

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 CD 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

**MEMORANDUM OF LAW IN SUPPORT OF
PETITION TO INTERVENE BY SPEAKER OF THE PENNSYLVANIA
HOUSE OF REPRESENTATIVES BRYAN CUTLER AND
MAJORITY LEADER OF THE PENNSYLVANIA
HOUSE OF REPRESENTATIVES KERRY BENNINGHOFF**

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Speaker of the Pennsylvania House of Representatives Bryan Cutler (“Speaker Cutler”) and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff (“Leader Benninghoff”; collectively the “House Leaders”) hereby file this Memorandum of Law supporting their Petition to Intervene under Pa. R.C.P. 2328 in the above-captioned declaratory judgment petition (the “Petition”) filed by the Secretary of the Commonwealth of Pennsylvania, Kathy Boockvar (“Petitioners”) docketed in the Supreme Court of Pennsylvania at 149 MM 2020.

As set forth in detail below, the House Leaders meet the requirements for intervention under Pa. R. Civ. P. 2328 and seek to protect their exclusive authority, as legislators in the Pennsylvania General Assembly (the “General Assembly”), of legislating for elections in Pennsylvania, and suspending any laws relating to elections, which this case could usurp. The House Leaders show as follows:

I. PRELIMINARY STATEMENT

1. This case is yet another in a seemingly never-ending string of cases where parties are asking the courts to bypass the legislative process and rewrite election laws in Pennsylvania. What is more, here, the Court is considering an issue of statutory interpretation regarding election laws passed by the Pennsylvania General Assembly (“General Assembly”). If anyone is to add color on the statutory interpretation of an election law, it is the House Leaders, who are members of the

body, the General Assembly, that passed the laws that are at issue in this case. The House Leaders have an enforceable interest that is implicated by this case, and they should be permitted to intervene as a matter of right.

2. One of the aforementioned cases, *Disability Rights Pa., v. Boockvar* (the “*Disability Rights* case”), was dismissed with prejudice by this Court on May 15, 2020. 2020 WL 2820467 (Pa. 2020).

3. Speaker Cutler and Majority Leader Benninghoff have been permitted to intervene in two other ongoing election cases—*Crossey v. Boockvar*, No. 108 MM 2020 (the “*Crossey* case”), and *NAACP Pennsylvania State Conference v. Boockvar*, No. 364 MD 2020 (the “*NAACP* case”).¹

4. Despite the petitioners in the *Pennsylvania Democratic Party, et al. v. Boockvar et al.*, 238 A.3d 345 (Pa. 2020) (“*PA Dem* case”) not opposing the House Leaders' Intervention Application and despite this Court granting the Pennsylvania Senate's Intervention Application, this Court inexplicably denied the House Leaders' Intervention Application, not based upon the merits, but principally because the

¹ This Court granted the House Leaders’ application to intervene on August 21, 2020 in the *Crossey* case. *Crossey v. Boockvar*, No. 108 MM 2020, Order (Pa. filed August 21, 2020). Likewise, Judge Brobson granted the House Leaders’ application to intervene in the *NAACP* case on August 24, 2020. *NAACP Pennsylvania State Conference v. Boockvar*, No. 364 MD 2020, Memorandum and Order (Pa. Commw. Ct. filed August 24, 2020) (citing *Fumo v. City of Philadelphia*, 972 A.2d 487 (Pa. 2009)). This Court never ruled on the House Leaders’ petition to intervene in *Disability Rights* because the Court dismissed the case and found the House Leaders’ petition to intervene to be moot.

House Leaders' Application was allegedly mooted based upon the Court's Order in that case.

5. The *PA Dem* case is now pending before the Supreme Court of the United States on a writ of certiorari regarding this Court's decision ("*PA Dem* decision"), which extended the deadline for mail-in and absentee ballots to be received by three-days irrespective of if the ballots had a postmark or illegible postmark.

6. The *PA Dem* decision is of particular note because it is inconsistent with a growing number of appellate decisions across the country wherein courts are reversing decisions that extended the deadline for mail-in and absentee ballots.

7. Now again, a Pennsylvania court is being asked to consider a fundamental rewrite of election laws that have already been considered and passed by Pennsylvania legislators, including the House Leaders.

8. As in *Crossey* and *NAACP*, this Court is considering questions that could usurp the House Leaders' interests in legislating Pennsylvania election rules and procedures, including any interpretation of those election laws.

9. Indeed, this case could change the election laws that have already been passed, in part, by the House Leaders, potentially allowing for a precedent to be established that House Leaders' authority to so legislate can be usurped without legislators even having an opportunity to defend this authority.

10. The House Leaders have an enforceable interest that may be adversely affected by the relief sought in this case, and no reasons exist for refusing to allow them to intervene. The House Leaders should be permitted to intervene as a matter of right.

II. BACKGROUND

11. On October 29, 2019, the Pennsylvania House of Representatives (“Pennsylvania House”) and the Pennsylvania Senate passed a bill that would become Act 77 (“Act 77”); it updated Pennsylvania’s election code, which had not been significantly revisited and reformed for more than 80 years. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). Two days later, on October 31, 2019, Pennsylvania Governor Tom Wolf signed Act 77 into law.

12. The consideration and passage of Act 77 involved comprehensive and collective drafting, negotiation, and effort by the Pennsylvania House. The Pennsylvania House carefully considered, and debated, the contents of Act 77. Among other changes, Act 77 modified laws relating to mail-in voting and election deadlines.

13. Since then, the Pennsylvania House has passed three additional election bills that have since been signed into law: to fine-tune Act 77 (Act 94 of 2019); to pass certain modifications to the Election Code to allow for the conduct of the 2020 Primary Election during the COVID-19 pandemic (Act 12 of 2020); and most

recently, to require the Secretary of the Commonwealth to publish a report on the 2020 Primary Election (Act 35 of 2020), which included a data analysis of the recent reforms of Act 77 of 2019 and Act 12 of 2020, in order to allow for additional fine-tuning of the Election Code, should it prove necessary. 2019 Pa. Legis. Serv. Act 2019-94 (H.B. 227) (West); 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West); 2020 Pa. Legis. Serv. Act 2020-35 (H.B. 2502) (West).

14. Despite having the exclusive authority to legislate and suspend election laws, including the ones that are being considered and may be changed in this case, no member of the General Assembly, nor the General Assembly as a body, was named as a party in this case. *See* Petition.

15. The House Leaders submit the Appellee Brief, which they seek to file in this case, as **Exhibit “A”** to their accompanying Petition to Intervene.

III. THE HOUSE LEADERS HAVE A RIGHT TO INTERVENE

16. Under Pennsylvania law, a party has an absolute right to intervene in a legal proceeding if it satisfies any one of the categories enumerated in Pa. R. Civ. P. 2327. *See id.*; Pa. R. Civ. P. 2329; *see also Larock v. Sugarloaf Township Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

17. Pa. R. Civ. P. 2327 states that intervention *shall* be permitted if a person not a party to the underlying case “(3) . . . 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.” *Id.* (emphasis added).

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. *Harrington v. Philadelphia City Employees Fed. Credit Union*, 364 A.2d 435 (Pa. Super. Ct. 1976).

19. The grant of intervention is mandatory where the intervenor satisfies one of the four bases set forth in Pa. R. Civ. P. 2327. *Larock v. Sugarloaf Township Zoning Hearing Board*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999) (“if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary . . .”) (internal citations omitted).

20. Pennsylvania courts have established “that the inquiry to determine whether a party has standing to initiate litigation is different than the inquiry to determine whether a party can intervene in existing litigation.” *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Commw. Ct. 2019); *Allegheny Reproductive Health Ctr. v. Pennsylvania Dep’t of Human Servs.*, 225 A.3d 902, 909 (Pa. Commw. Ct. 2020) (“There is a difference between personal standing and legislative standing”).

21. Indeed, “[s]tanding to file a formal complaint requires the moving party to have a direct, immediate, and substantial interest in the subject matter of the

controversy. . . . Conversely, a person seeking to intervene in a proceeding need have only an ‘interest of such nature that participation . . . may be in the public interest.’” *Sunoco Pipeline*, 217 A.3d at 1288-1289 (citation omitted).

22. While the test for standing to initiate litigation is stricter than it is to intervene, the principles of legislative standing are relevant to whether a legally enforceable interest exists. *Allegheny Reproductive Health Center*, 225 A.3d at 902.

23. Because the House Leaders have enforceable interests at play and could have been original parties to this case, they must be permitted to intervene as of right under both Pa. R. Civ. P. 2327 (3) and (4).

A. Determination of This Action Will Affect the House Leaders’ Legally Enforceable Interests in Legislating for Pennsylvania Elections.

24. The House Leaders have an enforceable interest to legislate election laws in Pennsylvania, whether creating new laws or suspending or repealing existing laws. Because the House Leaders are seeking to intervene into an existing case and are not filing an independent case, merely showing an enforceable interest is sufficient to intervene. Pennsylvania law affirms that the House Leaders’ exclusive authority to legislate and appropriate for elections not only rises to an enforceable interest to intervene, it also rises to a level to warrant independent standing to bring suit. Intervention is therefore mandatory here.

i. The House Leaders Have an Enforceable and Exclusive Interest in Legislating Election Laws, Which this Action Could Usurp.

25. Legislators can initiate litigation, and by extension, can intervene in cases where they “can demonstrate an injury to [their] ability ‘to act as a legislator.’”

Allegheny Reproductive Health Ctr. v. Pennsylvania Dep't of Human Servs., 225 A.3d 902, 909 (Pa. Commw. Ct. 2020) (citation omitted).

26. Pennsylvania courts have specifically found that negative impacts on a legislator’s “ability to participate in the voting process” qualify as legally enforceable interests sufficient to warrant intervention. *Id.* at 910, 913 (citation omitted); *see also Coleman v. Miller*, 307 U.S. 433, 438 (1939) (“[legislators] have

a plain, direct and adequate interest in maintaining the effectiveness of their votes.”); *Fumo v. City of Philadelphia*, 972 A.2d 487, 492 (Pa. 2009).

27. In *Fumo v. City of Philadelphia*, this Court found that a Pennsylvania city’s issuance of a license for the construction of a casino on a Pennsylvania river invaded individual legislators’ exclusive authority to regulate riverbeds. 972 A.2d 487, 501-3 (Pa. 2009).

28. This Court in *Fumo* held:

[w]e conclude that the state legislators have legislative standing The state legislators seek redress for an alleged usurpation of their authority as members of the General Assembly; ***aim to vindicate a power that only the General Assembly allegedly has***; and ask that this Court 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. (emphasis added).

29. Like regulating riverbeds, regulating elections in Pennsylvania is an exclusive legislative function that is left to legislators in the Pennsylvania House and Senate. *Abraham v. Shapp*, 400 A.2d 1249 (Pa. 1979) (“It is the responsibility of the legislature by appropriate legislation to provide the procedures for elections to public office.”).

30. Numerous provisions in the Pennsylvania and United States Constitutions affirm that the power to legislate election laws rests with Pennsylvania legislators.

31. Article VII, § 1 of the Pennsylvania Constitution states that the “laws requiring and regulating the registration of electors” are only to be enacted by members of the General Assembly. Article VII, § 14 takes it further, stating “[t]he **Legislature** shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence . . . may vote[.]” *Id.* (emphasis added). And Art. I, § 4 of the United States Constitution affirms that “[t]he times, places and manner of holding elections for Senators and Representatives, shall be prescribed **in each state by the legislature thereof**[.]” *Id.* (emphasis added).

32. This Court acknowledged “[t]he power to regulate elections is a legislative one, and has been exercised by the general assembly since the foundation of the government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v.*

Barlow, 60 Pa. 54 (Pa. 1869); *In re Guzzardi*, 99 A.3d 381 (Pa. 2014) (“[s]ubject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania”).

33. Affirming legislators’ exclusive authority to regulate elections, this Court went so far as to say that the “the judiciary should act with restraint, in the election arena, subordinate to express statutory directives.” *In re Guzzardi*, 99 A.3d 381 (Pa. 2014).

34. Moreover, Art. I, § 12 of the Pennsylvania Constitution establishes that only legislators have the power to suspend laws in Pennsylvania. *See also Wolf v. Scarnati*, 104 MM 2020 (Pa. filed July 1, 2020) (“The suspension of statutes like the amendment, repeal, or enactment of statutes, is a legislative action.”).

35. State law can solely be created, suspended, repealed or modified by the General Assembly. *In re Guzzardi*, 99 A.3d at 381; PA. CONST. art. I, § 12 (“No power of suspending laws shall be exercised unless by the Legislature or by its authority.”); PA. CONST. art. VII, § 1; PA. CONST. art. VII, § 14.

36. The Court is considering “[w]hether, as a matter of statutory construction pursuant to Pennsylvania law, the Commonwealth Court erred in reversing the trial, which concluded that Petitioner City of Philadelphia Board of Elections’ regulations

regarding observer and representative access complied with applicable Election Code requirements.” *See* November 9, 2020 Order.

37. The questions before the Court explicitly involve issues of statutory construction regarding election laws, which can only be created by the Pennsylvania legislature. The House Leaders have an enforceable interest in protecting their ability to legislate election laws in Pennsylvania and ensuring those laws are properly interpreted and applied.

38. Not only do the questions before the Court implicate the House Leaders’ exclusive authority to make election laws in Pennsylvania, they further potentially turn Pennsylvania courts into legislatures, which is constitutionally unsound. Pa. Const. art. VII, § 14; U.S. Const. Art. I, § 4; *Council 13 v. Commonwealth*, 986 A.2d 63, 74 (Pa. 2009) (“no branch [of the government] should exercise the functions exclusively committed to another branch.”).

39. Indeed, “the power of courts to formulate pronouncements of public policy is sharply restricted; otherwise they would become judicial legislatures rather than instrumentalities for the interpretation of law. Generally speaking, the Legislature is the body to declare the public policy of a state and to ordain changes therein.” *Mamlin v. Genoe (City of Phila. Police Beneficiary Ass’n)*, 17 A.2d 407, 409 (Pa. 1941).

40. The questions before the Court implicate at least a significant diminution, and at worst a complete upheaval, of the House Leaders' authority to legislate and suspend laws governing elections. *Fumo*, 972 A.2d at 501 (“[t]he standing of a legislator . . . to bring a legal challenge has been recognized in limited instances . . . to protect a legislator’s right to vote on legislation . . . [or] in actions alleging a diminution or deprivation of the legislator’s . . . power or authority.”).

41. Either way, determination of this action affects the House Leaders' legally enforceable interests to pass, modify, repeal and suspend election laws in Pennsylvania, showing they *shall* be permitted to intervene into this case as a matter of right and that they have standing to do so. *Fumo*, 972 A.2d at 502 (“the claim reflects the state legislators’ interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, falls within the realm of the type of claim that legislators, qua legislators, have standing to pursue.”).

42. Individual legislators, as opposed to the General Assembly as a whole, are the proper intervenors to protect against encroachment of legislative authorities. Countless Pennsylvania cases have affirmed this legal principle by allowing individual legislators to intervene in cases affecting their legislative authority, including in other recent election cases. *Crossey v. Boockvar*, No. 108 MM 2020, Order (Pa. filed August 21, 2020); *NAACP Pennsylvania State Conference v. Boockvar*, No. 364 MD 2020, Memorandum and Order (Pa. Commw. Ct. filed

August 24, 2020) (citing *Fumo v. City of Philadelphia*, 972 A.2d 487 (Pa. 2009); *Fumo*, 972 A.2d at 502 (finding six individual legislators had standing to protect authority to regulate riverbeds); *Allegheny Reproductive Health*, 225 A.3d at 913 (allowing eighteen (18) members of the Pennsylvania State Senate and eight members of the Pennsylvania House of Representatives to intervene); *Leach v. Commonwealth*, 118 A.3d 1271, 1273 n.2 (Pa. Commw. Ct. 2015) (President of Senate individually allowed to intervene in constitutional challenge to legislation); *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 112 n.3 (Pa. Commw. 1998) (Speaker of House and President of Senate individually granted leave to intervene in matter concerning constitutionality of enactment of legislation).

43. Taking this further, Pennsylvania courts have affirmed that “[s]tanding for legislators claiming an institutional injury is no different than traditional standing” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (holding there is no special category for legislative standing). In traditional cases, an individual does not have to intervene as a general body—corporation, club, partnership, etc.—for impingement of interests specific to the individual. If the individual possesses an interest that will be adversely affected by a lawsuit, then he can intervene as a matter of right. *See Keener v. Zoning Hearing Bd. Of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw. Ct. 1998) (“The right to intervention should be accorded to anyone having

an interest of his own which no other party on the record is interested in protecting”). It is no different for legislators. *Markham*, 635 Pa. at 298.

44. The House Leaders, as individual legislators, are permitted to intervene as a matter of right in this case as they have enforceable interests that may be adversely affected by the questions implicated in this case.

B. The House Leaders Could Have Joined as an Original Party in the Action or Could Have Been Joined Herein.

45. Pennsylvania courts routinely find that persons with special interests implicated in an action could have joined as original parties. *Appeal of Denny Bldg. Corp.*, 127 A.2d 724 (Pa. 1956) (finding that intervention is appropriate when parties “have an obvious special interest apart from that of the general public which would certainly have justified their joining as original parties in the action”).

46. As is shown above, the House Leaders have a special interest in this action. *See Harrington v. Philadelphia City Employees Federal Credit Union*, 364 A.2d 435, 441 (Pa. Super. Ct. 1976) (holding that candidates “could have been an original party or could have been joined in the action . . . [because they] had interests which would be drastically affected by the outcome of the equity action”).

47. As such, the House Leaders could have joined as original parties in this action, and, in fact, have been named as original respondents in numerous cases seeking to alter laws, including those relating to elections, that the General Assembly passed.

48. For example, in both *League of Women Voters v. Commonwealth* and *Adams Jones v. Boockvar*, then-Speaker Mike Turzai was named as an original respondent. 178 A.3d 737 (Pa. 2018); No. 717 MD 2018. *League of Women Voters* questioned the constitutionality of and sought to change a redistricting plan passed by the General Assembly, and the *Adams Jones* case questioned the constitutionality of and sought to change election laws passed by the General Assembly. *Id.*

49. *Erfer v. Commonwealth* is another case wherein one of Speaker Cutler's predecessors, Matthew J. Ryan as Speaker of the Pennsylvania House, was named as an original respondent in a case questioning the constitutionality of and seeking to change a federal congressional district map. 568 Pa. 128 (Pa. 2002).

50. The House Leaders could have been joined as original parties in this action, and, as these cases show, typically are joined. The instant action implicates the statutory interpretation of election laws duly considered and passed by the House Leaders, and could ultimately change and suspend these elections laws.

51. The issues to be decided directly affect the House Leaders' interest to act as legislators. Therefore, House Leaders must be allowed to intervene as a matter of right.

C. None of the Reasons Allowing for Refusal of the Petition to Intervene Exist.

52. The House Leaders have established they are permitted to intervene in this case. Given this showing, Rule 2329 provides for only three reasons that could allow

refusal of the House Leaders' right to intervene in this case and none of them are implicated here. Pa. R. Civ. P. 2329.

53. First, the House Leaders' defense is not in subordination to and in recognition of the propriety of the action because the House Leaders seek to defend their legislative authority that is sought to be impinged by this lawsuit and House Leaders do not support the averments in the Petition.

54. Second, the House Leaders' interests are not already adequately represented by any Respondent or proposed-intervenor in the case because the House Leaders' interests in legislating for elections are only possessed by them individually and no other party can adequately represent these interests. *Shapp*, 391 A.2d at 607 (allowing intervention based partly on finding that "the General Assembly cannot delegate its legislative powers" and thus has the unique authority to defend them). Indeed, the House Leaders are uniquely situated as they are in the legislative body that considered and passed the laws that are to be interpreted by the Court. No other current party in this case is in this position, and, thus, no other party can offer the value to the Court that the House Leaders can nor can or will protect the House Leaders' unique interests to pass laws governing elections in Pennsylvania.

55. Even more, paralleling *Allegheny Reproductive Health*, the House Leaders' interests as legislators are not adequately represented by the Respondents, who are in the executive branch. 225 A.3d at 913. "An executive branch agency is simply not

in a position to represent Proposed Intervenors' interest in the exercise of legislative power under Article III of the Pennsylvania Constitution." *Id.* A direct challenge to exclusive legislative functions implicates an interest unique to legislators.

56. Furthermore, the political and policy differences between the executive and legislative branches demonstrate that the executive branch Respondents are "simply not in a position to represent" the House Leaders. *Id.*

57. Finally, the House Leaders have not unduly delayed in filing this intervention petition, and it will not unduly delay, embarrass or prejudice the trial, or adjudication of the rights of the parties, because the House Leaders are filing this intervention petition within the deadline set for responses, and before any similar interventions have been ruled upon. The House Leaders' presence in this case will simplify this action and is necessary, as they will bring before the Court arguments and law that otherwise would not be present.

58. There is no basis allowing for refusal of the House Leaders' right to intervene into this case.

WHEREFORE, for the foregoing reasons, the House Leaders respectfully request that the Court grant their Petition to intervene and enter the proposed order attached as **Exhibit "B"** to the accompanying petition, granting the House Leaders' request to intervene in this action, and grant such other relief as this Court deems just and proper.

Dated: November 13, 2020

Respectfully submitted,

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