

I. PRELIMINARY STATEMENT

The Applicants artfully misrepresent that the PEDF has stated that its real target is the General Assembly. At Page 5 of the Application the Caucuses state, “As PEDF has acknowledged in its Answer to Respondents’ Application For Reargument, the real target of its claims is the General Assembly, not the Governor or other Commonwealth actors.” That is not what PEDF stated in its Response to the Respondents’ Rearguments. The statement was that the Respondents’ arguments in their Preliminary Objections cited the conduct of the General Assembly, not the Respondents, and that therefore there was no right for reargument. (See actual statement of PEDF quoted on Page 4 of the Application.)

PEDF did not sue the General Assembly because the General Assembly has no ability to assess the potential impacts of proposed legislation on the public trust lands and the public trust rights under Article I § 27 that are the subject of PEDF’s Petition For Review. Only the Governor and his Executive Departments have that ability.

III. BACKGROUND

In 1995 the General Assembly passed and the Governor signed into law the Conservation and Natural Resources Act, 71 P.S. §§ 1340.101 et seq. That law created the Department of Conservation and Natural Resources (DCNR), § 1340.101(b)(1). The law incorporated Article I § 27, § 1340.101(a)(1). It also enabled DCNR to lease State Forest Land for oil and gas extraction, § 1340.302(a)(6). And further, it passed on to DCNR the appropriation of all the funds from leasing the State Forest land for gas extraction for the

purposes set forth in the Oil and Gas Lease Fund, 71 P.S. §1340.302.

On October 9, 2009 the Amendments to the Fiscal Code, Articles XVI-E et seq., entitled Oil and Gas, 72 Pa.C.S. §§ 1601-E et seq, were signed into law. These amendments stripped DCNR's appropriations of the Oil and Gas Fund and gave those rights to the General Assembly, (§ 1602-E), and required DCNR to lease State Forest Land solely for the purpose of obtaining money for the General Fund, (§§ 1604-E and 1605-E).

IV. POINTS OF LAW ALLEGEDLY OVERLOOKED

A. LEGALLY ENFORCEABLE INTERESTS FOR INTERVENTION

The Court Opinion of August 16, 2013, pages 12 through 15, provides an in depth analysis of why the recent decision of the Supreme Court in *Fumo v. City of Philadelphia*, 601 Pa. 322, 972 A.2d 487 (2009), does not compel the Caucuses' assertions that the instant case presents a "concrete injury that threatens their members in their official capacities." The Applicants offer no clear rebuttal of the Opinion.

Instead, the Applicants argue that, "A legislator's exercise of power or right to vote on legislation can be infringed or diminished in myriad ways." (Application, P. 7). The Applicants then specifically describe the "rights" they want to protect, and that ostensibly the Opinion overlooked: "Specifically, the Caucuses seek to preserve their members' power and prerogative to alter or repeal existing environmental laws and to appropriate as they deem necessary the funds derived from leases of Commonwealth property..." The Opinion found that this case involves another entity's (PEDF) constitutional challenge to various legislative enactments.

The "prerogatives" alleged by the Applicants are exactly what is set forth in the

Fiscal Code Amendments of 2009 that are the subject of the Petition For Review before the Court. The Petition before the Court specifically requests a declaration that the Fiscal Code Amendments are unconstitutional. The Caucuses want to be able to defend in court the constitutionality of the Fiscal Code Amendments, which the members had voted on in 2009 and 2010.

The Applicants also take exception to the Opinion's finding that whether Article I § 27 is self-executing, and whether the *Payne* test applies are not "legally enforceable interests" under Rule 2327(4). The Court Opinion objected to by Applicants cites numerous cases, at page 15, justifying its decision, each of which look to the requirement under Rule 2327(4) that the alleged harm must deal with a legally enforceable interest, and not just a general interest.

Whether Article I § 27 is self enabling and thus is restrictive of that authority is not a legally enforceable interest. If that were the test, then any constitutional limitation on legislation would then be open to the Caucuses' alleged rights to intervene.

The Caucuses' argue that the question of whether or not Article I § 27 is self enabling is a legally enforceable interest because if PEDF were successful then the legislature would be unable to pass any legislation dealing with the Amendment. But that is not what self enabling (or self executing, perhaps a better term) means. What the Petitioner

PEDF means, and what the Supreme Court has decided in *Payne v. Kassab*, that,
"There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people, (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes and establish these relationships; the Amendment does so by its

own ipse dixit.”

Article I § 27 establishes a specific trust of the Commonwealth’s natural resources for the benefit of all the people, and the Commonwealth, i.e., the Governor and the Executive Branch, as well as the General Assembly, are bound to protect and preserve that public trust. That does not mean that the legislature cannot pass any laws dealing with the public trust, if the legislation supports the public trust. It is only when the proposed or actual legislation negatively impacts the natural resources, and takes away the rights and interests of the people to those natural resources that the PEDF argues is wrong, is a breach of their fiduciary duty under the trust, and is unconstitutional.

By analogy, there is a constitutional right to freedom of religion and speech. There is thus no right of the legislature to impinge on those rights. But the legislature can support those freedoms through legislation that mandates the specifics for protecting those rights.

The legislature has already passed legislation on the specific subject of the PEDF Petition, the leasing of State Forest land for oil and gas extraction. The Conservation and Natural Resources Act, cited above, deals with the authority of DCNR to lease State Forest land for oil and gas extraction under the authority of Article I § 27. The Conservation and Natural Resources Act was passed in 1995 to identify DCNR as the legislative designee of the Amendment, and to allow for continued leasing of State Land within the purposes of the Amendment, as decided by the trustee DCNR; and by providing DCNR with the appropriation of funds from the leases to insure that the provisions of the trust are met.

In having to acknowledge this reality the Caucuses then argue that PEDF is saying the legislature has no right to amend the Conservation and Natural Resources Act. That is

not PEDF's argument. PEDF is saying that the Fiscal Code Amendments of 2009-2010 violate Article I § 27 of the Constitution by stripping away the protections for the public trust the legislature established in the Conservation and Natural Resources Act to allow further leasing of public lands for gas and oil extraction.

There is no general prohibition of legislation inherent in the constitutional challenges of the Petition. Again, what the Caucuses are trying to do is to be allowed to intervene to argue the constitutionality of the Fiscal Code Amendments.

**B. COURT'S OPINION THAT CAUCUSES ARE ADEQUATELY
REPRESENTED NOT BASED ON OVERLOOKED OR
MISAPPREHENDED FACTS**

The Applicants argue that the Respondents have not specifically denied the PEDF assertion that Article I § 27 is self executing in their Answer to the Petition. But the Respondents have. In Paragraph 97 of PEDF's Petition the statement is made that Article I § 27 is self executing. In their answer to Paragraph 97 the Respondents deny the averments of the paragraph, and state that the averments are conclusions of law to which no further answer is required. And, the Respondents stated that Article I § 27 is a written document that speaks for itself. Thus, the Respondents have preserved the argument.

The Applicants suggest that because the current Attorney General made the decision recently to not represent the Commonwealth in a constitutional challenge of a legislative act implies that her motives in this case might be based on "political and policy issues hovering just beneath the surface of this action create a palpable undercurrent of partisanship." This is an illogical and outrageous assumption.

There is no evidence to suggest that the decision not to support the constitutionality of the statute was made by the Attorney General because of political and policy issues. There is definitely no evidence in this case to make such a presumption. If anything, the fact that the Attorney General has delegated authority to the General Counsel to represent the Governor's Office indicates otherwise. If the Attorney General has some secret motives to promote than it would have been better to maintain control over the case by not delegating to the Office of General Counsel.

VI. REQUEST ORDER TO ALLOW FOR INTERLOCUTORY APPEAL

The Applicants request this Court to grant allowance for interlocutory appeal under 42 Pa.C.S. § 702(b). The basis for their request is that there is allegedly a controlling question of law as to whether PEDF's claims pose a discernible infringement of legislative power sufficient to create a "legally enforceable interest", and there are substantial grounds for difference of opinion as to the Court's ruling. (Application, P. 13.)

There are no controlling questions of law that Applicant raises that might create a legally enforceable interest establishing the right to intervene. As This Court pointed out in the challenged August 15 Opinion, "Specifically, this case does not involve a claim by legislators that the executive branch or an administrative agency usurped the legislative power, or that their votes on a matter within the legislative province were impaired or nullified. Rather, this case involves another entity's constitutional challenge to various legislative enactments. In *Fumo*, the Supreme Court acknowledged this Court's prior holding that, 'legislative standing [is]not extended...where legislators' votes had been duly

counted but the legislators claimed the effectiveness of the legislation had been impaired by some subsequent event...Once...votes which [legislators] are entitled to make have been cast and duly counted, their interest as legislators ceases.” (Opinion at Pp 14-15)

It is clear from the arguments of the Applicants that what they want to be able to do is to argue that the Fiscal Code Amendments are within their authority to legislate, in spite of the obligations set forth in Article I §27. The members of the Caucuses voted on that when the Amendments were past. Their interests end there.

WHEREFORE, the Petitioner Pennsylvania Environmental Defense Foundation respectfully requests that this Honorable Court deny the Applicants’ Request for Reconsideration.

Respectfully Submitted,

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