

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DONALD J. TRUMP FOR
PRESIDENT, INC.; *et al.*,

Plaintiffs,

v.

KATHY BOOCKVAR; *et al.*,

Defendants.

Civil Action No. 2:20-CV-966

Judge J. Nicholas Ranjan

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, Proposed Intervenors Michael Crossey, Dwayne Thomas, Irvin Weinreich, Brenda Weinreich, and the Pennsylvania Alliance for Retired Americans (collectively, “Applicants”) move to intervene as Defendants in the above-titled action.

Applicants consist of individual Pennsylvania voters and the Pennsylvania Alliance for Retired Americans, an organization which serves and represents over 335,000 members in the Commonwealth. The Alliance’s membership is composed primarily of retirees, the vast majority of whom are over the age of 65, placing them at heightened risk of serious illness due to COVID-19. Thus, for the individual Applicants and the Alliance’s members, voting in the upcoming election—in the middle of a global pandemic—will require access to safe and reliable means of submitting their ballots. For this reason, Applicants have filed a lawsuit, which is currently pending before the Pennsylvania Supreme Court, in order to eliminate barriers to voting by mail, including restrictions against ballot collection and delivery assistance. *See* Am. Pet. For Declaratory and Injunctive Relief, *Crossey v. Boockvar*, No. 108 MM 2020 (Pa. July 13, 2020); *see also* Thomas Decl., Ex. B; Crossey Decl., Ex. C.

Plaintiffs Donald J. Trump for President, Inc., Glenn Thompson, Mike Kelly, John Joyce, Guy Reschenthaler, the Republican National Committee, Melanie

Stringhill Patterson, and Clayton David Show challenge election procedures that properly seek to protect lawful, eligible voters against disenfranchisement as they attempt to safely vote by casting absentee and mail-in ballots (collectively, “mail ballots”) in these unprecedented times. These procedures are not only reasonable, but constitutionally required to ensure that all eligible Pennsylvania voters can safely exercise their franchise during the COVID-19 pandemic. While Plaintiffs assert a slew of state and federal law claims in an attempt to impede Defendants’ efforts to protect Pennsylvania voters, their Complaint misapplies governing law and ignores the impact of their requested relief on the Commonwealth’s ability to conduct a free and equal election, particularly in light of the unique challenges facing voters and election officials over the next several months.

Plaintiffs’ claims and requested injunction not only implicate the relief Applicants currently seek in their ongoing lawsuit against the Secretary, but also poses a clear and direct threat to Applicants’ constitutional rights and legal interests, which the Secretary does not adequately represent. Thus, Applicants are entitled to intervene in this case as a matter of right under Rule 24(a)(2). In the alternative, Applicants should be granted permissive intervention pursuant to Rule 24(b). In accordance with Rule 24(c), a proposed Motion to Dismiss is attached as Exhibit A.

II. STATEMENT OF FACTS AND INTERESTS OF THE APPLICANTS

In 2019, Pennsylvania's General Assembly passed Act 77 of 2019, P.L. 552, which amended the Election Code in several ways, including by permitting all eligible voters to cast a ballot by mail. At the time it was passed, no one predicted that the world would soon find itself in the grip of a pandemic, but by the June 2, 2020 primary—the Commonwealth's first election conducted under the new legislation—COVID-19 was already spreading quickly through the country and threatening the lives of Pennsylvanians. It became clear months before the primary that the counties would have difficulty processing the resulting increased volume of mail ballot requests; voters would not receive their absentee ballots in a timely manner; and county processing backlogs and postal service delivery delays would disenfranchise thousands of voters who would not be able to return their mail ballots to their county boards of elections in time to have those ballots counted.

In response to the unprecedented demand for mail ballots and the disruptions to the election administration process caused by COVID-19, some county officials took the extraordinary step of seeking relief from Courts of Common Pleas to extend the ballot return deadlines, recognizing the need to ensure that lawful, eligible voters could have their votes counted despite the need for so many more voters to cast ballots by mail to ensure their own (and elections officials') safety, and related delays in processing mail ballot requests and in USPS pick-up and delivery. *See In*

re Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election, No. 2020-003416 (Delaware C.P. June 2, 2020); *In re: Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-02322-37 (Bucks C.P. June 2, 2020). The challenges posed by holding an election in the middle of a pandemic also required the Governor to issue an emergency order to protect voters on the evening before the primary by extending mail ballot return deadlines by a week in six counties affected by protest activity and COVID-19-related disruptions. *See* Ex. D.

In-person voting was also severely compromised. Counties encountered staffing shortages and fewer available polling locations due to the pandemic, creating congestion and long lines at the few polling locations that remained open, and confusion among voters. These events were entirely consistent with warnings issued by county officials in the weeks leading up to the election: at least a dozen counties proposed conducting the election entirely by mail and Montgomery County warned that its “polling places [would] be inadequately staffed or not staffed at all.” *See* Ex. E.

The general election is fast approaching, and the Commonwealth will likely see an even more dramatic increase in voter turnout—both in person and by mail—in this presidential election year. Neither the COVID-19 pandemic nor any of the

challenges that the county boards of elections faced in the primary will resolve themselves. In fact, the Director of the Centers for Disease Control and Prevention has cautioned that COVID-19 will be with us well into the fall, which means the November election will also occur in the midst of a public health crisis and will require additional safeguards to protect voters' constitutional rights. In addition, general elections are, by their nature, much higher-turnout elections than primaries. This high turnout, in combination with the continued challenges posed by the pandemic, will only further strain an already challenged elections system. The steps that Defendants are taking (that Plaintiffs challenge here) are meant to protect voters' access to the franchise under these extraordinary circumstances.

Applicant Michael Crossey, a 69-year-old retired schoolteacher, is one of those voters. Mr. Crossey is a registered Pennsylvania voter and resident of Allegheny County. Because of the heightened risks COVID-19 poses to voters his age, Mr. Crossey plans to request a mail ballot for the general election and is one of the petitioners in a lawsuit currently before the Pennsylvania Supreme Court that challenges the Commonwealth's failure to remove barriers to voting by mail and adopt safeguards to ensure safe and reliable access to the franchise during the COVID-19 pandemic. In particular, Mr. Crossey and his co-petitioners seek expanded options for returning their sealed ballots—namely, third party ballot delivery assistance—given the backlogs in processing mail ballot requests and

USPS's documented mail delivery delays. Joining Mr. Crossey in the state court lawsuit are Applicants Dwayne Thomas, a 70-year-old retired mineworker and registered voter in Fayette County; Irvin Weinreich, a disabled war veteran and retired maintenance worker registered to vote in Northampton County; and Brenda Weinreich, a retired textile factory worker, also registered in Northampton County.

Applicant Pennsylvania Alliance for Retired Americans, also a petitioner in the state court action, is incorporated in Pennsylvania as a 501(c)(4) nonprofit social welfare organization under the Internal Revenue Code. The Alliance has 335,389 members composed of retirees from public and private sector unions, community organizations, and individual activists, and is a chartered state affiliate of the Alliance for Retired Americans. The Alliance's mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work. The lack of adequate safeguards to ensure that the Alliance's members have sufficient access to reliable voting opportunities and to a free and equal election threatens the electoral prospects of candidates whom the Alliance and its members support to advance their mission. As such, the Alliance has a particular and distinct interest in Pennsylvania's election processes, especially as they relate to procedures affecting the delivery and submission of mail ballots, which many of its members aged 65 and over will rely upon to vote in the upcoming election. The Alliance has also expended and continues to invest significant time and resources, which it has

diverted from other organizational activities, into ensuring Pennsylvania's election processes are accessible to its members.

All individual Applicants plan to vote by mail due to the ongoing pandemic and require safe and reliable avenues to return their ballots that do not require them to risk disenfranchisement at the hands of the USPS's delayed and unpredictable delivery timelines, or to expose themselves to the health risks posed by the ongoing spread of COVID-19 by delivering their ballots in person. Yet Plaintiffs in this lawsuit demand the opposite: they seek to eliminate mail ballot drop-boxes from the already limited options for returning mail ballots, which would undermine the relief Applicants seek in their state court lawsuit and would all but ensure that Applicants and other Alliance members must risk either their health or potential disenfranchisement in order to cast a ballot by mail in November. The Alliance will also be forced to divert further resources from its ongoing mission and programs to re-educate their members on the permissible methods of voting by mail and assist them to exercise their right to vote safely.

The Complaint in this matter was filed on June 29, 2020. No hearings have been conducted at this time.

III. QUESTIONS PRESENTED

1. Whether Applicants are entitled to intervene as of right under Federal Rule of Civil Procedure 24(a)(2)?
2. In the alternative, whether the Court should grant Applicants permissive intervention under Federal Rule of Civil Procedure 24(b)?

IV. ARGUMENT

A fair and accessible electoral system is of central concern to the individual Applicants whose constitutional rights are at stake, and to the Alliance, whose mission would be compromised by Plaintiffs' requested injunction. Because Plaintiffs seek declaratory and injunctive relief limiting voters' ability to safely return their mail ballots, the resolution of this lawsuit will undoubtedly impact the Applicants' ability to protect their interests and, in the case of the Alliance, advance its mission in Pennsylvania. Furthermore, Applicants' interests are neither adequately represented by the County Defendants who are public officials charged with ministerial duties in connection with the conduct of elections, nor the Secretary who is adverse to the Applicants in their ongoing lawsuit challenging the Commonwealth's failure to ensure access to the franchise during the COVID-19 pandemic. As such, Applicants meet the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2); or, in the alternative, permissive intervention under Rule 24(b).

A. Applicants are entitled to intervene as a matter of right under Rule 24(a)(2).

Applicants easily meet the test applied in the Third Circuit to motions to intervene as of right. Specifically, (1) Applicants' motion is timely; (2) Applicants possess an interest in the subject matter of the action; (3) denial of Applicants' motion would impair or impede their ability to protect their interests; and (4) Applicants' interests are not adequately represented by the existing parties to the lawsuit. Fed. R. Civ. P. 24(a)(2); *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987).

1. Applicants' Motion to Intervene is timely.

Plaintiffs filed their Complaint on June 29, 2020; this Motion follows just over three weeks later. Indeed, Applicants seek to intervene in the very earliest stages of the lawsuit, when no hearings have been conducted before the Court, and only a single substantive motion has been filed by one of the Defendants in response to the Complaint, but that motion has not been fully briefed. And while the Court has granted Plaintiffs' request for a speedy hearing and expedited discovery schedule, discovery has yet to begin. Applicants intend to comply with all discovery deadlines, and the Court has yet to rule on outstanding motions to intervene. *See* Dkt. Nos. 83, 103 and 137. Accordingly, no party can legitimately claim that intervention by the Applicants would cause any prejudicial delay. Under these circumstances, the Court should find the Motion timely. *See, e.g., In re Cmty. Bank of N. Virginia*, 418 F.3d

277, 314 (3d Cir. 2005) (finding intervention motion timely where hearing schedule had been set but no hearing had yet been conducted).

2. Applicants have significant, legally cognizable interests in the substance of this litigation.

Applicants have significant and cognizable interests in protecting their rights (and the rights of the Alliance’s members) to vote by mail safely, through reliable means, particularly during a pandemic. “To justify intervention as of right, the applicant must have an interest ‘relating to the property or transaction which is the subject of the action’ that is ‘significantly protectable.’” *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 969 (3d Cir. 1998) (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971), superseded on other grounds by 26 U.S.C. § 7609). Yet applicants “need not possess an interest in each and every aspect of the litigation” to intervene. *Benjamin ex rel. Yock v. Dep’t of Pub. Welfare of Pa.*, 701 F.3d 938, 951 (3d Cir. 2012). “Instead, ‘[t]hey are entitled to intervene as to specific issues so long as their interest in those issues is significantly protectable.’” *Id.* (quoting *Mountain Top Condo. Ass’n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 368 (3d Cir. 1995)).

Here, the challenged procedures—providing secure drop-boxes for mail ballots or collecting mail ballots in locations other than the county board of elections offices—facilitate the use of mail ballots during the COVID-19 pandemic and provide safeguards that are necessary to protect against disenfranchisement as voters

(including Applicants) struggle to access the franchise in these unprecedented times. Plaintiffs seek to undo these modest accommodations in a last-ditch effort to limit voter participation for partisan advantage in the upcoming election, but they threaten Applicants' constitutional rights (including those of the Alliance's members) in the process, and fail to even acknowledge the global pandemic or its impact on the Commonwealth's electoral system. Plaintiffs' lawsuit not only misapplies Pennsylvania law (and the U.S. Constitution), it strikes at the heart of the Alliance's mission along with its efforts to ensure free and equal elections for its members throughout the Commonwealth.

As demonstrated by their ongoing lawsuit currently before the Pennsylvania Supreme Court, Applicants have expended and continue to invest significant time and resources into ensuring that they, among other members of the Alliance, can safely exercise their right to vote through the use of mail ballots. This interest is concrete, protectable, and substantial. *See e.g. Pierce v. Allegheny Cty. Bd. of Elections*, 324 F. Supp. 2d 684, 694-95 (W.D. Pa. 2003) ("The right of qualified electors to vote . . . is recognized as a fundamental right . . . [that] extends to all phases of the voting process . . . [and] applies equally to the initial allocation of the franchise as well as the manner of its exercise.") (quotation marks and citations omitted); *Orloski v. Davis*, 564 F. Supp. 526, 529 (M.D. Pa. 1983) (granting association's motion to intervene in case challenging election procedures).

3. The disposition of Plaintiffs' lawsuit may impair the Applicants' ability to protect their interests.

Applicants also meet the third factor of intervention as of right because the disposition of Plaintiffs' lawsuit may, as a practical matter, impair or impede Applicants' ability to protect their constitutional rights and may undermine the relief that they currently seek in their ongoing state court action. Fed. R. Civ. P. 24(a)(2).

When considering this factor, courts “look[] to the ‘practical consequences’ of denying intervention,” recognizing that even if the party seeking to intervene may vindicate its interests in some later litigation, that is not a sufficient basis to deny intervention under Rule 24(a)(2). *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977); *see also Mountain Top Condo*, 72 F. 3d at 368 (“proposed intervenors must also demonstrate that their interest *might* become affected or impaired, as a practical matter, by the disposition of the action in their absence”) (emphasis in original). Furthermore, proposed intervenors may satisfy this factor by showing that their rights may be affected by a proposed remedy, even if they would not be barred from bringing a later action in their names. *Brody By & Through Sugzdinis v. Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992) (“this factor may be satisfied if, for example, . . . the applicants’ rights may be affected by a proposed remedy” but “[a]n applicant need not, however, prove that he or she would be barred from bringing a later action or that intervention constitutes the only possible avenue of

relief”); *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1185 n. 15 (3d Cir. 1994) (similar).

Plaintiffs seek declaratory and injunctive relief that could limit the accessibility of mail ballots, secure drop-boxes, and even the collection of mail ballots by election officials anywhere outside the county board office, *see* Compl., Request for Relief ¶ F, in the midst of a pandemic where the alternatives—in-person voting or simply abstention from the voting process altogether—pose significant health risks and significantly burden Applicants’ constitutional rights. Plaintiffs’ request for an order that would enjoin county officials from collecting mail ballots from voters or in locations other than the county board of elections office, in particular, impedes Applicants’ efforts, through their state court action, to obtain third-party assistance in returning absentee ballots. If this Court were to grant Plaintiffs’ requested injunction, or the Defendants were to enter into a consent decree agreeing to such relief, it would not only impact Applicants’ interests in casting their own ballots, but it would also threaten the Alliance’s organizational mission and its ability to mobilize its members to advance common political goals. Even if Applicants could enforce their rights in a separate action following the disposition of this lawsuit, requiring them to do so would be contrary to the public interest in efficient handling of litigation. *Cf. Kleissler*, 157 F.3d at 974 (noting that postponing intervention may foster inefficiency). The letter and spirit of Rule 24 is best

promoted by granting Applicants' Motion for Intervention so that they may protect their interests in this action and avoid potentially duplicative litigation or inconsistent rulings.

4. Applicants' interests are not adequately represented by the Defendants.

Finally, Applicants' interests are not adequately represented by Defendants whose stake in this lawsuit is defined solely by their statutory—and in the case of the county boards, purely ministerial—duties to conduct elections. For this factor, the burden on Applicants is “minimal.” *See Dev. Fin. Corp. v. Alpha Hous. & Health Care, Inc.*, 54 F.3d 156, 162 (3d Cir. 1995). “Representation will be considered inadequate on any of the following three grounds: (1) that although the applicant’s interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant’s interests; (2) that there is collusion between the representative party and the opposing party; or (3) that the representative party is not diligently prosecuting the suit.” *Brody By & Through Sugzdinis*, 957 F.2d at 1123 (citing *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982)). Moreover, this requirement is satisfied if applicants show that representation “‘may be’ inadequate”; there is no requirement that applicants show it is, in fact, inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (quoting 3B J. Moore, *Federal Practice* 24.09-1(4) (1969)).

Defendants are the Secretary of State and the county boards of elections throughout the Commonwealth, which are responsible for “the conduct of primaries and elections in such count[ies],” Compl. ¶ 17, but do not represent Applicants’ interests in protecting their right to vote or ensuring sufficient access to the franchise for individual Applicants and the Alliance’s members. The Third Circuit has stated 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. Here, Applicants seek to ensure access to safe and reliable means to vote by mail, given the individual Applicants’ and Alliance’s members’ advanced age and heightened vulnerability to COVID-19, and oppose any attempt to limit ballot drop-off locations or ballot collection. Defendants, on the other hand, may find that providing drop-off locations is not an essential component of their duty to administer elections, or may even agree with restrictions on county officials collecting ballots. Indeed, the Secretary, who is the lead defendant in this case, is also a defendant in Applicants’ state court action in which they seek access to third party ballot collection or delivery assistance. Applicants’ interests, thus, are not adequately represented.

B. In the alternative, Applicants request that the Court grant them permission to intervene under Rule 24(b).

If the Court does not grant intervention as a matter of right, Applicants respectfully request that the Court exercise its discretion to allow them to intervene under Rule 24(b). The Court has broad discretion to grant a motion for permissive intervention when the Court determines that: (1) the proposed-intervenor's claim or defense and the main action have a question of law or fact in common, and that (2) the intervention will not unduly delay or prejudice the adjudication of the original parties' rights. *See* Fed. R. Civ. P. 24(b)(1)(B) and (b)(3); *Brody*, 957 F.2d at 1115; *League of Women Voters of Virginia v. Virginia State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2090678, at *5 (W.D. Va. Apr. 30, 2020) (granting permissive intervention in case involving voters' rights in Virginia). Even where courts find intervention as of right may be denied, permissive intervention might nonetheless be proper or warranted, as would be the case here. *See Hoots*, 672 F.2d at 1136.

Applicants easily meet the requirements of permissive intervention. First, Applicants and Defendants will inevitably raise common questions of law and fact in defending this lawsuit and the elections process, including questions involving the legality of the county boards' use of drop-box locations for the delivery of absentee ballots and the effect of such measures and Plaintiffs' requested relief on the constitutional rights of voters. Second, for the reasons set forth above, Applicants' Motion is timely, and, given the early stage of this litigation, intervention will not

unduly delay or prejudice the adjudication of the rights of the original parties. To the contrary, Applicants are prepared to proceed in accordance the Court's expedited schedule, and their intervention will only serve to contribute to the full development of the factual and legal issues before the Court.

V. CONCLUSION

For the reasons stated above, Applicants respectfully request that the Court grant their Motion to Intervene as a matter of right under Rule 24(a)(2), or, in the alternative, permit them to intervene under Rule 24(b). If granted permission to intervene under either provision, Applicants have submitted a proposed Motion to Dismiss in intervention for filing in accordance with the Federal and Local Rules of Civil Procedure.

Dated: July 24, 2020

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CERTIFICATE OF SERVICE

I, Justin T. Romano, hereby certify that on July 24th, 2020, I caused a true and correct copy of the foregoing Memorandum of Points and Authorities in Support of Proposed Intervenors' Motion to Intervene to be served on counsel of record for Plaintiffs and Defendants listed on the docket via the Court's ECF system.

/s/ Justin T. Romano
Justin T. Romano