

IN THE SUPREME COURT OF PENNSYLVANIA

No. 30 EAP 2020

IN RE: CANVASSING OPERATION

APPEAL OF: CITY OF PHILADELPHIA BOARD OF ELECTIONS

On Allowance of Appeal from the November 5, 2020,
Single-Judge Order of the Honorable Christine Fizzano Cannon of the
Commonwealth Court, No. 1094 CF 2020, Reversing the November 3, 2020 Order
of the Honorable Stella Tsai of the Court of Common Pleas of Philadelphia
County, November Term 2020, No. 07003

**ANSWER TO THE PETITION TO INTERVENE
OF REPRESENTATIVES BRYAN CUTLER AND KERRY BENNINGHOFF**

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ANSWER

Appellee-Intervenor Pennsylvania Democratic Party files the following Answer to the Petition to Intervene of Representatives Bryan Cutler & Kerry Benninghoff (collectively, the “Proposed Intervenors”).

1. The Pennsylvania Democratic Party opposes the intervention of Proposed Intervenors, whether in their individual capacity as Pennsylvania House members or as members of General Assembly leadership.
2. The instant appeal concerns whether the Philadelphia Board of Elections (the “Board”) violated the Election Code, which permits authorized representatives to “be present” and to “remain in the room” during canvassing operations, by failing to allow representatives to remain specifically within six feet of those operations.
3. Neither of the Proposed Intervenors resides in Philadelphia County, and neither were candidates for any office considered by Philadelphia voters. Accordingly, neither of the Proposed Intervenors had the right or ability to appoint canvassing representatives for Philadelphia County’s pre-canvassing or canvassing operations.
4. In their Memorandum in Support of their Petition, however, Proposed Intervenors both claim the General Assembly’s interest as their own, and argue that individual legislators may intervene in *any* case presenting an “issue of statutory

interpretation regarding election laws passed by the General Assembly,” Mem. ¶ 1; *see also* Mem. ¶ 24 (“The House Leaders have an enforceable interest to legislate election laws in Pennsylvania, whether creating new laws or suspending or appealing existing laws.”)

5. The application to intervene should be rejected on multiple grounds.

6. *First*, Proposed Intervenors’ assertions, insofar as they allege their authority to represent the General Assembly or the House of Representatives, are flatly incorrect.

7. Under established case law, Proposed Intervenors lack standing to represent the legislature.

8. It is well-settled that individual legislators lack standing to allege institutional injuries that are “wholly abstract and widely dispersed.” *Raines v. Byrd*, 521 U.S. 811, 829 (1997); *see Markham v. Wolf*, 635 Pa. 288, 304, 136 A.3d 134, 144 (2016) (relying upon *Raines*).

9. Thus, although individual legislators may allege particularized injuries to themselves as individuals, they cannot purport to represent the legislative houses as a whole. *Raines* at 829 at n.10 (citations omitted) (“The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its

action is not the action of any separate member or number of members, but the action of the body as a whole.”).

10. In *Corman v. Torres*, the U.S. District Court for the Middle District of Pennsylvania held that, for legislators to have standing to pursue an alleged institutional injury, the legislators must command a two-thirds majority of the members of both the Senate and House of Representatives. *Corman v. Torres*, 287 F. Supp. 3d 558, 568–69 (M.D. Pa.), *appeal dismissed sub nom. Corman v. Sec’y Commonwealth of Pennsylvania*, 751 F. App’x 157 (3d Cir. 2018).

11. Here, the Proposed Intervenors can only allege that they, as individuals, are Pennsylvania legislators and members of the Republican Caucus. Further, they cannot allege any individualized harms because their recent candidacies were in no way affected by the Board’s operations.

12. The Proposed Intervenors do not and cannot allege that they command two-thirds majority of both chambers of the legislature as the Court in *Corman* held are required for them to have standing to make any representations to this Court on behalf of the General Assembly or the House of Representatives. *See Corman*, 287 F. Supp. 3d at 568–69; *see also Disability Rights Pennsylvania v. Boockvar*, --- Pa. ----, 234 A.3d 390, 394 (2020) (Wecht, J., concurring) (expressing doubt that individual legislators may intervene under Rule 2327

“[b]ecause [they] cannot speak for the General Assembly as a whole, and therefore do not collectively represent that body's legislative prerogatives”).

13. Accordingly, Proposed Intervenors cannot intervene on behalf of the Pennsylvania General Assembly as a whole or either constituent chamber.

14. *Second*, Proposed Intervenors are not entitled to intervene under the principles previously articulated by this Court for legislative intervention. This Court has permitted the intervention of state legislators only “in limited instances in order to permit the legislator to seek redress for an injury the legislator ... claims to have suffered in his official capacity, rather than as a private citizen,” *Markham*, 635 Pa. at 302, 136 A.3d at 143; *see Fumo v. City of Philadelphia*, 601 Pa. 322, 345-346, 972 A.2d 487, 501 (2009). For instance, intervention may be appropriate “to protect a ‘legislator’s right to vote on legislation’ and to protect against a ‘diminution or deprivation of the legislator’s ... power or authority,’” but not merely a “disagreement with the way in which [an agency] interpreted and executed” a state statute. *Markham*, 635 Pa. at 303, 136 A.3d at 143.

15. This is exactly the kind of case in which this Court has denied intervention before. Proposed Intervenors seek to do no more than contest the “interpret[ation] and exec[ution]” by a state agency of a statute passed by the legislature. *Id.* As this Court explained in *Markham*, “allowing legislators standing to intervene in, or be a party to, any matter in which it is alleged that

government action is inconsistent with existing legislation would entitle legislators to challenge virtually every interpretive executive order or action (or inaction),” or “to join in any litigation in which a court might interpret statutory language in a manner purportedly inconsistent with legislative intent.” *Id.* at 306, 136 A.3d at 145; *see also Commonwealth v. Neiman*, 624 Pa. 53, 64 n.26, 84 A.3d 603, 609 n.26 (2013) (explaining that “legislators do not have standing to raise a claim in a legal proceeding that the effectiveness of a law which they have passed” has been “impaired”). That rule would allow legislative intervention in virtually every case.

16. *Finally*, Proposed Intervenors’ application can also be denied on the same ground as were their own identical motions to intervene in *Pennsylvania Democratic Party v. Boockvar*, --- Pa. ---, 238 A.3d 345 (2020). In that case, as here, litigation proceeded on a rapid schedule and the Court was presented with the views of multiple parties. There, as here, Proposed Intervenors Cutler and Benninghoff sought intervention at a late stage. *Id.* at 355 n.11. The Court denied the motion, explaining that, in light of “the necessary expediency of reaching a decision in this case” and the “adequate” nature of the papers before the Court, no additional intervenors were needed. *Id.*

17. The same is true here. The important questions of state law at issue here have been “adequate[ly]” presented by a range of parties, including the Board,

the Pennsylvania Democratic Party, and the Trump Campaign, and the Court's "expedien[t]" resolution of the case is of paramount importance to the parties. *Id.* Proposed Intervenors' arguments closely resemble those of the Trump Campaign, and they offer no reason of any substance why the Campaign cannot represent their interests in this case.

18. Thus, the Pennsylvania Democratic Party opposes the intervention of Proposed Intervenors in their capacity as Pennsylvania legislators or as members of the Republican Caucus.

19. The Pennsylvania Democratic Party's position coheres with this Court's decisions in other Election Code matters this year. *See, e.g. Disability Rights Pennsylvania v. Boockvar*, 83 MM 2020, 234 A.3d 390 (table) (Pa. May 15, 2020), *Pennsylvania Democratic Party*, --- Pa. at ---, 238 A.3d at 355 n. 11 (2020).

20. Proposed Intervenors have failed to state any reason why their interests in this matter (to the extent any such cognizable interests exist) will not be adequately represented by the Trump Campaign as an existing appellee.

WHEREFORE, the Pennsylvania Democratic Party respectfully requests that this Court deny the Petition to Intervene of Representatives Bryan Cutler and Kerry Benninghoff.

Dated: November 16, 2020

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 16, 2020 a copy of the foregoing ANSWER was filed with the PACFile system and through that system, served upon all counsel of record as demonstrated on the Proof of Service generated thereby.

/s/ Clifford B. Levine