[J-30B-2023 and J-30C-2023] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JESSICA SHIRLEY, INTERIM ACTING SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ACTING CHAIRPERSON OF THE ENVIRONMENTAL QUALITY BOARD	:	No. 85 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 41 MD 2022 dated June 28, 2022.
v.	:	ARGUED: May 24, 2023
PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, VINCENT C. DELIBERATO, JR., DIRECTOR OF THE LEGISLATIVE REFERENCE BUREAU, AND AMY J. MENDELSOHN, DIRECTOR OF THE PENNSYLVANIA CODE AND BULLETIN	:	
APPEAL OF: CITIZENS FOR PENNSYLVANIA'S FUTURE, SIERRA CLUB, AND CLEAN AIR COUNCIL, Possible Intervenors	:	
JESSICA SHIRLEY, INTERIM ACTING SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ACTING CHAIRPERSON OF THE ENVIRONMENTAL QUALITY BOARD	:	No. 87 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 41 MD 2022 dated July 8, 2022.
v.	:	ARGUED: May 24, 2023
PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, VINCENT C. DELIBERATO, JR., DIRECTOR OF THE LEGISLATIVE REFERENCE BUREAU, AND AMY J. MENDELSOHN, DIRECTOR	:	

OF THE PENNSYLVANIA CODE AND BULLETIN :
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Possible Intervenors :
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CONCURRING AND DISSENTING OPINION

JUSTICE BROBSON **DECIDED: July 18, 2024**

To facilitate Pennsylvania's participation in the Regional Greenhouse Gas Initiative (RGGI), the Department of Environmental Protection (DEP) developed, and the Environmental Quality Board (EQB) adopted, a rulemaking package, which, like the Majority, I will refer to as the RGGI Regulation. The Secretary of the DEP and Chairman of the EQB commenced this litigation by filing a petition for review in the Commonwealth Court's original jurisdiction, challenging the refusal of the Legislative Reference Bureau (LRB) to publish the RGGI Regulation. The focus of the action morphed after the Commonwealth Court permitted various members of the General Assembly to intervene in the matter, as intervenors from the Pennsylvania Senate (Senate Intervenors) presented counterclaims alleging that the DEP violated the law in several respects by promulgating and attempting to publish the RGGI Regulation.

Various entities also applied to intervene in this litigation. Most important for present purposes, three nonprofit environmental corporations requested intervenor status—namely, Citizens for Pennsylvania's Future, Clean Air Council, and Sierra Club (Nonprofits). The Commonwealth Court denied Nonprofits' application to intervene, and they appealed to this Court. Nonprofits also appealed a Commonwealth Court order that

preliminarily enjoined the implementation of the RGGI Regulation. The Majority reverses the Commonwealth Court order that denied Nonprofits' application to intervene and dismisses as moot the appeal from the preliminary injunction order.

I agree with several aspects of the Majority Opinion. Specifically, I agree with the Majority that: (1) the Commonwealth Court's order denying Nonprofits' request to intervene qualifies as an immediately appealable collateral order; (2) the issue regarding Nonprofits' intervention is not moot; and (3) Nonprofits' appeal concerning the Commonwealth Court's preliminary injunction order was rendered moot by the Commonwealth Court's subsequent order permanently enjoining the DEP from enforcing the RGGI Regulation, which was codified in July of 2022. On the first point—appealability as a collateral order—my reasoning differs from that of the majority, particularly with respect to the second prong of the collateral order inquiry. (Majority Opinion at 18.) This prong asks whether "the right involved is too important to be denied review." Pa. R.A.P. 313. To me, the Majority conflates Nonprofits' environmental interests with the "right involved" in the Commonwealth Court's order denying intervention, which is the order under review. Here, as with all orders denying intervention, the "right involved" is the right, under Rule 2327 of the Pennsylvania Rules of Civil Procedure, to intervene. *See K.C. v. L.A.*, 128 A.3d 774, 779-80 (Pa. 2015) (holding that decision regarding claimed right to standing to intervene has direct effect on appellants' ability to participate in proceeding, satisfying second prong of collateral order doctrine). Moreover, this Court has counseled would-be intervenors that the failure to seek an immediate appeal from an order denying intervention would adversely affect their ability to later seek appellate review of a later merits decision below. *See In re Barnes Found.*, 871 A.2d 792 (Pa. 2005). Accordingly, an order denying intervention not only implicates a right to intervene under our procedural rules but also a right to appeal under Article V, Section 9

of the Pennsylvania Constitution. It is because of these rights—*i.e.*, the right to intervene under our procedural rules and the right to appeal under the Pennsylvania Constitution—that I believe Nonprofits satisfy the second prong of the collateral order three-part inquiry. I thus concur with the Majority's conclusion set forth in Part II.A. I join in full Parts I, II.B., and III of the Majority Opinion.

I disagree, however, with Part II.C. of the Majority Opinion, wherein the Majority reverses the Commonwealth Court's decision denying Nonprofits' application to intervene. To establish their right to intervene in this matter, Nonprofits had to establish that they fell within one of the categories of persons entitled to intervene under Pennsylvania Rule of Civil Procedure 2327, which provides:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if
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> > (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
> >
> > (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
> >
> > (3) such person could have joined as an original party in the action or could have been joined therein; or
> >
> > (4) *the determination of such action may affect any legally enforceable interest of such person* whether or not such person may be bound by a judgment in the action.

Pa.R.Civ.P. 2327 (emphasis added). If Nonprofits satisfied this burden, then the Commonwealth Court had the discretion to deny Nonprofits' request to intervene under any one of the circumstances set forth in Pennsylvania Rule of Civil Procedure 2329, which provides:

> Upon the filing of the petition and after hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have

> been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if
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> > (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
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> > (2) the interest of the petitioner is already adequately represented; or
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> > (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Pa.R.Civ.P. 2329; *see In re Pa. Crime Comm'n*, 309 A.2d 401, 408 n.11 (Pa. 1973).

The Majority agrees with the Commonwealth Court's determination that Nonprofits presented sufficient evidence to qualify to intervene under paragraph (4) of Rule 2327—*i.e.*, "the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action." The Majority concludes, however, that the Commonwealth Court abused its discretion under Rule 2329(2) by finding that the DEP is adequately representing Nonprofits' interests and, for this reason, denied them intervention. For the reasons that follow, I disagree with the Commonwealth Court and the Majority that Nonprofits qualify to intervene under Rule 2327(4). Moreover, even if Nonprofits were entitled to intervene under Rule 2327(4), unlike the Majority, I do not believe that the Commonwealth Court abused its discretion in denying intervention under Rule 2329(2).

Whether an applicant should be permitted to intervene under Rule 2327 generally presents a question of law. *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs.*, 309 A.3d 808, 843 (Pa. 2024). Consequently, "our scope of review is plenary, and our standard of review is de novo." *Id.* As the Majority aptly explains, in deciding whether a potential intervenor has demonstrated that it is entitled to intervene pursuant to Rule 2327(4), a court must examine as a threshold matter whether the potential intervenor has standing. (*See* Majority Opinion at 23 (stating that "[w]hether a potential

party has a legally enforceable interest in permitting intervention under Rule 2327(4) 'turns on whether they satisfy our standing requirements'") (quoting *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016)).) To determine whether a potential intervenor is aggrieved and, therefore, has standing to intervene in litigation, a court should consider whether the potential intervenor has a substantial, direct, and immediate interest in the matter being litigated. *Wolf*, 136 A.3d at 140. As to these requirements, this Court has stated:

> To have a substantial interest, the concern in the outcome of the challenge must surpass the common interest of all citizens in procuring obedience to the law. An interest is direct if it is an interest that mandates demonstration that the matter caused harm to the party's interest. Finally, the concern is immediate if that causal connection is not remote or speculative.

Id. (citations and quotation marks omitted). Important to this matter, this Court also has explained:

> [A]n association, as a representative of its members, has standing to bring a cause of action even in the absence of injury to itself if the association alleges that at least one of its members is suffering immediate or threatened injury *as a result of the challenged action* and the members of the association have an interest in the litigation that is substantial, direct, and immediate.

Pa. Med. Soc'y v. Dep't of Pub. Welfare, 39 A.3d 267, 278 (Pa. 2012) (emphasis added) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)); *see Robinson Twp., Washington Cnty. v. Commonwealth*, 83 A.3d 901, 922 (Pa. 2013) ("Under Pennsylvania law, an association has standing as representative of its members to bring a cause of action even in the absence of injury to itself, if the association alleges that at least one of its members is suffering immediate or threatened injury *as a result of the action challenged*.") (emphasis added). Thus, if an association, like the various Nonprofits, wishes to establish standing by way of the status of one of its members, the association must prove, *inter alia*, that at least one of its members is suffering an immediate or threatened injury *as a result of the*

challenged action.[1] Our precedent establishes that, for purposes of associational standing, "the challenged action" typically is the act that prompted the litigation.

The Majority explains that, here, Nonprofits "presented the testimony of individual members regarding alleged harms they are suffering due to CO_2 emissions from fossil-fuel-fired power plants." (Majority Opinion at 27.) In addition, they "adduced expert testimony concerning the environmental and health impacts of CO_2 emissions and the RGGI Regulation."[2] (*Id.* at 28.) Based upon the testimony that Nonprofits offered at the evidentiary hearing concerning their application to intervene, the Commonwealth Court concluded that Nonprofits "provided sufficient credible evidence to establish that they have a legally enforceable interest by virtue of injury to their members." (Commonwealth Court Opinion at 21.) The Majority reaches the same conclusion.

Specifically, the Majority finds that one member of each of the various Nonprofits established that she has standing to intervene. In making this finding, the Majority first concludes that the members' "interests in the outcome of the litigation are substantial." (Majority Opinion at 29.) In support, the Majority states: "The members claim specific harms to their well-being, including hotter and wetter weather, poor air quality, breathing

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[1] *See Robinson Twp.*, 83 A.3d at 922-23 (concluding that non-profit environmental group had standing to challenge legislation where, *inter alia*, environmental group demonstrated that some of its individual members were likely to suffer considerable harm as result of enactment of legislation that prompted litigation); *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 481-88 (Pa. 2021) (determining that non-partisan political action committee had standing because it alleged that its members were harmed by enactment of ordinance challenged in litigation); *S. Whitehall Twp. Police Serv. v. S. Whitehall Twp.*, 555 A.2d 794 (Pa. 1989) (holding that police collective bargaining agent had standing because it demonstrated that its members were harmed by alleged quota system instituted by township and chief of police, where quota system was focus of litigation).

[2] This expert testimony was offered at the hearing on the Senate Intervenors' application for a preliminary injunction, not at the hearing dedicated to Nonprofits' application to intervene. Thus, the expert testimony did not concern Nonprofits' contention that they are entitled to intervene in this litigation.

difficulties, forced time inside, exacerbated asthma symptoms, worsened allergies, odd smells, dizziness, lightheadedness, headaches, ill loved ones, and eco-anxiety." (*Id.*) The Majority then reasons that "[t]hese specific interests in the outcome of the litigation go beyond the general interest shared by all Pennsylvanians in procuring obedience to the law. At stake for these individuals is not just fidelity to the law but the quality of their lives." (*Id.*)

The Majority also finds that the members' "interests in the outcome of this injunction litigation are direct: an injunction deprives them of the RGGI Regulation's purported environmental and health benefits, and their ongoing injuries persist or worsen." (*Id.* at 29-30.) Lastly, according to the Majority, the members' interest in the outcome of this litigation is immediate, as one of Nonprofits' experts testified at the preliminary injunction hearing that the RGGI Regulation would improve the environment and cause better health outcomes, moving the benefits of the RGGI Regulation outside of the realm of pure conjecture. In my view, the analyses offered by the Commonwealth Court and the Majority are not aligned with this Court's precedent regarding associational standing.

On almost a daily basis, individuals and organizations advocate for legislative and executive action that advances their favored policy interests. While individuals and organizations may seek to influence executive and legislative decision-making, we have never recognized any legally enforceable right to the implementation of favorable policies or the enactment of particular laws. Nonprofits, here, are advocates for "clean air and a stable climate." (Nonprofits' Application for Intervention ¶ 8.) The threshold question raised in this matter is whether those types of policy or advocacy interests become "legally enforceable interests"[3] such that their proponents have standing to intervene in litigation

[3] Pa.R.Civ.P. 2327(4).

challenging government action that promotes the proponents' interests rather than infringes upon them. Such a circumstance is strikingly inapposite to the circumstances under which this Court traditionally has determined standing to be proper in the face of a challenge to an ordinance, regulation, or statute.

Our decision in *Firearm Owners Against Crime* presents a traditional standing analysis when an ordinance, regulation, or statute is challenged as unconstitutional. In that case, we considered whether Firearm Owners Against Crime (FOAC) had standing to challenge—on a pre-enforcement basis—an ordinance that regulated various aspects of possessing and discharging firearms in the City of Harrisburg. We concluded that FOAC had standing for the following reasons:

> The individual [a]ppellees' interest is substantial because they, as lawful possessors of firearms and concealed carry licenses, seek a determination of the validity of the City's Discharge, Parks, and Lost/Stolen Ordinances, which criminalize aspects of their ability to carry and use firearms within the City and impose reporting obligations for lost or stolen firearms. This exceeds the "abstract interest of all citizens in having others comply with the law." *William Penn Parking Garage, Inc. v. City of Pittsburgh*, . . . 346 A.2d 269, 282 (1975) (defining substantial interest). Their interest is direct because the challenged ordinances allegedly infringe on their constitutional and statutory rights to possess, carry, and use firearms within the City. *See id.* (stating a direct interest "simply means that the person claiming to be aggrieved must show causation of the harm to his [or her] interest by the matter of which he [or she] complains."). Their interest is immediate because they are currently subject to the challenged ordinances, which the City is actively enforcing, and must presently decide whether to violate the ordinances, forfeit their rights to comply with the ordinances, or avoid the City altogether. This alleged harm to their interest is not remote or speculative. *See* [*Off. of Governor v. Donahue*, 98 A.3d 1223, 1229 (Pa. 2014)]. Because the individual [a]ppellees, who are all members of FOAC, have standing to challenge the Discharge, Parks, and Lost/Stolen Ordinances, FOAC has standing as an associational representative of these members to challenge the ordinances. *See Robinson Twp.*, 83 A.3d at 922.

Firearm Owners Against Crime, 261 A.3d at 487-88.

Applying a similar analysis here, we must first examine the claims or challenges raised in this action. As this action now stands, the Senate Intervenors, through their counter-claims to the petition for review, seek to enjoin the publication of the RGGI Regulation on the basis that it constitutes an unconstitutional violation of the separation of powers doctrine because it: (1) interferes with the General Assembly's legislative authority to consider a regulation under Section 7(d) of the Regulatory Review Act;[4] (2) constitutes an *ultra vires* action beyond the authority granted to the executive branch under the Air Pollution Control Act (APCA);[5] (3) usurps the General Assembly's authority to enter into interstate compacts or agreements, and (4) usurps the General Assembly's authority to levy taxes. The Senate Intervenors also seek to enjoin the regulation on the basis that it violates the APCA and what is commonly referred to as the Commonwealth Documents Law for failure to hold public hearings.[6]

As our precedent above makes clear, to have standing the would-be intervenor must establish interests that are adversely impacted—*i.e.*, harmed—by the challenged action. Here, Nonprofits make clear that their only desire is to intervene to assist the DEP in fending off challenges by the Senate Intervenors. When the Secretary of the DEP and Chairman of the EQB initiated this litigation, "the challenged action" was the LRB's refusal to publish the RGGI Regulation. In their application to intervene, Nonprofits expressly stated that they did not wish to intervene "on that narrow issue[.]" (Nonprofits' Application for Leave to Intervene, 4/25/2022, at 3, ¶5.) As noted, however, after the Commonwealth Court allowed various members of the Legislature to intervene, "the challenged action" morphed into the DEP's alleged violation of the law in promulgating and attempting to

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[4] Act of June 25, 1982, *as amended*, 71 P.S. § 745.7(d).

[5] Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001-4015.

[6] Act of July 31, 1968, *as amended*, P.L. 769, 45 P.S. §§ 1101-1611.

publish the RGGI Regulation. Nonprofits unequivocally desired to intervene to supplement the DEP's advocacy in favor of the validity of the RGGI Regulation. The question, then, is what "legally enforceable interest" of the Nonprofits may be harmed by the challenged action?

Although the Senate Intervenors' counterclaims are varied, the core of their position is that the DEP and the EQB violated the law, including constitutional principles concerning the separation-of-powers doctrine, by promulgating and attempting to publish the RGGI Regulation. Thus, the action challenged by the Senate Intervenors is the creation of the RGGI Regulation. Although Nonprofits would like this Court to view Senate Intervenors' challenge of the RGGI Regulation as infringing on their rights under the Environmental Rights Amendment (ERA),[7] the fact is that Nonprofits do not have a legally enforceable interest or right to executive or legislative action establishing the RGGI Regulation. Simply put, because Nonprofits have no right to the RGGI Regulation, none of the claims raised by Senate Intervenors in this litigation infringe upon any constitutional or other right currently enjoyed by Nonprofits. Furthermore, it is worth noting that the harms suffered by Nonprofits' members—*i.e.*, injuries suffered from existing environmental conditions, pollution, and their associated impacts—are similar to harms suffered by many if not all Pennsylvanians. If the RGGI Regulation does not become an enforceable regulation in this Commonwealth, its absence does not harm Nonprofits' members any more than they are already harmed. This is because the absence of the RGGI Regulation is simply the *status quo*. Again, Nonprofits have no right, let alone a "legally enforceable interest," to particular proposed policies, regulations, or statutes[8] that

[7] Pa. Const. art. I, § 27.

[8] The Majority takes issue with my conclusion that the absence of the RGGI Regulation is simply the status quo, claiming that the RGGI Regulation is not, as I suggest, a "proposed" regulation because it has been codified in the Pennsylvania Code. While that (continued…)

advance their interests. For this reason, I disagree with the Majority's conclusion that Nonprofits have established a substantial, direct, and immediate interest in the litigation that would confer standing on them for purposes of intervention under Rule 2327(4).

The Majority's view on standing essentially takes the position that an individual or organization that has an interest in the subject matter has standing to intervene in litigation seeking to challenge any proposed regulation or legislation that advances that interest. This Court, however, has never held that an interest in the subject matter of litigation alone creates a "legally enforceable interest" sufficient to establish standing for intervention purposes, particularly when dealing with challenges to proposed legislative or administrative action. Put another way, standing is not afforded to would-be intervenors who profess to have only an interest in the subject matter or the outcome of the litigation. To allow otherwise means that we must recognize standing for all individuals or organizations to intervene if they can establish a "mere" interest—*i.e.*, less than a "legally enforceable" interest—in the litigation.

Furthermore, I disagree with the Majority's conclusion that the Commonwealth Court abused its discretion by finding that the DEP is adequately representing Nonprofits' interest in this matter. *See* Pa.R.Civ.P. 2329(2). The only new dimension that Nonprofits add to this litigation is an argument that the money generated from the RGGI Regulation is not an unauthorized tax but, rather, a fee. Nonprofits highlight that, unlike the DEP, their members are beneficiaries of the trust created by the ERA. Nonprofits believe that this status establishes that they have a special interest in this litigation. Nonprofits insist that their members' beneficiary status places Nonprofits in the unique position to argue that the RGGI Regulation is not a tax but, rather, a permissible fee, as the ERA mandates

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may be true, the RGGI Regulation is, as the Majority concedes, "currently subject to an injunction" and, therefore, is not and has never been in effect in the Commonwealth. (Majority Opinion at 34.)

that the proceeds from this regulation cannot be treated as general revenue. Instead, Nonprofits argue that, in line with trust principles, the RGGI Regulation proceeds must be dedicated to conserving the environment. According to Nonprofits, "[t]his nexus with the public trust precludes the General Assembly from appropriating the fee proceeds to become part of the General Fund of the Commonwealth, and limits [the] DEP's ability to expend the fee monies to protecting the trust asset from which they derive." (Nonprofits' Brief at 47.) While the Majority concludes that such an argument is "nonfrivolous," (Majority Opinion at 31), DEP may have had legitimate reasons not to advance that argument.[9] Moreover, failure to advance every possible argument does not render the DEP's representation inadequate. Regardless, Nonprofits need not have party status to advance their argument on this point. This argument can be raised by an amicus. To become a party intervenor requires more under our rules.

Having failed to demonstrate that at least one member of each of the entities that make up Nonprofits have standing to intervene in this matter, Nonprofits have not established that they have a legally enforceable interest in the outcome of this litigation, as required by Pennsylvania Rule of Civil Procedure 2327(4). Thus, Nonprofits necessarily do not have associational standing to intervene. Consequently, I would affirm the Commonwealth Court's order denying Nonprofits' application to intervene, albeit for reasons that differ from those that led the Commonwealth Court to deny Nonprofits' application to intervene.

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[9] Assuming *arguendo* that any proceeds from the Commonwealth's participation in RGGI must be directed to matters of environmental conservation, this does not necessarily answer the question of which branch of our state government—the executive or legislative—makes the ultimate determination of which environmental initiatives should benefit from the RGGI proceeds. This seems to me to be the central point of the "fee v. tax debate" currently before the Court.