IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Montgomery County Board of Elections and Bucks County Board of Elections, Petitioners	:	
v.	:	
Veronica Degraffenreid Acting Secretary of the Commonwealth of Pennsylvania, Respondent	:	No. 339 M.D. 2021 Heard: January 25, 2022

BEFORE: HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FIZZANO CANNON FILED: January 27, 2022

On October 1, 2021, the Montgomery County Board of Elections and Bucks County Board of Elections (Petitioners) filed a petition for review in this Court's original jurisdiction. The matter currently before the Court for disposition is the Petition to Intervene filed by Speaker of the Pennsylvania House of Representatives Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff, President Pro Tempore of the Pennsylvania Senate Jake Corman, and Majority Leader of the Pennsylvania Senate Kim Ward (Legislative Leaders).

In their petition for review, Petitioners aver that Pennsylvania courts ruled that ballots submitted without a dated Voter's Declaration should be counted in the 2020 General Election. *See In re Canvass of Absentee and Mail-in Ballots of*

November 3, 2020 Gen. Election, 241 A.3d 1058 (Pa. 2020). However, they maintain that a question remains as to how these ballots should be treated in future elections. As such, Petitioners seek to have this Court declare that ballot envelopes that have a signed but undated Voter's Declaration should be accepted for canvassing by county boards of election. Without the declaration, Petitioners claim that voters will be disenfranchised in future elections.

Section 1306(a) of the Pennsylvania Election Code (Election Code), Act of June 3, 1937, P.L. 1333, *as amended*, added by the Act of March 6, 1951, P.L. 3, 25 P.S. § 3146.6(a) (absentee ballots) and Section 1306-D(a) of the Election Code, added by the Act of October 31, 2019, P.L. 552, 25 P.S. § 3150.16(a) (mail in ballots), both provide, in pertinent part that, once marking his or her ballot, the absentee or mail-in voter shall

> then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. *The elector shall then fill out, date and sign the declaration printed on such envelope.* Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

(Emphasis added.)

Legislative Leaders state that the Supreme Court addressed the issue that is the subject of Petitioners' request for declaratory judgment in *In re November 3, 2020 General Election*. In that case, three Justices held that the "shall fill out, date and sign" statutory language was mandatory (Justice Dougherty, joined by then-Chief Justice Saylor and Justice Mundy), three Justices (Justice Donohue, joined by

now Chief Justice Baer and Justice Todd) held that it was not, while the seventh Justice, Justice Wecht, entered a concurring opinion concluding that the requirement to date and sign "is stated in unambiguously mandatory terms, and nothing in the Election Code suggests that the legislature intended that courts should construe its mandatory language as directory." 241 A.3d at 1079 (Wecht, J., concurring) (footnote omitted). As such, Justice Wecht opined that, in future elections he would treat the date and sign requirement as mandatory in both particulars, with the omission of either item sufficient to invalidate the ballot in question. Justice Wecht, however, cited to specific issues related to the 2020 General Election, and held that he would apply his interpretation only prospectively. As such, Justice Donohue's opinion was designated as the Opinion Announcing Judgment of the Court, and ballots contained in ballot return envelopes missing the elector's signature or date were not required to be set aside for purposes of *the 2020 General Election*.

Legislative Leaders also maintain that, pursuant to the "narrowest grounds" rule set forth by the United States Supreme Court in *Marks v. United States*, 430 U.S. 188 (1977), and adopted by the Pennsylvania Supreme Court in *Commonwealth v. Alexander*, 243 A.3d 177, 197 (Pa. 2020), when a case is decided and no single rationale enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those members of the Court who concurred in judgments on the narrowest grounds. According to Legislative Leaders, applying the *Marks* rule to this case reveals that the operative "narrowest grounds" opinion is not the Opinion Announcing the Judgment of the Court authored by Justice Donohue, which would have set aside the date and sign requirement altogether, but rather the significantly narrower concurrence of Justice Wecht, who agreed that the Election Code's requirement to date and sign "is stated in unambiguously mandatory

terms, and nothing in the Election Code suggests that the legislature intended that courts should construe its mandatory language as directory [and as such] *in future elections [after November 3, 2020], [he] would treat the date and sign requirement as mandatory* in both particulars, with the omission of either item sufficient without more to invalidate the ballot in question." *In re Nov. 3, 2020 General Election*, 241 A.3d at 1079 (Wecht, J., concurring), (emphasis added) (footnote omitted).

On June 1, 2021, Veronica Degraffenreid, then-Acting Secretary of the Commonwealth of Pennsylvania (Respondent),[1] through Deputy Secretary for Elections and Commissions, Jonathan Marks, issued guidance to the county boards of election noting the application of the Supreme Court's holding that in *future elections* a Voter's Declaration must be both signed and dated for the ballot to count. Legislative Leaders state that, ostensibly in response to this guidance, Petitioners filed the Petition for Review seeking a declaratory judgment from this Court as to the application of the statutes in question.

On October 26, 2021, Legislative Leaders filed a Petition to Intervene in this matter. Respondent filed an answer stating that she takes no position on Legislative Leaders' Petition to Intervene. However, Petitioners oppose intervention.

It is apparent that both Respondent and Legislative Leaders believe that the question of whether ballots missing a voter's signature or date should be set aside has been settled by the Supreme Court – they believe that the answer to this question is that they should be set aside in future elections. Petitioners believe that this question is still unsettled.

[1] On January 8, 2022, Leah M. Chapman was appointed Acting Secretary of the Commonwealth.

Pa.R.Civ.P. 2327 governs who may intervene in a civil action and provides 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
>
> (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.Civ.P. 2327. The corollary rule on intervention is found at Rule 2329, which provides that an application for intervention shall be granted if the allegations of the petition have been established and are found to be sufficient. Pa.R.Civ.P. 2329. However, the rule also provides that

> an application for intervention may be refused, if
>
> (1) the claim or defense of the petitioner is not in subordination 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.

Id.

Legislative Leaders state that, because of their status as legislative leaders, they have enforceable interests at play in this case and could have been joined as original parties to this case. As such, they argue that they must be permitted to intervene as of right under both Pa.R.Civ.P. 2327(3) and (4). Specifically, Legislative Leaders state:

> The Legislative Leaders have an enforceable interest to legislate for elections in Pennsylvania, whether creating new laws or suspending or repealing existing laws. Because the Legislative 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 Legislative 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.

(Memorandum of Law in Support of Intervention, pp. 8-9, ¶27). Legislative Leaders cite several cases which they assert support their argument that they are entitled to intervene. The first case they cite is *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 225 A.3d 902, 909 (Pa. Cmwlth. 2020), wherein this Court stated:

> There is a difference between personal standing and legislative standing, which difference this Court addressed in *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Cmwlth. 2019). Therein, we explained that personal standing requires a party to have a direct, immediate, and substantial interest in order to initiate litigation. *See William Penn Parking Garage, Inc. v. City of Pittsburgh*, . . . , 346 A.2d 269, 280 ([Pa.] 1975). Nevertheless, a legislator that lacks personal standing may be able to initiate litigation in his legislative capacity, where the legislator can demonstrate an injury to his ability "to act as a legislator." *Sunoco Pipeline*, 217 A.3d at 1291.

225 A.3d at 909. Legislative Leaders also cite the Supreme Court's decision in *Fumo v. City of Philadelphia*, 972 A.2d 487, 502 (Pa. 2009), wherein the Supreme Court stated that state legislators have standing when they "seek redress for an alleged usurpation of their authority as members of the General Assembly [and] aim to vindicate a power that only the General Assembly allegedly has."

Petitioners allege that Proposed Intervenors incorrectly interpret their Petition for Review as a request for a judicial suspension and rewriting of the Election Code. Further, Petitioners state that they seek to do no more than contest the interpretation of a statute passed by the legislature, and that allowing standing to intervene in such situations would not be in accordance with the Supreme Court's decision in *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016). In that case, the Governor issued an Executive Order concerning direct care health workers. The Executive Order stated that these workers could obtain a designated representative to discuss wages and benefits with the Secretary of Human Services. A group of individuals filed a petition for review in this Court's original jurisdiction asserting that the Executive Order improperly established organizational labor rights, and the legislative leaders at that time sought to intervene in this matter. Our Supreme Court ultimately determined that intervention was not proper and stated:

> Indeed, taking the unprecedented step of 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). Similarly, it would seemingly permit legislators to join in any litigation in which a court might interpret statutory language in a manner purportedly inconsistent with legislative intent.

Id. at 145. In summary, Petitioners rely on the Supreme Court's reasoning in *Markham* and argue that Proposed Intervenors cannot establish that a decision on the issue before this Court would usurp their legislative powers or that they have any other special interest in this case to intervene on the basis that they could have been named original parties to the action.

Legislative Leaders counter that it is Petitioners who are confused as to the nature of the relief they seek. Legislative Leaders assert that the question of whether, in a future election, ballot envelopes that are signed but undated should be counted was already adjudicated last year by the Supreme Court in *In re November 3, 2020 General Election*. Legislative Leaders assert that their intervention in this case is necessary because Petitioners are attempting to sidestep the binding precedent of *In re November 3, 2020 General Election*, and that

> [t]his desire to relitigate (potentially *ad infinitum*) *In re [November] 3, 2020 General Election* until the "right" result is achieved is why this case constitutes both a perilous attempt to sidestep the political process, and a "discernable and palpable infringement on the [Legislative Leaders'] authority to act as legislators[,"] thereby creating sufficient standing in this action for the Legislative Leaders to intervene in this case. *Fumo,* [972 A.2d at 501].

(Legislative Leaders' Reply, p.4). Legislative Leaders maintain that this case presents an important issue of public policy and the ability of the legislature to fulfill its duty to set forth procedures for elections, and that their intervention is necessary because no party has thus far stepped forward to defend the statutory text of the Election Code and the decision of the Supreme Court in *In re November 3, 2020 General Election.*

It is well settled that "a person who is not adversely impacted by the matter he or she is litigating does not enjoy standing to initiate the court's dispute resolution machinery." *Markham*, 136 A.3d at 140 (citing *William Penn Parking Garage*, 346 A.2d at 280-81. In *Markham*, the Supreme Court discussed numerous cases dealing with legislative standing from the Supreme Court, this Court, and the federal courts. The Court summarized these cases as follows:

> What emanates from our Commonwealth's caselaw, and the analogous federal caselaw, is that legislative standing is appropriate only in limited circumstances. 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, *see Wilt* [*v. Beal*, 363 A.2d 876 (Pa. Cmwlth. 1976)], or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator, *see Fumo* (finding standing due to alleged usurpation of legislators' authority to vote on licensing). These are injuries personal to the legislator, as a legislator. By contrast, a legislator lacks standing where he or she has an indirect and less substantial interest in conduct outside the legislative forum which is unrelated to the voting or approval process, and akin to a general grievance about the correctness of governmental conduct, resulting in the standing requirement being unsatisfied. *Id*. (rejecting standing where legislators' interest was merely disagreement with way administrator interpreted or executed her duties, and did not interfere with legislators' authority as members of the General Assembly).

Id. at 145. Applying the standard set forth above, the Supreme Court determined that the legislators should not be allowed to intervene, as they were not aggrieved because their interests in the underlying challenge to the Executive Order was too indirect and unsubstantial, as it did not in any way impact their ability to propose, vote on, or enact legislation. Instead, the interests of the legislators were more in the nature of a generalized grievance about the correctness of governmental conduct.

In this case, Petitioners are asking this Court to interpret a section of the Election Code. The relief sought in the Petition for Review is unrelated to the voting or approval process and, as such, this case appears to be very similar to *Markham*, where the Supreme Court stated that allowing intervention under the standard proposed by the legislative leaders "would seemingly permit legislators to join in any litigation in which a court might interpret statutory language in a manner purportedly inconsistent with legislative intent." *Id*. at 145. Furthermore, this Court does not believe that intervention by Legislative Leaders in this matter is appropriate because the relief sought by Petitioners in no way interferes with the power of Legislative Leaders to enact legislation related to the issue that is the subject of the Petition for Review, nor does the relief sought by Petitioners threaten to impair or deprive Legislative Leaders "of an official power or authority to act as a legislator." *Id*. Therefore, pursuant to *Markham*, Legislative Leaders' Petition to Intervene must be denied.

Additionally, although Respondent Secretary of the Commonwealth informed this Court that she takes no position on whether Legislative Leaders should be allowed to intervene, we acknowledge that, on June 1, 2021, Respondent, through Deputy Secretary for Elections and Commissions, Jonathan Marks, issued guidance to the county boards of election noting the application of the Supreme Court's holding in *In re November 3, 2020 General Election* and directed that, in *future elections* a Voter's Declaration must be both signed and dated for the ballot to be counted. Legislative Leaders take the same position on the issue of how ballots should be treated in future elections. As such, it appears that Legislative Leaders' interests are aligned with and already adequately represented by Respondent, such that intervention should be denied. *See* Pa.R.Civ.P. 2329(2) ("an application for

intervention may be refused, if . . . the interest of the petitioner [the party seeking to intervene] is already adequately represented."

Accordingly, Legislative Leaders' Petition to Intervene is denied.

s/Christine Fizzano Cannon
Christine Fizzano Cannon, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Montgomery County Board of Elections and Bucks County Board of Elections, Petitioners	:	
v.	:	
Veronica Degraffenreid Acting Secretary of the Commonwealth of Pennsylvania, Respondent	:	No. 339 M.D. 2021

O R D E R

AND NOW, January 27, 2022, upon consideration of the Petition to Intervene filed by Legislative Leaders Speaker of the Pennsylvania House of Representatives Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff, President Pro Tempore of the Pennsylvania Senate Jake Corman, and Majority Leader of the Pennsylvania Senate Kim Ward, and the answer filed by Petitioners Montgomery County Board of Elections and Bucks County Board of Elections, the Petition to Intervene is hereby DENIED.

s/Christine Fizzano Cannon
Christine Fizzano Cannon, Judge

Order Exit
01/27/2022