

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' ANSWER IN OPPOSITION TO
AMENDED MOTION TO INTERVENE 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 Answer in opposition to the Amended Motion to Intervene by Joseph B. Scarnati, III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader (collectively, “Senators”).

INTRODUCTION

The Senators failed to comply with this Court’s July 27, 2020 deadline for “Responses” to Petitioners’ Amended Petition. *See* July 8, 2020 Order. The Court’s

July 8 Order and the deadline it imposed for all “Responses” applied not just to Respondents, but also to all parties who wished to be heard. *See also* July 6, 2020 Ltr. (rejecting the Speaker of the House and House Majority Leader’s response to Petitioners’ application for leave to file an amended petition, submitted after court-imposed deadline). The Senators’ filing is thus procedurally improper despite their attempt to recast their untimely response as an “Amended Motion to Intervene.”

In any event, the Senators do not meet any of the threshold grounds for intervention under Pa. R.C.P. 2327. Although they assert an 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”) (emphasis added). The individual Senators who have appeared before this Court 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 15, 2020) (per curiam) (Wecht, J.,

concurring); *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016).¹ The Senators have no role whatsoever in implementing, enforcing, or administering the Commonwealth’s Election Code, nor does this suit call into question any other unique role they might have as legislators. The Senators do not speak for the General Assembly itself; thus, 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).

Even if the Senators fell within the class of persons permitted to intervene under Pa. R.C.P. 2327, this Court should nonetheless exercise its discretion to deny intervention because the Senators’ interests are adequately represented and their participation in this case will only expand, extend, and duplicate litigation proceedings. *See* Pa. R.C.P. 2329(2), (3). By their own admission, the Senators “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,” Senators’ Mot. at ¶ 7, even though “it is the Commonwealth’s duty to defend the constitutionality” of its laws and Respondents have demonstrated that they intend to do so. *Robinson Twp. v. Commonwealth*, No. 284 M.D. 2012, 2012 WL 1429454, at *4 (Pa. Commw. Ct. Apr. 20, 2012). Allowing the Senators

¹ It is not even clear that the Senators can appear on behalf of the Senate as “they cite no formal enactment . . . purporting to authorize such interventions.” *Disability Rights Pa.*, 2020 WL 2820467, at *1.

to occupy the same role would duplicate Respondents' efforts, while needlessly multiplying briefing, expanding discovery, and prolonging any court proceedings or depositions in which they will undoubtedly seek to participate. For these reasons, and those set forth in Petitioners' previously submitted Memorandum in Opposition to the Senators' and Republican Committees' Applications for Leave to Intervene, which is also incorporated here by reference, *Crossey v. Boockvar*, 266 MD 2020 (Pa. Commw. Ct. May 18, 2020)., this Court should deny the Senators' Amended Motion to Intervene.

ANSWER TO REASONS FOR SENATORS' APPLICATION

1. This paragraph states a Pennsylvania Rule of Appellate Procedure, the content of which speaks for itself and to which no responsive pleading is required.

2. This paragraph states a Pennsylvania Rule of Civil Procedure, the content of which speaks for itself and to which no responsive pleading is required.

3. This paragraph states a Pennsylvania Rule of Civil Procedure, the content of which speaks for itself and to which no responsive pleading is required.

4. Denied. This paragraph contains conclusions of law to which no responsive pleading is required. To the extent a response is required, they are denied.

By way of further response, the Senators have not identified any legally enforceable interests that are implicated by this action. *See* Pa. R.C.P. 2327(4). Although individual legislators have an interest in protecting "the power or authority of their

offices” and “the potency of their right to vote” on pending legislation, *Robinson Twp. v. Commonwealth*, 84 A.3d 1054, 1055 (Pa. 2014), they have “no legal interest in actions seeking redress for a general grievance about the correctness of governmental conduct.” *See also, Markham*, 136 A.3d at 139. “[T]aking the unprecedented step of allowing [the Senators] standing to intervene 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.” *Id.* at 145. Furthermore, “principles of legislative standing[,] [which] are relevant” to determining the scope of the Senators’ legally enforceable interest “for purposes of Rule No. 2327(4),” counsel against the Senators’ intervention. *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Human Servs.*, 225 A.3d 902, 911 (Pa. Commw. Ct. 2020). Pennsylvania courts have made clear that “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 [process of voting on and approving a bill], and akin to a general grievance about the correctness of governmental conduct.” *Markham*, 136 A.3d at 145; *see also Fumo v. City of Phila.*, 972 A.2d 487, 501 (Pa. 2009) (recognizing that legislators do not have legislative standing absent “a discernible and palpable infringement on their authority as legislators”). For the same reasons, the Senators could not have joined as original parties to this action. *See Pa. R.C.P. 2327(3)*. Their interest in this lawsuit rests entirely on the General Assembly’s right

to determine the times, places, and manner of holding elections, suspend laws, appropriate funds, and modify election procedures, but they cite no authority that would allow a single chamber of a bicameral legislature—much less individual Senators—to enforce those rights on behalf of the Legislature. *See also Disability Rights Pa.*, 2020 WL 2820467, at *2-3 (Wecht, J., concurring) (citing the U.S. Supreme Court’s rejection in *Virginia House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945 (2019) of the notion that a single chamber of a bicameral legislature has standing to intervene in defense of state law).

5. Denied. Petitioners seek temporary, emergency procedures to protect the constitutional rights of Pennsylvanians to participate in a free and equal election during an ongoing public health emergency that has rendered the available voting options and procedures inaccessible. Am. Pet. ¶¶ 52-70. Such relief supplements, rather than supplants, existing election administration procedures. Furthermore, the individual Senators misread Article I, § 12 to suggest that only the legislature has the power to prevent the enforcement of unconstitutional laws. But that argument ignores the constitutional principle of separation of powers. The Pennsylvania Supreme Court has long recognized that the Senate cannot “usurp the judiciary’s function as ultimate interpreter of the Constitution.” *Zemprelli v. Daniels*, 436 A.2d 1165, 1170 (Pa. 1981).

6. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph pertaining to arguments on which the Senators wish to be heard, and therefore they are denied. Petitioners further deny the averments set forth in the footnote accompanying this paragraph. As Petitioners explained in their Amended Petition, their requested relief does not require the Court to apply Act 77's non-severability clause. Am. Pet. ¶¶ 8, 58-61.

7. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph pertaining to the Senators' intentions, and therefore they are denied. By way of further response, the Senators' desire to prevent a judicial determination regarding the validity of a statute does not confer an interest sufficient for intervention.

8. Denied. Petitioners seek an order that would require election officials to issue all mail ballots with postage prepaid envelopes. Article III, Section 24 of the Pennsylvania Constitution has no role to play here because the General Assembly has already authorized county commissioners to appropriate funds annually for all necessary expenses for the conduct of primaries and elections, including the issuance of mail ballots to eligible voters upon timely request. *See* 25 Pa.C.S. §§ 2645, 3146.2a(3), 3150.15. Moreover, Congress recently passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which provides \$400 million in

emergency funds to states to “protect the 2020 elections from the effects of the novel coronavirus.” Pennsylvania Dep’t of State, *Help America Vote Act (HAVA) 2020 CARES Act Grant Fund*, <https://www.dos.pa.gov/VotingElections/Pages/2020-Federal-Grants.aspx> (last visited July 31, 2020). Respondent, Secretary of the Commonwealth, has committed to distributing additional funding (approximately \$6 million) to counties from its share of the CARES Act funds to cover “increased costs related to mail-in and absentee voting,” among other expenses. *Id.*

9. Denied. Petitioners seek temporary, emergency procedures that protect the constitutional rights of Pennsylvanians to participate in a free and equal election during an ongoing public health emergency that has rendered the available voting options and procedures inaccessible. The remainder of this paragraph contains conclusions of law to which no responsive pleading is required. To the extent a response is required, they are denied.

10. This paragraph contains conclusions of law to which no responsive pleading is required. To the extent a response is required, they are denied. By way of further response, *Corman*, 287 F. Supp. 3d at 573, recognized that U.S. Const. art. I, § 4, cl. 1 vested “in each State by the Legislature thereof” the authority to prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives” (“Elections Clause”). The plaintiffs in *Corman* included the Majority Leader of the Pennsylvania Senate and the Chairman of the Pennsylvania

Senate State Government Committee, but not the Pennsylvania General Assembly. The U.S. District Court for the Middle District of Pennsylvania held that because the plaintiffs were “neither the Pennsylvania General Assembly nor a group to which Pennsylvania has delegated the Commonwealth’s lawmaking power,” they lacked Article III standing to assert violations of the Elections Clause, and held that the Elections Clause claims asserted in the complaint “belong, if they belong to anyone, only to the Pennsylvania General Assembly” as a whole. *Id.* Furthermore, the Senators’ citation to *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194 (1972) is inapposite because in that case the intervenor was the entire Minnesota Senate—not merely a subset thereof.²

11. Denied. Based on the authority above, *supra* ¶ 10, the Senators, like the plaintiffs in *Corman*, do not represent the Pennsylvania General Assembly, nor do the Senators cite any formal enactment or otherwise to suggest that they have been vested with the power to represent the Senate. *See Corman*, 287 F. Supp. 3d at 573 (recognizing that the Majority Leader of the Pennsylvania Senate and the Chairman of the Pennsylvania Senate State Government Committee were not “a group to which

² Denied. Only individual Senators and Representatives have sought intervention into this lawsuit. Neither set of legislative intervenors have produced evidence or authority suggesting they may speak on behalf of the entire General Assembly. *See Corman*, 287 F. Supp. 3d at 573.

Pennsylvania has delegated the Commonwealth’s lawmaking power”). As a result, the individual Senators have no right to intervene under Pa. R.C.P 2327(3) or (4).

12. Denied. Pennsylvania courts have made clear that “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 [process of voting on and approving a bill], and akin to a general grievance about the correctness of governmental conduct.” *Markham*, 136 A.3d at 145; *see also Fumo*, 972 A.2d at 501 (recognizing that legislators do not have legislative standing absent “a discernible and palpable infringement on their authority as legislators”). Here, the Senators advance an interest in broadly protecting their right to legislate, but that interest is unrelated to the narrow and specific relief that Petitioners seek. “[T]aking the unprecedented step of allowing legislators standing to intervene 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.

13. This paragraph states a Pennsylvania Rule of Civil Procedure and contains a citation to case law, the contents of which speak for themselves and to which no responsive pleading is required.

14. Denied that the Senators’ Amended Motion to Intervene was filed promptly.

15. Admitted that the Governor signed an Executive Order on June 1, 2020, otherwise denied. By way of further response, Respondents have demonstrated their intent to defend the laws or election procedures implicated by this lawsuit and will adequately represent the Senators' interests. Pennsylvania courts have made clear that, under Pa. R.C.P. 2329(2), intervention should not be permitted when the interest of a proposed intervenor is "already adequately represented." *See, e.g., Pa. Ass'n of Rural & Small Schs. v. Casey*, 613 A.2d 1198, 1200–01 (Pa. 1992) (denying intervention where "the substance of [the parties'] positions covers the substance of the positions proposed by [the intervenor]"). For example, in *Pennsylvania Association of Rural and Small Schools*, the Pennsylvania Supreme Court held that the proposed intervenor school districts' interest in upholding a school funding statute was adequately represented by the Commonwealth. The Pennsylvania Supreme Court affirmed the Commonwealth Court's conclusion that the proposed intervenors' "desire to pursue a preferred litigation strategy or defense theory was not an interest entitling [them] to intervene." *Id.* at 1201. Here, too, the Senators' interest in upholding the challenged voting laws is one that they share with Respondents and thus is already adequately represented because "it is the Commonwealth's duty to defend the constitutionality" of its laws. *Robinson Twp.*, 2012 WL 1429454, at *4. In sum, their "interests coincide." *E. Am. Transp. & Warehousing, Inc. v. Evans Conger Broussard & McCrea, Inc.*, Nos. 2186 JULY

TERM 2001, CONTROL No. 071266, 2002 WL 1803718, at *3 (Phila C. P. July 31, 2002) (“Burns’s interests are adequately represented in this litigation . . . [because] Eastern America’s interests coincide with Burns’[s] interests, ie. [sic] recovering money from the insurers and brokers.”). This Court also held in *In re Philadelphia Health Care Trust*, 872 A.2d 258, 262 (Pa. Commw. Ct. 2005) that the interests of individual state legislators (there, a state senator and city councilman) were “adequately represented by the Attorney General” because:

there is only one “Sovereign”, and, that Sovereign is the Commonwealth of Pennsylvania. When engaged in litigation before this Court, the Sovereign must be of one mind, and, must speak with one voice.

When a proposed intervenor and a party to a suit share the same interest, triggering Pa. R.C.P. 2329(2), courts have held that intervention is not appropriate unless the party is no longer representing the shared position either due to settlement, *see Keener v. Zoning Hearing Bd. of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw. Ct. 1998), or failure to enter an appearance on appeal, *Esso Standard Oil Co. v. Taylor*, 159 A.2d 692 (Pa. 1960). *See also Atticks v. Lancaster Twp. Zoning Hearing Bd.*, 915 A.2d 713, 718 (Pa. Commw. Ct. 2007) (allowing intervention where the party that “asserted the same or similar issues” as the proposed intervenor could not represent those interests beyond the trial court level “because the [Zoning Hearing Board] is precluded from appealing the trial court’s decision”). *Id.* Neither are applicable here.

16. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph pertaining to the Senators' litigation plan, and therefore they are denied.

17. Denied. Petitioners' case challenges the Commonwealth's failure to implement adequate safeguards that protect the right to vote and ensure access to vote by mail in the midst of a public health emergency. Furthermore, as with almost all legal analysis, the outcome of this case will turn on the application of law to facts. The distinction that the Senators attempt to draw between the effects of laws and reactions to the pandemic is legally irrelevant. External influences on the voting process—whether in the form of a public health crisis, or socioeconomic factors that deny voters access to the polls—do not absolve the Commonwealth of its duty to conduct a free and equal election, nor do they permit the Commonwealth to turn a blind eye when election procedures combine with external factors to impose an undue burden on the right to vote.

18. Denied. Petitioners' case is premised on the Commonwealth's failure to implement adequate safeguards that protect the right to vote and ensure access to vote by mail in the midst of a public health emergency, which violates the constitutional rights of Pennsylvania voters. The Pennsylvania Supreme Court has long recognized that the Legislature cannot "usurp the judiciary's function as ultimate interpreter of the Constitution." *Zemprelli*, 436 A.2d at 1170. Furthermore,

“it is beyond peradventure that state courts possess the authority to grant equitable remedies for constitutional violations.” *League of Women Voters v. Commw.*, 645 Pa. 1, 134 n.79 (2018).

19. This paragraph purports to summarize Petitioners’ Amended Petition, the content of which speaks for itself and to which no responsive pleading is required. To the extent a response is required, Petitioners deny that their requested relief would affect all voters in all circumstances.

20. Denied. This paragraph contains statements of law, to which no responsive pleading is required. To the extent a response is required, they are denied.

21. Admitted that the General Assembly postponed the primary elections to June 2, 2020, otherwise Denied. By way of further response, Petitioners deny that the General Assembly’s actions are sufficient to ensure a free and equal election in November as required by the Pennsylvania Constitution. If anything, the General Assembly’s postponement of the primary election illustrates that following normal procedures in times of emergency is not enough to ensure a free and equal election and protect the constitutional rights of Pennsylvania voters. Petitioners further deny the Senators’ suggestion that the only mechanism for “adjusting rights” which affect all voters is legislative. It is the prerogative of this Court—and not only the Senators—to determine whether the legislative response is sufficient to protect the rights of Pennsylvanians.

22. Admitted in part; denied in part. Admitted that the General Assembly passed, and the Governor signed into law, Act 35, which requires the Department of State to issue a report related to the administration of the 2020 general primary election; that the Senate held a hearing on July 23, 2020, to discuss 2020 election issues; and that Secretary Boockvar spoke at the hearing. Denied that the mere possibility of unspecified future action is sufficient to ensure a free and equal election as required by the Pennsylvania Constitution.

23. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph pertaining to the Senate's goals.

24. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph pertaining to the Senators' litigation plans, and therefore they are denied.

25. Denied. As an initial matter, the Court required a response to Petitioners' Amended Petition by July 27, and therefore the Senators' proposed preliminary objections are untimely. Petitioners further deny that the Senators' proposed preliminary objections have raised any "deficits" in Petitioners' case and deny each of the purported objections summarized in this paragraph. The Senators have not been permitted to intervene in this action and thus their preliminary objections are not properly before the Court. In the event that the Court allows the

Senators' to intervene and accepts their proposed preliminary objections as filed, Petitioners will address each of those objections in accordance with the schedule set forth by the Court.

WHEREFORE, Petitioners Michael Crossey, Dwayne Thomas, Irvin Weinreich, Brenda Weinreich, and the Pennsylvania Alliance for Retired Americans request that this Court deny the Senators' Amended Motion to Intervene.

Dated: July 31, 2020

By: _____

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