

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG MCLINKO,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF STATE, and VERONICA
DEGRAFFENREID, in her official capacity as Acting
Secretary of the Commonwealth of Pennsylvania,

Respondents,

TIMOTHY BONNER et al.,

Petitioners,

v.

VERONICA DEGRAFFENREID et al.,

Respondents,

and

DEMOCRATIC NATIONAL COMMITTEE, and
THE PENNSYLVANIA DEMOCRATIC PARTY,

Proposed Intervenors-Respondents.

Nos. 244 MD 2021
293 MD 2021

**PROPOSED INTERVENORS-RESPONDENTS' 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 consolidated litigation and in response to the *Bonner* petitioners’ memorandum of law in opposition to the application to intervene.¹

I. INTRODUCTION

Petitioners in this litigation challenge the constitutionality of Act 77, the Pennsylvania statute allowing all eligible voters in the Commonwealth to cast their ballots by mail. They seek an order invalidating the law and prohibiting the General Assembly from allowing no-excuse mail voting in future elections. 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. 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; nullify the significant time, money, and effort that the Applicants have invested in

¹ Petitioner McLinko has not responded to the application. Respondents have stated that they take no position on it.

education regarding and encouragement of mail-in voting; and create significant confusion for the hundreds of thousands of Pennsylvania Democrats who have already signed up for the permanent mail-in ballot list created by Act 77. It would affect not only the way that the Commonwealth administers elections, but also the manner in which the Applicants select their own nominees for elective office in Pennsylvania.

The *Bonner* petitioners argue (Opp. 2) that they will adequately represent the Applicants' interests in this litigation. That is farcical. The claims petitioners brought and are pressing here are precisely what *threaten* the Applicants' interests. Indeed, the Applicants' interests are more concrete—and the potential harm more particularized—than any interests or harms identified by the *Bonner* petitioners. As for respondents, their position on the constitutionality of Act 77 is indeed consistent with the Applicants'. But their *interests* are distinct from those of the Applicants. Respondents have an interest in defending the constitutionality of duly enacted legislation, and in the smooth and sound administration of elections in the Commonwealth. But 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 no-excuse mail voting. In addition, the DNC and PDP have

made considerable investments to inform Pennsylvania Democrats of the opportunity to vote by mail; and to encourage them to do so in the upcoming election and those in the future. Only the Applicants will fully protect those (and their other) interests in this litigation.

Equally flawed is the *Bonner* petitioners' suggestion that allowing the Applicants to intervene would somehow interfere with this Court's jurisdiction. Private entities are regularly permitted to intervene to defend a statute's constitutionality in state and federal courts across the country, with no effect on either the sovereigns' prerogatives or the courts' jurisdiction. Indeed, in many cases during the 2020 election cycle, federal and state courts in Pennsylvania permitted the Applicants to intervene in election-related cases. 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 Jason Henry, Ex. A (hereinafter "Henry Decl.") ¶9. The PDP is the DNC's coordinate party within the Commonwealth and is the largest political party by registration in Pennsylvania. *Id.* As of October 18, 2021, 4,024,275 registered voters in Pennsylvania are members

of the PDP. *See Voting & Election Statistics*, Pennsylvania Dep't of State.² 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. 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 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. Henry Decl. ¶18. Each applicant believes 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.* ¶¶22-32.

Act 77 was signed into law on October 31, 2019, with bipartisan supermajority support in each house of the General Assembly. McLinko Amended Petition (“Am.

² <https://www.dos.pa.gov/VotingElections/Other ServicesEvents/Voting ElectionStatistics/Pages/VotingElectionStatistics.aspx>.

Pet.”) ¶7. It allows Pennsylvanians to “vote by mail for any reason or no reason whatsoever (no excuse).” *Id.* ¶10. 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)³; Press Release, *Tom Wolf, Gov., Pa., Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting* (Oct. 31, 2019).⁴

³ <https://theintercept.com/2019/10/30/pennsylvania-voting-reform-straight-ticket/>.

⁴ <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting>.

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 and 2021 elections. Henry Decl. ¶¶18-21. In addition, the DNC and PDP have expended significant resources to encourage their supporters and constituents to vote by mail. *Id.* ¶¶22-32. 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.* ¶24. And because mail voting correlates with greater participation, the Applicants have encouraged members to use the opportunity to vote by mail. *See id.* ¶¶22-24. The Applicants have also invested resources in updating their voter-protection efforts to account for mail voting. *Id.* ¶23. 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.* ¶20.

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

a. As explained in the application (at 5-7), 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 powerfully 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 in the midst of a global pandemic—safer for Pennsylvanians to cast their ballots. Just one piece of evidence of Act 77's impact is that more than a million Pennsylvania voters (including hundreds of thousands of PDP members) have requested to be placed on a list to receive applications for mail-in voting for all primary, general, and special elections held in the coming year. *See supra* p.6. More generally, Act 77 has increased turnout by Pennsylvanians as a whole, and by Democratic voters in particular. *See id.*

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. *See supra* pp.3-6. 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. *See supra* p.6. 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.

Finally, the DNC and PDP rely on primary elections to select Democratic candidates for local, state, and federal races. They have a strong interest in ensuring that as many voters as possible participate in the primaries, so that the candidates who receive the party’s nomination are supported by the largest number of voters

possible—ensuring that the candidates best represent the PDP’s members. *See supra* pp.3-6.

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.⁵ 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

⁵ *See In re Canvassing Observation*, No. 30 EAP 2020 (Pa. Nov. 17, 2020); *In re: Canvass of Absentee & Mail-In Ballots of November 3, 2020 Gen. Election*, Nos. 31, 32, 33, 34, 35 EAP 2020, 29 WAP 2020 (Pa. Nov. 23, 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*, 5:20-cv-2299, ECF 49 (E.D. Pa. July 8, 2020).

significant protectable interests” for purposes of intervention. *Issa v. Newsom*, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020); *see also* Appl. 5 n.1 (collecting similar cases).

b. The *Bonner* petitioners do not grapple with the interests discussed above, even though they were set forth in the application (at 5-7). Instead, the *Bonner* petitioners suggest (Opp. 6-7) that any interests the Applicants could have in this litigation are necessarily shared by the general public. That is wrong.

The PDP has more than four 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 (the vast majority of them PDP members) have the ability to participate. The party’s 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,” Opp. 7 (quoting *Fraenzel v. Secretary of the Commonwealth*, 478 A.2d 903, 904 (Pa. Commw. Ct. 1984)).⁶

Indeed, the Applicants’ interest here is more concrete, personal, and particularized than the interest the *Bonner* petitioners assert in challenging Act 77. While petitioners assert an interest in voting on a *hypothetical* future constitutional referendum, *Bonner* Pet. ¶90, a victory for them here would *assuredly* impede Pennsylvania Democrats’ ability to cast a mail-in ballot in future elections. The Applicants’ interest in preserving that ability—which, as explained, translates into substantially increased voter participation—is far more significant than any interest supporting the *Bonner* petitioners’ standing argument. And it 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).

⁶ To the extent the *Bonner* petitioners mean to argue that the Applicants do not have *unique* interests in this litigation, i.e., interests shared by no one else, that does not render a personalized interest a grievance of the general public. *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)).

2. Neither Respondents Nor The *Bonner* Petitioners Adequately Represent The Applicants' Interests

As the DNC and PDP explained in their application (at 7-10), 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 *Bonner* petitioners do not address this fundamental distinction. The two central arguments they offer instead lack merit; each is addressed in turn.

First, the *Bonner* petitioners argue (e.g., Opp. 4-5) that the Applicants' interests boil down to defending the constitutionality of mail voting, an interest petitioners say is adequately represented by respondents. But the 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; *see also* Appl. 9.⁷

Second, the *Bonner* petitioners suggest (Opp. 14) that *they* adequately represent the Applicants' interests because they too are voters and candidates. That claim is farcical. To the extent they assert interests as candidates, the *Bonner* petitioners do so in races in which they will be running against a nominee of the PDP. More fundamentally, though, the Applicants' interests lie not simply in the

⁷ To take just one example, respondents and the Applicants may have different positions on severability. While the respondents might argue that other provisions of Act 77 should survive even if the vote-by-mail provisions are struck down, the Applicants believe that each crucial component of the law must rise or fall in its entirety, such that straight-ticket voting would be reinstated were the petitioners' claim successful. *See supra* p.5.

fact that their members include voters and candidates. Rather, their interests (as explained) include the fact that their members and candidates support no-excuse mail voting in Pennsylvania, and hence they—in *direct opposition* to petitioners—want Act 77 to be upheld. Petitioners do not represent the Applicants’ interests at all, let alone adequately.⁸

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

Granting intervention will not prejudice any party. The Applicants have committed to adhere to the briefing and argument schedule already set—as they have done with their several filings to date—and they have not raised defenses beyond those identified by respondents. The *Bonner* petitioners nonetheless argue that they will suffer prejudice if intervention is granted, for two reasons. Neither has merit.

First, petitioners argue (Opp. 19) that they will have to respond to the DNC and PDP brief on an “extremely truncated timeline.” But this purported harm has nothing to do with intervention; the same would be true if the Applicants filed an

⁸ The *Bonner* petitioners also spend a half-dozen pages responding to the Applicants’ brief argument that they are necessary parties to this litigation (an alternative argument for intervention because being a necessary party is not a prerequisite for intervention). *Compare* Appl. 6-7 *with* Opp. 13-19. While petitioners’ responses lack merit—for example, they rely on case law declining to require joinder of hundreds of potential parties on manageability grounds, a concern plainly not present with the two Applicants here—the Applicants will not burden this Court with a point-by-point rebuttal because petitioners’ arguments regarding the Rule 2327 permissive intervention factors are manifestly insufficient.

amicus brief, which the *Bonner* petitioners concede (Opp. 2 n.1) would be permissible.

Second, the *Bonner* petitioners contend (Opp. 2) that granting intervention would “permit[] partisan non-party groups to inject immaterial political arguments into these proceedings.” Even setting aside the fact that the *Bonner* petitioners are themselves partisan actors (each is a Republican member of the Pennsylvania House of Representatives, and eleven now claim that a law they voted to enact is unconstitutional), they do not identify a single “immaterial political argument” that the Applicants raised in their Preliminary Objections and Application for Summary Relief—because there are none. The Applicants instead raised the types of straightforward legal issues already pressed by respondents, i.e., challenges related to petitioner McLinko’s standing, his delay in suing, and the merits of the constitutional issue.

B. The *Bonner* Petitioners’ Novel Theory That Only Governmental Entities Can Intervene In Original-Jurisdiction Proceedings Should Be Rejected

The *Bonner* petitioners devote most of their opposition (e.g., Opp. 3-13) to the argument that only a state actor can intervene as a respondent in original proceedings under 42 Pennsylvania Consolidated Statutes §761(a)(1). The *Bonner* petitioners do not cite a single authority that adopts this argument, and for good reason: Pennsylvania Rule of Appellate Procedure 1531(b) provides that any

“*person* not named as a respondent” in an original-jurisdiction action “may seek to intervene.” Pa. R.A.P. 1531(b) (emphasis added). The term “person” does not necessarily mean a state actor. To the contrary, Pennsylvania statutes are assumed to use the word “person” in a broad manner that includes entities ranging from “a corporation” to an “association” to a “natural person.” 1 Pa. Cons. Stat. §1991.⁹

Nor does section 761(a)(1) itself impose the rule the *Bonner* petitioners suggest. It requires only that a lawsuit be originally brought “[a]gainst the Commonwealth government, including any officer thereof.” 42 Pa. Cons. Stat. §761(a)(1) (emphasis added). Once that jurisdictional requisite is met (as it is here, because McLinko sued the Commonwealth, one of its agencies, and one of its officers), nothing in the statute or its history suggests that jurisdiction is destroyed by intervention. Perhaps recognizing this, the *Bonner* petitioners repeatedly try to write the word “exclusive” into section 761(a)(1). They argue, for example (Opp. 1), that McLinko’s lawsuit was “brought under the Court’s original jurisdiction for actions exclusively against ‘the Commonwealth government or an officer thereof.’” But “exclusive” appears nowhere in (a)(1); it appears instead in sections 761(b) and

⁹ The *Bonner* petitioners’ assertion (Opp. 2-3) that intervention as of right does not exist under Rule 1531(b) is a red herring. As explained above and in the application, this Court has held that granting an intervention request is “effect[ively]” mandatory if “the petitioner is a person within one of the classes described in Rule 2327” and none “of the grounds for refusal under Rule 2329 is present.” *Larock*, 740 A.2d at 313, *quoted supra* p.7; *accord* Appl. 3. The *Bonner* petitioners have no answer to this critical point.

(c), which state that this Court has “exclusive jurisdiction”—i.e., that this Court alone can hear suits brought against the government. Neither subsection (b) nor (c) purports to limit the parties who can intervene in support of the government.

Further demonstrating the infirmity of the *Bonner* petitioners’ argument is the fact that there are numerous instances where private entities have successfully intervened as respondents in original-jurisdiction proceedings under section 761(a)(1). See *Pennsylvania State Educ. Ass’n ex rel. Wilson v. Commonwealth*, 616 Pa. 491, 494 (2012) (noting that Commonwealth Court granted “the Pennsylvania Association of School Retirees (‘PASR’), an association of former school employees” leave to intervene in support of the Commonwealth’s administration of a state law); see also *Scientific Games Int’l, Inc. v. Commonwealth*, 620 Pa. 175, 186-187 (2013) (noting that the Commonwealth Court had allowed a private corporation to intervene as a respondent in support of a government decision to award a contract); *Columbia Gas of Pa., Inc. v. Pennsylvania Pub. Util. Comm’n*, 521 A.2d 105, 107 (Pa. Commw. Ct. 1987) (two gas companies intervened in support of a public utility commission’s order requiring a third party to cease serving certain customers). As noted, the *Bonner* petitioners do not cite *any* contrary case, i.e., any that actually adopts their purported jurisdictional rule.

In fact, many of the cases the *Bonner* petitioners cite on this point were not even about whether a party could intervene. For example, *Tokar v. Commonwealth*,

480 Pa. 598 (1978), addressed whether it was appropriate for a plaintiff to name individual defendants in an original-jurisdiction suit, *see id.* at 600-601. And *Diamond v. Charles*, 476 U.S. 54 (1986), held only that a private citizen who had intervened to defend a state law could not seek Supreme Court review where the state declined to do so, *see id.* at 64-65. (If anything, *Diamond* supports the Applicants, because the Court did not indicate that the defendant was barred from intervening to defend a state law so long as (as here) the state continued to also defend the law, *see id.* at 54, 68-69.) Finally, *City of Philadelphia v. Commonwealth*, 575 Pa. 542 (2003), simply concerned whether the petitioners there had “joined all necessary parties,” *id.* at 570-571.¹⁰

Of the cases the *Bonner* petitioners cite that did involve a ruling on intervention itself, none denied intervention to a private entity comparable to the DNC and PDP. Indeed, the *Bonner* petitioners concede that four of the cases they rely on involved “a proposed-intervenor’s interest” that was “shared by the general public.” Opp. 6-7. And even *Fraenzl v. Secretary of the Commonwealth*, the case the *Bonner* petitioners assert is most comparable to this one (Opp. 7), is easily

¹⁰ To the extent the *Bonner* petitioners rely on *City of Philadelphia* to attack the argument that the Applicants are necessary parties, *see supra* n.15, this reliance is misplaced. *City of Philadelphia* emphasized that whether an entity is a necessary party “entails an assessment of the particular facts and circumstances presented in each case.” 575 Pa. at 572. Because the case did not involve election-related litigation, it says nothing about whether one of the Commonwealth’s two major political parties is a necessary party in such cases.

distinguished. There, this Court denied an *individual candidate's* request to intervene in pending election-related litigation. *See* 478 A.2d at 904. While the Court spent only a paragraph on the issue, it made clear that the only legally cognizable interest the candidate asserted was in seeing that the election laws were properly applied, an interest the general public shares. *Id.* at 904-905. In contrast, the DNC and PDP have interests that go far beyond those of the general public, *see supra* pp.8-15, and the *Bonner* petitioners make no attempt to explain how any of the intervention cases it cites involved remotely comparable interests.

The remainder of the *Bonner* petitioners' arguments fare no better. They assert (Opp. 10-11) that this case is comparable to *Harris v. Parnsley*, 820 F.2d 592 (3d Cir. 1987). But the Third Circuit concluded there that the would-be intervenor—a district attorney who filed in his capacity as a “public official”—would suffer *no* direct effects if the challenged rule went into place because it would not “obligate[him] to take any action or refrain from any action” or otherwise affect his legal duties in any way. *Id.* at 597, 600. Here, by contrast, the DNC and PDP face a significant and immediate impact if Act 77 is struck down. *See supra* pp.8-13.¹¹

The *Bonner* petitioners also mischaracterize (Opp. 12 n.3) this Court's holding in *Kelly v. Commonwealth*, No. 620 MD 2020, Mem. Op. (Pa. Commw. Ct.

¹¹ *Harris* also involved a request for “intervention as of right” under Federal Rule of Civil Procedure 24(a)(2), 820 F.2d at 597, which the *Bonner* petitioners argue (Opp. 10) “is not analogous” to Pennsylvania law.

Nov. 27, 2020), implying that this Court denied the DNC's request for intervention. In reality, this Court's relevant opinion noted that the Court had not ruled on the DNC's motion. *See* Mem. Op. at 6 n.2 ("As of the filing of this memorandum opinion, the Court has not yet ruled upon Proposed Intervenor's motion for leave to intervene."). Because this Court's *Kelly* ruling was overturned by the Pennsylvania Supreme Court the very next day, the intervention request was simply never resolved.

Finally, the *Bonner* petitioners criticize the DNC and PDP (Opp. 8) for failing to identify a case with identical facts where intervention was allowed. But the DNC and PDP have identified several cases where this Court permitted a non-government party to intervene as a respondent in an original-jurisdiction case. *See supra* p.13. In any event, many of the factual distinctions the *Bonner* petitioners draw about the cases cited in the application to intervene are so thin as to be meaningless. For example, they assert (Opp. 8-9) that any case where "intervention was never opposed" is "materially distinguishable from th[is] case." But regardless of whether any party opposed intervention, this Court had the obligation to consider *sua sponte* the precise question the *Bonner* petitioners raise here: whether intervention would have destroyed jurisdiction. *See, e.g., Pennsylvania Gamefowl Breeders Ass'n v. Commonwealth*, 551 A.2d 361, 363 (Pa. Commw. Ct. 1988) ("[W]e must raise ... *sua sponte*" whether "this court lacks original jurisdiction" even if the issue was "not

specifically rais[ed.]”); *Philadelphia Parking Auth. v. Am. Fed’n*, 845 A.2d 245, 247 (Pa. Commw. Ct. 2004) (“Though neither party raised the issue, we must first determine whether we have jurisdiction over this appeal.”).

IV. CONCLUSION

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

October 18, 2021

Respectfully submitted,

Seth P. Waxman*
Christopher E. Babbitt*
Daniel S. Volchok*
**WILMER CUTLER PICKERING
HALE AND DORR LLP**
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

/s/ Clifford B. Levine
Clifford B. Levine
Alex M. Lacey
Emma F. E. Shoucair
DENTONS COHEN & GRIGSBY P.C.
625 Liberty Ave.
Pittsburgh, PA 15222
(412) 297-4998
clifford.levine@dentons.com

**Appearing pro hac vice*

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.

/s/ Clifford B. Levine

CLIFFORD B. LEVINE

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served upon all counsel of record on October 18, 2021 by this Court's electronic filing system.

/s/ Clifford B. Levine

CLIFFORD B. LEVINE

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOUG MCLINKO,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF STATE, and VERONICA
DEGRAFFENREID, in her official capacity as Acting
Secretary of the Commonwealth of Pennsylvania,

Respondents,

TIMOTHY BONNER et al.,

Petitioners,

v.

VERONICA DEGRAFFENREID et al.,

Respondents,

and

DEMOCRATIC NATIONAL COMMITTEE, and THE
PENNSYLVANIA DEMOCRATIC PARTY,

Proposed Intervenors-Respondents.

Nos. 244 MD 2021

293 MD 2021

DECLARATION OF JASON HENRY

I, Jason Henry, 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 July of 2020.
2. Before that, I was the Political Director of the PDP, starting in February of 2020.
3. Prior to that, I was a consultant for the PDP. In that capacity, I developed, executed, and oversaw the delegate selection program for the 2020 presidential nominating process in Pennsylvania.
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.
6. I also supervise campaign expenditures to help county-level parties and candidates, including mail programs.
7. In June of 2020, I provided testimony in *Libertarian Party et al. v. Wolf et al.*, No. 20-cv-2299 (E.D. Pa) on behalf of the PDP, which had successfully intervened in that action. In that lawsuit, the federal court rejected a challenge to the Election Code’s requirements involving minor party signature collection in light of COVID-19 restrictions.
8. The District Court favorably cited my testimony in support of its decision.

II. PDP Generally

9. 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.
10. The DNC has an interest in electing Democratic candidates and invests significant resources in state parties, including the PDP.

11. Among other things, the PDP communicates with these 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.
12. The PDP represents the interests of Democratic voters in Pennsylvania by supporting candidates who share these voters' values. As of October 4, 2021, there were roughly four million registered Democrats throughout the Commonwealth.
13. 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.
14. 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.
15. 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.
16. This year, the PDP represents the interests of Democratic nominees for four statewide judicial offices, as well as numerous Democratic candidates for local municipal and judicial offices.
17. In Pennsylvania, we have state-run primaries, and the option for any qualified voter to vote by mail has become a key piece of the strategy in primaries as a tool to boost participation. The PDP endorses statewide candidates and has an interest in its endorsed candidates prevailing in their primaries.

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

18. 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.

19. 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. Typically, participation in municipal primaries is lower than participation in presidential primaries, and one of the PDP’s goals is to increase participation in all elections, including municipal elections.
20. 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.
21. 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

22. 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.
23. 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.
24. 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.

25. Our field efforts have similarly shifted to conducting substantial voter contact around voting by mail.
26. 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.
27. In short, we have made far-reaching changes to how we operate as a result of Act 77, expending significant resources to do so.
28. If Act 77 were invalidated and mail-in ballots declared unconstitutional, 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 full election cycles. Mail in ballots have already been sent to voters for a fourth election. Undoing those changes would itself require significant resources.
29. In addition, PDP has an interest in preserving the confidence and trust it has built with voters over the three, almost now four, full election cycles Act 77 has been in effect.
30. 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.
31. 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 unexpected problems during Election Day, among other things. Voting by mail allows voters more flexibility.
32. 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: October 18, 2021

Jason Henry 