No. 20-542 & 20-574

In the Supreme Court of the United States

REPUBLICAN PARTY OF PENNSYLVANIA,
Petitioner

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS SECRETARY OF PENNSYLVANIA, ET AL.,
Respondents

JOSEPH B. SCARNATI, III, ET AL.
Petitioners

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS SECRETARY OF PENNSYLVANIA, ET AL.,
Respondents

RESPONSE IN OPPOSITION TO MOTIONS TO INTERVENE

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The Pennsylvania Office of Attorney General, on behalf of the Secretary of the Commonwealth Kathy Boockvar, respectfully files this memorandum in opposition to the two motions to intervene by Donald J. Trump for President Inc. ("Trump Campaign"). Because the Trump Campaign cannot satisfy the standard for intervention as of right or by permission, the motion should be denied.

This matter has been pending before this Court for nearly six weeks. One day after Election Day, and for the second time in this case, the Trump Campaign has filed a motion for leave to intervene. The Trump Campaign's first motion was properly denied by the Pennsylvania Supreme Court because its generalized grievance in maintaining the electoral status quo was insufficient to justify standing or intervention. *See Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (dismissing appeal for lack of standing where petitioners had no role in enforcement of a California proposition). That defect has not been cured by the passage of time.

As the Seventh Circuit has aptly stated, a lower court's decision not to permit intervention is reviewed for abuse of discretion, and reversal "is a very rare bird indeed, so seldom seen as to be considered unique." *Planned Parenthood of Wisconsin v. Kaul*, 942 F.3d 793, 803 (7th Cir. 2019). In arguing that this Court should second-guess the Pennsylvania Supreme Court's determination, the Trump Campaign claims that the Republican Party petitioner does not adequately represent its interests. But the parties' interest were perfectly aligned below. Indeed, the same counsel who represented the Republican Party also represented the Trump Campaign in this case, filing both a motion to intervene and a response to Secretary Boockvar's

application for extraordinary relief in the Pennsylvania Supreme Court. Counsel of record for the Republican Party also represented the Trump Campaign in a separate case in Federal court, *Trump v. Boockvar*, 2:20-cv-00966 (W.D. Pa. 2020). In both instances, the arguments raised by the Trump Campaign with respect to the Electors and Elections Clauses are virtually identical to the arguments raised by the Republican Party in this Court.

"The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present parties." Wright & Miller, 7C Federal Practice and Procedure § 1909. Where, as here, the interest of the absentee is identical to that of one of the existing parties, and the parties have the same objective, representation is presumptively adequate. *Ibid.* Nearly every Circuit Court in the Country has adopted this presumption in some form.[1] Some courts require a showing of "gross negligence or bad faith" to overcome that presumption. *See Kaul*, 942 F.3d at 799.[2]

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[1] *See*, *e.g.*, *In re: Thompson*, 965 F.2d 1136, 1142-42 (1st Cir. 1992); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 180 (2d Cir. 2001); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970, 973 (3d Cir. 1982); Stuart v. Huff, 706 F.3d 345, 349 (4th Cir. 2013); *Baker v. Wade*, 743 F.2d 236, 240-41 (5th Cir. 1984); *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005); *Planned Parenthood of Wisconsin v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019); *FTC v. Johnson*, 800 F.2d 448, 452 (8th Cir. 2015); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086-87 (9th Cir. 2003); *Tri-State Generation & Transmission Ass'n v. N.M. Pub. Ref. Comm'n*, 787 F.3d 1068, 1072-73 (10th Cir. 2015); *Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999); *Environmental Defense Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979).

[2] Unsuccessful representation cannot, by itself, establish inadequate representation for intervention purposes. *See Pennsylvania v. Rizzo*, 530 F.2d 501, 593 (3d Cir. 1976).

As noted, the arguments previously raised by the Trump Campaign with respect to the Electors and Elections Clauses are virtually identical to the arguments raised by the Republican Party in this Court, and it cannot reasonably be argued that the parties have divergent objectives. Indeed, in its motion to intervene, the Trump Campaign expressly adopted the existing petitions filed by the Republican Party as its own. That the Republican Party is "capable and willing" to make all of the arguments that the Trump Campaign would make, *see Arakaki v. Cayetano*, 324 F.3d 1078, 1086-87 (9th Cir. 2003), and that the Trump Campaign has expressly adopted those arguments as its own, belies any assertion that the Republican Party does not adequately represent the Trump Campaign's interests.

Moreover, the Trump Campaign has not provided any justification for its delay in seeking intervention in this Court, and allowing intervention at this stage would significantly prejudice the existing parties.[3] Timeliness is to be judged "in consideration of all the circumstances," including how much time has elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the likelihood of prejudice. *See Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008). One of the circumstances to be considered is the length of time the intervenor knew or should

[3] In its motion to intervene, the Trump Campaign adopts the existing petitioners' support for expedited briefing and argument if certiorari is granted. Motion at 3. The Trump Campaign appears to acknowledge that further expedition of the petition for writ of certiorari that this court rejected, would constitute prejudice to the respondents. The Secretary agrees; any attempt to revisit that resolved issue would constitute prejudice to respondents.

have known of its interest in the case. *Heartwood v. United States Forest Service*, 316 F.3d 694 (7th Cir. 2003).

As noted, this matter has been pending before this Court for nearly six weeks and, with respect to what is at issue in this case, there is nothing that the Trump Campaign was not aware of at the outset. Though the Trump Campaign attempts to categorize this timeframe as "minimal" relative to the 90-day period for filing a petition for a writ of certiorari, in the runup to an election, six weeks is anything but minimal. During those six weeks, the existing parties litigated an application to stay and a motion to expedite, and the Republican Party filed its petition for a writ of certiorari. The Trump Campaign has not offered any justification for its delay in seeking leave to intervene before now.

In addition to the timeliness and prejudicial nature of the Trump Campaign's motion for intervention, the motion also improperly seeks to cure a jurisdictional defect. The Trump Campaign's motion to intervene is, as even it acknowledges, designed "to avert a possible standing defect" that arises from the Republican Party of Pennsylvania and the Individual Legislators (collectively Petitioners) petitioning for relief. Motion at 8. Without accepting the Trump Campaign's premise that it has standing, as we previously pointed out in our opposition to the motion to stay, Petitioners lack the standing necessary to give the Trump Campaign a proper case in which to intervene. Opp. 12-13.

There we explained that the Republican Party's claim that the Pennsylvania Supreme Court usurped authority delegated to the General Assembly under the

Elections and Electors Clauses amounts to a "generalized grievance," that is, "[a]n interest shared generally with the public at large in the proper application of the Constitution and laws." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992); *see also, Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (four voters' challenge to judicial redistricting plan as violating Elections Clause presented only generalized grievance). Moreover, this principle has been specifically held to apply to political parties and their members. *See Democratic National Comm. v. Bostelmann*, __ F.3d __, 2020 WL 5796311, *1 (7th Cir., Sept. 29, 2020) (extension of received-by deadline for mailed ballots did not cause any injury to political party or their members).

The Individual Legislators fare no better, as they too advance only a generalized grievance. *See Virginia House of Delegates v. Bethune-Hill*, __ U.S. __, 139 S.Ct. 1945, 1953-54 (2019). Any interest in protecting legislative authority belongs to the legislature as a whole, not individual legislators. *See Bethune-Hill*, 139 S.Ct. at 1953; *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 803 (2015). Although the Individual Legislators claim they have standing because they represent "the majority of the Pennsylvania General Assembly," Writ at 5, their leadership role does not confer standing on them. *See Corman v. Torres*, 287 F.Supp. 3d 558, 568-59 (M.D. Pa. 2018) (three-judge panel) (rejecting as speculative legislative leaders' argument that the majority of legislators would "vote in unison in a matter of great importance"). The General Assembly would first have to "authorize[] votes in both of its chambers" before seeking relief. *Arizona*

State Legislature, 576 U.S. at 802. None of the petitioners possesses Article III standing to bring this action.

The Trump Campaign seeks to cure this jurisdictional defect through intervention under Federal Rule of Civil Procedure 24. Motion at 8-9. This it cannot do. The Federal Rules of Civil Procedure neither limit nor extend the jurisdiction of federal courts. Fed. R. Civ. P. 82. Therefore, Rule 24 cannot provide a basis for jurisdiction. If a court lacks Article III jurisdiction over a case, "intervention [can] not cure this vice in the original suit[,]" nor can it "be treated as an original suit." *U.S. ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 163–64 (1914). Put another way, "it is axiomatic that 'intervention will not be permitted to breathe life into a "nonexistent" lawsuit.'" *McClune v. Shamah,* 593 F.2d 482, 486 (3d. Cir. 1979) (quoting *Fuller v. Volk*, 351 F.2d 323 (3d Cir. 1965)). "A motion for intervention under Rule 24 is not an appropriate device to cure a situation in which plaintiffs may have stated causes of action that they have no standing to litigate." *Ibid. See also*, *Interstate Commerce Commission v. Southern Railway Co.*, 543 F.2d 534 (5th Cir. 1976) ("[I]t is elementary that jurisdictional defects in the original complaint cannot be remedied by the papers of intervenors[.]").[4]

The Trump Campaign's reliance on *Mullaney v. Anderson*, 342 U.S. 415 (1952) does not save it from this well-settled principal of federal jurisprudence. In that case,

[4] "Indeed, this rule is so deeply entrenched in our jurisprudence that it is an axiomatic principle of federal jurisdiction in every circuit to have addressed the question." *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living*, 675 F.3d 149, 160-161 (2d. Cir. 2012) (collecting cases).

the respondent-plaintiff moved for leave to add parties under Fed. R. Civ. P. 21 in order to "put[] the principal, the real party in interest, in the position of his avowed agent." *Id* at 416–17. This Court granted that "motion in view of the special circumstances before us." *Id.* at 417.

Here, the Trump Campaign does not seek joinder under Rule 21 and the Republican Party of Pennsylvania is not merely an agent of a single candidate's campaign. The instant Rule 24 motion is an attempt to improperly circumvent the Pennsylvania Supreme Court's interpretation of state law standing using the federal standards. Upon being denied intervention below, the Trump Campaign should have initiated its own action. Its failure to do so is fatal to its attempt to intervene now. *Accord. Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, __ U.S.__, 138 S.Ct. 2448, 2462–63 (2018) (intervenor must meet the requirements that a plaintiff must satisfy—e.g., filing a separate complaint and properly serving the defendants).

CONCLUSION

The Court should deny the motions to intervene.

Respectfully submitted,

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November 5, 2020