

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA SENATE	:	
INTERGOVERNMENTAL OPERATIONS	:	
COMMITTEE,	:	
	:	
	:	
Petitioner,	:	No. 95 MD 2022
	:	
vs.	:	
	:	
PENNSYLVANIA DEPARTMENT OF STATE	:	
And LEIGH CHAPMAN, in her capacity as	:	
ACTING SECRETARY OF THE	:	
COMMONWEALTH,	:	
	:	
Respondents.	:	

**MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR LEAVE TO INTERVENE OF ROBERTA WINTERS,
NICHITA SANDRU, KATHY FOSTER-SANDRU, ROBIN ROBERTS,
KIERSTYN ZOLFO, MICHAEL ZOLFO, BEN BOWENS, THE LEAGUE
OF WOMEN VOTERS OF PENNSYLVANIA, COMMON CAUSE
PENNSYLVANIA AND MAKE THE ROAD PENNSYLVANIA**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

 I. Factual and Procedural Background.....3

 A. The Applicants3

 B. The Proposed Order and Cross-Petition.....9

 II. Argument10

 A. The Applicants Have A Right to Intervene Under Rule 2327(3)10

 B. The Applicants Also Have A Right to Intervene Under Rule 2327(4).....11

 C. The Narrow Exceptions of Rule 2329 Do Not Apply.....15

 1. Applicants’ Claim Relates Directly to the Petition.16

 2. The Existing Parties do not Adequately Represent Applicants’ Interests.17

 3. The Application is Timely and Granting it will not Delay the Proceedings.21

 D. The Practicalities21

 III. Conclusion23

CONFIDENTIAL DOCUMENTS CERTIFICATION25

CERTIFICATE OF COMPLIANCE.....26

CERTIFICATE OF SERVICE27

TABLE OF AUTHORITIES

Cases

<i>Allegheny Reprod. Health Ctr. v. Pennsylvania Dep’t of Human Servs.</i> , 225 A.3d 902 (Pa. Commw. 2020).....	16
<i>Annenberg v. Roberts</i> , 2 A.2d 612 (Pa. 1938).....	12
<i>Benjamin ex rel. Yock v. Dep’t of Pub. Welfare</i> , 701 F.3d 938 (3d Cir. 2012)	20
<i>City of Harrisburg v. Prince</i> , 219 A.3d 602 (Pa. 2019).....	10, 11,17
<i>Commonwealth v. Alexander</i> , 243 A.3d 177 (Pa. 2020).....	12
<i>Denoncourt v. Commonwealth, State Ethics Comm’n</i> , 470 A.2d 945 (Pa. 1983)	10
<i>D.G.A. v. Department of Human Services</i> , No. 1059 C.D. 2018, 2020 WL 283885 (Pa. Commw. Jan. 21. 2020).....	17,19,20
<i>Easton Area Sch. Dist. v. Miller</i> , 232 A.3d 716 (Pa. 2020).....	11,17
<i>Governor’s Office of Admin. v. Purcell</i> , 35 A.3d 811 (Pa. Commw. 2011).....	12
<i>Grant v. Zoning Hearing Bd. Of the Twp. Of Penn</i> , 776 A.2d 356 (Pa. Commw. 2001).....	16,20,23
<i>Havens Realty Corp. v. Coleman</i> , 455 U.S. 363, 102 S. Ct. 1114 (1982)	15
<i>Hunt v. Washington State Apple Advertising Comm’n</i> , 432 U.S. 333 (1977)	14
<i>In re T.R.</i> , 731 A.2d 1276 (Pa. 1999).....	11

<i>Keener v. Zoning Hearing Board of Millcreek Township,</i> 714 A.2d 1120 (Pa. Commw. 1998).....	18
<i>Larock v. Sugarloaf Twp. Zoning Hearing Bd.,</i> 740 A.2d 308 (Pa. Commw. 1999).....	17,18
<i>Lunderstadt v. Pennsylvania House of Representatives Select Comm.,</i> 519 A.2d 408 (Pa. 1986).....	12
<i>McMullan v. Wohlgemuth,</i> 281 A.2d 836 (Pa. 1971).....	13
<i>NAACP v. Alabama ex rel. Patterson,</i> 357 U.S. 449 (1958)	14
<i>Pa. State Educ. Ass’n v. Commonwealth, Dep’t of Community & Econ. Development,</i> 148 A.3d 142 (Pa. 2016).....	10,11,12
<i>Pennsylvania Prison Society v. Cortes,</i> 622 F.3d 215 (3d Cir. 2010)	15
<i>Reese v. Pennsylvanians for Union Reform,</i> 173 A.3d 1143 (Pa. 2017).....	10
<i>Sapp Roofing Company, Inc. v. Sheet Metal Workers’ Int’l Ass’n, Local Union No. 12,</i> 713 A.2d 627 (Pa. 1998).....	12

Statutes

18 U.S.C. §2721	12
18 U.S.C. §2725(3)	12

Rules

Pa. R.C.P. 2327(3)	10, 11
Pa. R.C.P. 2327(4)	11,14
Pa. R.C.P. 2329	16
Pa. R.C.P. 2329(1)	17
Pa. R.C.P. 2329(3)	21
Pa. R.C.P. No. 2329(4).....	16

**MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR LEAVE TO INTERVENE OF ROBERTA WINTERS,
NICHITA SANDRU, KATHY FOSTER-SANDRU, ROBIN ROBERTS,
KIERSTYN ZOLFO, MICHAEL ZOLFO, BEN BOWENS, THE LEAGUE
OF WOMEN VOTERS OF PENNSYLVANIA, COMMON CAUSE
PENNSYLVANIA AND MAKE THE ROAD PENNSYLVANIA**

Roberta Winters, Nichita Sandru, Kathy Foster-Sandru, Robin Roberts, Kierstyn Zolfo, Michael Zolfo, Ben Bowens (collectively “Voter Applicants”), and the League of Women Voters of Pennsylvania, Common Cause Pennsylvania and Make the Road Pennsylvania (collectively “Organizational Applicants”) together submit this memorandum of law in support of their Application for Leave to Intervene as Respondents in the above-captioned action.

INTRODUCTION

Voter Applicants are registered voters in the Commonwealth of Pennsylvania, and Organizational Applicants are nonpartisan organizations dedicated to promoting American democracy and the participation of Pennsylvania voters in democracy. All Applicants have an interest in the outcome of this action, which seeks the disclosure of Applicants’ constitutionally-protected private personal information without their notice or consent and without any demonstrated need for such information.

On September 15, 2021, the Intergovernmental Operations Committee of the Pennsylvania Senate (the “Committee”) issued a subpoena to the Acting Secretary

of State ordering disclosure of, among other things, the personally-identifying information of each and every one of the approximately nine million registered voters in Pennsylvania, including the Applicants and their members and constituents (the “Subpoena”). The Subpoena specifically requests, among other data, voters’ driver’s license numbers and the last four digits of their social security numbers.

In or around September 2021, three separate petitions were filed challenging the Subpoena. Those petitions were consolidated at Docket No. 310 MD 2021, and Applicants, the same voters and organizations as in this case, moved to intervene in the consolidated proceeding. The Committee opposed Applicants’ intervention in that proceeding, but the Commonwealth Court allowed Applicants to intervene. While the consolidated actions remain pending, the Committee commenced the instant action –an entirely new case—without including Applicants, and without even notifying Applicants they would be filing, or had filed, this new action. This new action appears to be a deliberate attempt to avoid Applicants’ involvement in this dispute despite their intervention in the consolidated proceeding, and to deny Applicants and other voters an opportunity to have their arguments heard and to protect their constitutional rights. Applicants seek to intervene, once again, to protect their constitutional rights and those of Pennsylvania’s approximately nine-million other voters.

As in the consolidated proceedings, Applicants wish to protect their constitutionally-protected information which is the subject of the Subpoena at issue in the instant action. Applicants have a right to notice and an opportunity to be heard before their personally-identifying information is disclosed. For the same reasons that the Court granted intervention in the consolidated proceeding, this Court should grant Applicants' intervention motion here.

I. Factual and Procedural Background

A. The Applicants

Applicants are Pennsylvania voters and nonpartisan organizations dedicated to promoting American democracy. The organizations serve, represent and have members who are Pennsylvania voters.

The Voter Applicants

Roberta Winters is a United States citizen, a resident of Delaware County, Pennsylvania, and a registered voter in the Republican party. Ms. Winters cast votes in the November 2020 election and May 2021 primary (Verified Application for Leave to Intervene, ¶8). Ms. Winters' private information is included within the information sought by the Subpoena. *Id.* Ms. Winters is concerned that the Department of State's compliance with the Subpoena and exposure of her sensitive

personal information will make her more vulnerable to identity theft and further public intrusions into her private financial and personal information. *Id.*

Nichita Sandru is a United States citizen, a resident of Monroe County, Pennsylvania, and a registered voter in the Democratic party. Mr. Sandru first registered to vote in Pennsylvania about five years ago, when he became a naturalized U.S. citizen (Verified Application for Leave to Intervene, ¶9). He cast a vote in the November 2020 election. Mr. Sandru's private information is included within the information sought by the Subpoena. *Id.* Mr. Sandru is concerned that the Department of State's compliance with the Subpoena and exposure of his sensitive personal information will make him more vulnerable to identity theft and further public intrusions into his private financial and personal information. *Id.*

Kathy Foster-Sandru is a United States citizen, a resident of Monroe County, Pennsylvania, and a registered voter in the Democratic party. Ms. Foster-Sandru cast a vote in the November 2020 election (Verified Application for Leave to Intervene, ¶10). Ms. Foster-Sandru's private information is included within the information sought by the Subpoena. *Id.* Ms. Foster-Sandru is concerned that her personally-identifying information, especially her social security number and

driver's license number, will be disclosed to others without her express permission, and may be misused. *Id.*

Robin Roberts is a United States citizen, a resident of Philadelphia County, Pennsylvania, and a registered voter in the Democratic party. Ms. Roberts cast votes in the November 2020 election and May 2021 primary (Verified Application for Leave to Intervene, ¶11). Ms. Roberts' private information is included within the information sought by the Subpoena. *Id.* Ms. Roberts is concerned that her personally-identifying information will be disclosed to others without her express permission, and may be misused. She is particularly concerned about the potential for voter intimidation efforts using this information. *Id.*

Kierstyn Zolfo is a United States citizen, a resident of Bucks County, Pennsylvania, and a registered Independent voter. Ms. Zolfo cast a vote in the November 2020 election (Verified Application for Leave to Intervene, ¶12). Ms. Zolfo's private information is included within the information sought by the Subpoena. *Id.* Ms. Zolfo is concerned that the Department of State's compliance with the Subpoena and exposure of her sensitive personal information will make her more vulnerable to identity theft and further public intrusions into her private financial and personal information. She is particularly concerned that this

information would allow others to access her medical records and bank accounts, and create new credit cards, among other things. *Id.*

Michael Zolfo is a United States citizen, a resident of Bucks County, Pennsylvania, and a registered voter in the Republican party. He cast a vote in the November 2020 election and the May 2021 primary (Verified Application for Leave to Intervene, ¶13). Mr. Zolfo's private information is included within the information sought by the Subpoena. *Id.* Mr. Zolfo is concerned that the Department of State's compliance with the Subpoena and exposure of his sensitive personal information will make him more vulnerable to identity theft and further public intrusions into his private financial and personal information. *Id.*

Ben Bowens is a United States citizen, a resident of Philadelphia County, Pennsylvania, and a registered voter in the Democratic party. Mr. Bowens cast votes in the November 2020 election and May 2021 primary (Verified Application for Leave to Intervene, ¶14). Mr. Bowens' private information is included within the information sought by the Subpoena. *Id.* Mr. Bowens is concerned that his personally-identifying information will be disclosed to others without his express permission, and may be misused. *Id.*

The Organizational Applicants

The League of Women Voters of Pennsylvania (“the League”) is a nonpartisan statewide non-profit formed in August 1920 (Verified Application for Leave to Intervene, ¶15). The League and its members are dedicated to helping the people of Pennsylvania safely exercise their right to vote, as protected by the law. Members of the League are registered voters in Pennsylvania and are at risk of having their private information disclosed if the Secretary complies with the Subpoena. *Id.* A significant part of the League’s mission is voter registration. It conducts voter registration drives, staffs nonpartisan voter registration tables and works with local high schools to register new 18-year-old voters. *Id.* at ¶16. The disclosure of constitutionally protected private information will interfere with the League’s ability to carry out its mission of registering voters and will cause it to divert resources away from its voter registration and other core activities and towards educating voters about the release of their personal information and the steps they will need to take to protect themselves from identity theft. *Id.*

Common Cause Pennsylvania (“Common Cause”) is a non-profit political advocacy organization and a chapter of the national Common Cause organization. Common Cause has approximately 36,000 members and supporters in Pennsylvania. These members live in all 67 Pennsylvania counties (Verified

Application for Leave to Intervene, ¶17). Many members of Common Cause are registered voters in Pennsylvania and are similarly at risk of having their private information disclosed if the Secretary complies with the Subpoena. *Id.* Common Cause seeks to increase the level of voter registration and voter participation in Pennsylvania elections, especially in communities that are historically underserved and whose populations have a low propensity for voting. Many of these communities are communities of color. *Id.* at ¶18. If the approximately nine million records of Pennsylvania Voters containing driver’s license numbers and last four digits of Social Security numbers are released to the Committee and unknown third-party vendors, Common Cause will have to divert resources away from its voter registration and other core civic engagement activities and to educating voters about how to try to protect themselves from possible identity theft as a result of the disclosure of their voter registration efforts, and monitoring the voter registration system to ensure that voter registration records are not altered or tampered with by bad actors. *Id.*

Make the Road Pennsylvania (“Make the Road PA”) is a not-for-profit, member-led organization formed in 2014 that builds the power of the working-class in Latino and other communities to achieve dignity and justice through organizing, policy innovation, and education services (Verified Application for Leave to Intervene, ¶19). Make the Road PA’s more than 10,000 members are

primarily working-class residents of Pennsylvania, many in underserved communities. Many members of Make the Road PA are registered voters in Pennsylvania and are similarly at risk of having their private information disclosed if the Secretary complies with the Subpoena. *Id.* Make the Road PA's work includes voter protection, voter advocacy and voter education on, for example, how to register to vote, how to apply for mail-in/absentee ballots, how to return mail-in/absentee ballots, and where to vote. Make the Road PA has run active programs to register voters in historically underserved communities of color, especially in Berks, Bucks, Lehigh, Northampton and Philadelphia Counties. *Id.* at ¶20. The disclosure of constitutionally-protected private information will interfere with Make the Road PA's ability to carry out its mission of registering voters and will cause it to divert resources away from its voter registration and other core activities and towards educating voters about the release of their personal information and the steps they will need to take to protect themselves from identity theft. *Id.*

B. The Proposed Answer and Cross-Petition

The Applicants file their application to intervene in this action. The Applicants' proposed Answer and Cross-Petition for Review seeks declaratory judgment and injunctive relief to prevent the disclosure of their constitutionally-protected personal information.

Applicants seek to assert their own individual interests and the interests of the organizations' members and constituents. Applicants' interests differ from those of the Commonwealth, which is the only Respondent presently in the action. Moreover, Applicants' requested relief is against not just the Petitioner Committee, but also against the Respondent, the Acting Secretary.

II. Argument

A. The Applicants Have A Right to Intervene Under Rule 2327(3)

A party is entitled to intervene if it “could have joined as an original party in the action or could have been joined therein.” Pa. R.C.P. 2327(3).

Here, Applicants could have been joined (indeed Applicants *should* have been joined) by either Petitioner or Respondents, as they have a clear interest in the relief requested. “[B]efore the government may release personal information, it must first conduct a balancing test to determine whether the right of informational privacy outweighs the public’s interest in dissemination.” *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1159 (Pa. 2017). *See also City of Harrisburg v. Prince*, 219 A.3d 602, 618 (Pa. 2019) (requiring assessment of constitutional right of privacy in context of right to know request---which by definition is seeking information held by a public entity); *Pa. State Educ. Ass’n v. Commonwealth, Dep’t of Community & Econ. Development*, 148 A.3d 142, 146, 150-52 (Pa. 2016) (hereinafter “*PSEA*”) (same); *Denoncourt v. Commonwealth, State Ethics Comm’n*,

470 A.2d 945, 947-48 (Pa. 1983) (same). According to Supreme Court precedent, the Court *cannot* perform the requisite balancing test without first affording the Applicants an opportunity to be heard. *City of Harrisburg*, 219 A.3d at 619 (“before the City can perform the required balancing test . . . the donors [those whose personal information was subject to potential disclosure] must be afforded notice and an opportunity to be heard”). *See also Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 733 (Pa. 2020). Accordingly, Applicants have a right to intervene under Rule 2327(3).

B. The Applicants Also Have A Right to Intervene Under Rule 2327(4)

A party also is entitled to intervene 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. 2327(4). Here, Applicants have a substantial, constitutionally protected privacy interest in their personal information and the personal information of the organizations’ members and constituents.

The Pennsylvania and United States Constitutions provide for a right of privacy that includes a right “to control access to, or the dissemination of, personal information about himself or herself.” *PSEA*, 148 A.3d at 150. *See also In re T.R.*, 731 A.2d 1276, 1279 (Pa. 1999) (plurality) (“There is no longer any question that

the United States Constitution and the Pennsylvania Constitution provide protections for an individual's right to privacy . . . [including] . . . the individual's interest in avoiding disclosure of personal matters . . ."). Every citizen's "right of informational privacy" includes "the right of the individual to control access to, or the dissemination of, personal information about himself or herself." *PSEA*, 148 A.3d at 150. This right to privacy is also set forth in the Pennsylvania Constitution's prohibition against unreasonable searches and seizures, *Commonwealth v. Alexander*, 243 A.3d 177, 206 (Pa. 2020), and protects against unjustified and overbroad legislative subpoenas, *see, e.g., Lunderstadt v. Pennsylvania House of Representatives Select Comm.*, 519 A.2d 408, 415 (Pa. 1986); *Annenberg v. Roberts*, 2 A.2d 612, 617-18 (Pa. 1938).

Information that is protected by the right to privacy includes individuals' driver's license numbers and social security numbers. *PSEA*, 148 A.3d at 158; *Sapp Roofing Company, Inc. v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 12*, 713 A.2d 627 (Pa. 1998); *Governor's Office of Admin. v. Purcell*, 35 A.3d 811, 821 (Pa. Commw. 2011); 18 U.S.C. §§2721, 2725(3). *See also* Applicants' Brief in Support of Motion for Summary Relief (filed October 13, 2021 at docket number 310 MD 2021), at pp. 18-23, a copy of which is attached to the accompanying Motion as Exhibit C.

Pennsylvania courts recognize privacy interests as legally-protectable interests that warrant intervention. *McMullan v. Wohlgemuth*, 281 A.2d 836, 839 (Pa. 1971). In *McMullan*, the Philadelphia Inquirer sought to obtain from the Secretary of Welfare for the Commonwealth the names and addresses of those who received public assistance and the amounts received by each. An individual whose information was subject to disclosure from that request sought to intervene on behalf of herself and all others similarly situated, arguing that disclosure of the information “would be an improper invasion of their rights of privacy.” *Id.* at 839. The Pennsylvania Supreme Court held that this was an interest in the outcome of the litigation justifying intervention.¹ *Id.* at 841.

The Subpoena seeks to compel the disclosure of Voter Applicants’ and the Organizational Applicants’ members and constituents’ constitutionally-protected private information (Verified Answer and Cross-Petition for Review, Exhibit A; Stipulation of Facts, Exhibit B). The disclosure of this confidential information will subject Applicants and their members and constituents to increased risk of identity theft and financial fraud, and further, increases the risk of interference with the electoral system and citizens’ ability to cast their votes (Exhibit C, Applicant’s

¹ The Court also found no prejudice to the Inquirer (the requester of the records) from allowing intervention. “If the Inquirer is entitled by law to the information which it seeks, it will gain access to that information irrespective of the intervention. If it is not so entitled, the presence or absence of the intervenors in this litigation will have no effect.” *Id.* at 840.

Brief in Support of Motion for Summary Relief, Exhibit I, ¶¶18-19). In particular, the most sensitive information, driver's license numbers and last four digits of the Social Security numbers, coupled with the other information the Subpoena seeks is the very information that could be used to access bank accounts, open credit cards, or access medical records. *Id.* Thus, Applicants have a cognizable interest in protecting the confidentiality of the information that is the subject of this action, and therefore, satisfy the requirements of Rule 2327(4).

The Organizational Applicants' members and constituents have a direct, tangible interest in the protection of their personal information, these interests are germane to the Organizational Applicants' purpose, and the claims and relief requested in the Proposed Petition for Review do not require the participation of individual members. Verified Application to Intervene, at ¶21. Therefore, Organizational Applicants have a representational or associational interest at stake, and may represent the interests of their members and constituents. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958).

In addition to representing and defending their members' interests, the Organizational Applicants also expend considerable resources for the purpose of registering voters and ensuring that eligible voters can exercise their right to vote.

Their members and constituents registered to vote and chose to participate in elections based on the reasonable expectation that their private personal information would be kept confidential (Verified Application for Leave to Intervene, ¶¶15-21). Disclosure of voters' private personal information works against the mission of these organizations and would require the organizations to divert resources and expend additional sums in seeking to protect that information, educating their members and constituents regarding the risk to their personal information, and encouraging them to participate in the process. *Id.* Thus, Organizational Applicants will suffer actual injury as organizations, not just as representatives of their members, if injunctive relief is not granted, and this injury is causally connected to the infringement on its members and constituent's privacy rights. Further, this interest, and the consequent injury, is likely to be addressed in this litigation. Therefore, Organizational Applicants have a direct interest at stake, not just as representatives for their members, but in their own right. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79, 102 S. Ct. 1114, 1124 (1982); *Pennsylvania Prison Society v. Cortes*, 622 F.3d 215, 228 (3d Cir. 2010).

C. The Narrow Exceptions of Rule 2329 Do Not Apply

“[A] grant of intervention is mandatory where the intervenor satisfies one of the four bases set forth in Rule No. 2327 unless there exists a basis for refusal

under Rule No. 2329.” *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep’t of Human Servs.*, 225 A.3d 902, 908 (Pa. Commw. 2020). Rule 2329 permits (but does not require) a court to refuse intervention by a party who satisfies Rule 2327 only in three narrowly prescribed circumstances: where “(1) the claim or defense of the petition 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. 2329. Even if one or more of the three circumstances applies, the courts still have discretion to permit intervention. *See Grant v. Zoning Hearing Bd. Of the Twp. Of Penn*, 776 A.2d 356, 360 (Pa. Commw. 2001) (“Pa. R.C.P. No. 2329(4) provides that the trial court ‘may’ refuse an application for intervention if the intervenors’ interests are adequately represented, Pa. R.C.P. No. 2329(4) does not mandate that the application be refused. . . . Pa. R.C.P. No. 2329(4) is discretionary.”). Here, none of the narrow circumstances apply.

1. Applicants’ claim relates directly to the Petition.

Applicants’ claims relate directly to the Subpoena in that the Subpoena seeks the disclosure of their personal information, which is precisely the information

they seek to protect. Moreover, before the Commonwealth is permitted to disclose constitutionally-protected personal information of Applicants and their members and constituents, Applicants have a right to notice and an opportunity to assert their interests. *City of Harrisburg*, 219 A.3d at 619 (“before the City can perform the required balancing test . . . the donors [those whose personal information was subject to potential disclosure] must be afforded notice and an opportunity to be heard”). *See also Easton Area Sch. Dist.*, 232 A.3d at 733. Therefore, the Applicants’ claims recognize, and relate directly to, the other claims at issue, and Applicants’ participation is in fact necessary. Applicants are not seeking to expand or change the nature of the pending action. Therefore, Rule 2329(1) does not apply.

2. The existing parties do not adequately represent Applicants’ interests.

The Acting Secretary does not adequately represent Applicants’ interests because her interests “may diverge” from those of the Applicants. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 314 (Pa. Commw. 1999). Indeed, an existing party only adequately represents a proposed intervenor where the parties “unequivocally share” interests, which is not the case here. *Id.* *See also D.G.A. v. Department of Human Services*, No. 1059 C.D. 2018, 2020 WL 283885, *7 (Pa. Commw. Jan. 21, 2020) (“the personal interests of Detainees in their

individual welfare could diverge from the more general interest of DHS in *public* welfare”).

First and foremost, among other requested relief, Applicants ask the Court to *enjoin the Acting Secretary* from disclosing information in response to the Subpoena. The interest of the Applicants and the Acting Secretary will diverge if the Commonwealth elects to negotiate a resolution with the Committee that permits the disclosure of a subset of the requested information and/or authorizes the disclosure of the information pursuant to agreed-upon safety protocols. *See Keener v. Zoning Hearing Board of Millcreek Township*, 714 A.2d 1120, 1123 (Pa. Commw. 1998) (holding that existing party to litigation did not adequately represent the interests of proposed intervenor once it “entered into a settlement agreement . . . to allow [a result] that [the proposed intervenor] had opposed all along”); *Larock*, 740 A.2d at 314 (holding that existing party did not adequately represent intervenors’ interests because the existing party “might consider settling the case by permitting [the challenged action], albeit with conditions”). Disclosure of Applicants’ highly-sensitive and private personal information to the Committee – even subject to any safety protocols the Commonwealth may negotiate – is, in and of itself, a violation of Applicants’ privacy rights given the lack of basis for the asserted public interest. Applicants’ private information belongs to them, not to

the Committee politicians demanding the information, or the Secretary of State who maintains it.

Second, it is anticipated that the Acting Secretary will raise a number of claims or issues that Applicants do not seek to raise. Therefore, the focus of the Commonwealth's efforts may diverge from the Applicants' interests. Further still, Applicants have the more direct interest in preserving their constitutional right to privacy, and can better demonstrate the potential impact on Applicants from the disclosure of their sensitive information.

D.G.A. v. Department of Human Services, No. 1059 C.D. 2018, 2020 WL 283885 (Pa. Commw. Jan. 21, 2020), is particularly instructive. In *D.G.A.*, the Department of Human Services ("DHS") sought to revoke the license of a facility that housed immigrants while they pursued asylum. *See id.* at *1. Several detainees at the facility sought to intervene in the administrative proceedings addressing the license revocation efforts, but the agency denied their request. *See id.* On the detainees' petition for review, this Court rejected the agency's conclusion that DHS adequately represented the detainees. *See id.* at *7. The Court explained that:

Detainees are the ones personally suffering any negative consequences to their health, safety, and well-being posed by the Center operating contrary to law such that their direct interest could diverge from DHS's more general interest in

confirming that the Center operates lawfully. In other words, the personal interests of Detainees in their *individual* welfare could diverge from the more general interest of DHS in *public* welfare.

Id. Therefore, the Court reversed the agency's order denying the detainees leave to intervene in the administrative proceeding. *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).

Here, as in *D.G.A.*, Applicants are the ones who will personally suffer any negative consequences (identity theft, financial fraud, and potential inferences with their ability to vote) resulting from the disclosure of their highly-sensitive, private information. The Commonwealth's general, public interest in protecting voters from the hardships that can result from data breaches is not the same as and may differ from the Applicants' direct personal interests in the repercussions arising from the theft of their private information.

Although it is anticipated that the Acting Secretary will resist the Committee's requested relief, that does not mean the Acting Secretary will adequately represent Applicants in opposing that relief. *See Grant*, 776 A.2d at 360 (affirming trial court's approval of application to intervene by party that sought same relief as the plaintiffs and "adopt[ed] the arguments presented by" the

plaintiffs). As noted above, because the interests of the Applicants and the respondents, and their roles in this controversy, differ, the relief to which the respective parties may agree also could differ.

3. The Application is timely and granting it will not delay the proceedings.

Applicants timely filed their application to intervene on April 21, 2022, only 40 days after the Petition was filed and 6 days after the Acting Secretary submitted her initial response. The pleadings are not yet closed and no discovery has taken place. Thus, the requested intervention has not delayed and will not delay the proceedings, and Rule 2329(3) does not apply.

D. The Practicalities

The instant Petition seeks to enforce a Subpoena which already is the subject of consolidated proceedings at Docket No. 310 MD 2021. Applicants moved to intervene in that consolidated proceeding, and after a hearing on October 22, 2021, the Court granted Applicants' Petition to Intervene (October 26, 2021 Order). The Court specifically found that the Applicants were not adequately represented by the Acting Secretary or others, and that their intervention would cause no delay.

Notwithstanding the pendency of those consolidated matters, the Committee filed the instant Petition, without naming Applicants and without even notifying Applicants that the Petition would be, or had been, filed. Undersigned counsel reached out to counsel for the Committee to discuss the reasons for this new Petition and Applicants' participation in these proceedings, but Counsel declined to respond. See Exhibit D. The Petition is a transparent attempt to side-step voters' participation, and to obtain voters' personally-identifying information without affording them an opportunity to assert their constitutionally protected right to privacy. The Committee's brazen denial of voters' constitutional rights, and refusal to even engage with the voters, is reprehensible and this gamesmanship should not be countenanced by this Court.

Given that this Court already had found intervention to be proper in the consolidated proceeding, Applicants submit there is no basis for a different result here. Both the consolidated proceedings and this action involve the same Subpoena that seeks disclosure of Applicants' highly sensitive, private information. The Applicants have every right to seek to prevent that disclosure, as this Court already has found. If intervention is not granted here, Applicants will be forced to file a separate action to enjoin the Committee from pursuing this action and to force the Committee to make its arguments in the already pending consolidated proceedings. To the extent this action proceeds at all, Applicants

suggest that permitting them to intervene is the most efficient way to proceed, and the Court has discretion to take such efficiencies into consideration when considering an intervention application. *See Grant*, 776 A.2d at 360 (Pa. Commw. 2001) (holding that the rules authorizing the courts to deny intervention request under limited circumstances are discretionary). If, however, Applicants must pursue their day in court through a less efficient procedure, they will not hesitate to do so.

III. Conclusion

Applicants could have (and should have) been joined in this action and the action will affect their constitutional privacy interests. Their timely-filed proposed claim directly relates to the subject matter of the cases, they are not adequately represented by the existing parties and allowing intervention will not delay the proceedings. Moreover, if Applicants are not permitted to intervene, they will simply file a new action seeking to enjoin the Committee from proceeding without them and forcing them to litigate the issues in the separate litigation in which Applicants already are participating. For these reasons, Applicants respectfully request that the Court grant their application to intervene.

Dated: April 22, 2022

/s/ Witold J. Walczak

Witold J. Walczak (PA I.D. No. 62976)
**AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA**
P.O. Box 23058
Pittsburgh, PA 15222
Tel: (412) 681-7736
vwalczak@aclupa.org

/s/ Marian K. Schneider

Marian K. Schneider (Pa. I.D. No.
50337)
**AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA**
P.O. Box 60173
Philadelphia, PA 19102
mschneider@aclupa.org

Respectfully submitted,

/s/ Keith E. Whitson

Keith E. Whitson (Pa. I.D. No. 69656)
SCHNADER HARRISON SEGAL & LEWIS LLP
2700 Fifth Avenue Place
120 Fifth Avenue
Pittsburgh, PA 15222
Telephone: (412) 577-5220
Facsimile: (412) 577-5190
kwhitson@schnader.com

/s/ Stephen J. Shapiro

Stephen J. Shapiro (Pa. I.D. No. 83961)
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103-7286
(215) 751-2000
sshapiro@schnader.com

*Counsel for Roberta Winters, Nichita Sandru,
Kathy Foster-Sandru, Robin Roberts, Kierstyn
Zolfo, Michael Zolko, Ben Bowens, League of
Women Voters of Pennsylvania; Common
Cause Pennsylvania and Make the Road
Pennsylvania*

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/ Keith E. Whitson
Keith E. Whitson

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief in Support of Application to Intervene was filed with the Commonwealth Court of Pennsylvania's PACFile System and is an accurate and complete representation of the paper version of the Brief filed by Intervenor-Petitioners. I further certify that the foregoing Brief complies with the length requirements set forth in Rule 2135(a) of the Pennsylvania Rules of Appellate Procedure as the Brief contains 4,838 words, not including the supplementary matter identified in Rule 2135(b), based on the word count of Microsoft Word 2010, the word processing system used to prepare the brief. It has been prepared in 14-point font.

Respectfully submitted,

SCHNADER HARRISON SEGAL
& LEWIS LLP

By: /s/ Keith E. Whitson

Keith E. Whitson

PA ID No. 69656

E-mail: kwhitson@schnader.com

Fifth Avenue Place, Suite 2700

120 Fifth Avenue

Pittsburgh, PA 15222

Telephone: (412) 577-5220

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via email, this 22nd day of April 2022, upon the following:

Michael J. Fischer
Aimee D. Thompson
Jacob B. Boyer
Stephen R. Kovatis
Pennsylvania Office of Attorney General
1600 Arch Street, Suite 300
Philadelphia, PA 19103
mfischer@attorneygeneral.gov
athomson@attorneygeneral.gov
jboyer@attorneygeneral.gov

Keli M. Neary
Karen M. Romano
Stephen Moniak
Pennsylvania Office of Attorney General
15th floor, Strawberry Square
Harrisburg, PA 17120

John C. Dodds
Morgan, Lewis & Bockius LLP
1701 Market Place
Philadelphia, PA 19103
John.dodds@morganlewis.com

Susan Baker Manning
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Susan.manning@morganlewis.com

Aaron Scherzer
Christine P. Sun
States United Democracy Center
572 Valley Road, No. 43592
Montclair, NJ 07043
aaron@statesuniteddemocracy.org
christine@statesuniteddemocracy.org

Counsel for Petitioners in 322 MD 2021

Matthew H. Haverstick
Joshua J. Voss
Shohin H. Vance
Samantha G. Zimmer
Kleinbard LLC
Three Logan Square
1717 Arch Street, 5th floor.
Philadelphia, PA 19103
mhaverstick@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com
szimmer@kleinbard.com

Counsel for Respondents

/s/ Keith E. Whitson
Keith E. Whitson