

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 73 MM 2022

**TOM WOLF, GOVERNOR OF THE COMMONWEALTH OF
PENNSYLVANIA, AND LEIGH M. CHAPMAN, ACTING SECRETARY
OF THE COMMONWEALTH OF PENNSYLVANIA,**

Petitioners,

v.

**GENERAL ASSEMBLY OF THE COMMONWEALTH OF
PENNSYLVANIA,**

Respondent.

**EMERGENCY APPLICATION FOR LEAVE TO INTERVENE ON
BEHALF OF SENATOR JAY COSTA, DEMOCRATIC LEADER OF THE
PENNSYLVANIA SENATE, AND THE PENNSYLVANIA SENATE
DEMOCRATIC CAUCUS**

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Pennsylvania Senate Democratic Caucus*

Senate Democratic Leader Jay Costa (“Democratic Leader Costa” or “Senator Costa”) and the Pennsylvania Senate Democratic Caucus (collectively the “Democratic Senate Intervenors”), by and through undersigned counsel, Willig, Williams, and Davidson, hereby seek leave to intervene as party respondents in this matter, and in support thereof, aver as follows:

1. On July 7, 2022, in a late-night session of the General Assembly of Pennsylvania (“General Assembly” or “Legislature”) and without any advance warning or meaningful debate or discussion, the Republican leadership of the Senate scheduled a meeting of the Senate Rules and Executive Nominations Committee to substantially amend Senate Bill 106 (“SB 106”) and report it to the full Senate for consideration. On July 8, 2022, the Republican majorities in both the Pennsylvania House and Senate passed SB 106, a joint resolution proposing a massive revision of the Pennsylvania Constitution, over the objection of the Democratic Senate Intervenors and in violation of the Pennsylvania Constitution.

2. In one omnibus resolution, SB 106, the Republican majorities in both the Pennsylvania House and Senate adopted five proposed amendments to the Pennsylvania Constitution:

a. A proposed constitutional amendment that would, for the first time in the Commonwealth’s history, declare that the Pennsylvania Constitution

precludes a right--in this case any right for taxpayer funding for abortion or a right to abortion access.

b. A proposed constitutional amendment that would impose a new requirement that qualified electors must present “valid identification” to vote in person or by mail and would limit the types of “valid identification” that qualify to government-issued identifications that are currently valid.

c. A proposed constitutional amendment that authorizes the General Assembly to disapprove of any regulations promulgated by the Governor, including regulations enacted to effectuate any environmental or climate change legislation, by simple passage of a concurrent resolution that is not subject to a veto of the Governor.

d. A proposed constitutional amendment that empowers the General Assembly to statutorily authorize the Auditor General to conduct an audit of Pennsylvania elections or by an independent auditor in the years in which the Auditor General stands for election.

e. A proposed constitutional amendment requiring that each nominated candidate for Governor selects his or her running mate for Lieutenant Governor, subject to approval of any political party or political body, and that Lieutenant Governor candidates may not at the same time run for Governor.

3. By forcing a vote on SB 106, in which legislators were only offered the opportunity to say “Yea” or “Nay” regarding all five proposed constitutional amendments and with little to no debate, the Republican majorities in the Senate and House violated Article XI, Section 1 of the Pennsylvania Constitution. *See* PA. CONST. ART. XI, §1. Specifically, the Republican Senate and House majorities infringed on the inherent rights of all legislators, including the Democratic Senate Intervenors, to separately consider, debate, and vote upon each of the five proposed amendments. *Id.* They did so despite the fact that the General Assembly was engaged in one of its most important constitutional functions for which the Legislature is granted sole authority—amending the Pennsylvania Constitution. *Id.* Furthermore, the Republican Senate and House majorities violated Article XI, Section 1 by forcing the members of the General Assembly to cast one vote concerning five proposed constitutional amendments in which some of those amendments violated the single subject test under Article XI, Section 1, which has been found a necessary condition for proper consideration of an amendment by Pennsylvania voters. *See League of Women Voters v. Degraffenreid*, 265 A.3d 207, 242 (Pa. 2021) (considering whether a constitutional amendment violated the single subject test under Article XI, Section 1).

4. On July 28, 2022, Governor Tom Wolf (“Governor”) and the Acting Secretary of the Commonwealth Leigh M. Chapman (“Secretary”) (collectively

“Petitioners”) filed an Application for Invocation of King’s Bench Power (“Application”), requesting that this Court declare SB 106 invalid and enjoin further action on the proposed constitutional amendments.

5. Through their Application, Petitioners seek to enforce provisions of our Pennsylvania Constitution and prevent the Republican majorities in the State House and Senate from engaging in a late-night redraft of the fundamental document in this Commonwealth governing the structure and powers of the three branches of our state government and inherent rights held by all Pennsylvanians.

6. Because the Application names as a respondent the General Assembly of the Commonwealth, of which the Democratic Senate Intervenors are a constituent part, and seeks a declaration that SB 106 is unconstitutional as well as an injunction barring members of the Legislature from further consideration of the proposed constitutional amendments, the Democratic Senate Intervenors have an interest separate and apart from Petitioners as well as the Republican Senate and House Caucuses who already sought intervention in this matter.¹ For these reasons, the Democratic Senate Intervenors seek to intervene to advance and support the position

¹ While counsel has entered their appearance on behalf of Respondent General Assembly, it is currently unknown what position they will take regarding Petitioners’ litigation. However, given that the Republican Senate and House Caucuses are in the majority, it is likely Respondent General Assembly will take a position consistent with the one taken by Republican Senate and House Caucuses. Thus, only intervention by Democratic Leader Costa and the Democratic Senate Caucus can ensure their interests, as enumerated in this application to intervene, are represented in this litigation.

of that part of the General Assembly who opposed SB 106 and who are authorized under the Pennsylvania Constitution to consider, debate, and vote on proposed constitutional amendments, including SB 106.

7. Any party to litigation must have standing to bring an action or be a party to an action. *Markham v. Wolf*, 136 A.3d 135, 140 (Pa. 2015) (citing *Stilp v. Commonwealth*, 940 A.2d 1227, 1233 (2007)). This rule remains true for legislators who bring an action or seek to intervene in an existing action. *Id.* As this Court explained in discussing *Fumo v. City of Philadelphia*, 972 A.2d 487, 502 (Pa. 2009):

“[l]egislators ... have been permitted to bring actions based upon their special status where there was a discernable and palpable infringement on their authority as legislators.” *Fumo*, 972 A.2d at 501. We stressed that such standing “has been recognized in limited circumstances 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.” *Id.* We further opined that standing has been recognized in this context to protect “legislator’s right to vote on legislation” and to protect against a “diminution or deprivation of the legislator’s ... power or authority,” but has not been recognized in actions “seeking redress for a general grievance about the correctness of governmental conduct.” *Id.*

Markham, 136 A.3d at 143 (citing and quoting *Fumo*, 972 A.2d at 502)).

8. Applying this standard, our Pennsylvania appellate courts have rejected legislative standing for members of the General Assembly when they simply sought to support the constitutionality of a bill the Legislature voted upon. *See, e.g.,*

Robinson Twp. v. Commonwealth, 84 A.3d 1054, 1055 (Pa. 2014) (rejecting standing for legislators as their interest implicated “neither a defense of the power or authority of their offices nor a defense of the potency of their right to vote,” but, rather, sought only to offer their perspective on the correctness of governmental conduct regarding the enactment of the relevant statute). However, this Court has recognized that legislators have standing if they are challenging the General Assembly’s voting process, rather than the constitutionality of any enacted piece of legislation. *See, e.g., Zemprelli v. Daniels*, 436 A.2d 1165, 1167 (Pa. 1981) (rejecting the argument that the senators’ interests in a gubernatorial nomination expired after they voted on the nomination, and recognizing they had a valid interest that conferred legislative standing based on their right to have the vote conducted in a constitutional manner).

9. In this case, the Democratic Senate Intervenors have standing to challenge the unconstitutional manner in which SB 106 was considered, debated, and voted upon, particularly when the Senate held a vote with little or no debate and without the opportunity for the legislators to separately express their support or opposition to each of five proposed amendments. The Democratic Senate Intervenors further have standing as the Republican Senate and House leadership forced

legislators of the General Assembly to vote on proposed amendments which clearly violated the single subject test requirement of Article XI, Section 1.²

10. A party is entitled to intervene in a matter if it satisfies any one of the requirements enumerated in Pennsylvania Rule of Civil Procedure 2327 (“Rule 2327”). Rule 2327 states that intervention “shall be permitted” if (1) entry of a judgment will impose liability to indemnify; (2) the intervenor will be adversely affected by a distribution of property in the custody of the court; (3) the intervenor could have joined or could have been joined as an original party; or (4) the determination of the action may affect the intervenor’s legally enforceable interest. Pa. R. Civ. P. 2327.

11. As an initial matter, Petitioners named the General Assembly as a Respondent in this matter, the latter of which consists of four constituent parts: the Republican Senate Caucus, the Democratic Senate Caucus, the Republican House Caucus, and the Democratic House Caucus. *See Precision Mktg., Inc. v. Com. Republican Caucus of the Sen. of PA/ AKA Sen. of PA Republican Caucus*, 78 A.3d 667, 671-75 (Pa. Cmwlth. 2014) (hereinafter “*Precision*”). Each of those constituent parts are parties or could be parties to this matter if each has standing and, if none are

² Unlike the Democratic Senate Intervenors, the Republican Senate and House Caucuses simply seek to intervene to likely offer support in favor of SB 106 and the manner it was presented to the General Assembly. They find no constitutional deficiencies in the manner that SB 106 was voted upon or the contents of the amendments as written and contained in the joint resolution.

already considered a party, meets the requirements for intervention enumerated in Rule 2327 and Pennsylvania Rule of Civil Procedure 2329 (“Rule 2329”).

12. Both Democratic Leader Costa and the Democratic Senate Caucus satisfy at least two of the criteria in Rule 2327.

13. First, Democratic Leader Costa represents the interests of the Senate Democratic members, which is the current minority party in the Senate. SB 106 passed by a vote of 28-22, with all but one member of the Democratic party voting against the resolution. Because almost all members of the Democratic Senate Caucus voted against SB 106, Democratic Leader Costa represents the interests of those members who considered and voted on SB 106 and found the actions of the General Assembly inappropriate and unconstitutional. Thus, Democratic Leader Costa could have joined or been joined as a party to this action, and arguably was included when Petitioners sued the General Assembly, and, by extension, the constituent parts of the Pennsylvania Senate and House, including Democratic Leader Costa. To the extent this Court declares SB 106, in whole or in part, unconstitutional, and enjoins any further legislative action regarding the resolution by the General Assembly, it would affect the interests and prerogatives of the members of the Democratic Senate Caucus, including Democratic Leader Costa.

14. Additionally, as stated above, the Democratic Senate Caucus is one of four constituent parts of the General Assembly and an “integral constituent of the

Senate.” *See Precision*, 78 A.3d at 675 (Pa. Cmwlth. 2014). The Republican and Democratic Senate Caucuses were created via the Senate’s constitutional authority under Article II of the Pennsylvania Constitution, and they perform “essential legislative functions and administrative business in the Senate.” *See id.* at 671-75. The Democratic Senate Caucus is composed of all Democratic Senators in the Pennsylvania Senate, *see id.*, at 672, who presently consist of twenty-one (21) members of the fifty (50) total Senators and whose membership is necessary to command the two-thirds majority necessary in both chambers to override a gubernatorial veto. *See PA. CONST. ART. II, §16; see also Corman v. Torres*, 287 F.Supp.3d 558, 567 (M.D. Pa. 2018) (citing *Raines v. Byrd*, 521 U.S. 811, 821 (1997)). All but one of the members of the Democratic Senate Caucus voted in opposition to SB 106. As an integral part of the Senate, and thus the General Assembly, the Democratic Senate Caucus could have been joined or seek joinder as a party to the Application.

15. Second, Democratic Leader Costa, representing the minority party of the Senate, and the Democratic Senate Caucus have a legally enforceable interest in challenging the General Assembly’s inappropriate and unconstitutional attempt to redraft substantial portions of the Pennsylvania Constitution with little or no public debate and in derogation of Article XI, Section 1. That interest will be substantially affected if this Court denies relief sought by Petitioners and refuses to declare SB 106

unconstitutional and fails to enjoin further consideration by the General Assembly or the voters of Pennsylvania of the multiple proposed constitutional amendments voted for and against by the Legislature. *See* Pa. R. Civ. P. 2327(4); *see also Fumo*, 972 A.2d at 502 (finding that legislative intervenors have grounds to intervene when the matter concerns their authority to vote upon the General Assembly’s exclusive authority to vote upon licensing legislation related to submerged Commonwealth lands).

16. Because Democratic Leader Costa and the Democratic Senate Caucus could have joined or been joined as original parties (and are a constituent part with standing of a named party), and this litigation affects legally enforceable interests of members of the Senate Democratic Caucus, the Democratic Senate Intervenors satisfy at minimum two categories for intervention. Pa. R. Civ. P. 2327(3) & (4).

17. The Democratic Senate Intervenors also are not barred from intervention under Rule 2329. A court can only deny an application to intervene when one of the narrowly prescribed circumstances in Rule 2329 is present. Rule 2329 states that an application to intervene may only be refused if:

- (1) the claim or defense of the petitioner is not subordinate to and in recognition of the propriety of the action; or

- (2) the interest of the petitioner is already adequately represented; or
- (3) 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(1)-(3).

18. None of the three considerations in Rule 2329 for denying intervention apply to the Democratic State Intervenors.

19. First, the participation in this action by Democratic Leader Costa and the Democratic Senate Caucus is not subordinate to and in recognition of the propriety of the pending action in as much as, unlike Petitioners and the Republican Senate and House caucuses, the Democratic Senate Intervenors are the only entity that both (a) possesses the authority to vote and debate proposed state constitutional amendments and (b) exercised that authority by rejecting the unconstitutional and inappropriate attempt by the Republican Senate and House Caucuses to pass SB 106. The Democratic Senate Intervenors seek to not only preserve the General Assembly's right granted through the Pennsylvania Constitution under Article XI, Section 1 to consider, debate, and vote on proposed state constitutional amendments,

but also ensure that the General Assembly abides by the dictates of our constitution when doing so.

20. Second, the Democratic Senate Caucus' interests differ from and, therefore, are not already adequately represented by the existing parties or proposed intervenors. While Petitioners, members of the executive branch of the Commonwealth government, raise constitutional challenges to the proposed amendments which the General Assembly inappropriately and unconstitutionally enacted with the passage of SB 106, neither the Governor nor the Secretary are afforded any authority to debate, consider, or veto resolutions of the General Assembly concerning proposed state constitutional amendments. PA. CONST., ART. XI, § 1. Instead, Article XI, Section 1 vests sole authority in members of the General Assembly to consider, debate, and vote on such proposed amendments and outlines the constitutionally permissible manner for doing so. *Id.* Nor do the proposed intervenors, the Republican Senate and House caucuses, represent the interests of the Democratic Senate Caucus as the overwhelming number of the members of those Republican caucuses supported the unconstitutional manner in which the amendments were considered, debated, and passed via SB 106. As among the parties and proposed intervenors presently participating in this litigation, only the Democratic Senate Caucus has both (a) a legally enforceable right to consider, debate, and vote on the proposed constitutional amendments and (b) demonstrated

its objection to the contents of the proposed amendments in SB 106 and the manner in which they were brought before the General Assembly. Therefore, the interests of the Democratic Senate Intervenors are not adequately represented by the existing parties in this litigation or the proposed Republican intervenors.³

21. Third, the Democratic Senate Intervenors have not unduly delayed in making this Application nor will their intervention delay, embarrass, or prejudice the trial or adjudication of rights of the parties. Petitioners filed their Application on July 28, 2022, and the Democratic Senate Intervenors filed the present Application thirteen (13) days thereafter. Respondent General Assembly has not filed an Answer or other responsive pleading, although they have indicated they do not oppose the Republican Senate and House Caucuses applications to intervene. The Democratic Senate Intervenors, like Petitioners, similarly seek to adjudicate this matter as swiftly as possible; thus, they will not delay a final-merits decision if granted intervention. See Pa. R. Civ. P. 2329(3).

22. Finally, if permitted to intervene, the Democratic Senate Intervenors will timely file a response to the Application. See Pa. R. Civ. P. 2328(a); see also Pa. R.A.P. 3309(b).

³ For the reasons stated at footnote 1, *supra*, it is likely that Respondent General Assembly will not represent the interests of Democratic Leader Costa and the Democratic Senate Caucus. Instead, counsel for the General Assembly likely will support the position advanced by the Republican Senate and House Caucuses in their applications for intervention.

WHEREFORE, Democratic Senate Leader Jay Costa and the Democratic Senate Caucus respectfully request that this Court grant their Application to intervene as a party in this matter or otherwise recognize that they are already a party with standing to participate in this litigation.

Respectfully submitted,

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Dated: August 10, 2022

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

I, Amy L. Rosenberger, do hereby certify that I have served the foregoing Emergency Application for Leave to Intervene on Behalf of Senator Jay Costa, Democratic Leader of the Pennsylvania Senate, and the Pennsylvania Senate Democratic Caucus, via the Court's PACFile system which service satisfies the requirements of Pa.R.A.P. 121:

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