IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SENATOR GENE YAW, *et al.*,

Plaintiffs,

v.

THE DELAWARE RIVER BASIN COMMISSION,

Defendant,

DELAWARE RIVERKEEPER NETWORK and MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER,

Intervenor-Defendants,

SENATORS STEVE SANTARSIERO, CAROLYN COMITTA, AMANDA CAPPELLETTI, MARIA COLLETT, WAYNE FONTANA, ART HAYWOOD, VINCE HUGHES, JOHN KANE, TIM KEARNEY, KATIE MUTH, JOHN SABATINA, NIKIL SAVAL, JUDY SCHWANK, SHARIF STREET, TINA TARTAGLIONE, ANTHONY WILLIAMS,

Intervenor-Defendants.

Civ. No. 21-119

ORDER

AND NOW, this _____ day of _____, 2021, upon consideration of the Motion to Intervene filed by sixteen members of the Pennsylvania State Senate, it is hereby **ORDERED** that the Motion to Intervene is **GRANTED**. *See* Fed. R. Civ. P. 24. The **CLERK OF COURT** shall **ADD** the following parties to the docket as Intervenor Defendants: Senators Steve Santarsiero, Carolyn Comitta, Amanda Cappelletti, Maria Collett, Wayne Fontana, Art Haywood, Vince Hughes, John Kane, Tim Kearney, Katie Muth, John Sabatina, Nikil Saval, Judy Schwank, Sharif Street, Tina Tartaglione, and Anthony Williams (collectively, the "Senator Intervenors").

IT IS FURTHER ORDERED that the Senator Intervenors shall file their motion to dismiss the Complaint within two days of the date this Order is entered.

AND IT IS SO ORDERED.

_____
Paul S. Diamond, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SENATOR GENE YAW, *et al.*, Plaintiffs, v. THE DELAWARE RIVER BASIN COMMISSION, Defendant, and DELAWARE RIVERKEEPER NETWORK and MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER, Intervenor-Defendants.	No. 2:21-cv-119

MOTION TO INTERVENE

Pennsylvania State Senators Steve Santarsiero, Carolyn Comitta, Amanda Cappelletti, Maria Collett, Wayne Fontana, Art Haywood, Vince Hughes, John Kane, Tim Kearney, Katie Muth, John Sabatina, Nikil Saval, Judy Schwank, Sharif Street, Tina Tartaglione, and Anthony Williams (collectively, "Democratic Senators") hereby move to intervene as defendants in this case.

The Democratic Senators seek intervention as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, permissive

intervention pursuant to Rule 24(b)(1)(B). In support of this Motion, the Democratic Senators rely on the accompanying Memorandum of Law, which is intended to be incorporated as if fully set forth herein.

Pursuant to Rule 24(c), the Democratic Senators submit, as Exhibit A, their proposed Motion to Dismiss and supporting Memorandum of Law.

WHEREFORE, the Democratic Senators respectfully request that the Court grant their motion and permit them to intervene as defendants in this action.

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

By: /s/ Steven T. Miano
Steven T. Miano
Robert A. Wiygul
Peter V. Keays
One Logan Square, 27th Floor
Philadelphia, PA 19103
215-568-6200

Attorneys for the Democratic Senators

Dated: March 12, 2021

CERTIFICATE OF SERVICE

I, Steven T. Miano, hereby certify that, on March 12, 2021, I caused true and correct copies of the foregoing Motion to Intervene along with the accompanying Memorandum of Law in Support of Democratic Senators' Motion to Intervene, proposed order, proposed Democratic Senator Intervenors' Motion to Dismiss the Complaint, and proposed Memorandum of Law in Support of Democratic Senator Intervenors' Motion to Dismiss the Complaint to be served on all counsel of record through the Court's electronic filing system.

/s/ Steven T. Miano
STEVEN T. MIANO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SENATOR GENE YAW, *et al.*, Plaintiffs, v. THE DELAWARE RIVER BASIN COMMISSION, Defendant, and DELAWARE RIVERKEEPER NETWORK and MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER, Intervenor-Defendants.	No. 2:21-cv-119

MEMORANDUM OF LAW IN SUPPORT OF THE DEMOCRATIC SENATORS' MOTION TO INTERVENE

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I. INTRODUCTION

The waters of the Delaware River Basin are a vital and irreplaceable asset shared by the citizens of four states. In an inspired act of cooperative federalism—and in recognition of the collective action problem presented by the diffusion of this resource across multiple political jurisdictions—the Basin states created the Delaware River Basin Commission. In so doing, the states ceded certain powers to the Commission so that it may act in the best interest of the common resource, particularly in situations where the pursuit of one set of stakeholders' parochial

economic interests would cause significant harm to the waters upon which all stakeholders rely. Toward that end, the Commission issued a moratorium on a practice that it determined could cause considerable and irreparable harm to the waters of the Basin: high volume hydraulic fracturing, or "fracking." Plaintiffs, including two members of the Pennsylvania Senate, now seek to claw back the Commission's authority to enact such a measure, claiming for themselves *as individual legislators* a remarkable set of powers, which they argue were unlawfully usurped by the Commission. Ironically, Plaintiffs' misguided assertions are based in part on the Environmental Rights Amendment to the Pennsylvania Constitution, which recognizes, relevant to this matter, that all citizens of the Commonwealth have an inviolable right to pure water.

Plaintiffs' claims on the merits—along with the legal theories regarding the rights and duties of individual legislators upon which those claims are premised—are wholly without merit. The Commission's fracking moratorium is entirely consistent with the Pennsylvania Constitution and is a valid exercise of the authority ceded to the Commission by the Commonwealth and the other Basin states six decades ago. The Democratic Senators seek to intervene in this case in order to oppose the Republican Senators' attempt to rewrite fundamental tenets upon which our system of government is based in order to exercise powers that are not—and never were—theirs to exercise. The Democratic Senators have a

significant interest in the outcome of this misguided litigation, and therefore respectfully request that the Court grant their motion to intervene.

II. STATEMENT OF FACTS

The Delaware River Basin ("Basin") is a watershed covering the approximately 13,600 square miles that drains into the Delaware River and its tributaries. The Basin spans four states—Pennsylvania, New Jersey, Delaware, and New York—and provides drinking water to 13.3 million people; 5.6 million residents of Pennsylvania live within its boundaries. Del. River Basin Comm'n, State of the Basin Report at PDF pp. 3, 12 (July 25, 2019), https://www.state.nj.us/drbc/library/documents/SOTBreport_july2019.pdf. The water in the Basin is a common resource over which local, state, and national interests have "joint responsibility." Del. River Basin Compact at 1. In recognition of that fact, the governments of the four Basin states and the United States Congress entered into the Delaware River Basin Compact ("Compact") in 1961. Acknowledging that the "water resources of the basin are subject to the sovereign right and responsibility of the signatory parties," those parties enacted the Compact with "the purpose of…provid[ing] for a joint exercise of such powers and sovereignty in the common interest of the people of the region." Compact § 1.3(b). The signatory parties also acknowledged the reality that the waters of the Basin do not respect political boundaries; rather, "the water resources of the basin are

functionally inter-related, and the uses of these resources are interdependent," and "[a] single administrative agency is therefore essential…." *Id.* at § 1.3(c). The Compact established the Commission as that agency. *Id.* at § 2.1.

The Commonwealth and the other signatories of the Compact endowed the Commission with significant powers and responsibilities. Most notably for purposes of this case, section 3.8 of the Compact prohibited all "project[s] having a substantial effect on the water resources of the basin" that have not been "submitted to and approved by the commission." *Id.* at §3.8. The scope of the Commission's authority under section 3.8 is at the center of this action.

Invoking its authority under section 3.8, the Commission has taken several actions over the past decade related to high volume hydraulic fracturing ("fracking") that effectively constitute a moratorium on fracking within the Basin. In 2009 and 2010, the Commission's Executive Director issued Determinations that fracking activities constitute "projects" as contemplated in section 3.8, and thus, that fracking may not be conducted without the Commission's approval. Del. River Basin Comm'n, Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formation Within the Drainage Area of Special Protection Waters (May 19, 2009),

https://www.state.nj.us/drbc/library/documents/EDD5-19-09.pdf.[1] These Determinations were based on "the risks to water resources, including ground and surface water that land disturbance and drilling activities inherent in any shale gas well pose," and, more specifically, on the Commission's "recognition that as a result of water withdrawals, wastewater disposal and other activities, natural gas extraction projects … could individually or cumulatively affect the water quality of Special Protection Waters by altering their physical, biological, chemical or hydrological characteristics." Del. River Basin Comm'n, Supplemental Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formation Within the Drainage Area of Special Protection Waters at 1 (June 14, 2010), https://www.state.nj.us/drbc/library/documents/SupplementalEDD6-14-10.pdf.

In May 2010, the Commission unanimously adopted a resolution directing Commission staff to develop regulations to govern the Commission's review of applications for fracking projects, and postponing consideration of all applications until those regulations have been adopted. Del. River Basin Comm'n, Meeting of

[1] The 2009 Determination applied to production and extraction projects. In a supplemental Determination issued in 2010, the Executive Director extended the earlier determination to cover projects intended for exploratory purposes. Del. River Basin Comm'n, Supplemental Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formation Within the Drainage Area of Special Protection Waters (June 14, 2010), https://www.state.nj.us/drbc/library/documents/SupplementalEDD6-14-10.pdf.

May 5, 2010 Minutes at 5, https://www.state.nj.us/drbc/library/documents/5-05-10_minutes.pdf.[2] Thus, the fracking moratorium that Plaintiffs challenge is a function of the Commission's determination that fracking projects require its approval, in combination with the Commission's decision to defer consideration of all applications for fracking projects.

Plaintiffs contend that the Commission's actions exceeded the authority granted to it under section 3.8 of the Compact and seek a declaratory judgment to that effect. Compl. ¶¶ 2, 94. Alternatively, Plaintiffs seek a declaration that the Commission's actions constitute a regulatory taking without just compensation under the Fifth Amendment of the United States Constitution. Compl. ¶ 3. Plaintiffs base their claims on the proposition that the Commission purportedly usurped the exclusive authority granted to the General Assembly and, according to Plaintiffs, to individual legislators by the Pennsylvania Constitution.

III. RELATED LITIGATION AND PROCEDURAL HISTORY

This is not the Republican Senators' first attempt to challenge to the Commission's fracking moratorium. The Republican Senators moved for and were denied intervention in a related suit that remains pending in the U.S. District Court for the Middle District of Pennsylvania. *See Wayne Land and Mineral Group, LLC*

[2] On February 25, 2021, the Commission issued final regulations prohibiting fracking in the Basin. Del. River Basin Comm'n, Resolution No. 2021-01 (Feb. 25, 2021), https://www.nj.gov/drbc/library/documents/Res2021-01_HVHF.pdf.

v. Delaware River Basin Comm'n, 3:16-CV-897 (M.D. Pa.). That case was initiated in May 2016 by Wayne Land and Mineral Group, LLC ("Wayne Land"), a company that has been precluded from fracking as a result of the Commission's moratorium. The gravamen of Wayne Land's case is that fracking does not constitute a "project" for purposes of section 3.8 of the Compact, and thus, that the fracking moratorium does not fall within the scope of the authority granted to the Commission by that section. *See Wayne Land & Mineral Group, LLC v. Delaware River Basin Comm'n*, 959 F.3d 569, 572 (3d Cir. 2020). In 2018, the Third Circuit reversed the district court's dismissal of Wayne Land's complaint, ruling that the term "project" is ambiguous and remanding so that the district court may conduct fact-finding in order to ascertain the Compact drafters' intent. *Wayne Land & Mineral Group, LLC v. Delaware River Basin Comm'n*, 894 F.3d 509, 534 (3d Cir. 2018). Trial is currently scheduled for October 2021.

The Republican Senators sought to intervene in the Wayne Land litigation—twice. The court denied both requests, ruling that the Republican Senators failed to show that they have a significantly protectable interest in that case. *Wayne Land & Min. Group, LLC v. Delaware River Basin Comm'n*, 331 F.R.D. 583, 593-596 (M.D. Pa. 2019), *vacated on different grounds and remanded*, 959 F.3d 569 (3d Cir. 2020). On appeal, the Third Circuit did not reach the merits of the Republican Senators' motion for intervention, but rather remanded for the district court to rule

on the threshold issue of whether the Republican Senators had standing to bring the claims contained in the proposed complaint that accompanied their second motion to intervene.[3] *Wayne Land*, 959 F.3d at 577.

Upon remand, however, the Republican Senators declined to litigate the question of their standing, and opted instead to withdraw their motion to intervene. *See* Senators Joseph B. Scarnati, Lisa Baker and Gene Yaw's Motion to Withdraw (July 1, 2020), *Wayne Land*, 3:16-CV-897 (M.D. Pa.) (ECF 193). The Republican Senators and their co-plaintiffs filed their complaint in this Court six months later, on January 11, 2021. (ECF No. 1.) The arguments and assertions made by the Republican Senators in their second unsuccessful motion to intervene in the Wayne Land litigation closely mirror those they now advance in this case, presumably in an attempt to establish standing. *See* Senators Joseph B. Scarnati, Lisa Baker and Gene Yaw's Motion to Intervene as Parties Plaintiff and Brief in Support of Motion to Intervene as Parties Plaintiff (Oct. 1, 2018), *Wayne Land*, 3:16-CV-897 (M.D. Pa.) (ECF 108, 110); *Wayne Land*, 331 F.R.D. at 589-600.

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[3] The Democratic Senators do not need to establish standing to intervene in this case because they are seeking to intervene as defendants, and because they do not seek any relief beyond the dismissal or ultimate rejection of Plaintiffs' claims, which is presumably the precise outcome the Commission will seek. *Commonwealth of Pennsylvania v. President United States of Am.*, 888 F.3d 52, 57 n.2 (3d Cir. 2018) ("Because the Little Sisters moved to intervene as defendants and seek the same relief as [defendant], they need not demonstrate Article III standing."). Conversely, the Republican Senators who sought to intervene in the Wayne Land case as plaintiffs were required to demonstrate standing because they were "clearly demand[ing] different relief" than what the original plaintiff was seeking. *Wayne Land*, 959 F.3d at 577.

The Delaware Riverkeeper Network and Delaware Riverkeeper Maya van Rossum (collectively "DRN") filed a motion to intervene in this case on February 12, 2021. (ECF. No. 9.) The Court granted DRN's motion on February 25, 2021, over Plaintiffs' objection. (ECF Nos. 12, 15). The Commission's response to Plaintiffs' Complaint is due to be filed by March 15, 2021. (ECF No. 4.)

IV. ARGUMENT

A. The Democratic Senators are Entitled to Intervene as of Right Pursuant to Rule 24(a)(2)

Rule 24(a) of the Federal Rule of Civil Procedure governs intervention as of right and provides, in relevant part:

> On timely motion, the court must permit anyone to intervene who … claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). In applying Rule 24(a)(2), the Third Circuit has held that a non-party may intervene as of right if it satisfies four criteria: "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation." *United States v. Territory of Virgin Islands*, 748 F.3d 514, 519, (3d Cir. 2014) (quoting *Harris v. Pernsley*, 820 F.2d 593, 596 (3d Cir. 1987)). The

Third Circuit has also explained that "Rule 24 demands flexibility when dealing with the myriad situations in which claims for intervention arise." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998).

The Democratic Senators respectfully submit that they have satisfied all four criteria, and that they are therefore entitled to intervene in this matter as of right.

1. The Democratic Senators' Motion is Timely

The Third Circuit has articulated three factors for courts to consider when determining whether a motion to intervene is timely: "(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay." *Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir. 1995). All three factors support a determination that the Democratic Senators' motion has been timely filed.

This case is in the very early stages. The Commission has not yet filed its response to Plaintiffs' Complaint, and counsel for Commission has informed the undersigned that discovery has not yet commenced. Those facts also support a finding that the Democratic Senators' intervention will not prejudice the existing parties. *See Chester Water Auth. v. Susquehanna River Basin Comm'n*, No. 1:14-CV-1076, 2014 WL 3908186, at *2 (M.D. Pa. Aug. 11, 2014) ("Generally, the intervention of a non-party will not prejudice the current parties when discovery has yet to commence and dispositive motions have not been filed." (citing *Nat'l*

Collegiate Athletic Ass'n v. Corbett, 296 F.R.D. 342, 347 (M.D.Pa. 2013)); *see also Mountain Top Condo. Ass'n*, 72 F.3d at 370 ("The record before us reveals that while some written discovery and settlement negotiations had occurred between the MTCA and the contractors prior to the [motion to intervene], there were no depositions taken, dispositive motions filed, or decrees entered during the four year period in question. Under these circumstances, we cannot say that intervention at this stage of the litigation would prejudice the current parties."). Finally, there is no delay to speak of. Plaintiffs filed their complaint on January 11, 2021, and the Democratic Senators' have moved expeditiously to intervene. The Democratic Senators' motion to intervene is therefore timely filed.

2. The Democratic Senators Possess Sufficient Interests in the Litigation to Warrant Intervention as of Right

In order to satisfy the "sufficient interest" required to intervene as of right, the prospective intervener must possess an interest that is "specific to [it], is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought." *Commonwealth of Pennsylvania v. President of the U.S.*, 888 F.3d 52, 58 (3d Cir. 2018) (quoting *Kleissler*, 157 F.3d at 972). The Third Circuit has acknowledged the "nebulous" nature of this standard, *Kleissler*, 157 F.3d at 969, and has recognized that "the precise nature of the interest required to intervene as of right has eluded precise and authoritative definition," *Mountain Top Condo. Ass'n*, 72 F.3d at 366. Along the same lines, in reflecting on its

jurisprudence on the "sufficient interest" requirement, the Third Circuit has extolled its own "adherence to the elasticity that Rule 24 contemplates when compared to the rigidity of earlier practice," *Kleissler*, 157 F.3d at 970, and stated that "[t]he facts assume overwhelming importance in each decision," *id.* at 972. The Democratic Senators have multiple interests that are sufficient to warrant intervention in this matter as of right.

(a) *The Democratic Senators Have a Substantial Interest in This Litigation Based Upon Foundational Legal Assertions Underpinning the Republican Senators' Claims*

The Democratic Senators have a direct, concrete, and specific interest in the outcome of several dubious foundational legal assertions upon which the Republican Senators' arguments are implicitly and explicitly premised, and which the Court must resolve in Plaintiffs' favor if it is to grant the relief they seek. The Court's rulings with respect to these assertions will directly impact the rights and obligations of the Democratic Senators individually in their legislative capacity.

Perhaps the most notable of these foundational issues relates to the powers and obligations of individual legislators under the Environmental Rights Amendment to the Pennsylvania Constitution ("ERA"), which Plaintiffs have placed squarely at issue in this case. The ERA states:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the

> people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27. Plaintiffs assert that *individual members of the Senate* are trustees for purposes of the ERA.[4] The Democratic Senators are unaware of any authority that supports such a radical proposition. In interpreting the ERA, the Pennsylvania Supreme Court has stated that the Governor and General Assembly have roles as trustees under the ERA. *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 939 (Pa. 2017). But that does not mean that individual members of the General Assembly are trustees; indeed, such an interpretation runs counter to the well-established principle against conflating *legislatures* and *legislators* with respect to powers and obligations bestowed upon the former.[5]

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[4] Plaintiffs' begin their Complaint by stating that it is submitted by the Republican Senators "in their official legislative capacities *and their concomitant capacities as trustee of the natural resources of the Commonwealth of Pennsylvania*." Compl. at 1 (emphasis added). Plaintiffs state that the corpus of the trust created by the ERA "consists of the natural resources and all funds derived from their sale or lease," *id.* at ¶ 24, and aver that the Senate Plaintiffs, a term defined as including the individual senators, *id.* at 1, "cannot allow the Trust's corpus to be managed in a manner inconsistent with the ERA," *id.* at ¶ 25, and "may bring and defend actions that impact the Trust, and take reasonable steps to increase the value of the Trust's assets," *id.* at ¶ 26. Plaintiffs also claim that certain funds "are part of the Trust's corpus and, thus, the Senate Plaintiffs … have a fiduciary duty to prevent their diminution," *id.* at ¶ 70, that the "Commission's moratorium interferes with the ability of the Senate Plaintiffs … to manage and act in the Trust's best interests and precludes them from exercising their constitutionally imposed fiduciary duties relative thereto," *id.* at ¶ 82, and that the Commission "interfered with Plaintiffs' management of the Trust," *id.* at ¶ 84.

[5] The distinction between the rights and powers of individual legislators, on the one hand, and the rights and powers of the legislature as an institution, on the other hand, arises primarily in the context of standing and is addressed at length in section III(A)(1) of the

(continued...)

In its most recent major decision regarding the scope of the ERA, *Pennsylvania Environmental Defense Foundation v. Commonwealth* ("*PEDF*"), the Pennsylvania Supreme Court reiterated that trustee obligations under the ERA "are not vested exclusively in any single branch of Pennsylvania's government, and instead, all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality." *Id.* at 932 n.23 (quoting *Robinson Twp.. v. Commonwealth*, 83 A.3d 901, 956-957 (Pa. 2013)). The Republican Senators apparently take this to mean that they as individuals—and by extension, all members of the General Assembly, *individually*, including each of the Democratic Senators—have a fiduciary duty under the ERA. *See* Compl. ¶¶ 70, 82. A ruling by the Court validating Plaintiffs' position on this score would not only extend to the Democratic Senators for the first time a fiduciary duty under the ERA, but in so doing, would fundamentally expand the bounds of their role as individual members of the Senate. The Democratic Senators have a direct and substantial interest in the Court's determination of their rights and obligations, as individual legislators, under the ERA. *See Blake v. Pallan*, 554 F.2d 947, 953 (9th Cir. 1977) ("A state

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proposed Memorandum of Law in Support of the Democratic Senator Intervenors' Motion to Dismiss the Complaint, filed as Exhibit A hereto.

official has a sufficient interest in adjudications which will directly affect his own duties and powers….").

Democratic Senators also have a substantial interest in refuting the Republican Senators' assertion that they—as individual legislators in one branch of the General Assembly whose predecessors voted to enact the Compact six decades ago—"stand in privity of contract" with respect to the Compact, and as such "are entitled to maintain such claims and advance such arguments as any party to an ordinary contract." Compl. ¶ 93. This proposition, if adopted by this Court, would fundamentally reshape the traditional division between a legislature and its individual members and impose upon the Democratic Senators obligations and liabilities not only under the Compact, but also by extension under any number of other legislative actions taken by the General Assembly over the centuries. The court in the Wayne Land litigation flatly rejected this argument, *Wayne Land*, 331 F.R.D. at 593-94, and the Democratic Senators have a vital interest in seeking the same outcome in this case.

Finally, Plaintiffs assert that the fracking moratorium amounts to a multi-pronged usurpation of the legislative power vested in the General Assembly *and* in the Republican Senators as individual members of that body.[6] These claims are

[6] Specifically, Plaintiffs assert: that the fracking moratorium "suspends law within the Commonwealth—a power reposed exclusively in the General Assembly," Compl. ¶ 75; that (continued...)

based upon a pair of fatally flawed premises, namely, that an individual Senator has the authority to represent the General Assembly, and that an individual Senator wields legislative power in his or her own right. The legislative power and the right to defend that power in court are vested in the General Assembly as a body, not in individual legislators. *See Maloney v. Murphy*, 984 F.3d 50, 73 (D.C. Cir. 2020) (recognizing that "the legislative power is not vested personally in individual legislators); *Disability Rts. Pennsylvania v. Boockvar*, 234 A.3d 390, 393–94 (Pa. 2020) (Wecht, J., concurring) ("Our foundational Charter confers no authority on individual legislators or caucuses within each respective chamber to act on behalf of the General Assembly…."); *supra* n.5. Because these issues go to the scope of an individual legislator's power, the Democratic Senators have a significant interest in their resolution.

(continued...)

the "Commission has displaced and/or suspended the Commonwealth's comprehensive statutory scheme within the Basin and attempted to exercise legislative authority exclusively vested in the General Assembly," *id.* at ¶ 76; that the Commission has "attempted to exercise powers that the General Assembly did not—and, indeed, could not—transfer," *id.* at ¶ 94; that "because the power of eminent domain is vested exclusively in the General Assembly and may only be exercised pursuant to an express grant of legislative authority, by imposing the *de facto* moratorium, the Commission has unlawfully attempted to exercise the Commonwealth's legislative power," *id.* at ¶ 108; that "[b]y usurping the legislative and regulatory authority existing under the constitutional framework of the Commonwealth of Pennsylvania … the Commission has deprived 5.5 million Pennsylvanians of their ability to choose their laws and governmental structure," *id.* at 112; and that the Commission has "palpably diminished the legislative powers of the Senate Plaintiffs," *id.* at 112-113.

(b) *The Democratic Senators Stand on Equal Footing With the Republican Senators and Have an Equal Interest in Interpreting the Nature of Whatever Duties and Authority May Be Found to Have Been Conferred Upon Them By the ERA or the Compact*

In the event that the Court ultimately accepts one or more of the Republican Senators' aforementioned legal assertions, *see supra* section IV(A)(2)(a), the Democratic Senators will have precisely the same obligations and authority as their Republican counterparts. It may not shock the Court to learn that the Democratic Senators' interpretation of the Compact and the ERA differs dramatically from the views espoused by their Republican colleagues. To the extent individual senators are found to have duties and authority under those enactments, the Republican and Democratic Senators have an identical interest on the merits in defining what those duties are and how that authority may be used. Two particularly noteworthy examples illustrate the interest the Democratic Senators have in playing a role in this Court's interpretation of those enactments.

First, in essence, the Republican Senators contend that the Commission's fracking moratorium impinges upon the ERA, whereas the Democratic Senators believe that the two are in perfect harmony. If fact, the Democratic Senators contend that the fracking moratorium advances a similar purpose as the ERA in that it protects a vital natural resource—clean water—from degradation caused by a polluting enterprise. The Republican Senators' argument is premised on the

Pennsylvania Supreme Court's ruling in *PEDF* that because funds derived from the exploitation of the Commonwealth's natural resources are part of the corpus of the trust created by the ERA, those funds must be used for conservation purposes. *See PEDF*, 161 A.3d at 936 (ruling that "proceeds from the sale of trust principal… remain in the corpus," and "must be devoted to the conservation and maintenance of our public natural resources, consistent with the plain language of Section 27"). The Republican Senators seize this opening to turn the ERA on its head in what can only be described as a staggeringly audacious attempt at legal gaslighting. In the alternate universe conjured by the Republican Senators, making money by exploiting and degrading the Commonwealth's natural resources is the primary objective of the ERA. The Democratic Senators posit that the perverse outcome their Republican colleagues seek is akin to Penn State University selling its campus in order to raise funds for its endowment. The Senate Republican's arguments on this score simply cannot be squared with the Pennsylvania Supreme Court's landmark opinions in *Robinson Township*—a case involving fracking in which the Court invalidated significant portions of Act 13, the very law upon which Plaintiffs now rely to support their claims, because they violated the ERA, *Robinson Twp.*, 83 A.3d at 985—and *PEDF*.[7] Regardless, The Democratic

[7] The Pennsylvania Supreme Court ruled that the ERA's "express purpose … [is] to be a bulwark against actual or likely degradation of, *inter alia*, our air and water quality."
(continued...)

Senators have a direct interest in ensuring that the contours of any duties or obligations individual legislators may have under the ERA or the Compact are drawn based on the correct interpretation of those enactments.

Second, the Democratic Senators object to the assertion that the Commission has usurped or encroached upon the General Assembly's legislative power. To the contrary, the fracking moratorium is a valid exercise of the authority vested in the Commission by the General Assembly through its enactment of the Compact. If the Court determines that the Republican Senators have any legislative power to speak of (or on behalf of), it follows that the Democratic Senators have the same power, and a significant interest in the merits determination as to whether the fracking moratorium amounts to a usurpation of that power.

3. The Democratic Senators' Interests May Be Affected or Impaired By the Disposition of This Action

Rule 24(a)(2) requires not only that a prospective intervenor have a sufficient interest in the litigation, but that the litigation must present a "tangible

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Robinson Twp., 83 A.3d at 953, that "economic development cannot take place at the expense of an unreasonable degradation of the environment," *id.* at 954, and that the ERA *rejects* the "proprietary theory" of natural resources, whereby government "measur[es] its gains by the balance sheet profits and appreciation it realizes from its resources operations," *id.* at 956. Moreover, the Court concluded that the ERA imposes a fiduciary duty on the Commonwealth, as trustee, to "conserve and maintain" Pennsylvania's public natural resources for the benefit of all Pennsylvanians. *Id.* at 957. That is, "the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources." *Id.*

threat" to that interest, meaning that the interest "may be affected or impaired as a practical matter by the disposition of the action." *Commonwealth of Pennsylvania*, 888 F.3d at 59. A prospective intervenor "must show only that impairment of its substantial legal interest is *possible* if intervention is denied. This burden is minimal." *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 278 F.R.D. 98, 108 (M.D. Pa. 2011) (quoting *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001)) (emphasis in original).

Plaintiffs' claims hinge on the proposition that individual senators have certain duties and obligations under the ERA and the Compact that have heretofore never been recognized by any court. As discussed above, the Court's resolution of these issues could therefore have a broad and tangible impact upon the Democratic Senators. *See supra* section IV(A)(2)(b). If intervention is denied, the Democratic Senators will be deprived of the opportunity to counter their Republican colleagues' assertions as to whether any such individual duties exist, and if so, how the ERA and Compact are to be interpreted with respect to those obligations.

4. The Democratic Senators' Interests Are Not Adequately Represented By Existing Parties to the Litigation

A prospective intervenor's interests are inadequately represented "if they diverge sufficiently from the interests of the existing party, such that the existing party cannot devote proper attention to the applicant's interests." *Commonwealth of Pennsylvania*, 888 F.3d at 60 (quoting *Virgin Islands*, 748 F.3d at 520). The

burden imposed by this factor "is generally treated as minimal and requires the applicant to show that the representation of his interest *may be* inadequate." *Id.* (quoting *Mountain Top Condo. Ass'n*, 72 F.3d at 368) (emphasis in original).

The Democratic Senators are presumably aligned with the Commission insofar as they support the Commission's fracking moratorium and ultimately seek the dismissal of the Plaintiffs' claims. Nevertheless, it is not clear whether the Commission will take the same position with respect to interests discussed above, *see supra* section IV(A)(2)(a), related to the Democratic Senators' duties and authority vis-à-vis the ERA and the Commission. At the very least, it cannot be said that the Commission shares those interests, which are unique to the Senators qua Senators. As such, the Commission's involvement certainly "*may be* inadequate" to advance and defend the Democratic Senators' vital interests. *Commonwealth of Pennsylvania*, 888 F.3d at 60.

The Third Circuit has held that "a rebuttable presumption of adequacy arises if one party is a government entity charged by law with representing the interests of the applicant for intervention." *Id.* (quoting *Virgin Islands*, 748 F.3d at 520). There is no such rebuttable presumption here. Assuming *arguendo* that the Commission is a "government entity" within the meaning of the Third Circuit's jurisprudence in this area (which is not clear), the Commission has not been charged by law with representing any interests implicated by the Democratic

Senators' as legislators. Moreover, even if a rebuttable presumption did arise, the Democratic Senators' burden would be "comparatively light" because the Commission's views "are necessarily colored by its view of the public welfare rather than the more parochial views" of the Democratic Senators, "whose interest is personal to [them]." *Kleissler*, 157 F.3d at 972. In light of the foregoing, and given the fact that the "parochial views" of the Democratic Senators relate to fundamental questions regarding the authority and duties that devolve upon them by virtue of their office, this burden is easily met.[8]

B. The Democratic Senators Should Be Permitted to Intervene Pursuant to Rule 24(b)(1)(B)

The Democratic Senators respectfully submit that if the Court determines they are not entitled to intervene as of right, they should nevertheless be permitted to intervene under Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure. A non-party may be permitted to intervene if it "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). District courts have "broad discretion to determine whether permissive intervention in a case is appropriate." *UBS Fin. Servs. Inc. v. Ohio Nat'l*

[8] It is perhaps obvious that although they hold the same office, the Republican Senators do not represent the Democratic Senators' interests in this case. As this brief outlines, there is a fundamental disagreement between the two groups of senators regarding the existence and nature of various duties and obligations purportedly bestowed upon them as individual legislators; as such, their interests in this case are diametrically opposed.

Life Ins. Co., No. 18-CV-17191, 2020 WL 5810562, at *2 (D.N.J. Sept. 30, 2020) (citing *Virgin Islands*,, 748 F.3d at 524). In exercising that discretion, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

As explained above, the Democratic Senators' motion to intervene in this action is timely, and their intervention will neither delay this litigation nor prejudice the existing parties. *See supra* section IV(A)(1). Moreover, the Democratic Senators' defenses and arguments fall squarely within the current bounds of this litigation. Specifically, the Democratic Senators intend to refute Plaintiffs' claims that the fracking moratorium exceeds the scope of the Commission's authority under section 3.8 of the Compact, that the moratorium is in any way inconsistent with the ERA, that the moratorium amounts to an unconstitutional taking, that the Plaintiffs have any duties or authority under the ERA or the Compact, that the Commission usurped the authority of individual members of the legislature, and that Plaintiffs have standing to bring their claims.

In deciding whether to permit intervention, "courts consider whether the proposed intervenors will add anything to the litigation." *Kitzmiller v. Dover Area Sch. Dist.*, 229 F.R.D. 463, 471 (M.D. Pa. 2005). Relatedly, courts have granted permissive intervention where the prospective intervenor "could aid the court when it comes to adding adversarial testing to the parties' dispute." *Libertarian Party of*

Pennsylvania v. Wolf, No. CV 20-2299, 2020 WL 6580739, at *1 (E.D. Pa. July 8, 2020). The Democratic Senators will provide a vital counterpoint with respect to the arguments that their Republican colleagues have raised, and in so doing, they will add adversarial testing to the existing parties' dispute. As explained above, the Republican Senators make numerous assertions related to their duties, obligations, and authority in their role as senators vis-à-vis the ERA and the Compact. The Democratic Senators have a fundamentally different view on some of these issues, and submit that the Court may benefit from informed counterarguments presented by others who occupy the same office as the Republican Senators.

Finally, the Democratic Senators respectfully submit that the principles of fairness and equity weigh heavily in favor of the court exercising its broad discretion to grant intervention in this instance. The Republican Senators do not speak on behalf of the Senate, and they should not be the only members of that body who are permitted to play a role in resolving the issues that they have raised. Intervention seems particularly appropriate in light of the very premise underpinning all of the Republican Senators' claims: that they *as individual legislators* have certain powers and duties, along with the right to petition this Court with respect thereto. The Democratic Senators stand on equal footing with their Republican colleagues and should be afforded an equal opportunity to litigate questions that go to the fundamental nature and scope of the office they hold.

V. CONCLUSION

For the reasons set forth above, the Democratic Senators respectfully request that this Court enter an order granting their Motion to Intervene.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

By: /s/ Steven T. Miano

Steven T. Miano
Robert A. Wiygul
Peter V. Keays
One Logan Square, 27th Floor
Philadelphia, PA 19103
215-568-6200

Attorneys for the Democratic Senators

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