

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 364 MD 2020

NAACP PENNSYLVANIA STATE CONFERENCE,

Petitioner,

v.

**KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE
COMMONWEALTH OF PENNSYLVANIA; AND JESSICA MATHIS, IN
HER CAPACITY AS DIRECTOR OF THE BUREAU OF ELECTION
SERVICES AND NOTARIES OF THE PENNSYLVANIA
DEPARTMENT OF STATE,**

Respondents,

**BRYAN CUTLER, SPEAKER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES, KERRY BENNINGHOFF, MAJORITY LEADER
OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES,**

Proposed-Intervenor Respondents.

**REPLY BRIEF IN SUPPORT OF PETITION TO INTERVENE BY
SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES
BRYAN CUTLER AND MAJORITY LEADER OF THE PENNSYLVANIA
HOUSE OF REPRESENTATIVES KERRY BENNINGHOFF**

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Speaker of the Pennsylvania House of Representatives Bryan Cutler (“Speaker Cutler”) and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff (“Leader Benninghoff”; collectively the “House Leaders”) hereby file this Reply Brief supporting their Petition to Intervene under Pa. R.C.P. 2328.

INTRODUCTION

Petitioner, which as an association lacks standing to bring this action,¹ seeks to challenge the standing of the House Leaders to intervene in this case—where such an intervention is clearly permitted by Pennsylvania law.

Individual legislators can, and routinely do, intervene in cases. It is not necessary, and never has been, for individual legislators to act as the General Assembly, as a body, to intervene in a case in Pennsylvania. In fact, the General Assembly, as a body, as opposed to individual legislators, rarely, if ever, intervenes in cases. Such a suggestion otherwise flies in the face of public policy (as the members of the minority party could never intervene to protect their legislative rights) and decades of Pennsylvania jurisprudence. The House Leaders have enforceable interests—legislating and appropriating for elections in Pennsylvania—

¹ See Section II.A., Proposed-Intervenor Respondents Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the House of Representatives Kerry Benninghoff’s Preliminary Objections.

that are specific to them that will be adversely affected in this lawsuit. The House Leaders are permitted to intervene as a matter of right.

ARGUMENT

Legislators can initiate litigation, and by extension, can intervene in cases where they “can demonstrate an injury to [their] ability ‘to act as a legislator.’” *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Human Servs.*, 225 A.3d 902, 909 (Pa. Commw. Ct. 2020) (citation omitted). Pennsylvania courts have specifically found that negative impacts on a legislator’s “ability to participate in the voting process” and “control the Commonwealth’s finances” qualify as legally enforceable interests sufficient to warrant intervention. *Id.* at 910, 913 (citation omitted); *see also Coleman v. Miller*, 307 U.S. 433, 438 (1939) (“[legislators] have a plain, direct and adequate interest in maintaining the effectiveness of their votes.”); *Fumo v. City of Philadelphia*, 972 A.2d 487, 492 (Pa. 2009).

What is more, Pennsylvania courts routinely find that individual legislators, as opposed to the General Assembly as a body, have standing, and by extension can intervene, in cases involving encroachment upon their authority to act as legislators. *Fumo*, 972 A.2d at 502 (finding six individual legislators had standing to protect authority to regulate submerged lands); *Allegheny Reproductive Health*, 225 A.3d at 913 (allowing 18 members of the Pennsylvania State Senate and 8 members of the Pennsylvania House of Representatives to intervene); *Leach v. Commonwealth*, 118

A.3d 1271, 1273 n.2 (Pa. Commw. Ct. 2015) (President of Senate individually allowed to intervene in constitutional challenge to legislation); *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 112 n.3 (Pa. Commw. 1998) (Speaker of House and President of Senate individually granted leave to intervene in matter concerning constitutionality of enactment of legislation).

Here, the House Leaders showed that their exclusive authority to legislate laws governing elections, and to appropriate financing for implementation and execution of those laws, are directly implicated, and could be adversely impacted, by this lawsuit. *See generally* House Leaders’ Intervention Petition and Supporting Brief. Petitioner offered nothing—argument or facts—to controvert this reality. *See generally* Response. Instead, Petitioner presented multiple red herrings, seeking to divert the Court’s attention to inapposite matters.

First, Petitioner alleges that it is a “bedrock rule under our state Constitution” that only the General Assembly, as a complete body, has standing to protect a legislator’s rulemaking authority. Response p.3. Far from being “bedrock,” Petitioner’s argument is legally unsupported, and, in actuality, directly contrary to countless Pennsylvania decisions. *Fumo*, 972 A.2d at 487; *Allegheny Reproductive Health*, 225 A.3d at 913; *Leach*, 118 A.3d at 1273 n.2; *Common Cause/Pennsylvania*, 710 A.2d at 112 n.3.

In support of its position, Petitioner ignores these precedential cases and instead leans on Justice Wecht’s unjoined concurring opinion in *Disability Rights Pa. v. Boockvar*, a case where the Court sustained the respondent’s demurrer and dismissed a flawed petition seeking wholesale changes to Pennsylvania’s Election Code. *Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, 2020 WL 2507661 (Pa. May 15, 2020).²

Justice Wecht’s concurrence was the only concurrence, or substantive written decision, in *Disability Rights Pa.*, and was not joined by any other Justice. *Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, 2020 WL 2507661 (Pa. May 15, 2020) (Wecht, J., concurring). Justice Wecht’s concurrence is plainly misplaced, as is shown in this Reply Brief; no wonder it was a solo opinion. Petitioner’s unrelenting reliance on Justice Wecht’s concurrence suggests that Petitioner believes it is authoritative law, but it is not.

Next, Petitioner points briefly to *Markham v. Wolf*, a case that affirms that “[s]tanding for legislators claiming an institutional injury is no different than traditional standing” 136 A.3d 134, 140 (Pa. 2016) (holding there is no special

² Petitioner also does not address the many cases where predecessors of the House Leaders have been joined as original respondents in challenges to Election Code provisions, which evidence that the House Leaders could have been joined as original parties to this action in fulfillment of the requirements of Pa. R.C.P. 2327(3). See, e.g., *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (former Speaker Mike Turzai joined as respondent in redistricting case); *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002) (former Speaker Matthew J. Ryan joined as respondent in redistricting case); *Adams Jones v. Boockvar*, 717 MD 2018 (Pa. Commw. Ct. 2018) (former Speaker Turzai joined as respondent in challenge to provisions of the Election Code).

category for legislative standing). In traditional cases, an individual does not have to intervene as a general body—corporation, club, partnership, etc.—for alleged impingement upon interests specific to that individual.³ If an individual possesses an interest that is directly impacted by a lawsuit, then she can intervene as a matter of right. *Keener v. Zoning Hearing Bd. Of Millcreek Tp.*, 714 A.2d 1120, 1123 (Pa. Commw. Ct. 1998) (“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”). It is no different for legislators. *Markham*, 635 Pa. at 298.

Consistent with this precedent, there is no Pennsylvania case law that assigns a legislator’s ability to protect his or her authority to act as a legislator to the General Assembly’s ability as a whole, and Petitioner cites no authority establishing that is the case. *See generally* Response.⁴ If Petitioner was correct, the members of the

³ In the election sphere, the proper party is frequently an individual, as “the right to vote is personal” and the rights sought to be vindicated in a challenge are “personal and individual.” *Albert v. 2001 Legis. Reapportionment Comm’n*, 790 A.2d 989, 995 (Pa. 2002) (quoting *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964)); *see also* Section II.A., Proposed-Intervenor Respondents Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the House of Representatives Kerry Benninghoff’s Preliminary Objections (discussing how Petitioner as an association that does not possess the right to vote lacks standing to bring this action).

⁴ Petitioner attempts to apply an inapplicable procedural standard from an entirely separate set of procedural rules by citing to the U.S. Supreme Court decision in *Virginia House of Delegates v. Bethune-Hill*. 139 S. Ct. 1945 (2019). *Bethune-Hill* concerned the standing of a branch of Virginia’s legislature, which had already been permitted by the federal District Court to intervene in the case, to then appeal the District Court’s ruling in its own right, which would be two levels removed from the facts of this case—where the House Leaders are seeking to *intervene* in an existing case brought by Petitioner in Pennsylvania Commonwealth Court. Pennsylvania courts have established “that the inquiry to determine whether a party has standing to initiate litigation is

minority party could never protect their voting rights, or any legislative rights for that matter, because they could never garner the votes to obtain majority support from the General Assembly. Petitioner’s argument would create absolute majority control, and Pennsylvania law does not contemplate such a result. A legislator’s ability to protect her right to “act as a legislator” rests with the legislator individually, and the legislator can individually intervene to protect this right. *Fumo*, 972 A.2d at 501 (“Legislators and council members have been permitted to bring actions based upon their special status where there was a discernible and palpable infringement ***on their authority*** as legislators.”) (emphasis added).

Petitioner’s contorted argument otherwise seems to be based on the language that the authority to legislate, and to legislate election laws, is with the “General Assembly”, not individual legislators. *See* Response, p. 3 (citing PA. CONST. art. II, § 1). This phrase, however, is meant to generally denote that the authority to legislate rests with the Legislative Branch of government, the General Assembly, which is necessarily comprised of its individual members. This phrase does not transform the standard for legislators to intervene in Pennsylvania. The *Fumo* court affirmed that generally stating a subject power rests with the “General Assembly” did not mean that individual legislators could not protect against interference with their legislative

different than the inquiry to determine whether a party can intervene in existing litigation.” *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Commw. Ct. 2019).

powers. *Id.* In fact, the *Fumo* court addressed that point directly, stating that the subject legislators had legislative standing “to vindicate a power that only the **General Assembly** allegedly has” *Fumo*, 972 A.2d at 501-03 (emphasis added). The *Fumo* court found that the right to protect their votes rested with individual legislators and permitted the legislators to intervene. *Id.* Powers reserved to the General Assembly can and must be protected by the individual legislators who comprise the General Assembly, and, as such, have specific rights as members of that legislative body.

Later in its Response, Petitioner weakly attempts to distinguish the controlling *Fumo* precedent by arguing that the *Fumo* legislative intervenors had been “directly deprived of their right to vote.” Response p. 7. As Petitioner seeks to do *exactly* that through its Petition, Petitioner confirms the necessity of granting the House Leaders’ intervention.

Through its Petition, Petitioner seeks for this Court to write **new** laws that actually conflict with existing law. PA. CONST. art. VII, § 1; PA. CONST. art. VII, § 14; U.S. Const. art. I, § 4. Indeed, Petitioner seeks expansive statutory revisions of its own choosing, namely that this Court “[d]irect Respondents to require each county board of election to maintain a sufficient a number of polling places such that each resident can exercise his or her right to vote”; b) that this Court “[d]irect Respondents to provide that each county board of election give adequate notice to

voters of any change in polling place by mailing notice to voters sufficiently in advance of the General Election, as well as posting at old polling places”; c) that this Court “[p]ermit early voting for the General Election in advance of election day”; d) that this Court “[r]equire increased access to vote by mail across the Commonwealth, by among other things, automatically sending mail-in ballot applications to all registered voters in accordance with their language preferences; ensuring that absentee and mail-in ballots are available in formats that are accessible to voters with disabilities without requiring assistance from another person; requiring each county to provide ballot dropboxes, and accepting ballots returned to a drop-box by close of polls on Election Day; and providing adequate guidance to election officials when verifying mail ballots through signature matching and require notice and an opportunity to cure a mail ballot flagged for signature mismatch”; and e) that this Court “[r]equire that all polling places in the Commonwealth use hand-marked paper ballots for the 2020 General Election, while retaining at least one accessible voting machine per polling place for those who request one and as required by federal law.” Petition, Request for Relief, p. 66-67.

Such expansive and unprecedented relief does not merely “challenge the constitutionality of state legislation,” but rather seeks a *wholesale revision* of duly enacted legislation that would deprive the House Leaders of their constitutional authority to enact laws for the conduct of Pennsylvania’s elections. Response p. 7;

see also Abraham v. Shapp, 400 A.2d 1249, 1254 (Pa. 1979) (Nix, J., dissenting) (“It is the responsibility of the legislature by appropriate legislation to provide the procedures for elections to public office.”).

Next, Petitioner cites to this Court’s unreported opinion in *Robinson Twp. v. Commonwealth*. No. 284 MD 2012, 2012 WL 1429454 (Pa. Commw. Ct. 2012), a case where individual legislators unsuccessfully sought to intervene in a constitutional challenge to Act 13 of the Oil and Gas Act, in order to defend “the legislative intent behind enactment of Act 13.” *Id.* at *3.

As this Court recently held in the analogous *Allegheny Reproductive Health* decision, “what distinguishes this case from *Markham* or *Robinson Township* is that the instant litigation relates directly to the legislative power to appropriate. . . . [T]he object of this litigation is to change the substance and manner by which the General Assembly can appropriate funds in the future.” *Allegheny Reproductive Health*, 225 A.3d at 911.

As in *Allegheny Reproductive Health*, this case impacts the General Assembly’s authority to appropriate funds. Pennsylvania law makes it clear that the Commonwealth pays for efforts needed for voter education and updating of infrastructure and technology. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). Petitioner seeks, *inter alia*, for the Commonwealth to lengthen its in-person voting period by multiple days and to mandate different voting systems to be used—all in

only a few months' time. *See* Petition, Request for Relief, p. 66-67. This wholesale overhaul of the manner in which the Commonwealth's elections are conducted must be funded, and information about those changes shared with the voters and integrated into existing election infrastructure, all of which would require extensive appropriation of additional state funds. *Allegheny Reproductive Health Center*, 225 A.3d at 912-13; *see also id.* at 911 ("Under Article III, Section 24 of Pennsylvania Constitution, state government cannot expend funds 'except on appropriations made by law' by the General Assembly.") (citation omitted); *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) ("[t]he power to regulate elections is a legislative one").

Finally, the House Leaders' interests in this case are not represented by another party. No other party in this case protects either of the House Leaders' individual rights to legislate and appropriate for elections. These rights are individually possessed by the House Leaders, and, thus, only they have the incentive and ability to protect them. *Fumo*, 972 A.2d at 502 ("the claim reflects the state legislators' interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, falls within the realm of the type of claim that legislators . . . have standing to pursue."). As such, the House Leaders are uniquely positioned to bring arguments and authority before the Court that no other party will.

While the Respondents claim the House Leaders' interest is represented by the Respondents, this Court has held that "[a]n executive branch agency is simply

not in a position to represent Proposed Intervenors’ interest in the exercise of legislative power under Article III of the Pennsylvania Constitution.” *Allegheny Reproductive Health*, 225 A.3d at 913. This is borne out through Petitioner’s concerns about actions taken by the Respondents in the administration of Act 12, such as Petitioner’s statement that “four counties presented consolidation plans calling for more than 60% consolidation of polling places and Respondents approved those consolidation plans without adjustment or question.” Petition ¶ 8. Petitioner even cites to the fact that members of the House leadership strongly opposed many of these actions, such as the consolidation of polling places beyond the limits of Act 12. Petition ¶¶ 52, 60. The House Leaders also strongly opposed the unilateral executive order by Governor Wolf extending the received-by deadline for mail-in and absentee ballots beyond the statutory deadline. House Leaders Memorandum of Law in Support of Intervention Petition ¶¶ 56-66. These facts underscore that the House Leaders’ interests are assuredly distinct from those of Respondents.

CONCLUSION

For the foregoing reasons, the House Leaders’ Petition to Intervene should be granted, and they should be admitted as Respondents in this case.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum of Law contains 2,736 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified 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.

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