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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin Weinreich, Brenda Weinreich, and the Pennsylvania Alliance for Retired Americans, Petitioners, v. Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries, Respondents.	No. 266 MD 2020

MEMORANDUM IN OPPOSITION TO SENATORS' AND REPUBLICAN COMMITTEES' APPLICATIONS FOR LEAVE TO INTERVENE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Both sets of proposed intervenors have clearly expressed their desire to roll the dice, in the midst of a global pandemic, and conduct an election without any additional accommodations which could protect the right to vote, notwithstanding the pleas of voters and county election officials. But their stake in this lawsuit amounts to nothing more than a generalized interest in enforcement of the laws, insufficient to meet the standard set forth in Pennsylvania Rule of Civil Procedure 2327(4), which requires that intervenors have a "legally enforceable interest" that will be affected by the determination in this action.

Senators Joseph Scarnati, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader (collectively, the "Senators") seek to intervene in their official capacities and attempt to invoke the General Assembly's constitutional authority, but present no evidence to suggest that they are authorized to represent the Senate, let alone the legislative body as a whole. And even if they were, the General Assembly has no role in implementing, enforcing, or administering the Commonwealth's Election Code. "[A] public law, after enactment, is not the [legislature's] any more than it is the law of any other citizen or group of citizens" who are governed by it. *Newdow v. U.S. Congress*, 313 F.3d 495, 499-500 (9th Cir. 2002).

The Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee, (collectively, the "Republican Committees") fare no better. They assert an interest that is akin to the generic desire to enforce laws, which is also shared by the entire citizenry. The Republican Committees allege that Petitioners' requested relief—which seeks to provide safeguards to ensure all Pennsylvanians have access to a free and equal election—would change the competitive environment in unspecified ways, but otherwise fail to explain how they would be affected, competitively or otherwise, by the expansion of voting

opportunities which would benefit voters of all political affiliations. Pennsylvania courts have consistently interpreted Pa.R.C.P. 2327(4) to require an interest that "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)). Without more, the Republican Committees' stated interest in helping the Respondents "uphold orderly free and fair elections," Republican Committees' Application at 2, is not a permissible ground for intervention. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016).

Even if the Senators and the Republican Committees did have a legally enforceable interest sufficient to intervene, this Court should nonetheless exercise its discretion to refuse intervention under Pa.R.C.P. 2329(2) and 2329(3). Ultimately, "it is the Commonwealth's duty to defend the constitutionality" of its laws, and proposed intervenors present no argument to suggest that Respondents will fail to do so in this case. *Robinson Twp. v. Commonwealth*, No. 284 M.D. 2012, 2012 WL 1429454, at *4 (Pa. Commw. Ct. Apr. 20, 2012). Proposed intervenors' involvement will only duplicate and prolong litigation proceedings. Because they advance generic interests that can be asserted by just about every interested Pennsylvanian, and, in any event, are adequately represented by Respondents, the Senators' and the Republican Committees' applications for intervention should be denied.

II. BACKGROUND

On April 22, 2020, Petitioners filed this lawsuit challenging the Commonwealth's failure to provide its citizens with sufficient access to a free and equal election during the COVID-19 pandemic, in violation of Petitioners' constitutional rights. Pet. ¶ 2. Petitioners alleged that the pandemic has upended virtually all aspects of daily life in Pennsylvania, including the staffing and operation of polling places. *Id.* ¶¶ 19–32. Staffing shortages and difficulty securing polling

locations, among other complications created by the pandemic, will require counties to drastically consolidate polling sites—and by extension the voters who use them—into fewer locations. *Id.* ¶ 22. Meanwhile, to stem the spread of the disease, the Governor encouraged residents to stay at home, practice social distancing, and vote-by-mail. *Id.* ¶ 7.

Individual Petitioners are Pennsylvania voters who, because of their advanced age, are especially vulnerable to severe illness from COVID-19. Pet. ¶¶ 12–15. Recognizing that the in-person voting process imposed significant health risks and no longer presented a reasonably accessible voting option for them, Petitioners joined the over one million Pennsylvanians who have decided to vote absentee or through mail-in voting (collectively, "mail voting" or "mail ballots") in the June 2 primary. *Id.* But it soon became apparent that the effects of COVID-19 threatened to obstruct their path to the franchise under the Commonwealth's current mail voting procedures. First, the U.S. Postal Service's operational difficulties during the pandemic (along with county backlogs in processing ballot requests) has resulted in delivery delays that significantly increase the risk that voters will not receive their mail ballots in a timely manner, and that their timely submitted ballots will not be delivered by 8 p.m. on Election Day. *Id.* ¶¶ 19–33; Mem. App. Prelim. Inj. at 9–11. Second, voters who do not maintain a supply of stamps at home must venture out to a post office or other establishment that sells stamps in order to mail their ballots, or purchase stamps online at an increased cost and sufficiently in advance of the election to allow for delivery of the stamps—which, too, is delayed because of COVID-19—and then delivery of their ballots. Pet. ¶¶ 48–52; Mem. App. Prelim. Inj. at 28–29. Third, voters who seek to avoid the vagaries of mail delivery must risk their health and visit their local county board of elections office to deliver their ballots in person because Pennsylvania law prohibits them from seeking delivery assistance from third parties. Pet. ¶¶ 42–51; Mem. App. Prelim. Inj. at 18–19.

And, finally, assuming the voter's ballot arrives on time, they are subject to undefined ballot verification rules and procedures, including signature matching, that threaten to disenfranchise voters arbitrarily, and without notice or an opportunity to cure. Pet. ¶¶ 53–59.

Without any reasonably accessible and safe voting options during the COVID-19 pandemic, Petitioners asked this Court to declare as unconstitutional the Commonwealth's failure to implement additional adequate safeguards to ensure a free and equal election and to protect the right to vote, including providing prepaid postage on mail ballots; providing additional emergency procedures to allow ballots submitted by mail to be delivered after 8:00 p.m. on Election Day—to the extent that such relief does not trigger Act 77's non-severability clause; allowing third parties to provide ballot delivery assistance; and providing uniform guidance and training to election officials that engage in signature matching as a means to verify mail ballots. Mem. App. Prelim. Inj. at 34–35; Pet. at 34–35 (Prayer for Relief).

On May 8, 2020, a day after Governor Wolf extended the stay-at-home order until June 4, Petitioners filed an application for preliminary injunction seeking limited, emergency relief narrowly tailored to implement procedures that can be adopted with minimal, if any, disruption to the election administration and voting process. Specifically, Petitioners' application requested an injunction requiring Respondents to implement the following procedures: (1) providing emergency write-in ballots for all voters who request mail ballots, designate all ballots submitted by mail as emergency ballots, and count all emergency ballots if postmarked by Election Day and received by the seventh day after the election; and (2) preliminarily enjoin Pennsylvania laws prohibiting third parties from providing assistance in delivering mail ballots. Mem. App. Prelim. Inj. at 34–35.

Shortly after Petitioners filed this lawsuit, a group of four organizations and a Pennsylvania voter filed a petition for review before the Pennsylvania Supreme Court against the same Respondents named in this case. Petition, *Disability Rights Pennsylvania, et al., v. Boockvar, et al.*, No. 83 MM 2020 (April 27, 2020). The Supreme Court petition challenged the constitutionality of the ballot receipt deadline, as applied during the public health emergency related to COVID-19, and sought to enjoin its enforcement for ballots postmarked by Election Day and received up to seven days after the election. *Id*. at 61-62. Both the Senators and the Republican Committees filed applications for intervention in the Supreme Court proceedings, and the Respondents filed preliminary objections. On May 15, the Supreme Court granted Respondents' preliminary objections and denied the Senators and Republican Committees' applications for intervention as moot. Order, *Disability Rights Pennsylvania, et al., v. Boockvar, et al*., No. 83 MM 2020 (May 15, 2020). Although the Supreme Court Order did not explain the reasons for its decision, Justice Wecht's concurring statement "expressed . . . skepticism that a single chamber of [Pennsylvania's] bicameral legislature would have standing to intervene in an action of this nature." Concurring Statement at 2, *Disability Rights Pennsylvania, et al., v. Boockvar, et al*., No. 83 MM 2020 (May 15, 2020). Specifically, Justice Wecht concluded that the House and Senate Intervenors "cannot speak for the General Assembly as a whole" and expressed doubt that such parties could be considered '"person[s]' with a 'legally enforceable interest' permitted to intervene under Rule 2327 in an action challenging the constitutionality of a Pennsylvania statute." *Id.* at 6.

III. LEGAL STANDARD

The proposed intervenors' applications are governed by Rules 2327 and 2329 of the Pennsylvania Rules of Civil Procedure. As a threshold matter, proposed intervenors must first demonstrate that they satisfy one of the threshold criteria set forth in Rule 2327. In this case, they

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. To meet this criterion, the 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). Furthermore, Pennsylvania courts have consistently denied intervention where the proposed intervenors advanced 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 falls into one of the four categories set forth under Rule 2327, the Court may deny intervention, within its discretion, 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 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).

IV. ARGUMENT

A. The Senators and the Republican Committees have no legally enforceable interests.

The Senators and Republican Committees misstate Petitioners' claims while failing to advance a legally enforceable interest in the actual dispute before the Court. The Senators rely primarily on the legislature's role in passing laws but ignore that—both as individual Senators and even as a complete legislative body (which is not how they proceed here)—they lack authority to enforce the General Assembly's lawmaking powers. The Republican Committees similarly point to unspecified interests in maintaining the current competitive structure but ultimately seek to

enforce the current laws and maintain the status quo. Both applications for intervention are animated in part by the mistaken beliefs that Petitioners' lawsuit seeks to undo the voting procedures introduced by Act 77, and that the proposed intervenors' desire to enforce the Act confers a legally enforceable interest. Neither is correct and proposed intervenors' applications must be denied as a result.

1. Petitioners have not challenged any laws that are subject to Act 77's jurisdictional or non-severability provisions.

Contrary to proposed intervenors allegations, Petitioners' have not challenged the constitutionality of any laws enacted through Act 77, nor do they seek to dismantle its "grand bipartisan compromise." Republican Committees' App. ¶ 5. Instead, Petitioners challenge the Commonwealth's failure to provide any reasonably accessible and safe voting options for elections that will take place during the COVID-19 pandemic as required by the Pennsylvania Constitution. *See*, *e.g.*, Pa. Const. art. I, § 5. Petitioners' requested relief, moreover, does not require the Court to enjoin any provision of Act 77 because Petitioners seek additional, emergency procedures to protect the constitutional rights of Pennsylvanians to participate in a free and equal election, and which supplement, rather than supplant, existing mail voting process. *See* Mem. App. Prelim. Inj. Part IV.A.5 .

To be sure, Petitioners also challenge Pennsylvania's long-standing ban on third party assistance in delivering voters' ballots; the failure to provide pre-paid postage for absentee ballots; and absence of signature matching guidelines and training for election officials engaged in ballot verification, but none of these claims implicate Act 77's exclusive jurisdiction or non-severability provisions. Section 1306 of Pennsylvania's Election Code has long required that ballots be submitted only by the voter. *See* Art. XIII, § 1306 of Act of Jun. 3, 1937, P.L. 1333, No. 320; *see also In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223 (Pa. 2004)

(finding the Election Code prohibits third party hand delivery of absentee ballots). Article XIII-D of Act 77 simply reproduces verbatim the same prohibition on ballot delivery assistance but in a different section of the Election Code, this time titled Section 1306-D, to clarify its application to mail-in ballots.

Section 1306-D's restatement of pre-existing law, however, does not amount to an "addition" or "amendment" that triggers Act 77's exclusive jurisdiction provision. Indeed, Pennsylvania's Statutory Construction Act confirms that "[w]henever a section or part of a statute is amended . . . the portions of the statute which were not altered by the amendment shall be construed as effective from the time of their original enactment . . . ." 1 Pa.C.S. § 1953; *see also* 1 Pa.C.S. § 1961 ("Whenever a statute reenacts a former statute, the provisions common to both statutes shall date from their first adoption."). Under the Statutory Construction Act, the ban on ballot delivery assistance—whether it appears in Section 1306 or 1306-D of the Election Code—remains a part of the law in which it was originally enacted, not Act 77. *Cf.* 1 Pa.C.S. § 1962 ("Whenever a statute is repealed and its provisions are at the same time reenacted in the same or substantially the same terms by the repealing statute, the earlier statute shall be construed as continued in active operation. All rights and liabilities incurred under such earlier statute are preserved and may be enforced."). To hold otherwise would require the Court to apply different jurisdictional rules to claims challenging the same restriction on third party ballot delivery, depending on whether the claim arises under Section 1306 or 1306-D, and would violate yet another rule of construction, 1 Pa.C.S. § 1932, which requires that laws pertaining to the same subject matter should be construed as one. *Royal Indemn. Co. v. Adams*, 455 A.2d 135, 141 (Pa. 1983) (citing *Girard Sch. Dist. v. Pittenger*, 392 A.2d 261 (Pa. 1978)).

Petitioners' claims concerning the Commonwealth's failure to provide pre-paid postage on mail ballot return envelopes and the lack of signature matching training or uniform standards are even farther removed from Act 77. In fact, no Pennsylvania statute requires voters to foot the bill for postage—the law simply requires that postage be pre-paid before a mail ballot is submitted to be voted, 25 Pa.C.S. §§ 3146.6(a), 3150.16(a)—and the current, non-uniform, error-prone signature matching efforts are not mandated by statute. Any order granting Petitioners' requested relief in the form of pre-paid postage on ballot return envelopes or signature matching training and uniform standards would neither supplant any existing law, nor implicate Act 77's jurisdictional or non-severability provisions.

2. The Senators' interests in seeing laws enforced is insufficient for intervention.

The Senators, as individual legislators, have no legally enforceable interest in seeing laws implemented. They lack authorization to represent the General Assembly—in fact, it is not clear that they have been authorized to represent even the Senate—and cannot invoke powers belonging to the General Assembly as a whole. "Principles of legislative standing are relevant" to determining the scope of the Senators' legally enforceable interest "for the purposes of Rule No. 2327(4)." *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Human Servs.*, 225 A.3d 902, 911 (Pa. Commw. Ct. 2020). And Pennsylvania courts have made clear that "a legislator lacks standing where he or she has an indirect and less substantial interest in conduct outside the legislative forum which is unrelated to the [process of voting on and approving a bill], and akin to a general grievance about the correctness of governmental conduct." *Markham*, 136 A.3d at 145.

A federal court rejected a similar attempt by a subset of the Pennsylvania General Assembly to initiate litigation by invoking the General Assembly's institutional powers, and the court's reasoning is instructive. In *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa.), *appeal dismissed sub nom. Corman v. Sec'y Commonwealth of Pennsylvania*, 751 F. App'x 157 (3d Cir.

2018), the U.S. District Court for the Middle District of Pennsylvania held that the plaintiffs, which included the Majority Leader of the Pennsylvania Senate and the Chairman of the Pennsylvania Senate State Government Committee, were "neither the Pennsylvania General Assembly nor a group to which Pennsylvania has delegated the Commonwealth's lawmaking power," and therefore lacked Article III standing to assert violations of the Elections Clause. *Id*. at 573. If the Elections Clause claims belong to anyone, the Court explained, they belong "only to the Pennsylvania General Assembly" as a whole. *Id*.

The same is true here of the General Assembly's institutional interests. The Senators, like the plaintiffs in *Corman*, do not represent the Pennsylvania General Assembly; they are only a subset thereof. Nor is there any resolution or otherwise from the General Assembly to suggest that the Senators have been vested with the power to represent the institution's interests in litigation. *See Corman*, 287 F. Supp. 3d at 573. Even if the Senators were, as they allege, "duly authorized to act in this matter" by the Senate Republican Caucus—though they cite no formal enactment purporting to authorize such intervention and do not indicate whether they consulted the Senate's full membership—they alone cannot authorize themselves to represent the General Assembly in this action. As a result, the Senators appear in this lawsuit as individual legislators. As such, they do not have a "legally enforceable interest" in the determination of this action, and thus have no right to intervene under Rule (4) or otherwise. *See also Disability Rights Pennsylvania v. Boockvar*, No. 83 MM 2020 (Pa. May 15, 2020) (Wecht, J., concurring) (citing the U.S. Supreme Court's rejection in *Virginia House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945 (2019), of the notion that a single chamber of the legislature has standing to intervene in defense of state law).

Although individual legislators may have an interest in protecting "the power or authority of their offices" and "the potency of their right to vote" on pending legislation, *Robinson Twp. v.*

Com., 84 A.3d 1054, 1055 (Pa. 2014), they have no legal interest in enforcing enacted laws or voting procedures. *Markham*, 136 A.3d at 139 ("[T]aking the unprecedented step of allowing legislators standing to intervene . . . would seemingly permit legislators to join in any litigation in which a court might interpret statutory language in a manner purportedly inconsistent with legislative intent.").

3. The Republican Committees also fail to advance a legally enforceable interest.

The Republican Committees' interest in "uphold[ing] orderly and free elections for all Pennsylvanians," Republican Committees' App. At 2, is shared with virtually all citizens and adequately represented by Respondents. It is well established 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*, 409 A.2d at 851 (quoting *William Penn Parking Garage*, 346 A.2d at 281. Applying this test, Pennsylvania courts consistently deny intervention where, as here, the proposed intervenors' proffered 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.*, 523 A.2d at 437–38.

This Court has previously rejected the notion that an interest in the outcome of an election, by itself, warrants intervention. In *Fraenzl v. Secretary of the Commonwealth of Pennsylvania*, 478 A.2d 903 (Pa. Commw. Ct. 1984), a Socialist Worker candidate filed suit to compel the Commonwealth to place her on the ballot, and this Court denied intervention by a Republican candidate for office. While the Court recognized that its "decision will no doubt have an effect on the outcome of the election," it found that the Republican candidate could "assert no legally enforceable interest in potential votes which may be lost to an additional candidate." 478 A.2d at

904. Instead, the candidate—like the Republican Committees—had "only an interest in having the election laws properly applied, an interest she [and the Republican Committees] shares in common with every other member of the electorate." *Id.*

The Republican Committees do not address the *Fraenzl* decision but instead string together a list of out-of-jurisdiction authorities, all of which clearly distinguishable. In *Siegel v. LePore*, 234 F.3d 1163, 1169 n.1 (11th Cir. 2001), intervention was granted to a political party only where there was no state defendant in the case. That is, of course, not true here. In *Trinsey v. Pennsylvania*, 941 F.2d 224, 226 (3d Cir. 1991), the challenged provision dealt specifically with vacancies for positions for which candidates "shall be nominated by political parties," thus giving a clear interest to political party intervenors which is absent here. Likewise, *Anderson v. Babb*, 632 F.2d 300, 304 (4th Cir. 1980), concerned "procedures to be followed for establishing a new political party." *Id.* at 303. Here, unlike *Trinsey* and *Anderson*, the challenged provisions have nothing to do with political parties on their face, or otherwise. In *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020), the court only permitted the Republican National Committee and Republican Party of Wisconsin to intervene because they were the "mirror-image" of the plaintiffs, the Democratic National Committee and the Democratic Party of Wisconsin. Here, Petitioners are not political parties. In *Citizens United v. Gessler*, No. 14-002266, WL 4549001, at *2 (D. Colo. Sept. 15, 2014), plaintiff Citizens United sought a declaration that it was a "press entity" exempt from certain disclosure requirements under campaign finance laws that it challenged as unconstitutional. Although the defendant and the proposed political party intervenor both asked the court to conclude that the disclosure laws were constitutional, in doing so the defendant did not "assert that a 'press entity' status does not exist under Colorado law or that such an interpretation would conflict with the plain

language and meaning of the campaign finance laws." *Id.* But the proposed political party intervenors did tackle that issue and "devote a large portion of their Response brief directly replying to Citizen United's requested relief and strongly opposing the finding of any exemptions based on a plain reading of the statute." *Id.* Here, the Republican Committees point to no argument that they plan to make that Respondents will not. In *Libertarian Party of Mich. v. Johnson*, No. 12-12782, 2012 U.S. Dist. LEXIS 126096 (E.D. Mich. Sept. 5, 2012), like in *Trinsey* and *Anderson*, the challenged provision explicitly concerned political parties since it provided that no person who appeared "on the primary ballots of 1 political party shall be eligible as a candidate of any other political party at the election following that primary." As noted above, the challenged provisions at issue in this suit make no mention of political parties. And finally, in *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 638–39 (N.D. Ill. 1991)—a congressional redistricting case in which the Illinois Legislature failed to devise a new redistricting scheme upon the loss of two congressional seats—the court "*invited any person or group desiring to participate* in the proceedings to file a petition to intervene." *Id.* at 639 (emphasis added). The court has made no such overture here, nor would one be as fitting as could be argued in the redistricting context.

Lacking any authority supporting their intervention, the Republican Committees make vague references to the "current competitive electoral environment," Republican Committees' App. ¶ 18, insinuating that Petitioners' requested relief impairs their competitive position. Yet they fail to explain why they believe that candidates from any particular party are any more or less likely to be elected if Petitioners' requested relief is granted. Nor do they identify the ways in which expanding voting opportunities to Pennsylvanians—irrespective of their political affiliation—alters competition. Because Petitioners' requested relief does nothing to restrict voters' opportunities or prevent anyone's supporters from participating in the electoral process—

and, to the contrary, makes voting more accessible—the Republican Committees need not "spend substantial resources informing their Republican voters of changes in the law" to ensure their franchise, *id*. at ¶ 23; even if Petitioners are successful in obtaining their requested relief, those same Republican voters can still proceed as though this action did not exist and vote in precisely the same timeframe and manner that they otherwise would have, with their vote still being counted all the same. Ultimately, Petitioners' requested relief will result in more voters being able to cast their ballots and will ensure those ballots can be counted. While the Republican Committees may ultimately opt to take advantage of any expanded voting opportunities that may result from Petitioners' requested relief, as is their prerogative, the prospect of additional voluntary spending to maximize voter turnout and capitalize on additional voting opportunities does not confer upon the Republican Committees a legally enforceable interest in opposing such relief.

B. The proposed intervenors' interests are adequately represented by Respondents.

Even if the Senators and the Republican Committees met the requirements for intervention under Rule No. 2327(4) (and for the reasons explained, they do not), this Court has discretion to deny intervention where the applicants' interests are adequately represented as they clearly are by the Respondents in this case. Pa. R.C.P. 2329(2). The proposed intervenors' interests in enforcing election laws and maintaining the status quo is already more than ably represented by Respondents 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 [the Respondents'] position[] will cover the substance of the positions proposed by [the Republican Committees]," *Pa. Assoc. of Rural and Small Schools v. Casey*, 613 A.2d 1198, 1201 (Pa. 1992). Pennsylvania Supreme Court precedent confirms that proposed intervenors fall squarely within the Rule 2329(2) exception. In *Pennsylvania Association of Rural and Small Schools v. Casey*, 613 A.2d 1198, 1200–01 (Pa. 1992), for instance, the Pennsylvania Supreme Court held that the proposed

intervenor school districts' interest in upholding a school funding statute was adequately represented by the Commonwealth, which advanced the same interest. The Court affirmed the Commonwealth Court's conclusion that the proposed intervenors' "desire to pursue a preferred litigation strategy or defense theory was not an interest entitling [them] to intervene." *Id.* at 1201. While the Senators and Republican Committees may have different motivations, or may opt to litigate differently, their interests in "seek[ing] to uphold orderly free and fair elections," Republican Committees' App. at 2, are nonetheless represented by Respondents who share the same objective.

Moreover, the Senators and Republican Committees present no argument to suggest that Respondents will not seek to enforce Pennsylvania's election laws and procedures. Nor could they. The same Respondents recently filed preliminary objections in response to the petition for review in *Boockvar*, No. 83 MM 2020, and an opposition to the *Boockvar* petitioners' application for a preliminary injunction, in which Respondents defended the constitutionality of the ballot receipt deadline before the Pennsylvania Supreme Court. The Republican Committees suggest that the Respondents' interests may later diverge from theirs but present no factual support for these entirely speculative assertions. *Cherry Valley Assocs.*, 530 A.2d at 1041 n.6 (rejecting argument that public entity did not adequately represent proposed private-intervenors' interests as "no more than speculation which [the court] decline[s] to consider"). The distinctions they attempt to draw between private and public interests, moreover, are irrelevant to this lawsuit which concerns the constitutionality of the current electoral process. The challenged actions in this case are "either constitutional or unconstitutional based on the legal theories petitioners advance. The [proposed intervenors'] interests, as identified, have no bearing on that determination." *Robinson Township*, 2012 WL 1429454, at *4; *see also Cherry Valley Assocs*., 530 A.2d at 1041 (rejecting distinction

between private and public interests where litigants presented narrow legal questions). Indeed, even the authorities the Republican Committees cite "presume[] adequate representation when an existing party [has] the same objectives as the would-be interveners" and "impose[] upon the proposed interveners the burden of coming forward with some evidence to the contrary." *Clark v. Putnam Cty.*, 168 F.3d 458, 461 (11th Cir. 1999). Neither the Senators nor the Republican Committees have provided any reason to suggest that the Respondents' interests diverge from theirs in any meaningful way for the purposes of this lawsuit.

C. The proposed intervenors will unduly expand and duplicate litigation proceedings and prejudice the adjudication of the parties' rights.

The Court also has discretion to deny intervention where allowing the additional parties to participate in the case will unduly delay or prejudice the adjudication of the Petitioners' rights. Pa. R.C.P. 2329(3). So even assuming the Senators and Republican Committees can satisfy Rule 2327(4)'s threshold requirements, and in the unlikely event that their interests are not adequately represented by Respondents, the Court should nonetheless exercise its discretion and deny intervention to avoid unnecessarily duplicating and prolonging litigation proceedings.

To date, three different groups of litigants have requested permission to intervene in this lawsuit, and all advance essentially the same interest and objective—to enforce election laws and maintain the status quo—which they also share with the Respondents. Despite the identical nature of their interests, each set of proposed intervenors intends to file separate preliminary objections and briefs with similar arguments, and will likely seek to pursue their own discovery plans, participate in hearings, arguments, or trial, needlessly duplicating litigation efforts at each stage of the case. *See Kitzmiller v. Dover Area Sch. Dist.*, 229 F.R.D. 463, 471 (M.D. Pa. 2005) (denying intervention from applicant whose participation was "duplicative of Defendants' efforts"). With the crowding of additional parties, litigation becomes more expensive and complex and takes

longer at every step. Briefing schedules become more complicated, the number of pages that the parties and the Court will have to contend with in briefing multiplies, scheduling is more difficult, and negotiating even basic stipulations consumes more time. If discovery is needed, additional Intervenor-Respondents will result in duplicative depositions, discovery requests, document productions, and so on. In a case involving the right to vote in impending elections, where time is of the essence and the existing Respondents already represent the pertinent interests, intervention is not appropriate and should not be granted. *See* Pa. R. Civ. P. 2329(3).

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court deny the Senators' and the Republican Committees' requests to intervene.

Dated: May 18, 2020

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