

<p>Disability Rights Pennsylvania; SeniorLaw Center; Southeast Asian Mutual Assistance Associations Coalition, Inc. (SEAMAAC); Suzanne Erb; The Barristers' Association of Philadelphia, Petitioners</p> <p>v.</p> <p>Kathy Boockvar, in her Capacity as Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in her Capacity as Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State, Respondents,</p> <p>Senator Joseph B. Scarnati, III, President Pro Tempore; and Senator Jake Corman, Senate Majority Leader, Intervenor Respondents</p>	<p>IN THE SUPREME COURT OF PENNSYLVANIA</p> <p>No. 83 MM 2020</p>
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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE
BY JOSEPH B. SCARNATI III, PRESIDENT PRO TEMPORE OF
THE PENNSYLVANIA SENATE, AND JAKE CORMAN, MAJORITY
LEADER OF THE PENNSYLVANIA SENATE**

Proposed Intervenors, Joseph B. Scarnati, III, Pennsylvania Senate President Pro Tempore and Jake Corman, Senate Majority Leader (“Proposed Intervenors”), by and through the undersigned counsel, respectfully request to intervene as

respondents in the above-captioned proceeding, pursuant to Rule 2327 of the Pennsylvania Rules of Civil Procedure.

Senators Scarnati and Corman have been duly authorized to act in this matter by each of the members of the Senate Republican Caucus, which constitutes a majority of the Pennsylvania Senate as a whole. In addition to this Memorandum of Law, Proposed Intervenors submit their proposed Preliminary Objections to Petitioners' pleading, attached as Exhibit A, as well as a supporting Memorandum of Law.

BASES FOR PROPOSED INTERVENORS' APPLICATION

1. Pursuant to Pennsylvania Rule of Appellate Procedure 106, the practice and procedures relating to original jurisdiction matters are to be in accordance with the Pennsylvania Rules of Civil Procedure.

2. Pennsylvania Rule of Civil Procedure 2327 allows a person not named as a party to seek leave to intervene by filing an application with the court.

3. Proposed Intervenors seek to intervene pursuant to Pennsylvania Rule of Civil Procedure 2327(4), which states, in pertinent part, as follows:

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 . . .

(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.

4. Proposed Intervenors meet the requirements for intervention under Pa.R.C.P. 2327(4). They seek to protect the Pennsylvania Senate's exclusive constitutional rights, together with the Pennsylvania House of Representatives, of determining the times, places and manner of holding elections under Art. I, §4 of the U.S. Constitution and Art. II, §1 of the Pennsylvania Constitution and of suspending laws under Art. I, §12 of the Pennsylvania Constitution, which may be adversely affected or usurped by Petitioners' requested relief, as described below.

5. Petitioners seek a declaration that the "received-by" deadline for mail-in and absentee ballots is unconstitutional under Art. I, §§1, 5, 20, 26, and Art. VII, §14 as applied during the public health emergency related to COVID-19. Such relief would be contrary to Article I, §12 of the Pennsylvania Constitution, which states that "no power of suspending laws shall be exercised unless by the legislature."

6. Petitioners seek a declaration that the non-severability provision of Act 77 of 2019 is also unconstitutional as applied during the public health emergency related to COVID-19. Proposed Intervenors wish to be heard on the question whether the relief petitioners seek would void the entire Act and deprive voters of the ability to vote by mail, under the terms of the non-severability provision in §11 of the Act. Proposed Intervenors seek to prevent a judicial determination that any provision of

Act 77 of 2019 is invalid and to prevent the disruption of the statutory scheme for voting in Pennsylvania’s 2020 primary and general elections.

7. Petitioners seek an order prohibiting election officials from enforcing the “received-by” deadline for mail-in and absentee ballots, and requiring election officials to count mail-in and absentee ballots if received by 8 pm on Election Day; if postmarked on or before Election Day and delivered by the USPS within seven days after Election Day; or if the postmark is missing or illegible but delivered by the USPS by the day after Election Day. Such an order would alter the “received-by” deadline to a “posted-by” deadline. It would be contrary to Art. II §1 of the Pennsylvania Constitution, which vests the legislative power of the Commonwealth in the General Assembly, and Art I, §4 of the United States Constitution (the “Elections Clause”), which reserves to state legislatures and Congress the power of determining the times, places, and manner of holding elections for Senators and Representatives to Congress.

8. The United States District Court for the Middle District of Pennsylvania in *Corman v. Torres*, 287 F.Supp.3d 558, 573 (M.D.Pa. 2018), recognized that only the General Assembly has standing to assert its prerogatives under the Elections Clause.¹ See also *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187,

¹ Upon information and belief, the Speaker of the Pennsylvania House of Representatives is moving to intervene, placing the entire legislative branch before this court.

194 (1972) (granting intervention in a redistricting case to the Minnesota Senate because the district court orders directly impacted the Senate).

9. Proposed Intervenors also wish to defend the constitutionality of the Election Code outside the context of the Covid-19 pandemic and oppose the granting of any permanent relief on the theory that the “received-by” deadline poses an inherent burden on the right to vote.

10. The only government actions in response to the pandemic that affect the elections are the decisions of local election officials to close or consolidate polling places due to lack of poll workers and lack of locations available for rent. The only legislative action in response to the pandemic that affects the elections is Act 12 of 2020, which postponed the primary and permitted consolidation of polling places.

11. All the other problems of which petitioners complain are a result of unforeseen contingencies connected with the pandemic – voter preference for mail-in ballots over voting in person; uneven delays or failures in processing applications due to the sheer volume of requests; and uneven delays or failures in postal service.

12. If the requirements for who may intervene are met, intervention shall be granted, unless the petition to intervene is unduly delayed, the interest of the proposed intervenor is already adequately represented, or the intervenor does not

take the litigation as he finds it. Pa.R.C.P. 2329; *Appeal of the Municipality of Penn Hills*, 519 Pa. 164, 546 A.2d 50, 52 (1988).

13. The Proposed Intervenors have filed their motion to intervene promptly.

14. On information and belief, the named respondents do not take the same position as the Proposed Intervenors and will not adequately represent their interests.

15. Proposed Intervenors seek to intervene as respondents. They will assert defenses to petitioners' claims but will not raise claims against the named respondents that the petitioners have not raised.

16. Petitioners' case rests mainly on the effects of the pandemic on voting behavior. The Proposed Intervenors believe that the alleged burdens on the right to vote are not the result of the laws themselves, but are the result of the voters' and poll workers' reactions to the pandemic.

17. The relief petitioners seek is not limited to the named petitioners but would affect all voters, whether or not they are similarly situated or similarly burdened.

18. In such a situation, the proper mechanism for relief is legislative. The General Assembly has already taken steps to give voters more time to apply for, receive, and post their mail-in ballots by postponing the primary elections to June 2, 2020. See Act 12 of 2020, §1804-B(a). The Pennsylvania Senate has recently

held hearings on whether the primary elections should be postponed even further, and/or other necessary legislative actions taken to ensure a free and fair election.

19. If allowed to intervene, Proposed Intervenors intend to file the attached preliminary objections to petitioners' pleading for lack of standing.

20. Petitioner organizations are not voters and lack standing to seek relief.

Petitioner individual asserts no actual, direct harm and lacks standing to seek relief.

Conclusion

For the foregoing reasons, Proposed Intervenors respectfully request that the Court grant his motion to intervene.

Dated: May 6, 2020

Respectfully submitted,
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