

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

WILLIAM PENN SCHOOL  
DISTRICT,  
et al.,

Petitioners,

v.

PENNSYLVANIA DEPARTMENT OF  
EDUCATION, et al.,

Respondents.

Docket No. 587 MD 2014

**UNOPPOSED APPLICATION FOR LEAVE TO INTERVENE OF HON.  
BRYAN D. CUTLER, LEADER OF THE REPUBLICAN CAUCUS OF THE  
PENNSYLVANIA HOUSE OF REPRESENTATIVES**

Pursuant to Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. No. 106 and 1531(b), and Pennsylvania Rules of Civil Procedure, Pa. R.C.P. No. 2326 through 2329, Bryan D. Cutler, the Leader of the Republican Caucus of the Pennsylvania House of Representatives and former Speaker of the House (“Proposed Intervenor”), hereby applies for leave to intervene in this matter in his official capacity as Leader of the House Republican Caucus.

The undersigned counsel represents that he has conferred with other counsel of record regarding their positions on this Application, and no party opposes the Application. Specifically, Senator Ward, in her official capacity of President *Pro Tempore* of the Pennsylvania Senate consents to this Application. Petitioners

disagree with various contentions and legal arguments made in the Application. However, for the purposes of efficiency and comity, they do not object to the intervention of Representative Cutler in his official capacity as Leader of the House GOP Caucus. The State Board of Education does not oppose the Application. The Executive Respondents take no position on this Application.

This case involves a constitutional challenge to the system of funding Pennsylvania public schools. Respondents include the Pennsylvania Department of Education, the Governor of Pennsylvania, in his official capacity; the Speaker of the Pennsylvania House of Representatives in his official capacity; the President *Pro Tempore* of the Pennsylvania State Senate, in her official capacity; and the Pennsylvania State Board of Education.

A trial on this matter was conducted before the Honorable Renee Cohn Jubelirer from November 12, 2021 through February 22, 2022. The case is currently awaiting disposition by the Court. At the time of trial, Proposed Intervenor was the Speaker of the House and actively defended the case, through his counsel Dilworth Paxson LLP. Proposed Intervenor submitted joint Proposed Findings of Fact and Conclusions of Law on May 2, 2022, together with then-Senate President *Pro Tempore* Jake Corman; submitted a post-trial brief on July 1, 2022; and, through his counsel, participated in oral argument on July 26, 2022. Additionally, Proposed

Intervenor and his predecessors as Speaker of the House, Michael C. Turzai (“former Speaker Turzai”) and Samuel H. Smith (“former Speaker Smith”), in their official capacities, have defended this case – both in this Court and the Pennsylvania Supreme Court – since shortly after it was filed in November 2014.

On January 3, 2023, Representative Mark Rozzi (“Speaker Rozzi”) was elected as Speaker of the Pennsylvania House of Representatives. By operation of Pa. R.A.P. 502(c), Speaker Rozzi became automatically substituted in place of Proposed Intervenor as a party respondent in this matter. Speaker Rozzi is of a different political party than the former Speakers who have previously acted as respondents in this case, in their official capacity, and it is currently unknown whether Speaker Rozzi will adopt the same legal positions or continue to defend this case at all.

As Leader of the House Republican Caucus, Proposed Intervenor has an interest in continuing to defend the constitutionality of the current school funding system, as well as participating in any remedial proceedings before this Court and/or in any appeal to the Pennsylvania Supreme Court, notwithstanding the fact that he has been substituted as a party respondent. If permitted to intervene in his official capacity, Proposed Intervenor would adopt the pleadings, briefs and arguments

previously submitted by him and his predecessor, former Speaker Turzai and former Speaker Smith, in their official capacities.

### **FACTUAL BACKGROUND**

1. Proposed Intervenor is a duly elected member of the House of Representatives (hereinafter, “the House”). He is the current Leader of the House Republican Caucus and the immediate-past Speaker of the House.

2. Upon assuming his position in the House, Proposed Intervenor, in accordance with Article VI, Section 3 of the Pennsylvania Constitution, took an oath that he would “support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth” and “discharge the duties of his office with fidelity.”

3. At the time the Petition was filed in this case, former Speaker Smith was named as a respondent in his official capacity.

4. On January 22, 2015, the Court entered an order granting the automatic substitution of former Speaker Turzai as a party respondent for former Speaker Smith pursuant to Pa. R.A.P. 502(c).

5. In 2020, after former Speaker Turzai’s resignation from the House, Proposed Intervenor was elected as Speaker and, on June 26, 2020, the Court granted the application to substitute then-Speaker Cutler, in his official capacity, as a party respondent in place of former Speaker Turzai.

6. Dilworth Paxson LLP initially entered its appearance in this case on behalf former Speaker Smith in November 2014 and has represented each of the former Speakers, in their official capacity, in this matter. Dilworth does not represent Speaker Rozzi.

7. Dilworth also initially entered its appearance on behalf of Joseph Scarnati in his official capacity as then-President *Pro Tempore* of the Pennsylvania Senate. In December 2017, Dilworth withdrew its appearance on behalf of the Senate President *Pro Tempore* and K & L Gates entered its appearance.

8. Article III, § 14 of the Pennsylvania Constitution (“Education Clause”) establishes in the General Assembly the authority and duty to “provide for the maintenance and support of a thorough and efficient system of public education.”

9. Petitioners in this case seek, among other things, declaratory and injunctive relieve that Pennsylvania’s public school financing arrangement violates the Education and Equal Protection Clauses of the Pennsylvania Constitution. [Petition for Review, ¶¶ 306, 315, 317]. Petitioners seek, among other things, to compel Respondents to “develop a school-funding arrangement that complies with the Education Clause and the Equal Protection Clause, to cease implementing a school-funding arrangement that does not assure that adequate, necessary, and sufficient funds are available to school districts to provide their students with an

equal opportunity to obtain an adequate education that will enable them to meet state academic standards and participate meaningfully in the economic, civic and social activities of our society.” [Id. at ¶ 321].

10. Because the named Respondents, by themselves, cannot implement a new school funding arrangement or appropriate additional funds to public education, Petitioners are in reality seeking relief not just from the named Respondents, but from the entire General Assembly.

11. Accordingly, the instant case “relates directly to the legislative power to appropriate.” *Allegheny Reproductive Health Center v. Pennsylvania*, 225 A.3d 902, 911 (Pa. Commw. 2020).

## **INTERVENTION STANDARD**

### **I. Proposed Intervenor is Entitled to Intervene Under the Pennsylvania Rules of Civil Procedure**

12. Proposed Intervenor has a right to intervene under Rule 2327 of the Pennsylvania Rules of Civil Procedure, which states that a person may be permitted to intervene when “such a person could have joined as an original party in the action or could have been joined therein.” Pa. R.C.P. 2327(3).

13. There are numerous examples, including this case, of the General Assembly and/or legislative leaders being sued over the passage of an alleged unconstitutional statute or when their appropriations power is called into question.

14. For instance, in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), the Commonwealth of Pennsylvania, the General Assembly and other legislative and administrative officials were sued for enacting an allegedly unconstitutional statute which resulted in purportedly gerrymandered voting districts. This action implicated a core legislative function and the General Assembly was joined as an original Defendant.

15. In *Stilp v. Commonwealth*, 974 A.2d 491 (2009), plaintiff sued the Commonwealth of Pennsylvania, the General Assembly and various individual members of the General Assembly over an allegedly unconstitutional receipt of compensation provided to members of the General Assembly in excess of the salary and mileage as provided in the Pennsylvania Constitution. This action challenged the General Assembly's authority to make certain appropriations to the legislature's internal operating budget.

16. In *City of Philadelphia v. Commonwealth*, 838 A.2d 566 (Pa. 2003), a plaintiff claiming unconstitutional procedural irregularities in the passage of a bill reorganizing governance of the Pennsylvania Convention Center sued a variety of governmental respondents in their official capacities, including the Speaker of the House, President *Pro Tempore* of the Senate, Minority Leader of the House and Minority Leader of the Senate.

17. While the above cases involved the General Assembly or legislative leaders as original respondents, this Court has permitted individual legislators to intervene in cases, like the present action, in which the General Assembly's power to control the Commonwealth's appropriations is at issue.

18. In *Allegheny Reproductive Health Center, supra*, this Court permitted eighteen members of the Pennsylvania Senate and eight members of the Pennsylvania House to intervene in an action challenging the constitutionality of Pennsylvania's Abortion Control Act, which prohibited the appropriation of state or federal funds for abortion services unless necessary to avert the death of the pregnant woman or when the pregnancy resulted from rape or incest. 225 A.3d at 905, 913. The Court held that "[t]he constitutional authority of the members of the General Assembly to control the Commonwealth's finances constitutes a legally enforceable interest that enables them to intervene and be heard before the Court rules in this manner." 225 A.3d at 913.

19. Petitioners in this matter claim that the General Assembly has fashioned an unconstitutional statutory appropriations scheme and request that the judiciary require that the General Assembly make certain appropriations. Petitioners could



have included and sued the General Assembly and/or the legislative leaders of all four caucuses as defendants due to the allegedly unconstitutional funding system.<sup>1</sup>

20. Therefore, the Proposed Intervenor satisfies the statutory requirements for intervention under Pa. R.C.P. 2327(3) and his Application should be granted.

## **II. Proposed Intervenor Possesses a Constitutional and Legally Enforceable Interest in the Outcome of the Matter**

21. Rule 2327 of the Pennsylvania Rules of Civil Procedure provides that “[a]t 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. No. 2327(4).

22. In determining whether, in their official capacities, members of the General Assembly have a “legally enforceable interest” in an action, Pennsylvania courts have drawn upon the principles governing legislative standing.

<sup>1</sup> Although Petitioners could have joined the leaders of all four legislative caucuses as parties to this case, Proposed Intervenor does not suggest that naming the legislative leaders alone would be sufficient to permit entry of a judgment against the General Assembly as a whole. As set forth in ¶2470 of Legislative Respondents’ Proposed Findings of Facts and Conclusions of Law, none of the legislative leaders (including the Speaker and the Senate President) can individually or collectively direct the votes of members of their chambers or change or enact any law. Accordingly, a judgment against the legislative leaders cannot be binding on their respective chambers or on the General Assembly.

23. In taking this approach, our Supreme Court has explained that legislative standing exists when, among other things, “state legislators seek redress for an alleged usurpation of their authority as members of the General Assembly.” *Fumo v. City of Philadelphia*, 972 A.2d 487, 502 (Pa. 2009). “Members of the General Assembly have sufficient interest to participate in a legal action in their official capacity and based upon their special status [as legislators] where there is a discernible and palpable infringement on their authority as legislators.” *Robinson Township v. Commonwealth*, 84 A.3d 1054, 1055 (2014) (*per curiam*) (internal quotation and brackets omitted). “A legislator’s legal interest has been recognized,” the court explained, “to protect the legislator’s right to vote on legislation and in actions alleging a diminution or deprivation of the legislator’s...power or authority.” *Id.* (internal quotation and brackets omitted).

24. Under Article II, §1 and Article III, §24 of the Pennsylvania Constitution, the power to make appropriations is vested exclusively in the General Assembly. *See Shapp v. Sloan*, 391 A.2d 595, 601 (Pa. 1978) (“The appropriations power in this Commonwealth is vested in the General Assembly.”); *Commonwealth ex rel. Schnader v. Liveright*, 161 A. 697, 707 (Pa. 1932) (“The legislature in appropriating is supreme within the limits of the revenue and moneys at its disposal.”); *Common Cause of Pennsylvania v. Commonwealth*, 668 A.2d 190, 205

(Pa. Cmwlth. 1995) (“The power to appropriate moneys lies exclusively with the legislative branch.”).

25. “The right of the General Assembly to appropriate funds from the State Treasury is expressly mandated by our Constitution itself.” *See Shapp v. Sloan*, 391 A.2d at 607.

26. The Pennsylvania Supreme Court has already found that standing is rightly conferred upon a governmental body, such as the General Assembly, when its fiscal authority and budgeting obligations are threatened. *See City of Philadelphia v. Schweiker*, 579 Pa. 591, 613 (2004).

27. Based on the relief requested by Petitioners, the Court’s ruling in this case could potentially require a significant increase in the amount of state funds to be spent on public education and/or a change in how such funds are allocated among Pennsylvania’s 500 School Districts. The General Assembly would need to determine how to raise and allocate such funds.

28. Legislators must be allowed to defend lawsuits which, in violation of the Separation of Powers doctrine, threaten to intrude upon the General Assembly’s prerogative to establish spending priorities within the Commonwealth.

29. Further, as explained during trial by David Donley, Executive Director of the House Republican Appropriations Committee, there are four legislative

Appropriations Committees – House Republican, House Democrat, Senate Republican and Senate Democrat – that are each involved in the budgeting and appropriations process. [2/3/22 Notes of Testimony (“N.T.”) at 11572:11-1511573:5-11574:4 (Donley)]. Each of those Caucuses may have different, and sometimes divergent, perspectives regarding legal challenges that relate directly to the constitutionality of General Assembly’s budgetary decisions and priorities, as expressed in enacted budgets and legislation. Therefore, each legislative caucus, as represented by its respective leader, holds a “legally enforceable interest” in defending the General Assembly’s statutes, budgets and spending priorities.

30. For instance, in the recent case of *Krasner v. Ward*, 2023 WL 164777 (Jan. 12, 2023), the Philadelphia District Attorney filed an action against certain respondents, including Senator Ward in her official capacity as interim President *Pro Tempore* of the Pennsylvania Senate, seeking a declaration that the impeachment proceedings pending against the District Attorney in the General Assembly were unlawful and unconstitutional. This Court granted Senate Minority Leader Jay Costa’s application to intervene, in his official capacity, finding that “resolution of this matter will directly affect his interests as a member of the Senate.” *Id.* at \*1, 22.

31. Similarly, as an elected member of the House of Representatives, and Leader of the House Republican Caucus, Proposed Intervenor has an interest in

making sure that his interests and those of his caucus continue to be heard in this important constitutional case, which directly impacts upon the General Assembly's legislative and appropriations power, as well as its constitutional duties and responsibilities under the Education Clause of Pennsylvania's Constitution. Such interest will continue to exist in the event of any remedial proceedings before this Court and/or further proceedings at the Supreme Court level.

32. Proposed Intervenor, in his official capacity, has a legally enforceable interest, which is pecuniary and constitutional in nature and deeply rooted in the General Assembly's unique budgetary and appropriations power, as well as the General Assembly's unique authority and responsibility to "provide for the maintenance and support of a thorough and efficient system of public education."

33. That legally enforceable interest is threatened by the determination of this matter, and the nature of the relief demanded, and the Court should conclude Proposed Intervenor qualifies for intervention under Rule 2327(4).

**V. There Are No Grounds For Refusing Proposed Intervenor's Application.**

81. Where the allegations of the application are sufficient to support intervention, the Court *may* nevertheless refuse intervention if "the interest of the Petitioner is already adequately represented." *See* Pa. R.C.P. 2329(2).

82. In this case, Proposed Intervenor's Constitutional and legally enforceable interest is not adequately represented by the named Respondents. As

noted above, there are four legislative caucuses (House Republican, House Democrat, Senate Republican and Senate Democrat), which each play an important role in the legislative, budgeting and appropriation process. The views of those caucuses may or may not align at any given time, and no legislative caucus or caucuses can be presumed to adequately represent the interest of the others.

83. Speaker Rozzi's views as to this litigation are currently unknown, including whether he intends to adopt the defense put forward by his predecessors or to defend this case at all. Therefore, he cannot adequately represent the interest and duties of Proposed Intervenor or the House Republican Caucus.

84. Although the Senate President *Pro Tempore* has defended this litigation alongside Proposed Intervenor, including making certain joint submissions to the Court, such parties have been represented by separate counsel since the matter was remanded to this Court, including being separately represented at trial and filing separate post-trial briefs. Proposed Intervenor has no ability to control or direct the litigation positions taken by the Senate President, through her counsel, and desires to continue participating in this case through his own counsel. Further, Proposed Intervenor's interest and positions in this case have not always aligned exactly with those of the Senate President, and there is no guarantee that Proposed Intervenor and the Senate President will share the same future positions on the important issues

raised in this case, particularly if Petitioners prevail and the case moves to the remedial phase and/or if a future Senate elects a President *Pro Tempore* of a different political party. Therefore, Proposed Intervenor's interest and duties are not adequately represented by the Senate President and her counsel.

85. Proposed Intervenor's interest and duties in the appropriations process are also not adequately represented by the Executive Respondents. *See Shapp*, 391 A.2d at 603 (“nowhere in our Constitution is the executive branch given any right or authority to appropriate public monies for any purpose”); *see also Jubelirer v. Rendell*, 953 A.2d 514, 529 (Pa. 2008). Indeed, Executive Respondents have repeatedly declined to defend the constitutionality of the current school funding system.

86. In any case, under the discretionary language of Pa. R.C.P. 2329(2), “[e]ven though the petitioner's interest is adequately represented in the pending action, this fact does not mandate the refusal of intervention since refusal of intervention on the ground of the adequacy of the representation is permissive in nature.” 7 Goodrich-Amram 2d § 2329:7 (Nov. 2022 Update). Therefore, this Court has the discretion to grant this Application even if it determines that Proposed Intervenor's interests may be adequately represented by the existing parties.

87. Under Pa. R.C.P. 2329(2), intervention may also be denied if “the petitioner has unduly delayed in making application or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.”

88. Proposed Intervenor has not unduly delayed in making this application. To the contrary, this Application was submitted approximately four weeks after Speaker Rozzi was elected as Speaker and became automatically substituted as a Respondent in this case in place of Proposed Intervenor, and during a period where the matter is largely inactive while awaiting a decision from the Court.

89. Intervention will not unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties. Rather, Proposed Intervenor seeks only to continue to participate in this litigation in which he had previously participated in his official capacity as then-Speaker, through the same counsel, and to adopt the same defense arguments that he previously advocated.

90. Neither Petitioners nor Respondents will be prejudiced or inconvenienced in any way by granting Proposed Intervenor’s Application to Intervene, since Proposed Intervenor and his counsel have already been participating in this litigation, including the trial of this case.

91. Proposed Intervenor further submits that because his counsel has been involved in this difficult and complicated case for more than seven years, including



serving as trial counsel, the continued participation of Proposed Intervenor and his counsel will be beneficial to this Court in any further proceedings.

## RELIEF SOUGHT

WHEREFORE, for the reasons stated above, Representative Bryan D. Cutler, respectfully requests that this Court grant him leave to intervene in his official capacity as Leader of the House Republican Caucus and allow him to continue to defend this important matter, in which he previously was a respondent in his official capacity as then-Speaker of the House, in order to protect a core and exclusive duty of the General Assembly to provide for the maintenance and support of a thorough and efficient system of public education.

Respectfully submitted,

By: /s/ Patrick M. Northen  
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Dated: February 1, 2023

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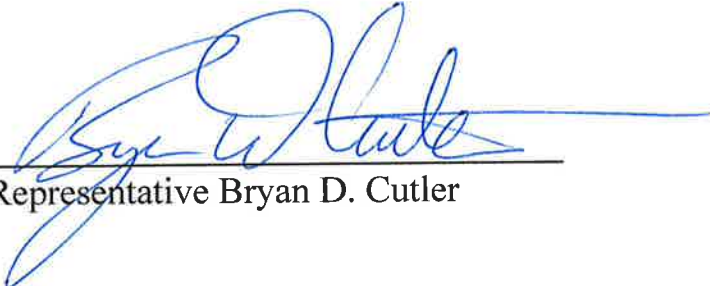
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**VERIFICATION**

Representative Bryan D. Cutler, Leader of the House Republican Caucus, in his official capacity, verifies that the factual averments in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge and information or belief. I make this verification subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

  
\_\_\_\_\_  
Representative Bryan D. Cutler

## **CERTIFICATE OF COMPLIANCE**

I, Patrick M. Northen, hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Patrick M. Northen  
Patrick M. Northen

## **CERTIFICATE OF SERVICE**

I certify that, on February 1, 2023 I caused the foregoing document to be served via the Court's PACFile System upon all persons registered to receive service in this matter.

/s/ Patrick M. Northen

Patrick M. Northen