Nos. 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 PENNSYLVANIA SECRETARY OF STATE, ET AL.,
Respondents.

JOSEPH B. SCARNATI, III, ET AL.,
Petitioners,

v.

PENNSYLVANIA DEMOCRATIC PARTY, ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the Pennsylvania Supreme Court

MOTION OF DONALD J. TRUMP FOR PRESIDENT, INC. FOR LEAVE TO INTERVENE AS PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, Movant, Donald J. Trump for President, Inc., states that it has no parent company or publicly held company with a 10% or greater ownership interest in it.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Other Authorities

INTRODUCTION

One week ago, several Justices predicted that the Pennsylvania Supreme Court's unconstitutional expansion of mail voting could create "serious post-election problems." *Republican Party of Pa. v. Boockvar*, 2020 WL 6304626, at *1 (Oct. 28, 2020) (statement of Alito, J.). The Justices stressed that these important issues had not "escape[d] [the Court's] review." *Id.* at *2. Because the certiorari petitions "remain[] before us," those petitions could be "granted," and the case could be resolved under a "shortened schedule," *id.*—if the time came when this Court's review was necessary.

That time has come. Given last night's results, the vote in Pennsylvania may well determine the next President of the United States. And this Court, not the Pennsylvania Supreme Court, should have the final say on the relevant and dispositive legal questions.

To prepare for judicial review, the President's reelection campaign asks to intervene as a petitioner in *Republican Party of Pennsylvania v. Boockvar*, No. 20-542; and *Scarnati v. Pennsylvania Democratic Party*, No. 20-574. Movant adopts those petitions as its own and agrees that the Pennsylvania Supreme Court's judgment violates federal law. As the real party in interest, Movant has a direct, concrete stake in the outcome of these petitions and, ultimately, the lawfulness of Pennsylvania's vote tally. The interests of justice and judicial economy strongly favor its participation in these proceedings.

REASONS FOR GRANTING THE MOTION

While no statute expressly governs intervention in this Court (or in the courts of appeals), this Court's Rule contemplate a "motion for leave to intervene," S. Ct. R. 33.1(e), and this Court frequently grants intervention, *e.g., N.B.D. v. Ky. Cabinet for Health & Family Servs.*, 140 S. Ct. 860 (2020); *BNSF Ry. Co. v. EEOC*, 140 S. Ct. 109 (2019); *Vos v. Barg*, 555 U.S. 1211 (2009); *Dames & Moore v. Regan*, 452 U.S. 932 (1981). When making that decision, this Court uses the Federal Rules of Civil Procedure as a guide. *Automobile Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *see also Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952). The Federal Rules contemplate both "intervention of right" and "permissive intervention." Fed. R. Civ. P. 24. Movant qualifies for both.

I. The Court should grant intervention as of right.

Federal Rule 24(a)(2)'s requirements for intervention as of right are a timely motion, a cognizable interest, a danger of that interest's impairment, and lack of adequate representation. Movant satisfies all four requirements.

A. Timeliness

This motion is timely. "[T]he requirement of timeliness is a flexible one." 7C Wright & Miller, *Federal Practice and Procedure* §1916 (3d ed.). The "most important consideration" is "whether the delay in moving for intervention will prejudice the existing parties." *Id.*

Here, any "delay" is minimal: The 90-day period to file a petition for a writ for certiorari has not yet expired, S. Ct. R. 13.1, and Respondents have not yet filed a brief in opposition to either of the pending petitions. Litigation in this Court, in other words, is just getting started. *See, e.g.*, *Geiger v. Foley Hoag LLC Ret. Plan*, 521 F.3d 60, 64 (1st Cir. 2008) (finding a motion to intervene timely where "the case had not progressed beyond the initial stages").

Movant was also prompt in moving to intervene below. *See* 7C Wright & Miller §1916. Movant sought leave to intervene in the state-court proceedings below, but that request was denied without explanation. *See* Order Granting in Part Applications for Intervention, *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020 (Pa. Sep. 3, 2020) (per curiam minute order); *see also Pa. Democratic Party v. Boockvar*, 2020 WL 5554644, at *2-3 (Pa. Sep. 17, 2020).

Nor would permitting intervention prejudice anyone. Movant adopts the existing petitions as his own, Movant supports an expedited briefing and argument schedule, and Movant will follow any schedule that this Court sets. Barring any possible prejudice, the timeliness factor plainly favors Movant's intervention.

B. Cognizable Interest

To intervene as of right, a proposed intervenor must have "a significantly protectable interest" in the lawsuit's subject matter. *Donaldson v. United States*, 400 U.S. 517, 531 (1971). Federal courts have recognized that political candidates and their campaigns

have a direct and judicially cognizable interest in the lawful administration of elections. *See, e.g.*, *Carson v. Simon*, 2020 WL 6335967, at *4-5 (8th Cir. Oct. 29, 2020). Thus, it is no surprise that federal courts have permitted candidates and campaigns to intervene in election disputes like this one. *See, e.g.*, *Hoblock v. Albany Cty. Bd. of Elections*, 233 F.R.D. 95, 99 (N.D.N.Y. 2005) ("Candidates have a right to run for office, and to hold office if elected," sufficient to intervene in action challenging canvass of absentee ballots); *Daggett v. Comm'n on Govtl. Ethics & Election Practices*, 172 F.3d 104, 109-10 (1st Cir. 1999) (allowing candidates to intervene in action challenging constitutionality of state campaign-funding statute).

This case is no different. Movant has a plain, direct, cognizable interest in a lawful canvass of votes in a State's presidential election. The Pennsylvania Supreme Court's decision may well dictate who will become the next President—the office that President Trump is running for and the election Movant has focused all its time, resources, and energy to win.

C. Impairment

For intervention as of right, it is sufficient if the disposition of the action "may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2); *see also Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967) (noting that this language in the Rule was "obviously designed to liberalize the right to intervene in federal actions"). Proposed Intervenors satisfy that pragmatic and liberal standard.

Movant's interest is directly affected by the Pennsylvania Supreme Court's judgment requiring the counting of absentee ballots received past the statutory deadline: election day. *See Carson*, 2020 WL 6335967, at *5. Indeed, if the Court grants certiorari and reverses the state court's judgment, Movant's interest will be directly vindicated. On the other hand, if the Court allows the state judgment to stand, that judgment will continue to require state officials to count untimely and unlawful ballots.

D. Inadequate Representation

A party who satisfies the previous three requirements is entitled to intervene "unless existing parties adequately represent [the intervenor's] interest." Fed. R. Civ. P. 24(a)(2). As this Court explained in the seminal decision on adequacy, this requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

Movant clears this minimal hurdle. Its interest is "related, but not identical" to those of the existing petitioners, which is sufficient. *Id.* at 538; *accord United Guar. Residential Ins. Co. of Iowa v. Phila. Sav. Fund Soc.*, 819 F.2d 473, 475 (4th Cir. 1987) ("*Trbovich* recognized that when a party to an existing suit is obligated to serve two distinct interests, which, although related, are not identical, another with one of those interests should be entitled to intervene."); *Kane County v. United States*, 928 F.3d 877, 895 (10th Cir.

2019) (finding "no presumption of adequate representation" where the parties' interests were "not identical," given interests unique to the Government and not shared by the private intervenor); *Pennsylvania v. President of the United States*, 888 F.3d 52, 61 (3d Cir. 2018) (similarly holding that because the Government had an array of interests, there was "no guarantee that [it would] sufficiently attend to [the intervenor's] specific interests"); *Conservation Law Found. of New England v. Mosbacher*, 966 F.2d 39, 44-45 (1st Cir. 1992) (finding representation inadequate where the intervenors' interests were "more narrowly focused" than those of the existing party).

Movant should be granted intervention because it is the real party in interest. *See Ross v. Marshall*, 426 F.3d 745, 757 (5th Cir. 2005) (reversing denial of intervention to insurance company that was "a real party in interest" up to the policy limit); *Teamsters Local Union No. 523 v. Keystone Freight Lines*, 123 F.2d 326, 329 (10th Cir. 1941) (reversing denial of intervention where intervenor was "the real party in interest"). Movant's interest is that of a presidential candidate—an interest that the existing petitioners represent either imperfectly or not at all. The *Scarnati* petitioners are government officials representing the public interest of the state legislature. And the *Republican Party of Pennsylvania* petitioner represents Movant's interest derivatively, at best. A candidate's "personal interest in winning and holding office" is manifestly more direct than the interest of the party supporting him. *Hoblock*, 233 F.R.D. at 99.

Because Movant's interests are not coextensive with the existing petitioners', Movant satisfies Rule 24's minimal requirement that representation *may* be inadequate. *Trbovich*, 404 U.S. at 538 & n.10. This conclusion holds even if Movant seeks the same outcome as the existing petitioners and will make the same basic arguments. *See Pennsylvania*, 888 F.3d at 61 (finding representation inadequate based on distinct sets of interests, even though the parties sought the same outcome). Indeed, in *Trbovich*, the Court reversed a denial of intervention *despite* having held earlier in its opinion that the intervenor's "evidence and argument" had to be "limited to the claims of illegality" already raised by the existing party. 404 U.S. at 635-36.

* * *

For all these reasons, Movant satisfies all the requirements for intervention as of right under Rule 24(a)(2). Accordingly, the Court should grant this motion.

II. Alternatively, the Court should grant permissive intervention.

Regardless of whether the Court grants intervention as of right, Movant should be allowed to intervene permissively. The threshold requirements for permissive intervention are a "timely motion" and "a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Rule 24(b)(3) also instructs courts to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Permis-

sive intervention is especially appropriate when resolving all parties' claims in one action would further the Court's "[s]trong interest in judicial economy and desire to avoid multiplicity of litigation wherever and whenever possible." *Buck v. Gordon*, 959 F.3d 219, 225 (6th Cir. 2020).

These principles clearly support permissive intervention. As explained above, this motion is timely. And because Movant adopts the existing petitions, Movant obviously raises common questions. Intervention would also cause no delay or prejudice, especially given Movant's willingness to comply with any expedited schedule. Judicial economy strongly supports the resolution of all relevant parties' arguments in a single action. Especially given the "press of time" in cases like this one, *Bush v. Gore*, 531 U.S. 98, 108 (2000), it makes little sense to force Movant to initiate its own lawsuit and conduct emergency litigation in the lower courts, just to wind up back before this Court raising the same questions already presented here.

One further practical consideration supports intervention. In *Mullaney*, this Court added a party on appeal to avert a possible standing defect, noting that "[t]o dismiss the present petition and require the new plaintiffs to start over … would entail needless waste and run[] counter to effective judicial administration."

342 U.S. at 417.* The same reasoning might apply here. Respondents have challenged the Article III standing of the current petitions. *E.g.*, State's Response in Opp. to Emerg. App. for Stay 11-14. While Movant disagrees with those arguments, there is no question that *Movant* has standing if the Pennsylvania Supreme Court's decision decides its success or failure in the presidential election. And one petitioner with standing is enough to enable this Court to review the judgment below. *Horne v. Flores*, 557 U.S. 433, 445 (2009).

If anything, *Mullaney*'s reasoning has added force in this case. The public interest in ensuring that a State like Pennsylvania conducts its federal elections in accord with federal law is extremely strong. A state court's commandeering of "the legislative scheme for appointing Presidential electors"—as happened here—"presents a federal constitutional question" of nationwide significance. *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring); *see also McPherson v. Blacker*, 146 U.S. 1, 35 (1892). Indeed, three Justices have already explained that "the Pennsylvania Supreme Court's decision calls out for review by this Court." 2020 WL 6304626, at *2 (statement of Alito, J.). That decision should not escape this Court's re-

* The grant of intervention in *N.B.D.* appears likely to have rested on similar reasoning. *See* Mot. for Leave to Intervene as Pet'r 2, 5, 9-11 (filed Dec. 23, 2019) (explaining that, as in *Mullaney*, intervention was sought "protectively" to "eliminate any doubt about whether a proper party [was] before this Court"), *granted by N.B.D.*, 140 S. Ct. 860.

view based on a possible jurisdictional defect that Movant's participation would necessarily fix. Thus, if the Court has any doubts at all about the existing petitioners' standing, it should allay those doubts by granting this motion.

CONCLUSION

For all these reasons, the Court should grant this motion and allow Movant to intervene as a petitioner.

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