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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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No. 330 CD 2012

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VIVIETTE APPLEWHITE, *et al.*,  
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,  
Respondents.

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*Petition for Review Addressed to the Court's Original Jurisdiction*

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**BRIEF FOR PETITIONERS IN OPPOSITION TO  
VERIFIED PETITION TO INTERVENE**

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## SUMMARY OF ARGUMENT

Intervenors seek to help the Attorney General defend the constitutionality of the Photo ID Law based on their stated interest not to have legitimate votes diluted by in-person-voter fraud. Intervenors' argument fails because that interest is shared by everyone.<sup>1</sup> Under the controlling cases of this Court and the Supreme Court such an interest — common to all — is not a permissible grounds for intervention. *See* Pa. R.C.P. 2327(4).

Intervenors' request to join this case should also be rejected for two additional independent reasons. **First**, the Commonwealth's Attorney General will adequately defend the Photo ID Law. *See* Pa. R.C.P. 2329(2). As this Court held in *In re Philadelphia Health Care Trust*, 872 A.2d 258, 262 (Pa. Commw. Ct. 2005).

[T]here is only one "Sovereign", and, that Sovereign is the Commonwealth of Pennsylvania. When engaged in litigation before this Court, the Sovereign must be of one mind, and, must speak with one voice. When the Commonwealth acts to protect the public interest, it does so by its Attorney General.

**Second**, the addition of eight new parties (who are already improperly filing objections to proposed scheduling) will complicate and delay the orderly resolution of this dispute. *See* Pa. R.C.P. 2329(3). For each of these reasons, the Court should deny the Petition to Intervene.<sup>2</sup>

## STANDARD OF REVIEW

A petition to intervene is governed by Rules 2327 and 2329 of the Pennsylvania Rules of Civil Procedure. As a threshold matter, Intervenors must establish under Rule 2327(4) that "the

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<sup>1</sup> *See e.g.*, Governor Corbett Signs Voter ID Bill to Require Voter Identification, PR Newswire (Mar. 14, 2012), <http://www.prnewswire.com/news-releases/governor-corbett-signs-voter-id-bill-to-require-photo-identification-142699565.html>. (all share

<sup>2</sup> On May 10, 2012, the Court ordered the parties to identify any material factual disputes related to the Petition to Intervene that would require an evidentiary hearing on May 24, 2012. The Petition to Intervene is based on abstract and erroneous legal theories and does not allege any material facts related to their standing to intervene that require an evidentiary hearing. Concurrent with this Brief, Petitioners are filing their Answer and New Matter to the Petition to Intervene.

determination of [this] action may affect [a] legally enforceable interest.” See Pa. R.C.P. 2327(4).<sup>3</sup> Absent a “legally enforceable interest,” Intervenors have no standing to intervene, and their Petition must be denied. See *Robinson Twp. v. Commonwealth*, 2012 WL 1429454, at \*2 (Pa. Commw. Ct. Apr. 20, 2012). The purpose of this requirement is “to prevent the curious and meddlesome from interfering with litigation not affecting their rights.” *In re Subpoena of Pa. Crime Comm’n*, 453 Pa. 513, 521, 309 A.2d 401, 406 (1973).

Even if Intervenors could satisfy Rule 2327(4), the Court may still deny intervention if, among other things, the Intervenors’ interests are “already adequately represented” by the Commonwealth, or “the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.” Pa. R.C.P. 2329(2)-(3); see *Pa. Assoc. of Rural & Small Sch. v. Casey*, 531 Pa. 439, 444, 613 A.2d 1198, 1200 (1992).

## ARGUMENT

### **I. INTERVENORS HAVE NO LEGALLY ENFORCEABLE INTEREST**

It is well established that Intervenors must “allege and prove an interest in the outcome of the suit which surpasses ‘the common interest of all citizens in procuring obedience to the law.’” *Biester v. Thornburgh*, 487 Pa. 438, 442, 409 A.2d 848, 851 (1979) (quoting *Wm. Penn Parking Garage v. City of Pittsburgh*, 464 Pa. 168, 192, 346 A.2d 269, 281 (1975)). Applying this test, this Court consistently has denied intervention where the alleged interest is shared by the community or public in general. See, e. g., *In re Phila. Health Care Trust*, 872 A.2d at 262; *Larock v. Sugarloaf TP Zoning Hearing Bd.*, 740 A.2d 308, 314 (Pa. Commw. Ct. 1999); *Vartan v. Zoning Hearing Bd. of City of Harrisburg*, 161 Pa. Commw. 210, 217, 636 A.2d 310, 313 (Pa. Commw. Ct. 1994); *Acorn Dev. Corp. v. Zoning Health Bd. of Upper Merion Twp.*, 105 Pa.

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<sup>3</sup> Intervenors do not contend that they qualify to intervene under subsections (1) through (3) of Rule 2327. See Petition to Intervene ¶ 11.

Commw. 138, 142, 523 A.2d 436, 437-38 (Pa. Commw. Ct. 1987).

Here, Intervenors advance an interest in preventing fraudulent votes from diluting properly cast ballots, or, in the case of Intervenor Thomas Killian, diluting votes cast for him. *See* Petition to Intervene Para. 12-14. Because every citizen of Pennsylvania shares this interest, it is insufficient as a matter of law to support intervention.

For example, in *Fraenzl v. Secretary of the Commonwealth of Pennsylvania*, 83 Pa. Commw. 539, 478 A.2d 903 (Pa. Commw. Ct. 1984), this Court denied intervention by a candidate for office because “while our decision will no doubt have an effect on the outcome of the election,” the candidate could “assert no legally enforceable interest in potential votes which may be lost to an additional candidate.” 83 Pa. Commw. at 541, 478 A.2d at 904. Instead, she had “only an interest in having the election laws properly applied, an interest she shares in common with every other member of the electorate.” *Id.* Similarly, in *Biester*, the intervenors asserted an interest, as taxpayers, in “the prevention of a waste of tax revenue as a result of expenditures [on illegal and unconstitutional activities].” 487 Pa. at 443, 409 A.2d at 851. Because the intervenor’s interest was “merely the same interest all citizens have in having others comply with the law or the constitution,” the Supreme Court held that “such an interest is not sufficient to confer standing” either to bring a petition to review or to intervene under Rule 2327. 487 Pa. at 442 n.2, 444, 409 A.2d at 850 n.2, 851-52.<sup>4</sup>

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<sup>4</sup> In contrast to the Intervenors, the individual Petitioners in the current case all personally will be outright prevented from voting in November and/or face unconstitutionally high burdens in order to exercise the fundamental right to vote. The organizational Petitioners have a dedicated and specific interest in assuring that their members and those who receive their services are permitted to vote, and have and will be required to devote substantial additional resources to fulfill their core missions as a result of the Photo ID Law. *See, e.g., Pa. Med. Soc’y v. Dep’t of Pub. Welfare*, 39 A.2d 267, 279 (Pa. 2012) (holding that associations have a direct interest in litigation and thus standing where their members would suffer immediate harm or their interest in the outcome of the litigation clearly surpassed the common interest of the general citizenry).

Intervenors ignore controlling Pennsylvania law in favor of cases from other jurisdictions discussing the general importance of elections to voters. *See* Petition to Intervene ¶ 11. But only *Hawkins v. Blunt*, No. 04-4177-CV-C-RED, 2004 U.S. Dist LEXIS 21512, at \*21 (W.D. Mo. Oct. 12, 2004), addressed the right to intervene (albeit under federal law), and it *denied* intervention. In *Hawkins*, a group of voters sought to intervene on the state's side to defend a constitutional challenge to Missouri's provisional ballot statute. *Hawkins* denied intervention because "the putative intervenors have not sustained or are immediately in danger of sustaining some direct injury if Plaintiffs' requested relief [to invalidate the Missouri statute] is granted and therefore would not have standing to defend against Plaintiffs' claim." *See Hawkins*, slip op. at 1 (W.D. Mo. Aug. 20, 2004) (attached as Exh. 1). Thus, even Intervenors' cases require denial of their request to intervene.<sup>5</sup>

The Petition to Intervene should also be denied because the supposed harm to Intervenors is conjectural and depends entirely on future actions by persons other than the parties to the proceedings. In *Pennsylvania Crime Commission*, 453 Pa. at 521, 309 A.2d at 406, the Pennsylvania Supreme Court denied a petition to intervene where the records sought "might" contain incriminating evidence against the intervenors. The court held that there is no "legally enforceable interest" where "the alleged harm [to the intervenors] is at best conjectural" and would "not flow as a direct consequent of the proceedings before us, but rather if it does in fact

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<sup>5</sup> Neither *Anderson v. United States*, 417 U.S. 211, 226 (1974), nor *United States v. Ehrlichmann*, 546 F.2d 910, 922 (D.C. Cir. 1976), involved the right to intervene. *Anderson* was a criminal prosecution of government officials who pressured "election officials [sic] . . . to cast false and fictitious votes on the voting machines." 417 U.S. at 214. The issue before the Supreme Court concerned the admissibility of certain hearsay statements, as well as the specific intent necessary under the federal statute. 417 U.S. at 213-14. *Ehrlichmann* involved the necessary *mens rea* to support a criminal prosecution of the former assistant to the President for violating the civil rights of psychiatrist and for committing perjury. 546 F.2d at 913. Other cases cited by Intervenors apply different federal and Louisiana law on intervening, not Pennsylvania law, and otherwise do not compel a different result. *See* Petition to Intervene ¶ 14.



occur it would be in connection with [o]ther proceedings that may at some future time be instituted as a result of the information obtained.” *Id.* at 407.

Here, the Intervenors do not argue — as they cannot — that a vote by any of the individual Petitioners would be fraudulent. Each individual Petitioner is duly qualified and registered to vote in November. *See Verified Petition for Review* ¶¶ 9-47. Intervenors are left to speculate about possible fraud committed by others if the Court strikes down the photo identification requirement. Conspicuous by its absence is any allegation (let alone actual evidence) that, without the photo identification requirement, there is any meaningful likelihood of in-person-voter fraud in which someone impersonates a registered voter (which is the only type of voter fraud that the Photo ID Law can even theoretically prevent). As such, the Intervenors’ theory of harm is “at best conjectural” and “will not flow as a direct consequence of the[se] proceedings . . . , but rather if it does in fact occur it would be in connection with” unlawful actions by others not before the Court. *See Pennsylvania Crime Commission*, 309 A.2d at 407. The Intervenors therefore lack the type of “legally enforceable interest” required to intervene and their Petition must be denied.

## **II. OTHER GOOD GROUNDS EXIST TO DENY THE PETITION TO INTERVENE**

Even if Intervenors could somehow be construed as stating a legally enforceable interest, their Petition to Intervene should still be denied under Pa. R.C.P. 2329 (2) & (3).

### **A. Intervenors’ Purported Interests are the Same as the Commonwealth’s and Are Adequately Represented by the Attorney General**

An independent basis for denying the Petition is that the purported interest of Intervenors is “adequately represented” by the Attorney General. *See Pa. R.C.P. 2329(2)*. Controlling case law decided by this Court and the Supreme Court hold that interests such as Intervenors’ are properly represented by the Commonwealth and thus intervention should be denied. For

example, less than a month ago in *Robinson Township*, 2012 WL 1429454, this Court held that, although members of the oil and gas industry (the “Industry”) had a legally enforceable interest in the constitutionality of a new regulatory statute, intervention should be denied under Rule 2329(2) because the Industry’s interests were already adequately represented by the Commonwealth:

All parties acknowledge it is the Commonwealth’s duty to defend the constitutionality of Act 13. Act 13 is either constitutional or unconstitutional based on the legal theories petitioners advance. The Industry’s interest, as identified, have no bearing on that determination.

*Id.* at \*4.

*Robinson Township* followed the Supreme Court’s ruling in *Pennsylvania Association of Rural and Small Schools v. Casey*, 531 Pa. 439, 444-45, 613 A.2d 1198, 1200-01 (1992), finding that the intervenor school districts’ interest in upholding the constitutionality of the school funding statute was adequately represented by the Commonwealth. The Supreme Court affirmed the Commonwealth Court’s holding that the intervenors’ “desire to pursue a preferred litigation strategy or defense theory was not an interest entitling [them] to intervene.” *Id.* at 1201.

None of the Intervenors’ cases are to the contrary. This Court *denied* intervention in *In re Philadelphia Health Care Trust*, 872 A.2d 258, 262 (Pa. Commw. Ct. 2005), finding that the intervenors lacked any legally enforceable interest because the intervenors’ “interest is only that held in common with other members of the public.” 872 A.2d at 261. The Court further held that the interests of a state senator and city councilman were “adequately represented by the Attorney General.” *Id.* at 262. The court adopted the trial court’s reasoning:

there is only one “Sovereign”, and, that Sovereign is the Commonwealth of Pennsylvania. When engaged in litigation before this Court, the Sovereign must be of one mind, and, must speak with one voice. When the Commonwealth acts to protect the public interest, it does so by its Attorney General.

*Id.* (quoting trial court).

In *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 314 (Pa. Commw. Ct. 1999), this Court held that even where there was a “potentially pervasive effect on township residents” from a proposed quarry, that was insufficient to support intervention by township residents because it “is an interest shared by the community” as a whole. *Id.* at 313-14. Only “property owners in the immediate vicinity of the proposed quarry” could intervene. *Id.* at 313. For those directly affected property owners, the Court found that the Township and Zoning Board had to represent the entire township that may want the quarry with conditions, and not just those in the immediate vicinity who did not want the quarry at all. *Id.* at 314. The instant Intervenors do not articulate any similar divergence from the Attorney General.

In *Sch. District of Erie v. Hamot Med. Center*, 4 Pa. D. & C. 4th 194, 198 (Erie Cty. Com. Pleas Ct. Apr. 24, 1989), *aff'd on other grounds*, 144 Pa. Commw. 668, 602 A.2d 407 (Pa. Commw. Ct. 1992), the Court of Common Pleas allowed the City of Erie to intervene as a separate taxing authority with different rights and interests and in large part because 72 Pa. Cons. Stat. §5350i “in essence would permit the city to intervene” as a statutory right. *Id.* at 196-97, 198. No analogy exists for the instant Intervenors.

Intervenors’ two Pennsylvania election cases also do not aid their cause. In *Zolitor v. Election Bd. of City of Montgomery*, 48 Pa. D. & C. 3d 544 (Mont. Cty. Com. Pleas Ct. 1988), the application to intervene was uncontested and the court cited no authority to support its finding of a legally enforceable interest. *Id.* at 547-48. *Wilson of Wallingford v. Nether Providence*, 85 Pa. Commw. 104, 481 A.2d 692 (Pa. Commw. Ct. 1984), also does not support Intervenors. There, the ruling was merely that the record did not include the trial court’s opinion on intervention and, therefore, the Commonwealth Court was unable to determine whether the trial court abused its discretion or otherwise erred. 85 Pa. Commw. at 108 n.6, 481 A.2d at 694

n.6.

The governing law from this Court and the Pennsylvania Supreme Court thus squarely compels the denial of the Petition to Intervene, although the Intervenors could submit an *amicus* brief if the Court were to conclude they have any additional arguments to present.

**B. Intervention Would Delay Trial and Unnecessarily Complicate Discovery**

The Petition to Intervene should also be denied because “the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.” Pa. R.C.P. 2329(3).

Intervenors seek to intervene for the express purpose of delaying these proceedings. *See* Intervenors’ Proposed Response to Petitioners’ Request to Expedite and Truncate Response Time ¶ 1. (Exh. 2 to Petition to Intervene).<sup>6</sup> This is reason enough to deny their Petition to Intervene under Rule 2329(3). In addition, the presence of eight additional parties will unavoidably cause delay, unnecessarily complicate the litigation, and unduly prejudice the adjudication of Petitioners’ rights. *See, e.g., E. Am. Transport & Warehousing, Inc. v. Evans Conger Broussard & McCrea, Inc.*, Nos. 2187 July Term 2011, Control No. 071266, 2002 WL 1803718, at \*4 (Pa. Com. Pleas Ct. July 31, 2002) (denying intervention for multiple reasons, including that it “will undoubtedly unduly delay the trial, as there are many tort plaintiffs who are involved in the underlying action” and “unnecessarily delay and complicate discovery”). Intervenors here will create more motions and more discovery, and they will divert the energies of the parties and the Court.

Some measure of the annoyance value of proposed Intervenors can be gleaned from the papers they propose to file. For example, Intervenors signal their interest in arguing this case

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<sup>6</sup> Intervenors improvidently filed their Proposed response to Petitioners’ Request to Expedite and Truncate Response Time. If the Court grants them leave to intervene, Petitioners reserve the right to respond to that filing at the appropriate time.

based on federal law. *See* Exh. 1 to Petition to Intervene ¶¶ 40, 42, 46, 47. This is a diversion and a delay. Petitioners are suing under the Pennsylvania Constitution, which unlike the United States Constitution, expressly guarantees that “every citizen,” having certain qualifications, “shall be entitled to vote at all elections,” Pa. Const. Art. VII § 1, and that “no power, civil or military, shall . . . prevent the free exercise of the right of suffrage.” Pa. Const. Art. I, § 5. The Constitution also ensures that all elections “shall be free and equal.” *Id.* These fundamental rights are expressly secured by the Commonwealth’s Constitution, but have no express counterpart in the federal Constitution.

There is more than enough to do in order to ensure that this case is ready for resolution. Permitting intervention of eight additional parties will only cause undue burden and prejudice and waste the resources of the parties and the Court.

#### **CONCLUSION**

For the foregoing reasons, the Petition to Intervene should be denied as not meeting the threshold requirements of Pa. R.C.P. 2327(4) and, in the alternative, should be denied under Pa. R.C.P. 2329(2)-(3).

Dated: May 16, 2012

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