

IN THE SUPREME COURT OF PENNSYLVANIA

MIKE KELLY, SEAN PARNELL,
THOMAS A. FRANK, NANCY
KIERZEK, DEREK MAGEE, ROBIN
SAUTER, MICHAEL KINCAID, and
WANDA LOGAN,

Petitioners,

v.

COMMONWEALTH OF
PENNSYLVANIA, PENNSYLVANIA
GENERAL ASSEMBLY, THOMAS W.
WOLF, and KATHY BOOCKVAR,

Respondents,

DNC SERVICES CORP. / DEMOCRATIC
NATIONAL COMMITTEE,

Proposed Intervenor-
Respondent.

No. 68 MAP 2020

**PROPOSED INTERVENOR-RESPONDENT DNC'S APPLICATION FOR
LEAVE TO INTERVENE**

Proposed-Intervenor DNC Services Corp. / Democratic National Committee
("DNC") hereby submits this Application for Leave to Intervene, and states the
following in support:

I. INTRODUCTION

Petitioners seek to retroactively invalidate millions of mail-in ballots and
enjoin the Commonwealth from finalizing its presidential electors and certifying the
remainder of its races. While Petitioners' claims are meritless, the requested relief,

if granted, would significantly impair the electoral prospects of the DNC's candidates and disenfranchise more than a million of its voters.

No party to this proceeding adequately represents the DNC's interests. Respondents have the duty to enforce Pennsylvania law, which is distinct from the DNC's particularized interest in having its candidates assume office and its voters' ballots counted. The DNC's interests could also break sharply from Respondents' interests in the event Act 77 is found unconstitutional under Pennsylvania law and the Court must devise an appropriate remedy. This is evident in the parties' briefs below at the Commonwealth Court, wherein the DNC highlighted the federal constitutional rights which the requested relief would violate—an issue that no other party directly raised. The DNC has plainly identified unique, cognizable interests that are not adequately represented by any party in this case, making the DNC's intervention not only permissible, but mandatory. *See Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999). Thus, the DNC requests that the Court grant its Application and allow the DNC to intervene and join in Respondents Commonwealth of Pennsylvania, Governor Thomas W. Wolf, and Secretary of the Commonwealth Kathy Boockvar's (collectively, "Respondents") Application for the Court to Exercise Extraordinary Jurisdiction. In the event that the Court does not exercise extraordinary jurisdiction, the DNC alternatively

requests permission to intervene in Respondents' appeal of the Commonwealth Court's November 25, 2020 Order.¹

II. LEGAL STANDARD

Petitions to intervene are governed by Pennsylvania Rules of Civil Procedure 2326-2350. Rule 2327 denotes 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 the action. Pa. R.C.P. 2327(4). Rule 2329 provides certain grounds for refusal to permit the intervention of a person who fits within the parameters of Rule 2327, including that such person’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*, 740 A.2d at 313. And, even when a ground for refusal under Rule 2329 is present, the Court still possesses discretion to permit intervention. *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of*

¹ Two days after the Petition for Review was filed in the Commonwealth Court, and before any Respondent had filed any substantive response, the DNC filed a Motion to Intervene and Preliminary Objections in the Commonwealth Court. The Commonwealth Court has not yet ruled on the DNC’s Motion to Intervene.

Human Servs., 225 A.3d 902, 908 (Pa. Commw. Ct. 1999) (citing *Larock*, 740 A.2d at 313).

III. ARGUMENT

The DNC is a national committee, as that term is defined under 52 U.S.C. § 30101, dedicated to electing local, state, and national candidates of the Democratic Party to public office throughout the United States, including in Pennsylvania. The DNC's membership and constituents in the Commonwealth include eligible voters who submitted absentee and mail-in ballots in the November 3 election, and candidates who appeared on the ballot across the Commonwealth, including President-elect Joseph R. Biden, whom the Governor has certified as the winner of Pennsylvania's electors.

Additionally, the DNC has dedicated significant resources to encourage its supporters and constituents to vote by mail, resources that could have been directed to other states or to encouraging in-person voting in Pennsylvania had the DNC been aware of the potential for lawfully-cast ballots to be declared spoiled, as Petitioners request. *See, e.g., Disability Rights Pa. v. Pa. Dep't of Human Servs.*, No. 1:19-CV-737, 2020 WL 1491186, at *5 (M.D. Pa. Mar. 27, 2020) (noting an organization has standing where it can show actions "perceptibly impaired" the organization's ability to provide its primary services or carry out its mission and have resulted in a diversion of resources). The DNC thus has legally enforceable and particularized

interests in the administration of the mail-in voting process that Petitioners seek to eliminate retroactively, and requests that this Court grant its application to intervene should the Court exercise jurisdiction over this matter.

A. The DNC has a legally-enforceable, particularized interest in this matter.

Both the DNC's institutional interests and the rights of its members stand to be adversely affected should Petitioners' requested relief be granted. Petitioners request a declaration that Act 77 is unconstitutional, and an injunction to prevent Respondents from certifying the results of the General Election and to discard the lawfully-cast votes of millions of Pennsylvanians. Many of those ballots were cast by the DNC's members and/or in favor of the DNC's candidates, and the Petitioners' legal challenge threatens the electoral prospects of Democratic candidates up and down the ballot, all of which implicates the DNC's legally-enforceable interests. *Cf. Schiaffo v. Helstoski*, 492 F.2d 413, 417 (3d Cir. 1974) (holding defeated candidate had standing to challenge right of his opponent to send constituent mail postage-free as "anybody who personally intends to oppose the candidacy of an incumbent congressman or who supports a person mounting such a challenge has a vital interest in securing the cessation of that incumbent's activities . . . that arguably promote his electoral prospects").

Under similar circumstances, courts around the country and in the Commonwealth have routinely granted intervention to political party committees,

such as the DNC—particularly in cases where plaintiffs seek to impose restrictions on voting access in ways that disenfranchise the party’s voters or harm the party’s candidates’ electoral prospects. *E.g.*, *Paher v. Cegavske*, No. 20-cv-00243, 2020 WL 2042365, at *4 (D. Nev. Apr. 28, 2020) (granting DNC intervention in election law case brought by conservative interest group); *see Donald J. Trump for President, Inc. v. Murphy*, No. 20-cv-10753, 2020 WL 5229209, at *1 (D.N.J. Sept. 1, 2020) (granting Democratic Congressional Campaign Committee intervention in lawsuit by Republican candidate and party entities); Minute Entry, *Cook Cty. Republican Party v. Pritzker*, No. 20-cv-4676 (N.D. Ill. Aug. 28, 2020), ECF No. 37 (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); Order, *Donald J. Trump for President v. Bullock*, No. 6:20-cv-66 (D. Mont. Sept. 8, 2020), ECF No. 35 (granting Democratic Congressional Campaign Committee, Democratic Senatorial Campaign Committee, and Montana Democratic Party intervention in lawsuit brought by four Republican party entities); *see also* Memorandum Order, *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-00966-NR (W.D. Pa. Aug. 3, 2020), ECF No. 309 (granting non-profit standing to represent members in lawsuit by Republican candidates for

President and Congress). These interests are especially salient where Petitioners seek to prevent duly-elected candidates supported by the DNC from assuming office, and ask this Court to invalidate votes already cast in this election.

Consistent with these authorities, the DNC has been granted intervention in recent Pennsylvania cases challenging the counting of ballots or seeking to enjoin certification of the November 3, 2020 General Election. *See In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, Nos. 31, 32, 33, 34, 35 EAP 2020, 29 WAP 2020 (Pa. Nov. 23, 2020) (DNC participated as Intervenor in case concerning whether thousands of mail-in ballots without a handwritten name, address, or date on the outer envelope should be counted); *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, ECF No. 72 (W.D. Pa. Nov. 12, 2020) (DNC participated as Intervenor in case seeking to enjoin Secretary Boockvar and certain Pennsylvania counties from certifying the election, a case in which Petitioners Mike Kelly and Sean Parnell moved to intervene); Oral Order, *Donald J. Trump for President, Inc. v. Montgomery Cty. Bd. of Elections*, No. 2020-18680 (Pa. Com. Pl. Nov. 10, 2020) (granting intervention to DNC in case seeking to prohibit Montgomery County from counting certain ballots); Oral Order, *Donald J. Trump for President, Inc. v. Phila. Cty. Bd. of Elections*, Nos. 201100874, 201100875, 201100876, 201100877, & 201100878 (Pa. Com. Pl. Nov. 13, 2020) (granting intervention to DNC in case seeking to prohibit Philadelphia County from

counting certain ballots); Oral Order, *Donald J. Trump for President, Inc. v. Bucks Cty. Bd. of Elections*, No. 2020-05786 (Pa. Com. Pl. Nov. 17, 2020) (granting intervention to DNC in case seeking to prohibit Bucks County from counting certain ballots).

Indeed, the DNC's interests are so squarely implicated in this case that its participation may well be required, given Petitioners' request for declaratory relief, under Pennsylvania's Declaratory Judgments Act. The Act provides that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." 42 Pa. C.S. § 7540(a); *see Stilp v. Commonwealth*, 910 A.2d 775, 785 (Pa. Commw. Ct. 2006) ("This provision is mandatory."); *Allegheny Cty. v. Commonwealth*, 453 A.2d 1085, 1087 (Pa. Commw. Ct. 1983) ("The statutory language is mandatory and, prior to the enactment of the Declaratory Judgments Act, our Supreme Court had held that a declaratory judgment action will not lie unless all interested parties who could be affected by the judgment are joined."). The DNC and its candidate members plainly have interests that would be affected by the proposed declaratory relief, thus requiring their participation in this matter before any declaratory judgment can issue. The DNC is therefore entitled to mandatory intervention.

B. Respondents do not adequately represent the DNC’s interests.

The DNC’s interests diverge from those of the state officials named as Respondents in their official capacities because their duties are solely defined by Pennsylvania law and Respondents are bound to represent all Pennsylvanians. The Respondents—state officials—have no interest in which candidates win the election. By contrast, the DNC has a strong interest in ensuring that its candidates (including President-elect Joe Biden and Vice President-elect Kamala Harris) prevail. For that reason, Respondents do not adequately represent the DNC’s interests. *See Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (“[W]hen the proposed intervenors’ concern is not a matter of ‘sovereign interest,’ there is no reason to think the government will represent it[.]”) (quoting *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996)) (internal quotation marks omitted); *Issa*, 2020 WL 3074351 at *3 (“While Defendants’ arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Proposed Intervenors are 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.”).

This distinction—between the DNC’s interest in the election of its candidates and Respondents’ interest in representing all Pennsylvanians and discharging their

statutory duties—is critical here because it also differentiates the DNC’s interests from the citizenry in general. *See City of Phila. v. Commonwealth*, 575 Pa. 542, 560-61, 838 A.2d 566, 577-78 (2003) (“Petitioners’ complaints stem from aspects of the bill under review that have particular application to Philadelphia. Therefore, Petitioners’ interest in the outcome of the litigation . . . surpasses that of Pennsylvania citizens generally in procuring obedience to the law.”).

Furthermore, that the DNC’s interests are sufficiently particularized and inadequately represented is supported by precedent. First, Pennsylvania courts have granted intervention (and also reversed denials of intervention) where intervenors were aligned with the government’s litigation position but possessed unique and personal interests not adequately addressed by government respondents. *See D.G.A. v. Dep’t of Human Servs.*, No. 1059 C.D. 2018, 2020 WL 283885, at *7 (Pa. Commw. Ct. Jan. 21, 2020) (finding that “governmental interests could diverge from that of [intervenors],” and citing to *Benjamin ex rel. Yock v. Dep’t of Pub. Welfare*, 701 F.3d 938 (3d Cir. 2012) in support of its holding); *Larock*, 740 A.2d at 314 (reversing denial of intervention of town residents opposed to change in commercial licensing to allow operation of rock quarry, which government board had also denied, noting that residents’ opposition to quarry and government’s ultimate interests in protecting its authority were not the same).

The Third Circuit has reached the same conclusion when considering this question under federal law, stating that “when an agency’s views 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 burden [of establishing inadequacy of representation] is comparatively light.” *Kleissler*, 157 F.3d at 972; *see also Yock*, 701 F.3d at 958 (same).

And the briefing below further demonstrates this divergence of interests, as none of the current Respondents have raised the significant constitutional issues created by Petitioners’ request to disenfranchise mail-in voters. As the DNC explained in its submissions below, the requested relief here would violate its members’ fundamental rights to vote, to equal protection, and to due process, under the federal and Commonwealth constitutions, and would also violate the Pennsylvania Constitution’s Free Elections Clause. *See* DNC Prelim. Obj. ¶¶ 37-39; Proposed Intervenor-Respondent’s Amicus Br. in Supp. of Prelim. Obj. at 22-29; Br. as Amicus Curiae in Opp’n to Pet’rs’ Mot. for Emergency/Special Prohibitory Inj. at 8-9; *see also Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964); *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978).² But neither the General Assembly’s nor the Commonwealth Respondents’ briefing below directly confronted these issues. “It is

² The motions cited here are attached to the DNC’s Proposed Joinder to Respondents’ Application for the Court to Exercise Extraordinary Jurisdiction as Exhibits A, B, and C, respectively.

not in the power of this Court to violate the Constitution.” *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *13 (M.D. Pa. Nov. 21, 2020). Yet—absent the DNC’s involvement here—no party will squarely advance the constitutional rights of the DNC’s voters and candidates as a basis to deny the requested relief.

C. Intervention is uniquely appropriate in these circumstances.

Finally, even if the Court were to find that one of the bases for refusal under Rule 2329 was met, “the court is given the discretion to allow or to refuse intervention [] where the petitioner falls within one of the classes enumerated in Rule 2327.” *Allegheny Reprod. Health Ctr.*, 225 A.3d at 908. This dispute presents a compelling case for allowing intervention. The results of the General Election in Pennsylvania, and the rights of DNC’s voters and candidates to a fair election, may well depend on the outcome of this case. Such a possibility should compel the court to use its discretion and grant the DNC’s Application for Leave to Intervene. *See Haggard v. Carbon Cty. Tax Claim Bureau*, 839 A.2d 448, 451 (Pa. Commw. Ct. 2003) (holding trial court abused its discretion in denying intervention where “[t]o deny Penn Investments its day in court [would be] to deny Penn Investments an opportunity to defend itself and shakes the very foundation of our legal system, and denies the individual the right to protect its interest in the property, which violates public policy”). There is a strong public interest in ensuring that all parties with an

interest in this case be allowed to participate, so that the public will have confidence in the outcome. Whether out of obligation or discretion, the Court should grant intervention.

CONCLUSION

The DNC respectfully requests that its Application for Leave to Intervene be granted, and that the Court allow the DNC to intervene and join in Respondents' Application for the Court to Exercise Extraordinary Jurisdiction. In the event that the Court does not exercise extraordinary jurisdiction, the DNC alternatively requests permission to intervene in Respondents' appeal of the Commonwealth Court's November 25, 2020 Order.

Dated: November 27, 2020

Respectfully submitted,

Marc E. Elias*
Uzoma Nkwonta*
Lalitha D. Madduri*
John M. Geise*
Christina A. Ford*
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
MElias@perkinscoie.com
UNkwonta@perkinscoie.com
LMadduri@perkinscoie.com
JGeise@perkinscoie.com
ChristinaFord@perkinscoie.com

Adam C. Bonin
PA ID No. 80929
The Law Office of Adam C. Bonin
121 S. Broad St., Suite 400
Philadelphia, PA 19107
Phone: (267) 242-5014
Facsimile: (215) 827-5300
adam@boninlaw.com

/s/ Matthew I. Vahey
Matthew A. White (Pa. Id. No. 55812)
Kahlil C. Williams (Pa. Id. No. 325468)
Michael R. McDonald (Pa. Id. No.
326873)
Matthew I. Vahey (Pa. Id. No. 315920)
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 864-8659
Facsimile: (215)864-8999
WhiteMA@ballardspahr.com
WilliamsKC@ballardspahr.com
McDonaldM@ballardspahr.com
VaheyM@ballardspahr.com

Seth P. Waxman*
Ari Holtzblatt*
**WILMER CUTLER PICKERING
HALE AND DORR LLP**
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
Telephone: (202) 663-6000
Seth.Waxman@wilmerhale.com
Ari.Holtzblatt@wilmerhale.com

Counsel for Proposed Intervenor Democratic National Committee
**Motions for Admission Pro Hac Vice Forthcoming*

CERTIFICATE OF COMPLIANCE

I 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.

/s/ Matthew I. Vahey

CERTIFICATE OF SERVICE

I, Matthew I. Vahey, hereby certify that a true and correct copy of the foregoing document was served upon all counsel of record on November 27, 2020 by this Court's electronic filing system.

/s/ Matthew I. Vahey _____
Matthew I. Vahey

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**[PROPOSED] ORDER GRANTING DEMOCRATIC NATIONAL
COMMITTEE’S MOTION TO INTERVENE**

Upon consideration of the Application for Leave to Intervene by Proposed Intervenor-Defendant DNC Services Corporation/Democratic National Committee (“DNC”), it is hereby ORDERED that the Application for Leave to Intervene is GRANTED. The DNC is hereby permitted to intervene in the above-captioned matter. The Court hereby DIRECTS the Prothonotary to enter the name of the DNC Services Corporation/Democratic National Committee on the docket in this matter

as an Intervenor-Respondent, and DOCKET the DNC's application and related materials.

Entered this ____ day of _____, 2020.
