition of congressional districts which will be the subject of a primary scheduled to take place on May 17, 2022, for which nomination petitions cannot be circulated until nearly 8 months from now.

9. The Petitioners can speak only to their assessment of the likelihood or probability of the General Assembly and Governor reaching agreement on the implementation of a congressional redistricting plan.

10. And Petitioners speculate regarding which congressional districts have been most affected by the population shifts when the official data will not be released for months.

11. Accordingly, the Petitioners have not alleged the direct and immediate interest in this litigation necessary to establish standing to assert their claims.

WHEREFORE, the Voter Respondents respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

**B. Petitioners' Claims Are Not Ripe and Thus Not Justiciable, Pa. R.C.P. 1028(a)(4)**

12. Voter Respondents hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

13. This action must be dismissed because Petitioners' claims are not ripe.

14. The doctrine of ripeness "mandates the presence of an actual controversy." *Bayada Nurses, Inc. v. Dep't of Labor & Industry*, 8 A.3d 866, 874 (Pa. 2010).

15. "Standing and ripeness are distinct concepts insofar as ripeness also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013).

16. "Parties may raise questions regarding standing, ripeness, and the political question doctrine by filing preliminary objections to a petition for review filed in the original jurisdiction of the Commonwealth Court." *Id.*

17. A claim is not ripe where it rests on speculation regarding future events. *See, e.g., Disability Rights Pa.*, 2020 WL 2820467, 2020 Pa. LEXIS 2751; *id.* (Wecht, J., concurring); *Delisle*, 2020 WL 3053629, 2020 Pa. LEXIS 2970; *id.* (Wecht, J., concurring).

18. Petitioners acknowledge that “Pennsylvania law does not set a deadline by which congressional redistricting plans must be in place prior to the first congressional election following the release of the Census.” Pet. ¶ 30.

19. As a practical matter, a new congressional redistricting plan need not be implemented until the first day to circulate nomination petitions, February 15, 2022. *See* 28 P.S. § 2868; Pet. ¶ 31.

20. Because no provision of the U.S. or Pennsylvania Constitution nor any statute imposes an earlier deadline, Petitioners have no right to demand the passage of a new congressional redistricting plan before February 15, 2022.

21. To justify depriving the legislature of the full opportunity to devise a congressional map of its own, the Petitioners premise their claims on the divided control of the legislative and executive branches. Pet. ¶ 7.

22. They assume, citing just two prior instances where a new congressional redistricting plan was not timely implemented, that the parties are destined to be incapable of reaching a compromise here. Pet. ¶¶ 7–8. Of course, one of those examples cited by Petitioners was 2018, when the Pennsylvania Supreme Court

afforded the General Assembly just 18 days from the date of its order striking down the prior congressional district map to submit a remedial district plan to the Governor. *See League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). And in the other example cited by the Petitioners (following the 1990 Census), no actions relating to the redistricting of Pennsylvania’s seats were filed until January 1992, the first day for circulating nominating petitions. *See Mellow v. Mitchell*, 607 A.2d 204, 205 (Pa. 1992)

23. Petitioner’s action is unripe for the additional reason that they premise their claims of population shifts reflected in two-year old estimates. *See, e.g.*, Pet. ¶¶ 24–27 (discussing the Census Bureau’s 2019 American Community Survey).

24. Such estimates cannot be used by the General Assembly or Governor to establish equipopulous congressional districts, falling far short of the “one person, one vote” standard.

25. Indeed, all of Petitioners’ requested relief seeks to address alleged injuries that might—but might not—occur. Petitioners do not allege any facts to establish that the Petitioners are likely to suffer a constitutional deprivation.

26. Petitioner’s claims that the existing congressional districts are unconstitutionally malapportioned *now* are simply erroneous. Pennsylvania’s 18 existing congressional districts may properly remain as constituted until the 118<sup>th</sup> Congress meets January 3, 2023, more than 18 months from now.

27. Although Petitioners may speculate regarding the possibility of political gridlock and unequal congressional districts in 2022, such does not give rise to a cognizable cause of action. *Cf. Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002).

WHEREFORE, the Voter Respondents respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

**C. Petitioners Request Relief the Court Cannot Lawfully Grant, Pa. R.C.P. 1028(a)(4)**

28. The Voter Respondents hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

29. Petitioners asks this Court to rewrite the Election Code, imposing deadlines the General Assembly never saw fit to create. Petitioners suggest that the absence of a yet-unspecified deadline for the passage of a congressional redistricting plan somehow “infringes on Petitioners’ right to association.” Pet. ¶ 51.

30. Petitioners’ request for relief would have the Court establish—for the first time in our Commonwealth’s history—a deadline prior to the first day to circulate nominating petitions for the legislative and executive branches to create the new congressional districts.

31. The Court lacks the authority to grant this relief because the Pennsylvania General Assembly—not the judiciary—holds the sole power to write

the laws for the Commonwealth. *See In re: Fortieth Statewide Investigating Grand Jury*, No. 75, 77–82, 84, 86–87, 89 WM 2018, slip. op. at 12–13 (Pa. Dec. 3, 2018); *see also* U.S. CONST. art. I, § 4 (granting the Legislatures of each state the power to prescribe the “Times, Places and Manner of holding Elections for Senators and Representatives”); PA. CONST. art. II § 1 (vesting the General Assembly with the legislative power).

32. “The 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 (1869); *see also Agre v. Wolf*, 284 F. Supp. 3d 591 (E.D. Pa. 2018) (Smith, C.J., mem.) (“The process for crafting procedural regulations is textually committed to state legislatures and to Congress.”).

33. The Court cannot take unilateral action to rewrite the law—or rather, as Petitioners request, write the law for the first time—as that would overstep the bounds of its authority. *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 583 (Pa. 2016); *Cali v. Philadelphia*, 177 A.2d 824, 835 (Pa. 1962). “[E]diting a statute” by the Court “would amount to judicial legislation.” *State Bd. of Chiropractic Exam’rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971). For the Court to assume “the power to write legislation would upset the delicate balance in our tripartite



system of government.” *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998), *rev’d on other grounds*, 529 U.S. 277 (2000).

34. By pressing this constitutional challenge, Petitioners are asking the Court to weigh in on the political policy judgments regarding the regulation of elections.

35. Moreover, this Court’s “role is distinctly *not* to second-guess the policy choices of the General Assembly.” *Ins. Fed. of Pa., Inc.*, 970 A.2d at 1122 n.15. (emphasis in original). Indeed, “[i]t is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring.” *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941). And “[i]f, in the domain of economic and social controversies, a court were, under the guise of the application of the doctrine of public policy, in effect to enact provisions which it might consider expedient and desirable, such action would be nothing short of judicial legislation[.]” *Id.*

36. Although the Court has the power to review the constitutionality of various provisions of the Election Code, it cannot direct the Legislature *how* to fix any alleged constitutional defect.

37. The drastic relief requested by the Petitioners would have the Court exceed its constitutional authority and strip the legislative and executive branches of

their full opportunity to pass a congressional redistricting plan, while at the same time diminishing the rights of the voters of this Commonwealth, including the Voter Respondents, who elected such officials to fulfill their constitutional mandate to implement a new congressional map.

WHEREFORE, the Voter Respondents respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

**D. Petitioners' Seek Attorney Fees They Are Not Permitted to Recover, Pa. R.C.P. 1028(a)(4)**

38. The Voter Respondents hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

39. Not only do the Petitioners ask the Court to exercise powers it lacks to remedy an alleged harm that may never come to fruition, but Petitioners request that the taxpayers fund this boondoggle, seeking an award of attorney fees. *See* Pet. Prayer for Relief ¶ e.

40. Pennsylvania courts have “consistently followed the general, American rule that there can be no recovery of attorneys’ fees from an adverse party, absent an express statutory authorization, a clear agreement by the parties or some other established exception.” *Merlino v. Delaware County*, 728 A.2d 949, 951 (Pa. 1999); *accord* 42 Pa.C.S. § 1726 (“Attorney’s fees are not an item of taxable costs except to the extent authorized by section 2503”); 42 Pa.C.S. § 2503(10) (providing that “a

litigant is entitled to attorneys' fees as part of the taxable costs, only in circumstances specified by statute heretofore or hereafter enacted").

41. Petitioners cite no authority for the recovery of attorney's fees and cannot be awarded the same regardless of the outcome of this litigation.

WHEREFORE, the Voter Respondents respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

### **III. CONCLUSION**

WHEREFORE, the Voter Respondents respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

Respectfully submitted,

**GALLAGHER GIANCOLA LLC**

Dated: June 18, 2021

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

PA #37950

[kag@glawfirm.com](mailto:kag@glawfirm.com)

Russell D. Giancola

PA #200058

[rdg@glawfirm.com](mailto:rdg@glawfirm.com)

3100 Koppers Building

436 Seventh Avenue

Pittsburgh, PA 15219

412.717.1900 (Phone)

412.717.1901 (Fax)

*Counsel for Intervenor-Respondents  
Haroon Bashir, Vallerie Biancaniello,  
Debra A. Biro, Tegwyn Hughes, James  
D. Bee, Richard L. Lawson, David  
Dillon, Rico Timothy Elmore, Barbara  
Steinour, James Curtis Jarrett, Jeffrey  
Wenk, and Donald W. Beishl, Jr.*

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

<p>CAROL ANN CARTER, <i>et al.</i>,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>VERONICA DEGRAFFENREID, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania, <i>et al.</i>,</p> <p style="text-align: center;">Respondents,</p> <p style="text-align: center;">v.</p> <p>HAROON BASHIR, VALLERIE BIANCANIELLO, DEBRA BIRO, TEGWYN HUGHES, JAMES BEE, RICHARD LAWSON, DAVID DILLON, RICO TIMOTHY ELMORE, BARBARA STEINOUR, JAMES CURTIS JARRETT, JEFFREY WENK, and DONALD BEISHL, JR.,</p> <p style="text-align: center;">Intervenor-Respondents.</p>	<p>No. 132 MD 2021</p>
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**[PROPOSED] ORDER**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2021, upon consideration  
of the Preliminary Objections filed by the Voter Respondents, and any opposition

thereto, it is hereby ORDERED that said preliminary objections are SUSTAINED and Petitioners' Petition for Review is DISMISSED WITH PREJUDICE.

BY THE COURT:

\_\_\_\_\_, J.

**VERIFICATION**

The undersigned, avers that the statements of fact contained in the attached Application for Leave to Intervene by Voters of the Commonwealth of Pennsylvania are true and correct to the best of his knowledge and belief, and are made subject to the penalties of 18 Pa. Cons. Ann. Section 4904 relating to unsworn falsification to authorities.

Date: June 17, 2021

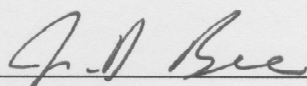
By: \_\_\_\_\_

Haroon Bashir

**VERIFICATION**

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Date: June 17, 2021

By:   
James D. Bee



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Date: June 17, 2021

By:   
Debra A. Biro

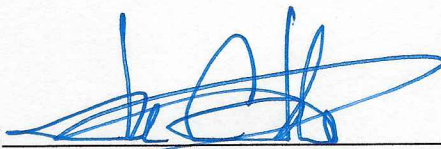
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Date: June 17, 2021

By: \_\_\_\_\_

James Curtis Jarrett

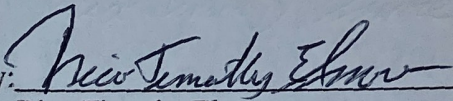




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Date: June 17, 2021

By:   
Rico Timothy Elmore

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Date: June 17, 2021

By: Jeffrey Wenk  
Jeffrey Wenk

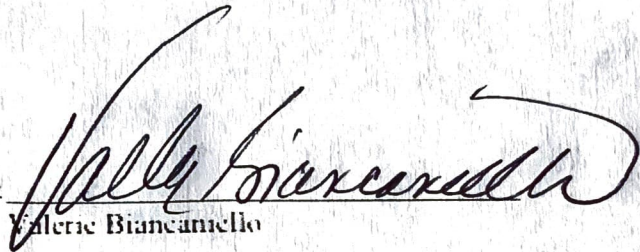


**VERIFICATION**

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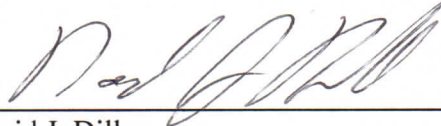
By.

  
Valerie Biancamello

**VERIFICATION**

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Date: June 17, 2021

By:   
David J. Dillon

## **CERTIFICATE OF COMPLIANCE**

I 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.

Dated: June 18, 2021

/s/ Kathleen A. Gallagher  
Kathleen A. Gallagher  
PA #37950  
Russell D. Giancola  
Pa. #200058  
GALLAGHER GIANCOLA LLC  
436 Seventh Avenue, 31<sup>st</sup> Floor  
Pittsburgh, PA 15219  
412.717.1900

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 18th day of June, 2021 I caused a true and correct copy of the forgoing **APPLICATION FOR LEAVE TO INTERVENE BY VOTERS OF THE COMMONWEALTH OF PENNSYLVANIA**, to be filed via the Court's PAC File system, which will serve below identified counsel:

Edward D. Rogers, Esq.  
Marcel S. Pratt, Esq.  
Robert J. Clark, Esq.  
Michael R. McDonald, Esq.  
Paul K. Ort, Esq.  
Ballard Spahr LLP  
1735 Market Street, Floor 51  
Philadelphia, PA 19103  
*(Counsel for Petitioners)*

Aria C. Branch, Esq.  
Perkins Coie LLP  
700 Thirteenth Street NW, Suite 800  
Washington, DC 20005-3960  
*(Counsel for Petitioners)*

Abha Khanna, Esq.  
Perkins Coie LLP  
1201 Third Avenue, Suite 3900  
Seattle, WA 98101-3099  
*(Counsel for Petitioners)*

Kathleen M. Kotula, Esq.  
Pennsylvania Department of State  
401 North Street  
306 North Office Building  
Harrisburg, PA 17120-0500  
*(Counsel for Respondents)*

Kenneth L. Joel, Esq.



Pennsylvania Governor's Office of General Counsel  
333 Market Street, 17<sup>th</sup> Floor  
Harrisburg, PA 17101  
*(Counsel for Respondents)*

Anthony R. Holtzman, Esq.  
K&L Gates LLP  
17 North Second Street, 18<sup>th</sup> Floor  
Harrisburg, PA 17101-1507  
*(Counsel for Proposed-Intervenors Jake Corman, President pro tempore of the Pennsylvania Senate, and Kim Ward, Majority Leader of the Pennsylvania Senate)*

Jeffrey Duffy, Esq.  
BakerHostetler LLP  
Cira Centre, 12<sup>th</sup> Floor  
2929 Arch Street  
Philadelphia, PA 19104  
*(Counsel for Proposed-Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives)*

Patrick T. Lewis, Esq.  
BakerHostetler LLP  
127 Public Square, Suite 2000  
Cleveland, OH 44114  
*(Counsel for Proposed-Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives)*

Robert J. Tucker, Esq.  
BakerHostetler LLP  
200 Civic Center Drive, Suite 1200  
Columbus, OH 43215  
*(Counsel for Proposed-Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives)*

Thomas W. King, Esq.  
Thomas E. Breth, Esq.  
Jordan P. Shuber, Esq.

Dillon, McCandless, King, Coulter & Graham LLP  
128 West Cunningham Street  
Butler, PA 16001  
*(Counsel for Proposed Intervenors)*

Jason B. Torchinsky, Esq.  
Jonathan P. Lienhard, Esq.  
Shawn T. Sheehy, Esq.  
Holtzman Vogel Baran Torchinsky Josefiak PLLC  
15405 John Marshall Highway  
Haymarket, VA 20169  
*(Counsel for Proposed Intervenors)*

Dated: June 18, 2021

/s/ Kathleen A. Gallagher  
Kathleen A. Gallagher  
PA #37950  
Russell D. Giancola  
Pa. #200058  
GALLAGHER GIANCOLA LLC  
436 Seventh Avenue, 31<sup>st</sup> Floor  
Pittsburgh, PA 15219  
412.717.1900

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

<p>CAROL ANN CARTER, <i>et al.</i>,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>VERONICA DEGRAFFENREID, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania, <i>et al.</i>,</p> <p style="text-align: center;">Respondents.</p>	<p>No. 132 MD 2021</p>
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**[PROPOSED] ORDER**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2021, upon consideration of the Application for Leave to Intervene filed by the Proposed Voter Intervenors, and any opposition thereto, it is hereby ORDERED that said application is GRANTED. The Proposed Voter Intervenors are granted leave to intervene as Respondents. The Preliminary Objections attached as Exhibit A to the application are deemed filed effective the date of this Order.

BY THE COURT:

\_\_\_\_\_, J.