

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

TIMOTHY R. BONNER, P. )  
MICHAEL JONES, DAVID H. )  
ZIMMERMAN, BARRY J. JOZWIAK, )  
KATHY L. RAPP, DAVID )  
MALONEY, BARBARA GLEIM, )  
ROBERT BROOKS, AARON J.  
BERNSTINE, TIMOTHY F.  
TWARDZIK, DAWN W. KEEFER,  
DAN MOUL, FRANCIS X. RYAN,  
and DONALD “BUD” COOK,

Petitioners,

v.

NO. 364 M.D. 2022

LEIGH M. CHAPMAN, in her official )  
capacity as Acting Secretary of the )  
Commonwealth of Pennsylvania, and )  
COMMONWEALTH OF )  
PENNSYLVANIA, DEPARTMENT )  
OF STATE, )

Respondents.

**PROPOSED INTERVENORS-RESPONDENTS DEMOCRATIC  
NATIONAL COMMITTEE AND PENNSYLVANIA DEMOCRATIC  
PARTY’S  
APPLICATION TO INTERVENE**

Proposed Intervenor-Respondents, the Democratic National Committee (“DNC”) and the Pennsylvania Democratic Party (“PDP”) (collectively, the “Applicants”), respectfully file this Application to Intervene in the above-captioned litigation, and to participate fully therein as Intervenor-Respondents. If permitted to

intervene, the Applicants will file the attached Preliminary Objections and Answer to the Petitioners' Application for Summary Relief and Expedited Briefing.

## **I. INTRODUCTION**

Petitioners in this case yet again challenge Act 77, the Pennsylvania statute allowing any eligible voter in Commonwealth to cast his or her ballot by mail, on the basis of the purported invalidation of Act 77's requirement that voters date their ballots and Act's nonseverability provision. The relief Petitioner requests would significantly impede the ability of millions of Pennsylvanians, including a large number of Democratic Party members and supporters, to exercise their fundamental right to vote and impair the electoral prospects of the Applicants' candidates.

No party to this proceeding adequately represents the Applicants' interests. Respondents have the duty to enforce Pennsylvania law, which is distinct from the Applicants' particularized interest in having their candidates assume office and their voters' ballots counted. The Applicants' unique interests make intervention not just permissible, but in fact mandatory. *See Larock v. Sugarloaf Twp. Zoning Hr'g Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

## **II. LEGAL STANDARD**

Applications to intervene in original jurisdiction matters before the Commonwealth Court are governed by Pennsylvania Rule of Appellate Procedure

1531(b), which mirrors the standards set forth in Pennsylvania Rules of Civil Procedure 2326-2350. Rule 2327 denotes four categories of persons or entities that may intervene “[a]t any time during the pendency of an action,” including any person or entity that has “any legally enforceable interest” that may be affected by a judgment in the action. Pa. R.C.P. 2327(4). Rule 2329 provides certain grounds for refusal to permit the intervention of a person who fits within the parameters of Rule 2327, including that such person’s interests are “already adequately represented.” Pa. R.C.P. 2329(2). “Considering Rules 2327 and 2329 together, the effect of Rule 2329 is that if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present.” *Larock*, 740 A.2d at 313. And even if a ground for refusal under Rule 2329 is present, the Court still possesses discretion to permit intervention. *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Human Servs.*, 225 A.3d 902, 908 (Pa. Commw. Ct. 1999) (citing *Larock*, 740 A.2d at 313).

### III. ARGUMENT

The DNC is a national committee (as that term is defined under 52 U.S.C. §30101) dedicated to electing local, state, and national candidates of the Democratic Party to public office throughout the United States, including in Pennsylvania. The PDP is the DNC’s coordinate party within the Commonwealth and is the largest

political party by registration in Pennsylvania. As of August 4, 2022, 3,571,594 registered voters in Pennsylvania are Democrats. *See Voting and Election Statistics, PENNSYLVANIA DEP'T OF STATE, available at* <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Pages/VotingElectionStatistics.aspx> (visited August 3, 2022). The PDP is a “major political party” as defined in the Pennsylvania Election Code (25 P.S. §§ 2601) and is statutorily created. *See* 25 P.S. §§ 2834 *et seq.* For each general election, the PDP nominates individuals for Pennsylvania’s federal, state, and local offices. The DNC’s membership and constituents in the Commonwealth include past and future individuals qualified to vote in the Commonwealth, as well as past and future candidates for offices across the Commonwealth. The DNC and PDP have dedicated significant resources to encourage their supporters and constituents to vote, including by mail. These efforts have been successful; 2020 election turnout in the Commonwealth was the highest in decades, with more than 2.6 million voters casting a ballot by mail.

The Applicants thus have particularized interests in defending the constitutionality of Act 77.

**A. The Applicants have a legally enforceable, particularized interest in this matter.**

The Applicants’ institutional interests and the rights of their members stand to be adversely affected should this Court grant Petitioners’ requested relief. Petitioners

ask this Court for a declaratory judgment that Act 77, including its mail-in voting provisions, and all amendments thereto are void. Petition at 9. Many Democrats have cast mail ballots based on Act 77 in the past and would do so again in the future, and many other Democrats running for office in the Commonwealth would receive votes cast by mail. Petitioners' legal challenge thus threatens the ability of Democrats to vote as well as the electoral prospects of Democratic candidates up and down the ballot—all of which implicate the Applicants' legally enforceable interests. Under similar circumstances, courts in the Commonwealth and around the country have routinely granted intervention to political party committees such as the Applicants— particularly in cases where plaintiffs seek to impose restrictions on voting access in ways that undermine the ability of one party's voters to vote or harm the electoral prospects of the party's candidates.<sup>1</sup> The Applicants were each also

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<sup>1</sup> See *Paher v. Cegavske*, 2020 WL 2042365, at \*4 (D. Nev. Apr. 28, 2020) (granting the DNC intervention in an election-law case brought by a conservative interest group); *Donald J. Trump for President, Inc. v. Murphy*, 2020 WL 5229209, at \*1 (D.N.J. Sept. 1, 2020) (granting the Democratic Congressional Campaign Committee (“DCCC”) intervention in a lawsuit by a Republican candidate and party entities); Minute Entry (ECF No. 37), *Cook Cty. Republican Party v. Pritzker*, No. 20-cv-4676 (N.D. Ill. Aug. 28, 2020) (granting the DCCC intervention in a lawsuit by a Republican party entity); *Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at \*3 (E.D. Cal. June 10, 2020) (granting the DCCC and the California Democratic Party intervention in a lawsuit by a Republican congressional candidate); Order (ECF No. 35), *Donald J. Trump for President v. Bullock*, No. 6:20-cv-66 (D. Mont. Sept. 8, 2020) (granting the DCCC, the Democratic Senatorial Campaign Committee, and the Montana Democratic Party intervention in a lawsuit brought by four Republican party entities); see also Memorandum Order (ECF No. 309), *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-00966-NR (W.D. Pa. Aug. 3, 2020) (granting a non-profit organization standing to represent its members in a lawsuit by Republican presidential and congressional candidates).

<sup>2</sup> See *In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020); *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020); *Donald J. Trump*

granted intervention in several election-related cases in Pennsylvania during the last election cycle.<sup>2</sup> In an essentially identical procedural and substantive matter, this Court granted Applicants' intervention request in *McLinko v. Commonwealth et al.*, 244 MD 2021. Applicants participated in the subsequent appeal before the Supreme Court, which was recently decided. *McLinko v. Commonwealth et al.*, \_\_A.3d\_\_, 2022 WL 3039295 (Pa. Aug. 2, 2022). The posture of the Applicants' intervention in *McLinko* was identical to the present case, and the same result should follow.

Furthermore, given Petitioners' request for declaratory relief and the extent to which the Applicants' interests are implicated, Applicants' participation may well be required under Pennsylvania's Declaratory Judgments Act. That law provides that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." 42 Pa. C.S. §7540(a). This provision "is mandatory and, prior to the enactment of the Declaratory Judgments Act, our Supreme Court had held that a declaratory judgment action will not lie unless all interested parties who could be affected by the judgment

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*for President, Inc. v. Boockvar*, No. 4:20-cv-02078, ECF No. 72 (W.D. Pa. Nov. 12, 2020); Oral Order, *Donald J. Trump for President, Inc. v. Montgomery Cty. Bd. of Elections*, No. 2020-18680 (Pa. Com. Pl. Nov. 10, 2020); Oral Order, *Donald J. Trump for President, Inc. v. Phila. Cty. Bd. of Elections*, Nos. 201100874, 201100875, 201100876, 201100877, & 201100878 (Pa. Com. Pl. Nov. 13, 2020); Oral Order, *Donald J. Trump for President, Inc. v. Bucks Cty. Bd. of Elections*, No. 2020-05786 (Pa. Com. Pl. Nov. 17, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-00966, ECF 309 (W.D. Pa. Aug. 3, 2020); *Libertarian Party of Pa. v. Boockvar*, No. 5:20-cv-2299, ECF 49 (E.D. Pa. July 8, 2020).

are joined.” *Allegheny Cty. v. Commonwealth*, 453 A.2d 1085, 1087 (Pa. Commw. Ct. 1983); accord *Stilp v. Commonwealth*, 910 A.2d 775, 785 (Pa. Commw. Ct. 2006). The Applicants and their candidate and voter members assuredly have interests that would be affected by the proposed declaratory relief; having declared those interests, their participation in this matter is required before any declaratory judgment can issue. The Applicants are therefore entitled to mandatory intervention.

**B. Respondents do not adequately represent the Applicants’ interests.**

Although the Respondents share Applicants’ interest in defending the validity of Act 77, the Applicants’ interests diverge from those of Respondents. Respondents’ duties are solely defined by Pennsylvania law, and they are bound to represent all Pennsylvanians. Respondents have no interest in which candidates win an election, and they likewise do not have millions of members who have voted by mail and desire to do so in the future. By contrast, the Applicants have a strong interest in ensuring that their candidates prevail and that their members have the fullest opportunity to vote afforded them by law. Respondents therefore do not adequately represent the Applicants’ interests. See *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (“[W]hen the proposed intervenors’ concern is not a matter of ‘sovereign interest,’ there is no reason to think the government will represent it[.]” (quotation marks omitted)); *Issa*, 2020 WL 3074351 at \*3 (“While

Defendants’ arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Proposed Intervenors are concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures.”).

This distinction—between the Applicants’ interest ensuring the broadest access for their voters and in the election of their candidates, on the one hand, and Respondents’ interest in representing all Pennsylvanians and discharging their statutory duties, on the other hand—is critical here because it also differentiates the Applicants’ interests from the citizenry in general. *See City of Phila. v. Commonwealth*, 575 Pa. 542, 560-561 (2003) (“Petitioners’ complaints stem from aspects of the bill under review that have particular application to Philadelphia. Therefore, Petitioners’ interest in the outcome of the litigation ... surpasses that of Pennsylvania citizens generally in procuring obedience to the law.”).

Pennsylvania courts have previously granted intervention (and reversed denials of intervention) where intervenors were aligned with the government’s litigation position but possessed unique and personal interests not adequately addressed by government respondents. *See D.G.A. v. Dep’t of Human Servs.*, 2020 WL 283885, at \*7 (Pa. Commw. Ct. Jan. 21, 2020) (citing *Benjamin ex rel. Yock v.*



*Dep't of Pub. Welfare*, 701 F.3d 938 (3d Cir. 2012)); *Larock*, 740 A.2d at 314 (reversing the denial of intervention by town residents opposed to a change in commercial licensing to allow the operation of rock quarry, which the government board had also denied, on the ground that the residents' opposition to the quarry and the government's interests in protecting its authority were not the same). Third Circuit precedent applying federal law is to the same effect. The Court explained in one case, for example, that "when an agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden [of establishing inadequacy of representation] is comparatively light." *Kleissler*, 157 F.3d at 972; *accord Yock*, 701 F.3d at 958.

**C. The Applicants' interests in this matter are broader than the Petitioners' asserted interests.**

The Applicants' interests here exceed in scope those asserted by the Petitioners. The Petitioners are Republican Party candidates and officeholders. *See generally* Pet. Applicants here have their associational interests with candidates, officeholders, and millions of registered Democratic voters. To the extent the Petitioners have standing to adjudicate Act 77's continued viability, so too do Applicants.

**D. Intervention is uniquely appropriate in these circumstances.**

Finally, even if the Court were to find that one of the bases in Rule 2329 for refusing intervention is met, “the court is given the discretion to allow or to refuse intervention [] where the petitioner falls within one of the classes enumerated in Rule 2327.” *Allegheny Reprod. Health Ctr.*, 225 A.3d at 908. This dispute presents a compelling case for allowing intervention. The widespread use of mail ballots in Pennsylvania created by Act 77 demonstrates that millions of residents of the Commonwealth, many of whom are registered Democrats, prefer to vote by mail—and thus also demonstrates that invalidating Act 77 would impose an increased burden on the right to vote of an enormous number of Pennsylvania Democrats. As of May 10, 2022, 70% of the 959,794 mail-in ballot requests for the 2021 General Election came from registered Democrats. *See Mail Ballot Request Application Statistics*, PENNSYLVANIA DEPT. OF STATE, available at [https://data.pa.gov/Government-Efficiency-Citizen-Engagement/2021-General-Election-Mail-Ballot-Requests-Departm/mksf-6xzy\\_](https://data.pa.gov/Government-Efficiency-Citizen-Engagement/2021-General-Election-Mail-Ballot-Requests-Departm/mksf-6xzy_) (visited Aug. 4, 2022). And 77% of the 866,182 mail-in ballot requests for the 2022 Primary Election similarly came from registered Democrats. *See 2022 Primary Election Mail Ballot Requests*, PENNSYLVANIA DEP’T OF STATE, available at <https://data.pa.gov/Government-Efficiency-Citizen-Engagement/2022-Primary-Election-Mail-Ballot-Requests-Departm/8qup-ffkc> (visited Aug. 4, 2022). Such a

burden on the most fundamental of all rights should of course not be imposed lightly. Permitting the Applicants to intervene would help ensure that this Court's decision is made with the benefit of a full airing of views.

**E. The Applicants' intervention will not affect the schedule set forth in this consolidated matter.**

The Applicants are prepared to present their Brief in Support of their Preliminary Objections and their Answer to the Petitioners' Application for Summary Relief in accordance with the Court's scheduling order in this matter. Accordingly, no alterations would need to be made to the Scheduling Order by virtue of the Applicants' intervention. The Applicants take no position on Petitioners' request for expedited briefing but note that county boards of elections will shortly begin to finalize and print their ballots, and it is unlikely that this case can be fully resolved in time to affect the 2022 General Election. For comparison, *McLinko v. Commonwealth et al.* was filed in July of 2021 and only reached final resolution on August 2, 2022.

## **VI. CONCLUSION**

For the foregoing reasons, the application of the DNC and PDP to intervene should be granted.

Respectfully submitted,

DENTONS COHEN & GRIGSBY P.C.

By: Clifford B. Levine

Clifford B. Levine

Pa. I.D. No. 33507

Emma F.E. Shoucair

PA I.D. No. 325848

625 Liberty Avenue, 5th Floor

Pittsburgh, PA 15222-3152

(412) 297-4900

clifford.levine@dentons.com

emma.shoucair@dentons.com

GREENBERG TRAURIG, LLP

By: /s/ Kevin M. Greenberg

Kevin M. Greenberg

PA I.D. 082311

Adam Roseman

PA I.D. No. 313809

1717 Arch Street, Suite 400

Philadelphia, PA 19103

(215) 988-7800

greenbergk@gtlaw.com

rosemana@gtlaw.com

By: /s/ Lazar M. Palnick

PA I.D. No. 52762

1216 Heberton Street

Pittsburgh, PA 15206

(412) 661-3633

lazarpalnick@gmail.com

Dated: August 8, 2022

*Counsel for the Democratic National  
Committee and Pennsylvania Democratic  
Party*

## **CERTIFICATE OF COMPLIANCE**

This filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.



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Clifford B. Levine

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## **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was served upon all counsel of record on August 8, 2022, by this Court's electronic filing system.



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Clifford B. Levine

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capacity as Acting Secretary of the )  
Commonwealth of Pennsylvania, and )  
COMMONWEALTH OF )  
PENNSYLVANIA, DEPARTMENT )  
OF STATE, )

Respondents.

**[PROPOSED] ORDER GRANTING THE APPLICATION TO INTERVENE  
OF THE DEMOCRATIC NATIONAL COMMITTEE AND THE  
PENNSYLVANIA DEMOCRATIC PARTY**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2022, and upon consideration of the application to intervene filed by the Democratic National Committee (“DNC”) and the Pennsylvania Democratic Party (“PDP”), it is hereby ORDERED that the application is GRANTED. The Court DIRECTS the Prothonotary to enter the DNC

and the PDP on the docket in this matter as an intervenors-respondents, and to  
DOCKET their application and related materials.

BY THE COURT:

\_\_\_\_\_ J,

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# **PROPOSED FILINGS**

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**[PROPOSED] INTERVENORS-RESPONDENTS DEMOCRATIC  
NATIONAL COMMITTEE AND PENNSYLVANIA DEMOCRATIC  
PARTY’S PRELIMINARY OBJECTIONS TO PETITION FOR REVIEW  
IN THE NATURE OF AN ACTION FOR DECLARATORY JUDGMENT**

Proposed Intervenors Democratic National Committee (“DNC”) and the Pennsylvania Democratic Party (“PDP”) (collectively “Party Intervenors”) hereby file these Preliminary Objections to the Petitioners’ Petition for Review in the Nature of an Action for Declaratory Judgment (“Petition”).

## **I. INTRODUCTION**

1. Nearly three years after the General Assembly passed Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”) with overwhelming bipartisan support, Act 77 remains in the crosshairs of Republican members of the General Assembly and their allies, who now view Act 77—and specifically its universal mail-in voting provisions—as politically inconvenient.

2. Petitioners ask this Court to invalidate all of Act 77 pursuant to its nonseverability clause. They contend that the nonseverability clause was triggered by the United States Court of Appeals for the Third Circuit’s holding in *Migliori v. Cohen*, 36 F.4th 153, 163 (3d Cir. 2022). There, the Third Circuit held that the Election Code’s Act 77’s requirements that mail-in and absentee voters date the outer envelope of their ballots are immaterial under the Materiality Provision of the Civil Rights Act. This provision of the Election Code existed before Act 77 (as to absentee voters) and was also applied to mail-in voters in Act 77.

3. To Petitioners, the *Migliori* Court’s application of federal law as to a single phrase in a single sentence in a comprehensive statute “invalidated” the requirement that voters must date the outside envelope of their ballots and, as a consequence, all of Act 77 is now automatically invalid by virtue of its nonseverability provision.

4. Petitioners are wrong. Their Petition fails to state a claim upon which relief may be granted because (a) the nonseverability clause under the circumstance that the Petitioners have pled is unenforceable; (b) the *Migliori* holding involving a federal statute that found that treating a clause of a single sentence requirement to be immaterial does not implicate Act 77's nonseverability clause under Pennsylvania law; (c) a determination that a nonmaterial provision is to be applied in a "directory" manner, instead of a "mandatory" manner does not constitute an invalidation of a statutory provision; and (d) the rationale of applying the nonseverability clause would lead to absurd and chaotic results.

## II. BACKGROUND

### A. Act 77

5. Act 77 was a comprehensive statute passed by the General Assembly and signed into law in 2019. It includes numerous modifications to the Pennsylvania Election Code including changes to, among other things, mail-in voting, funding for voting systems, voter registration deadlines, and the elimination of straight-ticket voting.

6. One section of that comprehensive law addresses the limited issue of how a voter should prepare a mail-in ballot. Section 8 of Act 77, Section 1306-D(a) (25 Pa. Stat. § 3150.16(a)), states:

At any time after receiving an official mail-in ballot, but on or before eight o'clock p.m. the day of the primary or election, the mail-in elector

shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed “official election ballot.” This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector. ***The elector shall then fill out, date and sign the declaration on such envelope.*** Such envelop shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it to the person to said county board of election.

(emphasis added).

7. Section 6 of Act 77, Section 1306(a) (25 Pa. Stat. § 3146.6(a)), is substantially similar except that it applies to absentee electors (collectively “Dating Provisions”).

8. Section 11 of Act 77 states “Sections 1, 2, 3, 3.2, 4, 5. 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is ***held invalid***, the remaining provisions or applications of this act are void.” Petition, at ¶ 3 (emphasis added).

9. On March 27, 2020 the General Assembly passed Act of March 27, 2020, P.L. 41, No. 12 (“Act 12”). Act 12 amended Act 77 but, unlike Act 77, the General Assembly chose not to add a nonseverability clause in Act 12.

**B. *Migliori v. Cohen***

10. Petitioners incorrectly allege the Third Circuit in *Migliori v. Cohen*, 36 F.4th 153, 163 (3d Cir. 2022) “invalidated” Act 77’s Dating Provisions when it

concluded that such provisions violated the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101. Pet. at ¶¶ 4-5.

11. The Materiality Provision of the Civil Rights Act states:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, *if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.*

52 U.S.C. § 10101(a)(2)(B) (emphasis added).

12. The *Migliori* Court ruled on May 27, 2022 that the Dating Provisions of the Election Code, including in Act 77, would violate federal law if they were interpreted to be mandatory provisions. 36 F.4th at 163-64.

13. According to Petitioners, the *Migliori* Court's ruling that the Dating Provisions of Act 77 violates the Materiality Provision of the Civil Rights Act renders all of Act 77, and all amendments to it, including Act 12 of 2020, void pursuant to the nonseverability provision in Act 77. Pet. at ¶ 8.

### **III. STANDARD OF REVIEW**

14. The Pennsylvania Rules of Civil Procedure allow for preliminary objections for “legal insufficiency of a pleading (demurrer).” Pa. R. Civ. P. 1028(a)(4). “Where the complaint fails to set forth a valid cause of action, a preliminary objection in the nature of a demurrer is properly sustained.” *Lerner v. Lerner*, 954 A.2d 1229, 1235 (Pa. Super. Ct. 2008). A demurrer accepts as true well-

pleaded facts, but it does not accept as true, and the Court should not consider, “the pleader’s conclusions of law, unwarranted inferences from facts, opinions, or argumentative allegations.” *Wiernik v. PHH U.S. Mortg. Corp.*, 736 A.2d 616, 619 (Pa. Super. Ct. 1999).

#### IV. DEMURRER: FAILURE TO STATE A CLAIM

**A. In Failing to Plead that Act 77 is So Essentially and Inseparably Connected with the Dating Provisions or Somehow Incomplete or Incapable of Execution Without Such Provisions Being Applied, the Petitioners Have Failed to Allege Facts Sufficient to Show that Act 77’s Nonseverability Provision is Enforceable.**

15. In cases involving the Declaratory Judgments Act, courts are guided by Pennsylvania’s Statutory Construction Act. 1 Pa.C.S. § 1501-1991. Under the Act, “the object of all statutory construction is to ascertain and effectuate the General Assembly’s intention.” *Sternlicht v. Sternlicht*, 583 Pa. 149, 876 A.2d 904, 909 (2005). Section 1925 of the Statutory Construction Act establishes a presumption that statutes are severable unless certain exceptions are met. Nonseverability provisions are counter to Section 1925’s severability presumption. *Stilp v. Commonwealth*, 588 Pa. 539, 632, 905 A.2d 918, 977-81 (Pa. 2006). Thus, the issue of the enforceability of a nonseverability provision is a question of judicial review, not, simply of whether such provision is contained within a statute. *See id.*

16. As the Pennsylvania Supreme Court explained in *Stilp v. Commonwealth*, where a nonseverability clause places severe restraints on judicial

authority, it is unenforceable. 588 Pa. 539, 627-643, 905 A.2d 918, 977-81 (Pa. 2006) (noting nonseverability provision “sets forth no standard for measuring nonseverability, but instead, simply purports to dictate to the courts how they must decide severability”). Put simply, “the courts have not treated legislative declarations that a statute is severable, or nonseverable, as ‘inexorable commands,’ but rather have viewed such statements as providing a rule of construction.” *Id.*; *see also Pa. Federation of Teachers v. Sch. Dist.*, 506 Pa. 196, 201 (Pa. 1984) (declining to enforce nonseverability provision after court found act unconstitutional only as applied to certain individuals).

17. Here, like the nonseverability clause at issue in *Stilp*, Act 77’s nonseverability clause sets no standard for measuring nonseverability. Rather, it merely dictates how courts *must* decide severability and is therefore unenforceable.

18. Because the plain language of the nonseverability provision does not dictate the outcome here because it is unenforceable, the Court must analyze whether Act 77 is nonseverable under Section 1925 of the Pennsylvania Statutory Construction Act.

19. As a starting point, the Pennsylvania Statutory Construction Act makes clear that provisions of every statute are severable unless one of two exceptions apply: (1) the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provisions or applications,



that it cannot be presumed the General Assembly would have enacted the remaining provisions without the void one; or (2) the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. 1 Pa.C.S. § 1925.

20. The Petitioners have failed to plead that either of these exceptions applies, nor could they. First, Petitioners do not allege the other provisions of Act 77, many of which concern topics unrelated to universal mail-in voting, are so essentially and inseparably connected with, and so depend upon, the Dating Provisions of Act 77 that it cannot be presumed the General Assembly would have enacted Act 77 without the Dating Provisions. Further, it is impossible to assert that the Dating Provisions were somehow critical to a compromise that was ultimately enacted. Indeed, Act 77 was the result of a political compromise that had nothing to do with the Dating Provisions: as the Pennsylvania Supreme Court recently noted, Act 77 involved a bipartisan compromise involving funding for upgraded voting systems, the expansion of mail-in voting, and the elimination of straight-ticket voting. *See McLinko v. Commonwealth, et al.*, \_\_A.3d\_\_, 2022 WL 3039295, at \*1 n.2 (Pa. Aug. 2, 2022).

21. As for the second prong of consideration, Petitioners do not allege, nor could they, that the remaining provisions of Act 77 are incomplete or incapable of being executed without the Dating Provisions. In fact, the *Migliori* Court literally

found the Dating Provisions to be immaterial in that the county boards of election knew when the ballots were sent to a particular voter, and when the qualified voter completed and returned their ballot. Given that ruling, it is impossible to assert that Act 77 is now incomplete or incapable of being executed without application of an immaterial provision.

**B. The Migliori Court Did Not Invalidate Act 77 Simply By Determining That the Dating Provisions Were Immaterial and Thus, Their Application Is Preempted Under Federal Statute if Applied to Invalidate the Ballots of Qualified Voters on that Basis Alone.**

22. In addition to the Petitioner's failure to allege facts sufficient to show that Act 77's nonseverability clause is enforceable, the Petition fails to allege that the clause is even implicated because the *Migliori* Court did not invalidate any provision of Act 77.

23. In *Migliori*, the Third Circuit examined whether the Board's refusal to count the plaintiffs' mail-in ballots for omitting the date on the outer envelope violated their rights under the Materiality Provision of the Civil Rights Act. *Id.* at 162. The Third Circuit held the Board violated plaintiffs' rights because their failure to date the outer envelope of their mail-in or absentee ballot is not material in determining whether "such individual is qualified to vote under Pennsylvania law"; that is, it did not impact or determine a voter's "age, citizenship, residency, or current imprisonment for a felony." *Id.* at 163.

24. To support its ruling, the Third Circuit noted the Board initially agreed to count undated mail-in ballots, counted ballots that contained *incorrect* dates, and the Deputy Secretary for Elections and Commissions testified “that the date [on the outer envelope] is not used ‘to determine the eligibility’ (i.e., qualifications) of a voter.” *Id.* at 164. Because the Third Circuit found the Dating Provisions were immaterial under the Materiality Provision, “[t]here [] was no basis . . . to refuse to count undated ballots that ha[d] been set aside in the November 2, 2021 election for Judge of the Common Pleas of Lehigh County.” *Id.*

25. The Third Circuit did not *invalidate* or strike down the Dating Provisions. Rather, the Third Circuit concluded that federal law preempted the application of the Dating Provisions on an as-applied basis. Accordingly, the *Migliori* decision does not trigger or implicate Act 77’s nonseverability clause, and Petitioners have not pled facts that show otherwise.

26. Petitioners have also not pled that the rationale for the nonseverability clause applies to this case. It cannot be argued that the *Migliori* Court’s holding somehow voids or detracts from the legislative compromise that culminated in *expanding* mail-in voting, additional funding for voting machines, eliminated straight-ticket voting, moved registration deadlines, and reorganized the pay structure for poll workers.

27. Nothing in *Migliori* prohibits Pennsylvania from directing voters to date the ballot envelopes. Instead, it merely prevents the Commonwealth from rejecting ballots from otherwise qualified voters solely on the basis that the voter did not follow this immaterial direction.

**C. The *Migliori* Court Treated the Dating Provisions As Directory, Which Does Not Constitute Invalidation, But Rather a Directory Application.**

28. In finding that the Dating Provisions were immaterial under federal law, the *Migliori* Court essentially recognized that they should be treated as directory, rather than mandatory provisions, ensuring that qualified voters were not disenfranchised. See e.g., *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 376 (Pa. 2020) (discussing difference between directory and mandatory provisions in Election Code).

29. Treating the Dating Provisions as directory does not constitute a determination of invalidity as would, for instance a decision that a provision is unconstitutional, and effectively stricken from a statute.

30. Even if the Court concludes that the Third Circuit “invalidated” a provision of Act 77, the plain language of the nonseverability provision further underscores that the *Migliori* Court’s holding was the not a requisite condition precedent needed to trigger the nonseverability provision. Act 77’s nonseverability clause contains two parts: (1) certain sections of Act 77, including Sections 6 and 8 are nonseverable; and (2) if any of the aforementioned sections are “held invalid”

the remaining provisions of the Act are void. Thus, the condition precedent to trigger the nonseverability clause is the invalidation of the *entirety* of one of 12 different sections identified in the first sentence of the nonseverability clause. *At most*, the *Migliori* Court's holding "invalidated" exactly two words ("shall. . . date") of one sub-part of one section of Sections 6 and 8. *See* Section 1306(a) (25 Pa. Stat. § 3146.6(a); Section 1306-D(a) (25 Pa. Stat. § 3150.16(a)). The *Migliori* Court's holding cannot in any way be construed or interpreted as invalidating the *entirety* of either Section 8 or Section 6 of Act 77, which contain multiple requirements related to mail-in and absentee ballots. Accordingly, the condition precedent necessary to trigger the nonseverability provision has not yet occurred.

**D. The Comprehensive Nature of Act 77 and the Subsequent Amendments Made to It Makes Clear the Absurd Result Sought by Petitioners and Why the Nonseverability Provision Cannot Be Applied Under These Circumstances.**

31. Finally, recognizing that Act 12 of 2020 dictates that this Court reject their arguments as to the invalidity of Act 77 of 2019, Petitioners brazenly ask this Court to imagine a non-existent nonseverability clause and thereby invalidate Act 12 as well as Act 77.

32. Petitioners are correct that the absence of a nonseverability clause in Act 12 is conclusive, but that fact does not help them. Rather, it provides an additional basis to disregard Act 77's nonseverability clause. The absence of a nonseverability clause in Act 12 reflects the legislative understanding that as

amendments are made to the Election Code generally, and to Act 77 specifically, there would be chaos were this Court to engage in wholesale removal of Election Code provisions.

33. The Petitioners' unrealistic remedy over the application of a single sentence involving a literally immaterial provision would leave this Court in the unenviable position of attempting to unscramble multiple legislative eggs. Among other things, the Court would have to resolve whether (or how) the Election Code would return to its pre-Act 77 form but retain the Act 12 amendments. Most, if not all, of Act 12 amendments make little logical or linguistic sense without Act 77. The Statutory Construction Act requires Court to construe laws to avoid absurd results, like the one that necessarily derives from Petitioners' requested relief.

WHEREFORE, this Court must sustain Proposed Intervenor's Preliminary Objection to Petitioners' Petition and dismiss the Petition in its entirety.

Respectfully submitted,

DENTONS COHEN & GRIGSBY P.C.



By: \_\_\_\_\_

Clifford B. Levine

Pa. I.D. No. 33507

Emma F.E. Shoucair

PA I.D. No. 325848

625 Liberty Avenue, 5th Floor

Pittsburgh, PA 15222-3152

(412) 297-4900

clifford.levine@dentons.com

emma.shoucair@dentons.com

GREENBERG TRAURIG, LLP

By: /s/ Kevin M. Greenberg  
Kevin M. Greenberg  
PA I.D. 082311  
Adam Roseman  
PA I.D. No. 313809  
1717 Arch Street, Suite 400  
Philadelphia, PA 19103  
(215) 988-7800  
greenbergk@gtlaw.com  
rosemana@gtlaw.com

By: /s/ Lazar M. Palnick  
PA I.D. No. 52762  
1216 Heberton Street  
Pittsburgh, PA 15206  
(412) 661-3633  
lazarpalnick@gmail.com

Dated: August 8, 2022

*Counsel for the Democratic National  
Committee and Pennsylvania Democratic  
Party*

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

TIMOTHY R. BONNER, P. )  
MICHAEL JONES, DAVID H. )  
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TWARDZIK, DAWN W. KEEFER,  
DAN MOUL, FRANCIS X. RYAN,  
and DONALD “BUD” COOK,

Petitioners,

v.

NO. 364 M.D. 2022

LEIGH M. CHAPMAN, in her official )  
capacity as Acting Secretary of the )  
Commonwealth of Pennsylvania, and )  
COMMONWEALTH OF )  
PENNSYLVANIA, DEPARTMENT )  
OF STATE,

Respondents.

**[PROPOSED] INTERVENORS-RESPONDENTS DEMOCRATIC  
NATIONAL COMMITTEE AND PENNSYLVANIA DEMOCRATIC  
PARTY’S ANSWER TO PETITIONERS’ APPLICATION FOR SUMMARY  
RELIEF AND EXPEDITED BRIEFING**

The Applicants incorporate by reference the arguments presented in their Preliminary Objections and reserve the right to file a Brief in Opposition to Petitioners’ Application for Summary Relief and Expedited Briefing and/or file a



Cross-Motion for Summary Relief, pursuant to the briefing schedule set by the Court.

It is the Applicants' position that the nonseverability provision of Act 77 is not enforceable under the test laid out in *Stilp v. Commonwealth*, 910 A.2d 775 (Pa. Commw. Ct. 2006). Further, it is the Applicants' position that the nonseverability provision of Act 77 was not implicated by the Third Circuit's decision in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), as the decision did not invalidate any section of Act 77. These arguments apply equally in opposition to Petitioners' Application for Summary Relief and Expedited Briefing.

Finally, the Applicants take no position on expedited briefing. However, the Applicants point out that a final resolution on this matter will simply not be possible in time to affect how voting is conducted in the 2022 General Election. As Petitioners concede, "Pennsylvania counties may begin processing mail-in ballots by default on September 19, 2022, just sixty-one (61) days from the date of filing this Application." Application at 1. In the related litigation involving the challenge to the constitutionality of Act 77, the litigation period took over a year, measured from the filing of the Petition for Review with this Court on July 26, 2021 and the decision of the Pennsylvania Supreme Court, which was issued on August 2, 2022, *McLinko v. Commonwealth et al.*, \_\_A.3d\_\_, 2022 WL 3039295 (Pa. Aug. 2, 2022). Therefore, although Applicants are fully prepared to engage in

an expedited schedule, before proceeding with the Application for Summary Relief, it may be appropriate to first consider the Preliminary Objections.

Respectfully submitted,

DENTONS COHEN & GRIGSBY P.C.



By: \_\_\_\_\_

Clifford B. Levine

Pa. I.D. No. 33507

Emma F.E. Shoucair

PA I.D. No. 325848

625 Liberty Avenue, 5th Floor

Pittsburgh, PA 15222-3152

(412) 297-4900

clifford.levine@dentons.com

emma.shoucair@dentons.com

GREENBERG TRAURIG, LLP

By: /s/ Kevin M. Greenberg

Kevin M. Greenberg

PA I.D. 082311

Adam Roseman

PA I.D. No. 313809

1717 Arch Street, Suite 400

Philadelphia, PA 19103

(215) 988-7800

greenbergk@gtlaw.com

rosemana@gtlaw.com

By: /s/ Lazar M. Palnick  
PA I.D. No. 52762  
1216 Heberton Street  
Pittsburgh, PA 15206  
(412) 661-3633  
lazarpalnick@gmail.com

*Counsel for the Democratic National  
Committee and Pennsylvania Democratic  
Party*

Dated: August 8, 2022

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# EXHIBIT A

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

TIMOTHY R. BONNER, P. )  
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Petitioners,

v.

NO. 364 M.D. 2022

LEIGH M. CHAPMAN, in her official )  
capacity as Acting Secretary of the )  
Commonwealth of Pennsylvania, and )  
COMMONWEALTH OF )  
PENNSYLVANIA, DEPARTMENT )  
OF STATE,

Respondents.

**DECLARATION OF COREY PELLINGTON**

I, Corey Pellington, hereby declare and state upon personal knowledge as follows:

**I. Professional Experience**

1. I currently serve as the Executive Director of the Pennsylvania Democratic Party (“PDP”). I have held that position since June of 2022.
2. Before that, I was the Deputy Executive Director of the PDP, starting in December of 2015.

3. Additionally, I have been the Chief Operations Officer since April of 2018.
4. As Executive Director of the PDP, I work with PDP officers and oversee the administration of the State Democratic Committee and state party activities, including the endorsement of statewide candidates.
5. Additionally, I oversee the operation of the Coordinated Campaign, a program that links all Democratic candidates on the ballot and conducts political, digital, communications, and field activities for all Democratic candidates running that cycle. I manage the full financial apparatus of the PDP coming to bear on each election cycle.
6. I also supervise campaign expenditures to help county-level parties and candidates, including mail programs.

## **II. PDP Generally**

7. The Democratic National Committee (“DNC”) is the national umbrella organization for state parties. The PDP is the official state affiliate of DNC; what that means in practice is that nothing in our bylaws can contradict anything in the DNC bylaws (with the exception of primary endorsements in certain states). The PDP oversees 67 subsidiary county committees, whose bylaws in turn cannot contradict anything in the PDP bylaws.
8. The DNC has an interest in electing Democratic candidates and invests significant resources in state parties, including the PDP.
9. Among other things, the PDP communicates with voters concerning the timing of and how to participate in upcoming elections; encourages them to participate in the selection of the party’s nominees; and encourages them to support the party’s nominees during the general election.
10. The PDP represents the interests of Democratic voters in Pennsylvania by supporting candidates who share these voters’ values. As of August 4, 2022, there were roughly three and a half million registered Democrats throughout the Commonwealth.
11. The PDP also represents the interests of Democratic candidates by providing campaign resources, logistical support, and coordination with other candidates. The number of Democratic candidates varies by year and cycle.
12. In 2020, for example, the PDP represented the interests of Democratic nominees for President and Vice President; four Democratic candidates for

statewide row offices; 18 Democratic congressional candidates; 25 Democratic State Senate candidates; and roughly 203 Democratic State House candidates.

13. In 2018, the PDP represented the interests of Democratic candidates for Governor and United States Senate; 18 Democratic congressional candidates; 25 Democratic candidates for State Senate; and roughly 203 Democratic State House candidates.
14. This year, the PDP represents the interests of Democratic nominees for Governor and Lieutenant Governor, United States Senate, 17 Democratic Congressional candidates, 25 Democratic candidates for State Senate, and roughly 203 Democratic State House candidates.

### **III. Increasing the Availability of Mail Voting Raises (And In Pennsylvania Has Raised) Voter Participation**

15. The DNC and the PDP share the goal of universal voter participation. That means that we take steps to facilitate safe, secure, and convenient voting so that an any eligible voter may exercise their right to vote. In our experience, allowing any qualified voter to vote by mail increases participation.
16. Using two recent state-run Democratic primaries as examples—one prior to no-excuses mail-in voting under Act 77, and one after Act 77 took effect—illustrates the point: In 2019, before Act 77 took effect, the Democratic primary participation was approximately 835,000; in 2021, by contrast, in a primary with similar offices, the turnout was over 1.1 million, a 32% increase. I believe that Act 77 is one of the principal reasons for this increase in voter participation.
17. In the 2020 general election, roughly 2.6 million voters voted by mail. Of these voters, roughly 65% or 1.7 million were registered Democrats.
18. As of October 4, 2021, over 700,000 voters had requested to be placed on the “permanent” vote by mail application list for 2021, which allows them to receive a mail-in ballot automatically for both elections this year. Of these voters, roughly 72% or 500,000 are registered Democrats. According to the Department of State, nearly 1.4 million voters have exercised this option in 2020 and 2021 combined.

#### IV. PDP Made Changes in Reliance on Act 77

19. Consistent with its goal to elect Democrats to public office, the PDP examined Act 77 after its enactment and formulated its election strategy based on the new law's provisions. The passage of Act 77 caused us to make significant changes to our strategy. The PDP shifted its approach gradually after the Act's passage, in response to changes on the ground and the law's interpretation in the courts.
20. In particular, as a result of Act 77, the PDP invested vastly more resources than before in a robust set of programs, including digital outreach, communications, field, and get-out-the-vote ("GOTV") that both encourage our voters to vote by mail and support their efforts to do so.
21. These programs consume an enormous amount of time, money, and effort. For example, our digital and communications teams educated voters on (1) the availability of mail voting for all qualified voters and (2) how to vote by mail in accordance with the requirements of the law. These efforts are conducted by mail and online.
22. Our field efforts have similarly shifted to conducting substantial voter contact around voting by mail.
23. Finally, PDP's GOTV program has fundamentally changed. Before Act 77, we conducted that program only in the four days preceding any election. Now, we work the entire *month* before the election, from when voters first receive their mail-in ballots to the receipt deadline for ballots. This vast expansion in the scope of the GOTV program has required wholesale revisions in the allocation of our resources.
24. In short, we have made far-reaching changes to how we operate as a result of Act 77, expending significant resources to do so.
25. If Act 77 were invalidated, we would have to tear down all of the processes and procedures we have built in reliance on the law, which has now been in place for three and a half election cycles. Mail in ballots will shortly be sent to voters for the 2022 General Election. Undoing those changes would itself require significant resources.
26. In addition, PDP has an interest in preserving the confidence and trust it has built with voters over the four full election cycles Act 77 has been in effect.



27. Specifically, there are many voters who did not vote until they realized the simplicity of voting by mail. Many voters took advantage of the safety of voting by mail during the pandemic. The PDP put significant resources into educating and convincing these voters that mail-in voting was safe, secure, and effective through digital advertising, social media, media interviews, and online events.
28. If Act 77 were struck down, my experience with the PDP makes me believe it would do damage to civic participation. Voters who were convinced to take part in the process because Act 77 removed barriers to participating would no longer participate. These barriers included taking time to vote during a workday, needing to find childcare, and encountering unexpected problems during Election Day, among other things. Voting by mail allows voters more flexibility.
29. The DNC and the PDP would also have to invest resources in overcoming heightened voter confusion if Act 77 were struck down and the law were to change after four election cycles. Many voters in 2022 will never have participated in any way other than voting by mail. We would have to invest more time and resources educating voters and convincing them to participate under the new state of the law.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 4, 2022

  
\_\_\_\_\_  
Corey Pellington

**BRIEF IN SUPPORT OF  
APPLICATION TO INTERVENE**

RETRIEVED FROM DEMOCRACYDOCKET.COM

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

TIMOTHY R. BONNER, P. )  
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NO. 364 M.D. 2022

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Respondents.

**PROPOSED INTERVENORS-RESPONDENTS DEMOCRATIC  
NATIONAL COMMITTEE AND PENNSYLVANIA DEMOCRATIC  
PARTY’S BRIEF IN SUPPORT OF APPLICATION TO INTERVENE**

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Proposed Intervenors-Respondents, the Democratic National Committee (“DNC”) and the Pennsylvania Democratic Party (“PDP”) (collectively “Applicants”), submit this brief in support of their Application to Intervene in the above-captioned matter.

## I. INTRODUCTION

Petitioners in this litigation continue their efforts to invalidate Act 77, the Pennsylvania statute allowing all eligible voters in the Commonwealth to cast their ballots by mail. They seek a declaratory judgment that Act 77’s nonseverability provision has been triggered by the Third Circuit’s holding in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), and that, therefore, Act 77 as a whole is void along with any amendments thereto. The Applicants should be allowed to intervene because that relief would significantly injure the DNC and PDP in a manner separate and distinct from the harm it would impose on Respondents.

Specifically, the relief Petitioners seek would impede the ability of many of the Applicants’ members and supporters to exercise their fundamental right to vote. Such a draconian change will likely create confusion amongst the Applicants’ members and supporters, who have embraced mail-in voting in substantial numbers. It would also impair the electoral prospects of the Applicants’ candidates by making it harder and potentially less safe for those candidates’ supporters to vote, thereby nullifying the significant time, money, and effort that the Applicants have invested in voter education



regarding the encouragement of mail-in voting. For the hundreds of thousands of Pennsylvania Democrats who have already signed up for the permanent mail-in ballot list created by Act 77, the complete invalidation of Act 77 will certainly create significant confusion. The fundamental disruption that likely occur would not only impact general elections and the general administration of elections, it would also impact primary elections, which are how the registered members of the Democratic Party select their own nominees for elective office, from Governor to party committee members.

The Applicants here have interests distinct from those of Respondents, who have an interest in defending the operation of duly enacted legislation and in the smooth and sound administration of elections in the Commonwealth. The Applicants have an additional interest in ensuring that as many of their members vote as possible—in their primaries, to ensure that their nominees are supported by the broadest swath of their voters, and in general elections, to obtain the most votes. That interest would be acutely harmed by a court order striking down Act 77. In addition, the DNC and PDP have made considerable investments since the enactment of Act 77 in 2019 to inform Pennsylvania Democrats of the opportunity to vote by mail and to encourage them to do so in the upcoming General Election and elections in the future. Only the Applicants will fully protect these (and their other) interests in this litigation. Indeed, in many cases during the 2020 election cycle, federal and state courts in

Pennsylvania permitted the Applicants to intervene in election-related cases. This Court recognized the appropriateness of intervention when it recently allowed the Applicants to intervene in *McLinko v. Commonwealth, et al.*, 244 MD 2021. The same result should obtain here.

## II. FACTUAL BACKGROUND

The DNC is a national committee (as that term is defined in 52 U.S.C. §30101) dedicated to electing local, state, and national candidates of the Democratic party to public office throughout the United States. *See* Declaration of Corey Pellington, Ex. A (hereinafter “Pellington Decl.”) ¶7. The PDP is the DNC’s coordinate party within the Commonwealth and is the largest political party by registration in Pennsylvania. *Id.* As of August 4, 2022, 3,571,594 registered voters in Pennsylvania are members of the PDP. *See Voting & Election Statistics*, PENNSYLVANIA DEP’T OF STATE.<sup>1</sup> The PDP is statutorily created. *See* 25 P.S. §§ 2834 *et seq.* The PDP’s membership in Pennsylvania includes individuals qualified to vote in the Commonwealth, as well as past, present, and prospective candidates for offices throughout Pennsylvania.

The PDP nominates candidates for office in federal, state, and local elections. It does so through state-run primaries held under the same voting rules that govern Pennsylvania’s general elections. The winners of the Democratic primary go on to run

<sup>1</sup> *See*

<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Pages/VotingElectionStatistics.aspx>.

in general elections. Both the DNC's and PDP's platforms pledge to protect all citizens' right to vote and to pursue opportunities to expand access to the franchise, including by increasing the availability of options like mail-in voting that reduce the hurdles faced by voters who—whether for work, health, or other reasons—find it difficult to cast a ballot in person. Pellington Decl. ¶15. The Applicants believe that eligibility to participate in our democracy should not depend on the arbitrary question of whether one is available to vote in person on Election Day. *Id.* In service of these goals, the DNC and PDP have invested significant resources to encourage as many voters as possible to participate in every Democratic primary and general election in Pennsylvania. *Id.* ¶¶19-29.

Act 77 was signed into law on October 31, 2019, with bipartisan supermajority support in each house of the General Assembly. *Mclinko v. Commonwealth, et al.*, \_\_A.3d\_\_, 2022 WL 3039295, at \*1 (Pa. Aug. 2, 2022). It provides for “state-wide, universal mail-in voting.” *Id.* In particular, the Act provides that “[a] qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article.” 25 Pa. Stat. §3150.11(a). (The term “qualified mail-in elector” has the same meaning as “qualified elector,” *id.* §3150.11(b), which is “any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth,” *id.* §2602(t).) The Act also included other reforms of Pennsylvania's Election Code, including a longer registration window, allowing voters to register up to

15 days before an election; and the elimination of so-called straight-ticket voting (i.e., the option to tick a single box on a ballot to cast a vote for all members of a particular political party who are running for office that cycle). *See* Lacey, *Democratic Governor's Voting Reform Bill Would Eliminate Straight-Ticket Voting In Pennsylvania*, *The Intercept* (Oct. 30, 2019);<sup>2</sup> Press Release, *Tom Wolf, Gov., Pa., Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting* (Oct. 31, 2019).<sup>3</sup> In the wake of Act 77's enactment, PDP members have embraced voting by mail, signing up to receive a mail ballot in the 2020, 2021, and 2022 elections. Pellington Decl. ¶¶15-18. In addition, the DNC and PDP have expended significant resources to encourage their supporters and constituents to vote by mail. *Id.* ¶¶19-29. They have also created voter-education programs dedicated to informing voters about: the availability of mail-in voting, how to cast a mail ballot, and how to register for the permanent mail-in voter list so they can receive mail-in ballot applications automatically in future elections. *Id.* ¶¶19-23. And because mail voting correlates with greater participation, the Applicants have encouraged members to use the opportunity to vote by mail. *See id.* All these efforts have succeeded: 2020 election turnout in the Commonwealth was the highest in decades, with more than 2.6 million voters casting a ballot by mail. *Id.* ¶17.

<sup>2</sup> <https://theintercept.com/2019/10/30/pennsylvania-voting-reform-straight-ticket/>.

<sup>3</sup> <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting>.

### III. ARGUMENT

#### A. The Application Satisfies All The Requirements For Intervention

Applications to intervene in original-jurisdiction matters before this Court are governed by Pennsylvania Rule of Appellate Procedure 1531(b), which provides that intervention in such matters may be sought “by filing an application for leave to intervene ... contain[ing] a concise statement of the interest of the applicant and the grounds upon which intervention is sought.” Because the rule provides no specific standards for determining when intervention is appropriate, courts look to the intervention standard under the Pennsylvania Rules of Civil Procedure. *See* Pa. R.A.P. 106.

Pennsylvania Rule of Civil Procedure 2327 lists four categories of persons or entities that may intervene “[a]t any time during the pendency of an action,” including any person or entity that has “any legally enforceable interest” that may be affected by a judgment in that action. Pa. R.C.P. 2327(4). And Rule 2329 provides grounds for denying intervention even if an applicant falls within one of those four categories, including that the applicant’s interests are “already adequately represented.” Pa. R.C.P. 2329(2). “Considering Rules 2327 and 2329 together, the effect of Rule 2329 is that if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present.” *Larock v. Sugarloaf Twp. Zoning Hr’g Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999). But even if a ground for refusal under Rule 2329 is present, this Court still

possesses discretion to permit intervention. *See Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, 225 A.3d 902, 908 (Pa. Commw. Ct. 1999) (citing *Larock*, 740 A.2d at 313).

**1. The Applicants Have Legally Enforceable, Particularized Interests In This Case**

As explained in the Application (at 4-7), the Applicants have numerous qualifying interests that may be affected by a judgment in this litigation.

As political parties, and as representatives of their members, the DNC and PDP have an institutional interest in safeguarding the right to vote, including by making voting accessible to as many qualified Pennsylvanians as possible so that as many of the Applicants' members as possible can participate in elections. Act 77 supports this institutional interest by expanding the right to vote by mail and thereby fostering voting in the Commonwealth, which makes it easier and—particularly as the global pandemic continues—safer for Pennsylvanians to cast their ballots. Act 77 has increased turnout by Pennsylvanians as a whole, and by Democratic voters in particular. *See, e.g.*, Application at 10.

Relatedly, the DNC and PDP have an interest in bolstering the electoral prospects of Democratic candidates up and down the ballot. Defending against a challenge to Act 77 likewise protects and furthers this interest, as many Democrats running for office in the Commonwealth have received and will continue to receive votes cast by mail. This lawsuit thus threatens to reduce the number of votes cast in favor of Democratic

candidates in future elections—not based on the candidates’ substantive positions but for the purely procedural reason that if some Pennsylvanians must provide an excuse to vote absentee, they will not vote at all.

The DNC and PDP also have an economic interest in defending Act 77. The Applicants have expended considerable resources developing programs to educate Pennsylvanians about mail voting and to encourage them to sign up to receive a mail ballot in every election. Pellington Decl. ¶¶18-24. For example, the PDP has reoriented its get-out-the-vote and voter-protection programs to focus more heavily on Pennsylvanians who wish to vote by mail. *Id.* at ¶23. If Petitioners’ requested relief is granted, those expenditures will have been wasted. In addition, because the sudden abolition of no-excuse mail voting would cause widespread confusion and inhibit voters’ ability to cast their ballot, it would require the expenditure of even more resources in order to combat that confusion and educate voters about the changed state of the law.

Under similar circumstances, courts in Pennsylvania and around the country have granted intervention to political parties, particularly where the effect of a lawsuit would be to impose restrictions on voting access in ways that undermine the ability of one party’s voters to vote, harm the electoral prospects of the party’s candidates, or both. In the 2020 cycle alone, the national and state Democratic parties were permitted to intervene as a matter of course in at least half a dozen cases involving the Pennsylvania

Election Code.<sup>4</sup> As one court put it, political parties' interests in "(1) asserting the rights of their members to vote safely ... (2) advancing their overall electoral prospects; and (3) diverting their limited resources to educate their members on the election procedures ... are routinely found to constitute significant protectable interests" for purposes of intervention. *Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at \*3 (E.D. Cal. June 10, 2020); *see also* Appl. at 5 n.1 (collecting similar cases).

The PDP has three and a half million members, a significant portion of whom request a mail ballot in every election in which they are eligible to do so; and the PDP has a direct interest in making sure each and every one of those members votes so that the PDP's candidates win elections. This is an interest quite distinct from that of the general public. And, of course, unlike the general public, the PDP nominates candidates via state-administered primaries in which only Democratic voters have the ability to

<sup>4</sup> *See In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020); *In re: Canvass of Absentee & Mail-In Ballots of November 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020); *In re Allegheny County Provisional Ballots in the 2020 Gen. Elections*, 241 A.3d 695, 2020 WL 6867946 at \*1 (Pa. Commw. Ct. Nov. 20, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, ECF No. 72 (M.D. Pa. Nov. 12, 2020); Oral Order, *Donald J. Trump for President, Inc. v. Montgomery Cty. Bd. of Elections*, No. 2020-18680 (Pa. Com. Pl. Nov. 10, 2020); Oral Order, *Donald J. Trump for President, Inc. v. Philadelphia Cty. Bd. of Elections*, Nos. 201100874, 201100875, 201100876, 201100877, & 201100878 (Pa. Com. Pl. Nov. 13, 2020); Oral Order, *Donald J. Trump for President, Inc. v. Bucks Cty. Bd. of Elections*, No. 2020-05786 (Pa. Com. Pl. Nov. 17, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-00966, ECF 309 (W.D. Pa. Aug. 3, 2020); *Libertarian Party of Pa. v. Boockvar*, No. 5:20-cv-2299, ECF 49 (E.D. Pa. July 8, 2020).



participate. *See* 25 P.S. §§ 2862 *et seq.* The Applicants’ interest in the administration of those primaries in a manner that allows for the greatest participation possible is quite distinct from the interest of the general public, which participates in those primaries only to the extent they are Democratic voters. In addition, the DNC and PDP have spent resources in reliance on Act 77 to encourage mail-in voting by their members, which is a distinct harm not shared by the general public. The Applicants’ interests are therefore distinct—and go well beyond a generalized interest “in having election laws properly applied,” *Fraenzel v. Secretary of the Commonwealth*, 478 A.2d 903, 904 (Pa. Commw. Ct. 1984). Indeed, the Applicants’ interests are concrete, personal, and particularized: the Applicants’ interest in preserving the ability of Pennsylvania Democrats’ to cast a mail-in ballot—which, as explained, translates into substantially increased voter participation—is an interest that courts routinely recognize as both cognizable and significant. *See, e.g., Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 556 (6th Cir. 2021). Further, the Applicants do not have to demonstrate that their interests are unique. *See Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (“[T]he fact that ... interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.”). It is therefore not part of the intervention standard. *See Keener v. Zoning H’rg Bd. of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw. Ct. 1998) (“The right to intervention should be accorded to

anyone having an interest of his own which *no other party on the record* is interested in protecting.” (emphasis added)).

Finally, this Court recently vindicated the exact interests outlined above and allowed the Applicants to intervene in *McLinko v. Commonwealth et al.*, 244 MD 2021 and *Bonner et al. v. Degraffenreid, et al.*, 293 MD 2021 (“*Bonner I*”). There is no procedural or factual difference between this case and *McLinko/Bonner I* and the instant case that would warrant a different result here.

## **2. Respondents Do Not Adequately Represent The Applicants’ Interests**

As the DNC and PDP explained in their Application (at 7-9), their interests are not adequately represented by the parties to this litigation. Other courts have recognized this in similar circumstances; as one court explained, whereas state officials’ interest in defending a challenged law “turn[s] on their inherent authority as state executives and their responsibility to properly administer election laws,” the Democratic Party is “concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming ... election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures.” *Issa*, 2020 WL 3074351 at \*3. In other words, Respondents’ sovereign interests in defending the legality of enacted laws and advocating for the General Assembly’s authority are substantially different from the Applicants’ political,

ideological, economic, and representative interests. And as the Third Circuit has noted, “when the proposed intervenors’ concern is not a matter of ‘sovereign interest,’ there is no reason to think the government will represent it[.]” *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (quotation marks omitted).

The mere fact that two entities want the same *outcome* in a lawsuit does not mean they have identical *interests*. This is amply demonstrated by the fact that Pennsylvania courts grant intervention (and reverse denials of intervention) where, as here, intervenors are aligned with the government’s litigation position but possess unique and personal interests not adequately addressed by government respondents. *See D. G.A. v. Dep’t of Human Servs.*, 2020 WL 283885, at \*7 (Pa. Commw. Ct. Jan. 21, 2020) (citing *Benjamin ex rel. Yock v. Dep’t of Pub. Welfare*, 701 F.3d 938 (3d Cir. 2012)); *Larock*, 740 A.2d at 314.

### **3. No Party Will Suffer Cognizable Prejudice From The Applicants’ Intervention**

Granting intervention will not prejudice any party. The Applicants are prepared to submit the attached Proposed Preliminary Objections and Answer to the Petitioners’ Application for Summary Relief and Expedited Briefing.

Further, Applicants commit to compliance with whatever briefing schedule for the Preliminary Objections and Application for Summary Relief the Court deems fit to set. Applicants take no position on the question of expediting briefing, but point out that expedited briefing may not aid the Court because the case cannot be resolved in time to

affect voting in the 2022 General Election. For example, *McLinko* took nearly 14 months to fully resolve. *See McLinko v. Commonwealth, et al.*, 14 MAP 2021 (filed in Commonwealth Court on July 26, 2021 and decided by the Supreme Court on August 2, 2022). In anticipation of voters beginning to cast their ballots in the 2022 General Election in October 2022, county boards of election will have to finalize ballots by the end of September, 2022.

#### IV. CONCLUSION

This Court should grant the DNC's and PDP's application to intervene.

DENTONS COHEN & GRIGSBY P.C.



By: \_\_\_\_\_

Clifford B. Levine

Pa. I.D. No. 33507

Emma F.E. Shoucair

PA I.D. No. 325848

625 Liberty Avenue, 5th Floor

Pittsburgh, PA 15222-3152

(412) 297-4900

clifford.levine@dentons.com

emma.shoucair@dentons.com

GREENBERG TRAURIG, LLP

By: /s/ Kevin M. Greenberg

Kevin M. Greenberg

PA I.D. 082311

Adam Roseman

PA I.D. No. 313809

1717 Arch Street, Suite 400

Philadelphia, PA 19103

(215) 988-7800  
greenbergk@gtlaw.com  
rosemana@gtlaw.com

By: /s/ Lazar M. Palnick  
PA I.D. No. 52762  
1216 Heberton Street  
Pittsburgh, PA 15206  
(412) 661-3633  
lazarpalnick@gmail.com

Dated: August 8, 2022

*Counsel for the Democratic National  
Committee and Pennsylvania Democratic  
Party*

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## **CERTIFICATE OF COMPLIANCE**

This filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.



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Clifford B. Levine

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## **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was served upon all counsel of record on August 8, 2022 by this Court's electronic filing system.



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Clifford B. Levine

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### **CERTIFICATE OF LENGTH**

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a), I hereby certify that this brief has a word count of 3,090, as counted by Microsoft Word's word count tool.

A handwritten signature in blue ink that reads "Clifford B. Levine". The signature is written in a cursive style with a horizontal line underneath it.

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Clifford B. Levine

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