

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Jim Bognet, *et al.*,

Plaintiffs,

v.

Kathy Boockvar, in her capacity as Secretary
of the Commonwealth of Pennsylvania, *et al.*,

Defendants.

No. 3:20-cv-215

**PROPOSED INTERVENOR-
DEFENDANTS' BRIEF IN SUPPORT OF
MOTION TO INTERVENE**

I. INTRODUCTION

The Pennsylvania Supreme Court previously ruled in *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644 at *10 (Pa. Sept. 17, 2020), that the Commonwealth's ballot receipt deadline as applied in the present election violated the *Pennsylvania Constitution*. The Pennsylvania Supreme Court is the ultimate arbiter of what Pennsylvania state law, including the Pennsylvania Constitution, requires. This case represents an improper collateral attack on that judgment, as well as an improper attempt to invite a federal court to effectively displace a considered judgment of a state supreme court about the law of that state (albeit dressed up in the clothing of a federal legal dispute).

Under the ballot receipt deadline, election officials rejected all mail ballots cast by lawful Pennsylvania voters if those ballots were received by elections officials after election day—even if they were voted and mailed before election day, and even where the delay was no fault of the voter's own.¹ In *Boockvar*, the Pennsylvania Supreme Court considered whether that deadline could be applied consistent with the Pennsylvania Constitution's Free and Equal Elections Clause in the midst of the current pandemic. After careful consideration, the Pennsylvania Supreme Court

¹ Only mail-in and absentee ballots returned by mail could be received by election officials after election day since ballot drop boxes are required to close by 8 P.M. on election day.

held that it could not be, and ordered modest relief to bring the deadline in line with the Pennsylvania Constitution in the current election. Specifically, the Court ordered that ballots mailed on or before election day, November 3, 2020, that are received by 5 p.m. on November 6, must be counted. To be clear: ballots that are postmarked later than November 3rd still are rejected, regardless of whether they are received before 5 p.m. on November 6. And while the Court ordered that, for the small universe of ballots missing a postmark or where the postmark is illegible, there is a presumption that they were mailed by election day, the Court allowed for that presumption to be rebutted if a preponderance of the evidence demonstrates that it was mailed after November 3rd.

The Republican Party of Pennsylvania was a party to the *Boockvar* case and it sought an emergency stay from the U.S. Supreme Court, which was denied on October 19, 2020. Three days later, Plaintiffs Jim Bognet, a Republican candidate for Congress, along with voter Plaintiffs Donald K. Miller, Debra Miller, Alan Clark, and Jennifer Clark initiated this collateral attack against that decision in this federal court. In their complaint, they make two arguments: (1) they contend that the Pennsylvania Supreme Court lacked authority to interpret and apply the Pennsylvania Constitution to the extent it conflicted with the Election Code; and (2) they argue that the federal statute setting the date of the election preempts the Pennsylvania Supreme Court's directive on how to judge whether a ballot was cast by election day if the ballot return envelope lacks a legible postmark. Neither claim has merit. And—critical to this motion—Plaintiffs' requested injunction would undo the relief crafted by the Pennsylvania Supreme Court, and subject Pennsylvanians to the same illegal and disenfranchising conditions that spurred the state court litigation in the first place.

The DNC Services Corporation/Democratic National Committee (the “DNC”) has a concrete and protectible interest in protecting its candidates and its voters from the last-minute re-imposition of disenfranchising voting rules. The DNC is a national committee, as that term is defined by and used 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. The DNC has members and constituents across the United States, including eligible voters in Pennsylvania who will be submitting absentee and mail-in ballots for the November 3 election. As such, the DNC has a particular and distinct interest in Pennsylvania’s election processes, especially as they relate to procedures affecting the delivery and submission of mail ballots. The DNC has also expended and continues to invest significant time and resources, which it has diverted from other organizational activities, into ensuring Pennsylvania’s election processes are accessible to its members. As a result, the DNC and other political parties have routinely been granted intervention in cases materially indistinguishable from this one. *See supra* at III.A.3.

For the reasons that follow, this Court should find that the DNC is entitled to intervene in this case as a matter of right under Rule 24(a)(2). In the alternative, it should be granted permissive intervention pursuant to Rule 24(b). In accordance with Rule 24(c), a proposed Answer is attached as Exhibit A.

II. BACKGROUND

Although the background of the State Court litigation is a bit convoluted, the relevant facts are as follows. Shortly after the onset of the COVID-19 pandemic, several different groups of plaintiffs brought suit in Pennsylvania state courts challenging certain aspects of the Commonwealth’s elections laws and procedures as applied in the pandemic under the Pennsylvania Constitution’s robust protections for voting rights. The litigation that culminated in the Pennsylvania Supreme Court’s decision in *Boockvar* began in July 2020. 2020 WL 5554644

at *1. It challenged the strict application of the election day receipt deadline for mail ballots as applied during the present pandemic. *Id.* at *18. The Pennsylvania Supreme Court resolved that challenge on exclusively state law grounds in an order issued over a month ago, on September 17. Since then, Pennsylvania’s voters have had a clear answer to the question of when ballots must be received by election officials in the November election in order to be counted. *See id.* at *18 (holding ballots postmarked by 8 p.m. on election day and received by November 6 will be counted).

The Pennsylvania Supreme Court has “broad authority to craft meaningful remedies” under Pennsylvania law when provisions of the Election Code endanger the rights of voters. *Id.* at 36 (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2018) (citing Pa. Const., art. V, §§ 1, 2, 10; 42 P.S. § 726 (granting power to “enter a final order or otherwise cause right and justice to be done”))). In *Boockvar*, the Pennsylvania Supreme Court exercised that power in resolving challenges to the ballot receipt deadline, applying the Free and Equal Elections Clause of the Pennsylvania Constitution to modify the Commonwealth’s deadline “in light of the current COVID-19 pandemic” and significant mail delivery delays. *See Boockvar*, 2020 WL 5554644 at *10. That Court found that the Commonwealth’s Constitution *requires* that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth,” *id.* at 17 (quoting *League of Women Voters*, 178 A.3d at 804). This directive is thwarted where voters are disenfranchised through no fault of their own because of the ballot receipt deadline. *Id.* at 18.

The Pennsylvania Supreme Court’s order was not the first time that the Commonwealth’s courts exercised authority under state law to extend the ballot receipt deadline this year. Recognizing that the Election Code “implicitly granted [courts the] authority to provide relief

when there is a natural disaster or emergency” that threatens to deprive electors of the opportunity to participate in the electoral process, the Courts of Common Pleas of Bucks and Delaware Counties extended the deadline for the return of mail-in ballots during the June Primary for seven days, so long as the ballot was postmarked by the date of the election. *In re: Extension of Time for Absentee and Mail-In Ballots to be Received By Mail and Counted in the 2020 Primary Election*, No. 2020-02322-37 (C.P. Bucks June 2, 2020) (McMaster, J.); *see also In re: Extension of Time for Absentee and Mail-In Ballots to be Received By Mail and Counted in the 2020 Primary Election*, No.-CV 2020-003416 (June 2, 2020) (C.P. Delaware June 2, 2020).²

Following the decision in *Boockvar*, the Republican Party of Pennsylvania submitted an application to the United States Supreme Court requesting that it stay the Pennsylvania Supreme Court’s ruling, asserting the same theories the Plaintiffs now allege here. The Court denied the application. *Republican Party of Pa. v. Boockvar*, No. 20A54, 2020 U.S. LEXIS 5181, at *1 (Oct. 19, 2020); *see also Scarnati v. Boockvar*, No. 20A53, 2020 U.S. LEXIS 5182, at *1 (Oct. 19, 2020). Presumably unsatisfied with that outcome, Plaintiffs filed this action three days later. The DNC now moves to intervene.

III. ARGUMENT

A. The DNC is entitled to intervene as of right.

The DNC qualifies for intervention as of right. Intervention as of right must be granted when (1) the motion to intervene is timely, (2) the proposed intervenors possess an interest in the subject matter of the action; (3) denial of the motion to intervene would affect or impair the proposed intervenors’ ability to protect their interests, and (4) the proposed intervenor’s interests

² Governor Tom Wolf, invoking the Emergency Management Services Code, 35 P.S. § 7301(c), also extended the ballot receipt deadline in six counties during the primary elections via executive order.

are not adequately represented by the existing parties to the lawsuit. Fed. R. Civ. P. 24(a)(2); *Harris v. Pemsley*, 820 F.2d 592, 596 (3d Cir. 1987). The DNC satisfies each of these factors.

1. The motion to intervene is timely.

First, the motion to intervene is timely. The DNC sought intervention at the earliest possible stage of this action, and its intervention will neither delay the resolution of this matter nor prejudice any party. Plaintiffs filed their Complaint on October 22, 2020; this Motion follows just two days later. This case is still in its infancy—no motions have been fully briefed; no hearings have been held—and thus no party can legitimately claim that intervention by the DNC would cause any prejudicial delay. Under these circumstances, the Court should find the Motion timely. *See, e.g., In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 314 (3d Cir. 2005) (finding intervention timely where no hearing had yet been conducted).

2. The DNC has a significant protectable interest in the outcome of the litigation.

Second, the DNC has significant and cognizable interests in intervening in this case to ensure that absentee and mail-in ballots cast before election day are counted. Movants “are entitled to intervene as to specific issues so long as their interest in those issues is significantly protectable.” *Benjamin ex rel. Yock v. Dep’t of Pub. Welfare of Pa.*, 701 F.3d 938, 951 (3d Cir. 2012). Here, the DNC and its members maintain a powerful interest in avoiding a last-minute disruption of the postmark deadline ordered by the Pennsylvania Supreme Court over a month ago on September 17, to enforce the Pennsylvania Constitution’s Free and Equal Elections Clause. *See Boockvar*, 2020 WL 5554644, at *18; Pa. Const. art. I, § 5.

As the Pennsylvania Supreme Court explained in *Boockvar*, the county election boards “struggled to process the flow of mail-in ballot applications for voters who sought to avoid exposure to the virus” during the Commonwealth’s June Primary. *See* 2020 WL 5554644, at *17.

Because of this struggle, voters were disenfranchised. *See id.* The Court explained, “[a]n elector cannot exercise the franchise while her ballot application is awaiting processing in a county election board nor when her ballot is sitting in a USPS facility after the deadline for ballots to be received.” *Id.* Election officials expect staggeringly high participation in absentee and mail-in voting for the November Election in Pennsylvania. *See id.* “In light of these unprecedented numbers and the near-certain delays that will occur in Boards processing the mail-in applications,” the Pennsylvania Supreme Court concluded that the “timeline built into the Election Code cannot be met by the USPS’s current delivery standards.” *Id.* at *18. Accordingly, the Court held that the Pennsylvania Constitution required a one-time extension of the ballot receipt deadline. *Id.*

With this decision the Pennsylvania Supreme Court directly addressed the interest of Pennsylvania voters, including members of the party that the DNC leads. A last minute reduction of the window to submit mail ballots will force these voters to choose their injury: either rush a mail ballot earlier than they had planned and hope that it arrives in time to be counted, forgoing the opportunity to reflect on late-developing campaign news and the certainty that their ballot will be counted, or head to the polls in person in the midst of a pandemic (where, unless they are in possession of their mail ballot, they will be required to vote provisionally). The DNC’s interest in protecting the constitutional relief ordered by the Supreme Court and preventing this burdensome dilemma is evident.

That is especially true here where the DNC will be required to expend significant resources to assist voters in casting their ballots, and to ensure that their members can vote in the midst of a pandemic, in compliance with a ballot receipt deadline that infringes their rights under the Pennsylvania Constitution should Plaintiffs prevail in this litigation. *E.g. Issa*, 2020 WL 3074351, at *3 (explaining courts “routinely” find a protectible interest where proposed intervenors will be

required to “divert[] their limited resources to educate their members on the election procedures.”); *cf. NEOCH v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (holding diversion of resources sufficient for Article III purposes). Worse yet, Plaintiffs’ goal is to reimpose at the last minute a restricted window for ballots to be received and counted. This change will require extra efforts to prevent the disenfranchisement of the DNC’s members.

3. Denial of the motion to intervene will impair the DNC’s ability to protect its interests.

Third, denial of the motion to intervene will, as a practical matter, impair or impede the DNC’s ability to protect these interests. Where a proposed intervenor has a protectible interest in the outcome of the litigation, courts have “little difficulty concluding” that their interests will be impaired. *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011). When considering this factor, courts “look[] to the ‘practical consequences’ of denying intervention.” *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977); Fed. R. Civ. P. 24 notes (“If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene....”). Intervention is warranted if the proposed remedy threatens to harm intervenors. *Brody By & Through Sugzdinis v. Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992); *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1185 n. 15 (3d Cir. 1994); *Associated Builders & Contractors of W. Penn. v. Cty. of Westmoreland*, No. 2:19-CV-01213-LPL, 2020 WL 571691, at *5–6 (W.D. Pa. Jan. 21, 2020) (holding parties to contract were entitled to intervene where the requested relief could undermine the contract), *report and recommendation adopted*, 2020 WL 571031 (Feb. 05, 2020).

There can be no doubt that disposition of this matter has the potential to impair the DNC’s ability to protect its interests. This litigation’s very purpose is to reimpose the conditions that the

Pennsylvania Supreme Court found violated the DNC's members' rights under the Pennsylvania Constitution. Courts routinely find that political party committees should be granted intervention in cases where plaintiffs seek to impose restrictions on voting access. *E.g. Paher v. Cegavske*, No. 20-cv-00243, 2020 WL 2042365, at *4 (D. Nev. April 28, 2020) (granting DNC intervention in election law case brought by conservative interest group); *see Donald J. Trump for President, Inc.*, No. 20-cv-10753, 2020 WL 5229209, at *1 (D. N.J. Sept. 01, 2020) (granting Democratic Congressional Campaign Committee intervention in lawsuit by Republican candidate and party entities); *Cook County Republican Party v. Pritzker*, No. 20-cv-4676 (N.D. Ill. Aug. 28, 2020) (granting Democratic Congressional Campaign Committee intervention in lawsuit by Republican party entity); *Issa v. Newsom*, No. 20-cv-01044, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (granting Democratic Congressional Campaign Committee and California Democratic Party intervention in lawsuit by Republican congressional candidate); *Donald J. Trump for President v. Bullock*, No. 20-cv-66 (D. Mont. Sept. 08, 2020) (granting Democratic Congressional Campaign Committee, Democratic Senatorial Campaign Committee, and Montana Democratic Party intervention in lawsuit by four Republican party entities); *see also Order, Trump for President, Inc. v. Boockvar*, No. 20-00966-NR (W.D. Pa. Aug. 03, 2020), ECF No. 309 (granting non-profit standing to represent members in lawsuit by Republican candidates for President and Congress). This Court should do the same.

4. The DNC's interests are not adequately represented by Defendants.

Fourth, the DNC's interests are not adequately represented by Defendants. The burden to satisfy this factor is "minimal." *Dev. Fin. Corp. v. Alpha Hous. & Health Care, Inc.*, 54 F.3d 156, 162 (3d Cir. 1995). Intervenors need not show that representation *will* be inadequate, only that it "*may be*" inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis added) (quoting 3B J. Moore, Federal Practice 24.09-1(4) (1969)). When one of the

original parties to the suit is a government entity, whose positions “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 Third Circuit has found that “the burden [of establishing inadequacy of representation] is comparatively light.” *Kleissler*, 157 F.3d at 972.

Defendants’ stake in this lawsuit is defined solely by their statutory duties to conduct elections. The DNC’s interest is in ensuring that as many of its voters can vote as possible, and in *not* being required to expend substantial additional resources to do so. Because their interests diverge, election officials cannot adequately represent the DNC’s interests. *See Issa*, 2020 WL 3074351, at *4 (“While Defendants’ arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Alliance is 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.”); *Paher*, 2020 WL 2042365, at *2 (granting intervention where litigants in state court action including voter engagement non-profit “may present arguments about the need to safeguard Nevada’s right to vote that are distinct from Defendants’ arguments”).

B. In the alternative, the DNC should be granted permissive intervention.

If the Court does not grant intervention as a matter of right, the DNC respectfully requests that the Court exercise its discretion to allow it to intervene under Rule 24(b). The Court has broad discretion to grant a motion for permissive intervention when the Court determines that: (1) the proposed-intervenor’s claim or defense and the main action have a question of law or fact in common, and that (2) the intervention will not unduly delay or prejudice the adjudication of the original parties’ rights. *See Fed. R. Civ. P. 24(b)(1)(B) and (b)(3); Brody*, 957 F.2d at 1115; *League of Women Voters of Virginia v. Virginia State Bd. of Elections*, No. 6:20- CV-00024, 2020 WL

2090678, at *5 (W.D. Va. Apr. 30, 2020). Even where courts have denied intervention as of right, permissive intervention might nonetheless be proper or warranted. *See Hoots*, 672 F.2d at 1136.

The DNC easily meets the requirements of permissive intervention. First, the DNC will inevitably raise common questions of law and fact including whether Plaintiffs have standing, whether the U.S. Constitution prohibits the Pennsylvania Supreme Court from interpreting and applying the Pennsylvania Constitution, and the likely harm to voters. Second, for the reasons set forth above, the motion to intervene is timely, and, given the early stage of this litigation, intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

IV. CONCLUSION

For the reasons stated, the DNC is entitled to intervention as of right. In the alternative, it requests that the Court grant permissive intervention.

Dated: October 24, 2020

Respectfully submitted,

/s/ Justin T. Romano

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**Motions for Admission Pro Hac Vice
Forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on Saturday, October 24, 2020, I filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Justin T. Romano
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