IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
PENNSYLVANIA

DSCC,
BOB CASEY FOR SENATE, INC.,

Petitioners,

v.

PHILADELPHIA COUNTY BOARD OF ELECTIONS,

Respondent.

CIVIL DIVISION

No. 241102214

Election Appeal

BRIEF IN SUPPORT OF PETITION FOR LEAVE TO INTERVENE

Filed on behalf of:
Proposed Intervenor-Respondents Senator-elect David McCormick, the Republican National Committee, the National Republican Senatorial Committee, and the Republican Party of Pennsylvania

Counsel of Record for this Party

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PROPOSED INTERVENOR-RESPONDENTS' BRIEF
IN SUPPORT OF PETITION FOR INTERVENTION

Proposed Intervenor-Respondents Senator-elect David McCormick, the Republican National Committee, the National Republican Senatorial Committee, and the Republican Party of Pennsylvania (collectively, "Proposed Intervenor-Respondents") respectfully submit this Brief in support of their Petition for Leave to Intervene. For the reasons explained below, the Court should grant intervention to Proposed Intervenor-Respondents.

INTRODUCTION

Pennsylvania's voters have clearly spoken: they have elected Senator-elect McCormick to represent the Commonwealth in the U.S. Senate in the 2024 general election (the "Election"). Senator-elect McCormick currently leads his Democrat opponent, Bob Casey, by an insurmountable margin of more than 17,000 votes. On November 7, 2024, the AP declared Senator-elect McCormick the winner of the Election.[1] On November 14, 2024, after a substantial number of provisional ballots had been counted, Decision Desk HQ declared Senator-elect McCormick the winner of the Election.[2] Regrettably, despite a long and distinguished career in public service, outgoing Senator Casey has chosen to deny the results of the Election and refused to concede. In fact, outgoing Senator Casey has chosen to undermine the integrity of the Election and Senator-elect McCormick's victory—and to inflict wasteful costs on the Commonwealth and its taxpayers—by filing numerous legal actions across Pennsylvania asking courts to order that election officials count legally deficient ballots in contravention of the Election Code and

[1] *See AP Race Call: Republican Dave McCormick wins election to U.S. Senate from Pennsylvania, beating incumbent Bob Casey*, Associated Press (Nov. 7, 2024), https://apnews.com/article/race-call-mccormick-wins-pennsylvania-senate-49bdac09ba654d07b88bc62b10b49154.

[2] *See, e.g.*, Bo Erickson, *Republican Dave McCormick wins US Senate seat in Pennsylvania, DDHQ projects*, Reuters (Nov. 14, 2024), https://www.reuters.com/world/us/republican-dave-mccormick-wins-us-senate-seat-pennsylvania-ddhq-projects-2024-11-14/.

governing Pennsylvania law.

This case is just one example. Petitioners appeal from the decision made by the Philadelphia City Commissioners (the "Commissioners") not to count 2,073 provisional ballots that the Election Code deems invalid and, thus, requires the Commissioners not to count. 1,330 of these ballots were missing a voter signature on the provisional ballot envelope, and the remaining 743 were not enclosed in secrecy envelopes. In both instances, the Commissioners were correct to decline to count the disputed ballots under controlling Pennsylvania law. Petitioners' contrary position is wrong as a matter of law, and the Court should dismiss the Petition.

Moreover, the Court should grant intervention to Proposed Intervenor-Respondents. Proposed Intervenor-Respondents have substantial interests in this case and should be permitted to intervene. Senator-elect McCormick has obvious interests in defending his election to the U.S. Senate. In fact, all Proposed Intervenor-Respondents have concrete interests in protecting Senator-elect McCormick's victory in the Election and ensuring that Proposed Intervenor-Respondents, their voters, their candidates, and their members compete for office in Pennsylvania's elections subject to the laws duly enacted by the General Assembly. No other party to this action represents these private interests, and therefore this timely petition for intervention should be granted. Notably, Petitioners have consented to Proposed Intervenor-Respondents' intervention.

FACTUAL BACKGROUND

The Commissioners convened to consider disputed provisional ballots on November 15, 2024. At that time, they determined that 1,330 provisional ballots were missing a legally mandatory signature from the elector and that 743 provisional ballots were not enclosed in a secrecy envelope. In accordance with the Election Code, the Commissioners voted not to count these 2,073 provisional ballots.

Petitioners appealed the Commissioners' decision to this Court on November 18, 2024.

Proposed Intervenor-Respondents now move to intervene and to defend the Commissioners' decisions with respect to these 2,073 provisional ballots.

ARGUMENT

Proposed Intervenor-Respondents easily satisfy the standard for intervention because they have multiple protected interests that could be impaired if Petitioners prevail, are not adequately represented by any existing party, and timely moved to intervene.

Rule 2327 governs the standards under which "a person not a party" to an action "shall be permitted to intervene therein." Pa. R. Civ. P. 2327. Specifically, a proposed intervenor is entitled to intervene if "the determination of [the lawsuit] may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action." *Id.* If a proposed intervenor satisfies that test, the Court *must* grant intervention unless: (1) the proposed intervenor's claim or defense "is not in subordination to and in recognition of the propriety of the action"; (2) the proposed intervenor's interest is already adequately represented; or (3) the proposed intervenor "has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties." *In re Philadelphia Health Care Tr.*, 872 A.2d 258, 261 (Pa. Commw. Ct. 2005).

Here, Proposed Intervenor-Respondents have several cognizable interests that may be impaired by this litigation. They have an interest in preserving Senator-elect McCormick's win in the Election, in ensuring Republican candidates compete in a legally structured environment, and in avoiding diversions of resources that impair their core missions of electing Republican candidates. And there is no reasonable basis to deny intervention because Proposed Intervenor-Respondents' arguments will simply oppose those of Petitioners, no existing party represents Proposed Intervenor-Respondents' interests, and Proposed Intervenor-Respondents promptly

moved to intervene. Indeed, Petitioners consented to the intervention of Proposed Intervenor-Respondents. The Court should grant the Petition for Leave to Intervene.

A. Proposed Intervenor-Respondents meet the requirements of Pennsylvania Rule of Civil Procedure 2327(4) because they have several cognizable interests that may be impaired by this action.

The Pennsylvania Supreme Court has explained that the phrase "legally enforceable interest" in Rule 2327(4) "does not have a clear and exact definition [meaning] the Court must necessarily exercise discretion in determining whether such an interest exists." *Tremont Twp. Sch. Dist. v. W. Anthracite Coal Co.,* 381 Pa. 276, 279, 113 A.2d 234, 236 (1955). One clear indicator, however, that a movant has such a legally enforceable interest is seen when it can demonstrate that it has a stake in the case which would be impaired by the case's disposition that no other party on the record is interested in protecting. *See Keener v. Zoning Hearing Bd. of Millcreek Twp.,* 714 A.2d 1120, 1123 (Pa. Commw. Ct. 1998) ("The right of intervention should be accorded to anyone having an interest of his own which no other party on the record is interested in protecting.") (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty*., 44 A.2d 250 (Pa. 1945)).

Proposed Intervenor-Respondents have several interests that justify intervention in this case. *First*, Proposed Intervenor-Respondents have an interest in preserving Senator-elect McCormick's win in the Election. Petitioners are asking this Court to order the counting of ballots that could reduce Senator-elect McCormick's. That threatened injury to McCormick and the other Proposed Intervenor-Respondents is obviously cognizable. *See, e.g.*, *McLinko v. Commonwealth*, 270 A.3d 1278, 1282 (Pa. Commw. 2022) ("In sum, a candidate has an interest beyond the interest of other citizens and voters in election matters."). After all, "[t]he counting of votes that are of questionable legality does . . . threaten irreparable harm to" Proposed Intervenor-Respondents. *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring).

Second, Proposed Intervenor-Respondents have an interest in defending the General Assembly's duly enacted electoral rules, so that they are not forced to "participate in an illegally structured competitive environment." *Mecinas v. Hobbs*, 30 F.4th 890, 898 (9th Cir. 2022). Courts have repeatedly recognized that political entities have cognizable interests (for standing and intervention) in defending electoral rules enacted by legislatures. *See, e.g.*, *id.*; *Nelson v. Warner*, 12 F.4th 376, 384 (4th Cir. 2021); *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014); *Shays v. FEC*, 414 F.3d 76, 84–85 (D.C. Cir. 2005); *Smith v. Boyle*, 144 F.3d 1060, 1062–63 (7th Cir. 1998). That includes when executive or judicial officials "set the rules of the game in violation of statutory directives." *Shays*, 414 F.3d at 85. As a result, candidates and political parties may file suit (and thus, intervene) to vindicate their "interest … in seeking []election through contests untainted by … practices [the Legislature] has proscribed." *Id.*

Here, Petitioners seek to have this Court order the counting of ballots the General Assembly has said cannot be counted. Accordingly, Petitioners are asking the Court to subject Proposed Intervenor-Respondents to an illegally structured electoral environment—and Proposed Intervenor-Respondents must be allowed to intervene to defend against that harm. *See id.*

Third, Petitioners' suit would, if successful, impair Proposed Intervenor-Respondents' core missions and force them to divert resources away from their core missions of electing Republican candidates. The RNC, NRSC, and RPP invest substantial resources in training their candidates, volunteers, poll watchers, and voters on the rules governing Pennsylvania's elections. If this Court accepts Petitioners' invitation to change those roles, the RNC, NRSC, and RPP will be forced to invest substantial resources to retrain their candidates, volunteers, poll watchers, and voters on the new rules. That diversion of resources would impair the RNC's, NRSC's, and RPP's core mission

of electing Republican candidates. Notably, the Fifth Circuit has held that political entities had a right to intervene under similar circumstances. *See La Union Del Pueblo Entero v. Abbott*, 29 F.4th 299, 305-06 (5th Cir. 2022). The same course is warranted here.

At the end of the day, it is obvious why intervention is warranted in this case. Petitioners want Bob Casey to win the Election that Senator-elect McCormick has won—an interest diametrically opposed to those of Proposed Intervenor-Respondents. The other existing party, the Commissioners, are government actors that—rightly—do not and should not represent the interests of any candidate or political party. Thus, none of the existing parties shares Proposed Intervenor-Respondents' partisan interests, making intervention here required under Rule 2327(4). *See Keener,* 714 A.2d at 1123.

B. No Exception Under Rule 2329 Applies.

Because Proposed Intervenor-Respondents have interests protected by Rule 2327, the Court should grant intervention because none of the narrow exceptions outlined in Rule 2329 applies here. *See In re Philadelphia Health Care Tr.*, 872 A.2d 258, 261 (Pa. Commw. Ct. 2005); *see also* Pa. R. Civ. P. 2327, 2329.

Rule 2329 enumerates three narrow exceptions in which the court can deny entering an order to allow intervention once a movant meets their burden under Rule 2327. They are:

> (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
>
> (2) the interest of the petitioner is adequately represented; or
>
> (3) the petitioner has unduly delayed in making the application for intervention, and intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

See Pa. R. Civ. P. 2329. In this case, none of these exceptions apply.

1. The defense of the Proposed Intervenor-Respondents is in subordination to and in recognition of the propriety of the action, thus 2329(1) does not apply.

Under Pennsylvania Rule of Civil Procedure 2329(1), the court may deny a petition to intervene if the movant seeking intervention does so purely to question the propriety of an action. *See id.* As the Pennsylvania Supreme Court has explained, Rule 2329(1) dictates that a party seeking to intervene must "take the suit as he finds it." *Com. ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 366 Pa. 149, 153 (Pa. 1950) (cleaned up). In other words, an intervenor cannot simply try to intervene in a case in order to dispute the record built in that case up to that point, and must instead be bound by the record at the time of intervention. *Brown v. Northampton Tr. Co. v. Northampton Traction Co.*, 270 Pa. 199, 205, 112 A. 871, 872–73 (Pa. 1921) ("It may be stated as a general principle that an intervener must take a suit as he finds it, and should be bound by the record of the case at the time of intervention.").

Here, Proposed Intervenor-Respondents do not dispute the factual record previously compiled in this case. Proposed Intervenor-Respondents are simply seeking to present legal arguments in defense of their protected interests. Indeed, if permitted to intervene, Proposed Intervenor-Respondents' arguments will simply be "the 'mirror-image'" of Petitioners' arguments, a situation where granting intervention is especially appropriate. *See, e.g.*, *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020).

2. The interests of Proposed Intervenor-Respondents are not adequately represented by existing parties.

Under Pennsylvania Rule of Civil Procedure 2329(2), the Court may deny a petition to intervene if a party to the case already adequately represents the interest of the movant seeking intervention. Here, no existing party adequately represents Proposed Intervenor-Respondents' interests.

As discussed above, intervention should be granted where the moving party has interests that no existing party will clearly protect. *See Keener,* 714 A.2d at 1123 ("The right of intervention should be accorded to anyone having an interest of his own which no other party on the record is interested in protecting.") (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty*., 44 A.2d 250 (Pa. 1945)). Such adequacy can only be met if there is a person on the record who both *technically* and *actually* represents the interests of the party seeking intervention. *See Lakeside Park Co. v. Forshark,* 4 Pa. D. & C.2d 574, 576 (Pa. Com. Pl. 1956).

To start with the obvious, outgoing Senator Casey and other political entities seeking to overturn the Commissioners' decisions with respect to these 2,073 provisional ballots have diametrically opposed interests to those of Proposed Intervenor-Respondents, which seek to uphold the Commissioners' actions.

The same is true of the Philadelphia City Commissioners, who are government officials that do not (and should not) share Proposed Intervenor-Respondents' *partisan* interests in preserving Senator-elect McCormick's win in the Election and helping elect other Republican candidates. After all, as public officers, the Commissioners have interests in applying and enforcing the law that can differ significantly from candidates and political parties. *See, e.g.*, *Trbovich v. United Mine Workers*, 404 U.S. 528, 538-39 (1972). Indeed, the Commissioners have many responsibilities, and it must consider the "the expense of defending [state laws] out of [its] coffers," when the money could go to some other enforcement priority. *Clark v. Putnam Cty.*, 168 F.3d 458, 462 (11th Cir. 1999). The Commissioners also may stay their hands out of concern for "the social and political divisiveness of the election issue," and its "own desires to remain politically popular." *Meek v. Metro. Dade Cnty.*, 985 F.2d 1471, 1478 (11th Cir. 1993).

Proposed Intervenor-Respondents' interests, on the other hand, "are narrower than, and

cannot be subsumed into, the government['s] … interests." *Living Word Bible Camp v. Cnty. of Itasca*, 2012 WL 4052868, at *6 (Minn. Ct. App. Sept. 17, 2012). Proposed Intervenor-Respondents' ultimate "interest" in this action is "winning []election[s]" for the Republican Party. *Shays*, 414 F.3d at 86. The Commissioners do not share that interest *at all*. Indeed, they *could not* "vindicate such an interest while acting," as they must, "in good faith." *La Union del Pueblo Entero*, 29 F.4th at 309.

Consequently, there are good reasons to believe the Commissioners may litigate this case differently than Proposed Intervenor-Respondents would. *See id.* at 308. Even if the Commissioners defend the General Assembly's rules with the same zeal as Proposed Intervenor-Respondents would, the Commissioners' "interests" may "diverge" on "how to carry out" the defense. *Id.*

The U.S. Supreme Court's decision in *Trbovich* is instructive and confirms that intervention is appropriate here. *See* 404 U.S. at 538 n.10. *Trbovich* involved a motion to intervene by a voting union member in a suit filed by the Secretary of Labor to set aside a union election in which the rights of voting members had allegedly not been respected. *Id.* at 529–30. The Supreme Court held the Secretary's representation was inadequate given his "duty to serve two distinct interests": to vindicate the "rights" of "individual union members" *and* "'assuring free and democratic union elections that transcends the narrower interest of the complaining union member.'" *Id.* at 538–39. These two functions "may not always dictate precisely the same approach to the conduct of the litigation." *Id.* at 539. So "[e]ven if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about [his] performance," which is "sufficient to warrant … intervention" as of right. *Id.* So too here, the Commissioners have duties relating to the conduct of election that transcend

the "narrower interest" of the Proposed Intervenor-Respondents, giving them sufficient grounds to intervene. *Id.*

Therefore, there is no basis to deny intervention under Rule 2329(2).

3. The petition for intervention is timely.

Finally, Proposed Intervenor-Respondents have timely moved to intervene, so timeliness is no basis to deny intervention. *See* Pa. R. Civ. P. 2927, 2329(3).

The timeliness rule prevents a movant from intervening if he "has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties." Pa. R. Civ. P. 2329. Under Rule 2329, the "question of the timeliness of a petition to intervene is one exclusively within the exercise of the trial court's discretion." *Chairge v. Exeter Borough Zoning Hearing Bd.*, 616 A.2d 1057, 1059 (Pa. Commw. Ct. 1992).

Here, it is obvious that the instant motion was timely. Petitioners filed their appeal on November 18, 2024. Proposed Intervenor-Respondents moved to intervene on November 19, 2024, a mere day after Petitioners opened this case. Such a rapid response is timely, and Petitioners will suffer no unfair prejudice from having to answer legal arguments opposed to their position. *See, e.g.*, *Democratic Nat'l Comm.*, 2020 WL 1505640, at *5. Notably, Petitioners have consented to Proposed Intervenor-Respondents' intervention.

CONCLUSION

The Court should grant the Petition for Leave to Intervene.

DATED: November 19, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH CASE RECORDS PUBLIC ACCESS POLICY

I 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.

/s/ Linda A. Kerns
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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2024, I caused a true and correct copy of this document to be served on all counsel of record

/s/ Linda A. Kerns
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