

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA ENVIRONMENTAL
DEFENSE FOUNDATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
and
GOVERNOR OF PENNSYLVANIA
THOMAS W. CORBETT, JR., in his official
Capacity as Governor,

Respondents.

No. 228 M.D. 2012

**PETITION TO INTERVENE BY
PENNSYLVANIA HOUSE REPUBLICAN CAUCUS
AND PENNSYLVANIA SENATE REPUBLICAN**

Petitioners Pennsylvania House Republican Caucus and Pennsylvania Senate Republican
Caucus (collectively, the "Caucuses"), by and through their counsel Buchanan Ingersoll &
Rooney PC, hereby file this Petition seeking leave to intervene in the above-captioned matter
pursuant to Pa. R. Civ. P. 2327 and 2328. In support of this Petition, the Caucuses state as
follows:

1. The Caucuses are comprised of the Republican members of the Pennsylvania
House of Representatives and the Pennsylvania State Senate.

2. In its Petition for Review in the Nature of an Action for Declaratory Relief,
Petitioner Pennsylvania Environmental Defense Foundation ("PEDF") asserts facial challenges
to Article XVI-E of Act 50 of 2009 (Count I), Section 1602-E of the 2009 amendments to The
Fiscal Code (Count II), Section 1603-E of The Fiscal Code (Count III), Sections 1604-E and

2012 JUN 13 A 10:55
OFFICE OF THE CLERK
OF THE COMMONWEALTH COURT
OF PENNSYLVANIA

1605-E of The Fiscal Code (Count IV), the General Appropriations Acts for fiscal years 2009/2010, 2010/2011, 2011/2012 and 2012/2013 (Counts VVI and VII) and certain provisions of Act 13 of 2012.

3. Although Governor Corbett and the Commonwealth are the named Respondents, PEDF's action is most directly an attack on the General Assembly's statutory enactments.

4. PEDF disagrees with the budgetary and policy judgments enacted by the General Assembly through the challenged statutes. It avers that the General Assembly's legislative enactments are unconstitutional. Specifically, PEDF avers that the challenged statutes violate Article I, Section 27 and Article III, Sections 3 and 11 of the Pennsylvania Constitution.

5. In its January 22, 2013 Memorandum Opinion ("Mem. Op.") overruling Respondents' preliminary objections, this Court emphasized that PEDF's basic claim is that the challenged statutes are unconstitutional, and determining whether a statute is constitutional is ultimately a legal question, and therefore a judicial function. Mem. Op. at 27.

6. PEDF's action is based on several legal premises: (a) Article I, Section 27 is self-executing; (b) the test of *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 468 Pa. 226, 361 A.2d 263 (1976) can and should be used to subject to judicial review duly enacted legislative amendments which alter existing laws in response to changing economic, budgetary, technological or environmental circumstances; (c) Article XVI-E of Act 50 of 2009 violates the single subject requirement of Article III, Section 3 of the Pennsylvania Constitution; and (d) the General Appropriation Act of 2011 includes language that is not germane to an appropriation. The Caucuses dispute each of these premises.

7. In its Memorandum Opinion, this Court acknowledged that the Supreme Court of Pennsylvania has not definitively resolved the issue of whether Article I, Section 27 is self-executing. Mem. Op. at 18, n.14. In *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 203-205, 311 A.2d 588, 593-595 (1973), a plurality of the Supreme Court held that Article I, Section 27 “was not self-executing, and legislative action was necessary to accomplish the goals of that Amendment.” *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 535 Pa. 370, 385, 635 A.2d 612, 620 (1993). The Caucuses dispute that Article I, Section 27 is self-executing. By petitioning to intervene, the Caucuses seek to protect the General Assembly’s legislative power and authority to define the values which Article I, Section 27 seeks to protect and to make budgetary decisions in accord with those values and other constitutional obligations. See *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d at 595.

8. Since 1973, Pennsylvania courts have regularly used the three-part *Payne* test to determine whether a challenged agency or municipal decision is constitutional under Article I, Section 27. Mem. Op. at 19. The *Payne* test was clearly designed for, and has only been applied to, actions of state agencies and municipalities acting pursuant to enabling legislation; it has never been used by a court exercising judicial review to facially determine the constitutionality of an act of the General Assembly. Indeed, the *Payne* test is particularly ill-suited for such a determination. The separation of powers and political question doctrines make the *Payne* test wholly inappropriate for a case like this, where the challenged action is not agency or municipal action, but a legislative amendment duly enacted by the General Assembly.

9. The General Assembly's legislative power is affected by PEDF's assertion that Article I, Section 27 is self-executing and the novel attempt to facially apply the *Payne* test to a legislative enactment of the General Assembly. PEDF's claims for declaratory relief are a direct attack on the power and authority that members of the Caucuses constitutionally exercise as elected legislators. If the General Assembly has no say over the meaning and application of Article I, Section 27 (because it is allegedly self-executing), or if the General Assembly cannot amend its own budgetary and environmental legislation (because it is constrained by the *Payne* test), then its ability to vote or otherwise exercise legislative authority is to that extent diminished or destroyed. Accordingly, the Caucuses seek leave to intervene in this proceeding to protect their members' rights and to prevent a concrete injury that threatens members in their official capacities. *See Fumo v. City of Philadelphia*, 601 Pa. 322, 339-347, 972 A.2d 487, 497-502 (2009) (discussing legislative standing).

10. PEDF's Amended Petition also seeks a declaration that Article XVI-E of Act 50 of 2009 violates Article III, Section 3 of the Pennsylvania Constitution (Count I), and that the General Appropriation Act of 2011 violates Article III, Section 11 of the Pennsylvania Constitution (Count VI).

11. Because these claims attack the General Assembly's ability to apportion special funds, and to make incidental directives in connection with regular and ordinary monetary appropriations, the Caucuses also request leave to intervene in order to defend the General Assembly's legislative prerogatives.

12. Pursuant to Pa. R. Civ. P. 2328(a), if granted leave to intervene, the Caucuses would adopt by reference the Respondents' Answer and New Matter with Affirmative Defenses in Response to the Amended Petition for Review in the Nature of an Action for Declaratory Relief. However, because that pleading does not explicitly address the issue of whether Article I, Section 27 is self-executing, and because this Court noted in footnote 14 of its January 22, 2013 Memorandum Opinion that Respondents have not asserted that the provision is not self-executing, the Caucuses would specifically assert as additional New Matter their position that Article I, Section 27 is not self-executing. The Caucuses would also specifically assert as additional New Matter their position that Article XVI-E of Act 50 of 2009 satisfies the single subject requirement of Article III, Section 3, and the General Appropriation Act of 2011 comports with Article III, Section 11 of the Pennsylvania Constitution.

13. Respondents recently filed their Answer and New Matter, and since then little has occurred in this proceeding. The Caucuses have acted promptly to intervene in this proceeding, and their intervention will not unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties. *See* Pa. R. Civ. P. 2329 (3).

WHEREFORE, Petitioners the Pennsylvania House Republican Caucus and the Pennsylvania Senate Republican Caucus respectfully request that this Court grant them leave to intervene in this proceeding.

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC

By: David J. Porter

David J. Porter

PA ID No. 66125

Kevin P. Lucas

PA ID No. 25596

301 Grant Street, 20th Floor

Pittsburgh, PA 15219

(412) 562-1318/8350

(412) 562-1041 (fax)

Thomas G. Collins

PA ID No. 75896

409 North Second Street, Suite 500

Harrisburg, PA 17101

(717) 237-4843

(717) 233-0852 (fax)

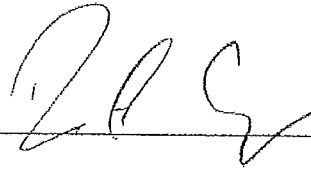
Attorneys for Petitioners/Intervenors

DATE: June 13, 2013

VERIFICATION

I, Rodney A. Corey, Chief Counsel to the Republican Caucus of the Pennsylvania House of Representatives, have read the foregoing document and verify that the facts set forth are true and correct to the best of my knowledge, information and belief. To the extent that the foregoing document and/or its language is that of counsel, I have relied upon counsel in making this Verification.

I understand that any false statements made herein are subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

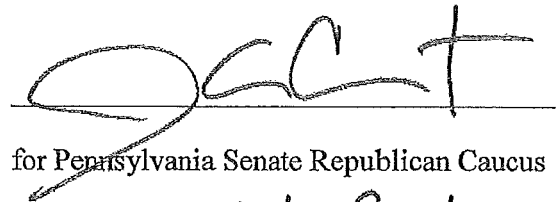


for Pennsylvania House Republican Caucus

VERIFICATION

I, J. Andrew Grompton, have read the foregoing document and verify that the facts set forth are true and correct to the best of my knowledge, information and belief. To the extent that the foregoing document and/or its language is that of counsel, I have relied upon counsel in making this Verification.

I understand that any false statements made herein are subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.



for Pennsylvania Senate Republican Caucus

Counsel to Senator

SCARNATI

6.12.2013

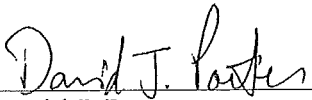
CERTIFICATE OF SERVICE

I, David J. Porter, hereby certify that on June 13, 2013, I served a true and correct copy of the enclosed **Petition to Intervene by Pennsylvania House Republican Caucus and Pennsylvania Senate Republican Caucus** by first class United States mail, upon the following:

John E. Childe, Esquire
1847 Center Street
Camp Hill, PA 17011

Howard G. Hopkirk, Esquire
Office of Attorney General
Civil Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

Kevin P. Schmidt, Esquire
Governor's Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101



David J. Porter