

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

THE HONORABLE MIKE KELLY,
SEAN PARNELL, THOMAS A.
FRANK, NANCY KIERZEK, DEREK
MAGEE, ROBIN SAUTER,
MICHAEL KINCAID, and WANDA
LOGAN,

Petitioners,

v.

COMMONWEALTH OF
PENNSYLVANIA, PENNSYLVANIA
GENERAL ASSEMBLY,
HONORABLE THOMAS W. WOLF,
and KATHY BOOCKVAR,

Respondents,

DNC SERVICES
CORP./DEMOCRATIC NATIONAL
COMMITTEE

Docket No. 620 M.D. 2020

**MEMORANDUM OF LAW IN
SUPPORT OF OPPOSITION TO
MOTION TO INTERVENE**

Filed on behalf of Petitioners,
The Honorable Mike Kelly, Sean
Parnell, Thomas A. Frank, Nancy
Kierzek, Derek Magee, Robin Sauter,
Michael Kincaid, and Wanda Logan

Counsel of Record for Petitioners:

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Proposed
Intervenor-
Respondent.

SUMMARY OF ARGUMENT

DNC Services Corporation/Democratic National Committee (“Proposed-Intervenors”) seek to help the Commonwealth defend the constitutionality of Act 77 based on their stated interest to prevent disenfranchisement and ensure that candidates receiving the most votes in an election take office. Because this interest is shared by virtually all citizens, and adequately represented by Petitioners and Respondents, Proposed-Intervenors fail to meet the threshold criteria for intervention. Under controlling case law of this Court and the Supreme Court, such interests are common to all and are not permissible grounds for intervention.

Proposed-Intervenors’ motion should also be denied for the additional reason that the Commonwealth will adequately defend the constitutionality of Act 77. As this Court held in *In re Philadelphia Health Care Trust*:

[T]here is only one "Sovereign", and, that Sovereign is the Commonwealth of Pennsylvania. When engaged in litigation before this Court, the Sovereign must be of one mind, and, must speak with one voice. When the Commonwealth acts to protect the public interest, it does so by its Attorney General.

872 A.2d 258, 262 (Pa. Commw. Ct. 2005).

LEGAL STANDARD

Proposed-Intervenors’ motion is governed by Rules 2327 and 2329 of the Pennsylvania Rules of Civil Procedure. Proposed-Intervenors, as a threshold matter, must demonstrate that they satisfy one of the criteria for intervention set

forth in Rule 2327. Petitioners rely on Rule 2327(4), which requires them to demonstrate that the determination of this action “may affect any legally enforceable interest” that they possess. In order to satisfy this requirement, Proposed-Intervenors must establish that they have a legal or equitable right that is not shared with the public, or a cause of action that will be affected by the proceedings. *Acorn Dev. Corp. v. Zoning Hearing Bd. Of Upper Merion Twp.*, 523 A.2d 436, 437-38 (Pa. Commw. Ct. 1987). It is standard practice in Pennsylvania for courts to deny intervention when proposed-intervenors advance only shared interests. *See id.* (“The [proposed intervenor’s] interest is an interest shared by the community, and is not sufficient to satisfy Rule 2327(4)”); *see also In re Philadelphia Health Care Tr.*, 872 A.2d 258, 262 (Pa. Commw. Ct. 2005).

Even when a proposed-intervenor satisfactorily establishes that they meet the standard under Rule 2327, the Court may still deny intervention under its discretion if “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 adjudication of the rights of the parties.” Pa. R. Civ. P. 2329; *see also Cherry Valley Assocs. v. Stroud Twp. Bd. of Supervisors*, 530 A.2d 1039, 1041 (Pa. Commw. Ct. 1987).

ARGUMENT

I. **The Democratic National Committee fails to advance a legally enforceable interest.**

Proposed-Intervenors' motion should be denied because the Democratic National Committee's interest in "preventing the disenfranchisement of its members, and in ensuring that its candidate members who obtained the most votes in their respective elections can take office" is shared with virtually all citizens, and adequately represented by both Petitioners and Respondents. 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.'" *Biester v. Thornburgh*, 409 A.2d 848, 851 (Pa. 1979) (quoting *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 281 (Pa. 1975)). Courts consistently deny 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 at 262; *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*, 636 A.2d 310, 313 (Pa. Commw. Ct. 1994); *Acorn Dev. Corp. v. Zoning Hearing Bd. of Upper Merion Twp.*, 523 A.2d 436, 437-38 (Pa. Commw. Ct. 1987).

Here, Proposed-Intervenors advance an interest in preventing the disenfranchisement of its members (qualified Pennsylvania voters) and ensuring

that its member-candidates (qualified Pennsylvania candidates) receive all ballots cast lawfully for them. Because virtually every citizen of Pennsylvania shares this interest, including Petitioners – which include qualified Pennsylvania voters and candidates protecting the same interest as Proposed-Intervenors – and Respondents, which enforce the public interest of all Pennsylvanians.

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 (Pa. Commw. Ct. 1984), this Court denied intervention by a political party (the Socialist Workers Party) representing voters and candidates. The Court noted that the proposed-intervenors “could assert no legally enforceable interests ... [and] can assert only an interest in having election laws properly applied, an interest [] share[d] in common with every other member of the electorate.” *Id.* at 541. In making its decision, the Court recognized that it “will no doubt have an effect on the outcome of the election,” yet still denied intervention. Respondents, notably, failed to make any mention of *Fraenzel* in their Memorandum of Law.

In fact, Proposed-Intervenors do not once in their Memorandum of Law cite to any determinative legal authorities under Pennsylvania state law that support or mandate their right to intervene under Rule 2327. Proposed-Intervenors first note – in a broad, generalized manner, that courts have in certain situations allowed

political party committees to intervene in lawsuits. In support of this general assertion, Proposed-Intervenors cite to a handful of federal matters reliant on the Federal Rules of Civil Procedure, which have nothing more than persuasive bearing in this action.

Next, Proposed-Intervenor notes that it has recently been granted intervention “in Pennsylvania and beyond,” but presents no support for why intervention was granted in the cases it references or how the reason for granting intervention in those cases pertain to this action. *Donald J. Trump for President v. Boockvar*, 4:20-cv-02078, ECF No. 72 (W.D. Pa. Nov. 12, 2020), is a federal matter – reliant on the Federal Rules of Civil Procedure and not the Pennsylvania Rules of Civil Procedure – and intervention was only granted under the Court’s discretionary authority (*i.e.*, permissive intervention pursuant to Fed. R. Civ. P. 24). As the Court itself noted in that action, “A District Court’s decision to allow permissive intervention is ‘highly discretionary.’” *Id.* (quoting *U.S. v. Territory of Virgin Islands*, 748 F.3d 514, 519 (3d. Cir. 2014)).

Petitioners also refer to three Court of Common Pleas actions in which they were granted intervention. *See* Oral Order, *Donald J. Trump for President, Inc. v. Montgomery Cty. Bd. of Elections*, No. 2020-18680 (Pa. Com. Pl. Nov. 10, 2020); Oral Order, *Donald J. Trump for President, Inc. v. Phila. Cty. Bd. of Elections*, Nos. 201100874, 201100875, 201100876, 201100877, & 201100878 (Pa. Com. Pl.

Nov. 13, 2020); Oral Order, *Donald J. Trump for President, Inc. v. Bucks Cty. Bd. of Elections*, No. 2020-05786 (Pa. Com. Pl. Nov. 17, 2020). It is not clear that any party objected to intervention in those cases.

For the aforementioned reasons, Proposed-Intervenors fail to establish the threshold criterion required for intervention in this action and this Court should deny their motion.

II. Proposed-Intervenors’ interests are the same as the Commonwealth’s and are already adequately represented.

Even if Proposed-Intervenors could somehow manage to establish the threshold criterion under Rule 2327, this Court should still deny intervention under Rule 2329(2) because their “interest[s] are already adequately represented [by the Commonwealth] in this action.” Pa.R.Civ.P. 2329(2). Interests such as those proffered Proposed-Intervenors’ in enforcing election laws and maintaining the status quo are already more than adequately represented by the Commonwealth because “it is the Commonwealth’s duty to defend the constitutionality” of its laws, *Robinson Township*, 2012 WL 1429454, at *4, and because “the substance of [Respondents’] position[] will cover the substance of the positions proposed by [Proposed-Intervenors],” *Pa. Assoc. of Rural and Small Schools v. Casey*, 613 A.2d 1198, 1201 (Pa. 1992).

Proposed-Intervenors do not, and cannot, in any way assert that Respondents in this action will not seek to enforce Pennsylvania’s election laws and procedures

or uphold their constitutionality. Respondents, in a plethora of cases this year, have aggressively defended the constitutionality of the Election Code as amended by Act 77. *See, e.g., In re November 3, 2020 General Election*, No. 149 MM 2020 (Pa. 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, ECF No. 72 (W.D. Pa. 2020). Because Proposed-Intervenors have provided no reason to suggest that Respondents' interests diverge from theirs in any meaningful way for the purposes of this lawsuit, this court should also deny their Motion to Intervene under Rule 2329(2).

CONCLUSION

For the foregoing reasons, Proposed-Intervenors' Motion to Intervene should be should be denied.

Respectfully submitted,

OGC Law, LLC

/s/ Gregory H. Teufel

Gregory H. Teufel, Esq.

Attorney for Petitioners

CERTIFICATE OF COMPLIANCE

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

Date: November 24, 2020

/s/ Gregory H. Teufel
Gregory H. Teufel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all counsel of record on November 24, 2020 by this Court's electronic filing system.

/s/ Gregory H. Teufel
Gregory H. Teufel