

<p><b>Michael Crossey, Dwayne Thomas, Irvin Weinreich, Brenda Weinreich, and the Pennsylvania Alliance for Retired Americans;</b></p> <p style="text-align: center;"><b>Petitioners,</b></p> <p style="text-align: center;"><b>v.</b></p> <p><b>Kathy Boockvar, Secretary of the Commonwealth; and Jessica Mathis, Director of the Bureau of Election Services and Notaries;</b></p> <p style="text-align: center;"><b>Respondents,</b></p> <p style="text-align: center;"><b>and</b></p> <p><b>Senator Joseph B. Scarnati III, President Pro Tempore; and Senator Jake Corman, Senate Majority Leader,</b></p> <p style="text-align: center;"><b>Proposed Intervenor- Respondents.</b></p>	<p><b>IN THE SUPREME COURT OF PENNSYLVANIA</b></p> <p><b>No. 108-MM-2020</b></p>
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**MEMORANDUM OF LAW IN SUPPORT OF AMENDED MOTION  
TO INTERVENE BY JOSEPH B. SCARNATI III, PRESIDENT  
PRO TEMPORE, AND JAKE CORMAN, MAJORITY LEADER  
OF THE PENNSYLVANIA SENATE**

Proposed Intervenors, Joseph B. Scarnati III, President Pro Tempore of the Pennsylvania Senate, and Jake Corman, Majority Leader of the Pennsylvania Senate (“Applicants”), by and through the undersigned counsel, respectfully submit this memorandum of law in support of their motion to intervene as Respondents in the

above-captioned proceeding, pursuant to Rule 2327 of the Pennsylvania Rules of Civil Procedure.

Senators Scarnati and Corman originally filed a motion to intervene in this case before it was transferred from the Commonwealth Court to the Supreme Court. The motion to intervene was filed on May 11, 2020 under the docket number 266 MD 2020 and is presently before the Supreme Court as a result of the transfer. After the case was transferred, the petitioners were granted leave to file an amended petition for review. The amended petition for review was filed on July 13, 2020. In response to the amended petition, Senators Scarnati and Corman desire to amend their motion to intervene, including the preliminary objections they intend to file if intervention is granted.

Senators Scarnati and Corman have been duly authorized to act in this matter by each of the members of the Senate Republican Caucus, which constitutes a majority of the Pennsylvania Senate as a whole.

In addition to the Amended Motion and Memorandum of Law in support of intervention, Applicants submit their proposed amended Preliminary Objections to Petitioners' pleading, attached as Exhibit A.

## **REASONS FOR PROPOSED INTERVENORS' APPLICATION**

1. Pursuant to Pennsylvania Rule of Appellate Procedure 106, the practice and procedures relating to original jurisdiction matters are to be in accordance with the Pennsylvania Rules of Civil Procedure.

2. Pennsylvania Rule of Civil Procedure 2327 allows a person not named as a party to seek leave to intervene by filing an application with the court.

3. Proposed Intervenors seek to intervene pursuant to Pennsylvania Rule of Civil Procedure 2327(3) and (4), which states, in pertinent part, as follows:

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. 2327.

4. Proposed Intervenors meet the requirements for intervention under Pennsylvania Rule of Civil Procedure 2327(3) and/or (4). They seek to protect the Pennsylvania Senate's exclusive constitutional rights, together with those of the Pennsylvania House of Representatives, of (1) determining the times, places, and manner of holding elections under Art. I, § 4 of the United States Constitution and Art. II, § 1 of the Pennsylvania Constitution; (2) suspending laws under Art. I, § 12

of the Pennsylvania Constitution; (3) appropriating funds for expenditure by the state, under Art. III, § 24 of the Pennsylvania Constitution; and (4) preserving the General Assembly’s prerogative to empower the Executive Branch to modify election procedures through emergency orders in accordance with law,<sup>1</sup> all of which may be adversely affected or usurped by Petitioner’s requested relief, as described below.

5. Petitioners seek to have this court issue an Order that would re-write, suspend, or modify certain provisions of the election code or otherwise direct the administration of elections concerning the following: extending the statutorily defined Election Day deadline for receipt of mail-in ballots by an additional seven days if such ballots are postmarked by Election Day; permitting voters to designate third parties to submit their mail-in ballots (so-called “ballot harvesting”); and requiring the state to provide prepaid postage for all mail-in ballots. Such relief would be contrary to Art. I, § 12 of the Pennsylvania Constitution, which states that “no power of suspending laws shall be exercised unless by the legislature.”

6. Proposed Intervenors wish to be heard on the question of whether such an Order would void the entire Act and deprive voters of the ability to vote by mail-in

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<sup>1</sup> *Cf.* On June 1, 2020, the Governor issued an executive order extending the deadline for the receipt of mail-in ballots in six counties—Allegheny, Dauphin, Delaware, Erie, Montgomery, and Philadelphia—in advance of the June 2, 2020, general primary election. Exec. Order No. 2020-02 (Jun. 1, 2020) (hereinafter *June Executive Order*).

ballot, under the terms of the non-severability provision found at § 11 of the Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”).<sup>2</sup>

7. Proposed Intervenors seek to prevent both a judicial determination that any provision of the election code is invalid and a disruption of the statutory scheme for voting in Pennsylvania’s 2020 general elections.

8. Petitioners’ requested Order regarding prepaid postage for all mail-in ballots would require the Commonwealth and/or the County Boards of Elections to subsidize such activities. Such relief would be contrary to Art. III, § 24 of the Pennsylvania Constitution, which provides that “no money shall be paid out of the treasury except on appropriations made by law” by the General Assembly. Pa. Const. Art. III, § 24.

9. Petitioners’ requested orders seek to re-write large portions of the election code or even create new standards out of whole cloth. This is contrary to both Art. II, § 1 of the Pennsylvania Constitution, which vests the legislative power of the Commonwealth in the General Assembly, and Art. I, § 4 of the United States Constitution (the “Elections Clause”), which reserves to state legislatures and Congress the power of determining the times, places, and manner of holding elections for Senators and Representatives to Congress.

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<sup>2</sup> Petitioners attempt to finesse their way around this issue by asking the court to grant its request “only to the extent that such procedures do not require the Court to apply Act 77’s nonseverability clause.” Am. Pet. ¶ 8. Petitioners’ effort cannot be reconciled with Act 77’s express terms.

10. The United States District Court for the Middle District of Pennsylvania in *Corman v. Torres*, 287 F.Supp.3d 558, 573 (M.D. Pa. 2018), recognized that only the General Assembly has standing to assert its prerogatives under the Elections Clause.<sup>3</sup> *See also Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) (granting intervention in a redistricting case to the Minnesota Senate because the district court orders directly impacted the Senate).

11. As the only parties with standing to assert their prerogatives under the Elections Clause, Proposed Intervenors and Proposed House Intervenors—through the authority granted to them by their respective chambers—are parties that should be joined herein. *See* Pa.R.C.P. No. 2327(3).

12. Proposed Intervenors have standing because Petitioners' claims and proposed remedies seek to undermine, among other things, the Pennsylvania Senate's right to vote on legislation and will also diminish or deprive the Senate's (and each individual Senator's) power and authority to enact laws. *See Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, 225 A.3d 902, 909-10 (Pa. Comm. Ct. 2020) (quoting *Fumo v. City of Philadelphia*, 972 A.2d 487, 501 (Pa. 2009)).

13. If the requirements for who may intervene are met, intervention shall be granted unless the petition to intervene is unduly delayed, the interest of the proposed

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<sup>3</sup> The Speaker of the Pennsylvania House of Representatives moved to intervene on May 14, 2020, placing the entire legislative branch before this court.

intervenor is already adequately represented, or the intervenor does not take the litigation as he or she finds it. Pa.R.C.P. 2329; *see Appeal of the Municipality of Penn Hills*, 546 A.2d 50, 52 (1988).

14. The Proposed Intervenors have filed a motion to intervene promptly.

15. Furthermore, on information and belief, the named Respondents do not take the same position as the Proposed Intervenors and will not adequately represent the Proposed Intervenors' interests. This is illustrated by the Governor's emergency executive order on June 1, 2020,<sup>4</sup> which modified election laws in six counties based on circumstances not even contemplated in the complaint in this matter, and which essentially granted in part relief sought by Petitioners without legislative action.

16. Finally, Proposed Intervenors seek to intervene as Respondents. They will assert defenses to Petitioners' claims, but will not raise claims against the named Respondents that the Petitioners have not raised.

17. Petitioners' case rests primarily on the alleged effects of the pandemic on voting behavior. The Proposed Intervenors believe that the alleged burdens on the right to vote are not the result of the laws themselves nor of any action of the Commonwealth, but instead are attributable to the novel coronavirus.

18. Petitioners' case is also premised on a set of hypothetical conditions regarding how the pandemic will impact voters in November. The pandemic presents

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<sup>4</sup> *June Executive Order*, *supra* note 1.

a fast-moving, continuously evolving circumstance that touches on fundamental policy decisions left to Pennsylvania’s elected officials, not the courts.

19. The relief sought by Petitioners is not limited to the named Petitioners but would affect all voters, regardless of whether they are similarly situated or similarly burdened.

20. By contrast, the General Assembly as a whole—by and through its two chambers—represents the interests of all voters of the Commonwealth and have been elected to fill that exact function.

21. In such a situation, the proper mechanism for adjusting the rights of Pennsylvanians is the legislative process. The General Assembly has shown that it is responsive to the needs of the electorate by, *inter alia*, providing voters more time to apply for, receive, and post their mail-in ballots by postponing the primary elections until June 2, 2020. *See* Act of Mar. 27, 2020, P.L. 41, No. 12 (“Act 12”), §1804-B(a).

22. In addition, the General Assembly has passed a new law that requires the publication of a report on the conduct of the June 2, 2020, primary election, which will help the General Assembly determine if further changes to the election code are needed before the November general election to address COVID-19’s impacts. *See* Act of Jun. 17, 2020, P.L. 259, No. 35 (“Act 35”). The Senate already had a hearing on July 23, 2020, to consider 2020 election issues, at which the committee heard

from, among others, the Secretary Boockvar and several county election officials, on possible changes to the election code. These actions indicate the time and willingness to consider legislative changes for the 2020 general election.

23. The Senate's goal is for every eligible and valid voter to have the means to vote and for every eligible and valid voter to be able to do so safely.

24. If allowed to intervene, Proposed Intervenors intend to file the attached Preliminary Objections, objecting to Petitioners' standing in this case. Proposed Intervenors will, upon intervention and in addition to the Proposed Objections, file a Memorandum of Law in support of the same.

25. The Preliminary Objections raise substantial deficits in Petitioners' case, including that: (1) Petitioners' claims are not ripe because no one can accurately predict the extent to which COVID-19 will impact November's general election, and in any event, the General Assembly is the proper body for addressing election-related complications caused by the current pandemic; (2) Petitioners failed to join the County Boards of Elections, which are indispensable parties; (3) Petitioners' claims present non-justiciable political questions; (4) Petitioners' requested relief would abrogate the rights of the Pennsylvania General Assembly under Art. I, § 12 of the Pennsylvania Constitution and Art. I, § 4 of the United States Constitution; (5) Petitioners' claims are not plead with sufficient specificity; and (6) the Pennsylvania

Alliance for Retired Americans lacks standing to sue as an organization without the right to vote.

<p>Dated: July 29, 2020</p>	<p>Respectfully submitted,</p> <p>Obermayer Rebmann Maxwell &amp; Hippel LLP</p> <p>By: <u>/s/ Richard Limburg</u> Lawrence J. Tabas (ID No. 27815) Mathieu J. Shapiro (ID No. 76266) Richard Limburg (ID No. 39598) Centre Square West 1515 Market St., Suite 3400 Philadelphia, PA 19102 <i>Attorneys for Joseph B. Scarnati III and Jake Corman</i></p> <p>Holtzman Vogel Josefiak Torchinsky PLLC</p> <p>By: <u>/s/ Jason B. Torchinsky</u> Jason B. Torchinsky (Va. ID No. 47481) Jonathan P. Lienhard (Va. ID No. 41648) Matthew S. Petersen (D.C. ID No. 468604) 45 North Hill Drive, Suite 100 Warrenton, VA 20186 (540) 341-8808 (P) (540) 341-8809 (F) <i>Attorneys for Joseph B. Scarnati III and Jake Corman pending approval of application for admission pro hac vice</i></p>