

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

SENATOR JAY COSTA, SENATOR	:	
ANTHONY H. WILLIAMS, SENATOR	:	CASES
VINCENT J. HUGHES, SENATOR STEVEN	:	CONSOLIDATED
J. SANTARSIERO, AND SENATE	:	
DEMOCRATIC CAUCUS,	:	

Petitioners,	:	No. 310 MD 2021
--------------	---	-----------------

vs.

SENATOR JACOB CORMAN III, SENATE	:
PRESIDENT PRO TEMPORE, SENATOR	:
CRIS DUSH, AND SENATE SECRETARY-	:
PARLIAMENTARIAN MEGAN MARTIN,	:

Respondents.	:
--------------	---

COMMONWEALTH OF PENNSYLVANIA,	:
PENNSYLVANIA DEPARTMENT OF STATE	:
And VERONICA DEGRAFFENREID, Acting	:
Secretary of the Commonwealth of	:
Pennsylvania,	:

Petitioners,	:	No. 322 MD 2021
--------------	---	-----------------

vs.
SENATOR CRIS DUSH, SENATOR JAKE
CORMAN, and THE PENNSYLVANIA
STATE SENATE INTERGOVERNMENTAL
OPERATIONS COMMITTEE,

Respondents.
ARTHUR HAYWOOD
JULIE HAYWOOD,

Petitioners,

vs.
VERONICA DEGRAFFENREID, ACTING
SECRETARY OF STATE,
COMMONWEALTH OF PENNSYLVANIA,

Respondents.

No. 323 MD 2021

**MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION OF ROBERTA WINTERS, NICHITA SANDRU, KATHY
FOSTER-SANDRU, ROBIN ROBERTS, KIERSTYN ZOLFO, MICHAEL
ZOLFO, PHYLLIS HILLEY, BEN BOWENS, THE LEAGUE OF WOMEN
VOTERS OF PENNSYLVANIA, COMMON CAUSE PENNSYLVANIA
AND MAKE THE ROAD PENNSYLVANIA FOR LEAVE TO INTERVENE**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

 I. Factual and Procedural Background.....2

 A. The Applicants2

 B. The Petitions.....9

 II. Argument12

 A. The Applicants Have A Right to Intervene Under Rule 2327(3)12

 B. The Applicants Also Have A Right to Intervene Under Rule 2327(4).....13

 C. The Narrow Exceptions of Rule 2329 Do Not Apply.....18

 1. Applicants’ Claim Relates Directly to the Consolidated Actions.19

 2. The Existing Parties do not Adequately Represent Applicants’ Interests.20

 3. The Application is Timely and Granting it will not Delay the Proceedings.26

 D. The Practicalities27

 III. Conclusion28

CONFIDENTIAL DOCUMENTS CERTIFICATION30

CERTIFICATE OF COMPLIANCE.....31

CERTIFICATE OF SERVICE32

TABLE OF AUTHORITIES

Cases

<i>Allegheny Reprod. Health Ctr. v. Pennsylvania Dep’t of Human Servs.</i> , 225 A.3d 902 (Pa. Commw. 2020).....	18
<i>Annenberg v. Roberts</i> , 2 A.2d 612 (Pa. 1938).....	14
<i>Benjamin ex rel. Yock v. Dep’t of Pub. Welfare</i> , 701 F.3d 938 (3d Cir. 2012)	23
<i>City of Harrisburg v. Prince</i> , 219 A.3d 602 (Pa. 2019).....	13, 19
<i>Commonwealth v. Alexander</i> , 243 A.3d 177 (Pa. 2020).....	14
<i>Commonwealth v. National Ass’n of Flood Insurers</i> , 520 F.2d 11 (3d Cir. 1975)	22
<i>Denoncourt v. Commonwealth, State Ethics Comm’n</i> , 470 A.2d 945 (Pa. 1983).....	13
<i>D.G.A. v. Department of Human Services</i> , No. 1059 C.D. 2018, 2020 WL 283885 (Pa. Commw. Jan. 21. 2020).....	20, 22, 23
<i>Easton Area Sch. Dist. v. Miller</i> , 232 A.3d 716 (Pa. 2020).....	13, 19
<i>Governor’s Office of Admin. v. Purcell</i> , 35 A.3d 811 (Pa. Commw. 2011).....	15
<i>Grant v. Zoning Hearing Bd. Of the Twp. Of Penn</i> , 776 A.2d 356 (Pa. Commw. 2001).....	18, 26, 27-28
<i>Havens Realty Corp. v. Coleman</i> , 455 U.S. 363, 102 S. Ct. 1114 (1982)	18
<i>Hunt v. Washington State Apple Advertising Comm’n</i> , 432 U.S. 333 (1977)	17

<i>In re T.R.</i> , 731 A.2d 1276 (Pa. 1999).....	14
<i>Keener v. Zoning Hearing Board of Millcreek Township</i> , 714 A.2d 1120 (Pa. Commw. 1998).....	20
<i>Larock v. Sugarloaf Twp. Zoning Hearing Bd.</i> , 740 A.2d 308 (Pa. Commw. 1999).....	20, 21
<i>Lunderstadt v. Pennsylvania House of Representatives Select Comm.</i> , 5519 A.2d 408 (Pa. 1986).....	14
<i>McMullan v. Wohlgemuth</i> , 281 A.2d 836 (Pa. 1971).....	15
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958)	17
<i>Pa. State Educ. Ass’n v. Commonwealth, Dep’t of Community & Econ. Development</i> , 148 A.3d 142 (Pa. 2016).....	13, 14
<i>Pennsylvania Prison Society v. Cortes</i> , 622 F.3d 215 (3d Cir. 2010)	18
<i>Reese v. Pennsylvanians for Union Reform</i> , 173 A.3d 1143 (Pa. 2017).....	12, 13
<i>Sapp Roofing Company, Inc. v. Sheet Metal Workers’ Int’l Ass’n, Local Union No. 12</i> , 552 Pa. 105, 713 A.2d 627 (1998).....	15

Statutes

18 U.S.C. §2721	15
18 U.S.C. §2725(3)	15

Rules

Pa. R.C.P. 2327	18
Pa. R.C.P. 2327(3)	12, 13
Pa. R.C.P. 2327(4)	13, 16

Pa. R.C.P. 2329	18
Pa. R.C.P. 2329(1)	19
Pa. R.C.P. 2329(3)	27
Pa. R.C.P. No. 2329(4).....	18, 19

**MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION OF ROBERTA WINTERS, NICHITA SANDRU, KATHY
FOSTER-SANDRU, ROBIN ROBERTS, KIERSTYN ZOLFO, MICHAEL
ZOLFO, PHYLLIS HILLEY, BEN BOWENS, THE LEAGUE OF WOMEN
VOTERS OF PENNSYLVANIA, COMMON CAUSE PENNSYLVANIA
AND MAKE THE ROAD PENNSYLVANIA FOR LEAVE TO INTERVENE**

Roberta Winters, Nichita Sandru, Kathy Foster-Sandru, Robin Roberts, Kierstyn Zolfo, Michael Zolfo, Phyllis Hilley, Ben Bowens (collectively “Voter Applicants”), and the League of Women Voters of Pennsylvania, Common Cause Pennsylvania and Make the Road Pennsylvania (collectively “Organizational Applicants”) together submit this memorandum of law in support of their Application for Leave to Intervene as co-Petitioners in the above-captioned action.

INTRODUCTION

Voter Applicants are registered voters in the Commonwealth of Pennsylvania, and Organizational Applicants are nonpartisan organizations dedicated to promoting American democracy and the participation of Pennsylvania voters in democracy. All Applicants have an interest in the outcome of these consolidated actions, which may determine whether Applicants’ constitutionally-protected private personal information will be disseminated beyond any reasonable privacy expectation or constitutional limit.

On September 15, 2021, the Intergovernmental Operations Committee of the Pennsylvania Senate (the “Committee”) issued a subpoena to the Acting Secretary

of State ordering disclosure of, among other things, the personally-identifying information of each and every one of the approximately nine million registered voters in Pennsylvania, including the Applicants and their members and constituents (the “Subpoena”). The Subpoena specifically requests, among other data, voters’ driver’s license numbers and the last four digits of their social security numbers.

These consolidated actions – brought by three different groups of petitioners whose interests differ from those of Applicants and/or who have asserted causes of action that differ from those Applicants intend to pursue – seek declaratory and injunctive relief with respect to the Subpoena. Applicants also wish to protect their interests in the constitutionally-protected information that the Subpoena seeks by preventing the disclosure of such information. Applicants could have filed, and still can file, a separate action to protect their interests. However, because the governing Rules of Civil Procedure allow it, and in the interest of efficiency, Applicants seek to pursue their rights by intervention.

I. Factual and Procedural Background

A. The Applicants

Applicants are Pennsylvania voters and nonpartisan organizations dedicated to promoting American democracy that serve, represent and have members who are Pennsylvania voters.

The Voter Applicants

Roberta Winters is a United States citizen, a resident of Delaware County, Pennsylvania, and a registered voter in the Republican party. Ms. Winters cast votes in the November 2020 election and May 2021 primary (Verified Application for Leave to Intervene, ¶11). Ms. Winters' private information is included within the information sought by the Subpoena. *Id.* Ms. Winters is concerned that the Department of State's compliance with the Subpoena and exposure of her sensitive personal information will make her more vulnerable to identity theft and further public intrusions into her private financial and personal information. *Id.*

Nichita Sandru is a United States citizen, a resident of Monroe County, Pennsylvania, and a registered voter in the Democratic party. Mr. Sandru first registered to vote in Pennsylvania about five years ago, when he became a naturalized U.S. citizen (Verified Application for Leave to Intervene, ¶12). He cast a vote in the November 2020 election. Mr. Sandru's private information is included within the information sought by the Subpoena. *Id.* Mr. Sandru is concerned that the Department of State's compliance with the Subpoena and exposure of his sensitive personal information will make him more vulnerable to identity theft and further public intrusions into his private financial and personal information. *Id.*

Kathy Foster-Sandru is a United States citizen, a resident of Monroe County, Pennsylvania, and a registered voter in the Democratic party. Ms. Foster-Sandru cast a vote in the November 2020 election (Verified Application for Leave to Intervene, ¶13). Ms. Foster-Sandru's private information is included within the information sought by the Subpoena. *Id.* Ms. Foster-Sandru is concerned that her personally-identifying information, especially her social security number and driver's license number, will be disclosed to others without her express permission, and may be misused. *Id.*

Robin Roberts is a United States citizen, a resident of Philadelphia County, Pennsylvania, and a registered voter in the Democratic party. Ms. Roberts cast votes in the November 2020 election and May 2021 primary (Verified Application for Leave to Intervene, ¶14). Ms. Roberts' private information is included within the information sought by the Subpoena. *Id.* Ms. Roberts is concerned that her personally-identifying information will be disclosed to others without her express permission, and may be misused. She is particularly concerned about the potential for voter intimidation efforts using this information. *Id.*

Kierstyn Zolfo is a United States citizen, a resident of Bucks County, Pennsylvania, and a registered Independent voter. Ms. Zolfo cast a vote in the November 2020 election (Verified Application for Leave to Intervene, ¶15). Ms.

Zolfo's private information is included within the information sought by the Subpoena. *Id.* Ms. Zolfo is concerned that the Department of State's compliance with the Subpoena and exposure of her sensitive personal information will make her more vulnerable to identity theft and further public intrusions into her private financial and personal information. She is particularly concerned that this information would allow others to access her medical records and bank accounts, and create new credit cards, among other things. *Id.*

Michael Zolfo is a United States citizen, a resident of Bucks County, Pennsylvania, and a registered voter in the Republican party. He cast a vote in the November 2020 election and the May 2021 primary (Verified Application for Leave to Intervene, ¶16). Mr. Zolfo's private information is included within the information sought by the Subpoena. *Id.* Mr. Zolfo is concerned that the Department of State's compliance with the Subpoena and exposure of his sensitive personal information will make him more vulnerable to identity theft and further public intrusions into his private financial and personal information. *Id.*

Phyllis Hilley is a United States citizen, a resident of Delaware County, Pennsylvania, and a registered voter in the Democratic party. She has been a registered voter for 46 years. Ms. Hilley cast votes in the November 2020 election and May 2021 primary (Verified Application for Leave to Intervene, ¶17). Ms.

Hilley’s private information is included within the information sought by the Subpoena. *Id.* Ms. Hilley is concerned that the Department of State’s compliance with the Subpoena and exposure of her sensitive personal information will make her more vulnerable to identity theft and further public intrusions into her private financial and personal information. *Id.*

Ben Bowens is a United States citizen, a resident of Philadelphia County, Pennsylvania, and a registered voter in the Democratic party. Mr. Bowens cast votes in the November 2020 election and May 2021 primary (Verified Application for Leave to Intervene, ¶18). Mr. Bowens’ private information is included within the information sought by the Subpoena. *Id.* Mr. Bowens is concerned that his personally-identifying information will be disclosed to others without his express permission, and may be misused. *Id.*

The Organizational Applicants

The League of Women Voters of Pennsylvania (“the League”) is a nonpartisan statewide non-profit formed in August 1920 (Verified Application for Leave to Intervene, ¶19). The League and its members are dedicated to helping the people of Pennsylvania safely exercise their right to vote, as protected by the law. Members of the League are registered voters in Pennsylvania and are at risk of having their private information disclosed if the Secretary complies with the

Subpoena. *Id.* A significant part of the League’s mission is voter registration. It conducts voter registration drives, staffs nonpartisan voter registration tables and works with local high schools to register new 18-year-old voters. *Id.* at ¶20. The disclosure of constitutionally protected private information will interfere with the League’s ability to carry out its mission of registering voters and will cause it to divert resources away from its voter registration and other core activities and towards educating voters about the release of their personal information and the steps they will need to take to protect themselves from identity theft. *Id.*

Common Cause Pennsylvania (“Common Cause”) is a non-profit political advocacy organization and a chapter of the national Common Cause organization. Common Cause has approximately 36,000 members and supporters in Pennsylvania. These members live in all 67 Pennsylvania counties (Verified Application for Leave to Intervene, ¶21). Many members of Common Cause are registered voters in Pennsylvania and are similarly at risk of having their private information disclosed if the Secretary complies with the Subpoena. *Id.* Common Cause seeks to increase the level of voter registration and voter participation in Pennsylvania elections, especially in communities that are historically underserved and whose populations have a low propensity for voting. Many of these communities are communities of color. *Id.* at ¶22. If the approximately nine million records of Pennsylvania Voters containing driver’s license numbers and

last four digits of Social Security numbers are released to the Committee and unknown third-party vendors, Common Cause will have to divert resources away from its voter registration and other core civic engagement activities and to educating voters about how to try to protect themselves from possible identity theft as a result of the disclosure of their voter registration efforts, and monitoring the voter registration system to ensure that voter registration records are not altered or tampered with by bad actors. *Id.*

Make the Road Pennsylvania (“Make the Road PA”) is a not-for-profit, member-led organization formed in 2014 that builds the power of the working-class in Latino and other communities to achieve dignity and justice through organizing, policy innovation, and education services (Verified Application for Leave to Intervene, ¶23). Make the Road PA’s more than 10,000 members are primarily working-class residents of Pennsylvania, many in underserved communities. Many members of Make the Road PA are registered voters in Pennsylvania and are similarly at risk of having their private information disclosed if the Secretary complies with the Subpoena. *Id.* Make the Road PA’s work includes voter protection, voter advocacy and voter education on, for example, how to register to vote, how to apply for mail-in/absentee ballots, how to return mail-in/absentee ballots, and where to vote. Make the Road PA has run active programs to register voters in historically underserved communities of color,

especially in Berks, Bucks, Lehigh, Northampton and Philadelphia Counties. *Id.* at ¶24. The disclosure of constitutionally-protected private information will interfere with Make the Road PA’s ability to carry out its mission of registering voters and will cause it to divert resources away from its voter registration and other core activities and towards educating voters about the release of their personal information and the steps they will need to take to protect themselves from identity theft. *Id.*

B. The Petitions

The Costa Action

On September 17, 2021, Senators Costa, Williams, Hughes and Santarsiero, all Democrats, and the Senate Democratic Caucus, sued two Republican senators – Senator Corman and Senator Dush – and Senate Secretary-Parliamentarian Megan Martin (the “Costa Action”). The petition for review (filed of record at Docket Number 310 MD 2021) in the Costa Action asserts three causes of action, each seeking a declaratory judgment and injunctive relief, on the following grounds:

- “Legislative Exercise of Judiciary’s Exclusive Power Over the Trial and Determination of Contested Elections in Violation of Pennsylvania Constitutional and Statutory Law and the Separation of Powers Doctrine” (Count I)
- “Violation of Pennsylvania’s Law Regarding Authority to Conduct Election-Related Audits” (Count II)

- “Committee Subpoena Requests Information Protected from Disclosure by the Pennsylvania Election Code and Regulations of the Department of State” (Count III)

The Commonwealth Action

On September 23, 2021, the Pennsylvania Department of State and Acting Secretary of State sued Senator Dush, Senator Corman and the Committee (the “Commonwealth Action”). The petition for review (filed of record at Docket Number 322 MD 2021) in the Commonwealth Action asserts seven causes of action, each seeking a declaratory judgment and injunctive relief, on the following grounds:

- “Violation of the Right of Privacy” (Claim I)
- “Violations of the Right to Free Elections and Right to Vote under the Pennsylvania and U.S. Constitution” (Claim II)
- “Not in Furtherance of a Legitimate Legislative Purpose” (Claim III)
- “Outside the Committee’s Subject Matter Area and Issued Without Authority” (Claim IV)
- “Unlawful demand for Critical Infrastructure Information” (Claim V)
- “Unlawful Demand for Material Protected by the Deliberative Process Privilege” (Claim VI)
- “Overbreadth” (Claim VII)

The Haywood Action

On September 27, 2021, Senator Arthur Haywood, a Democrat, and Julie Haywood sued the Acting Secretary of State (the “Haywood Action”). The petition for review in the Haywood Action (filed of record at Docket Number 323 MD 2021) asserts a single cause of action for a declaratory judgment and injunctive relief on the following ground: “Committee Subpoena Requests Information Protected from Disclosure by the Pennsylvania Election Code and Regulations of the Department of State.”

The Applicants’ Petition

On October 4, 2021, the Applicants filed an application to intervene in the Commonwealth Action. The Applicants’ proposed petition for review (filed of record at Docket Number 322 MD 2021) asserts a single cause of action against the parties to the Commonwealth Action for a declaratory judgment and injunctive relief on the following ground: “Infringement Upon Constitutionally-Protected Privacy Interest in Voters’ Personal Information.”

Unlike the Petition that initiated the Commonwealth Action, Applicants are not government departments or officials, and they seek to assert individual interests of themselves and their members and constituents, rather than any interest

of the State generally. Further, the relief requested by the Applicants is against both Respondents and the Acting Secretary.

The same day the Applicants filed their application to intervene in the Commonwealth Action, the Court consolidated the Costa Action, the Commonwealth Action and the Haywood Action.

II. Argument

A. The Applicants Have A Right to Intervene Under Rule 2327(3)

A party is entitled to intervene if it “could have joined as an original party in the action or could have been joined therein” Pa. R.C.P. 2327(3). Here, Applicants could have joined as an original party in the action. The Applicants and their members and constituents own the information sought by the Subpoena, so their interests are directly at stake. Indeed, Applicants could file a separate lawsuit at any time asserting their interests. Therefore, they easily qualify under Rule 2327(3), and are entitled to intervene on that basis alone.

Applicants also could have been joined by either Petitioners or Respondents, as they have a clear interest in the relief requested. “[B]efore the government may release personal information, it must first conduct a balancing test to determine whether the right of informational privacy outweighs the public’s interest in dissemination.” *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1159

(Pa. 2017). *See also City of Harrisburg v. Prince*, 219 A.3d 602, 618 (Pa. 2019) (requiring assessment of constitutional right of privacy in context of right to know request---which by definition is seeking information held by a public entity); *Pa. State Educ. Ass'n v. Commonwealth, Dep't of Community & Econ. Development*, 148 A.3d 142, 146, 150-52 (Pa. 2016) (hereinafter “PSEA”) (same); *Denoncourt v. Commonwealth, State Ethics Comm'n*, 470 A.2d 945, 947-48 (Pa. 1983) (same). According to Supreme Court precedent, the Court *cannot* perform the requisite balancing test without first affording the Applicants an opportunity to be heard. *City of Harrisburg*, 219 A.3d at 619 (“before the City can perform the required balancing test . . . the donors [those whose personal information was subject to potential disclosure] must be afforded notice and an opportunity to be heard”). *See also Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 733 (Pa. 2020). For this reason as well, Applicants have a right to intervene under Rule 2327(3).

B. The Applicants Also Have A Right to Intervene Under Rule 2327(4)

A party also is entitled 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. 2327(4). Here, Applicants have a substantial, constitutionally protected privacy interest in protecting their

personal information or the personal information of their members and constituents.

The Pennsylvania and United States Constitutions provide for a right of privacy that includes a right “to control access to, or the dissemination of, personal information about himself or herself.” *PSEA*, 148 A.3d at 150. *See also In re T.R.*, 731 A.2d 1276, 1279 (Pa. 1999) (plurality) (“There is no longer any question that the United States Constitution and the Pennsylvania Constitution provide protections for an individual’s right to privacy . . . [including] . . . the individual’s interest in avoiding disclosure of personal matters . . .”). Every citizen’s “right of informational privacy” includes “the right of the individual to control access to, or the dissemination of, personal information about himself or herself.” *PSEA*, 148 A.3d at 150. This right to privacy is also set forth in the Pennsylvania Constitution’s prohibition against unreasonable searches and seizures, *Commonwealth v. Alexander*, 243 A.3d 177, 206 (Pa. 2020), and protects against unjustified and overbroad legislative subpoenas, *see, e.g., Lunderstadt v. Pennsylvania House of Representatives Select Comm.*, 519 A.2d 408, 415 (Pa. 1986); *Annenberg v. Roberts*, 2 A.2d 612, 617-18 (Pa. 1938).

Information that is protected by the right to privacy includes individuals’ driver’s license numbers and social security numbers. *PSEA*, 148 A.3d at 158;

Sapp Roofing Company, Inc. v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 12, 552 Pa. 105, 713 A.2d 627 (1998); *Governor's Office of Admin. v. Purcell*, 35 A.3d 811, 821 (Pa. Commw. 2011); 18 U.S.C. §§2721, 2725(3). *See also* Applicants' Brief in Support of Motion for Summary Relief (filed October 13, 2021), at pp. 18-23.

Pennsylvania courts recognize privacy interests as legally-protectable interests that warrant intervention. *McMullan v. Wohlgemuth*, 281 A.2d 836, 839 (Pa. 1971). In *McMullan*, the Philadelphia Inquirer sought to obtain from the Secretary of Welfare for the Commonwealth the names and addresses of those who received public assistance and the amounts received by each. An individual whose information was subject to disclosure from that request sought to intervene on behalf of herself and all others similarly situated, arguing that disclosure of the information "would be an improper invasion of their rights of privacy." *Id.* at 839. The Pennsylvania Supreme Court held that this was an interest in the outcome of the litigation justifying intervention.¹ *Id.* at 841.

¹ The Court also found no prejudice to the Inquirer (the requester of the records) from allowing intervention. "If the Inquirer is entitled by law to the information which it seeks, it will gain access to that information irrespective of the intervention. If it is not so entitled, the presence or absence of the intervenors in this litigation will have no effect." *Id.* at 840.

The Subpoena seeks to compel the disclosure of Voter Applicants', and the Organizational Applicants' members and constituents', constitutionally-protected private information (Verified Petition for Review, Exhibit A). The disclosure of this confidential information will subject Applicants and their members and constituents to increased risk of identity theft and financial fraud, and further, increases the risk of interference with the electoral system and citizens' ability to cast their votes (Applicant's Brief in Support of Motion for Summary Relief, Exhibit I, ¶¶18-19). In particular, the most sensitive information, driver's license numbers and last four digits of the Social Security numbers, coupled with the other information the Subpoena seeks is the very information that could be used to access bank accounts, open credit cards, or access medical records. *Id.* Thus, Applicants have a cognizable interest in protecting the confidentiality of the information that is the subject of this action, and therefore, satisfy the requirements of Rule 2327(4).

The Organizational Applicants' members and constituents have a direct, tangible interest in the protection of their personal information, these interests are germane to the Organizational Applicants' purpose, and the claims and relief requested in the Proposed Petition for Review do not require the participation of individual members. *Id.* Therefore, Organizational Applicants have a representational or associational interest at stake, and may represent the interests of

their members and constituents. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958).

In addition to representing and defending their members' interests, the Organizational Applicants also expend considerable resources for the purpose of registering voters and ensuring that eligible voters can exercise their right to vote. Their members and constituents registered to vote and chose to participate in elections based on the reasonable expectation that their private personal information would be kept confidential (Verified Application for Leave to Intervene, ¶¶19-25, 35-37). Disclosure of voters' private personal information works against the mission of these organizations and would require the organizations to divert resources and expend additional sums in seeking to protect that information, educating their members and constituents regarding the risk to their personal information, and encouraging them to participate in the process. *Id.* Thus, Organizational Applicants will suffer actual injury as organizations, not just as representatives of their members, if injunctive relief is not granted, and this injury is causally connected to the infringement on its members and constituent's privacy rights. Further, this interest, and the consequent injury, is likely to be addressed in this litigation. Therefore, Organizational Applicants have a direct interest at stake, not just as representatives for their members, but in their own

right. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79, 102 S. Ct. 1114, 1124 (1982); *Pennsylvania Prison Society v. Cortes*, 622 F.3d 215, 228 (3d Cir. 2010).

C. The Narrow Exceptions of Rule 2329 Do Not Apply

“[A] grant of intervention is mandatory where the intervenor satisfies one of the four bases set forth in Rule No. 2327 unless there exists a basis for refusal under Rule No. 2329.” *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep’t of Human Servs.*, 225 A.3d 902, 908 (Pa. Commw. 2020). Rule 2329 permits (but does not require) a court to refuse intervention by a party who satisfies Rule 2327 only in three narrowly prescribed circumstances: where “(1) the claim or defense of the petition is not in subordination to and in recognition of the propriety of the action; or (2) the interest of the petitioner is already adequately represented; or (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.” Pa. R.C.P. 2329. Even if one or more of the three circumstances applies, the courts still have discretion to permit intervention. *See Grant v. Zoning Hearing Bd. Of the Twp. Of Penn*, 776 A.2d 356, 360 (Pa. Commw. 2001) (“Pa. R.C.P. No. 2329(4) provides that the trial court ‘may’ refuse an application for intervention if the intervenors’ interests are adequately

represented, Pa. R.C.P. No. 2329(4) does not mandate that the application be refused. . . . Pa. R.C.P. No. 2329(4) is discretionary.”). Here, none of the narrow circumstances apply.

1. Applicants’ claim relates directly to the consolidated actions.

Applicants’ claims relate directly to the Subpoena in that the Subpoena seeks the disclosure of their personal information, which is precisely the information they seek to protect. Moreover, before the Commonwealth is permitted to disclose constitutionally-protected personal information of Applicants and their members and constituents, Applicants have a right to notice and an opportunity to assert their interests. *City of Harrisburg*, 219 A.3d at 619 (“before the City can perform the required balancing test . . . the donors [those whose personal information was subject to potential disclosure] must be afforded notice and an opportunity to be heard”). *See also Easton Area Sch. Dist.*, 232 A.3d at 733. Therefore, the Applicants’ claims recognize, and relate directly to, the other claims at issue, and Applicants’ participation is in fact necessary. Applicants are not seeking to expand or change the nature of the pending action. Therefore, Rule 2329(1) does not apply.

2. The existing parties do not adequately represent Applicants' interests.

The Petitioners in the Commonwealth Action

The Commonwealth does not adequately represent Applicants' interests because its interests "may diverge" from those of the Applicants. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 314 (Pa. Commw. 1999). Indeed, an existing party only adequately represents a proposed intervenor where the parties "unequivocally share" interests, which is not the case here. *Id.* See also *D.G.A. v. Department of Human Services*, No. 1059 C.D. 2018, 2020 WL 283885, *7 (Pa. Commw. Jan. 21, 2020) ("the personal interests of Detainees in their individual welfare could diverge from the more general interest of DHS in public welfare").

First and foremost, among other requested relief, Applicants ask the Court to *enjoin the Commonwealth* from disclosing information in response to the Subpoena. The interest of the Applicants and the Commonwealth will diverge if the Commonwealth elects to negotiate a resolution with the Committee that permits the disclosure of a subset of the requested information and/or authorizes the disclosure of the information pursuant to agreed-upon safety protocols. See *Keener v. Zoning Hearing Board of Millcreek Township*, 714 A.2d 1120, 1123 (Pa. Commw. 1998) (holding that existing party to litigation did not adequately

represent the interests of proposed intervenor once it “entered into a settlement agreement . . . to allow [a result] that [the proposed intervenor] had opposed all along”); *Larock*, 740 A.2d at 314 (holding that existing party did not adequately represent intervenors’ interests because the existing party “might consider settling the case by permitting [the challenged action], albeit with conditions”). Disclosure of Applicants’ highly-sensitive and private personal information to the Committee – even subject to any safety protocols the Commonwealth may negotiate – is, in and of itself, a violation of Applicants’ privacy rights given the lack of basis for the asserted public interest. Applicants’ private information belongs to them, not to the Committee politicians demanding the information, or the Secretary of State who maintains it.

Second, the Commonwealth contends that it can assert claims similar to the Applicants because it has a “quasi-sovereign interest in protecting Pennsylvanians’ right to privacy” (Petition for Review in Commonwealth Action ¶ 189). As a preliminary matter, the Committee has not conceded that the Commonwealth has a “quasi-sovereign interest” in pursuing privacy claims on behalf of all voters. Indeed, the Committee has yet to respond to the Commonwealth’s Petition for Review or otherwise take a position on the issue. Unless and until the Committee concedes the point, the interests of the Commonwealth may diverge from those of the Applicants. But even assuming the Committee concedes that the

Commonwealth has such a “quasi-sovereign interest,” that interest is different than the Applicant’s interests as a matter of law: “A ‘quasi-sovereign’ interest [is] an interest of the State existing separate and apart from those injuries suffered individually by the State’s citizens.” *Commonwealth v. National Ass’n of Flood Insurers*, 520 F.2d 11, 22 (3d Cir. 1975). Here again, the interests of the Commonwealth and the Applicants diverge.

Third, the Commonwealth has raised a number of claims that Applicants do not seek to raise. Therefore, the focus of the Commonwealth’s efforts may diverge from the Applicants’ interests. Further still, Applicants have the more direct interest in preserving their constitutional right to privacy, and can better demonstrate the potential impact on Applicants from the disclosure of their sensitive information.

D.G.A. v. Department of Human Services, No. 1059 C.D. 2018, 2020 WL 283885 (Pa. Commw. Jan. 21. 2020), is particularly instructive. In *D.G.A.*, the Department of Human Services (“DHS”) sought to revoke the license of a facility that housed immigrants while they pursued asylum. *See id.* at *1. Several detainees at the facility sought to intervene in the administrative proceedings addressing the license revocation efforts, but the agency denied their request. *See id.* On the detainees’ petition for review, this Court rejected the agency’s

conclusion that DHS adequately represented the detainees. *See id.* at *7. The Court explained that:

Detainees are the ones personally suffering any negative consequences to their health, safety, and well-being posed by the Center operating contrary to law such that their direct interest could diverge from DHS's more general interest in confirming that the Center operates lawfully. In other words, the personal interests of Detainees in their *individual* welfare could diverge from the more general interest of DHS in *public* welfare.

Id. Therefore, the Court reversed the agency's order denying the detainees leave to intervene in the administrative proceeding. *See also Benjamin ex rel. Yock v. Dep't of Pub. Welfare*, 701 F.3d 938, 958 (3d Cir. 2012) (no adequate representation where agency's views are colored by public welfare rather than the more personal view of a proposed intervenor).

Here, as in *D.G.A.*, Applicants will personally suffer any negative consequences (identity theft, financial fraud, and potential inferences with their ability to vote) resulting from the disclosure of their highly-sensitive, private information. The Commonwealth's general, public interest in protecting voters from the hardships that can result from data breaches is not the same as and may differ from the Applicants' direct personal interests in the repercussions arising from the theft of their private information.

The Petitioners in the Costa and Haywood Actions

Applicants sought to intervene in just the Commonwealth Action and, therefore, the only question for the Court is whether the Commonwealth will adequately represent the Applicants. As discussed above, it will not. But even if the Court were to consider the petitioners in the Costa Action and the Haywood Action, those petitioners also will not adequately represent Applicants' interests.

As is the case with the Commonwealth, the Costa and Haywood petitioners may seek to resolve their claims through a negotiated settlement that does not protect Applicants' interests. For instance, given the lack of basis for the asserted public interest, a negotiated resolution that allows disclosure of Applicants' highly-sensitive, private information to the Commission is, in and of itself, a violation of Applicants' privacy right, regardless of any security protocols upon which the parties may agree.

With respect to the petitioners in the Costa Action, they cannot adequately represent the Applicants for several reasons. First, Senators Corman and Dush contend that: (1) the Court lacks subject matter jurisdiction over the Costa Action for failure to join an indispensable party; (2) the petitioners in the Costa Action lack standing; and (3) the petitioners in the Costa Action have failed to adequately plead a claim for injunctive relief. *See Answer to Petition for Review in Costa*

Action, filed September 30, 2021. Therefore, according to Senators Corman and Dush, the petitioners in the Costa Action cannot adequately represent their own interests, let alone those of the Applicants. Second, as detailed above, the petitioners in the Costa Action have pled causes of action alleging violations of the Pennsylvania Elections Code and regulations and challenging the respondents' authority to issue the Subpoena, and have not made any claim for violation of citizens' constitutional right to privacy. Applicants, by contrast, seek to bring a cause of action for violation of their constitutionally-protected right to privacy. Third, the petitioners in the Costa Action are not pursuing claims against the Committee – the Applicants are. Finally, unlike the Applicants, the petitioners in the Costa Action are elected officials whose interests and motivations may differ from individual voters, like Voter Applicants and Organizational Applicants' members.

With respect to the petitioners in the Haywood Action, they also cannot adequately represent the Applicants for several reasons. First, unlike the Applicants, the Haywood petitioners are pursuing claims against the Commonwealth only, not also against Senator Dush, Senator Corman and the Committee. Second, the petitioners in the Haywood Action base their privacy claim on violations of the Pennsylvania Elections Code and regulations, whereas the Applicants are pursuing a claim for violation of their constitutionally-protected

right to privacy. *See* Haywood Petition, Count I (seeking declaratory and injunctive relief because “Committee Subpoena Requests Information Protected from Disclosure by the Pennsylvania Election Code and Regulations of the Department of State”). Third, unlike the Applicants, one of the petitioners is an elected official who may have different or additional interests as compared to Applicants.

The Relief Sought

Although the Applicants and the petitioners in the consolidated actions all, in broad terms, seek the same ultimate relief – prohibiting the disclosure of the information that the Subpoena requests – that fact does not mean the petitioners in the consolidated actions will adequately represent Applicants in seeking that relief. *See Grant*, 776 A.2d at 360 (affirming trial court’s approval of application to intervene by party that sought same relief as the plaintiffs and “adopt[ed] the arguments presented by” the plaintiffs). As noted above, because the interests of the Applicants and the petitioners, and their roles in this controversy, differ, the relief to which the respective parties may agree also could differ.

3. The Application is timely and granting it will not delay the proceedings.

Applicants timely filed their application to intervene in the Commonwealth Action eleven days after the Commonwealth initiated it. The parties to the

consolidated actions entered into a stipulated briefing schedule, pursuant to which they agreed that the petitioners would file applications for summary relief by October 13. So as not to delay the proceedings, Applicants filed an application for summary relief on October 13 and will adhere to the other dates in the stipulated briefing schedule or otherwise ordered by the Court.² Thus, the requested intervention has not delayed and will not delay the proceedings, and Rule 2329(3) does not apply.

D. The Practicalities

The Subpoena seeks disclosure of Applicants' highly-sensitive, private information. The Applicants have every right to seek to prevent that disclosure. Whether Applicants pursue that relief as intervening parties in these consolidated actions or in a separate action against the Commonwealth and/or the Committee (that could eventually end up consolidated with these cases), Applicants will not sit idly by and leave the fate of their private information in the hands of others. Applicants suggest that permitting them to intervene is the most efficient way to proceed, and the Court has discretion to take such efficiencies into consideration when considering an intervention application. *See Grant*, 776 A.2d at 360 (Pa.

² In their Application for Leave to File Over-Length Brief, filed on October 14, 2021, Respondents requested relief, in part, in order to respond to Applicants' Motion and arguments, and represented that they would respond to Applicants' Motion. Therefore, Respondents cannot legitimately argue that Applicants' participation will delay proceedings.

Commw. 2001) (holding that the rules authorizing the courts to deny intervention request under limited circumstances are discretionary). If, however, Applicants must pursue their day in court through a less efficient procedure, they will not hesitate to do so.

III. Conclusion

Applicants could have joined or been joined in these actions and the actions will affect their privacy interests. Their timely-filed proposed claim directly relates to the subject matter of the cases, they are not adequately represented by the existing parties and allowing intervention will not delay the proceedings. Moreover, if Applicants are not permitted to intervene, they will simply file a new action asserting the same claims, thereby wasting scarce judicial resources. For these reasons, Applicants respectfully request that the Court grant their application to intervene.

Dated: October 18, 2021

Witold J. Walczak (PA I.D. No. 62976)
**AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA**
P.O. Box 23058
Pittsburgh, PA 15222
Tel: (412) 681-7736
vwalczak@aclupa.org

Marian K. Schneider (Pa. I.D. No.
50337)
**AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA**
P.O. Box 60173
Philadelphia, PA 19102
mschneider@aclupa.org

Sophia Lin Lakin*
**AMERICAN CIVIL LIBERTIES UNION
FOUNDATION**
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500
slakin@aclu.org

Respectfully submitted,

/s/ Keith E. Whitson
Keith E. Whitson (Pa. I.D. No. 69656)
SCHNADER HARRISON SEGAL & LEWIS LLP
2700 Fifth Avenue Place
120 Fifth Avenue
Pittsburgh, PA 15222
Telephone: (412) 577-5220
Facsimile: (412) 577-5190
kwhitson@schnader.com

/s/ Stephen J. Shapiro
Stephen J. Shapiro (Pa. I.D. No. 83961)
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103-7286
(215) 751-2000
sshapiro@schnader.com

*Counsel for Roberta Winters, Nichita Sandru,
Kathy Foster-Sandru, Robin Roberts, Kierstyn
Zolfo, Michael Zolko, Phyllis Hilley, Ben
Bowens, League of Women Voters of
Pennsylvania; Common Cause Pennsylvania
and Make the Road Pennsylvania*

**Pro hac vice* forthcoming

CONFIDENTIAL DOCUMENTS CERTIFICATION

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/ Keith E. Whitson
Keith E. Whitson

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief in Support of Application to Intervene was filed with the Commonwealth Court of Pennsylvania's PACFile System and is an accurate and complete representation of the paper version of the Brief filed by Intervenor-Petitioners. I further certify that the foregoing Brief complies with the length requirements set forth in Rule 2135(a) of the Pennsylvania Rules of Appellate Procedure as the Brief contains 5,819 words, not including the supplementary matter identified in Rule 2135(b), based on the word count of Microsoft Word 2010, the word processing system used to prepare the brief. It has been prepared in 14-point font.

Respectfully submitted,

SCHNADER HARRISON SEGAL
& LEWIS LLP

By: /s/ Keith E. Whitson

Keith E. Whitson

PA ID No. 69656

E-mail: kwhitson@schnader.com

Fifth Avenue Place, Suite 2700

120 Fifth Avenue

Pittsburgh, PA 15222

Telephone: (412) 577-5220

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via email, this 18th day of October, 2021, upon the following:

Michael J. Fischer
Aimee D. Thompson
Jacob B. Boyer
Stephen R. Kovatis
Pennsylvania Office of Attorney General
1600 Arch Street, Suite 300
Philadelphia, PA 19103
mfischer@attorneygeneral.gov
athomson@attorneygeneral.gov
jboyer@attorneygeneral.gov

Keli M. Neary
Karen M. Romano
Stephen Moniak
Pennsylvania Office of Attorney General
15th floor, Strawberry Square
Harrisburg, PA 17120

John C. Dodds
Morgan, Lewis & Bockius LLP
1701 Market Place
Philadelphia, PA 19103
John.dodds@morganlewis.com

Susan Baker Manning
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Susan.manning@morganlewis.com

Aaron Scherzer
Christine P. Sun
States United Democracy Center
572 Valley Road, No. 43592
Montclair, NJ 07043
aaron@statesuniteddemocracy.org
christine@statesuniteddemocracy.org

Counsel for Petitioners in 322 MD 2021

Matthew H. Haverstick
Joshua J. Voss
Shohin H. Vance
Samantha G. Zimmer
Kleinbard LLC
Three Logan Square
1717 Arch Street, 5th floor.
Philadelphia, PA 19103
mhaverstick@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com
szimmer@kleinbard.com

Counsel for Respondents

Tamika N. Washington
LEGIS GROUP LLC
3900 Ford Road, suite B
Philadelphia, PA 19131
twashington@legislawyers.com

Counsel for Petitioners in 323 MD 2021

Clifford B. Levine
Emma Shoucair
Matthew R. Barnes
Dentons Cohen & Grigsby P.C.
625 Liberty Avenue
Pittsburgh, PA 15222-3152
Clifford.Levine@dentons.com
Emma.Shoucair@dentons.com
Matthew.Barnes@dentons.com

Claude J. Hafner, II
Ronald N. Jumper
Shannon A. Sollenberger
Democratic Caucus
Senate of Pennsylvania
Room 535, Main Capitol Building
Harrisburg, PA 17120
Cj.hafner@pasenate.com
Ron.jumper@pasenate.com
Shannon.sollenberger@pasenate.com

Counsel for Petitioners in 310 MD 2021

/s/ Keith E. Whitson
Keith E. Whitson