
IN THE SUPREME COURT OF PENNSYLVANIA

No. 102 MM 2022

DAVID BALL, et al.,

PETITIONERS,

BRYAN CUTLER, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, KERRY BENNINGHOFF, MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, THE PENNSYLVANIA HOUSE REPUBLICAN CAUCUS, JAKE CORMAN, PRESIDENT PRO TEMPORE OF THE PENNSYLVANIA SENATE, KIM WARD, MAJORITY LEADER OF THE PENNSYLVANIA SENATE, AND THE PENNSYLVANIA SENATE REPUBLICAN CAUCUS,

PROPOSED-INTERVENOR PETITIONERS,

v.

LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, et al.,

RESPONDENTS.

APPLICATION FOR RELIEF *NUNC PRO TUNC* TO PERMIT THE FILING OF RESPONDENTS ALLEGHENY, BUCKS, CHESTER, MONTGOMERY, AND PHILADELPHIA COUNTY BOARDS OF ELECTIONS' OPPOSITION TO PROPOSED-INTERVENOR PETITIONERS' MOTION TO INTERVENE

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I. INTRODUCTION

Respondents, Philadelphia, Chester, Delaware, Bucks, Montgomery, and Allegheny County Boards of Elections (“Respondents”), respectfully request this Court’s leave to file *nunc pro tunc* an Answer to the Application to Intervene (“Answer”) of Certain members of the Pennsylvania state legislature (hereinafter, “Proposed Intervenors”). The Answer is attached to this Application as Exhibit A.

Counsel for Respondents attempted to file the Answer in advance of this morning’s 8:30 a.m. filing deadline. Despite the Answer being ready for filing in advance of that deadline, the undersigned was unable to accomplish the filing as a result of a block in the PACFile system. Specifically, last night, in anticipation of this morning’s filing, the undersigned filed a Praecipe for Appearance, which had not yet been accept by the Prothonotary’s office as of this morning at 8:30 a.m. As a result, the PACFile system did not allow counsel to file Respondents’ Answer. Counsel took immediate efforts to rectify this situation with the Prothonotary’s Office. Specifically, counsel contacted the Prothonotary’s Office as soon as it opened at 9:00 a.m., at which point the Prothonotary’s Office promptly accepted the undersigned’s Praecipe for Appearance. Within minutes of that acceptance, the undersigned and was able to successfully file the Answer, shortly after 9:00 a.m. and less than an hour after the 8:30 a.m. deadline. As such, it is respectfully requested that this Court grant the present Application and permit the filing *nunc pro tunc*.

II. FACTUAL AND PROCEDURAL BACKGROUND

1. Proposed Intervenors filed the Application to Intervene on October 24, 2022.

2. This Court served correspondence related to that Application shortly thereafter on the same day, directing any and all Answers to the Application be filed by 8:30 a.m. on October 25, 2022. *See*, Exhibit B.

3. Undersigned Counsel for the Philadelphia County Board of Elections was recently retained in this matter. As such, counsel was unable to file a Praecipe for Appearance until the evening of October 24, 2022.

4. The Praecipe for Appearance of Hana Eisenstein was filed at 11:32 p.m. on October 24, 2022 but was not immediately accepted in light of the fact that the Prothonotary's Office was closed for the evening.

5. The PACFile system does not permit an attorney to file any document other than an Amicus Curiae Brief, an Application for Intervention, an Application for Leave to File Amicus Brief, and a Praecipe for Appearance if counsel's Praecipe for Appearance has not been process, approved, and docketed by the Prothonotary's office.

6. The undersigned counsel attempted to reach the Prothonotary's Office in advance of the 8:30 a.m. deadline, however, the Prothonotary's office does not open until 9:00 a.m.

7. Immediately upon opening, at precisely 9:00 a.m., counsel called the Prothonotary's Office to seek assistance in light of Respondents' physical inability to file the Answer. Counsel was instructed that the Praecipe for Appearance must be accepted to allow this filing, which was accomplished during this phone call.

8. The undersigned then filed the Answer immediately after the Praecipe for Appearance was processed and the PACFile system permitted the full range of filings.

9. Respondents made every attempt to file the Answer in advance of the Court's 8:30 a.m. deadline but were prevented from doing so by the PACFile system's limitation on filings by counsel who have not yet filed a Praecipe for Appearance.

III. LEGAL ARGUMENT

Pursuant to Pennsylvania Rule of Civil Procedure 205.4 relating to Electronic Filing and Service of Legal Papers, "[i]f a pleading or other legal paper is not accepted upon presentation for filing or is refused for filing by the electronic filing system, the prothonotary or the electronic filing system, as may be appropriate, shall immediately notify the party presenting the legal paper for filing of the date of presentation, the fact that the document was not accepted or refused for filing by the system, and the reason therefor." *Pa.R.C.P.* 205.4(e)(3). Further, "[i]f a party makes a good faith effort to electronically file a legal paper but it is not received, accepted

or filed by the electronic filing system, the court may order that the paper be accepted and filed *nunc pro tunc* upon a showing that reasonable efforts were made to timely present and file the paper.” *Pa.R.C.P.* 205.4(e)(4)(ii).

While a slightly different context, the commentary to Rule of Appellate Procedure 1925 is instructive on the nature of *nunc pro tunc* relief, generally:

In general, *nunc pro tunc* relief is allowed only when there has been a breakdown in the process constituting extraordinary circumstances. *See, e.g., In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 577 Pa. 231, 843 A.2d 1223, 1234 (Pa.2004) (“We have held that fraud or the wrongful or negligent act of a court official may be a proper reason for holding that a statutory appeal period does not run and that the wrong may be corrected by means of a petition filed *nunc pro tunc*.”)[.] Courts have also allowed *nunc pro tunc* relief when “non-negligent circumstances, either as they relate to appellant or his counsel” occasion delay. *McKeown v. Bailey*, 731 A.2d 628, 630 (Pa.Super.1999). However, even when there is a breakdown in the process, the appellant must attempt to remedy it within a “very short duration” of time. *Id.*; *Amicone v. Rok*, 839 A.2d 1109, 1113 (Pa.Super.2003) (recognizing a breakdown in process, but finding the delay too long to justify *nunc pro tunc* relief).

Pa.R.A.P. 1925(b)(2) cmt.

“The party seeking *nunc pro tunc* filing must show 1) that extraordinary circumstances, involving fraud or breakdown in the administrative process or non-negligent circumstances related to the party, its counsel or a third party, caused the untimeliness; 2) that it filed the document within a short time period after the deadline or date that it learned of the untimeliness; and 3) that the respondent will not suffer prejudice due to the delay.” *Bureau Veritas North Am., Inc. v. Dept. of*

Transp., 127 A.3d 871, 879 (Pa.Cmwlt. 2015), *citing Cook v. Unemployment Comp. Bd. of Review*, 543 Pa. 381, 671 A.2d 1130, 1131 (1996).

Here, Respondents attempted to file the Praecipe for Appearance significantly in advance of the filing deadline. Unfortunately, as the filing deadline was set before the Prothonotary's office opened for the day, Respondents were administratively prohibited from filing the Answer by PACFile until the Praecipe for Appearance could be processed. Immediately upon learning that Respondents would be unable to file the Answer by the deadline, counsel for Respondents called the Prothonotary's Office to seek assistance and ultimately filed the Answer immediately after the Praecipe was processed. Respondents made a good faith, reasonable effort to file the Answer in advance of the 8:30 a.m. deadline. In light of the short deadlines associated with the Application and the similar Answer filed by other Respondents, Proposed Intervenors cannot claim prejudice if this Court were to allow the filing of Respondent's Answer. As such, it is respectfully requested that this Court permit the filing of the Answer *nunc pro tunc*.

IV. CONCLUSION

Based on the foregoing, it is respectfully requested that the Application for Relief *Nunc Pro Tunc* be granted and Respondents be permitted to file the Answer to Proposed Intervenor's Application for Permission to Intervene.

Dated: October 25, 2022

Respectfully submitted,

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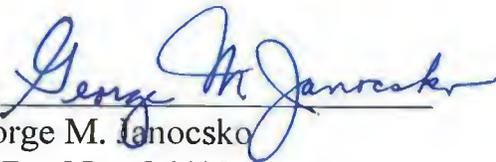
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**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

I certify that this filing complies with the provisions of the *Public Access Policy of the United 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.

Dated: October 25, 2022

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RULE 2135(d) CERTIFICATE OF COMPLIANCE

I certify pursuant to Pa.R.A.P. 2135(d) that this brief contains fewer than the 14,000 words, excluding the supplementary matter outlined in Pa.R.A.P. 2135(b), as determined using Microsoft Word for Office 365 software, and therefore complies with the word count limit set forth in Pa. R.A.P. 2135(a).

Dated: October 25, 2022

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RESPONDENTS.

[PROPOSED] ORDER

Now, this ____ day of October, 2022, upon consideration of the Application for Relief *Nunc Pro Tunc* of Respondents Philadelphia, Chester, Delaware, Bucks, Montgomery, and Allegheny County Boards of Elections to allow the filing of the Answer to the Application to Intervene filed by Speaker of the Pennsylvania House

of Representatives Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff, the Pennsylvania House Republican Caucus, President Pro Tempore of the Pennsylvania Senate Jake Corman, Majority Leader of the Pennsylvania Senate Kim Ward, and the Pennsylvania Senate Republican Caucus, it is hereby **ORDERED, ADJUDGED, and DECREED** that the Application is **GRANTED**.

It is further **ORDERED** that the Answer to the Application to Intervene be filed by _____.

SO ORDERED BY THE COURT:

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EXHIBIT A

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RESPONDENTS.

**RESPONDENTS ALLEGHENY, BUCKS, CHESTER,
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COUNTY BOARDS OF ELECTIONS OPPOSITION TO
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I. INTRODUCTION

Certain members of the Pennsylvania state legislature (hereinafter, “Proposed Intervenors”) seek to intervene in the present dispute on the basis that they are seeking to preserve their constitutional prerogatives to legislate Pennsylvania election rules and procedures and their ability to act as legislators. These purported aims have no bearing on the standard to intervene in civil litigation. Proposed Intervenors have no independent standing and cannot meet any of the provisions of Rule 2327 of the Pennsylvania Rules of Civil Procedure.

II. FACTUAL AND PROCEDURAL BACKGROUND

Respondents refer to and incorporate by reference the factual and procedural history outlined in Respondent Philadelphia County Board of Election’s Answer to Petitioners’ Application for Extraordinary Relief.

III. LEGAL ARGUMENT

a. Applicable Standard

Rule 2327 of the Pennsylvania Rules of Civil Procedure governs intervention in civil lawsuits. *See Markham v. Wolf*, 136 A.3d 134, 140 n.7 (Pa. 2016). Rule 2327 specifically provides:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if

(1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person

to indemnify in whole or in part the party against whom judgment may be entered; or

(2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or

(3) such person 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.

Pa. R.C.P. 2327. Neither Rule 2327(1) nor (2) are alleged to be applicable in this matter as they concern issues related to the imposition of liability or the disposition of property.

This Court has found “no question . . . that an intervening party must establish standing,” and that this requires a to be “aggrieved” by showing it “has substantial, direct, and immediate interest in the matter” *Markham*, 136 A.3d at 139; *see also Stilp v. Commonwealth*, 940 A.2d 1227, 1233 (2007) (holding that, in Pennsylvania, a party to litigation must establish as a threshold matter that her or she has standing to bring an action.). “[L]egislators enjoy standing when “a discernable and palpable infringement on their authority as legislators” is present, as compared to a general grievance about the correctness of governmental conduct, about which they do not have standing.” *Markham*, 136 A.3d at 140 (quoting *Fumo v. City of Philadelphia*, 972 A.2d 487, 501 (Pa. 2009)). While Proposed Interveners contend they have “an

absolute right to intervene,” under subsections (3) and/or (4) (Proposed Intervenors’ Motion at ¶¶24-25), their arguments are without merit and they lack standing to do so.

b. Proposed Intervenors Lack Legislative Standing to Intervene in this Matter.

Proposed Intervenors cannot meet the third subsection of Rule 2327 because they lack “a substantial, direct and immediate interest in the outcome of the litigation.” *Markham*, 136 A.3d at 140. Such interest, as explained by this Court, is animated by the threat that a “person . . . [is] negatively impacted in some real and direct fashion,” *Id.* This Court has made clear that the “[s]tanding for legislators claiming an institutional injury is no different than traditional standing.” *Id.*

“[L]egislative standing is available in limited circumstances.” *Sunoco Pipeline L.P. v. Dinninman*, 217 A.3d 1283, 1291 (Pa. Commw. Ct. 2019). As this Court explained, “[s]tanding 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.” *Markham*, 136 A.3d at 145 (internal citations and quotations omitted); *see also Fumo*, 972 A.2d at 345-46 (finding legislative standing to pursue only the claim affecting the alleged usurpation of legislators’ authority to vote on licensing, but not to assert the “legislators’

disagreement” with the how the City “exercise[ed] its statutory authority to license”).

In the present matter, Proposed Intervenors fail to demonstrate legislative standing. There is no challenge to their powers to vote, no challenge to their power to legislate, and no deprivation of authority to act as a legislator. Instead, the question presented here calls the Court to resolve a dispute over the meaning of a statute. In other words, this is “only a generalized grievance about the conduct of government that all citizens share.” *Fumo*, 972 A.2d at 502. Accordingly, the Proposed Intervenors cannot demonstrate standing to intervene.

Proposed Intervenors’ reliance on *Fumo* and *Allegheny Reproductive Health Ctrs.* is misplaced. In *Fumo*, the intervenors established that the dispute at issue directly impacted the legislature’s exclusive jurisdiction to regulate submerged lands in the Delaware River. 972 A.2d at 501. Likewise, in *Allegheny Reproductive Health Centers*, the court concluded that the challenge asserted in the litigation related directly to the legislature’s appropriation powers. *Allegheny Reproductive Health Ctrs. V. Penn. Dept. of Human Svcs.*, 225 A.3d 902, 911-12 (Pa. Commw. Ct. 2020). The Commonwealth Court concluded in *Allegheny* that the legislators were seeking to preserve their ability to propose and vote on funding litigation in the future. *Id.* at 913. No such interest is implicated in the present case.

This Court has repeatedly exercised its authority to interpret provisions pertaining to the Election Code. *See, e.g., In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020) (holding that failure to handwrite name or address not tantamount to material violation of Election Code); *In re James*, 944 A.2d 69 (Pa. 2008) (exercising review of Election Code related to filing deadline for objections). This case is no different: interpretation of the Election Code does not implicate “the state legislators’ interest in maintaining the effectiveness of the legislative authority and their vote.” *Sunoco Pipeline*, 217 A.3d at 1290. Rather, “interests in seeking enforcement of [state legislators’] preferred interpretation of [a statute] are no different from a private citizen’s interest in securing obedience to the law.” *Fumo*, 972 A.2d at 503.

If this Court were to accept Proposed Intervenors’ proposed definition of standing, the proverbial floodgates of litigation would open. As this Court has observed, “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).” *Markham*, 136 A.3d at 146. Here, as was the case in so many other interpretive challenges to the Election Code, there is simply no basis to allow legislators to intervene.

c. Proposed Intervenors Further Cannot Demonstrate a Legally Enforceable Interest That May be Affected by this Action.

Relatedly, Proposed Intervenors cannot make a proper showing under Rule 2327(4), which requires that a legally enforceable interest be affected. This issue is inextricably linked to the former because without an enforceable interest that may be affected, standing cannot be found. Proposed Intervenors' allegedly harmed interest relating to their legislative function does not rise to legal enforceability because their argument amounts to no more than challenging the interpretation of the provisions of the Election Code as they relate to dating requirements on a mail-in ballot envelope. In other words, Proposed Intervenors claim aggrieved status as legislators because of the impact of an enacted law, but the law is clear that their role (and standing) as legislators does not extend to such post-enactment activities.

Recently, this Court denied the League of Women voters' motion for intervention in *Gov. Wolf and Sec. Chapman v. PA General Assembly*, No. 73 MM 2022 (Pa. Sep. 12, 2022) (per curiam) where movants tried to lodge facial challenge of a Pennsylvania constitutional provision. The parallel is evident: just as the movants there challenged legislative provisions that reflected only generalized interest of the public, *see, e.g., Common Cause v. Pennsylvania*, 558 F.3d 249, 262 (3d Cir. 2009), Proposed Intervenors fail to show any nexus between one

interpretation of the Election Code and an alleged usurpation of their legislative function.

Proposed Intervenors generally suggest that this matter will affect their ability to legislate Pennsylvania elections. This is wrong. Nothing about this action will impact the ability of any legislator to propose new legislation or to vote on legislation related to elections in this Commonwealth. Again, this matter relates only to the interpretation of existing legislation. As this Court has held, once a legislator's vote on legislation is cast, "has been duly counted, and the bill is signed into law, his connection with the transaction as a legislator [is] at an end." *Fumo*, 601 Pa. at 498, citing *Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Commw. Ct. 1976). The *Wilt* court continued to hold that the legislator "retains no personal state...in the outcome of his vote which is different from the state each citizen has in seeing the law observed. He therefore has no standing to sue in his capacity as a legislator." *Id.*

IV. CONCLUSION

Based on the foregoing, it is respectfully requested that the Motion to Intervene be denied. It is evident that the Proposed Intervenors lack standing to join this action and, as such, cannot demonstrate the requisite showing under Pa. R. C. P. 2327.

Dated: October 25, 2022

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

I certify that this filing complies with the provisions of the *Public Access Policy of the United 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.

Dated: October 25, 2022

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RULE 2135(d) CERTIFICATE OF COMPLIANCE

I certify pursuant to Pa.R.A.P. 2135(d) that this brief contains fewer than the 14,000 words, excluding the supplementary matter outlined in Pa.R.A.P. 2135(b), as determined using Microsoft Word for Office 365 software, and therefore complies with the word count limit set forth in Pa. R.A.P. 2135(a).

Dated: October 25, 2022

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EXHIBIT B

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October 24, 2022

RE: Ball, D., et al, Pets v. Chapman, L., et al
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Intermediate Court Docket No:

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Wayne County Board of Elections
Wyoming County Board of Elections

This is to advise that the below listed item(s) was/were received in the above-captioned matter.

Application for Intervention, together with Memorandum in Support

A response, if any, is due by **8:30 a.m. on Tuesday, October 25, 2022.**

Very truly yours,

Office of the Prothonotary

/ad

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