

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY,  
PENNSYLVANIA

IN RE: 2020 GENERAL ELECTION  
PROVISIONAL BALLOT  
CHALLENGES

CIVIL DIVISION

No. 4152 OF 2020

**MOTION TO INTERVENE**

Filed on Behalf of:  
Pennsylvania Democratic Party and  
James Brewster, Proposed Intervenors

Counsel of Record for  
This Party:

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FILED IN  
PROthonotary's OFFICE

NOV 19 2020

*B*

CLERK

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**MOTION TO INTERVENE**

Proposed Intervenors, the Pennsylvania Democratic Party and James Brewster (the "Candidate" and collectively with the Pennsylvania Democratic Party, the "Intervenors"), move for leave to intervene in this appeal from the determination of the Westmoreland County Board of Elections ("Board"). In support of this Motion to Intervene, the Intervenors submit the accompanying Memorandum of Law. For the reasons stated in the accompanying Memorandum of Law, Intervenors request that this Court grant Intervenors leave to intervene in this action.

WHEREFORE, the Pennsylvania Democratic Party and James Brewster respectfully request that the Court GRANT this Motion to Intervene and allow the Pennsylvania Democratic Party and James Brewster to intervene in this action.

Respectfully submitted,

DENTONS COHEN & GRIGSBY P.C.

Dated: November 19, 2020

By /s/ Clifford B. Levine

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**[PROPOSED] ORDER**

AND NOW, this \_\_\_\_ day of November 2020, upon consideration of the Motion to Intervene by the Pennsylvania Democratic Party and James Brewster, it is hereby

**ORDERED** that the Motion to Intervene is **GRANTED**, and it is further

**ORDERED** that the Pennsylvania Democratic Party and James Brewster shall hereby intervene in the above-captioned action.

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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on this 19<sup>th</sup> day of November, 2020, a true and correct copy of the foregoing MOTION TO INTERVENE was served as indicated below, upon the following:

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*/s/ Clifford B. Levine* \_\_\_\_\_  
Clifford B. Levine

**CERTIFICATE OF COMPLIANCE**

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.

Submitted by: Proposed Intervenors

Signature: /s/ Clifford B. Levine

Name: Clifford B. Levine

Attorney No. (if applicable): 33507

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No. 4152 OF 2020

**BRIEF IN SUPPORT OF MOTION TO INTERVENE**

The Pennsylvania Democratic Party and James Brewster (the “Candidate” or “Brewster” and collectively with the Pennsylvania Democratic Party, the “Intervenors”), submit this brief in support of their motion for leave to intervene in this action, and state as follows:

**I. INTRODUCTION**

Petitioner in this appeal is Nicole Zicarelli, the Republican Candidate for State Senate in the 45<sup>th</sup> District (“Zicarelli”). In her first issue, she asks this Court to reverse the November 16, 2020 decision of the Respondent, the Westmoreland County Board of Elections (the “Board”), which directed the acceptance, canvassing, and computation of 204 provisional ballots wherein the provisional ballot voter signed the poll book in addition to casting a provisional ballot (“Signed Poll Book Issue”) but did not provide testimony or an affidavit to “confirm” they only voted once. Despite the fact that Zicarelli has not presented any evidence, or even alleged in her petition that any of the 204 voters voted twice. In her second issue, she asks this Court to reverse the November 16, 2020 decision of the Board, which directed the acceptance, canvassing, and computation of certain provisional ballots that did not contain a secrecy



envelope, and contradictory to her position on the Signed Poll Book Issue, she specifically asks that “all provisional ballots lacking a secrecy envelopes should either all be counted or all rejected”<sup>1</sup> regardless of whether voters provided testimony on this issue (“Provisional Secrecy Envelope Issue”). The proposed Intervenors are entitled to intervene in this action because they have a vital interest, on behalf of themselves, their voters, and their candidates – including James Brewster – that warrants intervention and participation in this matter.

*First*, courts across the country, including in Pennsylvania, have recognized the right of political parties and candidates to intervene where significant changes to general election procedures are sought. *Second*, the relief Zicarelli requests would directly and substantially impair the Intervenors’ cognizable rights and interests. *Third*, the Board, as Respondent, does not adequately represent the Intervenors’ cognizable interests. *Fourth*, Intervenors’ interests in this action mirror the asserted interests, as applicable, of Zicarelli, who is also a candidate-elect. For these reasons, this Court should grant Intervenors’ Motion to Intervene.

## **II. FACTUAL BACKGROUND**

### **A. The Pennsylvania Democratic Party, Its Members, Its Candidates and Its Interests Here**

The Pennsylvania Democratic Party is the largest political party by registration in Pennsylvania and has many members that reside in Westmoreland County. The Pennsylvania Democratic Party is a “major political party” as defined in the Pennsylvania Election Code (the “Election Code”). 25 P.S. §§ 2601. Its members include elected officials in the highest offices in Pennsylvania government, including the Governor, Lieutenant Governor, Attorney General, Auditor General, and Treasurer. In the 2020 General Election, the Pennsylvania Democratic

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<sup>1</sup> See paragraph 38 of Zicarelli’s Petition For Review In the Nature Of A Statutory Appeal docketed 4152 of 2020.

Party fielded candidates for all statewide elected positions and virtually all legislative seats on the 2020 General Election ballot. It also supported the Democratic nominees for President and Vice President, Joseph Biden and Kamala Harris. The goal of the Pennsylvania Democratic Party is to promote its candidates and the interests of its registered voters.

**B. The Candidate**

Candidate James Brewster currently represents the 45<sup>th</sup> District in the Pennsylvania State Senate (“Senate”). He is a registered voter in the Commonwealth and is the Democratic Party’s nominee in the 2020 General Election for the seat he currently holds in the State Senate.

Brewster won the 2020 Democratic primary election, conducted on June 2, 2020. Brewster has spent significant resources getting on the ballot and running for election or reelection. Brewster supports the voting reforms found in Act 77 of 2019 (“Act 77”).

**C. The 2020 General Election**

The 2020 General Election was held on November 3, 2020. The free and fair administration of the 2020 General Election is imperative to the future of the Commonwealth of Pennsylvania and the country. The Intervenors have a significant interest in preventing efforts to undermine the outcome of the 2020 General Election, including efforts to cause valid votes to be discarded and efforts to interfere the counties’ administration of the election in a manner that allows all voters to exercise their franchise as easily as is feasible in this era of a pandemic.

**D. November 16, 2020 Determination Of The Allegheny County Board of Elections**

On Friday, November 13, 2020 the Board began a hearing for consideration of submitted ballots for the November 3, 2020 election during which it considered individual provisional ballots and on Monday, November 16, 2020, the Board addressed the Signed Poll Book Issue and by a bi-partisan unanimous vote the Board determine that Signed Poll Book Issue ballots

should be canvassed in accordance with the Election Code. Additionally, during the November 13, 2020 and November 16, 2020 meeting of the BOE certain provisional ballots that lacked a secrecy envelope were reviewed by the Board and the Board made determinations whether to canvass or reject said ballots. The Pennsylvania Democratic Party and Brewster participated on the November 13, 2020 and November 16, 2020 hearings. Zicarelli filed her appeal related to the Signed Poll Book Issue and Provisional Secrecy Envelope Issue determination with this Court on November 18, 2020.

### III. LEGAL STANDARD

Section 752 of the Local Agency Law provides that “any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure).” 2 Pa.C.S. § 752. Section 933 of the Judicial Code states that “each court of common pleas shall have jurisdiction of appeals from final orders of government agencies” including “appeals from government agencies, except Commonwealth agencies, under Subchapter B of Chapter 7 of Title 2 (relating to judicial review of local agency action) or otherwise.” 42 Pa.C.S. § 933(a)(2).<sup>2</sup>

“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.” *Keener v. Zoning Hearing Bd. of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw. Ct. 1998) (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty.*, 44 A.2d 250, 251 (Pa. 1945)). If the determination may affect the intervenor’s legally enforceable interest, and no exception applies,

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<sup>2</sup> The Board is a “local agency,” as defined in the Local Agency Law. 2 Pa.C.S. § 101 and the appeal from the Board’s November 12, 2020 decision is properly within this Court’s jurisdiction.

approving intervention is mandatory, not discretionary. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

#### IV. ARGUMENT

##### A. **The Pennsylvania Democratic Party and the Candidate have Substantial Interests in the Outcome of this Action.**

The Pennsylvania Democratic Party, like other political organizations, has distinct interests in litigation that challenges general election procedure, namely protecting Democratic candidates in competing in a free and fair election and further protecting registered Democratic voters' rights to an effective vote. *See Orloski v. Davis*, 564 F. Supp. 526 (M.D. Pa. 1983); *Pennsylvania Democratic Party v. Republican Party of Pennsylvania*, No. 16-5664, 2016 WL 6582659 (E.D. Pa. Nov. 7, 2016).<sup>3</sup>

Both the Pennsylvania Democratic Party and the Pennsylvania Republican Party have been permitted to intervene in cases addressing the conduct of the general election. *See, e.g., Pierce v. Allegheny County Bd. of Elections*, 324 F.Supp.2d 684 (W.D. Pa. 2003) (addressing Republican challenge to third-party delivery of absentee ballots and noting the intervention of the Pennsylvania Democratic Party); *Stein v. Cortes*, 223 F.Supp.3d 423 (E.D. Pa. 2016) (addressing recount demand for 2016 general election ballots and noting the intervention of the Pennsylvania Republican Party). State parties, their voters, and their candidates have a cognizable interest in intervening in lawsuits regarding general election procedure. This case is no exception. Federal courts in this Commonwealth have held that political associations have

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<sup>3</sup> The Pennsylvania Democratic Party represents and is accountable to the interest of its registered voters in the Commonwealth. It promotes and protects its members and nominees for public office. It works to increase voter turnout to elect Democratic candidates at the federal, state and local levels and monitors the election process to ensure that all eligible voters have their votes protected. James Brewster seeks to be re-elected to the seat for which he is the nominee and he has spent significant resources and invested his time to win the Democratic Primary and to compete in the General Election.

standing to protect the interests of their candidates, including challenges to general election balloting procedures. *See Orloski*, 564 F.Supp. at 531.

Here, Zicarelli seeks to disenfranchise at least 204 voters wherein the provisional ballot voter signed the poll book in addition to casting a provisional ballot but did not provide testimony or an affidavit to "confirm" they only voted once. Despite the fact that Zicarelli has not presented any evidence or even alleged in her petition, that any of the 204 voters voted twice. The Intervenor seeks to protect the electoral franchises of their voters and to ensure free and fair elections in the Commonwealth. Because federal and state courts in have explicitly held that political candidates and political parties have standing to challenge general election procedures on behalf of their party, candidates, and voters, this Court can and should find that Intervenor have an interest in this litigation. *See Orloski*, 564 F. Supp. at 530 (permitting Democratic State Committee and Chair of that committee to intervene to protect interests of, among others, political candidates). For these reasons, the Intervenor, as a state party, its voters, and its candidates, have a legally recognized interest in protecting their voters, members, and themselves.

Not only does the Candidate share many of the interests in the outcome of this appeal with the Pennsylvania Democratic Party, this Court's decision with regard to whether the Board properly determined that the Signed Poll Book Issue votes and Provisional Secrecy Envelope Issue votes should be counted could alter the outcome of the election. Due to the fact that Brewster has spent significant resources getting on the ballot and running for re-election in the 45<sup>th</sup> District, his interest in the enfranchisement of at a minimum 204 qualified voters is substantial.

**B. The Relief Zicarelli Requests Would Directly And Substantially Impair The Intervenors' Rights And Interests.**

Zicarelli asks this Court to throw out at least 204 lawfully cast provisional ballots. The relief she demands would directly and substantially impair the Intervenors' rights and interests because many of the ballots at issue were undoubtedly cast by the Pennsylvania Democratic Party's member voters and were cast in favor of the Pennsylvania Democratic Party's member candidates, including Brewster. The Intervenors thus have substantial rights and interest that would be affected in this appeal.

**C. Intervenors' Interests are not Adequately Represented by the Named Defendant in this Action**

The Board, as the named respondent in this appeal, is statutorily required to remain impartial in elections. *See, e.g.,* 25 Pa.C.S. § 301 (outlining the duties of Boards). The Board thus cannot adequately represent the Intervenors' distinct cognizable interests, which are directly opposed to those of Zicarelli. Interests "are not adequately represented if they diverge sufficiently from the interests of the existing party, such that 'the existing party cannot devote proper attention to the applicant's interests.'" *Pennsylvania v. President United States of America*, 888 F.3d 52, 60 (3d Cir. 2018).

The Intervenors' interests diverge from the Board's because their purpose is to protect their own party, candidates, and voters, which political parties and candidates have a distinct right to protect. *See Orloski*, 564 F.Supp. at 531; *Pa. Democratic Party*, 2016 WL 6582659 at \*3. Where no other record party here has a specific interest in protecting their rights and interests in this appeal, it is mandatory that the Intervenors should be permitted to intervene. *See Keener*, 714 A.2d at 1123; *Larock*, 740 A.2d at 313.

**D. Intervenors' Interests In This Appeal Mirror Zicarelli's Asserted Interests.**

Intervenors' interests in this action mirror Zicarelli's asserted interests on appeal. In her Petition, Zicarelli asks this Court to reverse the Board's November 16, 2020 decision to canvass 204 provisional ballots wherein the provisional ballot voter signed the poll book in addition to casting a provisional ballot but did not provide testimony or an affidavit to "confirm" they only voted once. Despite the fact that Zicarelli has not presented any evidence or even alleged in her petition that any of the 204 voters voted twice. Intervenors ask the Court to affirm the decision of the Board.

Intervenors' interests here thus mirror Zicarelli's asserted interests.

**V. CONCLUSION**

For the foregoing reasons, the Intervenors respectfully ask this Court to enter an order granting Intervenor's Motion to Intervene.

Respectfully submitted,

DENTONS COHEN & GRIGSBY P.C.

By /s/ Clifford B. Levine

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Dated: November 19, 2020

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**On behalf of the Pennsylvania Democratic Party**  
**and James Brewster, Proposed Intervenors**



**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on this 19<sup>th</sup> day of November, 2020, a true and correct copy of the foregoing BRIEF IN SUPPORT OF MOTION TO INTERVENE was served as indicated in the manner below, upon the following:

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Submitted by: Proposed Intervenors

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