

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 266 MD 2020

**MICHAEL CROSSEY, DWAYNE THOMAS, IRVIN WEINREICH,
BRENDA WEINREICH, AND THE PENNSYLVANIA ALLIANCE FOR
RETIRED AMERICANS,**

Petitioners,

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,

**MIKE TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES, BRYAN CUTLER, 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
MIKE TURZAI AND MAJORITY LEADER OF THE PENNSYLVANIA
HOUSE OF REPRESENTATIVES BRYAN CUTLER**

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

INTRODUCTION

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—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 *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 (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 river beds); *Allegheny Reproductive*, 225 A.3d at 913 (allowing eighteen members of the Pennsylvania State Senate and eight members of the Pennsylvania House of Representatives to intervene); *Leach v. Commw*, 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, will be adversely impacted by this lawsuit. (*See generally* House Leaders’ Intervention Petition and Supporting Brief.) Petitioners offered nothing—argument or facts—to controvert this reality. (*See generally* Response.) Instead, Petitioners presented multiple red herrings, seeking to divert the Court’s attention to inapposite matters.

First, Petitioners allege that only the General Assembly, as a complete body, has standing to protect a legislator’s rulemaking authority. This argument is legally unsupported, and, in actuality, directly contrary to countless Pennsylvania decisions. *Fumo*, 972 A.2d at 487; *Allegheny Reproductive*, 225 A.3d at 913; *Leach*, 118 A.3d at 1273 n.2; *Common Cause/Pennsylvania*, 710 A.2d at 112 n.3. The very case Petitioners so heavily rely on affirms that “[s]tanding for legislators claiming an institutional injury is no different than traditional standing” *Markham v. Wolf*, 635 Pa. 288, 298 (2016) (holding there is no special category for legislative standing). In traditional cases, an individual does not have to intervene as a general body—corporation, club, partnership, etc.—for impingement of interests specific to her. If she possesses an interest that will be adversely affected 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 that reduces a legislator’s ability to protect her authority to act as a legislator to the General Assembly’s ability as a whole, and Petitioners cite no case or authority establishing that is the case.¹ (*See generally* Response.) If it were the case, the members of the 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. Petitioners’ argument would create complete majority control, and Pennsylvania law does not contemplate for such a result. A legislator’s ability to protect her right to “act as a legislator” rests with her individually, and she 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).

¹ Petitioners cite Justice Wecht’s concurrence in *Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, 2020 WL 2507661 (Pa. May 15, 2020) (Wecht, J., concurring). Petitioners have otherwise sought to distinguish the *Disability Rights Pa.* case from this case, but here seek to analogize it. Justice Wecht’s concurrence was the only concurrence, or substantive written decision, in *Disability Rights Pa.*, and was not joined by any other Justice. Justice Wecht’s concurrence is plainly misplaced as is shown in this Reply Brief, showing why it was a solo opinion. Petitioners’ unrelenting reliance on Wecht’s concurrence suggest that they believe it is authoritative law. But it is not.

Petitioners' contorted argument otherwise seems to be based on the language that the authority to legislate election laws is with the "General Assembly", not individual legislators. (*See* Response, p. 4.) But this phrase is meant to generally state that the authority to legislate election laws rests with 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 powers. *Id.* In fact, the *Fumo* court addressed it quite directly. Specifically, the *Fumo* court stated 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). Despite making this statement, 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 individual legislators, who make up the General Assembly and have specific rights as members of the General Assembly.

Second, attempting to take the Court further off course, Petitioners incessantly focus on the "Authorization" obtained by the House Leaders. (Response, pp. 4, 13, 15, 16.) While acting on behalf of the Pennsylvania House of Representatives as a

body arguably would be needed for standing in federal court, it is not needed to intervene as a legislator in Pennsylvania state courts. Petitioners' focus on the "Authorization" is, therefore, irrelevant.

Third, 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. This is particularly the case, here, where Petitioners seek to change or circumvent existing Pennsylvania election laws that were, in part, passed by the House Leaders.

Fourth, this case does impact 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. 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West). Petitioners seek to change existing election law relating to deadlines, and the manner and duration in which absentee ballots are verified and counted. (*See* Petition, Prayer for Relief, p. 34-35.) These

changes must be shared with the voters and integrated into existing election infrastructure, both of which require appropriation of 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”).

Lastly, the House Leaders are not usurping the judiciary’s function to interpret the Constitution. (Response, p. 8.) The House Leaders are merely seeking to defend rights that are possessed only by them. This fact is underscored here, as Petitioners are not seeking to have this Court interpret existing laws, but are seeking to have the Court 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, Petitioners seek expansive relief, including alteration of the deadline for received mail-in ballots, legalization of ballot harvesting, provisioning of free postage, etc. (*See* Petition, Prayer for Relief, p. 34-35). Such relief does not seek judicial interpretation, but rather wholesale revision of duly enacted legislation. *See 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.”).

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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Dated: May 22, 2020

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum of Law contains 1,708 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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CERTIFICATE OF SERVICE

I hereby certify that, on May 22, 2020, I caused a Reply Brief In Support of Petition To Intervene By Speaker of The Pennsylvania House of Representatives Mike Turzai and Majority Leader of The Pennsylvania House of Representatives Bryan Cutler to be served *via* email upon all parties as follows:

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