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244 MD 2021 and additional consolidated case(s)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug McLinko,
Petitioner,

v.

Commonwealth of Pennsylvania, Department of State, and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania,
Respondents.

Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook,
Petitioners,

v.

Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Commonwealth of Pennsylvania, Department of State,
Respondents.

CASES CONSOLIDATED
No. 244 M.D. 2021
No. 293 M.D. 2021

MEMORANDUM OF LAW IN OPPOSITION TO APPLICATION FOR INTERVENTION

Filed on behalf of Petitioners, Timothy R. Bonner, P. Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook

Counsel of Record for Petitioners:

Gregory H. Teufel
Pa. Id. No. 73062
OGC Law, LLC
1575 McFarland Road, Suite 201
Pittsburgh, PA 15216
412-253-4622
412-253-4623 (facsimile)
gteufel@ogclaw.net

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INTRODUCTION

Petitioners submit this Memorandum of Law in opposition to the request by a national political party and its subordinate state group (collectively, "Proposed Intervenors") to be given status as co-equal sovereign respondents, in a constitutional challenge over Pennsylvania's legislative power, brought under the Court's original jurisdiction for actions exclusively against "the Commonwealth government or an officer thereof." 42 Pa.Cons.Stat. § 761(a)(1). No election, party nomination, nor ballot cast is being contested in this case. And Proposed Intervenors assert no claims against any party, nor raise any defense to a claim by any other party against them – whether foreseeable or actual. Accordingly, Proposed Intervenors' application to intervene in this case entirely lacks merit and should be denied.

First, Proposed Intervenors fail to assert any legally cognizable interest under Pa.R.Civ.P. 2327(4) in defending the constitutionality of a state statute *as a respondent*, which by law in Pennsylvania is exclusively vested in the Attorney General. Applicant-Intervenor's unprecedented request, if granted, would amount to usurpation of the Attorney General's mandate to defend the constitutionality of the Commonwealth's laws, in addition to raising issues with this Court's jurisdiction as Proposed Intervenors are not the Commonwealth or one of its agencies. ***Second***, any interest Proposed Intervenors and their members could

plausibly assert is already represented in this case by qualified voters, candidates for elected office, a county election administrator, the Department of State, the Secretary of State, the Attorney General, and the Commonwealth. And ***third***, granting Proposed Intervenors' request would irreparably prejudice the rights of Petitioners by permitting partisan non-party groups to inject immaterial political arguments into these proceedings.

Before wading into the question of whether it is prudent to allow Proposed Intervenors to intervene as respondents, this Court must answer the threshold question of whether Pennsylvania has designated Proposed Intervenors as agents in defending the Commonwealth's interests. Proposed Intervenors have not and cannot meet this burden. Accordingly, Proposed Intervenors' application seeking leave for permission to intervene under Pa.R.A.P. 1531(b) must be denied.[1]

LEGAL STANDARD

In proceedings under this Court's original jurisdiction, 42 Pa.Cons.Stat. § 761(a)(1), intervention as of right does not exist. *Compare* Pa.R.A.P. 1531(a) (granting intervention as of right in Commonwealth Court *appellate jurisdiction*

[1] Petitioners are not aware of anything that prevents Proposed Intervenors from airing their views by "seek[ing] leave of court to file briefs as *amicus curiae* consistent with the requirements of Pa.R.A.P. 531." *Disability Rights Pa. v. Boockvar*, 234 A.3d 390 at 394 n.3 (Wecht, J., concurring statement). Proposed Intervenors are also free to file their own separate petition against the Commonwealth under 42 Pa.Cons.Stat. § 761(a)(1) if the Proposed Intervenors or their members have valid claims against the Commonwealth.

matters to parties in below proceeding before government unit, *if filed within 30 days*), *with* Pa.R.A.P. 1531(b) (non-parties "may seek leave to intervene" in Commonwealth Court original jurisdiction proceedings). The Court may permit intervention under Pa.R.A.P. 1531(b) when a person meets one of the four criteria under Pa.R.Civ.P. 2327. Proposed Intervenors only seek intervention under subsection (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.Civ.P. 2327(4).[2]

Even if a putative intervenor meets its burden under the Pa.R.Civ.P. 2327 criteria, the Court should still refuse intervention if:

> (1) the claim or defense of the petitioner 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.Civ.P. 2329.

[2] Petitioners agree that Proposed Intervenors fail to qualify for permissive intervention under Pa.R.Civ.P. 2327(1)-(3) criteria.

ARGUMENT

I. Neither state nor federal law gives the Proposed Intervenors standing or legal authority to defend the constitutionality of Pennsylvania statutes as a Respondent in this action.

A. The Proposed Intervenors' ultimate interest in this case is upholding the constitutionality of mail voting under Act 77, the authority for which is exclusively vested in the Attorney General.

The only independent interest that the Proposed Intervenors could have as a Respondent Intervenor in this case is the interest of denying Pennsylvania citizens their lawful right of referendum to approve state constitutional amendments. All other interests are either not legally enforceable by the Proposed Intervenors as respondents or are already represented in this proceeding by other parties. This is not a case about who won an election or the nomination as a Democratic candidate for elected office.

The interests asserted by the Proposed Intervenors in their Application can be summarized as follows:

1. Dedicating resources to encouraging Pennsylvanians to vote.
2. The interests of their members in voting through legally prescribed methods.
3. The interests of their members in receiving votes cast through legally prescribed methods.

Apart from these stated interests already being represented by the Department of State, they ultimately represent an interest in defending the constitutionality of

mail voting under Act 77 (Laws of the General Assembly of the Commonwealth of Pennsylvania, Act of October 31, 2019, P.L. 552, No. 77 ("Act 77"); 25 Pa.Stat. §§ 3146.6(c), 3150.16(c)). Pennsylvania law does not recognize Proposed Intervenors as a "persons" with a "legally enforceable interest" permitted to intervene *as respondents* to uphold the constitutionality of a challenged state statute. The only other entity that *potentially* could intervene as a respondent in this proceeding is the Pennsylvania Legislature as a whole.

> "[I]n Pennsylvania, the Attorney General is the Commonwealth official statutorily charged with defending the constitutionality of all enactments passed by the General Assembly… regardless of the nature of the constitutional challenge …. As this is a facial constitutional attack upon an act of the General Assembly, ***the Attorney General stands in a representative capacity for, at a minimum, all non-Commonwealth parties having an interest in seeing the statute upheld***."

City of Philadelphia v. Com., 575 Pa. 542, 570–71, 838 A.2d 566, 583–84 (2003) (citations and footnotes omitted) (emphasis added)*; see also Disability Rights Pa. v. Boockvar*, 234 A.3d 390, 391-394 (Pa. 2020) (Wecht, J., concurring statement) (analyzing lack of individual legislator standing as intervenor defendant to defend constitutionality of state laws); 71 Pa.Stat. § 732-204(a)(3) ("It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes…."); *accord, e.g.*, *Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel

a State to create and retain the legal framework within which individual enforcement decisions are made.").

It is well established under Pennsylvania law that proposed intervenors must "allege and prove an interest in the outcome of the suit which surpasses 'the common interest of all citizens in procuring obedience to the law.'" *In re Application of Biester*, 487 Pa. 438, 442, 409 A.2d 848, 851 (1979) (quoting *William Penn Parking Garage v. City of Pittsburgh*, 464 Pa. 168, 192, 346 A.2d 269, 281 (Pa. 1975)). This is especially critical when a party seeks to intervene in an original jurisdiction matter on the side of the Commonwealth. *Com., Dep't of Transp. v. Joseph Bucheit & Sons Co.*, 506 Pa. 1, 8, 483 A.2d 848, 851 n.3 (1984) ("It is axiomatic that a rule of procedure cannot operate to confer jurisdiction."). In general, it must be alleged "that the Commonwealth or its officers share joint and several liability with others who are not the Commonwealth or its officers." *Tokar v. Com., Dep't of Transp.*, 480 Pa. 598, 600–01, 391 A.2d 1046, 1048 (1978) (quoting *Freach v. Commonwealth*, 471 Pa. 558, 570-71, 370 A.2d 1163, 1169 (1977)).

This Court has consistently denied intervention in cases where a proposed-intervenors' interest is shared by the general public. *See, e.g., In re Philadelphia Health Care Tr.*, 872 A.2d 258, 262 (Pa. Commw. Ct. 2005); *Larock v. Sugarloaf Twp. Zoning Hearing Bd*., 740 A.2d 308, 314 (Pa. Commw. Ct. 1999); *Vartan v.*

Zoning Hearing Bd. of City of Harrisburg, 161 Pa. Commw. 210, 216, 636 A.2d 310, 313 (1994); *Acorn Dev. Corp. v. Zoning Hearing Bd. of Upper Merion Twp.*, 523 A.2d 436, 437–38 (Pa. Commw. Ct. 1987).

In the past, this Court has denied intervention by proposed intervenors similarly situated to Proposed Intervenors here. In *Fraenzl v. Secretary of the Commonwealth of Pennsylvania,* 83 Pa. Commw. 539, 478 A.2d 903 (1984), this Court denied intervention by a Republican Party candidate for the United States House of Representatives in a case between the Socialist Workers Party and a Socialist Workers Party candidate, on one side, and the Secretary of the Commonwealth of Pennsylvania and the Pennsylvania Bureau of Legislation, Commissions and Elections, on the other side. The Socialist Workers Party candidate in that case sought a writ of mandamus to compel the Secretary to accept her nomination papers and place her name on the ballot. While the Republican candidate would certainly have been affected by the decision to place the Socialist Workers Party's candidate's name on the ballot, including its impact on the election, the Republican candidate would not have been bound by any judgment in that case. The Court noted that the proposed intervenor could "assert only an interest in having election laws properly applied, an interest she shares in common with every other member of the electorate." *Id.* at 541. This Court granted leave for the Republican candidate in that case to file an amicus brief.

In fact, the Proposed Intervenors do not cite a single case where a political party was permitted to intervene as a respondent in a constitutional challenge to a state statute under 42 Pa.Cons.Stat. § 761. Neither do the Proposed Intervenors provide any precedential legal authority supporting permissive intervention as a respondent under Pa.R.Civ.P. 2327(4), generally. The Proposed Intervenors can only show that some courts, in some states and in unrelated contexts, have sometimes permitted a political party to intervene in litigation. Proposed Intervenors state that they were "granted intervention in several election-related cases in Pennsylvania during the last election cycle" but this proceeding is not an election contest. Proposed Intervenors-Respondents' Application to Intervene, at 5-6.

Each case cited by the Proposed Intervenors is materially distinguishable from the case at bar. Many of the cases cited involved actions in federal district court, for which there exists no analogous jurisdictional restriction to 42 Pa.Cons.Stat. § 761(a)(1), which limits this Court's original jurisdiction to claims against or by the Commonwealth. *See, e.g.*, *Donald J. Trump for President, Inc. v. Murphy*, 2020 WL 5229209 (D.N.J. 2020) (challenge to discretionary executive action to implement election plan by *plaintiffs* RNC, candidate, and NJ Republican Party). The cited cases did not involve constitutional challenges to the state

legislature's authority to enact the election laws at issue in those cases – many involve challenges to discretionary state executive action and not the law that the Executive relied upon. Other cases cited involved situations where the Democratic Party sought to be involved in an agreed-to election plan or consent decree. And for those cited cases vaguely referred to as "election-related," they were distinguishable for the same reasons noted above, intervention was never opposed, or if filed in state court were brought under a different kind of jurisdiction. These cases are inapposite to the constitutional challenges Petitioners bring in this case.

The Proposed Intervenors fare no better under federal law. The U.S. Supreme Court has held time and time again that only "a State has standing to defend the constitutionality of its statute." *Diamond v. Charles*, 476 U.S. at 62. In *Diamond*, the Court unequivocally stated:

> The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made. The State's acquiescence in the Court of Appeals' determination of unconstitutionality serves to deprive the State of the power to prosecute anyone for violating the Abortion Law. Diamond's attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with Diamond's interests. But "the power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601, 102 S.Ct. 3260, 3265–66, 73 L.Ed.2d 995 (1982). Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" identified in *Sierra Club v. Morton*, 405 U.S., at 740, 92 S.Ct., at 1369, in defending the standards embodied in that code.

Id. at 65. Unlike the case at hand, *Diamond* was a case where the state of Illinois entirely gave up on defending the constitutionality of the abortion law at issue. Here, the Proposed Intervenors cannot even allege the Commonwealth's failure to defend the Constitutionality of Act 77, for it has not. Regardless, this still would not be enough to permit the Proposed Intervenors to stand in the shoes of the state under *Diamond*.

The Proposed Intervenors cite to *Kleissler v. U.S. Forest Serv.*, as federal law in support of their position. 157 F.3d 964, 972 (3d Cir. 1998). This Third Circuit case, in fact, cuts against their argument. Initially, *Kleissler* involved intervention as of right under Federal Rule of Civil Procedure 24, which is not analogous to Pa.R.A.P. 1531(b) and Pa.R.Civ.P. 2327. *Kleissler* turned on intervention as of right due to interests in the property or transaction at issue in the case, which would analogize most closely to Pa.R.Civ.P. 2327(1) & (2). But the Proposed Intervenors have not sought to intervene or asserted any cognizable interest as a respondent in this case based on indemnification liability, Pa.R.Civ.P. 2327(1), nor based upon the disposition of property in the custody of the court, Pa.R.Civ.P. 2327(2).

One of the cases relied upon by the *Kleissler* Court, *Harris v. Pernsley,* 820 F.2d 592 (3rd Cir. 1987), is more relevant. In *Harris*, the District Attorney for Philadelphia County sought to intervene "as a ***full-party defendant*** to litigate the

constitutionality of the conditions of the Philadelphia prison system and the relief, if any, to which the plaintiffs may be entitled." *Id.* at 596 (emphasis added). The District Attorney's motion to intervene in that case rested upon his duties as a public official under Pennsylvania law, and he sought to challenge a consent decree entered between the class-plaintiffs and the City. The Consent decree, he argued, would interfere with his duties in two ways:

> First, he argues that a prison cap will result in the release of inmates who have not posted the bond set by state court judges or inmates who have not served their full sentences. This, in turn, will result in his work going for naught and will hamper his ability to prosecute cases because those released without posting bond will not appear for their trials.
>
> Second, he directs the court's attention to the fact the prison cap may make it impossible for the City prisons to admit additional persons. He contends that if the City refused to operate any jails, the refusal would interfere with his duties because his function as a prosecutor would be rendered meaningless. According to the District Attorney, it therefore follows that if some individuals are not admitted to prison because of the ceiling placed on the prison population, his role is rendered meaningless for those individuals.

Id. at 599. These *statutory* interests, however, were insufficient to provide him the right to intervene as a defendant. Under Pennsylvania law, the Court determined, only the City Defendants were responsible and faced liability for managing the prison system. *Id.* at 599-600. So "the District Attorney has no interest entitling him to litigate the plaintiffs' contention that the conditions in the Philadelphia prison system are unconstitutional." *Id.*at 600.

The Proposed Intervenors here are not entrusted with any statutory duties under Pennsylvania law related to this proceeding. The Proposed Intervenors do not enforce, determine, or otherwise administer the election code. Accordingly, their interests in this proceeding fall well below the standard in *Harris*.

As the Proposed Intervenors have no *legally enforceable* interest permitting them to intervene as a respondent in this proceeding, their application should be denied. Beyond that, granting intervention would result in a delegation of the Executive Branch's exclusive authority to "take care that the laws be faithfully executed," Pa. Const. Art. IV, § 2, to the Proposed Intervenors in violation of the state constitution, which is another basis for denial.

Proposed Intervenors do not, and cannot, assert that Respondents in this action will not seek to enforce Pennsylvania's election laws and procedures or uphold their constitutionality. Respondents, in multiple cases, have aggressively defended the constitutionality of the Election Code as amended by Act 77. *See, e.g., In re November 3, 2020 General Election*, 240 A.3d 591 (Pa. 2020); *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020).[3] Because Proposed Intervenors have provided no reason to suggest that

[3] In the previous similar challenge to the constitutionality of Act 77, Kelly, Mike, et al. v. Cmwlth et al., 620 M.D. 2020, DNC Services Corporation/Democratic National Committee sought to intervene as a defendant/respondent, and this Court did not grant the motion, but instead directed it to file *amicus* briefs.

Respondents' interests diverge from Proposed Intervenor's interests in any meaningful way for the purposes of this lawsuit, this court should also deny their Motion to Intervene under Pa.R.Civ.P. 2329(2).

B. The Proposed Intervenors fail to address how they can be granted status as respondent intervenors under the Court's original jurisdiction.

Unlike election contests under 42 Pa.Cons.Stat. § 764, this Court's original jurisdiction under 42 Pa.Cons.Stat. § 761 extends only to claims by or against the Commonwealth government, its units, and its officers. 42 Pa.Cons.Stat. § 761(a)(1). As a threshold matter, the Proposed Intervenors have not asserted any claims against any party, including the Commonwealth, and no other party, including the Commonwealth, has asserted any claims against the Proposed Intervenors. Neither have the Proposed Intervenors asserted how they can otherwise overcome the jurisdictional limitation of 42 Pa.Cons.Stat. § 761. For these reasons alone, their Application to Intervene must be denied.

II. Any interest the Proposed Intervenors could plausibly assert is already represented by numerous parties in this case.

There is no special category of standing for national and state political parties. Even if Proposed Intervenors could somehow manage to establish the threshold criterion under Pa.R.Civ.P. 2327 – which they cannot – this Court should still deny intervention under Pa.R.Civ.P. 2329(2) because the Proposed Intervenors' "interest[s] are already adequately represented in this action."

Pa.R.Civ.P. 2329(2). As putative respondent-intervenors, any interest the Proposed Intervenors could assert is represented by the Commonwealth parties and the Attorney General.

The Proposed Intervenors do not seek to intervene as petitioners. But even then, granting intervention would still be inappropriate because the interests that could be asserted as petitioners are already adequately represented in this case by parties who are qualified voters, candidates for elected office, a county election administrator, the Department of State, the Secretary of State, the Commonwealth government, and the Attorney General.

The fact that the Petitioners are members of a single political party is also immaterial. Neither Petitioner's claims nor their grounds for standing arise out of membership to a political party. Indeed, the law being challenged, as Respondents have pointed out numerous times, was passed into law through action by members of both the Republican and Democratic parties. Allowing Proposed Intervenors to rely on immaterial party affiliation as a basis for granting intervention would substantially expand any known application of the permissive intervention principles by allowing extrinsic and legally irrelevant characteristics of a third-party to serve as a basis for permitting another party to intervene. Petitioners do not represent the Republican party in this action; for the Proposed Intervenors to imply that they do is an ineffective attempt to manufacture the intervention criteria.

In an attempt to expand the scope of necessary parties for this case to encompass not only the Commonwealth but each and every one of its citizens, Proposed Intervenors' cites three unhelpful cases. The first case that Proposed Intervenors cites, *Allegheny Cty. v. Commonwealth*, 71 Pa. Commw. 32, 453 A.2d 1085, (1983), was not a case under this Court's original jurisdiction, which is a controlling factor. The case below in *Allegheny Cty.* involved a request for a declaration on how to harmonize the application of the Second Class County Code, Act of July 28, 1953, P.L. 723, as amended, 16 Pa.Stat. §§ 3101–6302, with the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634 (1976). At issue on appeal in the Commonwealth Court was a question of joinder – not intervention – related to two individual firemen and their continued gainful employment after the occurrence of a necessary reduction in force action. These very personal, economic, and individual interests have no meaningful analogy to this proceeding, and *Allegheny Cty.* neither involved challenging the constitutionality of a statute nor defending it.

Next, Proposed Intervenors cite *Stilp v. Commonwealth*, 910 A.2d 775 (Pa. Commw. Ct. 2006), an original jurisdiction matter wherein this Court denied a motion to dismiss claim presented on the basis that not all indispensable parties had been named as respondents in a constitutional challenge to legislation involving legislator pay and benefits brought under the Declaratory Judgment Acts.

The same argument Proposed Intervenors make here was made in *Stilp* by several legislators who argued that the language of the Declaratory Judgment Acts required "all past and present members of the General Assembly, whose rights to various benefits may be affected by the declarations" to be named as respondents. *Stilp*, 910 A.2d at 786-786. This Court disagreed, finding that the participation of the Attorney General and legislative leaders of both chambers comprised all necessary parties in that case, which involved a constitutional challenge to legislation regarding legislator pay and benefits. *Id.* (citing *City of Phila. v. Commonwealth*, 575 Pa. 542 (2003)).

To the extent that *City of Philadelphia* is relevant here, it perhaps cuts against Proposed Intervenors the most. That case was also a constitutional challenge to a statute under the Declaratory Judgments Act, beginning in this Court's original jurisdiction. On appeal, the Pennsylvania Supreme Court ruled that all necessary parties, *e.g.*, the Commonwealth government, were joined in that litigation seeking declaratory relief against an unlawful statute. In support of this decision, the Court noted:

> We agree with the Wisconsin Supreme Court that requiring the participation of all parties having any interest which could potentially be affected by the invalidation of a statute would be impractical, for the reasons stated. Further, as such an interpretation would result in an unwieldy judicial resolution process, it would run contrary to the Legislature's direction, as expressed in the text of the Declaratory Judgments Act, that the statute constitutes remedial legislation to be construed liberally

> so as to settle, and afford relief from, uncertainty relative to rights, status, and other legal relations. See 42 Pa.C.S. § 7541(a); see also 1 Pa.C.S. § 1922(1) (providing that the General Assembly does not intend a result which is unreasonable or incapable of execution).

City of Phila. v. Commonwealth, 575 Pa. at 568-572.

Missing from the Democratic Party's Application to Intervene, however, is any discussion of *Sprague v. Casey*, which is separately important to this proceeding for its holding on standing. 520 Pa. 38, 550 A.2d 184 (1988). One of the issues the Pennsylvania Supreme Court dealt with in *Sprague* was the question of whether the two Justices whose appointments would be impacted by the declaration sought by Sprague were indispensable parties. The Court found "it abundantly clear that Justice Stout and Judge Melinson are not indispensable parties," in part because the *Sprague* petitioner sought no redress against either of the judicial appointees. *Id.* at 49. Relevant here is what the *Sprague* Court noted regarding the corollary to the indispensable party doctrine: "A corollary of this principle is that a party against whom no redress is sought need not be joined." *Id.* 48-49 (citing *Kern v. Duquesne Brewing Co.*, 396 Pa. 279, 152 A.2d 682 (1959); *In re Culbertson's Estate*, 301 Pa. 438, 152 A. 540 (1930)).

Here, similarly, no redress is sought against Proposed Intervenors, and they seek no redress against the Commonwealth. They fail to assert any unique prejudice in the outcome of this case that is not already represented by other parties or not shared by all citizens. To the extent that the Proposed Intervenors suggest

that their members have a legal right to vote by unexcused absentee ballot, such interest is already represented by the Commonwealth, with whom the Proposed Intervenors' legal arguments align identically.

The Proposed Intervenors further state that "Respondents have no interest in which candidates win an election; and they likewise do not have millions of members who have voted by mail and desire to do so in the future." The Commonwealth has every interest in ensuring that the candidate who received the most votes wins any election. Likewise, the Commonwealth has millions of members, otherwise known as Pennsylvania citizens – which encompass all of the Democratic Party's members and more – who have previously voted by mail and desire to do so in the future. Further, the Commonwealth also notes it has spent millions of dollars to ensure that Pennsylvanians were previously able to vote by mail and those who desire will be able to vote by mail in the future. While Petitioners disagree on the merits of these positions, there is no question that Proposed Intervenors' interests are more than adequately represented by the Commonwealth in this case.

If Proposed Intervenors have some particularized injury to claim under Act 77, nothing prevents them from separately filing their own case seeking a remedy of those harms. But a political party has no right to step into the shoes of the Commonwealth here solely to continue the disenfranchisement of millions of

Pennsylvania voters who were denied their constitutional right to exercise their referendum vote on effective amendments to the Pennsylvania Constitution's election provisions.

III. Granting the Proposed Intervenors' untimely application will also cause undue prejudice to Petitioners.

While the Proposed Intervenors argue that their intervention will not cause delays, citing the fact that they will file on the same schedule as Respondents, they do not take into account the added burden placed on Petitioners to have to respond to yet another brief in the extremely truncated timeline. The burden on the Petitioners was no doubt considered by this Court when determining the timeline and did not factor in late-coming intervenor filings. Thus, if this Court allowed the intervention, it would prejudice the Petitioners because of the Proposed Intervenor's delay in filing their motion. Either the timeline would need to be extended to lessen the already substantial burden of the truncated timeline or Petitioners would be required to bear the added time burden of such intervention.

CONCLUSION

There is no value Proposed Intervenors could provide to this case that cannot be done as *amici*. Contrarily, granting Proposed Intervenors full rights as respondents in this case beside the government Respondents, who are actively defending this case, would be unprecedented. Doing so would represent to the

citizens of the Commonwealth that a partisan political party stands on equal footing with the Commonwealth in upholding Pennsylvania's election laws.

For the aforementioned reasons, Petitioners respectfully urge this Court to DENY the Proposed Intervenors' Application to Intervene.

Respectfully submitted,

Gregory H. Teufel, Esq.
Attorney for Petitioners

CERTIFICATE OF WORD COUNT

I certify that this application/brief contains 4,625 words, as determined by the word-count feature of Microsoft Word.

Date: October 14, 2021

Gregory H. Teufel, Esq.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Date: October 14, 2021

Gregory H. Teufel, Esq.