

IN THE SUPREME COURT OF PENNSYLVANIA

No. 108 MM 2024

REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH,
AND 67 COUNTY BOARDS OF ELECTIONS,

Respondents.

Application for Leave to Intervene in Response to Petitioners' Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction by Faith A. Genser, Frank P. Matis, Center for Coalfield Justice, Washington Branch NAACP, Bruce Jacobs, Jeffrey Marks, June Devaughn Hython, Erika Worobec, Sandra Macioce, Kenneth Elliott, and David Dean

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Counsel for Proposed Intervenors

Faith A. Genser and Frank P. Matis (“*Genser* Plaintiffs”) and the Center for Coalfield Justice, Washington Branch NAACP, Bruce Jacobs, Jeffrey Marks, June Devaughn Hython, Erika Worobec, Sandra Macioce, Kenneth Elliott, and David Dean (“*CCJ* Plaintiffs”) (collectively “Proposed Intervenors”) submit this Application for Leave to Intervene as co-Respondents in the above-captioned action pursuant to Pennsylvania Rule of Appellate Procedure 1531(b) and Pennsylvania Rules of Civil Procedure 2327 through 2329.

1. Proposed Intervenors are the prevailing plaintiffs in two election cases against the Butler and Washington County election boards that are currently on appeal, one before this Court and one in Commonwealth Court. *Genser v. Butler Cnty. Bd. Of Elections*, No. 26 WAP 2024 (Pa.) (“*Genser*”); *Ctr. for Coalfield Just. v. Wash. Cnty. Bd. Of Elections*, No. 1172 C.D. 2024 (Pa. Commw. Ct.) (“*CCJ*”). Resolution of this matter will materially affect, and potentially resolve, the issues in Proposed Intervenors’ two pending cases.

2. Importantly, the Petitioners in this case are intervenor defendants/respondents in *Genser* and *CCJ*. And they now are the appellants in both cases. Both cases await further court action.

3. Petitioners' King's Bench Petition, brought against the Commonwealth and the 67 county boards of elections, is a naked attempt to make an end run around the Petitioners' own appeals in *Genser* and *CCJ*, without the benefit of the complete records and arguments developed in the Butler and Washington County trial courts and on appeal. The Petition largely ignores Proposed Intervenors' carefully developed records and arguments, and excludes Proposed Intervenors from participating in a proceeding that could materially impact their cases.

4. The *Genser* petitioners are two Butler County voters. *CCJ* is brought by 7 individual voters and two Washington County nonpartisan organizations dedicated to promoting American democracy and the participation of voters in our shared civic enterprise. Courts in both cases have, most recently, ruled that the county boards of elections violated Proposed Intervenors' rights. Proposed Intervenors, thus, have a vested interest in this litigation that is not otherwise adequately represented. Indeed, nearly all of the issues raised by Petitioners in the King's Bench Petition were decided against them in *Genser* and *CCJ*.

Significantly, those cases include full factual records, robust briefing, and are positioned to timely complete appellate review.

5. Proposed Intervenors are uniquely positioned to represent the interests of Pennsylvania voters in ensuring that every eligible voter's timely cast ballot—regardless of political affiliation—is counted, to advocate for all voters' rights under Pennsylvania's Constitution and Election Code, and to address the burdens that Petitioners' proposed relief would impose on Pennsylvania's voters. Intervention should be granted.

A. The Petitioners Are Seeking to Evade the Developed Evidentiary Records and Briefing in the Pending Appeals in *Genser* and *CCJ*

6. The *Genser* petitioners are two Butler County voters who submitted mail-ballot packets in the 2024 Primary Election without the required inner secrecy envelopes, then submitted provisional ballots at their polling places on the April 23 primary election day. The Butler County Board of Elections refused to count their provisional ballots on the grounds that their earlier submission of defective mail ballots precluded their voting by provisional ballot. *Genser* Commw. Ct.

Opinion, Sept. 5, 2024 (“*Genser* Commw. Ct. Op.”), *1-2. *Genser*, No. 1074 C.D. 2024, 2024 WL 4051375 (Pa. Commw. Ct. Sept. 5, 2024). On April 29, 2024, the *Genser* Plaintiffs filed a timely action appeal under 25 P.S. § 3157, challenging the decision of the Butler County Board of Elections not to count their provisional ballots. *Id.* at *2. Petitioners successfully moved to intervene in advance of the trial court’s hearing in the matter, *id.* at *2, and they participated fully in the trial court hearing and subsequent briefing.

7. On August 16, 2024, following an evidentiary hearing and briefing by all parties, the trial court issued an opinion rejecting the *Genser* petitioners’ statutory and constitutional arguments and held that the Election Code prohibited the counting of their provisional ballots after submission of a defective mail ballot. 2024 WL 4051375 at *5.

8. On appeal, an *en banc* panel of the Commonwealth Court reversed in a 4-1 decision. *Id.* at *16. Interpreting the language of the Election Code, and in particular the provisions regarding the counting of provisional ballots in 25 P.S. §§ 3050 and 3150.15, the Court held that the Election Code required the counting of a provisional ballot

submitted by a voter who had unsuccessfully attempted to submit a countable mail ballot. *Id.* at *14-16. On September 8, 2024, Petitioners as well as the Butler County Board of Elections filed petitions for allowance of appeal with this Court. Earlier today, the Court granted allocatur to Petitioners as to two questions. Under the Court’s scheduling order, briefing in the appeal will conclude on September 26.

9. The *CCJ* Plaintiffs consist of seven individual Washington County voters whose 2024 primary election mail ballots the Washington County Board of Elections rejected for technical ballot-envelope defects under a new policy of the board, and two nonprofit organizations that advocate and promote voter education and election participation within the county. *CCJ* (Pa. Ct. Com. Pl. Wash. Cnty. Aug. 23, 2024) (“Wash. Cnty. Op.”) at 6. On July 1, 2024, the *CCJ* Plaintiffs sued the board, alleging that its practice of concealing the fact that the county had segregated for post-election rejection their apparently defective mail ballots violated voters’ procedural due process rights under the Pennsylvania Constitution and prevented them from exercising their statutory right to cast provisional ballots on Election Day. *Id.* at 6; *CCJ* Plaintiffs’ Complaint. The court granted Petitioners’ motion to

intervene, and Petitioners participated from the outset in all phases of the litigation. Wash. Cnty. Op. at 6.

10. After discovery, an extensive joint fact stipulation, and an evidentiary hearing, the Washington County Court of Common Pleas granted summary judgment to the *CCJ* Plaintiffs. *Id* at 27-28. The trial court ordered the board (a) to notify any voter whose mail ballot it had segregated for a disqualifying error so that the voter could challenge the determination, (b) to input the accurate ballot status code into the Pennsylvania SURE system, and (3) to provide that status to voters who requested it. *Id.* at 27. Petitioners and the Board appealed to Commonwealth Court on September 5, 2024. Expedited briefing on the appeal closed on September 11, 2024, and the parties await a decision.

REASONS INTERVENTION SHOULD BE GRANTED

11. Proposed Intervenors are entitled to intervene pursuant to Pennsylvania Rule of Civil Procedure 2327 and Pennsylvania Rule of Appellate Procedure 1531(b). “[I]f the petitioner is a person coming within one of the classes described in Rule 2327, the allowance of intervention is not discretionary, but is mandatory, unless one of the grounds for refusal of intervention enumerated in Rule 2329 is present.”

Shirley v. Pa. Legis. Reference Bureau, 318 A.3d 832, 853 (Pa. 2024)
(internal quotation marks and citation omitted).

12. Proposed Intervenors here satisfy at least two of the four Rule 2327 requirements. Under Pa.R.Civ.P. 2327(4), the determination in this action may affect Proposed Intervenors' legally enforceable interests, namely, their rights to vote and have their votes counted, as presently being considered by this Court and the Commonwealth Court. And under Pa.R.Civ.P. 2327(3), Proposed Intervenors could have been joined as original parties in this matter. The application to intervene must accordingly be granted unless "(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.Civ.P. 2329.

13. Here, Proposed Intervenors satisfy Rule 2327, and there is no basis to deny intervention under Rule 2329. Intervention should be granted.

A. Proposed Intervenors Are Directly Affected by This Action under Rule 2327(4).

14. Faith Genser is a fifty-six-year-old qualified registered voter who resides in Zelenople, Butler County, and is the lead petitioner in the *Genser* case, which is within the scope of the questions on review according to this Court's grant of allocatur from today as discussed above.

15. Frank Matis is a sixty-seven-year-old longtime qualified registered voter who resides in Center Township, Butler County. He is the other petitioner in the *Genser* case, which is within the scope of the questions on review according to this Court's grant of allocatur from today as discussed above.

16. *CCJ* Plaintiff Center for Coalfield Justice ("CCJ") is a 501(c)(3) Pennsylvania nonprofit organization headquartered in Washington County. CCJ uses public education, organizing, and advocacy to advance policies that address the health and environmental impacts of the coal, oil, and gas industries on Washington and Greene Counties; to strengthen the area's local economies; and to ensure that area residents have a voice in electing officials that will be accountable

on the issues that matter most to their community. CCJ has 300 individual members, many of whom are registered voters and regularly vote in Washington County, including by mail-in ballot. CCJ is an organizational plaintiff in the *CCJ* case currently on appeal to Commonwealth Court.

17. *CCJ* Plaintiff Washington Branch NAACP is a non-profit, non-partisan organization operating in Washington County, Pennsylvania, and is affiliated with the NAACP Pennsylvania State Conference and the national NAACP. Washington Branch NAACP's mission is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination in Washington County. Washington Branch NAACP has nearly 200 individual members, many of whom are registered voters and regularly vote in Washington County, including by mail-in ballot. Washington Branch NAACP is an organizational plaintiff in the *CCJ* case currently on appeal to Commonwealth Court.

18. *CCJ* Plaintiff Bruce Jacobs is a 65-year-old, longtime registered voter who lives in Venetia, Pennsylvania, located in Washington County. Mr. Jacobs voted by mail-in ballot in the April

2024 primary election and intends to vote again by mail in the November 2024 general election. Mr. Jacobs is an individual voter and plaintiff in the *CCJ* case currently on appeal to Commonwealth Court as discussed above.

19. *CCJ* Plaintiff Jeffrey Marks is a 72-year-old, longtime registered voter who lives in Washington, Pennsylvania, located in Washington County. Mr. Marks voted by mail-in ballot in the April 2024 primary election and intends to vote by mail in the November 2024 general election. The Washington County Board of Elections rejected Mr. Marks' ballot in the April 2024 election because he wrote an "incomplete date" on the declaration envelope. Mr. Marks did not learn that his mail-in ballot was rejected until after the April 2024 primary election, and his vote was not counted. Mr. Marks is an individual voter and plaintiff in the *CCJ* case currently on appeal to Commonwealth Court as discussed above.

20. *CCJ* Plaintiff June DeVaughn Hython is an 85-year-old, longtime registered voter who lives in Canonsburg, Pennsylvania, located in Washington County. Ms. DeVaughn Hython voted by mail-in ballot in the April 2024 primary election and intends to vote by mail in

the November 2024 general election. The Washington County Board of Elections rejected Ms. DeVaughn Hython's ballot in the April 2024 election because she signed the declaration envelope in the wrong area and failed to fill in the date. Ms. DeVaughn Hython did not learn that her mail-in ballot was rejected until after the April 2024 primary election, and her vote was not counted. Ms. DeVaughn Hython is an individual voter and plaintiff in the *CCJ* case currently on appeal to Commonwealth Court as discussed above.

21. *CCJ* Plaintiff Erika Worobec is a 45-year-old, longtime registered voter who lives in Cecil, Pennsylvania, located in Washington County. Ms. Worobec voted by mail-in ballot in the April 2024 primary election and intends to vote by mail in the November 2024 general election. The Washington County Board of Elections rejected Ms. Worobec's ballot in the April 2024 election because she wrote an "incomplete date" on the declaration envelope. Ms. Worobec did not learn that her mail-in ballot was rejected until after the April 2024 primary election, and her vote was not counted. Ms. Worobec is an individual voter and plaintiff in the *CCJ* case currently on appeal to Commonwealth Court as discussed above.

22. *CCJ* Plaintiff Sandra Macioce is a 64-year-old, longtime registered voter who lives in Canonsburg, Pennsylvania, located in Washington County. Ms. Macioce voted by mail-in ballot in the April 2024 primary election and intends to vote by mail in the November 2024 general election. The Washington County Board of Elections rejected Ms. Macioce’s ballot in the April 2024 election because she wrote an “incomplete date” on the outer declaration envelope. Ms. Macioce did not learn that her mail-in ballot was rejected until after the April 2024 primary election, and her vote was not counted. Ms. Macioce is an individual voter and plaintiff in the *CCJ* case currently on appeal to Commonwealth Court as discussed above.

23. *CCJ* Plaintiff Kenneth Elliott is a 48-year-old, longtime registered voter who lives in Amity, Pennsylvania, located in Washington County. Mr. Elliott voted by mail-in ballot in the April 2024 primary election. The Washington County Board of Elections rejected Mr. Elliott’s ballot this past April because he wrote an “incomplete date” on the declaration envelope. Mr. Elliott did not learn that his mail-in ballot was rejected until after the April 2024 primary election, and his vote was not counted. Mr. Elliott is an individual voter

and plaintiff in the *CCJ* case currently on appeal to Commonwealth Court as discussed above.

24. *CCJ* Plaintiff David Dean is a 54-year-old, longtime registered voter who lives in Canonsburg, Pennsylvania, located in Washington County. Mr. Dean voted by mail-in ballot in the April 2024 primary election and intends to vote by mail in the November 2024 general election. The Washington County Board of Elections rejected Mr. Dean’s ballot in the April 2024 election because he wrote an “incomplete date” on the declaration envelope. Mr. Dean did not learn that his mail-in ballot was rejected until after the April 2024 primary election, and his vote was not counted. Mr. Dean is an individual voter and plaintiff in the *CCJ* case currently on appeal to Commonwealth Court as discussed above.

25. All voter and organizational Proposed Intervenors’ rights will be affected by this Court’s disposition of this matter.

B. Proposed Intervenors May Intervene Under Rule 2327(3)

26. Proposed Intervenors additionally qualify for intervention under Rule 2327(3). In particular, Proposed Intervenors, and the

members of the organizational Proposed Intervenors, have an interest in avoiding disenfranchisement, and not only could have filed their own lawsuit to assert those interests, they *did* file such lawsuits, which are on appeal before this Court and the Commonwealth Court.

27. State and federal courts have repeatedly held that individual voters have standing to sue over rules that affect the right to vote and voters' ability to exercise that right. *See, e.g., Nat'l Election Def. Coal. v. Boockvar*, 266 A.3d 76, 101 (Pa. Commw. Ct. 2021) (plaintiffs' "interest in ensuring that their votes ... are recorded and counted in an accurate, secure, and secret manner" supported standing); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *6 (Pa. Commw. Ct. Jan. 17, 2014) (burden of "obtaining a compliant photo ID" was sufficient to create standing); *accord Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 180 (M.D.N.C. 2020).

28. The organizational *CCJ* Proposed Intervenors will also suffer an actual injury if the Petitioners' requested relief is granted; namely, they will be forced to expend resources ensuring that eligible voters' timely delivered mail ballots are counted. A last-minute

alteration in the election rules, which would result in some voters being disenfranchised for a minor paperwork error, would require Proposed Intervenors to divert resources and expend additional sums to educate their members and constituents about this change, and to help affected persons cure what would otherwise be an irrelevant mistake so that they will not forever lose their right to vote in the election on November 5, 2024 and in subsequent elections. Proposed Intervenors accordingly have a direct interest at stake in these proceedings. An organization has standing to seek relief from injury to itself when it has “a substantial, direct and immediate interest in the outcome of the litigation.” *Allegheny Reproductive Health Ctr. v. Pa. Dep’t of Human Servs.*, 309 A.3d 808, 832 (Pa. 2024). Courts have consistently found that an organization has a cognizable injury when the entity must “alter its operations and reroute its resources in response to allegedly unlawful conduct in a way it otherwise would not have.” *See, e.g., Disability Rts. Pa. v. Pa. Dep’t of Hum. Servs.*, No. 1:19-CV-737, 2020 WL 1491186, at *5 (M.D. Pa. Mar. 27, 2020); *accord Allegheny*, 309 A.3d at 838-39 (finding that medical providers had standing to challenge the Abortion Control Act where they were forced to modify their treatment

plans and incur additional expenses as a result of the Act’s coverage exclusion); *see also Applewhite*, 2014 WL 184988 at *8. (finding that respondents’ actions caused organizational petitioners “to *waste*, not merely divert resources to perform its voter education efforts that are crucial to its mission.”) (emphasis in original).

29. The voting rights of the individual *Genser* and *CCJ Plaintiff* Applicants, as well as those of the organizational *CCJ* Applicants’ members, and the potential injury the organizational *CCJ* Applicants themselves will suffer if Petitioners’ request is granted, will be addressed in this litigation. Because Applicants did file their own lawsuits to assert nearly all of the interests raised in the Republicans King’s Bench Petition, Applicants should be allowed to intervene on either basis.

C. The Narrow Exceptions of Rule 2329 Do Not Apply

30. When a party qualifies under Rule 2327, intervention is mandatory unless the application falls within certain narrowly prescribed circumstances under Rule 2329. *Shirley v. Pa. Legis. Reference Bureau*, 318 A.3d 832, 853 (Pa. 2024).

31. None of those narrow circumstances applies here. First, Rule 2329(1) does not apply because Proposed Intervenors seek to intervene as co-respondents and do not seek to inject claims that would not be subordinate to the claims asserted by Petitioners. This application does not seek to expand or change the nature of the pending action, and Proposed Intervenors seek no additional relief from any party beyond the ability to defend their interests against Petitioners' misguided attempt to disenfranchise Pennsylvania voters. In other words, Proposed Intervenors properly seek to intervene in this suit as it is, "tak[ing] the suit as [they] find[] it." *E.g., Commonwealth ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867, 870 (Pa. 1950) (internal quotation marks and citation omitted) (discussing Pa.R.Civ.P. 2329(1)).

32. Second, the existing parties in the litigation do not adequately represent Proposed Intervenors' interests, Pa.R.Civ.P. No. 2329(2), because those interests "may diverge" from those of the Petitioners and Respondents. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 314 (Pa. Commw. Ct. 1999).

33. Respondents are the Secretary of the Commonwealth and 67 county boards of elections charged with administering the upcoming

General Election. Two of those county boards were directly adverse to Proposed Intervenors in *Genser* and *CCJ*, and are appellants adverse to Proposed Intervenors in those appeals. Further, Proposed Intervenors are all either individual voters who are appellees in the *Genser* and *CCJ* appeals or are organizations directly representing voters in Washington County in the *CCJ* case, who are differently and very directly impacted by the potential disenfranchisement and violation of their fundamental right to vote. Since the existing parties do not “unequivocally share [Applicants’] interest,” the application to intervene should be granted. *Id.*; see also *Benjamin ex rel. Yock v. Dep’t of Pub. Welfare*, 701 F.3d 938, 958 (3d Cir. 2012) (no adequate representation where agency’s views are colored by public welfare rather than the more personal view of a proposed intervenor); *D.G.A. v. Dep’t of Human Servs.*, No. 1059 C.D. 2018, 2020 WL 283885, at *7 (Pa. Commw. Ct. Jan. 21, 2020) (reversing denial of petition to intervene in administrative proceeding because “the personal interests of [proposed intervenors] in their *individual* welfare could diverge from the more general interest of [a governmental agency] in *public* welfare”).

34. Especially if this Court is to exercise its King's Bench jurisdiction to take up this case, voters and non-partisan civil society organizations who are dedicated to the advancement of democracy must be included to directly represent their distinct interests.

35. Finally, this Application is timely. *See* Pa.R.Civ.P. No. 2329(3). Petitioners initiated this litigation just two days ago, on September 18, 2024, and this Application is filed before the Court-ordered deadline of September 20, 2024, for responses to the petition. Applicants will adhere to any agreed schedule with respect to briefing and a hearing. Thus, Rule 2329(3) does not apply because the requested intervention will not delay, embarrass, or prejudice the trial or the adjudication of the parties' respective rights, and Rule 2329(3) does not apply.

WHEREFORE, Proposed Intervenors request that the Court grant their Application for Leave to Intervene and docket Proposed Intervenors' Response, attached hereto as Exhibit 1.

Dated: September 20, 2024

Respectfully submitted,

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CONFIDENTIAL DOCUMENTS CERTIFICATION

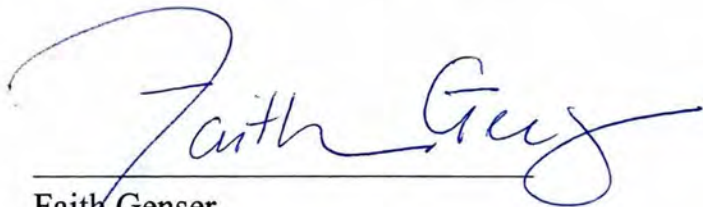
I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Mary M. McKenzie
Mary M. McKenzie

VERIFICATION

I, Faith GENSER, hereby state:

1. The statements made in the foregoing *Application for Leave to Intervene in Response to Petitioners' Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction* are true and correct to the best of my own personal knowledge, information, and belief; and
2. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.



Faith Genser

Dated: September 20, 2024

VERIFICATION

I, Sarah Martik, hereby state:

1. The statements made in the foregoing *Application for Leave to Intervene in Response to Petitioners' Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction* are true and correct to the best of my own personal knowledge, information, and belief; and
2. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Sarah Martik
Sarah Martik
Executive Director, Center for Coalfield Justice

Dated: September 20, 2024

VERIFICATION

I, Mary M. McKenzie, verify that the statements made in the foregoing Application are true and correct to the best of my knowledge, information, and belief, based upon the publicly available and previously established court records in *Genser et al. v. Butler Cty. Bd. Of Elections, Republican Nat'l Cmte. and Republican Party of Pennsylvania*, 240 WAL 2024 & 241 WAL 2024 and *Center for Coalfield Justice et al. v. Washington Cty. Bd. Of Elections, Republican Nat'l Cmte. and Republican Party of Pennsylvania*, No. 1172 C.D. 2024 (Cmwlth. Court) ("CCJ"), where I serve as counsel of record for the Proposed Intervenors.

I make this verification subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Dated: September 20, 2024

/s/ Mary M. McKenzie
Mary M. McKenzie

Exhibit 1

IN THE SUPREME COURT OF PENNSYLVANIA

No. 108 MM 2024

REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA,
Petitioners,

v.

AL SCHMIDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH,
AND 67 COUNTY BOARDS OF ELECTIONS,

Respondents.

**PROPOSED INTERVENORS' RESPONSE TO PETITIONERS' APPLICATION FOR THE
EXERCISE OF KING'S BENCH POWER OR EXTRAORDINARY JURISDICTION**

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Proposed Intervenors, Faith Genser and Frank Matis (the “*Genser Intervenors*”), and the Center for Coalfield Justice, the Washington Branch NAACP, Bruce Jacobs, Jeffrey Marks, June Devaughn Hython, Erika Worobec, Sandra Macioce, Kenneth Elliott, and David Dean (the “*CCJ Intervenors*”), submit this Response to Petitioners’ Application for the exercise of King’s Bench power or extraordinary jurisdiction.

INTRODUCTION

In every election since Pennsylvania implemented no-excuse mail-in voting in 2020, thousands of otherwise qualified eligible voters have made inadvertent errors on their mail-ballot packets that have prevented their timely submitted mail ballots from being counted.¹ In an effort to reduce the number of mail-in ballots that are disqualified for paperwork errors, many county boards of elections in both populous and rural counties, spanning the political spectrum, have developed procedures to notify mail-in voters before Election Day that they have made a mistake that will prevent their votes from being counted, and to offer voters options to fix the mistake such that they will have a mail-in vote counted. Those

¹ See Pa. Dep’t of State, “Shapiro Administration Introduces Redesigned Mail Ballot Materials To Give Voters Clearer Instructions, Decrease Number Of Rejected Ballots, And Ensure Every Legal Vote Is Counted” Nov. 29, 2023), <https://www.media.pa.gov/pages/state-details.aspx?newsid=584>. Current Pennsylvania law disqualifies mail ballots if the voter makes any of a variety of mistakes when completing the envelope packet, including three common mistakes: failing to sign or date the declaration envelope; writing a date that is deemed “incorrect;” or failing to include the secrecy envelope. See *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

options range from allowing voters to come into the elections office to fix their mistake in person to letting voters request a replacement ballot at the election office.² Separately, under the Election Code voters whose mail-in ballot will ultimately be rejected may vote a provisional ballot at their polling place on Election Day and have that provisional ballot counted.

Now, in a sweeping effort to disenfranchise tens of thousands of Pennsylvania voters, Petitioners ask this Court to exercise its King’s Bench power or extraordinary jurisdiction and 1) direct the Secretary of the Commonwealth to rescind the Pennsylvania Department of State’s guidance recognizing that voters who make mail ballot errors are legally entitled to cast provisional ballots; 2) direct county boards of election on which codes to enter in the SURE system in order to avoid notifying voters that their mail-in ballot contains a disqualifying error in time to rescue their vote; and 3) declare that county boards of elections are prohibited from providing notice and curing of mail-in ballots that contain disqualifying errors. Petitioners’ Application (“App.”) 58.

But the issues raised in Petitioners’ 287-page Application are already being litigated in two cases brought by Proposed Intervenors, both of which are quickly

² See Carter Walker, *ACLU signals effort to target disparate ‘notice and cure’ policies for flawed mail ballots*, VOTEBEAT PA. (May 16, 2024), <https://www.votebeat.org/pennsylvania/2024/05/16/aclu-lawsuit-challenges-butler-county-mail-ballot-notice-cure-policy-act-77/>. For instance, 62% of defective ballots in Allegheny County and 66% in Chester County were “cured” in the April 2024 primary election. *Id.*

working their way through the appellate courts (and one of which is already before this Court). See *Genser v. Butler Cnty. Bd. of Elections.*, MsD. No. 2024-40116, (Pa. Ct. Com. Pl. Butler Cnty. Aug. 16, 2024), rev'd, Nos. 1074 C.D. 2024 & 1085 C.D. 2024 (Pa. Cmwlth. Sept. 5, 2024), alloc. Granted, Nos. 26 & 27 WAP 2024 (Pa. Sept. 20, 2024) (“*Genser*”); *Ctr. for Coalfield Just. v. Wash. Cnty. Bd. of Elections*, No. 2024-3953 (Pa. Ct. Com. Pl. Wash. Cnty. Aug. 23, 2024), appeal pending, No. 1172 CD 2024 (Pa. Cmwlth.) (“*CCJ*”). Petitioners here intervened as party respondents at the outset of both *Genser* and *CCJ*, and they have participated fully in factual development and legal briefing in both cases. These two cases, with their developed factual records and refined legal analysis, present the appropriate vehicles to resolve the claims raised by Petitioners in their Application.

ARGUMENT

Petitioners’ Application for the Exercise of King’s Bench or Extraordinary Jurisdiction is an attempt to end-run around the *Genser* and *CCJ* cases, in which they intervened, in an effort avoid well-developed factual records and robust examination of the legal issues. This is clear from a comparison between Petitioners’ questions presented, and the questions they have presented in their appeals of *Genser* and *CCJ*.

Genser, in which the Court earlier today partially granted Petitioners’ petition for allowance of appeal, presents questions that Petitioners raise in their

current Application. There, Proposed Intervenors Faith Genser and Frank Matis attempted to vote by mail in the April 2024 primary election. After learning their mail-in ballots would not count because they had each made a disqualifying error, they went to their polling places on Election Day and submitted provisional ballots, which the Butler County Board of Elections declined to count. The appeal of that vote denial included an all-day hearing in the Butler County Court of Common Pleas, during which the voters and Butler County’s election director testified. The trial court affirmed the board’s refusal to count Ms. Genser’s and Mr. Matis’s provisional ballots, and Ms. Genser and Mr. Matis appealed to the Commonwealth Court.

Following briefing, the Commonwealth Court reversed in a comprehensive, well-reasoned opinion holding that county boards of elections must count provisional ballots cast by voters whose mail ballots contain disqualifying errors, declaring that “[t]he General Assembly obviously *did* intend that mail-in and absentee voters can vote by provisional ballot if they have not already voted an earlier ballot.” *Genser*, 2024 WL 4051375, at *16 (Pa. Cmwlth. Sept. 5, 2024). Moreover, the court recognized that the “[Election] Code independently authorizes electors to vote by provisional ballot, and, when properly construed, it requires [Butler] County to count the provisional ballots here. That does not depend on any ballot curing process, whether optional or mandatory.” *Id.*

Petitioners, who are Intervenor Defendants in *Genser*, obtained allocatur today as to two questions, both of which reference the Commonwealth Court's *Genser* decision:

1. Whether, contrary to this Court's binding precedent in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 352 (Pa. 2020), the Commonwealth Court improperly usurped the authority of the General Assembly by effectively rewriting the Election Code to engage in court-mandated curing when it held that a voter is entitled to submit a provisional ballot and have that provisional ballot counted in the election tally after the voter has timely submitted a defective absentee or mail-in ballot, contrary to the Election Code.
2. Whether the Commonwealth Court erred in holding that, due to purported ambiguities in the Election Code, the Butler County Board of Elections is required to count a provisional ballot cast by an elector who received a mail-in ballot and delivered the mail-in ballot to the county board of elections without the required secrecy envelope, despite the language of 25 P.S. § 3050 (a.4)(5)(ii)(F), which provides that a provisional ballot shall not be counted if the elector's absentee ballot or mail-in ballot is timely received by a county board of elections.

Genser v. Butler Cnty. Bd. of Elections, Nos. 26 & 27 WAP 2024 (Pa. Sept. 20, 2024).

Likewise, *CCJ*, now pending on appeal in Commonwealth Court, presents very similar questions to those that Petitioners raise in their current Application. There, the Washington County Board of Elections implemented a procedure for handling mail-in ballots in which the elections office set aside ballots with disqualifying errors and then entered them into the SURE system using a code that

deprived voters of notice that their mail ballots would not be counted, preventing those voters from being able to preserve their right to vote by casting a provisional ballot. As a result, the Board disenfranchised 259 eligible mail-in voters, including *CCJ* Intervenors, who had timely returned mail-ballot packets with defects.

Following discovery and briefing, the trial court ruled in favor of the *CCJ* Intervenors, holding that the due process guarantee in the Pennsylvania Constitution requires pre-deprivation notice to voters who have made disqualifying errors on their mail-in ballot envelopes. *Ctr. for Coalfield Justice v. Wash. Cnty. Bd. of Elections*, No. 2024-3953 (Pa. Ct. Com. Pl. Wash. Cnty. Aug. 23, 2024), slip op. at 2-3. The court noted that the due process issue was one of first impression. *Id.* at 2.

Petitioners, who are also Intervenor Defendants in *CCJ*, have appealed to the Commonwealth Court and asserted that *CCJ* presents the following questions on appeal:

1. Whether the Trial Court erred in finding that the Board's Policy for the 2024 Primary Election violates Appellees' claimed procedural due process right to challenge the canvass board's decisions and to submit a provisional ballot to remedy a defective mail ballot.

* * *

3. Whether, given the Pennsylvania Supreme Court's explicit holding in *Pa. Dems.* that voters have no legal right to notice of a defect in a mail-in ballot, the Trial Court erred in ordering the

Board to notify any elector whose mail-in ballot is segregated for a disqualifying error despite.

* * *

4. Whether the Trial Court mandating notice-and-cure procedures usurps the province of the General Assembly.

* * *

5. Whether the Trial Court erred in mandating compliance with the Secretary's SURE Instruction because neither the SURE Instruction nor the Secretary's Guidance are binding, and the SURE Instruction directly contradicts the express provisions of the Election Code and is thus void ab initio.

Brief of Appellants Republican National Committee and Republican Party of Pennsylvania, *Ctr. for Coalfield Justice v. Wash. Cnty. Bd. of Elections*, No. 1172 CD 2024 (Pa. Cmwlt. Sept. 10, 2024), at 6-7.

The point of King's Bench jurisdiction is not to permit an unsuccessful litigant to take an end run around the normal appellate process or to present abstract legal questions removed from well-developed factual records that are relevant to how constitutional provisions and the Election Code should be interpreted. King's Bench is most appropriate where, unlike here, there is no other procedural vehicle realistically available as a practical or legal matter to resolve a question of exceptional importance. In addition, Petitioners' bare, unsupported assertions of "disuniformity, uncertainty, chaos, and an erosion of public confidence in the imminent 2024 general election," App.1, do not warrant the grant

of extraordinary jurisdiction because it would bypass the normal and orderly process of appellate review in *Genser* and *CCJ*. Both *Genser* and *CCJ* are positioned for speedy resolution, with the former already scheduled for merits briefing to close in this Court in six days. Petitioners' Application should be rejected in favor of the appellate process already underway.

Dated: September 20, 2024

Respectfully submitted,

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CONFIDENTIAL DOCUMENTS CERTIFICATION

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.

/s/ Mary M. McKenzie
Mary M. McKenzie

IN THE SUPREME COURT OF PENNSYLVANIA

No. 108 MM 2024

REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH,
AND 67 COUNTY BOARDS OF ELECTIONS,

Respondents.

[PROPOSED] ORDER

AND NOW, on this ____ day of September, 2024, upon consideration of the Application for Leave to Intervene by Center For Coalfield Justice, Washington Branch NAACP, Bruce Jacobs, Jeffrey Marks, June Devaughn Hython, Erika Worobec, Sandra Macioce, Kenneth Elliott, David Dean, Faith A. Genser, and Frank P. Matis (“Proposed Intervenors”) it is hereby ORDERED that:

1. The proposed intervenors’ Application for Leave to Intervene is GRANTED;
2. The proposed Response of Faith A. Genser, Frank P. Matis, Center for Coalfield Justice, Washington Branch NAACP, Bruce Jacobs, Jeffrey Marks, June Devaughn Hython, Erika Worobec, Sandra Macioce, Kenneth Elliott, and David Dean, attached as Exhibit 1 to proposed intervenors’ Application for Leave to Intervene shall be docketed as proposed intervenors’ response to Petitioners’ September 18, 2024 Application for the Exercise of King’s Bench Power or Extraordinary Jurisdiction.

BY THE COURT:
