

**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,

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**TIMOTHY BONNER, et al.,**

Petitioners,

v.

**DEGRAFFENREID, et al.,**

Respondents,

and

**BUTLER COUNTY REPUBLICAN COMMITTEE; YORK COUNTY REPUBLICAN COMMITTEE; and WASHINGTON COUNTY REPUBLICAN COMMITTEE.**

Proposed Intervenors-Petitioners.

**Nos.: 244 M.D. 2021  
293 M.D. 2021 (Consolidated)**

**PROPOSED INTERVENORS-PETITIONERS', BUTLER COUNTY REPUBLICAN COMMITTEE, YORK COUNTY REPUBLICAN COMMITTEE, and WASHINGTON COUNTY REPUBLICAN COMMITTEE, BRIEF IN SUPPORT OF APPLICATION TO INTERVENE**

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**PROPOSED INTERVENORS-PETITIONERS' BRIEF IN SUPPORT OF  
THEIR APPLICATION TO INTERVENE**

**I. BACKGROUND AND PROCEDURAL HISTORY.**

This case originated with the filing of a Petition for Review on July 26, 2021 by Petitioner, Doug McLinko (“Petitioner McLinko”), docketed at 244 M.D. 2021. Petitioner McLinko sued the Commonwealth of Pennsylvania, Department of State and Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, challenging the constitutionality of Act 77, P.L. 552, No. 77 (Act 77). Separate from Petitioner McLinko’s Petition for Review, Rep. Timothy R. Bonner filed a Petition for Review on August 31, 2021 against Veronica Degraffenreid, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and the Commonwealth of Pennsylvania Department of State, also challenging the constitutionality of Act 77, P.L. 552, No. 77 (Act 77).

***a. McLinko v. Dep’t of State, et al., 244 M.D. 2021 Procedural History.***

On July 27, 2021, Petitioner McLinko filed an Application for Expedited Briefing and Summary Relief. On July 27, 2021, this Court entered an Order granting Petitioner’s request for Expedited Briefing, requiring that Petitioner’s Brief in Support of their Application for Summary Relief to be filed by August 11, 2021, and requiring Respondent’s Brief in Opposition be filed by August

26, 2021. On August 26, 2021, Respondent also filed an Application for Summary Relief. In response to the Respondent's Cross-Application for Summary Relief, the Court modified its July 27, 2021 Order setting forth an expedited briefing schedule, requiring the Petitioner's reply to Respondent's Application for Summary Relief be filed by September 8, 2021, and requiring Respondent's Reply Brief to be filed by September 15, 2021.

***b. Bonner, et al. v. Degraffenreid, et al., 293 M.D. 2021  
Procedural History.***

On August 31, 2021, Petitioners Timothy R. Bonner, P., Michael Jones, David H. Zimmerman, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Timothy F. Twardzik, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald "Bud" Cook ("Bonner Petitioners") filed a Petition for Review challenging the constitutionality of Act 77, P.L. 552, No. 77 (Act 77). On September 1, 2021, the Bonner Petitioners filed an Application for Consolidation, seeking to consolidate their case with *McLinko v. Dep't of State, et al.*, 244 M.D. 2021. On September 3, 2021, this Court denied the Bonner Petitioners' Application for Consolidation, without prejudice, due to the time constraints associated with the September 22, 2021 oral argument scheduled in *McLinko v. Dep't of State, et al.*, 244 M.D. 2021. On September 24, 2021, this Court issued an Order rescinding their September 3, 3032 Order, and granted the Bonner

Petitioners' Application for Consolidation, consolidating the two cases at docket number 244 M.D. 2021. Following the consolidation of the cases, on October 8, 2021, the Democratic National Committee and the Pennsylvania Democratic Party filed an Application for Intervention under Pa. R.A.P. 1531(b). On October 13, 2021, this Court issued an Order setting a hearing for Proposed-Intervenors' Democratic National Committee and Pennsylvania Democratic Party for October 22, 2021, at 9:30 A.M.

On October 18, 2021, Proposed-Intervenors Petitioners Butler County Republican Committee, York County Republican Committee, and Washington County Republican Committees (collectively referred to as the "County Republican Intervenors")<sup>1</sup> filed an Application to Intervene (the "Application"). On October 19, 2021 this Court issued an Order setting a hearing for October 25, 2021 at 1:00 p.m. The Court also issued a briefing schedule, and the County Republican Intervenors timely submit this Brief in Support of their Application to Intervene and aver as follows.

## **II. SUMMARY OF ARGUMENT.**

The determination of whether Act 77 is constitutional is critical to the County Republican Intervenors because it affects both their equitable and

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<sup>1</sup> The County Republican Intervenors incorporate their Application to Intervene, Proposed Petition for Review, and all exhibits, as if fully set forth at length herein.

legally enforceable interests – both of which they could have asserted on their own separate and apart from the proceedings. Additionally, the interests of the County Republican Intervenors are not currently represented in the litigation because the County Republican Intervenors are responsible for: leading voter registration efforts within their respective counties; assisting Republican voters with questions regarding proper voting practices; advancing the policies and principles of the Republican Party within their Counties; assisting candidates in their election campaigns; and “getting out the Republican vote” in their respective counties.

These above-described interests meet the “substantial, direct, and immediate” test, and surpass the “common interest or all citizens in procuring obedience to the law” because the County Republican Intervenors’ resources and rights are being directly impacted. See the Affidavits of David Ball, Jeffrey Piccola, and Alexander H. Lindsay, Jr. attached to the Application as Exs. 1, 2, and 3. These interests impact more than the common interest of all citizens – the act of voting – because the County Republican Intervenors are responsible for not only voting – but the mechanics of how voting is conducted in their respective counties.

### III. LEGAL STANDARD.

“With respect to original jurisdiction petitions for review, a non-party may file an application for leave to intervene.” § 1531:4 Intervening in original jurisdiction petitions for review (Pa.R.A.P. 1531(b)), 20A West's Pa. Prac., Appellate Practice § 1531:4. “Rules of Civil Procedure 2326 to 2329 provide guidance in this situation.” *Id.* “At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein...if

(1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or

(2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or

(3) such person could have joined as an original party in the action or could have been joined therein; or

(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.C.P. No. 2327. Pennsylvania Rule of Civil Procedure 2329, titled, “Action of Court on Petition,” declares:

Upon the filing of the petition, and after hearing...the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, 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.C.P. No. 2329.

“Generally, pendency, for purposes of intervention, has been defined as the state of an undetermined proceeding since in those cases in which intervention has been allowed, there was a pending proceeding with further steps remaining to be taken before the case was concluded.” § 14:374. Time for intervention, generally; allowable during pendency of action, 3 Standard Pennsylvania Practice 2d § 14:374 (citing *In re Estate of Albright*, 376 Pa. Super. 201, 545 A.2d 896 (1988)).

“Pennsylvania Rule of Civil Procedure No. 2327(4)...permits intervention where the determination “*may affect* any legally enforceable interest” of a proposed intervenor. *Allegheny Reprod. Health Ctr. v. Pennsylvania Dept. of Human Services*, 225 A.3d 902, 909 (Pa. Cmmw. 2020) (citing Pa.R.C.P. 2327(4) (emphasis in the original)). “Rule No. 2329 prohibits intervention if the interest of the proposed intervenor is already adequately represented or intervention will cause undue delay or prejudice.” *Id.* at 913.



“The [Commonwealth] Court has held that a grant of intervention is **mandatory** where the intervenor satisfies one of the four bases set forth in Rule No. 2327 unless there exists a basis for refusal under Rule No. 2329.” *Id.* at 908 (emphasis added).

#### **IV. ARGUMENT.**

##### ***a. The County Republican Intervenors’ Intervention in this Matter is Proper Under Rule 2327(4).***

“The inquiry to determine whether a party has standing to initiate litigation is different than the inquiry to determine whether a party can intervene in existing litigation.” *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Cmmw. 2019). “Pennsylvania Rule of Civil Procedure No. 2327(4)...permits intervention where the determination ‘**may affect** any legally enforceable interest’ of a proposed intervenor.” *Allegheny Reprod. Health Ctr.* at 909 (emphasis in the original).

Here, the ultimate determination of the constitutionality of Act 77 may affect the legally enforceable interest of the County Republican Intervenors both equitably and legally. Specifically, the constitutionality of Act 77 will impact how they allocate their resources equitably and impact fundamental associational rights.

***b. The County Republican Intervenors' Have a Unique Equitable Interest that Will be Affected by the Proceedings.***

To intervene, an “applicant must have some right, whether legal or equitable which will be affected by the proceedings.” *Keener v. Zoning Hrg. Bd. of Millcreek Tp.*, 714 A.2d 1120, 1122 (Pa. Cmmw. 1998) (citation omitted).

As stated in the County Republican Intervenors' Application, they are “responsible for:

- leading voter registration efforts within their respective counties;
- assisting Republican voters with questions regarding proper voting practices;
- advancing the policies and principles of the Republican Party within their [c]ounties;
- assisting candidates in their election campaigns; and
- ‘getting out the Republican vote,’ in their respective counties.”

See, Application, ¶ 15. Further, “[t]he allocation of financial resources; prioritizing...efforts of volunteers; [and] prioritizing get-out-the-vote efforts and communications...,” all have created a burden on the County Republican Intervenors. *Id.* at ¶ 40. All of the above efforts are significantly impacted by the availability, or unavailability, of voting by mail-in ballots – which is the primary practical impact of Act 77.

Here, all three chairs of the County Republican Intervenors identified equitable interests that will be affected by Act 77. See Application, Exs. 1, 2, and 3 at ¶ 2. Specifically, the chairs all testified that the “goals, activities, finances, and operations of the[ir] Committee[s]” will be impacted. *Id.* The most obvious example of the equitable interest being affected is the amount of time devoted to encouraging and educating Republican voters to utilize mail-in ballots. *Id.* ¶ 9. Alternatively, if “Act 77 is held to be unconstitutional, those resources will have been wasted and [the] efforts to elect Republican candidates [would be] severely harmed.” *Id.*

The County Republican Intervenors’ concern about the equitable effects of the proceedings before the Court are well documented. Specifically, the County Republican Intervenors felt the strain of the equitable considerations of Act 77 in the 2020 election cycle and fear the same impacts again. Simply stated, the County Republican Intervenors “did not have sufficient financial resources to create specific mailers to educate Republican voters regarding the appropriate way to request, complete, and return a mail-in ballot.” *Id.* at ¶ 11. Unfortunately, the Committees were “forced to take space away from mailers designed to support Republican candidates [to] use that space to educate Republican voters regarding Act

77.” *Id.* It was not effective and ended up being a waste of limited resources.  
*Id.*

The equitable considerations described above fit squarely within the legal standard for intervention because the determination of the constitutionality of Act 77 *may* affect the allocation of the County Republican Intervenors’ resources to either promote mail-in voting or to encourage Republican citizens in Butler, York, and Washington to vote in-person at the polls. As a result, the uncertainty and impact of the case creates the “dilemma” for the County Republican Intervenors to either utilize their resources to promote mail-in ballots or in-person voting. See Application, Exs. 1, 2, and 3 ¶ 12.

***c. The County Republican Intervenors’ Have a Unique Legal Interest that Will be Affected by the Proceedings.***

In addition to the equitable interests affected by the proceedings, the County Republican Intervenors have legal interests affected by the proceedings. Specifically, the committee members’ “associational rights” and “right to vote for and elect Republican candidates” within Butler, York, and Washington County are directly impacted by the determination of the constitutionality of Act 77.

It cannot be understated that Act 77 was the most sweeping change to the Election Code in Pennsylvania history. For the first time in the history of

the Commonwealth, any voter could vote by mail. The impact of mail-in ballots, for better or worse, significantly changed how the County Republican Intervenors' will elect their candidates. Never before could the County Republican Intervenors recommend to their committee members and constituents that their votes be cast by mail. Currently, votes are being cast by mail for the November 2, 2021 election, but if Act 77 is declared to be unconstitutional, in-person voting will be how the County Republican Intervenors exercise their First Amendment associational rights. Watching from the sidelines is something the County Republican Intervenors' cannot, and should not, be forced to do without having their legal rights heard directly in the proceedings.

***d. The County Republican Intervenors' rights are Unique and Different Than Any Other Current Party to the Proceedings.***

“The right to intervention should be accorded to anyone having an interest of his own which no other party on the record is interested in protecting.” *Keener v. Zoning Hrg. Bd. of Millcreek Tp.*, 714 A.2d 1120, 1123 (Pa. Cmmw. 1998) (citation omitted).

The analysis of whether Rule 2329 applies here primarily turns on Rule 2329 (2).<sup>2</sup> Petitioners in the proceedings are politicians and voters. None of the Petitioners are political committees with contributions and resources to allocate and distribute. While the constitutionality of Act 77 is certainly important, the County Republican Intervenors “seek to do more than offer “their perspective on the correctness” of Act 77. *Allegheny Reprod. Health Ctr. v. Pennsylvania Dept. of Human Services*, 225 A.3d 902, 912 (Pa. Cmmw. 2020).

Additionally, it is important to note that if the Proposed Intervenors- Respondents, the Democratic National Committee and the Pennsylvania Democratic Party (“Democratic Intervenors”) are permitted to intervene, the County Republican Intervenors would not be joined simply because they oppose their requested relief. To the contrary, the County Republican Committees are not similarly situated to the Democratic National Committee or Pennsylvania Democratic Party with regard to the specific equitable and legal effect of these proceedings. Further, the County Republican Intervenors’ position is stronger than the Democratic Intervenors’ position

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<sup>2</sup> Additionally, Rule 2329(1) and (3) do not apply since the proceedings are not closed and the County Republican Committees’ claims are not in subordination to or in recognition of the propriety of the action.

because their position is simply a mirror image of the objections raised by the Commonwealth. As a result, Rule 2329(2) is not at issue here.

***e. If the Court Declines to Find that the County Republican Intervenors Satisfy Rule 2327(4), They Satisfy 2327(3).***

“Th[e] [Commonwealth] Court has held that a grant of intervention is **mandatory** where the intervenor satisfies **one** of the four bases set forth in Rule No. 2327 unless there exists a basis for refusal under Rule No. 2329.” *Allegheny Reprod. Health Ctr. v. Pennsylvania Dept. of Human Services*, 225 A.3d 902, 908 (Pa. Cmmw. 2020) (emphasis added). Here, if there is any doubt that the County Republican Intervenors are appropriate intervenors under Rule No. 2327(4), they meet the standard set forth in Rule 2327(3) and do not meet any grounds for refusal under Rule 2329.

The County Republican Intervenors could have filed a Petition for Review against the Respondents. Indeed, they have included a Proposed Petition in their Application. That action could have been filed and could have stood on its own separate and apart from the Petitioners in the proceedings.

**V. CONCLUSION.**

The County Republican Intervenors meet the “substantial, direct, and immediate” test set forth in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). Their interests surpass “the common interest of all citizens in procuring obedience to the law.” The County

Republican Intervenors “seek to do more than offer “their perspective on the correctness” of Act 77, but want a seat at the table to see how their own separate and unique resources and associational rights will be impacted by the outcome of determining its constitutionality.

For these reasons, the County Republican Intervenors respectfully request to intervene in these proceedings.

Respectfully Submitted,

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Date: October 21, 2021

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## **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.

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