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IN THE SUPREME COURT OF PENNSYLVANIA

No. 30 EAP 2020

IN RE: CANVASSING OPERATION

APPEAL OF: CITY OF PHILADELPHIA BOARD OF ELECTIONS

APPELLANT THE PHILADELPHIA COUNTY BOARD OF ELECTIONS' RESPONSE IN OPPOSITION TO PETITION TO INTERVENE OF SPEAKER CUTLER AND MAJORITY LEADER BENNINGHOFF

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I. INTRODUCTION

Two individual members of the House of Representatives, Speaker Bryan Cutler and Majority Leader Kerry Benninghoff (the Proposed Intervenors), once again seek to intervene in this Court's consideration of an election-law matter—although no other member of the General Assembly has joined them, and although they admittedly seek merely to "add color on the statutory interpretation of an election law." Proposed Intervenors' Memorandum In Support of Petition to Intervene (Memorandum) at 1.

Their arguments for intervention are as radical as they are wrong. According to the Proposed Intervenors, individual legislators are entitled to intervene as parties in any case involving the interpretation of an election statute. That, of course, is not the law. Indeed, the Proposed Intervenors' Memorandum misapprehends the law governing intervention by legislators—which has been thoroughly developed by this Court's precedents—at nearly every turn. That well-settled law makes clear there is no basis for intervention here. This case manifestly does *not* present any issue affecting an enforceable legal interest of individual legislators. To the contrary, it involves a quotidian exercise of the judicial power: interpretation of a statute and its application to a set of judicially found facts. Because Proposed Intervenors seek merely to offer their views on statutory

interpretation, and do not show any individualized harm or usurpation of their legislative powers, this Court should deny their petition to intervene.[1]

II. RELEVANT FACTS

This case was commenced by Donald J. Trump for President, Inc. (the Trump Campaign) in the Court of Common Pleas of Philadelphia County at 9:51 p.m. on November 3, 2020. The Trump Campaign acknowledged that, at all times employees of the Philadelphia County Board of Elections (the Board) were canvassing ballots, the Campaign's representatives were allowed to be in the room and observe those canvassing operations. Nonetheless, the Campaign contended that the Board was failing to comply with certain purportedly applicable Election Code provisions allowing party and candidate representatives "to be present" and "to remain in the room" where ballots are canvassed. *See* 25 P.S. §§ 3146.8(b), (g)(1.1), (2). After an evidentiary hearing at which the Court heard live testimony and legal arguments from the parties, the Court of Common Pleas denied the

[1] Proposed Intervenors could have sought—but did not—to submit an amicus brief under Rule of Appellate Procedure 531. Had they done so, Appellant the Philadelphia County Board of Elections (the Board) would have had good cause to complain of unfair prejudice as a result of Proposed Intervenors' timing: This Court set an expedited briefing schedule calling for the filing of Appellant's Brief by 5:00 pm on Wednesday, November 11, 2020, the filing of Appellee's Brief by 5:00 pm on Friday, November 13, 2020, and not providing for a Reply Brief. Consistent with that schedule, at 4:48 p.m. on November 13—immediately following the filing of Appellee's Brief, and less than 30 minutes after Proposed Intervenors' filing—the Court issued a notice that this appeal had been submitted on the briefs.

Despite these circumstances, the Board does not object to accepting Proposed Intervenors' proposed brief as an amicus brief under Rule 531, as it largely repeats the arguments of Appellee, which the Board has already addressed in its own Brief.

Trump Campaign's Petition. Proposed Intervenors did not seek to intervene in these proceedings.

On November 4, 2020, the Trump Campaign appealed to the Commonwealth Court. On November 5, 2020, the parties filed appellate briefs. Later that day, the Commonwealth Court issued a single-judge decision reversing the Court of Common Pleas. The Commonwealth Court construed the statutory language permitting candidate and party representatives "to be present" and "to remain in the room" as a requirement that they "be permitted to observe all aspects of the canvassing process within 6 feet." (R.69a.) The Commonwealth Court also rejected the Court of Common Pleas' factual findings. The Court of Common Pleas had found that the Campaign's representative had an unobstructed view of the canvassing operations, was "free to walk around the premises," "c[ould] see the [canvassing] workers prepare the [declaration] forms for evaluation, examine them, and sort the [ballots] into separate bins," and could observe every stage of the canvassing process. (Appellant's Brief, App. B at 2.) The Commonwealth Court, however, concluded that the Campaign's representative was "[unable] to actually observe the canvassing processes in any meaningful way." (*Id.*, App. A at 8.) Proposed Intervenors did not seek to intervene in these Commonwealth Court proceedings.

Also on November 5, 2020, the Board petitioned this Court for allowance of appeal from the Commonwealth Court's decision. On November 9, 2020, after the Campaign had filed a response, this Court granted the petition. Proposed Intervenors did not seek to intervene in these proceedings.

This Court set an expedited schedule for merits briefing: the Board's brief was due by 5:00 p.m. on November 11, 2020, and the Campaign's brief was due by 5:00 p.m. on November 13, 2020. The schedule did not provide for the filing of a reply brief. Proposed Intervenors filed their Petition to Intervene at 4:20 p.m. on November 13, 2020. At 4:48 p.m., the Court notified the parties that the case had been submitted on the briefs. The Court then directed the Board to respond to the Petition to Intervene by 12:00 p.m. on November 16, 2020.

III. PROPOSED INTERVENORS HAVE NOT SATISFIED—AND CANNOT SATISFY—THE CRITERIA FOR INTERVENTION

The prerequisites of intervention are set forth in Rule of Civil Procedure 2327:

> 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
>
> (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability to indemnify in whole or in part the party against whom judgment may be entered; or
>
> (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or

> (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. Civ. P. 2327; *see Johnson v. Tele-Media Co. of McKean Cnty.*, 90 A.3d 736, 742 (Pa. Super. Ct. 2014) ("When faced with a request for intervention, a trial court must first determine whether the petitioner comes within one of the classes of persons entitled to intervene pursuant to Rule 2327."). "It is the petitioner's burden to show that all the requirements of Rule 2327 are met." *Johnson*, 90 A.3d at 742.

Even if a proposed intervenor meets the test set forth in Rule 2327, "an application for intervention may be refused if," among other things, "the interest of the petitioner is already adequately represented" or "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." Pa. R. Civ. P. 2329. Importantly, the absence of the factors listed in 2329 is *not* a sufficient basis for intervention. "[I]f the petitioner does not show himself to be within one of the four classes described in Rule 2327, intervention must be denied, irrespective of whether any of the grounds for refusal in Rule 2329 exist." *In re Phila. Health Care Trust*, 872 A.2d 258, 261 (Pa. Commw. Ct. 2005).

Here, Proposed Intervenors do not contend they satisfy Rule 2327(1) or (2). Rather, they assert they are entitled to intervene because they could have been joined as an original party in the action, *see* Pa. R. Civ. P. 2327(3), and have a "legally enforceable interest" in the determination of the action, *see* Pa. R. Civ. P. 2327(4). (Memorandum ¶¶ 17, 23.) Because Proposed Intervenors are wrong on both counts, and because, in any event, their request to intervene was untimely, their Petition should be denied.

A. The Proposed Intervenors Do Not Have a Legally Enforceable Interest in the Determination of This Action

At the core of Proposed Intervenors' arguments is an extraordinarily sweeping—and manifestly incorrect—proposition: that legislators' "interest to legislate election laws in Pennsylvania" is a sufficient basis for individual legislators to intervene in any case involving the interpretation of an election statute. (Memorandum ¶ 24.) This radical notion directly contravenes well-established Pennsylvania law.

1. This Court's Decision in *Markham v. Wolf* Compels Denial of the Petition to Intervene

The leading authority on intervention by legislators is this Court's decision in *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016). Puzzlingly, although Proposed Intervenors cite *Markham* in passing (*see* Memorandum ¶ 43), they completely

ignore its holding, which controls this case and requires denial of the Petition to Intervene.

Markham involved two related actions filed in the Commonwealth Court by certain private parties against Governor Wolf, the Commonwealth of Pennsylvania, the Department of Human Services, and the Office of Long Term Living. The petitioners challenged an Executive Order issued by Governor Wolf, alleging that it "conflict[ed]" with certain statutory labor laws. *Id.* at 136-37. After the actions were underway, "Senate President Pro Tempore Joseph Scarnati, III, Senate Majority Leader Jake Corman, Senate Majority Whip John Gordner, and Senate Majority Appropriations Chairman Pat Brown, on behalf of the Pennsylvania Senate Majority Caucus," filed an application to intervene in both actions, "claiming [the Executive Order] was an unauthorized attempt by the Governor to exercise legislative power in violation of the separation of powers doctrine." *Id.* at 137. President Judge Pellegrini of the Commonwealth Court denied the application to intervene, and the proposed intervenors took an interlocutory appeal to this Court. As phrased by the *Markham* appellants, the question was whether they could intervene, based on their interest as legislators, "to challenge an executive order the origin of which has neither been authorized by the Constitution nor promulgated pursuant to statutory authority, thus constituting a violation of the Separation of Powers doctrine[.]" *Id.* at 138.

This Court affirmed the Commonwealth Court's decision, holding that President Judge Pellegrini had correctly denied the applications to intervene. In reaching that conclusion, the Court conducted an extraordinarily thorough analysis of Pennsylvania legislative standing precedents, as well as analogous federal case law. *See id.* at 140-45; *see also id.* at 140 (explaining that "whether Appellants were properly denied intervenor status … turns on whether they satisfy our standing requirements"). From these precedents, the Court distilled the principle that legislators have standing to intervene "only in limited circumstances," namely, "only when a legislator's direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator." *Id.* at 145 (citing *Wilt v. Beal*, 363 A.2d 876 (Pa. Commw. Ct. 1976), and *Fumo v. City of Phila.*, 972 A.2d 487 (Pa. 2009)). In these narrow circumstances, the legislator sustains an "injur[y] personal to the legislator, as a legislator." *Id.*; *see also Wilt*, 363 A.2d at 881 ("[L]egislators, as legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with. Once, however, votes which they are entitled to make have been cast and duly counted, their interest as legislators ceases."). "By contrast, a legislator lacks standing where he or she has an indirect and less substantial interest in conduct outside the

legislative forum which is unrelated to the voting or approval process, and akin to a general grievance about the correctness of governmental conduct, resulting in the standing requirement being unsatisfied." *Markham*, 136 A.3d at 145.

The *Markham* Court explained that the allegations by the proposed legislator intervenors in that case, who contended that the Executive Order at issue was unconstitutional because it violated the separation-of-powers doctrine, fell into the second category—and thus failed to provide a basis for legislative intervention. The order "d[id] not inhibit or in any way impact Appellants' ability to propose, vote on, or enact legislation." *Id.* It "d[id] not touch upon the constitutional or legislative prerequisites for the voting upon and enacting of legislation. Nor d[id] the order prevent Appellants from acting as legislators with respect to advising, consenting, issuing, or approving matters within their scope of authority as legislators." *Id.* The Court acknowledged the proposed intervenors' claim that the Executive Order was "a violation of the separation-of-powers doctrine … that … diminishes the effectiveness of, or is inconsistent with, prior-enacted legislation." *Id.* But these allegations failed to plead a sufficient legal interest because "these claims of injury reflect no impact on Appellants' right to act as legislators, and are more … in the nature of a generalized grievance about the correctness of governmental conduct." *Id.* As summarized by the Court in words dispositive of this case: "Simply stated, *the assertion that another branch of government … is*

diluting the substance of a previously-enacted statutory provision is not an injury which legislators, as legislators, have standing to pursue." *Id.* (emphasis added); *accord Robinson Twp. v. Commonwealth*, 84 A.3d 1054, 1055 (Pa. 2014) (holding that legislators could not intervene for purpose of "defend[ing] the constitutionality of [a statute]" and "offer[ing] evidence and argument with respect to the intent of the General Assembly in enacting [the statute]" and "the procedure by which [the statute] was adopted"; "the legislators' interest implicates neither a defense of the power or authority of their offices nor a defense of the potency of their right to vote," but rather "the legislators simply seek to offer their perspective on the correctness of governmental conduct, *i.e.*, that the General Assembly did not violate the substantive and procedural strictures of the Pennsylvania Constitution in enacting [the statute]").

Indeed, the *Markham* court expressly warned against the expansive view of legislative standing to intervene that Proposed Intervenors urge here, as "***it would seemingly permit legislators to join in any litigation in which a court might interpret statutory language in a manner purportedly inconsistent with legislative intent***." *Markham*, 136 A.3d at 145 (emphasis added); *accord Commonwealth v. Neiman*, 84 A.3d 603, 609 n.26 (Pa. 2013) (noting that, while two Justices questioned intervenor status of the General Assembly because "legislators do not have standing to raise a claim in a legal proceeding that the effectiveness of a law

which they have passed was impaired by a judicial decision," the issue was not raised), *cited approvingly by Markham*, 136 A.3d at 144. Moreover, the Court continued, if the legislators believed that an executive action or judicial decision was inconsistent with existing legislation, the legislators were not "in any way prevented from enacting future legislation in this area." *Markham*, 136 A.3d at 145. And, "like [this Court's] federal counterparts," the *Markham* Court was "leery to recognize such uncabined and broad-based standing for legislators" as urged by the *Markham* Appellants and by Proposed Intervenors here, "as separation-of-powers problems are inherent in legislative standing." *Id.* at 145-46. For all of these reasons, the Court explained, "Appellants' interests purportedly impinged by [the Executive Order at issue] are not directly or substantially related to unique legislative prerogatives, but, rather, are generalized interests in the conduct of government common to the general citizenry." *Id.* at 146. Accordingly, these asserted interests were not sufficient to support intervention.

Markham is controlling precedent that disposes of Proposed Intervenors' Petition. Proposed Intervenors do not even contend that this case implicates separation-of-power principles. Nor can they argue this case presents a question of whether a certain statute is constitutionally valid. *See Robinson Twp.*, 84 A.3d at 1055 (legislators' interest in defending constitutionality of statute was insufficient to support intervention). And this case certainly does not "impact [Proposed

Intervenors'] ability to propose, vote on, or enact legislation," "touch upon the constitutional or legislative prerequisites for the voting upon and enacting of legislation," or threaten "to prevent Appellants from acting as legislators with respect to advising, consenting, issuing, or approving matters within their scope of authority as legislators." *Markham*, 136 A.3d at 145. Rather, this case involves a garden-variety exercise of core judicial functions: interpretation of statutory provisions and application of those provisions to a particular set of facts.

Proposed Intervenors' suggestion that the Court's decision in this case "could change the election laws that have already been passed" (Memorandum ¶ 9) and "turn Pennsylvania courts into legislatures" (*Id.* ¶ 38) is impossible to square with the actual nature and scope of this case. This case is simply about whether the Board's procedures complied with the Election Code's requirement that candidate and party representatives "be permitted to remain in the room" where canvassing occurs. 25 P.S. § 3146.8(g)(1.1), (2). What Proposed Intervenors really mean, of course, is that they may potentially disagree with the Court's interpretation of the statute or its application of the statute to the facts at issue. But any such "claim[] of injury reflect[s] no impact on [Proposed Intervenors] right to act as legislators," but is rather "in the nature of a generalized grievance about the correctness of governmental conduct" (either the Board's procedures under review, the courts' interpretation of the statute, or both). *Markham*, 136 A.3d at 145. It is well

established that the interest asserted by Proposed Intervenors is insufficient to support intervention. *See id.*

Indeed, if the Court grants the Petition for Intervention here, it would be bound, as a matter of consistency and logic, to "permit legislators to join in any litigation in which a court might interpret statutory language in a manner purportedly inconsistent with legislative intent." *Id.* Any legislator would be entitled to intervene in every case involving interpretation of the Election Code, including every contested nomination petition, every dispute about the certification of a voting machine, and every challenge to any ballot or ballot application. Such a rule would be obviously unsound as a matter of judicial policy, and it would plainly transgress the limits this Court delineated in *Markham*.

Proposed Intervenors' argument, if accepted by this Court, would also pose "separation-of-powers problems," just as *Markham* warned. *Id.* at 145-46. "[T]he proper interpretation of statutory provisions for purposes of resolving a controversy brought before the courts is a matter entrusted to the Judiciary." *HSP Gaming, L.P. v. City of Phila.*, 954 A.2d 1156, 1181 (Pa. 2008); *accord Stilp v. Commonwealth*, 905 A.2d 918, 948 n.26 (Pa. 2006) ("The interpretation of the laws is the proper and peculiar province of the courts." (quoting The Federalist No. 78 (Alexander Hamilton))); *Titusville Iron-Works v. Keystone Oil Co.*, 15 A. 917 (Pa. 1888) (It is the province of the courts and not the legislature to declare the

meaning of an act of assembly and to determine its application to particular facts in the decision of cases.). As this Court has held, "the statement of a later legislative body, concerning the intended meaning and scope of an enactment passed by legislative predecessors, is entitled to no particular deference."[2] *HSP*, 954 A.2d at 1181. Less weighty still are the statutory-interpretation opinions of only two individual legislators.[3] A rule that any individual legislator has standing to *intervene as a party* any time the construction of a(n election[4]) statute is at issue

[2] As discussed in the Board's merits Brief, two clauses in the Election Code are at issue in this appeal: 25 P.S. § 3146.8(b) (allowing watchers "to be present" during certain canvassing activities), and 25 P.S. § 3146.8(g)(1.1), (2) (allowing candidate and party representatives "to remain in the room" in which canvassing occurs). Section 3146.8(g)(1.1) was enacted in 2006. *See* Act of May 11, 2006, No. 2006-45, sec. 12, § 1308(g)(2), 2006 Pa. Laws 178, 187. The language at issue in section 3146.8 was enacted even earlier. *See id.*, sec. 12, § 1308.

[3] That the Proposed Intervenors are merely two individual legislators, rather than the legislature as a body, is an independent reason to deny the Petition. Notably, unlike legislators in other petitions to intervene that have been filed in other cases, the Proposed Intervenors do not assert that they have been authorized to act on behalf of the Republican Caucus in their legislative body. *Compare* Petition to Intervene here, *with, e.g.*, Motion to Intervene by Joseph B. Scarnati III, President Pro Tempore, and Jake Corman, Majority Leader of the Pennsylvania Senate at p. 2, *Pa. Democratic Party v. Boockvar*, No. 407 MD 2020 (Pa. Commw. Ct. filed Aug. 24, 2020) (alleging that proposed intervenors "have been duly authorized to act in this matter by each of the members of the Senate Republican Caucus, which constitute a majority of the Pennsylvania Senate as a whole"). And even if they had, that would not equate to authority to speak for the legislative body as a whole. *See Disability Rights Pa. v. Boockvar*, 234 A.3d 390, 391 (Pa. 2020) (Wecht, J., concurring) (noting that, despite such allegations, the proposed intervenors "cite no formal enactment by the House or the Senate purporting to authorize such interventions," which seems "problematic"). And even if Proposed Intervenors *did* have authority to speak for the Pennsylvania House as a whole, "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." *Id.* at 393 (quoting *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-54 (2019)).

But this Court need not reach these issues to dispose of Proposed Intervenors' Petition. As shown in the text of this Response, even if the Legislature as a whole had sought intervention, the request would have to be denied for lack of a sufficient legislative interest.

[4] By its logic, Proposed Intervenors' argument for intervention would apply to cases

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would represent a dangerous encroachment on the judiciary's authority "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

2. The Cases Cited by Proposed Intervenors Do Not Support Their Position

To dispose of the Petition, this Court need not look beyond *Markham*, which is controlling. But it is worth noting that the cases cited by Proposed Intervenors do not support their argument.

Proposed Intervenors grossly misread *Fumo v. City of Philadelphia*, 972 A.2d 487 (Pa. 2009), the case on which they principally rely. (*See* Memorandum

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involving the construction and application of *any* statute. (*See, e.g.*, Memorandum ¶ 34 (purporting to ground Proposed Intervenors' argument in the Pennsylvania Constitution's grant to the legislature of authority to suspend laws, which applies not only to election laws but all laws) (citing Pa. Const., art I, § 12).) Given the position the Proposed Intervenors have taken in *Republican Party of Pa. v. Boockvar*, No. 20-542 (U.S.), the Board presumes Proposed Intervenors are relying on a theory that the Elections Clause of the U.S. Constitution somehow means that the General Assembly is not subject to the constraints of the Pennsylvania Constitution when it enacts election laws, even generally applicable election laws that govern federal, state, and local elections alike. *See* [Proposed] Amicus Curiae Brief of Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives in Support of Applicants, *Republican Party of Pa. v. Boockvar*, No. 20-542 (U.S. filed Sept. 30, 2020). For one thing, this Elections Clause theory is incorrect and has never been endorsed by a majority of the United States Supreme Court. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817-18 (2015) ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."). But even more fundamentally, this is not a case in which the constitutionality of an election statute is drawn into question. As noted, this case simply requires the Court to construe the Election Code and apply it to a particular set of facts.

Indeed, any suggestion that this Court's discharge of that pedestrian judicial duty could usurp the General Assembly's purported rights under the Elections Clause would be particularly odd coming from Proposed Intervenors—given that the Commonwealth Court decision they defend held (albeit incorrectly) that the statutory provisions at issue *were ambiguous* (yet the Commonwealth Court failed to give any deference to the interpretation of the agency charged with implementing them). (*See* Appellant's Brief, App. A at 5.)

¶¶ 26-28.) Notably, Proposed Intervenors neglect to mention that there were multiple holdings in *Fumo*. In that case, certain legislators challenged the Philadelphia Department of Commerce's issuance of a license authorizing construction of a gaming casino on submerged lands, on the grounds that (a) "the General Assembly, not the City, has the authority to license the use of the submerged lands in the Delaware River" and (b) the Commerce Department's decision "was inconsistent with the licensing authority [a certain statute] provides." 972 A.2d at 491, 502. This Court held the legislators had standing to assert the *first* claim because it sought "redress for an alleged usurpation of their authority as members of the General Assembly" and asked the Court "to uphold their right as legislators to cast a vote or otherwise make a decision on licensing the use of the Commonwealth's submerged lands." *Id.* at 502. Put simply, the legislators contended that no license to use submerged Delaware River lands could be granted without the approval of the General Assembly, and that the Philadelphia Commerce Department's issuance of the license in question thus deprived the legislators of their right to vote on the issue. *See id.* at 502; *see also Markham*, 136 A.3d at 143 (explaining that *Fumo* found legislative standing for this claim because it "asked [the] Court to uphold [the legislators'] sole right as legislators to cast a vote or otherwise make a decision on licensing the use of the Commonwealth's submerged lands").

By contrast, the *Fumo* Court *rejected* the argument that the legislators had standing to claim that the Commerce Department's licensing decision had not complied with certain statutory requirements. *See* 972 A.2d at 502. The Court noted that this "claim does not demonstrate any interference with or diminution in the state legislators' authority as members of the General Assembly," but rather reflects "only a generalized grievance about the conduct of government that all citizens share." *Id.*

In sum, *Fumo* only underscores that there is no basis for legislators to intervene where, as here, the only question is the proper construction and application of a statute previously enacted by the legislature.

Also misplaced is Proposed Intervenors' reliance on the Commonwealth Court's decision in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 225 A.3d 902 (Pa. Commw. Ct. 2020), which granted a motion to intervene by several legislators. This Court need not decide whether that case was correctly decided because it is readily distinguishable from the present one. In *Allegheny*, the petitioners contended that certain statutes and regulations, which prohibited the expenditure of state and federal funds for abortion services except in certain narrow circumstances, were unconstitutional. The Commonwealth Court held that the proposed intervenors had legislative standing to defend the statute because "the constitutional principles [the

petitioners] seek to establish w[ould] extend beyond the statute and the Department's regulations" and "could bar the General Assembly from 'tieing legislative strings' to its appropriation of funds for the Medical Assistance program." *Id.* at 912. Because, in the Commonwealth Court's view, the proposed intervenors sought "to preserve their authority to propose and vote on funding legislation *in the future*," the legislators satisfied the test laid out in *Markham* and *Fumo* and alleged an injury personal to them, as legislators. *Id.* at 913 (emphasis added).[5]

[5] In addition to relying on *Allegheny*'s holding, Proposed Intervenors rely heavily on *Allegheny*'s reference to the distinction the Commonwealth Court drew in *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Commw. Ct. 2019), between "the inquiry to determine whether a party has standing to initiate litigation" and "the inquiry to determine whether a party can intervene in existing litigation." *Id.* at 1288. (*See* Memorandum ¶¶ 20-21.) But Proposed Intervenors neglect to point out that the intervention standard at issue in *Sunoco* was not Pa. R. Civ. P. 2327(4)'s requirement that the determination of the action affect a "legally enforceable interest" of the intervenor. Because *Sunoco* involved a proceeding before the Public Utility Commission (PUC), the proposed intervenor needed to show only that his participation "may be in the public interest." *Sunoco*, 217 A.3d at 1288-89 (quoting 52 Pa. Code § 5.72(a)(3)); *see also id.* at 1289 ("[T]he grant of intervention to a party is not 'recognition by the [PUC] that the intervenor has a direct interest in the proceeding or might be aggrieved by an order of the [PUC] in the proceeding,' only that the intervenor's participation will advance the public interest.").

Proposed Intervenors also fail to recognize that the "legally enforceable interest" prerequisite for intervention has already been authoritatively construed by this Court in *Markham*, which held that "whether [proposed intervenors] were properly denied intervenor status … turns on whether they satisfy our standing requirements." *Markham*, 136 A.3d at 140.

The Commonwealth Court's *Allegheny* decision is not to the contrary—nor could it displace the controlling rule set forth by this Court. *Allegheny* acknowledged, *in the context of the rules governing intervention in PUC proceedings*, that "the test for standing to initiate litigation is not co-terminus with the test for intervention in existing litigation." 225 A.3d at 910-11; *see id.* at 910 ("it does not follow that because a legislator was permitted to intervene *in a Commission proceeding* that he has standing to initiate a proceeding before the Commission"). But the *Allegheny Court* acknowledged that "the principles of legislative standing *are* relevant to a determination of whether a putative intervenor has demonstrated a 'legally enforceable interest'

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Allegheny's rationale is obviously inapplicable here. No party in this case seeks to establish a rule of constitutional law that would tie the hands of the legislature in the future. Once again, this case presents only a simple, straightforward question: whether the Board's procedures in the November 2020 general election complied with certain requirements in the Election Code.[6]

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for purposes of Rule No. 2327(4)" and proceeded to apply the legislative standing test set forth in *Markham*, *Robinson Township*, and *Fumo*. *Id.* at 911 (emphasis added).

[6] To the extent Proposed Intervenors attempt to rely on unreported and unreasoned orders on intervention motions (*see* Memorandum ¶¶ 2-3), these decisions are unavailing. In fact, Representatives Cutler and Benninghoff have tried several times to intervene in this Court over the last six months, with little success.

On May 15, 2020, the Court denied Representative Cutler's attempt to intervene in *Disability Rights Pennsylvania v. Boockvar*, 234 A.3d 390 (Pa. 2020). The Court denied the effort as moot (having just dismissed the case), but, as noted, Justice Wecht concurred, explaining in detail that Representative Cutler, even though joined in that case by 109 out of 203 members of the House, "offer[ed] *no* argument" to intervene in a challenge to Pennsylvania's mail voting statute. *Id.* at 392 (Wecht, J., concurring) (emphasis original). He further explained that intervention was inappropriate where a movant's allegations were "akin to a general grievance about the correctness of governmental conduct." *Id.* (citing *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016)).

On September 17, 2020, the Court denied the Proposed Intervenors' request in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 355 n.11 (Pa. 2020), the case where this Court extended the deadline for receiving ballots past Election Day. The Court denied the intervention request, among other reasons, "because of the necessary expediency of reaching a decision in this case, and given that adequate advocacy has been provided." *Id.*

On October 14, 2020, the Court denied the Proposed Intervenors' request in *In re: November 3, 2020 General Election*, No. 149 MM 2020, 2020 WL 6110774, at *1 (Pa. Oct. 14, 2020), where the Court ultimately held that the Election Code does not authorize or require county election boards to reject absentee or mail-in ballots during the canvassing process based on an analysis of a voter's signature on the declaration.

Therefore, this Court has rejected Proposed Intervenor's request several times, and it should also do so here. In fact, Proposed Intervenor's assertion here—that they are entitled to offer their views on statutory interpretation—is even weaker. As discussed in the text above, this is a pure "general grievance about the correctness of governmental conduct." Proposed Intervenors are in the same position as the general public.

The Board understands that, on August 24, 2020, Judge Brobson of the Commonwealth Court granted Proposed Intervenors' application for intervention in *NAACP v. Boockvar*, No.

(footnote continued on next page)

B. The Proposed Intervenors Could Not Have Been Joined as Original Parties in the Action

Nor can Proposed Intervenors base intervention on Pa. R. Civ. P. 2327(3), which requires that they could have been joined in the action as an original party. Proposed Intervenors conclusorily assert that they could have been so joined, and appear to fault the Trump Campaign for not bringing the action against them as well as the Board. (Memorandum ¶ 50.) But this argument is as spurious as it is undeveloped. The Trump Campaign's complaint was (and is) that the Board was not allowing its representatives to approach as close to canvassing staff as the Election Code purportedly (according to the Campaign) entitled them to approach. On what possible basis could legislators have been named as parties? They have nothing whatsoever to do with the claims, defenses, or issues in this action.

The cases Proposed Intervenors cite are not remotely apposite. In *Harrington v. Philadelphia City Employees Federal Credit Union*, 364 A.2d 435 (Pa. Super. Ct. 1976), certain individuals who had been elected to a credit union's board of directors and were then denied their elected positions or removed filed a suit in equity claiming they "had been improperly denied access to their duly elected offices, or improperly removed from office." *Id.* at 437. Two of the

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364 MD 2020 (Pa. Commw. Ct.), but the Commonwealth Court provided no explanation other than citing *Fumo v. City of Philadelphia*, 972 A.2d 487 (Pa. 2009). As explained herein, *Fumo* is distinguishable because it involved a specific challenge to legislative power.

individuals who had been "precluded from taking office" but had not been named as original parties then moved to intervene. *Id.* at 438, 441. Unsurprisingly, the Superior Court found they were entitled to intervene, as "[b]oth could have been an original party" and "[b]oth had interests that would be drastically affected by the outcome of the equity action." *Id.* at 441. *Harrington* bears no analogy to this case.

The other cases cited by Proposed Intervenors involve challenges to redistricting maps in which the petitioners sued certain legislative leaders, among others. *See League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018); *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002), *abrogated by League of Women Voters*, 178 A.3d 737. These leaders were sued because the maps they helped created were being directly challenged. Left unexplained by Proposed Intervenors is how these redistricting cases support Proposed Intervenors' intervention in *this* case. They do not.[7]

[7] Proposed Intervenors also refer to *Adams Jones v. Boockvar*, No. 717 MD 2018, in which "then-Speaker Mike Turzai was [purportedly] named as an original respondent." (Memorandum ¶ 48.) But Proposed Intervenors neither provide any citation for this case nor attach any decisions or even pleadings. Nor is there any indication that the propriety of Speaker Turzai's being named as a respondent was ever tested. Simply put, there is no basis to conclude that *Adams Jones* stands for any proposition whatsoever, let alone the one for which Proposed Intervenors invoke it.

C. The Petition to Intervene Is Untimely

Although Proposed Intervenors' failure to satisfy Rule 2327 is dispositive, their Petition should also be denied for untimeliness. *See* Pa. R. Civ. P. 2329(3) (even if requirements of Rule 2327, "an application for intervention may be refused if … the petitioner has unduly delayed in making [the] application"). As Proposed Intervenors' own Memorandum makes clear, applications for intervention are supposed to be made *in the trial court.* (Memorandum ¶ 18 ("Intervention rests with the discretion *of the trial court* and, in the absence of manifest abuse of discretion, *the trial court's* determination will not be disturbed on appeal.") (emphasis added).) *See also Johnson*, 90 A.3d at 742 (describing the determination that "*a trial court*" must make "[w]hen faced with a request for intervention" (emphasis added)). Reflecting this, the Rules invoked by Proposed Intervenors are ones of civil procedure, not appellate procedure. *See* Pa. R. Civ. P. 2327-2329. There is significant authority for the proposition that, absent extraordinary circumstances, attempts to intervene after a trial court has entered judgment should be denied. *See, e.g.*, *Boerner v. Hazle Twp. Zoning Hearing Bd.*, 845 A.2d 210, 214 (Pa. Commw. Ct. 2004) (holding that a "petition to intervene was not timely filed" when "it was filed after the trial court" disposed of the local agency appeal); *accord* 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed.) ("There is considerable reluctance on the part of the courts to allow intervention after the

action has gone to judgment and a strong showing will be required of the applicant. Motions for intervention after judgment ordinarily fail to meet this exacting standard and are denied…. There is even more reason to deny an application to intervene made while an appeal is pending ….").

Here, Proposed Intervenors did not file their Petition in the trial court, in the Commonwealth Court, or even during the pendency of the Board's petition for allowance of appeal. Instead, they waited until less than 30 minutes before this second-level appeal was submitted to the Court on November 13. Nor can Proposed Intervenors credibly argue not to have been aware of this case, which was prominently covered by both Pennsylvania and national media. *See, e.g.*, Jeremy Roebuck et al., *Trump campaign vows to halt Pa. vote count in a wave of legal challenges*, Philadelphia Inquirer, Nov. 4, 2020, https://www.inquirer.com/politics/pennsylvania/trump-suing-pa-lawsuit-recount-2020-election-20201104.html; Jonathan Lai et al., *Philly's counting of mail ballots has been slowed by a Trump legal challenge*, Philadelphia Inquirer, Nov. 5, 2020, https://www.inquirer.com/politics/election/philadelphia-counting-mail-ballots-20201105.html; Victor Fiorillo, *Court Orders Philly to Allow Elections Watchers Within 6 Feet of Vote Counters*, Philadelphia Magazine, Nov. 5, 2020, https://www.phillymag.com/news/2020/11/05/election-watchers-philadelphia-vote-count/; Jim Rutenberg & Alan Feuer, *Flurry of Trump campaign lawsuits nets*

small victory in Pennsylvania, N.Y. Times, Nov. 5, 2020, https://www.nytimes.com/live/2020/11/05/us/election-results; *Judge denies Trump campaign bid to halt Philadelphia count*, Reuters, Nov. 5, 2020, https://www.reuters.com/article/us-usa-election-philadelphia-trump/judge-denies-trump-campaign-bid-to-halt-philadelphia-count-idUSKBN27L2UP. Yet Proposed Intervenors did not move to become parties until well past the eleventh hour, just before the appeal was submitted to this Court for decision. Given these circumstances, the Petition to Intervene should be rejected as untimely.

IV. CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Petition to Intervene.

Date: November 16, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I 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.

Date: November 16, 2020

/s/ *Mark A. Aronchick*
Mark A. Aronchick

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Response upon counsel of record by electronic filing.

/s/ *Mark A. Aronchick*
Mark A. Aronchick

November 16, 2020