

**IN THE SUPREME COURT OF PENNSYLVANIA**

Michael Crossey, Dwayne Thomas,  
Irvin Weinreich, Brenda Weinreich, and  
the Pennsylvania Alliance for Retired  
Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the  
Commonwealth, and Jessica Mathis,  
Director of the Bureau of Election  
Services and Notaries,

Respondents.

No. 108 MM 2020

**PETITIONERS' RESPONSE IN OPPOSITION TO PETITION  
TO GRANT INTERVENTION AND MOTION TO AMEND  
BRIEFING SCHEDULE BY JOSEPH B. SCARNATI III,  
PRESIDENT PRO TEMPORE, AND JAKE CORMAN,  
MAJORITY LEADER OF THE PENNSYLVANIA SENATE**

Petitioners Michael Crossey, Dwayne Thomas, Irvin Weinreich, Brenda Weinreich, (“Individual Petitioners”), and the Pennsylvania Alliance for Retired Americans (“the Alliance”) submit this response in opposition to the petition to grant intervention and motion to amend briefing schedule by Joseph B. Scarnati, III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader (collectively, “Senators”).

## INTRODUCTION

Contrary to the Senators' petition, Respondents' recent praecipe does not cure the Senators' failure to establish the threshold grounds for intervention under Pa. R.C.P. 2327. These individual Senators have not been authorized to represent the Senate, let alone the General Assembly as a whole. And even if they were, the General Assembly has no role in implementing, enforcing, or administering the Commonwealth's Election Code. "[A] public law, after enactment, is not the [legislature's] any more than it is the law of any other citizen or group of citizens" who are governed by it. *Newdow v. U.S. Congress*, 313 F.3d 495, 499-500 (9th Cir. 2002). Respondents' praecipe merely confirms what has already been widely understood: mail delays caused tens of thousands of ballots to arrive after June 2 despite being postmarked by or before Election Day, and therefore changes must be made to ensure a free and equal election in November. Ultimately, "it is the Commonwealth's duty to defend the constitutionality," of its laws, and the Senators present no argument or authority which would allow them to occupy this role. *Robinson Twp. v. Commonwealth*, No. 284 M.D. 2012, 2012 WL 1429454, at \*4 (Pa. Commw. Ct. Apr. 20, 2012). For all these reasons, the Court should deny the Senators' amended motion to intervene and deem this application moot.

## ARGUMENT

As discussed in Petitioners’ recent Answer to the Senators’ Amended Motion to Intervene and prior Memorandum in Opposition to the Senators’ and Republican Committees’ Application for Intervention, the Senators cannot establish the threshold requirements for intervention by merely invoking the *legislature’s* interest in “determining the time, places, and manner of holding elections,” suspending laws, appropriating funds, and modifying election procedures; those institutional powers belong only to the General Assembly as a whole. *See* U.S. Const. art. I, § 4, cl. 1 (vesting “in each State by the Legislature thereof” the authority to prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives”).<sup>1</sup> The individual Senators who have appeared before this Court are just that—individuals. They are “neither the Pennsylvania General Assembly nor a group to which Pennsylvania has delegated the Commonwealth’s lawmaking power.” *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa.), *appeal dismissed sub nom. Corman v. Sec’y Commonwealth of Pa.*, 751 F. App’x 157 (3d Cir. 2018); *see also Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, 2020 WL 2820467 (Pa. May

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<sup>1</sup> Petitioners incorporate by reference their Answer to the Senators’ Amended Motion to Intervene and Memorandum in Opposition to the Senators’ Application for Intervention. *See* Pet’rs’ Answer to Am. Mot. to Intervene (Pa. July 31, 2020); Mem. in Opp. to Appl. for Intervention (Pa. Commw. Ct. May 18, 2020).

15, 2020) (per curiam) (Wecht, J., concurring); *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016).

In any event, that interest is not implicated here because neither the Senators nor even the General Assembly have any role whatsoever in implementing, enforcing, or administering the Commonwealth's Election Code. And this suit does not call into question any other unique role the Senators might have as legislators. Ultimately, the Senators do not speak for the General Assembly and they cannot assert the legislative body's institutional interests as a basis for intervention under Pa. R.C.P. 2327(4), nor could they have joined this action as original parties in their current capacities, see *id.* 2327(3). In that sense, the Senators are no different than any other citizen who wishes to see laws enforced; such generalized grievances are insufficient to establish standing to intervene. *Markham*, 136 A.3d at 145; *Corman*, 287 F. Supp. 3d at 573.<sup>2</sup>

Nor does the Secretary's recent withdrawal of certain preliminary objections—based on her recognition that an extension of the ballot receipt deadline is necessary to protect the right to vote in the November election—create any new grounds for intervention *by any of the proposed intervenors*. The United States Supreme Court recently addressed this issue, foreclosing intervention in a case like

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<sup>2</sup> Because the Senators fail to qualify for intervention under Pa. R.C.P. 2327, the Court should deny their Application outright and need not address whether their interests are adequately represented.

this where the state election officials support the requested relief and proposed intervenors “lack a cognizable interest in the State’s ability to ‘enforce its duly enacted’ laws.” *Republican Nat. Comm. v. Common Cause RI*, No. 20A28, 2020 WL 4680151, at \*1 (U.S. Aug. 13, 2020). In *Common Cause Rhode Island v. Gorbea*, the Republican National Committee and the Republican Party of Rhode Island (collectively “Republican Committees”) had sought intervention to stop the State from suspending its witness and notary requirements for mail ballots, concessions the State determined were necessary to remove significant and unconstitutional burdens to voting during the ongoing pandemic. No. 20-1753, 2020 WL 4579367 at \*1-2 (1st Cir. Aug. 7, 2020). In denying intervention, the First Circuit found that the Republican Committees’ claimed harm was “dubious as a matter of fact and reality” because there was no evidence that any candidate could be the victim of a fraudulent ballot. *Id.* at \*2. “Indeed, no [state election] official has stepped forward in these proceedings, even as amicus, to tout the need for the rule.” *Id.*

The Senators (and the remaining proposed intervenors) fail to demonstrate how an extension of the ballot receipt deadline mentioned in Respondents’ praecipe harms their interests.<sup>3</sup> *Cherry Valley Assocs. v. Stroud Twp. Bd. of Supervisors*, 530

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<sup>3</sup> Pennsylvania accepts mail ballots sent pursuant to the Uniformed and Overseas Citizens Absentee Voting Act if they are received by the 7th day after the election. None of the proposed intervenors dispute this, nor do they raise any issue with accepting such ballots days after Election Day.

A.2d 1039, 1041 n.6 (Pa. Commw. Ct. 1987) (rejecting argument that public entity did not adequately represent proposed private-intervenors' interests as "no more than speculation which [the court] decline[s] to consider"). They do not appear to dispute that tens of thousands of ballots that were postmarked by Election Day did not arrive for several days; voters, state officials, and the United States Postal Service ("USPS"), have confirmed that mail delivery delays persist and will *in fact* deny some voters the ability to cast an effective ballot in the November election unless the Court extends the ballot receipt deadline. And though the Senators baldly claim that the letter from USPS is not "dispositive of anything related to this litigation," they do not dispute its contents.<sup>4</sup> In sum, the Senators have failed to satisfy the basic requirements for intervention under Pa. R.C.P. 2327 and 2329 for the reasons stated in Petitioners' previously-filed Answer to the Senators' Amended Motion to Intervene, and Memorandum in Opposition, and Respondents' recent praecipe does not change this.<sup>5</sup>

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<sup>4</sup> If the Senators are right that, despite the Department of State's express acknowledgement of widely reported mail delays, Petitioners' relief is still "too speculative," then, effectively, no kind of preliminary relief would ever be possible. This is simply not the case, and especially cannot be the case when the fundamental right to vote is at stake.

<sup>5</sup> *See* Pet'rs' Answer to Am. Mot. to Intervene (Pa. July 31, 2020); Mem. in Opp. to Appl. for Intervention (Pa. Commw. Ct. May 18, 2020).

Finally, neither the Senators nor any of the proposed intervenors provide any basis for their assumption that their interests are not adequately protected. The fact that an agency with expertise in overseeing elections independently concluded that the risk of disenfranchisement due to mail delivery delays resulting from the COVID-19 pandemic warrants an extension of the ballot receipt deadline is not an abandonment of its interest in enforcing election laws. Indeed, the district court in *Common Cause Rhode Island* reached the same conclusion, rejecting the RNC's assertion that its interests had not been adequately protected simply because Rhode Island's election officials entered into a consent decree to suspend its witness and notarization requirements for mail ballots. *Common Cause RI v. Gorbea*, No. 1:20-cv-00318-MSM-LDA, 2020 WL 4365608, at \*5 n.5 (D.R.I. July 30, 2020) (noting the court denied RNC's motion to intervene because, among other reasons, "the RNC did not assert an interest any different from that asserted by the named defendants" notwithstanding the state election officials' agreement to a consent decree); *United States v. W.R. Grace & Co.-Conn.*, 185 F.R.D. 184, 191 (D.N.J. 1999) (finding proposed intervenors' disagreement with the United States' position irrelevant because the issue is "whether the United States served as an adequate representative of the [proposed intervenors'] interest."). Proposed intervenors' disagreement with Respondents' proposed extension of the ballot receipt deadline is

insufficient to overturn the presumption that Respondents adequately represent their purported interests in enforcing the Commonwealth's election laws.

**CONCLUSION**

For the foregoing reasons, Petitioners respectfully request that the Court deny the Senators' efforts to intervene into this lawsuit.

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

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