

IN THE SUPREME COURT OF PENNSYLVANIA

No. 102 MM 2022

David Ball, James D. Bee, Jesse D. Daniel, Gwendolyn Mae DeLuca, Ross M. Farber, Lynn Marie Kalcevic, Vallerie Siciliano-Biancaniello, S. Michael Streib, Republican National Committee, National Republican Congressional Committee, and Republican Party of Pennsylvania,

Petitioners,

v.

Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth, *et al.*,

Respondents.

PROPOSED INTERVENORS' APPLICATION FOR INTERVENTION

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APPLICATION OF DSCC, DCCC, DEMOCRATIC NATIONAL COMMITTEE, AND PENNSYLVANIA DEMOCRATIC PARTY FOR LEAVE TO INTERVENE AS RESPONDENTS

DSCC, DCCC, Democratic National Committee (“DNC”), and the Pennsylvania Democratic Party (“PDP”) (collectively, “Proposed Intervenors”) submit this Application for Leave to Intervene as Respondents in the above-captioned action pursuant to Pennsylvania Rules of Appellate Procedure 106, 1517, and 1531(b), and Pennsylvania Rules of Civil Procedure Chapter 2320 *et seq.*

INTRODUCTION

Proposed Intervenors seek to protect access to the franchise and ensure free and equal elections, particularly for Democratic voters—who in the 2020 elections were disproportionately more likely to cast ballots by mail than Republicans—and the candidates they support.

In 2019, the General Assembly approved amendments to the Election Code to allow all qualified electors to vote by mail. The underlying legislation—Act 77—received unanimous Republican support in the Senate and suffered only two Republican defections in the House. According to the Republican House Majority Leader, Act 77 was written to “lift the voice of

every voter in the Commonwealth.”¹ But after the 2020 elections, where Democrats cast nearly three times as many mail ballots as Republicans, and more than three out of every five mail ballots were cast by registered Democrats,² Republican party committees, candidates, and legislators turned against Act 77 and mail voting in general. In 2020 alone, Republicans (1) challenged Pennsylvania’s three-day extension of its mail-in ballot receipt deadline, see *Bognet v. Boockvar*, No. 3:20-cv-215 (W.D. Pa. Oct. 22, 2022); (2) challenged the Pennsylvania Election Code’s provisions governing poll observer access during ballot canvassing activities, see *In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020); (3) sought to throw out thousands of validly cast mail-in ballots, see, e.g. *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-00966-NR (W.D. Pa. June 28, 2020); *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 2020-18680 (Pa. C.C.P. Montg. Cty. Nov. 5, 2020); *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 2011-00874 (Pa. C.C.P. Phila. Cty. Nov. 9, 2020); *Zicarelli v. Allegheny Cnty. Bd. of*

¹ House Republican Caucus, Historic Election Reform, <https://www.pahousegop.com/electionreform> (last visited Sept. 6, 2022).

² Holly Otterbein, *Democrats return nearly three times as many mail-in ballots as Republicans in Pennsylvania*, POLITICO (Nov. 3, 2020) (hereinafter “Otterbein”), available at <https://www.politico.com/news/2020/11/03/democrats-more-mail-in-ballots-pennsylvania-433951>.

Elections, No. GD-20-011654 (Pa. C.C.P. Allegheny Cty. Nov. 12, 2020); and (4) moved to exclude mail-in ballots entirely from Pennsylvania and various counties' certification of the presidential election, see, e.g., *Kelly v. Pennsylvania*, No. 620 MD 2020 (Pa. Cmwth. Nov. 20, 2020); *Ziccarelli v. Allegheny Cnty. Bd. of Elections*, No. 2:20-cv-1831-NR (W.D. Pa. Nov. 25, 2020).

More recently, in 2021, Republican legislators challenged the *entire* mail-in voting process as unconstitutional, see *McLinko v. Degraffenreid*, 244 MD 2021 (Pa. Cmwth. July 26, 2021). And this past July, fourteen Republican members of the Pennsylvania House of Representatives filed suit to eliminate Act 77 and mail-in voting entirely. *Bonner v. Chapman*, No. 364 MD 2022 (Pa. Cmwth. July 20, 2022).

This action, filed three weeks before the November 8, 2022 general election, and after Pennsylvania voters have begun voting and counties have commenced the vote-by-mail and absentee ballot process, is just the latest chapter in the relentless attack on mail voting, this time targeting the Acting Secretary's guidance to include undated or incorrectly dated mail-in and absentee ("mail") ballots—*that were timely received by the county*—in the pre-canvass and canvass. To be sure, this is not the first time that high profile Republicans have sought to disenfranchise lawful Pennsylvania voters when

their mail ballot suffers a defect unrelated to their qualifications. In 2020, then-President Donald Trump's campaign filed suit in federal court challenging Pennsylvania election officials' ability to implement cure procedures that allowed lawful voters to resolve minor, correctable errors on mail ballots and avoid disenfranchisement. The district court dismissed that lawsuit, and the Third Circuit thoroughly affirmed. *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 923 (M.D. Pa. 2020); *Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377, 384, 391 (3d Cir. 2020). And just last month, the Republican National Committee sued to enjoin county boards of elections from developing and implementing cure procedures for mail ballots. *Republican Nat'l Comm. v. Chapman*, No. 447 M.D. 2022 (Pa Cmwth. 2022). Proposed Intervenors were granted intervention in that case, see Order Granting Applications for Intervention (Sept. 22, 2022), *id.*, which continues to be litigated before this Court.

DSCC, DCCC, and DNC are political committees with the mission to elect Democratic candidates nationwide, including to the U.S. Senate and House of Representatives. PDP has a mission of electing Democrats to state, local, and federal office in Pennsylvania, is the official state affiliate of DNC and a major political party under Pennsylvania law. The Proposed

Intervenors' participation in this action is imperative to protect the rights of Democratic voters to vote by mail and have those votes counted, to preserve the ability of Democratic candidates to be elected with the support of said votes, and to defend their own interests. If Petitioners succeed in invalidating the Acting Secretary's guidance directing county boards to count undated (or incorrectly dated) but timely received ballots, Proposed Intervenors will have to redirect substantial resources away from other critical initiatives to re-educate Democratic voters and candidates about the changing rules in an effort to minimize the inevitable disenfranchisement that will result, and to ensure their members' ballots are counted in order to advance their candidates' overall electoral prospects.

As such, Proposed Intervenors have legally enforceable interests in the Pennsylvania election processes implicated by this lawsuit and have the right to intervene.

PROPOSED INTERVENORS

DSCC is the Democratic Party's national senatorial committee, as defined by 52 U.S.C. § 30101(14). Its mission is to elect candidates of the Democratic Party across the country, including in Pennsylvania, to the U.S. Senate. DSCC works to accomplish its mission by, among other things, assisting state parties throughout the country. In 2022, DSCC will provide

millions of dollars in contributions and expenditures to persuade and mobilize voters to support U.S. Senate candidates who affiliate with the Democratic Party. For the 2022 election for U.S. Senate in Pennsylvania, DSCC has worked (and will continue to work) to elect the Democratic candidate, Lt. Gov. John Fetterman, and has made (and will continue to make) substantial contributions and expenditures to support Lt. Gov. Fetterman in his candidacy.

DCCC is the Democratic Party's national congressional committee as defined by 52 U.S.C. § 30101(14). Its mission is to elect candidates of the Democratic Party from across the country, including those running in Pennsylvania's congressional districts, to the U.S. House of Representatives. DCCC works to accomplish its mission by, among other things, assisting state parties throughout the country, including in Pennsylvania. In 2022, DCCC will provide millions of dollars in contributions and expenditures to persuade and mobilize voters to support congressional candidates who affiliate with the Democratic Party.

The DNC is a national committee (as that term is defined in 52 U.S.C. § 30101), dedicated to electing local, state, and federal candidates of the Democratic Party to public office throughout the United States, including in Pennsylvania.

PDP is the political party of all Democrats within the Commonwealth and is the largest political party by registration in Pennsylvania. Recent registration data indicates that 4,014,812 registered voters in Pennsylvania are Democrats.³ The PDP is a “political party” as defined in the Pennsylvania Election Code (25 Pa. Stat. § 2601) and is statutorily created. See 25 Pa. Stat. §§ 2831 *et seq.* In each primary election, the PDP nominates individuals for Pennsylvania’s federal, state, and local offices, who then run as candidates in the general election. The DNC’s and PDP’s members in the Commonwealth include qualified voters as well as candidates for offices across the Commonwealth, hundreds of which are before the voters at this time. 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. See Affidavit of Corey Pellington, Executive Director of the Pennsylvania Democratic Party (Ex. D).

³ See *Voting & Election Statistics*, PENNSYLVANIA DEP’T OF STATE, available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Pages/VotingElectionStatistics.aspx> (visited October 17, 2022).

FACTUAL AND PROCEDURAL BACKGROUND

In 2019, the General Assembly enacted Act 77, an omnibus election bill that “effected major amendments to the Pennsylvania Election Code.” *McLinko v. Dep’t of State*, 279 A.3d 539, 543 (Pa. 2022). The Act introduced no-excuse mail voting, see 25 P.S. § 3150.11 (providing that any qualified voter in Pennsylvania “shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth”), and added other lesser-known changes like the requirement that individuals signing a nomination petition include their registration address. See *In re Major*, 248 A.3d 445, 447 (Pa. 2021), *reargument denied* (Apr. 12, 2021).

Act 77 also included a series of instructions and procedures for voting by mail, which largely mirror preexisting absentee ballot instructions:

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 printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail,

postage prepaid, except where franked, or deliver it in person to said county board of election.

Act 77 § 8 (codified at 25 P.S. § 3150.16(a)); *compare with* Act 77 § 6 (amending 25 P.S. § 3146.6(a)) (similar preexisting instructions and procedures for voting absentee).

The present action concerns a line of cases analyzing the provision buried in Act 77’s mail balloting instructions that directs voters to “date” their signature under the declaration on the outer envelope containing their mail ballot. Act 77 §§ 6, 8. As Pennsylvania Republican House and Senate legislative leaders recently explained in an *amicus* brief to the Supreme Court of the United States, this provision is not of recent vintage, but has “remained constant” within the Election Code since absentee voting was extended beyond military voters in 1963.⁴

After the 2020 general election, Donald Trump’s campaign committee challenged the decision of several county boards of elections to count timely received mail ballots that arrived in envelopes on which voters had failed to handwrite some of the prescribed information, including, in some instances, a date. *In re Canvass of Absentee and Mail-In Ballots*, 241 A.3d 1058, 1062

⁴ See Brief of Speaker of the Pennsylvania House of Representatives, Bryan Cutler, et al., as Amici Supporting Petitioner, at 3-4, *Ritter v. Migliori*, No. 22-30, available online at https://www.supremecourt.gov/DocketPDF/22/22-30/233169/20220810121620703_SCOTUS%20amicus%20Ritter.pdf.

(Pa. 2020). Consistent with opinions of the Courts of Common Pleas, Justice Donohue announced the judgment of this Court that ballots in undated envelopes were to be counted in the elections at issue. *Id.* at 1079.

A similar controversy arose after the November 2021 election for Judge of the Court of Common Pleas of Lehigh County. There, the Court of Common Pleas (on remand from the Commonwealth Court) ordered the Lehigh County Board of Elections not to count 257 timely received ballots from registered, eligible voters where the voters did not date the return envelope. In the ensuing federal litigation, the Third Circuit ultimately held, in a unanimous decision, that refusing to count undated ballots would violate the “Materiality Provision” of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), and directed the trial court “to enter an order that the undated ballots be counted.” *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022), *stay denied sub nom. Ritter v. Migliori*, 142 S. Ct. 1824 (2022), *cert granted, vacated as moot, Ritter v. Migliori*, ___ S. Ct. ___, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022).

The Third Circuit determined the Date Provision was not material to a voter’s qualifications because there was no conceivable way in which it helped to “determin[e] age, citizenship, residency, or current imprisonment for a felony.” *Migliori*, 36 F.4th at 163. And while that alone was enough to

preclude the rejection of ballots in undated envelopes, “[t]he nail in the coffin” was that “ballots were only to be set aside if the date was missing—not incorrect,” revealing that the content of what a voter supplied on the date line was meaningless. *Id.* at 164. After this ruling, the Supreme Court denied a stay sought by the losing candidate. *Ritter*, 142 S. Ct. 1824.

Following those cases and now-vacated (on mootness grounds) federal litigation, this Summer the Acting Secretary challenged the failure of three county boards of elections to include otherwise-valid undated ballots in their certified results of the May 17, 2022, primary election. See *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 MD 2022, 2022 WL 4100998, at *1 (Pa. Cmwlth August 19, 2022). In a 69-page opinion scrutinizing the Date Provision’s text, context, history, and purpose—and with the benefit of a full evidentiary record—the Commonwealth Court concluded: “[T]he General Assembly’s intent was for the ‘shall’ used in the dating provisions to be directory, not mandatory, such that timely received absentee and mail-in ballots of qualified Pennsylvania electors are not invalid only because they lack a handwritten date on the return envelope declaration.” *Id.* at *25. The court noted that the Date Provision does not “provide that [undated] ballots should not be counted, unlike other provisions of the Election Code,” *id.* at *16; does not support a particular purpose, *id.* at *17-20, 25; was not

“designed to prevent fraud, or to protect the privacy and secrecy of voting,” *id.* at *20-22; and that interpreting the Date Provision as mandatory would violate the Materiality Provision, *id.* at *25-29. The court also noted that other jurisdictions interpret similar statutory language to be directory, *id.* at *22. Thus, the Court interpreted Act 77 to *require* counties to include undated ballots in their certified election results. *Id.* at *25.

On October 11, 2022, the U.S. Supreme Court vacated on mootness grounds—without addressing the merits—the Third Circuit’s decision in *Ritter*, 2022 WL 6571686, which held that the refusal to count undated ballots violated the “Materiality Provision” of the Civil Rights Act. See *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (“The established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.”). Soon after, the Secretary issued guidance consistent with the Third Circuit’s decision and the Commonwealth Court’s ruling in *Berks County* directing counties to include undated or incorrectly dated ballots that were timely received in their pre-canvass and canvass.

Petitioners filed the instant Application on October 16, 2022, just over three weeks before election day, and weeks after county boards began

distributing mail ballots to voters; many voters have already returned their ballots.⁵ Petitioners' last-minute attempt to disrupt and inject chaos into an active electoral process would not only nullify months of preparation by elections officials and political campaigns for the November election, but it would disenfranchise entirely lawful voters. In any event, Petitioners misread the law and invite this Court to adopt an interpretation of the Election Code that would violate the federal rights of Pennsylvania voters, as is briefly discussed in Proposed Intervenor's Response to Petitioners' Application for King's Bench Jurisdiction, attached herein as Exhibit A, and will be more fully developed in the substantive briefing if the Court exercises extraordinary jurisdiction.

For the reasons stated above and herein, Proposed Intervenor's file this Application for Leave to Intervene as Respondents in accordance with Pennsylvania Rules of Appellate Procedure 106, 1517, and 1531(b), and Pennsylvania Rules of Civil Procedure Chapter 2320 *et seq.*

LEGAL STANDARD

A person not named as a respondent in an original jurisdiction petition

⁵ Mail ballots were sent out to voters beginning September 19, 2022, and voters can return ballots as soon as they receive them. See 25 P.S. § 3146.2a (setting deadline for county boards of elections to receive applications for absentee ballots no earlier than 50 days before the election, or September 19, 2022).

for review can seek leave to intervene in the action by filing an application with the court. Pa. R.A.P. 1531(b). The practices and procedures for original jurisdiction petitions for review must conform to the Pennsylvania Rules of Civil Procedure. Pa. R.A.P. 106; Pa. R.A.P. 1517. Intervenors must satisfy one of four requirements to intervene in an action. Relevant here is the requirement that the intervenor show that “the determination of [the] action may affect any legally enforceable interest of” the intervenor, regardless of whether they “may be bound by a judgment in the action.” Pa. R.C.P. 2327(4).

If the intervenor satisfies one of the four requirements, the court *must* grant intervention. Pa. R.C.P. 2327. Courts have discretion to refuse intervention, after a hearing, *only* if (1) the intervenor’s “claim or defense . . . is not in subordination to and in recognition of the propriety of the action;” (2) the intervenor’s interest is adequately represented by the existing parties; or (3) the intervenor unduly delayed in moving to intervene or intervention would unduly delay the action. Pa. R.C.P. 2329; *see also Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Hum. Servs.*, 225 A.3d 902, 908 (Pa. Cmwlth. 2020); *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Cmwlth. 1999).

ARGUMENT

I. Proposed Intervenors satisfy the requirement for intervention under Pennsylvania law.

Proposed Intervenors' interests will be affected by a judgment in this action, warranting intervention. Pa. R.C.P. 2327(4). "[B]ecause a political party, by statutory definition, is an organization representing qualified electors, it maintains the same interest as do its members in" fair and accessible elections. *In re Barlip*, 428 A.2d 1058, 1060 (Pa. Cmwlth. 1981). Courts therefore routinely find that political party committees like DSCC, DCCC, and DNC, and political parties like PDP, are entitled to intervene in cases where election administration practices are being challenged. See, e.g., *In re Appointment of Dist. Att'y*, 756 A.2d 711, 713 n.5 (Pa. Cmwlth. 2000) (granting intervention to Lackawanna County Democratic Party to intervene in support of board of elections); *Parnell v. Allegheny Bd. of Elections*, No. 20-cv-01570 (W.D. Pa. Oct. 22, 2020), ECF No. 34 (granting intervention to DCCC); *Pa. Democratic Party v. Republican Party of Pa.*, No. 16-5664, 2016 WL 6582659, *3 (E.D. Pa. Nov. 7, 2016) (recognizing Democratic party committee had standing "to protect the interests of both Democratic candidates running for office and Democratic voters"); *Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (finding a political party has a "significant protectable interest"

in intervening to defend its voters' interests in vote-by-mail and its own resources spent in support of vote-by-mail).

Proposed Intervenors expend substantial resources on educating and assisting voters in navigating the voting process. Affidavit of Pavitra Abraham, National Organizing Director of DCCC (Ex. B) at ¶¶ 4–8; Affidavit of Andrea Young, Voter Protection Advisor of DSCC (Ex. C) at ¶¶ 4–6; Ex. D, Pellington Aff. ¶¶ 21–25. This includes the process through which voters submit mail ballots. *Id.* Indeed, the majority of mail ballots cast in Pennsylvania elections are cast by Democrats. Ex. B, Abraham Aff. ¶¶ 8, 11; Ex. C, Young Aff. ¶¶ 5, 9; Ex. D, Pellington Aff. ¶¶ 17–19. In the 2020 general election, for example, registered Democrats returned nearly three times as many mail ballots as registered Republicans, and more than three out of every five mail ballots in Pennsylvania were cast by registered Democrats.⁶ Accordingly, Proposed Intervenors and their members and constituents have a heightened interest in the procedures surrounding mail ballots and in ensuring that votes cast using these ballots are counted.

Petitioners' requested relief imperils Proposed Intervenors' significant protectable interests in ensuring their members' ballots are counted and in

⁶ See Otterbein, *supra* note 2.

“advancing [their candidates’] overall electoral prospects.” *Issa*, 2020 WL 3074351, at *3; *Pa. Democratic Party*, 2016 WL 6582659, at *3. Because of the high proportion of registered Democrats who vote using mail ballots,⁷ Proposed Intervenors have a cognizable interest in protecting the rights of these voters who have relied on mail voting in prior elections, including those who have already voted in this election. Indeed, that was the basis for Proposed Intervenors’ protectable interests as recognized by the Commonwealth Court in granting intervention last month in litigation challenging county boards of elections’ ability to implement cure procedures for mail ballots. See, e.g., *Application of DSCC and DCCC For Leave to Intervene* (Sept. 9, 2022) at 8–9, *Republican Nat’l Comm.*, No. 447 M.D. 2022 (noting a “heightened interest in the procedures surrounding mail-in ballots and in ensuring that votes cast using these ballots are counted”); *Order Granting Applications for Intervention* (Sept. 22, 2022), *id.* These and other Democratic voters risk disenfranchisement in November’s general

⁷ 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 DEP’T OF STATE, available at <https://data.pa.gov/Government-Efficiency-Citizen-Engagement/2021-General-Election-Mail-Ballot-Requests-Departm/mksf-6xzy> (visited October 17, 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 October 17, 2022).

election if Petitioners' challenge succeeds, which would impair Proposed Intervenor's missions of electing Democratic candidates and ensuring that Democrats in Pennsylvania are not unfairly disenfranchised. See, e.g., *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365, at *2 (D. Nev. Apr. 28, 2020) (proposed Intervenor, Democratic organizations, had significant protectable interests in ensuring election of Democratic Party candidates).

Further, if Petitioners are successful, Proposed Intervenor will have to redirect their limited resources from other programs to address the impacts of the judgment on voters. Ex. B, Abraham Aff. ¶ 9; Ex. C, Young Aff. ¶ 7, Ex. D, Pellington Aff. ¶ 30. This includes diverting additional staff and funds to educating voters about the requirements of the mail voting procedures and developing new programs to mobilize in person voting to minimize potential disenfranchisement. *Id.*

II. None of the exceptions to granting intervention apply.

Because Proposed Intervenor satisfies the requirements set forth under Rule 2327(4), intervention is mandatory unless the grounds for denial under Rule 2329 apply—and they do not.

First, Proposed Intervenor's claims are "in subordination to and in recognition of the propriety of the action." Pa. R.C.P. No. 2329(1). The

purpose of this requirement is to ensure an intervenor takes the suit as they find it, *Commonwealth ex rel. Chidsey v. Keystone Mutual Casualty Co.*, 76 A.2d 867, 870 (Pa. 1950), and to prevent an intervenor from “becom[ing] a party to the suit merely to review what the court has done and to require demonstration of the legality and propriety of its action.” *Wells Fargo Bank N.A. v. James*, 90 A.3d 813, 822 (Pa. Cmwlth. 2014) (Covey, J., dissenting) (quoting *Chidsey*, 76 A.2d at 870).

The requirement is met. Proposed Intervenors do not object to the Court’s exercise of jurisdiction over this Application, and—because the Court has yet to render any substantive rulings and there were no lower court rulings—do not seek to “review what the court has done.” 90 A.3d at 822.

Second, none of Proposed Intervenors’ interests in the rights of Democratic voters, the electoral prospects of Democratic candidates, or the resources they must expend to mobilize voters and enhance turnout are adequately represented by any of the parties to this action. *See, e.g., In re Barlip*, 428 A.2d at 1060 (recognizing interest of political party in preventing “impair[ment of] its effectiveness”); *Issa*, 2020 WL 3074351, at *3 (recognizing political party’s unique interests in “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”); Order Granting Applications for Intervention (Sept. 22, 2022), *Republican Nat’l Comm.*, No. 447 M.D. 2022.

Where an original party to the suit is a government entity, whose position is “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 by existing parties is “comparatively light.” *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998); see also *D.G.A. v. Dep’t of Human Servs.*, No. 1059 C.D. 2018, 2020 WL 283885, at *7 (Pa. Cmwlth. Jan. 21, 2020) (reversing denial of intervention where intervenors were aligned with the government’s litigation position but possessed unique and personal interests not adequately represented by government respondents); *Larock*, 740 A.2d at 314 (similar).

The U.S. Supreme Court’s decision in *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191, 2203 (2022), confirms the point. In that case, the Supreme Court explained that the burden of demonstrating a lack of adequate representation “presents proposed intervenors with only a minimal challenge.” *Id.* at 2195. The Supreme Court also explained that while state agents may pursue “related” interests to political actors, those

interests are not “identical.” *Berger*, 142 S. Ct. at 2204 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972)). In particular, the Court noted that state actors must “bear in mind broader public-policy implications” than those with more partisan or private interests. *Id.*

The same is true here. Even if Respondents’ position aligns with Proposed Intervenors—an uncertainty as there have been no filings in this action to indicate what position Respondents will take—their interests will not be “identical.” *Id.* Respondents’—all state actors—“position [will be] defined by the public interest.” *Feller v. Brock*, 802 F.2d 722, 730 (4th Cir. 1986); accord *Letendre v. Currituck Cnty.*, 261 N.C. App. 537, 817 S.E.2d 920 (Table), 2018 WL 4440587, *4 (2018) (unpublished). But Proposed Intervenors’ interests are defined by their mission and the interests of themselves, their members, and their candidates and, as such, Proposed Intervenors’ interests are not adequately represented by any of the parties to this action. Ex. B, Abraham Aff. ¶¶ 10–11; Ex. C, Young Aff. ¶¶ 8–9; Ex. D, Pellington Aff. ¶¶ 8, 10–14.

Third, Proposed Intervenors timely sought Intervention only three days after Petitioners filed their Application, and within the Court-ordered deadline for responses. Permitting this intervention will neither delay the resolution of this matter nor prejudice any party, especially since Respondents have yet

to meaningfully litigate this case. Nor will any party be prejudiced by Proposed Intervenors' participation, which will aid the Court in understanding the factual and legal issues involved.

Because Proposed Intervenors meet the requirement for intervention under Pennsylvania Rule of Civil Procedure 2327 and because none of the exceptions to granting intervention apply, intervention is mandatory. In any event, even if an exception under Rule 2329 applied, the Court retains discretion to grant intervention and should allow Proposed Intervenors to join this action for the reasons set forth in this application.

CONCLUSION

For the reasons stated above, the Court should grant Proposed Intervenors' application to intervene in this case. Pursuant to Pennsylvania Rule of Civil Procedure 2328, Proposed Intervenors are attaching a copy of the pleading that they will file in the action if permitted to intervene. Proposed Intervenors request a Hearing on this Application if deemed necessary.

WHEREFORE, Proposed Intervenors respectfully request this Honorable Court to grant their Application to Intervene in this matter, and accept their Response to Petitioners' Application attached hereto as their first filing.

Dated: October 19, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I, Adam Bonin, certify that this filing contains fewer than 14,000 words as prescribed by Pa.R.A.P. 2135.

Submitted by:

Adam Bonin

Signature:



Attorney No. (if applicable):

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Date:

October 19, 2022

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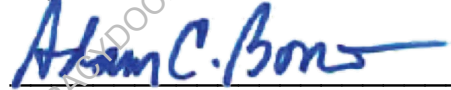
CERTIFICATE OF COMPLIANCE WITH Pa. R.A.P. 127

I, Adam Bonin, certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by:

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Signature:



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October 19, 2022
