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

DONALD J. TRUMP FOR PRESIDENT, INC., *et al.*, Plaintiffs, v. KATHY BOOCKVAR, in her capacity as Secretary of the Commonwealth of Pennsylvania, *et al.*, Defendants.	Civil Action No. 2:20-cv-00966-NR Judge J. Nicholas Ranjan

[PROPOSED] REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE OF PROPOSED DEFENDANT-INTERVENORS CITIZENS FOR PENNSYLVANIA'S FUTURE AND SIERRA CLUB

Plaintiffs' Response in Opposition to Intervention (ECF 224) grossly mischaracterizes the facts and is wrong on the law. Proposed Intervenors Citizens for Pennsylvania's Future ("PennFuture") and Sierra Club (collectively "Applicants") are, accordingly, compelled to submit this reply in support of their Motion to Intervene as Defendants (ECF 137).

Plaintiffs' response manufactures an onerous bar for intervention, misrepresents the facts about Proposed Intervenors' interests in this litigation, and asks the Court to apply the wrong standard for Article III standing. Plaintiffs indeed altogether ignore the concrete and recognizable interests PennFuture and Sierra Club catalogued in their intervention brief. These include preventing: (1) the de-legitimization of vote-by-mail in Pennsylvania, (2) the limitation of safe, alternate means of returning mail ballots; (3) the elimination of longstanding measures under Pennsylvania law that protect Pennsylvania voters against intimidation and harassment by outside interlopers; and (4) the imposition of purported constitutional barriers against proactive steps government actors can take to support, apply, and enforce state election laws and regulations. *See* ECF 138 at 4-5, 8-17. Applicants have already meaningfully advanced these interests in this litigation by filing a Motion to Dismiss which, while seeking the same relief as Defendants, presented unique arguments that serve the interests that have led, and entitle, Applicants to participate in this lawsuit. ECF 219. For the reasons set forth here and in their moving brief (ECF 138), PennFuture and Sierra Club have all necessary standing and satisfy the requirements for intervention and the Court should, respectfully, grant Applicants' Motion to Intervene.

I. APPLICANTS MEET THE STANDARD FOR INTERVENTION AS OF RIGHT

While the parties agree on the relevant requirements for intervention as of right under Rule 24(a)(2) (*see* ECF 224 at 10), Plaintiffs ignore that the test is construed to favor intervention, which is wholly merited here. *Commonwealth of Pennsylvania v. President United States of Am.*, 888

F.3d 52, 59 (3d Cir. 2018) (citing *Kleissler v. United States Forest Service*, 157 F.3d 964, 970 (3d Cir. 2018) .

As detailed in their brief in support of intervention, PennFuture and Sierra Club have a significant protectable interest in Plaintiffs' suit. Applicants have expended thousands of dollars and hours educating and encouraging voters to cast ballots by mail, focusing such efforts on voters who are most vulnerable to the effects of the ongoing Covid-19 pandemic, and most in need of broader and easier access to the democratic process. ECF 138 at 2-3, 6-7. These interests are directly at risk in this lawsuit. Among other things, the injunctive relief that Plaintiffs seek (*see* ECF 232 at 70-72) is directly contrary to Proposed Intervenors' goals of expanding participation in the political process for such underrepresented voters. *See* ECF 138 at 12-13; *see also Pennsylvania*, 888 F.3d at 59 (intervention focuses on practical consequences of the litigation). Applicants' interests in expanding the political access of populations dually vulnerable to Covid-19 and climate change are, by themselves, well recognized legal interests sufficient to warrant intervention as of right. *See id.* 57-58, 60; *Texas v. United States*, 798 F.3d 1108, 1111 (D.C. Cir. 2015).

Nor, contrary to Plaintiffs' misrepresentation, do PennFuture and Sierra Club assert "an alleged impairment of what they believe the General Assembly should have permitted in terms of mail-in voting." ECF 224 at 14. To the contrary, Applicants' position is that the relief Plaintiffs seek would be *inconsistent* with the terms and intent of the laws as written, in a manner that would specifically and particularly injure the interests Applicants seek to advance. Plaintiffs do not cite any support for their novel proposition that "impairment does not exist when the relief sought is merely the enforcement of the laws as written," *id.*, nor could they given their inconsistent (and incorrect) assertion that, at least as to some of the at-issue provisions of Pennsylvania's election

code, it is *Plaintiffs* who seek to enforce what they believe the Commonwealth's laws already require.

II. APPLICANTS MEET THE STANDARD FOR PERMISSIVE INTERVENTION

Plaintiffs also err on both the facts and the law with respect to Applicants' alternative request to be permitted to intervene as a matter of the Court's discretion. Misleadingly quoting from a case in a different posture (*see* ECF 224 at 17),[1] Plaintiffs, unsurprisingly, ignore the lenient intervention standard applied in the Third Circuit under Rule 24(b), pursuant to which Applicants' motion should be granted. *See, e.g., Audi of Am., Inc. v. Bronsberg & Hughes Pontiac, Inc.*, 2017 WL 2118285, at *2 (M.D. Pa. May 16, 2017) (granting permissive intervention and noting that "decisions regarding requests for permissive joinder rest in the sound discretion of the court and will not be disturbed absent an abuse of that discretion") (citing *Hoots v. Commonwealth of Pennsylvania.*, 672 F.2d 1133, 1135 (3d Cir. 1982)).

Where, as here, a party that seeks to intervene establishes that the defense they seek to assert "shares with the main action a common question of law or fact," Rule 24(b) commits intervention to the Court's discretion, exercised in light of "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B), 24(b)(3). Applicants will cause no such delay or prejudice. Contrary to Plaintiffs' unfounded

[1] Plaintiffs cite *Brody v. Spang*, 957 F.2d 1108 (3d Cir. 1992), but whether the proposed intervenors in that case had a cognizable interest depended entirely on a legal question—whether a particular high school graduation ceremony constituted a designated public forum—which the Third Circuit directed the District Court to decide on remand. *Id.* at 1120. The Third Circuit stated that if the District Court determined that the high school graduation ceremony was not a public forum, the proposed intervenors "would have only a minimal interest in the litigation" and it would "likely be within the district court's discretion to deny permissive intervention as well." *Id.* at 1124. It is nonsensical to suggest that this *dicta* means that a Court should (or must) deny permissive intervention every time it finds the requirements of Rule 24(a) not met. Plaintiffs' theory would entirely elide the difference between intervention as of right and permissive intervention, obviating the need for Rule 24(a) *and* (b).

assertion (*see* ECF 224 at 17), Applicants have already expressly advised the Court and the other parties that they "do not propose to add a counterclaim or expand the questions presented by the Complaint." ECF 138 at 18. Further, Applicants have already strictly abided by the schedule the Court has set, and they will continue to do so. Applicants' participation in this litigation will thus neither delay nor prejudice Plaintiffs' or Defendants' rights, but instead ensure that the important interests uniquely served by Applicants are protected.

III. PLAINTIFFS' ARTICLE III AND PROCEDURAL ARGUMENTS FAIL

Plaintiffs newly-minted Article III standing argument (*see* ECF 224 at 5-9), and their related, albeit futile, challenge to the form of Applicants' Motion to Intervene (*see id.* at 2-5), are equally misguided. As Plaintiffs concede (*see id.* at 6 n.5), it is black-letter law that intervenors who do not seek different relief from the named defendants, nor seek any affirmative relief from Plaintiffs, are not required to show independent Article III standing to participate in litigation. *See Pennsylvania*, 888 F.3d at 57 n.2 (where intervenors seek same relief as plaintiffs "they need not demonstrate Article III standing") (citing *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017)). Applicants, like Defendants, seek to dismiss Plaintiffs' suit in its entirety; they thus seek the identical relief already asserted, and need not separately establish their independent satisfaction of Article III.[2]

[2] Even if Applicants were required to establish Article III standing to assert their defenses against Plaintiffs' arguments, the injury that Plaintiffs' requested relief would exert on Applicants' concrete and particularized interest in expanding political and electoral access for underrepresented and vulnerable Pennsylvania citizens would support such standing. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("perceptibly impaired" ability to fulfill organizational mission constitutes a "concrete and demonstrable injury"); *League of Women Voters v. Newby*, 838 F.3d 1, 8-9 (D.C. Cir. 2016); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040-41 (9th Cir. 2015); *Arcia v. Fla. Secretary of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014).

Plaintiffs' last-ditch attempt to conjure a procedural objection to Applicants' participation similarly fails. Applicants' detailed Motion to Intervene and Motion to Dismiss more than satisfy Rule 24(c). Applicants' proposed intervention is entirely distinct from the situation presented in *SEC v. Investors' Security Leasing Corp.*, 610 F.2d 175 (3d Cir. 1979), in which a proposed intervenor filed no motion, but instead simply a claim form, *id.* at 177-78, or *Dickerson v. U.S. Steel Corp.*, 582 F.2d 827 (3d Cir. 1978), in which the proposed intervenors were witnesses who had testified at trial and only afterwards raised the prospect of participating as parties, *id.* at 828. *See Assoc. Builders & Contrs. of W. Pa. v. County of Westmoreland*, 2020 WL 571691, at *2-3 (W.D. Pa. Jan. 21, 2020) (holding that motion to intervene complied with Rule 24(c) because it gave sufficient notice to other parties of the unique interests proposed intervenors would advance). Even assuming some purported detail was lacking from Applicants' pleadings (there is not), there is no principled basis for dismissal on such grounds—let alone in a case of this public importance. *See, e.g., id.* at *2 (noting that, in a survey of intervention decisions, "it is rare that only procedural grounds are proffered for denial") (quoting *United States ex rel. Frank M. Sheesley Co. v. St. Paul Fire & Marine Ins. Co.*, 239 F.R.D. 404, 410 (W.D. Pa. 2006)).[3]

For these reasons and those set forth in their moving brief (ECF 138), the Court should grant Applicants' Motion to Intervene and consider the grounds for dismissal set forth in Applicants' Motion to Dismiss (ECF 219).

[3] As Exhibit 1 to Plaintiffs' Opposition makes clear, ECF 224-1, counsel for Applicants attempted to meet and confer about their forthcoming Motion to Dismiss in accordance with the Court's practices and procedures. This communication was sent late in the day because Applicants' counsel were making every effort to comply with the expedited schedule that Plaintiffs themselves requested. Counsel for Plaintiffs did not respond to that communication, and notably made no mention of it until filing their opposition to the Motion to Intervene.

Dated: July 30, 2020

Respectfully submitted,

/s/ Myrna Pérez

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CERTIFICATE OF SERVICE

I, Eliza Sweren-Becker, certify that I served the foregoing REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE OF PROPOSED DEFENDANT-INTERVENORS CITIZENS FOR PENNSYLVANIA'S FUTURE AND SIERRA CLUB sent automatically by CM/ECF on the following counsel who are registered as CM/ECF filing users who have consented to accepting electronic service through CM/ECF:

All counsel of record

Dated: July 30, 2020

Respectfully submitted,
/s/ Eliza Sweren-Becker

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