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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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.

PETITIONERS' ANSWER TO APPLICATIONS TO INTERVENE FILED BY LEADER WARD AND SENATE REPUBLICAN CAUCUS AND BY LEADER BENNINGHOFF AND HOUSE REPUBLICAN CAUCUS

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The constitutionality of Senate Bill 106 of 2021 ("SB 106") and, specifically, whether its multi-faceted, far-reaching proposals to amend the Pennsylvania Constitution strictly conform to the mandatory requirements in Article XI, § 1, is of immediate public importance. Voting on SB 106 in the General Assembly is complete. The joint resolution passed both houses on July 8, 2022. Under settled precedent, legislators' interest in SB 106 as legislators ended there and consequently they lack standing to participate as parties or intervenors seeking to defend the constitutionality of SB 106. *See Robinson Twp. v. Commonwealth*, 84 A.3d 1054, 1055 (Pa. 2014) (*per curiam*); *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016). For this reason, and because they are adequately represented in this matter by Respondent General Assembly, the applications to intervene filed by Majority Leader Kim Ward and Majority Leader Kerry Benninghoff and their respective caucuses (collectively, "Proposed Intervenors") should be denied.

Proposed Intervenors' Interest in SB 106 as Legislators Ended When They Cast Their Votes.

The applications filed by Leader Ward and the Senate Republican Caucus and by Leader Benninghoff and the House Republican Caucuses are substantively the same. They seek to intervene under Pennsylvania Rule of Civil Procedure 2327(3) and (4) which permit intervention, respectively, where the proposed intervenor could have joined or been joined as an original party or where the determination of the

action may affect a legally enforceable interest of the proposed intervenor. Pa. R. Civ. P. 2327(3), (4). The Proposed Intervenors cannot satisfy either requirement.

With respect to Rule 2327(3), the Proposed Intervenors could not have joined or been joined as parties because their interest in SB 106 as legislators ended when they cast their votes.[1] As this Court has made clear, "legislative standing is appropriate only in limited circumstances." *Markham*, 136 A.3d at 145. "Standing exists 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 (citations omitted). By contrast, "a legislator has no legal interest 'in actions seeking redress for a general grievance about the correctness of governmental conduct'" and, as a result, cannot intervene to "defend the constitutionality" of a legislative enactment. *Robinson Twp.*, 84 A.3d at 1055 (citing *Fumo v. City of Philadelphia*, 972 A.2d 487, 501 (Pa. 2009)).

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[1] The requests by the Senate Republican Caucus and House Republican Caucus to intervene also fail because a caucus is not a "person" that can seek intervention under Rule 2327 to defend previously-enacted legislation. *See Disability Rights Pa. v. Boockvar*, 234 A.3d 390, 393-94 (Pa. 2020) (Wecht, J., concurring statement) ("Our foundational Charter confers no authority on individual legislators or caucuses within each respective chamber to act on behalf of the General Assembly or to substitute their interests for the Commonwealth.").

The Proposed Intervenors are exclusively in the latter category. They do not claim that they were inhibited from proposing, voting on or enacting legislation,[2] rather their interest in this matter stems from their status as current leaders in the 206th Session of the General Assembly and their desire to defend votes cast during the 206th Session in favor of SB 106. Leaders Ward and Benninghoff contend that they could have joined as parties because they are among "the highest ranking officials" in the General Assembly representing Republican members who voted in favor of SB 106 and because their caucuses include the members who "control the legislative calendar." Ward Appl. ¶¶ 8-10; Benninghoff Appl. ¶¶ 9-13.[3] Even if the Proposed Intervenors were assured of majority control in the next General Assembly, their mere status as legislators and leaders is insufficient to confer party

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[2] To the extent Proposed Intervenors are claiming that the relief sought in this action affects their ability to vote on second passage of the constitutional amendments, this is not a reason to allow intervention. The relief sought in this matter is an injunction barring further publication and action on the constitutionally defective SB 106, including presentation of the same defective joint resolution for second passage by the next General Assembly. An interest in defending the alleged constitutionally defective legislative enactment does not give rise to legislative standing. *Robinson Twp.*, 84 A.3d at 1055.

[3] The Proposed Intervenors claim that they have "the power to control the legislative calendar regarding . . . future resolutions concerning the same subject matter," Ward App. ¶ 10; Benninghoff App. ¶ 13, but this may not be borne out by future events. Pursuant to Article XI, § 1, any subsequent vote on the constitutional amendments in SB 106 will be by "the General Assembly next afterwards chosen," which may or may not be comprised of Republican majorities.

standing to defend previously-enacted legislation. Controlling precedent dictates that legislators have no standing to participate as parties or intervenors seeking to defend the constitutionality of a legislative enactment. *See, e.g.*, *Robinson Twp.*, 84 A.3d at 1055 (President Pro Tempore of Senate and Speaker of House lack standing to intervene in legal action challenging constitutionality of a legislative enactment); *Markham*, 136 A.3d at 145 ("[T]he 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."); *Fumo*, 972 A.2d at 502 (senators and representatives lack standing to bring claim challenging way in which statute is implemented because such claim "does not demonstrate any interference with or diminution in the state legislators' authority as members of the General Assembly").

The Proposed Intervenors argue in the alternative that, as the majority party and its leaders, they "have a legally enforceable interest in defending the General Assembly's constitutional authority" which "will be substantially affected" if SB 106 is invalidated. Ward Appl. ¶ 11; Benninghoff Appl. ¶ 15. This same argument was squarely rejected in *Robinson Twp.* Like the Proposed Intervenors, the President Pro Tempore of the Senate and the Speaker of the House sought leave to intervene under Rule 2327(4) in *Robinson Twp.* "to defend the constitutionality" of challenged

legislative action. 84 A.3d at 1055. In a *per curiam* order, this Court affirmed the Commonwealth Court's decision to deny intervention, explaining:

> [T]he 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. 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 Act 13. As in *Fumo*, the interest articulated is not sufficient to support the party standing of legislators in a legal action challenging the constitutionality of a legislative enactment.

Id. Robinson Twp. is on all fours and compels the conclusion that the Proposed Intervenors lack the necessary interest to participate as parties or intervenors in this litigation challenging the constitutionality of SB 106.

The cases cited by the Proposed Intervenors are not on point and do not support intervention. *Precision Mktg.* was a contract dispute before the Board of Claims where the Senate Republican Caucus claimed a legal right to cancel a contract for computer services by virtue of sovereign immunity. *See Precision Mktg., Inc. v. Commonwealth of Pa., Republican Caucus of the Senate of Pa./AKA Senate of Pa. Republican Caucus*, 78 A.3d 667, 668-70 (Pa. Cmwlth. 2013). That case did not address intervention or legislative standing and consequently has no application here. In *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, 225 A.3d 902, 913 (Pa. Cmwlth. 2020), the Commonwealth Court granted members

of the General Assembly leave to intervene where "the object of th[e] litigation [wa]s to change the substance and manner by which the General Assembly can appropriate funds in the future for the Medical Assistance program." *Id.* at 911. The Application for Invocation of King's Bench Power in this action does not involve or implicate the power to appropriate and therefore *Allegheny Reprod. Health Ctr.* does not support intervention here.

In short, the Proposed Intervenors have failed to establish a right to intervene under Rule 2327(3) or (4). Under this Court's precedents, the Proposed Intervenors' interest in defending SB 106 is not sufficient to confer party standing and is not a "legally enforceable interest" sufficient to justify intervention. Accordingly, the Proposed Intervenors' applications to intervene should be denied for failure to satisfy Rule 2327.

Intervention Is Also Properly Denied for Each of the Reasons Itemized in Rule 2329.

While failure to satisfy one of the requirements in Rule 2327 requires denial of intervention without proceeding to the analysis in Rule 2329, the Proposed Intervenors fail the Rule 2329 analysis as well. Rule 2329 provides that intervention may be refused if (1) the claim or defense of the proposed intervenor is not subordinate to and in recognition of the propriety of the action; or (2) the interest of the proposed intervenor is already adequately represented; or (3) the proposed intervenor unduly delayed in applying to intervene or intervention will delay,

embarrass or prejudice the adjudication of the rights of the parties. Each of these considerations weighs against allowing intervention here.

First, it is not clear that Proposed Intervenors concede the propriety of this action as required by Rule 2329(1). The Proposed Intervenors failed to attach their proposed responses as required by Rule 2328(a), but they indicated an intention to file separate responses to the Application for Invocation of King's Bench Power, Ward Appl. ¶ 17; Benninghoff Appl. ¶¶ 3, 21, and Leader Benninghoff suggested that he will challenge the application as premature, Benninghoff Appl. ¶ 3. To the extent the Proposed Intervenors plan to seek summary dismissal of Petitioners' Application for Invocation of King's Bench Power, such a procedural maneuver would not be subordinate to or recognize the propriety of this action and for this reason intervention should be denied. *See Pierce Junior College v. Schumacker*, 333 A.2d 510, 513 (Pa. Cmwlth. 1975) (affirming decision to deny intervention where proposed intervenor sought to quash appeal because "[t]his is clearly not in subordination to nor in recognition of the propriety of the appeal").

Second, the interest in this matter claimed by the Proposed Intervenors is adequately represented by the General Assembly. While they concede the Senate Republican Caucus and House Republican Caucus are "subparts" of the Senate and House, respectively, Ward Appl. ¶ 10; Benninghoff Appl. ¶ 12, the Proposed Intervenors theorize that the General Assembly will not protect their interests

because many members voted against SB 106, Ward Appl. ¶ 15; Benninghoff Appl. ¶ 19. This argument lays bare the lack of legislative standing. The Proposed Intervenors are not seeking to vindicate the power or authority of their office or their right to vote, but rather to defend the legislation that they and most of their fellow caucus members voted for. This, of course, is not sufficient to support party standing for the Proposed Intervenors. *Robinson Twp.*, 84 A.3d at 1055. And, to the extent this action can be perceived as posing any risk of infringement on the constitutional authority of the legislature, any interest in preserving such authority is already adequately protected by the General Assembly which is separately represented before this Court.

Third, allowing intervention by the Proposed Intervenors may delay resolution of this matter to the substantial prejudice of Pennsylvania voters.[4] The Proposed Intervenors agree that this matter should be resolved "as swiftly as possible," Ward Appl. ¶ 16; Benninghoff Appl. ¶ 20, but Leader Benninghoff's submission suggests that he intends to use party status to challenge the propriety of

[4] As this Court recognized in addressing a challenge to a constitutional amendment under Article XI, § 1, "[t]he interest sought to be protected is the fundamental right to vote." *Bergdoll v. Kane*, 731 A.2d 1261, 1268 (Pa. 1999). It is this fundamental right of Pennsylvanians to be fairly apprised of and to vote on proposed amendments to the Constitution that Governor Wolf and Acting Secretary Chapman seek to protect and enforce through this proceeding, not their respective individual rights to vote on any particular amendment.

this action. This circumstance, together with Proposed Intervenors' lack of a legitimate basis to participate, foretells delay and thus warrants denial of intervention under Rule 2329(3).

Conclusion

In sum, Proposed Intervenors have failed to establish a basis for intervention under Rule 2327(3) or (4) and intervention is properly refused under Rule 2329(1), (2) and (3). The applications to intervene should be denied.

Respectfully submitted:

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Date: August 5, 2022

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.

/s/ Daniel T. Brier
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Date: August 5, 2022

PROOF OF SERVICE

I, Daniel T. Brier, hereby certify that the Answer to Applications To Intervene was served upon the following counsel via the Court's PACFile system which service satisfies the requirements of Pa.R.A.P. 121:

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