

IN THE COMMONWEALTH 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. 620 MD 2020

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

Proposed Intervenor-Defendant, DNC Services Corp. / Democratic National Committee (the “DNC”), by and through its undersigned counsel, respectfully submits this memorandum of law in support of its motion to intervene as a Respondent in the above-captioned proceeding pursuant to Rule 2327 of the Pennsylvania Rules of Civil Procedure.

In addition to this Motion and Memorandum of Law in support of intervention, the DNC submits its Preliminary Objections in Opposition to

Petitioners' Complaint for Declaratory and Injunctive Relief ("Petition").

REASONS FOR PROPOSED INTERVENORS' APPLICATION

1. Pursuant to Pennsylvania Rule of Procedure 2327, a non-party may seek leave to intervene by filing an application with the court.

2. The DNC seeks to intervene pursuant to Pennsylvania Rule of Civil Procedure 2327(4), which states, in pertinent part:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if . . .

(4) 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. 2327.

3. The DNC meets the requirements for intervention under Pennsylvania Rule of Civil Procedure 2327(4).

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

5. Petitioners ask this Court to declare Act 77 unconstitutional, enjoin Respondents from certifying the results of the General Election, and, in effect, discard the lawfully-cast votes of millions of Pennsylvanians. Many of those ballots were cast by DNC's member voters, in favor of DNC's member candidates.

6. The DNC has a concrete and protectible interest in preventing the disenfranchisement of its members, and in ensuring that its candidate members who obtained the most votes in their respective elections can take office. As such, the DNC and its members maintain powerful and legally enforceable interests in the election processes that are implicated by this lawsuit.

7. The named Respondents do not adequately represent the DNC's interests. Respondents' stake in this lawsuit is defined solely by their statutory duties to conduct elections and to protect the public interest at large, whereas the DNC seeks to protect its voters and its candidates' electoral prospects. When one of the original parties to the suit is a government entity whose positions "are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it," courts have repeatedly found that intervention is appropriate. *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (citing *Conservation Law Found. of New England v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992), and *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996)).

8. For these reasons, courts routinely grant intervention to political party committees in cases where plaintiffs seek to make it harder to vote and harder to have that vote counted. *E.g. Parnell v. Allegheny Bd. of Elections*, No. 20-cv-01570 (W.D. Pa. Oct. 22, 2020), ECF No. 34 (granting intervention to Democratic Congressional Campaign Committee in lawsuit regarding processing of ballots); *Donald J. Trump for President v. Bullock*, No. 20-cv-66 (D. Mon. Sept. 08, 2020), ECF No. 35 (granting Democratic Congressional Campaign Committee, Democratic Senatorial Campaign Committee, and Montana Democratic Party intervention in lawsuit filed by four Republican party entities); *Donald J. Trump for President, Inc.*, No. 20-cv-10753, 2020 WL 5229209, at *1 (D.N.J. Sept. 01, 2020) (granting Democratic Congressional Campaign Committee intervention in lawsuit by Republican candidate and party entities); *Cook County Republican Party v. Pritzker*, No. 20-cv-4676 (N.D. Ill. Aug. 28, 2020) (granting Democratic Congressional Campaign Committee intervention in lawsuit by Republican party entity); *Issa v. Newsom*, No. 20-cv-01044, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (granting Democratic Congressional Campaign Committee and California Democratic Party intervention in lawsuit by Republican congressional candidate); *Paher v. Cegavske*, No. 20-cv-00243, 2020 WL 2042365, at *4 (D. Nev. April 28, 2020) (granting Democratic National Committee and other Democratic Party entities intervention in election law case brought by conservative interest group).

9. Consistent with these authorities, the DNC has recently been granted intervention in numerous cases, both in Pennsylvania and beyond, challenging the counting of ballots or seeking to enjoin certification of the November 3, 2020 general election. *See, e.g., Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, ECF No. 72 (W.D. Pa. Nov. 12, 2020) (granting intervention to DNC 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 have now 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); *Constantino v. Detroit*, No. 20-014780-AW (Mich. Cir. Ct) (granting intervention to DNC in case seeking to enjoin Wayne County from certifying election results).

10. The DNC has promptly filed its motion to intervene and its intervention will neither delay the resolution of this matter nor prejudice any party.

11. Intervention is particularly important here given the extreme nature of the relief sought and its potential to significantly injure the DNC. The reasons why this case is meritless abound. First, Petitioners seek a declaration that a law passed by the General Assembly over a year ago—which allowed millions of Pennsylvanians to vote by mail in the midst of a global pandemic—is unconstitutional without providing any basis for their decision to not bring their lawsuit until after multiple elections were held and millions of Pennsylvanians had voted under the law they now challenge.

12. Second, having brought this suit nearly three weeks after the general election, Petitioners seek to disenfranchise millions of Pennsylvanians by asking this Court to enjoin certification of the election (scheduled to occur today) and to only count what Petitioners perceive as the “legal votes” in the election or, alternatively, to direct Pennsylvania’s General Assembly to determine Pennsylvania’s electors. This relief would eviscerate the right to vote, which includes the right to have a ballot counted. See *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). This relief would also violate voters’ due process rights. See *Griffin v. Burns*, 570 F.2d 1065, 1075-76 (1st Cir. 1978) (holding state cannot, constitutionally, invalidate absentee and mail-in ballots the state had induced voters to use). And, of course, it is also deeply ironic

that Petitioners purport to defend Pennsylvania's constitution and law while asking this Court to give Pennsylvania's General Assembly a power that Pennsylvania law does not contemplate. Finally, Petitioners also lack standing because their lawsuit asserts a prototypical generalized grievance about government conduct they disagree with, not providing the faintest hint in their Petition of any individualized injury to any Petitioner sufficient to support standing. This Court should not entertain this action at this critical time in the election certification process.

13. Attached to this motion is the DNC's Proposed Preliminary Objections in Opposition to the Petition.

Dated: November 23, 2020

Respectfully submitted,

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**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
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 23, 2020 by this Court's electronic filing system.

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