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266 MD 2020

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CROSSEY, DWAYNE THOMAS, IRVIN WEINREICH, BRENDA WEINREICH, AND THE PENNSYLVANIA ALLIANCE FOR RETIRED AMERICANS,

Petitioners,

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH, AND JESSICA MATHIS, DIRECTOR OF THE BUREAU OF ELECTION SERVICES AND NOTARIES,

Respondents.

Case No. 266 MD 2020

REPLY IN SUPPORT OF THE APPLICATION FOR LEAVE TO INTERVENE BY THE REPUBLICAN PARTY OF PENNSYLVANIA, REPUBLICAN NATIONAL COMMITTEE, AND NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE

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INTRODUCTION

Proposed Intervenor-Respondents the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee (collectively, "Republican Committees") satisfy all of the requirements to intervene in this suit seeking to overturn the grand bipartisan compromise that the General Assembly and the Governor struck in Act 77 to ensure the integrity of the Commonwealth's elections. The Republican Committees have a substantial private interest in upholding the current structure of the competitive environment in which they actively support candidates and their voters exercise their voting rights. *See* App. ¶¶ 17–24. Any order granting Petitioners relief in this case would impair that interest: such an order would undercut democratically enacted laws that protect voters and candidates (including the Republican Committees' members), change the "structur[e] of [the] competitive environment in which [the Republican Committees] defend their concrete interests (e.g., their interest in . . . winning [elections])," and force the Republican Committees to spend substantial resources informing their Republican voters of changes in the law, fighting inevitable confusion, and competing against "a broader range of competitive tactics" than state law "otherwise would allow," *Shays v. Fed. Elec. Comm'n*, 414 F.3d 76, 86 (D.C. Cir. 2005).

Thus, while the Republican Committees oppose Petitioners' claims, the Committees' interest is the mirror image of the interest that Petitioner the

Pennsylvania Alliance for Retired Americans claims gives it standing to sue. *See* App. ¶ 20. No other party shares, much less represents, the Republican Committees' unique interest in this suit. *See id.* ¶¶ 28–31. And the Republican Committees' Application for Leave to Intervene—filed just 19 days after the Petition—and their timely responses to all of the Court's deadlines to date demonstrate that their participation in this suit will not cause any delay or prejudice to any party. The Court should grant intervention.

ARGUMENT

I. THE COURT SHOULD GRANT INTERVENTION TO THE REPUBLICAN COMMITTEES

Respondents do not object to the Republican Committees' intervention. Petitioners oppose intervention, but provide no basis for this Court to depart from Pennsylvania's liberal policy in favor of intervention here. Petitioners concede that the Republican Committees have not "unduly delayed" in applying for intervention and that the Committees' defense is in "subordination to and in recognition of the action's propriety." *See* Pa. R.C.P. No. 2329. Nonetheless, Petitioners advance three arguments in an attempt to rebut the Republican Committees' showing of a right to intervene, none of which is persuasive.

First, Petitioners' argument that the Republican Committees have no legally enforceable interest ignores the Republican Committees' "concrete interests" in preserving the "structur[e] of [the] competitive environment" of the

Commonwealth's election scheme, a scheme that Petitioners' requested relief would "fundamentally alter." *Shays*, 414 F.3d at 86. Indeed, this Court has previously permitted Republican voters and officials to intervene in a case seeking to change election laws enacted by the General Assembly. *League of Women Voters v. Comm.*, 178 A.3d 737, 741 n.5, 800 (Pa. 2018).

Second, Petitioners' argument that the Republican Committees' interests are adequately represented by Respondents is fatally flawed. Government officials rarely, if ever, adequately represent private interests. That is especially true here: Respondents obviously have no interest in ensuring Republican candidates' and voters' political fortunes and have already taken positions in this case at odds with the Republican Committees' positions.

Third, Petitioners' speculation that intervention will cause delay or prejudice is misplaced. This case is in its infancy, and the Republican Committees have diligently pursued their right to participate in this case at every turn. Indeed, the Republican Committees' proposed preliminary objections were filed even before the Respondents responded to the Petition. The Court should grant intervention.

A. The Republican Committees Have A Legally Enforceable Interest

Pennsylvania's liberal intervention rule directs that "a person . . . *shall be permitted to intervene . . . if the determination of such action may affect any legally enforceable interest of such person* whether or not such person may be bound by a

judgment in the action." Pa. R.C.P. No. 2327(4) (emphasis added). As the Republican Committees explained in their Application, they have a significant interest in preserving the existing legally valid competitive electoral environment and in protecting the integrity and reliability of Pennsylvania's elections in which the Republican Committees and their members, supported candidates, and voters actively participate. *See* App. ¶¶ 17–24. Petitioners' suit imperils that interest because it seeks to change the rules that govern primary and general elections and, thus, the "structur[e] of [the] competitive environment in which [the Republican Committees] defend their concrete interests (e.g., their interest in . . . winning [elections])." *Shays*, 414 F.3d at 86.

Accordingly, any order enjoining enforcement of the various laws Petitioners challenge would "affect" the Republican Committees' interest, Pa. R.C.P. No. 2327(4), and subject the Republican Committees and their members, supported candidates, and voters to a "broader range of competitive tactics"—such as ballot-harvesting—than state law "otherwise would allow." *Shays*, 414 F.3d at 86; *see also League of Women Voters v. Comm.*, 178 A.3d at 741 n.5. Indeed, altering the competitive electoral environment on the basis of Petitioners' meritless claims would be "illegal" and would "injure[]" the Republican Committees "who are regulated in that environment." *Shays*, 414 F.3d at 85. That Petitioners have sought an eleventh-hour preliminary injunction on the eve of the June 2 primary election

only exacerbates the potential injury to the Republican Committees' interest, the risk of voter confusion, and the erosion of confidence in the electoral process that the Republican Committees seek to uphold. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006); *see also* App. ¶ 23.

Petitioners' Opposition does not even mention *Shays* or *League of Women Voters*. Petitioners instead mischaracterize the Republican Committees' interest, arguing that the Committees possess only an interest in "orderly and free elections" that is "common" to "all citizens" who support "obedience to the law." Pet'rs' Opp. 11. But that is not the interest that the Republican Committees assert here. Rather, the Committees seek to protect their private interest in upholding the free and fair electoral environment in which they actively support candidates and members and in which their voters exercise their voting rights. *See* App. ¶¶ 17–24. This is the mirror-image of the interest that Petitioner the Pennsylvania Alliance for Retired Americans claims gives it standing to sue. *See id.* ¶ 20; *see also* Pet. ¶ 16 (claiming the challenged laws "frustrate[] the Alliance's mission" by "depriv[ing] individual members of the right to vote and to have their votes counted, threaten[ing] the electoral prospects of progressive candidates . . . and mak[ing] it more difficult for the Alliance and its members . . . to effectively further their shared political purposes").

Petitioners next claim that "all" of the cases the Republican Committees cite in the Application are "clearly distinguishable." Pet'rs' Opp. 12. But Petitioners' failure even to mention *Shays* or *League of Women Voters* puts the lie to this argument. *See id.* Petitioners also never discuss *Ohio Democratic Party v. Blackwell*, where the court permitted the Ohio Republican Party to intervene in a case in which the Ohio Democratic Party sought an injunction to provide "alternate voting means for voters who were standing in line waiting to cast their votes." No. 04-1055, 2005 WL 8162665, *2 (S.D. Ohio Aug. 26, 2005). The court explained: "[T]here is no dispute that the Ohio Republican Party had an interest in the subject matter of this case, given the fact that changes in voting procedures could affect candidates running as Republicans and voters who were members of the Ohio Republican Party." *Id.* This is precisely the scenario that warrants intervention here. *See* App. ¶¶ 17–24.

Petitioners' purported distinctions in the cases they actually discuss do not hold water. Consider *Trinsey v. Pennsylvania*, 941 F.2d 224 (3d Cir. 1991). According to Petitioners, the difference in that case is that "the challenged provision dealt specifically with" rules about how "candidates 'shall be nominated by political parties.'" Pet'rs' Opp. 12 (quoting *Trinsey*, 941 F.2d at 226). But, of course, the same is true here: Petitioners challenge the rules that govern how the political parties

conduct their primary elections and thereby "nominate[]" their candidates for the November general election. *Trinsey*, 941 F.3d at 226.

Much the same can be said about Petitioners' characterization of *Anderson v. Babb*, 632 F.2d 300, 304 (4th Cir. 1980), and *Libertarian Party of Mich. v. Johnson*, No. 12-12782, 2012 U.S. Dist. LEXIS 126096 (E.D. Mich. Sept. 5, 2012). Petitioners claim that in those cases "the challenged provision explicitly concerned political parties." Pet'rs' Opp. 13. But this case concerns political parties, their members, supported candidates, and voters, too. Petitioners challenge the rules that govern elections in Pennsylvania, including party primary elections—something the Republican Committees have a direct and particular interest in.

The other cases the Republican Committees cited also support intervention. There may have been no state defendant in *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2001), but that does not undermine the district court's conclusion that the political party necessarily had a legally enforceable interest in the case. And the court's analysis of the Republican National Committee's interest in *Democratic National Committee v. Bostelmann*, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020), did not turn on the fact that the Republican National Committee was the "mirror image" of the plaintiff (the Democratic National Committee). Instead, the court used that fact to explain why it permitted the Republican National Committee and not the legislature to intervene. *Id.*

Failing to explain away the myriad cases that support intervention, Petitioners offer a single case that, in their view, warrants denial of intervention: *Fraenzl v. Secretary of the Commonwealth of Pennsylvania*, 478 A.2d 903 (Pa. Commw. Ct. 1984). Pet'rs' Opp. 11. But *Fraenzl* offers Petitioners no help. The dispute in that case was whether a candidate qualified for the ballot. The court concluded that another candidate already on the ballot could not intervene because she had no "legally enforceable interest in potential votes." 478 A.2d at 904. Whatever the merits of the court's opinion, it has nothing to do with the situation here. Petitioners are not claiming that they have *complied* with the Commonwealth's election laws or are entitled to be placed on the ballot. Instead, they seek to *change* the very rules of the elections in which the Republican Committees actively participate and devote their resources. As a long line of cases from *Shays* to *Ohio Democratic Party* to *League of Women Voters* demonstrates, the Republican Committees have a "legally enforceable interest" in those rules that Petitioners' suit "may affect," and therefore are entitled to intervene. Pa. R.C.P. 2327(4).[1]

[1] Petitioners protest that they "have not challenged any laws that are subject to Act 77's jurisdictional or non-severability provisions." Pet'rs' Opp. 7–9. But Petitioners nowhere explain the relevance of these protestations to the Republican Committees' intervention. *See id.* In all events, Petitioners are simply wrong, as the Republican Committees elsewhere have explained. *See* Br. on Juris.; Prelim. Objs. Br. 11–21; Opp. To Prelim. Inj. 5–9.

B. Respondents Do Not Adequately Represent The Republican Committees' Unique Private Interests

Petitioners' argument that Respondents adequately represent the Republican Committees' private interests, *see* Pet'rs' Opp. 14–16, fares no better. As a general matter, "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [private movant] merely because both entities occupy the same posture in the litigation." *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001); *see also, e.g.*, *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 321 (D.C. Cir. 2015) ("[W]e look skeptically on government entities serving as adequate advocates for private parties." (citing *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003)).

That is true here: in acting on behalf of all Pennsylvania citizens and the Commonwealth, Respondents must consider "a range of interests likely to diverge from those of" the Republican Committees' private interests on behalf of themselves, their preferred candidates, and their voters. *Meek v. Metro. Dade Cty.*, 985 F.2d 1471, 1478 (11th Cir. 1993). Indeed, "[i]n litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of [a private party] intervenor." *Utah Ass'n of Cntys.*, 255 F.3d at 1256. These considerations may include "the expense of defending the current [laws] out of [state] coffers," *Clark v.*

Putnam Cnty., 168 F.3d 458, 461–62 (11th Cir. 1999), "the social and political divisiveness of the election issue," *Meek*, 985 F.2d at 1478, "their own desires to remain politically popular and effective leaders," *id.*, and the interests of opposing parties, *In re Sierra Club*, 945 F.2d 776, 779–80 (4th Cir. 1991).

Thus, "[f]or a proposed intervenor to establish inadequate representation by a representative party, 'the possibility of divergence of interest need not be great,' and this showing 'is easily made' when the representative party is the government." *Kane Cnty. v. United States*, 928 F.3d 877, 894 (10th Cir. 2019). That showing is easily made here: Respondents do not represent, adequately or otherwise, the Republican Committees' unique private interest in preserving the existing competitive electoral environment on behalf of the Republican Committees and their members, supported candidates, and voters. *See* App. ¶¶ 30–31; *see also Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (holding that the government's representation of the general public interest did not adequately represent the intervenor's narrower private interests, despite the similarity in their goals).

Moreover, while Respondents oppose the relief Petitioners seek "at this juncture," *see* Resps.' Opp. to Prelim. Inj. 27, their position diverges from the Republican Committees' position on at least three key points.

First, Respondents have left open the possibility that a future change in circumstances might warrant relief for Petitioners, *see id.*, but the Republican

Committees have explained that Petitioners' various claims all fail as a matter of law, *see* Prelim. Objs. Br. 21–45.

Second, Respondents have not mentioned in any of their submissions to the Court the Pennsylvania Supreme Court's order dismissing for failure to state a claim a parallel challenge to Act 77 filed by a separate group of petitioners. *See Disability Rights Pennsylvania v. Boockvar*, No. 83 MM 2020 (Pa. May 15, 2020) (per curiam order). The Republican Committees, however, have submitted that order to the Court and explained that it requires dismissal of the Petition and, at a minimum, denial of any injunction. *See* Praecipe to Provide Supplemental Authority; Mem. in Opp. to Prelim. Inj. 1, 10, 25–27, 33, 34.

Finally, Respondents agree with Petitioners that Petitioners' requested relief would not trigger Act 77's non-severability provision, *see* Resps.' Opp. to Prelim. Inj. 49–51, but the Republican Committees have taken the opposite position and have shown that the non-severability provision is fatal to Petitioner's claims, *see* Prelim. Objs. Br. 15–21.

Petitioners do not mention any of this. *See* Pet'rs' Opp. 14–16. Instead, their argument rests on a quantum leap that contradicts the governing Pennsylvania case law. Petitioners leap from the unremarkable premise that Respondents have a duty to defend the Commonwealth's laws to the incorrect conclusion that Respondents therefore must be adequate representatives. *See id.* But the Commonwealth's duty

has no bearing on whether other parties may have an interest in this suit. More to the point, the question for intervention is whether the putative intervenor has "any legally enforceable *interest*" in the suit, Pa. R.C.P. No. 2327(4) (emphasis added), not whether the putative intervenor might take the same *position* on some question as some other party, *see, e.g.*, *Sierra Club*, 82 F.3d at 110; *Utah Ass'n of Cntys.*, 255 F.3d at 1255-56.

Moreover, Petitioners' argument would foreclose intervention on the side of the Commonwealth whenever a party challenges a Commonwealth law. That, however, is not the law. *See League of Women Voters*, 178 A.3d at 741 n.5 ("[T]he Commonwealth Court permitted to intervene certain registered Republican voters from each district . . . and other active members of the Republican Party" in a case against Commonwealth officials challenging the constitutionality of a Commonwealth law). And cases, such as those Petitioners cite, where the putative intervenor's interest was *identical* to the Commonwealth's interest, are of no moment where, as here, the intervenor seeks to represent its own *private* interest. *See, e.g.*, *Pa. Ass'n of Rural and Small Schools v. Casey*, 613 A.2d 1198, 1201 (Pa. 1992) (putative intervenor's "main interest" in maintaining the Commonwealth's educational funding formula was identical to Commonwealth's own interest) (cited at Pet'rs' Opp. 16).

Petitioners also contend in passing that if the Court grants intervention, "every interested Pennsylvanian would have a right to participate in voting rights litigation." Pet'rs' Joint Answer 3–4. To the extent that Petitioners suggest that granting intervention would open up a parade of parties in this or any other election-related lawsuit, Petitioners are mistaken. In the first place, *any* putative intervenor must satisfy the rules governing intervention—and so far, no parade of putative intervenors has presented itself to the Court in this case.

Moreover, once the current applications for leave to intervene are granted, it is at best unclear that *any* other entity could satisfy the requirements for intervention because the universe of potential interests would already be adequately represented. *See* Pa. R.C.P. No. 2327, 2329. Indeed, at that juncture, Petitioners would be representing the interests of voters and groups challenging Act 77; Respondents would be representing the interests of the Commonwealth and the executive branch; the legislative intervenors would be representing the interests of the legislative branch; and the Republican Committees would be representing the private interests of candidates and voters who seek to uphold Act 77 and the competitive electoral environment it creates. Petitioners' prognostication about "every interested Pennsylvanian" joining this suit, Pet'rs' Opp. 3, lacks any basis in fact or law. The Court should grant intervention.

C. Granting Intervention Will Not Result In Delay Or Prejudice

Petitioners do not dispute that the Republican Committees' Application for Leave to Intervene—which was filed only 19 days after the Petition and 3 days after Petitioners Application for Special Relief in the Form of a Preliminary Injunction—is timely. Nor do they dispute that the Republican Committees have been diligent in pursuing their right to participate in this case at every turn.

Petitioners nonetheless argue that granting intervention will result in delay or prejudice because the Republican Committees would "file separate preliminary objections and briefs," "seek to pursue their own discovery plans," and "participate in hearing, arguments, or trial." Pet'rs' Opp. 16. Yet *any* party or intervenor in any case has the right to participate in the case. Indeed, if mere participation in the case were the standard for finding undue delay and prejudice, no party would ever be permitted to intervene. Petitioners' lone case does not prove otherwise: that case involved denial of *permissive* intervention under the federal rules to a party that would not "add anything" to the litigation. *Kitzmiller v. Dover Area Sch. Dist.*, 229 F.R.D. 463, 471 (M.D. Pa. 2005) (cited at Pet'rs' Opp. 16). It therefore does not support Petitioner's untenable position that an intervenor's participation in litigation is a sufficient basis to deny the intervenor participation in litigation.

In fact, there is no meaningful risk of delay or prejudice from the Republican Committee Respondents' intervention here. This case remains in its "early stages."

Wellington Res. Grp., LLC v. Beck Energy Corp., No. 2:12-CV-00104, 2012 WL 2995181, at *3 (S.D. Ohio July 23, 2012) ("[T]his case is at its early stages, and [movant] moved to intervene before any case schedule had been set."). Because the Republican Committees' "defenses . . . largely overlap with the legal and factual issues that are already present in the main action, the addition of the proposed intervenors is not likely to significantly complicate the proceedings or unduly expand the scope of any discovery in this case." *Carcaño v. McCrory*, 315 F.R.D. 176, 179 (M.D.N.C. 2016). And the Republican Committees, through their timely Application for Leave to Intervene and timely briefing on all of the Court's deadlines to date, have proven that they are prepared to work on an expedited schedule to avoid delay. The Court should grant intervention.

CONCLUSION

The Court should grant the Republican Committees' Application to intervene.

Dated: May 22, 2020

Respectfully submitted,

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**Pro hac vice application forthcoming*

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Brief contains 3,384 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE

I hereby certify that 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.

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