Aria C. Branch
Perkins Coie LLP
700 Thirteenth Street NW Suite 800
Washington, D.C. 20005-3960
ABranch@perkinscoie.com
T: (202) 654-6200
F: (202) 654-6211

Abha Khanna
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
AKhanna@perkinscoie.com
T: (206) 359-8000
F: (206) 359-9000

Robert J. Clark, No. 308105
Edward D. Rogers, No. 69337
Marcel S. Pratt, No. 307483
Michael R. McDonald, No. 326873
Paul K. Ort, No. 326044
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
ClarkR@ballardspahr.com
RogersE@ballardspahr.com
PrattM@ballardspahr.com
McDonaldM@ballardspahr.com
OrtP@ballardspahr.com
T: (215) 665-8500
F: (215) 864-8999

Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CAROL ANN CARTER; MONICA PARRILLA; REBECCA POYOUROW; WILLIAM TUNG; ROSEANNE MILAZZO; BURT SIEGEL; SUSAN CASSANELLI; LEE CASSANELLI; LYNN WACHMAN; MICHAEL GUTTMAN; MAYA FONKEU; BRADY HILL; MARY ELLEN BALCHUNIS; TOM DEWALL; STEPHANIE MCNULTY; and JANET TEMIN,

Petitioners,

v.

VERONICA DEGRAFFENREID, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; JESSICA MATHIS, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries,

Respondents.

No. 132 MD 2021

PETITIONERS' MEMORANDUM IN OPPOSITION TO THE APPLICATION FOR LEAVE TO INTERVENE BY REPUBLICAN LEGISLATORS

INTRODUCTION

After every decennial census, states must redraw the boundaries of their congressional districts to bring those districts into compliance with constitutional one-person, one-vote principles. When a state's political branches are divided among partisan lines, as the General Assembly and Governor are today in Pennsylvania, the political branches often fail to compromise on a redistricting plan, requiring courts to intervene and protect the state's voters. The last time Pennsylvania began a redistricting cycle in which its political branches were as politically divided as they are now, those branches failed to enact a congressional redistricting plan in time for the next elections, forcing Pennsylvania's judiciary to take responsibility for implementing a new plan. *See Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (Pa. 1992). To secure their constitutional rights, Petitioners, who live in congressional districts that are currently malapportioned, filed suit to ensure a new congressional plan would be implemented in time for the 2022 primary elections, asking this Court to implement a plan should the General Assembly and Governor fail to do so in the first instance.

The four members of the Pennsylvania General Assembly who seek to intervene in this action (the "Legislators") do so with both a flawed understanding of Petitioners' claims and this Court's intervention precedents. Because Plaintiffs do not seek to wrest control of redistricting from the General Assembly, but instead

seek to ensure this Court is prepared to act should the political branches abdicate their responsibility to redistrict, the Legislators do not have a credible claim to legislative standing in this case. As the Pennsylvania Supreme Court's precedents recognize, this Court is not required to defer to a legislator's own perception that their legislative authority is under siege, as these Legislators repeatedly claim. Instead, this Court can and should make a reasoned judgment that, under the circumstances, the Legislators have not demonstrated any infringement on their legislative power and thus lack the necessary prerequisite for intervention. This is particularly true where the Legislators have sought to intervene without the authorization of the General Assembly or even the authorization of their Caucuses. For these reasons, this Court should deny the Legislators' application to intervene. If the Legislators still wish to participate, an amicus brief is the appropriate vehicle to offer their perspectives.

BACKGROUND

On April 26, 2021, the same day the Census Bureau publicly released its apportionment counts, Petitioners filed this action in the Commonwealth Court. The 2020 Census confirmed that, as a result of significant population shifts in the past decade, Pennsylvania's congressional districts are now unconstitutionally malapportioned. *See* Pet. ¶¶ 22-28. Petitioners are registered Pennsylvania voters who reside in now-overpopulated congressional districts and are consequently

"deprived of the right to cast an equal vote, as guaranteed to them by the U.S. Constitution and the Pennsylvania Constitution." Pet. ¶ 11-12. Petitioners named as Respondents Acting Secretary Degraffenreid and Director Mathis of the Pennsylvania Bureau of Election Services and Notaries, both of whom are responsible for administering Pennsylvania's elections and enforcing the Election Code. *See* Pet. ¶¶ 13-14.

Petitioners' suit is not novel. Pennsylvania courts have previously heard such malapportionment suits following the decennial census. *See, e.g.*, *Mellow v. Mitchell*, 530 Pa. 44 (hearing petition asking court to declare Pennsylvania's congressional districts unconstitutional after 1990 census and expected impasse in redistricting). Just as in *Mellow*, Petitioners in this action ask the court "to declare Pennsylvania's current congressional district plan unconstitutional; enjoin Respondents from using the current plan in any future elections; [and] implement a new congressional district plan that adheres to the constitutional requirement of one-person, one-vote should the General Assembly and Governor fail to do so." Pet. ¶ 1.

Five weeks after Petitioners filed this action, Speaker Cutler, Leader Benninghoff, President Corman, and Leader Ward of the Pennsylvania General Assembly filed the instant Application to Intervene. The Legislators contend they should be permitted to intervene to "defend their unique, legislative interests and their vested, exclusive authority to conduct congressional redistricting in the

Commonwealth." App. ¶ 26. The same day the Legislators applied to intervene, the Republican Party of Pennsylvania, Republican candidates, and Republican voters filed a separate Application for Intervention, to which Petitioners have responded in a separate memorandum.

LEGAL STANDARD

Applications to intervene are evaluated under Rule 2327 of the Pennsylvania Rules of Civil Procedure. To be entitled to intervene, the Legislators must establish under Rule 2327(3) that they "could have joined as an original party in the action or could have been joined therein," or, under Rule 2327(4), that "the determination of [this] action may affect any legally enforceable interest" of the Legislators.[1] *See* Pa. R.C.P. 2327. This Court may also deny intervention under Rule 2329 should it find the Legislators' interests are already adequately represented or their participation would unnecessarily complicate the litigation or prejudice the Petitioners. *See* Pa. R.C.P. 2329.

ARGUMENT

I. The Legislators could not have been joined as original Respondents.

Contrary to the Legislators' assertions, Petitioners could not have named the Legislators as Respondents in this case because the General Assembly and its

[1] The Legislators do not contend that they qualify to intervene under subsections (1) and (2) of Rule 2327.

members are not responsible for enforcing Pennsylvania's electoral boundaries. While the Legislature is responsible for proposing apportionment plans in the first instance, it is not the proper party to defend the constitutionality of those plans, just as the Legislature is not the proper party to defend the constitutionality of statutes or government action more generally. *See, e.g.*, *In re Nov. 3, 2020 Gen. Election*, 244 A.3d 317 (Pa. 2020) (denying motion to intervene by leaders of General Assembly to defend Pennsylvania's election statutes); *Markham v. Wolf*, 635 Pa. 288, 136 A.3d 134 (2016) (denying motion to intervene by state legislators to invalidate executive order the legislators claimed impinged on their legislative interests); *see also Robinson Twp., Washington Cnty. v. Commonwealth*, No. 284 M.D. 2012, 2012 WL 1429454, at *3 (Pa. Commw. Ct. Apr. 20, 2012) (noting, "[c]learly, Legislatures do not fall with the category of persons permitted to intervene as described in [Rule 2327(3)]"), *aff'd*, 624 Pa. 219, 84 A.3d 1054 (2014). The task of defending Pennsylvania law—here, Pennsylvania's current electoral boundaries—rests instead with those responsible for enforcing and implementing those boundaries directly—here, the Acting Secretary of the Commonwealth and the Director for the Bureau of Election Services, both of whom Petitioners have named as Respondents in this suit. *See* Pet. ¶ 13-14.

Petitioners similarly could not have named the Legislators as Respondents in this case because Petioners do not seek any relief against the General Assembly or

its members. It is axiomatic that a party is not properly joined as a Respondent if "no claim for relief is asserted against it in [the] complaint." *Haber v. Monroe Cnty. Vocational-Technical Sch.*, 296 Pa. Super 54, 57, 442 A.2d 292, 294 (Pa. Super 1982). And indeed, a quick examination of the Petition reveals just that: Petitioners do not seek any relief against the General Assembly, nor do they ask the Court to order the General Assembly to do anything. *See* Pet. Prayer for Relief (a)-(e) (requesting the Court declare the current districts unconstitutionally malapportioned, enjoin the Secretary from using such districts in upcoming elections, and establish a schedule for implementing a new congressional plan if the political branches fail to act in time for the 2022 elections). Petitioners do not ask this Court to restrain the General Assembly from passing a new congressional plan, nor do they ask this Court to order the General Assembly to pass a congressional plan by a certain date, as the Legislators imply. *See* App. ¶ 25. Rather, Petitioners ask this Court to establish a process for implementing new, lawful district boundaries *if the political branches fail to act*—in other words, a request to remedy the harms to Petitioners' rights caused by the current apportionment.

In support of their intervention, the Legislators note that, in prior redistricting cases, "the then-presiding officers of the General Assembly were named as original parties." App. ¶ 31. But this argument fails to grapple with the relief sought in those cases. The Legislators cite, for example, *League of Women Voters*, the recent

partisan gerrymandering challenge to Pennsylvania's congressional districts. *See id.* The Petitioners in *League of Women Voters*, however, named the Presiding Officers of the General Assembly as Respondents precisely because the Petitioners sought relief against the General Assembly. That Petition, for example, sought to "[e]njoin the Pennsylvania General Assembly from creating any future congressional districts with the purpose or effect of burdening [voters on the basis of partisanship] and to "[e]njoin the Pennsylvania General Assembly from using data regarding a voter's political party membership [in redrawing districts]." *See* Petition for Review at 51, *League of Women Voters of Pa. v. Commonwealth*, No. 261 MD 2017 (Pa. Commw. Ct. June 15, 2017). The Presiding Officers were thus (at least plausibly) proper Respondents in *League of Women Voters*, unlike here.

The Legislators also improperly cite *Mellow v. Mitchell*, 530 Pa. 44, a case in which State Senators themselves were the Petitioners when the political branches reached an impasse in the 1990 redistricting cycle, for the proposition that they could have been original parties to this case. *See* App. ¶ 31. At the outset, the Legislators do not seek to intervene here as Petitioners. But more importantly, *Mellow* predates now binding caselaw from the Pennsylvania Supreme Court holding that *only voters* (not parties, not candidates, not politicians) have a direct interest in redistricting litigation sufficient for standing. *See Albert v. 2001 Legislative Reapportionment Comm'n*, 567 Pa. 670, 678-79, 790 A.2d 989, 994-95 (2002). In *Albert*, a

malapportionment challenge to Pennsylvania's legislative districts, the Pennsylvania Supreme Court explicitly considered whether non-voting entities (in that case, Chairs of the Republican and Democratic Committees, Boards of Commissions, and Townships) had a direct interest in redistricting litigation, concluding they did not. In so holding, the Court explained the "subject matter of a reapportionment challenge" is "the right to vote and the right to have one's vote counted," and thus, any non-voting entity lacked a direct interest in the outcome of the litigation—a rule which was meant to vindicate the "personal and individual" voting rights at stake in the case. *Albert*, 657 Pa. at 678–79 (citing *Reynolds v. Sims*, 377 U.S. 533, 544-55, 561 (1964)). For this reason, the Legislators would not have standing to initiate the same redistricting litigation today as they did in *Mellow*.

Because the General Assembly is not responsible for enforcing the boundaries Pennsylvania's congressional districts, Petitioners do not seek relief against the General Assembly, and thus its presiding officers could not have been properly named as Respondents. To the extent the Legislators claim they could have been Petitioners to this action, their requested intervention as respondents disclaims such an interest, and in any event the Pennsylvania Supreme Court has made clear that only voters have a direct interest in bringing redistricting litigation. Accordingly, the Legislators could not have been original parties to this action, and they are not proper intervenors in this case under Rule 2327(3).

II. The Legislators do not have a legally enforceable interest in this action.

A. Pennsylvania courts permit legislators to intervene under Rule 2327(4) only in limited circumstances.

In their Application to Intervene, the Legislators improperly assert that a person seeking to intervene need not have a direct or substantial interest in the litigation; instead, they argue "a person seeking to intervene in a proceeding need have only an 'interest of such nature that participation . . . may be in the public interest.'" App. ¶ 26 (citing *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288-89 (Pa. Commw. Ct. 2019)). This argument both mischaracterizes *Sunoco* and, more critically, cites the standard for intervention before Pennsylvania's Public Utility Commission, not before its civil courts.

In *Sunoco*, the Commonwealth Court examined whether the Utility Commission had properly denied intervention to a state senator who sought to intervene in the Commission's proceedings. Under the Pennsylvania Administrative Code, a person seeking intervention in formal proceedings before the Utility Commission "need have only an 'interest of such nature that participation . . . may be in the public interest,'" *Sunoco*, 217 A.3d at 1288–89 (citing 52 Pa. Code § 5.72), a standard this Court has described as "easily satisfied" in comparison to the standards for intervening in matters before other tribunals, like civil courts. *See Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs.*, 225 A.3d 902, 910 (Pa. Commw. Ct. 2020). It is precisely because the standards for intervention differ

across tribunals that the *Sunoco* Court agreed with the general principle, as the Legislators now urge, that the standards to intervene are not necessarily the same as those to initiate litigation. *See* App. ¶ 15 (citing *Sunoco*, 217 A.3d at 1288). The Legislators similarly omit that, in its very next sentence, the *Sunoco* Court emphasized that even the Utility Commission, under its flexible intervention standard, must "adhere to the 'basic requirements'" for standing in granting intervention before the Commission. *See Sunoco*, 217 A.3d at 1288 (citation omitted).

Indeed, under the proper application of Rule 2327(4) for intervention in civil litigation in Pennsylvania courts, to determine whether a party has a "legally enforceable interest" sufficient to intervene, courts look to principles governing legal standing. *See Markham*, 635 Pa. at 297 (explaining, in a case in which Pennsylvania Legislators attempted to intervene in civil litigation, that "whether Appellants were properly denied intervenor status . . . turns on whether they satisfy our standing requirements"); *Application of Biester*, 487 Pa. 438, 443, 409 A.2d 848, 851 (1979) (vacating order granting intervention where applicant lacked standing). In determining whether a party is sufficiently aggrieved to have standing, "courts consider whether the litigant has a substantial, direct, and immediate interest in the matter." *Markham*, 635 Pa. at 298. "The fact that the proceeding may, in some way, affect the proposed intervenor is not sufficient to

invoke a 'legally enforceable interest.'" *In re L.J.*, 456 Pa. Super. 685, 700, 691 A.2d 520, 527 (Pa. Super. 1997) (citation omitted).

When legislators seek to intervene in their official capacity under Rule 2327(4), as the Legislators do here, the Legislators must demonstrate legislative standing to proceed. *See Markham*, 635 Pa. at 294-95; *see also Allegheny Reprod. Health Ctr.*, 225 A.3d at 911 (explaining courts look to "principles of legislative standing" in determining whether legislators "ha[ve] demonstrated a 'legally enforceable interest' for purposes of Rule 23247(4)").

In *Markham*, the Pennsylvania Supreme Court explained, "[w]hat emanates from our Commonwealth's caselaw, and the analogous federal caselaw, is that legislative standing is appropriate only in limited circumstances." *Markham*, 635 Pa. at 305. Legislative "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, or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator." *Id*. (citation omitted); *see also Robinson Twp.*, 624 Pa. at 221 (explaining legislators have standing "where there [i]s a discernible and palpable infringement on their authority as legislators"). Pennsylvania's quintessential legislative standing cases, for example, are quo warranto actions challenging executive appointments without the Senate's consent, in which legislative standing derives from the deprivation of "the individual right of

each Senator to vote to confirm or reject nominees." *See Disability Rts. Pa. v. Boockvar*, 234 A.3d 390, 392 n.2 (Pa. 2020) (Wecht, J., concurring) (citing cases).

B. Petitioners' action does not deprive the General Assembly of its authority to redistrict.

The fundamental basis for the Legislators' intervention hinges on an overarching mischaracterization of the underlying Petition: the idea that the Petitioners are asking this Court to "bypass the General Assembly and transfer complete redistricting authority to the courts." App. ¶ 25. But Petitioners seek no such thing. While Petitioners do contend that a redistricting impasse is exceedingly likely given the practical realities in Pennsylvania, Petitioners do not ask this Court to seize the power to redistrict from the General Assembly. Instead, Petitioners ask this Court "to implement a new congressional district plan that adheres to the constitutional requirement of one-person, one-vote *should the General Assembly and Governor fail to do so,*" Pet. ¶ 1 (emphasis added), and to establish a schedule for implementing such plans in the event of such an impasse, *see id.* at Prayer for Relief (e). In addition remedying the harm to Petitioners' constitutional rights, these requests are grounded in the reality that redistricting plans do not spring from thin air; should the Court need to adopt one, it will need to appoint a Special Master and undertake the fact-intensive work of considering and drafting congressional plans consistent with redistricting principles and constitutional doctrines, including conducting hearings on plans proposed by the various parties and potential amici.

This process does not and cannot happen overnight. Asking the Court to recognize this reality does not impermissibly intercede on the General Assembly's power to redistrict in the first instance.

While Petitioners agree there is no "date" prescribed by state law by which the General Assembly must enact a congressional redistricting plan, that does not foreclose a court from setting a date by which it will implement an apportionment plan in order to ensure constitutionally-sound boundaries are in place before the next election. In *Mellow v. Mitchell*, for example, another Pennsylvania redistricting impasse suit, Judge Craig of the Commonwealth Court "provided notice that [it] would select a plan if the Legislature failed to act by February 11, 1992." 530 Pa. at 48. When the General Assembly did in fact fail to act by the court's deadline, the Commonwealth Court moved forward in selecting a reapportionment plan for the Commonwealth. On appeal, and over the General Assembly's protest, the Pennsylvania Supreme Court explained "Judge Craig was absolutely correct in adhering to the pre-announced deadline of February 11" when the General Assembly failed to act. *Id*. at 49. As the Pennsylvania Supreme Court explained, allowing the Commonwealth to continue into primary election season without a constitutional apportionment plan would cause nothing but "chaos." *Id.* at 59.

This approach, moreover, is entirely consistent with those taken by other courts, which have often set dates by which the judiciary will intercede if the

Legislature has failed to act. *See, e.g.*, *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 698 (E.D.N.Y. 1992) (New York federal redistricting panel developed new apportionment plan while waiting for the Legislature to pass their own, ordering that, "if no other valid redistricting plan is in place by 5:00 pm, Eastern Daylight Savings Time, on July 8, 1992, the Special Master's plan shall automatically take effect as the plan of congressional districts for the 1992 primary and general elections in the State of New York"); *Monier v. Gallen*, 122 N.H. 474, 476, 446 A.2d 454, 455 (1982) (New Hampshire Supreme Court noting filing dates were approaching and explaining, "[t]his court will issue appropriate orders on or after Friday, May 28, 1982, at 10:00 a.m., unless a senate reapportionment plan has properly become law by that time"); *Larios v. Cox*, 306 F. Supp. 2d 1214, 1215–16 (N.D. Ga. 2004) ("[W]e gave the Georgia General Assembly until March 1, 2004, to submit to the court enacted reapportionment plans that are acceptable to the legislature . . . The Georgia General Assembly having been unable to meet this deadline, it now falls to this court to draw interim reapportionment plans for use in the upcoming election cycle.")

As history demonstrates, it is entirely proper (and in fact common) for a court to set a date by which it will adopt a redistricting plan if the Legislature has failed to do so. Doing so does not, as the Legislators contend, "dilute, abrogate, impair, or abolish [the General Assembly's] constitutional prerogative" to redistrict. App. ¶ 18.

Far from it, setting such a date respects the General Assembly's right to redistrict in the first instance.[2]

Simply put, because this case will not restrict any legislator's "ability to participate in the voting process," or "deprive" legislators of their official "legislative authority," *Markham*, 635 Pa. at 305, there is no legally enforceable interest present to give the Legislators standing to intervene. This is not like a case in which the General Assembly was unlawfully deprived of its right to vote for certain nominees, *see Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165 (1981) (finding legislative standing), or a case which sought to "directly limit the General Assembly's exclusive authority to appropriate," *Allegheny Reprod. Health Ctr.*, 225 A.3d at 911 (finding legislative standing sufficient for intervention). This case is instead more similar to those in which legislators have claimed an infringement on their authority, but courts have found such claims lacking substance, consequently denying legislators intervention. *See Markham*, 635 Pa. at 306 (holding legislators' claim that an Executive Order infringed on their legislative authority to be unfounded and consequently denying intervention).

[2] Notably, by setting a date by which redistricting must be complete, state courts also ensure redistricting will not be ceded to federal courts. While Supreme Court precedent requires federal courts to defer to state courts in drawing redistricting plans, it also counsels that a "[federal] District Court would [be] justified in adopting its own plan if it [were] apparent that the state court, through no fault of the [federal] District Court itself, would not develop a redistricting plan in time for the primaries." *Growe v. Emison*, 507 U.S. 25, 36 (1993). Accordingly, by failing to take timely action, this Court would risk ceding its own primacy in the redistricting process to federal courts.

Nothing in Petitioners' lawsuit seeks to force the Legislators to relinquish control over redistricting; it remains entirely within their power to attempt to enact a new congressional plan. In the likely event the political branches fail to do so, and when this Court inevitably is tasked with redrawing a congressional apportionment plan for the Commonwealth, it will be because the General Assembly has abdicated its responsibility to redistrict, not because this Court has deprived the General Assembly of its power to do so.

C. The Legislators should not be permitted to intervene without the consent of the General Assembly.

While the Legislators in this case lead the General Assembly and are due the respect those offices afford them, the Legislators do not claim to intervene with the authorization of the full General Assembly (let alone even one chamber of the General Assembly, or even their Caucuses).[3] The Legislators are instead here of their own accord, on their own terms. This factor is critical: while *Markham* currently represents the Pennsylvania Supreme Court's most recent articulation of legislative standing, as one Pennsylvania Supreme Court Justice has already aptly noted, "[s]ince *Markham* was decided, the Supreme Court of the United States has had occasion to consider—and reject—the notion that a single chamber of a bicameral

[3] In their Application to Intervene, the Legislators note that they lead the House Republican Caucus and Senate Republican Caucus, which they then note consist of a majority of the members of those bodies. *See* App. ¶¶ 8, 10. The Legislators do not, however, claim that those Caucus authorized them to intervene in this suit, as they have in prior litigation, nor do they cite any formal enactment by the House or Senate to authorize their intervention.

legislature has standing to intervene" without authorization to do so. *See Disability Rts. Pa.*, 234 A.3d at 392 (Wecht, J., concurring) (citing *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019)).

In *Bethune-Hill*, the Supreme Court held the Virginia House, "as a single chamber of a bicameral legislature, ha[d] no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part." 139 S. Ct. at 1950. There, for example, the Court distinguished the Virginia House of Delegate's position from that of the Arizona Legislature in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), "in which the Court recognized the standing of the Arizona House and Senate—*acting together*—to challenge a referendum that gave redistricting authority exclusively to an independent commission, thereby allegedly usurping the legislature's authority . . . over congressional redistricting." *Bethune-Hill*, 139 S.Ct. at 1953 (emphasis added).

Here, the Legislators appear before this Court seeking to intervene to defend the state's congressional redistricting plan not only without authorization from one chamber, but without authorization from *any chamber* of the Pennsylvania General Assembly. As Justice Wecht has noted, however, the Commonwealth's "foundational Charter confers no authority on individual legislators or caucuses within each respective chamber to act on behalf of the General Assembly or to substitute their interests for the Commonwealth." *Disability Rts. Pa.*, 234 A.3d at

393–94 (Wecht, J., concurring). Because individual legislators "cannot speak for the General Assembly as a whole, and therefore do not collectively represent that body's legislative prerogatives," *see id*., they should not be permitted to intervene to do just that.[4]

Even if this Court concludes that a lack of authorization from the General Assembly does not alone bar the Legislators' Application to Intervene, the Court should consider this factor in weighing the strength of their claim to legislative standing. As Justice Dougherty noted presciently in *Markham*, "[a] bipartisan challenge brought by the General Assembly as a whole premised upon a claim of an improper inroad into legislative prerogative . . . presumably would present a stronger case for recognizing legislative standing than a claim forwarded by a single legislator (regardless of party affiliation)." *Markham*, 635 Pa. at 309 (Dougherty, J., concurring).

Here, the Legislators present a claim for legislative standing without the official support of the full General Assembly, one chamber of that Assembly, or even their Caucuses. More concerningly, however, the Legislators' claim to legislative standing rests on legislative interests which are not credibly under attack by either Petitioners or this Court. Under the circumstances, the Legislators have not

[4] Petitioners note that even if the Legislators later received such authorization, their Application to Intervene would still fail on independent grounds discussed above.

established the requisite legislative standing sufficient to intervene under Rule 2327(4) and their Application should be denied.

CONCLUSION

For these reasons, Petitioners respectfully request this Court deny the Legislators leave to intervene.

Dated: June 17, 2021

Respectfully submitted,

/s/ Edward D. Rogers

Aria C. Branch
Perkins Coie LLP
700 Thirteenth Street NW Suite 800
Washington, D.C. 20005-3960
ABranch@perkinscoie.com
T: (202) 654-6200
F: (202) 654-6211

Abha Khanna
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
AKhanna@perkinscoie.com
T: (206) 359-8000
F: (206) 359-9000

Robert J. Clark, No. 308105
Edward D. Rogers, No. 69337
Marcel S. Pratt, No. 307483
Michael R. McDonald, No. 326873
Paul K. Ort, No. 326044
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
ClarkR@ballardspahr.com
RogersE@ballardspahr.com
PrattM@ballardspahr.com
McDonaldM@ballardspahr.com
OrtP@ballardspahr.com
T: (215) 665-8500
F: (215) 864-8999

CERTIFICATE OF COMPLIANCE

I 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.

Submitted by: Edward D. Rogers

Signature: */s/ Edward D. Rogers*

Name: Edward D. Rogers

Attorney No.: 69337

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused the foregoing Memorandum in Opposition to the Republican Legislators' Application to Intervene to be served upon the following parties and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

By PACFile:

All counsel of record

By First Class Mail:

Jeffrey Duffy, Esq.
BakerHostetler LLP
2828 Arch Street
Philadelphia, PA 19104
Counsel for Proposed Intervenors
Bryan Cutler and Kerry Benninghoff

Dated: June 17, 2021

/s/ Edward D. Rogers
Edward D. Rogers, No. 69337
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
RogersE@ballardspahr.com
T: (215) 665-8500
F: (215) 864-8999