

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

BLACK POLITICAL EMPOWERMENT  
PROJECT, POWER INTERFAITH,  
MAKE THE ROAD PENNSYLVANIA,  
ONEPA ACTIVISTS UNITED, NEW  
PA PROJECT EDUCATION FUND,  
CASA SAN JOSÉ, PITTSBURGH  
UNITED, LEAGUE OF WOMEN  
VOTERS OF PENNSYLVANIA, AND  
COMMON CAUSE PENNSYLVANIA,

Case No. 283 MD 2024  
Original Jurisdiction

Petitioners,

v.

AL SCHMIDT, in his official capacity as  
Secretary of the Commonwealth,  
PHILADELPHIA COUNTY BOARD  
OF ELECTIONS, AND ALLEGHENY  
COUNTY BOARD OF ELECTIONS,

Respondents.

**MEMORANDUM OF LAW IN SUPPORT  
OF APPLICATION FOR LEAVE TO INTERVENE**

Proposed Intervenor-Respondents the Republican National Committee (“RNC”) and the Republican Party of Pennsylvania (“RPP”) (collectively, “Republican Intervenors”), by and through undersigned counsel, respectfully submit the following Memorandum of Law in Support of their Application for Leave to Intervene:

## I. Summary of the Argument

The Republican Intervenors support and seek to uphold free and fair elections for all Pennsylvanians and for all voters across the country. For that reason, they seek to intervene in this case to defend the General Assembly's duly enacted date requirement for absentee and mail-in ballots, which is a commonsense and constitutional rule for preserving the integrity of Pennsylvania's elections.

Petitioners' suit is the latest iteration of a longstanding quest to invalidate the date requirement. The Republican Intervenors, on behalf of themselves, their voters, and their candidates, have led the successful defense of the legality of the date requirement in several of these cases. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022); *Pa. State Conf. of NAACP Branches v. Sec'y of Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024).

Petitioners now ask the Court to undercut decisions by both the Pennsylvania Supreme Court and the Third Circuit Court of Appeals, both of which have recently upheld the envelope dating requirements at issue in this case. In 2022, the Pennsylvania Supreme Court upheld the date requirement as mandatory under state law. *See Ball*, 289 A.3d 1; *Ball*, 284 A.3d 1189. Earlier this year, the Third Circuit rejected a challenge to the date requirement brought under the Materiality Provision of the Civil Rights Act of 1964. *See Pa. State Conf. of NAACP Branches*, 97 F.4th 120.

Those decisions eliminated two key grounds on which plaintiffs—including some of the Petitioners here—have sought to invalidate the date requirement. In fact, four Petitioners in this action—Black Political Empowerment Project, Make The Road Pennsylvania, League of Women Voters of Pennsylvania, and Common Cause Pennsylvania—already participated as *amici* in *Ball*. Those four Petitioners are also federal-court plaintiffs whose Materiality Provision claim the Third Circuit recently rejected and who continue to pursue federal constitutional challenges to the date requirement. *See* Am. Compl., ECF No. 121, *NAACP v. Schmidt*, No. 22 CV 339 (W.D. Pa. filed Nov. 4, 2022) *and* Compl., ECF No. 1, *Eakin v. Adams Cnty. Bd. of Elections*, No. 22 CV 340 (W.D. Pa. filed Nov. 7, 2022).

Rather than raise their claims under the Pennsylvania Constitution in their pending federal cases, Petitioners now file *yet another* lawsuit raising them in this Court. Petitioners thus are attempting to circumvent the prior decisions upholding the date requirement won by the RNC and the RPP. The RNC and the RPP have an obvious interest, and right, to intervene in this case to prevent such circumvention and to preserve those decisions in their favor, particularly given the well-established principle of Pennsylvania law which states that: “[t]he 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 Hearing Bd. of Millcreek Twp.*,

714 A.2d 1120, 1123 (Pa. Commw. Ct. 1998) (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty.*, 44 A.2d 250 (Pa. 1945)).

As explained more fully below in greater detail, the Republican Intervenors satisfy all criteria for intervention, and the Court should grant them intervention. The Republican Intervenors have an obvious interest, and right, to intervene in this case to preserve their successful defense of the date requirement and the decisions in their favor in prior cases, and to prevent circumvention of those decisions through this lawsuit.

Generally, political parties such as the RNC and the RPP have a recognized interest in securing election of their supported candidates, in asserting and protecting the rights of their members in upcoming elections, and in protecting their own agendas and resources from such changes to election laws. *See, e.g., Pa. State Conf. of the NAACP v. Chapman*, No. 1:22-cv-00339-SPB, 2023 WL 121867, at \*3-6 (W.D. Pa. Jan. 6, 2023) (granting intervention of right to the RNC, National Republican Congressional Committee, and the Republican Party of Pennsylvania), *rev'd on other grounds*, 97 F.4th 120 (3rd Cir. 2024). In addition, the RNC and the RPP have made significant investments in support of Republican candidates up and down the ballot and in connection with voter mobilization and education efforts in Pennsylvania for the past many election cycles and continue to do so again in 2024. They thus have a substantial and particularized interest in defending this action to

preserve the structure of the competitive environment in which their supported voters and candidates participate and seek to win elections, and to ensure that Pennsylvania carries out free and fair elections.

Indeed, in recent years, non-enforcement of the date requirement has changed the outcome of elections to the detriment of the Republican Intervenors, their voters, and their candidates. In 2022, court rulings invalidating the date requirement flipped the outcome of a Lehigh County Court of Common Pleas election and resulted in Republican David Ritter losing the election. *See* Cert. Pet. at 7-12, *Ritter v. Migliori*, No. 22-30 (U.S. July 7, 2022).<sup>1</sup> In 2023, the federal district court ruling invalidating the date requirement that the Third Circuit reversed on appeal nonetheless resulted in Montgomery County election officials flipping the outcome of a Towamencin Township Board of Supervisors Election and declaring Republican Richard Marino—who received the highest number of votes under the rules in effect on Election Day—the loser to a Democratic challenger. *See* North Penn Now, “Towamencin candidates address latest ruling on 2023 race” (Apr. 17, 2024).<sup>2</sup>

No other party to this action represents the Republican Intervenors’ interests. Petitioners, who seek invalidation of the date requirement, obviously do not

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<sup>1</sup> [https://www.supremecourt.gov/DocketPDF/22/22-30/22951/20220707140738344\\_Ritter%20Petition.pdf](https://www.supremecourt.gov/DocketPDF/22/22-30/22951/20220707140738344_Ritter%20Petition.pdf).

<sup>2</sup> *See* <https://northpennnow.com/news/2024/apr/17/towamencin-candidates-ruling-2023-race/>.

represent those interests. Neither do Respondents: all three Respondents opposed the Republican Intervenors' position in prior litigation and asked the Pennsylvania Supreme Court and the Third Circuit to invalidate the date requirement. *See* Resp't Allegheny Cnty. Bd. of Elections Br. and Resp't Phila. Cnty. Bd. of Elections Br., *Ball v. Chapman*, No. 102 MM 2022 (Pa. filed Oct. 16, 2022); Defs.-Appellee Resp. Br., *NAACP v. Schmidt*, No. 23-3166 (3d Cir. filed Dec. 7, 2023). If Respondents again decline to defend the date requirement in this case, there will be no party before the Court to defend it, absent intervention by the Republican Intervenors.

Further, Respondents, as Commonwealth and county officials, do not share the Republican Intervenors' objectives regarding the promotion of Republican candidates. Thus, the Republican Intervenors have a unique and, at present, unrepresented interest in the outcome of this litigation which can only be protected by a grant of intervention.

For all of these reasons, and as explained more fully below, the Republican Intervenors' timely application for intervention should be granted.

## **II. Argument**

### **A. Background**

On May 28, 2024, Petitioners filed their Petition for Review addressed to the Commonwealth Court of Pennsylvania's original jurisdiction against Al Schmidt, in

his official capacity as the Secretary of the Commonwealth, and the Philadelphia and Allegheny County Boards of Elections. Pet. ¶ 1.

This suit is the latest in a long line of attempts to persuade the courts to undo the General Assembly's date requirement for absentee and mail-in ballots. *See McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112 (Pa. Commw. Ct. June 2, 2022); *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 993 (Pa. Commw. 2022) (unpublished); *Ritter v. Lehigh Cnty Bd. of Elections*, 272 A.3d 989 (Pa. Commw. 2022) (unpublished); *NAACP v. Schmidt*, No. 22 CV 339 (W.D. Pa. filed Nov. 4, 2022); *Eakin v. Adams Cnty. Bd. of Elections*, No. 22 CV 340 (W.D. Pa. filed Nov. 7, 2022).

On November 1, 2022, the Pennsylvania Supreme Court ruled in a case brought by the Republican Intervenors and voters that the date requirement is lawful and mandatory under state law. *See Ball*, 289 A.3d 1; *Ball*, 284 A.3d 1189. The court ordered county boards of elections “to refrain from counting any absentee and mail-in ballots received for the November 8, 2022 general election that are contained in undated or incorrectly dated outer envelopes.” 284 A.3d at 1192.

Petitioners now contend that the date requirement violates Pennsylvania's Free and Equal Elections Clause, Pa. Const. art. I, § 5, and serves no meaningful purpose. *See* Pet. ¶¶ 81–91. Petitioners advance these arguments even though the Pennsylvania Supreme Court had these very arguments before it when it upheld the

date requirement in *Ball*. See *Ball*, 289 A.2d at 14-15 (discussing Free and Equal Elections Clause arguments raised by the parties), 16 n.77 (discussing lack of “functionality” of the date requirement); Brief of Respondent in *Ball*, 2022 WL 18540590, at \*37 (“Imposing draconian consequences for insignificant errors could, as is the case here [] implicate the Constitution's Free and Equal Election Clause[.]”); Brief of Intervenor-Respondents DCCC, DNC and PDP in *Ball*, 2022 WL 18540587 at \*1-2 and 8-10 (discussing lack of meaningful function of date requirement), 29-32 (making argument under Free and Equal Elections Clause).

The Pennsylvania Supreme Court’s holding in *Ball* aligned with the view of three Justices of the U.S. Supreme Court. In addressing an application for a stay following Pennsylvania’s 2022 primary election, three Justices concluded that the notion that the date requirement violates the federal Materiality Provision is “very likely wrong.” *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Mem.) (Alito, J., dissenting from the denial of the application for stay). No other Justices addressed the merits in the stay posture of that litigation.

Earlier this year, the Third Circuit endorsed the view espoused in the *Ritter* dissent. Siding with the Republican Interveners, the Third Circuit reversed the district court’s grant of summary judgment and held that the date requirement does not violate the Materiality Provision or “deny” any individual “the right to vote.”



*See Pa. State Conf. of NAACP Branches*, 97 F.4th at 133–135. The Third Circuit has denied the petition for rehearing.

Nonetheless, Petitioners—four of whom participated in both *Ball* and the ongoing federal-court litigation—now seek to circumvent those decisions by arguing that the date requirement violates the Pennsylvania Constitution. *See* Pet. ¶¶ 81–91. Petitioners ask the Court to invalidate the General Assembly’s duly enacted date requirement in two counties and to preliminarily and permanently enjoin further enforcement of the requirement in those counties. Pet. Prayer for Relief ¶¶ a-c.

This case is still in its infancy. As of the filing of this memorandum, no Respondent has yet responded to the Petition. The Court has set a status conference for June 10, 2024, to discuss the schedule for proceeding in this case.

## **B. Governing Legal Standard**

This action is governed by the Pennsylvania Rules of Civil Procedure concerning intervention—specifically, rules 2326 to 2329—because in an original jurisdiction matter, Pennsylvania Rule of Appellate Procedure 106 (“Original Jurisdiction Matters”) makes clear that procedure is governed by the “general rules” for practice in the courts of common pleas—namely, the Rules of Civil Procedure—“so far as they may be applied.” Pa. R.A.P. 106.

Pennsylvania Rule of Civil Procedure 2327(4) is permissive and provides in pertinent part:

At any time during the pendency of an action, a person not a party thereto *shall be permitted to intervene therein*, subject to these rules if . . . *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(4) (emphasis added); *see also Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, No. 26 M.D. 2019, 2020 Pa. Commw. LEXIS 104, 2020 WL 424866, at \*5 (Pa. Commw. Ct. Jan. 28, 2020) (“Pennsylvania Rule of Civil Procedure No. 2327(4) . . . permits intervention where the determination ‘*may affect any legally enforceable interest*’ of a proposed intervenor.” (quoting Pa. R.C.P. No. 2327(4) and emphasis in original)).

Although the rule is permissive, this Court has held that if the determination may affect the intervenor’s legally enforceable interest, and no exception applies, approving intervention is **mandatory**, not discretionary. *See Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999). Thus, where none of the exceptions to the general principles of intervention set forth in the Rules of Civil Procedure apply, intervention must be allowed.

Pa. R.C.P. No. 2329 sets forth the following exceptions under which an “application for intervention may be refused,” despite the allegations therein being sufficient:

“(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.

None of these exceptions to intervention apply here, as explained below. In all events, the Court may, in its discretion, allow intervention *even if* it determines that one of the Rule 2329 exceptions applies. *See* Pa. R.C.P. 2329 (instructing that “an application for intervention *may* be refused” if an exception applies (emphasis added)); *see also* 7 Goodrich Amram 2d § 2329:7 (“Even though the petitioner’s interest is adequately represented in the pending action, this fact does not mandate the refusal of intervention since the refusal of intervention on the ground of the adequacy of the representation is permissive in nature.”).

In sum, the Court should grant the Republican Intervenors’ application to intervene because the Court’s determination of this action may affect the Republican Intervenors’ legally enforceable interests, no exception applies under Pennsylvania Rule of Civil Procedure 2329, and the Republican Intervenors’ participation will aid the Court.

**C. The Republican Intervenors have substantial interests in this action.**

It is clear that the Republican Intervenors have a substantial and particularized interest in the outcome of this litigation. On behalf of themselves, their members and candidates, and their constituency, the Republican Intervenors have an interest

in ensuring that Pennsylvania's elections are conducted fairly, predictably, and with integrity.

Indeed, the Republican Intervenors have led the defense of the date requirement's legality in prior cases, including *Ball* and *Pennsylvania State Conference of the NAACP*. The Republican Intervenors have an obvious interest in protecting the decisions upholding the date requirement in those cases, in which they prevailed and expended substantial resources. Petitioners' suit directly implicates that interest because it seeks to circumvent those decisions and secure a new, contrary judicial decision that the date requirement is valid and unenforceable. *See* Pet. Prayer for Relief ¶¶ a-b.

More generally, there can be no question that the Republican Intervenors have an obvious interest in the continued enforcement of Pennsylvania's laws governing absentee and mail-in ballots as those laws are designed to ensure "the integrity of [the] election process." *Eu v. San Fran. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and the "orderly administration" of elections, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (op. of Stevens, J.). Were these validly enacted laws to be cast aside, the current competitive electoral environment in Pennsylvania, in which the Republican Intervenors invest substantial resources in support of Republican candidates to try to win elections, would be altered or impaired. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5,

800 (Pa. 2018). Courts around the country routinely recognize that political parties have an interest in defending against suits seeking judicial changes to election laws and procedures.<sup>3</sup> Indeed, courts generally recognize that committees of the

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<sup>3</sup> See, e.g., *Pa. State Conf. of the NAACP*, 2023 WL 121867, at \*3-6 (granting intervention of right to the RNC, National Republican Congressional Committee, and the Republican Party of Pennsylvania); *La Union Del Pueblo Entero v. Abbott*, 29 F.4th 299 (5th Cir. 2022) (granting intervention of right to county party committees, Republican National Committee, National Republican Senatorial Committee, and National Republican Congressional Committee); *United States v. Georgia*, No. 1:21-cv-2575 (N.D. Ga. July 12, 2021) (granting intervention to the RNC, NRSC, and Georgia Republican Party); *Concerned Black Clergy of Metro. Atlanta, Inc. v. Raffensperger*, No. 1:21-cv-1728 (N.D. Ga. June 21, 2021) (granting intervention to the RNC, NRSC, NRCC, and Georgia Republican Party); *Coalition for Good Governance v. Raffensperger*, No. 1:21-cv-02070 (N.D. Ga. June 21, 2021) (same); *New Georgia Project v. Raffensperger*, No. 1:21-cv-1229, 2021 WL 2450647 (N.D. Ga. June 4, 2021) (same); *Ga. State Conf. of the NAACP v. Raffensperger*, No. 1:21-cv-1259 (N.D. Ga. June 4, 2021) (same); *Sixth Dist. of the African Methodist Episcopal Church v. Kemp*, No. 1:21-cv-1284 (N.D. Ga. June 4, 2021) (same); *Asian Ams. Advancing Justice-Atlanta v. Raffensperger*, No. 1:21-cv-1333 (N.D. Ga. June 4, 2021) (same); *VoteAmerica v. Raffensperger*, No. 1:21-cv-1390 (N.D. Ga. June 4, 2021) (same); *Wood v. Raffensperger*, No. 1:20-cv-5155 (N.D. Ga. Dec. 22, 2020) (granting intervention to the DSCC and Democratic Party of Georgia); *Alliance for Retired American's v. Dunlap*, No. CV-20-95 (Me. Super. Ct. Aug. 21, 2020) (granting intervention to the RNC, NRSC, and Republican Party of Maine); *Mi Familia Vota v. Hobbs*, Doc. 25, No. 2:20-cv-1903 (D. Ariz. June 26, 2020) (granting intervention to the RNC and NRSC); *Ariz. Democratic Party v. Hobbs*, Doc. 60, No. 2:20-cv-1143-DLR (D. Ariz. June 26, 2020) (granting intervention to the RNC and Arizona Republican Party); *Swenson v. Bostelmann*, Doc. 38, No. 20-cv-459-wmc (W.D. Wis. June 23, 2020) (granting intervention to the RNC and Republican Party of Wisconsin); *Edwards v. Vos*, Doc. 27, No. 20-cv-340-wmc (W.D. Wis. June 23, 2020) (same); *League of Women Voters of Minn. Ed. Fund v. Simon*, Doc. 52, No. 20-cv-1205 ECT/TNL (D. Minn. June 23, 2020) (granting intervention to the RNC and Republican Party of Minnesota); *Issa v. Newsom*, 2020 WL 3074351, at \*4 (E.D. Cal. June 10, 2020) (granting intervention to the DCCC and Democratic Party of California); *Nielsen v. DeSantis*, Doc. 101, No. 4:20-cv-236-RH (N.D. Fla. May 28, 2020) (granting intervention to the RNC,

Republican Party have “an interest in the subject matter of [a] case,” when “changes in voting procedures could affect candidates running as Republicans and voters who

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NRCC, and Republican Party of Florida); *Priorities USA v. Nessel*, 2020 WL 2615504, at \*5 (E.D. Mich. May 22, 2020) (granting intervention to the RNC and Republican Party of Michigan); *Thomas v. Andino*, 2020 WL 2306615, at \*4 (D.S.C. May 8, 2020) (granting intervention to the South Carolina Republican Party); *Corona v. Cegavske*, Order Granting Mot. to Intervene, No. CV 20-OC-644-1B (Nev. 1st Jud. Dist. Ct. Apr. 30, 2020) (granting intervention to the RNC and Nevada Republican Party); *League of Women Voters of Va. v. Va. State Bd. of Elections*, Doc. 57, No. 6:20-cv-24-NKM (W.D. Va. Apr. 29, 2020) (granting intervention to the Republican Party of Virginia); *Paher v. Cegavske*, 2020 WL 2042365, at \*2 (D. Nev. Apr. 28, 2020) (granting intervention to four Democratic Party entities); *Democratic Nat’l Comm. v. Bostelmann*, 2020 WL 1505640, at \*5 (W.D. Wis. Mar. 28, 2020) (granting intervention to the RNC and Republican Party of Wisconsin); *Gear v. Knudson*, Doc. 58, No. 3:20-cv-278 (W.D. Wis. Mar. 31, 2020) (same); *Lewis v. Knudson*, Doc. 63, No. 3:20-cv-284 (W.D. Wis. Mar. 31, 2020) (same); see also *Democratic Exec. Cmte. of Fla. v. Detzner*, No. 4:18-cv-520-MW-MJF (N.D. Fla. Nov. 9, 2018) (granting intervention to the NRSC); *Citizens United v. Gessler*, No. 14-002266, 2014 U.S. Dist. LEXIS 128669, 2014 WL 4549001, at \*2 (D. Colo. Sept. 15, 2014) (granting intervention to the Colorado Democratic Party); *Libertarian Party of Mich. v. Johnson*, No. 12-12782, 2012 U.S. Dist. LEXIS 126096 (E.D. Mich. Sept. 5, 2012) (granting intervention to the Republican Party of Michigan); *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 U.S. Dist. LEXIS 134520, 2011 WL 5868225, \*1 (N.D. Ill. Nov. 22, 2011) (granting intervention to the Illinois Republican Party); *Siegel v. LePore*, 234 F.3d 1163, 1169 n.1 (11th Cir. 2001) (acknowledging that the district court granted a motion by the Florida Democratic Party to intervene); *Trinsey v. Pennsylvania*, 941 F.2d 224, 226 (3d Cir. 1991) (acknowledging that the district court permitted Republican Party officials and the Republican State Committee of Pennsylvania to intervene and granting intervention to the Pennsylvania Democratic State Committee on appeal); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 639 (N.D. Ill. 1991) (granting intervention to a political party organized under the Illinois Election code); *Anderson v. Babb*, 632 F.2d 300, 304 (4th Cir. 1980) (acknowledging that the district court granted the DNC’s motion to intervene).

[are] members of the . . . Republican Party.” *Ohio Democratic Party v. Blackwell*, No. 04-1055, 2005 WL 8162665, at \*2 (S.D. Ohio Aug. 26, 2005).

This interest is not a hypothetical one. The courts’ failure to enforce the date requirement in *Migliori v. Cohen* actually changed the outcome of an election in which a Republican candidate prevailed. *See supra* n.2. Similarly, in 2023, the Montgomery County Board of Elections’ decision to count misdated ballots flipped the election against Republican incumbent, Richard Marino. *See supra* n.3. A similar outcome is possible in the 2024 election cycle, and the Republican Intervenors’ interest in preventing such an outcome is obvious.

If Petitioners’ action succeeds, the orderly administration of Pennsylvania’s elections will be upended shortly before a critical general election.

Invalidating the date requirement would not only undercut the prior court rulings in the Republican Intervenors’ favor and the democratically enacted laws that protect voters and candidates (including the Republican Intervenors and their members), *Caba v. Weaknecht*, 64 A.3d 39, 50 (Pa. Commw. Ct. 2013) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008)), but also change the “structur[e] of [the] competitive environment” in Pennsylvania’s elections and “fundamentally alter the environment in which [the Republican Intervenors] defend their concrete interests (e.g. their interest in . . . winning [elections]),” *Shays v. Fed. Elec. Comm’n*, 414 F.3d 76, 86 (D.C. Cir. 2005).

Such changes also risk confusing voters and undermining confidence in the electoral process. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (“Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”). If Petitioners were to prevail, Republican Intervenors will be forced to spend substantial resources informing their Republican voters of changes in the law, fighting inevitable confusion, and galvanizing participation in the election as a result of such a change.

Such interference with Pennsylvania’s election scheme—and with the Republican Intervenors’ electoral activities—would impair the Republican Intervenors’ interests on behalf of their candidates, their members, and themselves, and thus warrants intervention.<sup>4</sup>

**D. There is no basis to refuse the Republican Intervenors’ application for intervention.**

As discussed above, *supra* Section II.A, the Pennsylvania Rules of Civil Procedure instruct when an application for intervention may be denied. Pa. R.C.P. 2329 provides that an application for intervention may be refused if: (1) the

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<sup>4</sup> Additionally, as addressed in the Republican Intervenor’s Proposed Preliminary Objections, Petitioners fail to address the broader election law implications of declaring the envelope dating provisions of the Election Code by improperly cabinining their relief as only enjoining “enforcement” of the provision, and further failing to address the nonseverability clause contained in Act 77. *See* Act 77, 2019 P.L. 552, at § 11.



petitioner's claim or defense "is not in subordination to and in recognition of the propriety of the action"; (2) the petitioner's interest 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." None of these exceptions applies to the Republican Intervenors.<sup>5</sup>

First, the Republican Intervenors' defense in this action is in subordination to and in recognition of the action's propriety, thus rendering the first of these exceptions inapplicable.

Second, no existing party adequately represents the Republican Intervenors' particularized interests. *See* Pa. R.C.P. No. 2329(2). That Petitioners do not represent the Republican Intervenors' interests is clear, since they seek invalidation of the date requirement the Republican Intervenors seek to uphold. Moreover, four Petitioners here opposed the Republican Intervenors' position as *amici* in *Ball* and as plaintiffs in the ongoing federal-court challenges to the date requirement. *See supra* p. 5. Thus, it is obvious that the Petitioners represent interests diametrically opposed to those of the Republican Intervenors.

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<sup>5</sup> As explained above, the Court retains discretion to allow the Republican Intervenors to intervene even if it concludes that an exception under Rule 2329 applies. Pa. R.C.P. 2329; 7 Goodrich Amram 2d § 2329:7.

Respondents also do not represent the Republican Intervenors' interests in this case. As noted, all three Respondents have taken positions opposed to the positions taken by the Republican Intervenors and have sought invalidation of the date requirement in prior litigation, including *Ball* and the federal-court litigation. *See supra* pp. 5-6. If Respondents again decline to defend the date requirement in this case, there will be no party before the Court to defend it, absent intervention by the Republican Intervenors. The Republican Intervenors have already expended substantial resources in prior litigation regarding the date requirement and should be afforded the opportunity to ensure that their position is defended as Petitioners bring *yet another* challenge to the date requirement.

Finally, Respondents, as Commonwealth and county officials, do not represent the private interests of the Republican Intervenors at stake in this litigation, which are fundamentally different from, and far narrower than, the broad public interests represented by Respondents. Indeed, "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [private movant] merely because both entities occupy the same posture in the litigation." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001); *see also, e.g., Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 321 (D.C. Cir. 2015) ("[W]e look skeptically on

government entities serving as adequate advocates for private parties.” (citing *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003)).

Whereas the Republican Intervenors have particularized interests in securing election of Republican officials and in maintaining the competitive electoral environment adopted through the Election Code, Respondents—appropriately—have no interest in the election of particular candidates. *See, e.g., Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (holding that the government’s representation of the general public interest did not adequately represent the intervenor’s narrower private interests, despite the similarity in their goals). Instead, in acting on behalf of Pennsylvania citizens, the Commonwealth, and their counties, Respondents must consider “a range of interests likely to diverge from those of the intervenors.” *Meek v. Metro. Dade Cty.*, 985 F.2d 1471, 1478 (11th Cir. 1993). Indeed, “[i]n litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of [a private party] intervenor.” *Utah Ass’n of Ctys.*, 255 F.3d at 1256. These considerations may include “the expense of defending the current [laws] out of [state] coffers,” *Clark v. Putnam Cty.*, 168 F.3d 458, 461–62 (11th Cir. 1999), “the social and political divisiveness of the election issue,” *Meek*, 985 F.2d at 1478, “their own desires to remain politically popular and effective leaders,” *id.*, and the interests of opposing parties, *In re Sierra Club*, 945 F.2d 776, 779–80 (4th

Cir. 1991). Given that Respondents may take these other interests into account, their interests may diverge with the Republican Intervenors' interests throughout this litigation.

Third, the Republican Intervenors have not unduly delayed in submitting their application to intervene in this action, which remains in its infancy. The Petition was filed only ten days ago. Intervention by the RNC and the RPP will not cause any undue delay, embarrassment, or prejudice to any party, but it will aid the Court in resolving the important legal and factual questions before it.

### **III. Conclusion**

For all the reasons set forth herein, the Republican Intervenors respectfully request that their Application for Leave to Intervene be granted.

Dated: June 7, 2024

Respectfully submitted,

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