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**Motions for Admission Pro Hac Vice Forthcoming
Attorneys for Proposed Intervenors DSCC and DCCC*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TIMOTHY R. BONNER, P. MICHAEL
JONES, DAVID H. ZIMMERMAN, BARRY
J. JOZWIAK, KATHY L. RAPP, DAVID
MALONEY, BARBARA GLEIM, ROBERT
BROOKS, AARON J. BERNSTINE,
TIMOTHY F. TWARDZIK, DAWN W.
KEEFER, DAN MOUL, FRANCIS X.
RYAN, and DONALD "BUD" COOK,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official
capacity as Acting Secretary of the

Case No. 364 MD 2022

Commonwealth of Pennsylvania, and
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF STATE,

Respondents.

APPLICATION OF DSCC AND DCCC FOR LEAVE TO INTERVENE

DSCC and DCCC submit this Application for Leave to Intervene as co-Respondents in the above-captioned action pursuant to Pennsylvania Rules of Appellate Procedure 106, 1517, and 1531(b), and Pennsylvania Rules of Civil Procedure 2326 *et seq.*

INTRODUCTION

1. Act 77, which allows any qualified Pennsylvanian elector to vote by mail for any reason, was approved by a bipartisan supermajority of the General Assembly in 2019. Of the fourteen Petitioners—all Republican members of the Pennsylvania House of Representatives—eleven voted in favor of Act 77.¹

2. Now Petitioners are scrambling to undo this signature achievement. But rather than enact new legislation that reflects their evolving policy preferences, Petitioners again seek to offload that task onto the judiciary. For the second time this year, Petitioners ask this Court to redline no-excuse mail voting out of the Election Code.²

¹ See Pennsylvania Senate Bill 421, LEGISCAN, available at <https://legiscan.com/PA/rollcall/SB421/id/895746>.

² See *Bonner v. Degraffenreid*, No. 293 M.D. 2021 (Pa. Commw. Ct. Jan. 28 2022).

3. This about-face regarding a previously uncontroversial voting method reflects the fact that mail voting had a clear partisan valence in the 2020 general election. Democrats cast nearly three times as many mail ballots as Republicans, and more than three out of every five mail and absentee ballots in Pennsylvania were cast by registered Democrats.³

4. DSCC and DCCC are political committees with the mission to elect Democratic candidates to the U.S. Senate and House of Representatives, respectively. Their intervention in this action is imperative to protect the rights of Democratic voters to vote by mail, to preserve the ability of Democratic candidates to be elected with the support of these voters, and to defend their own interests as political committees. If Petitioners succeed in invalidating Act 77, DSCC and DCCC will have to redirect substantial resources to re-educate Democratic voters and candidates about the changing rules, determine which voters remain eligible for an absentee ballot, and assist those who are suddenly ineligible to cast a ballot in person. As such, DSCC and DCCC have legally enforceable interests in the Pennsylvania election processes implicated by this lawsuit.

³ See Holly Otterbein, *Democrats return nearly three times as many mail-in ballots as Republicans in Pennsylvania*, POLITICO (Nov. 3, 2020), available at <https://www.politico.com/news/2020/11/03/democrats-more-mail-in-ballots-pennsylvania-433951>.

PROPOSED INTERVENORS

5. DSCC is the Democratic Party's national senatorial committee, as defined by 52 U.S.C. § 30101(14). Its mission is to elect candidates of the Democratic Party across the country, including in Pennsylvania, to the U.S. Senate. DSCC works to accomplish its mission by, among other things, assisting state parties throughout the country. In 2022, DSCC will provide millions of dollars in contributions and expenditures to persuade and mobilize voters to support U.S. Senate candidates who affiliate with the Democratic Party. For the 2022 election for U.S. Senate in Pennsylvania, DSCC has worked (and will continue to work) to elect the Democratic candidate, Lt. Gov. John Fetterman, and has made (and will continue to make) substantial contributions and expenditures to support Lt. Gov. Fetterman in his candidacy.

6. DCCC is the Democratic Party's national congressional committee as defined by 52 U.S.C. § 30101(14). Its mission is to elect candidates of the Democratic Party from across the country, including those running in Pennsylvania's 17 congressional districts, to the U.S. House of Representatives. DCCC works to accomplish its mission by, among other things, assisting state parties throughout the country, including in Pennsylvania. In 2022, DCCC will provide millions of dollars in contributions and expenditures to persuade and

mobilize voters to support congressional candidates who affiliate with the Democratic Party.

FACTUAL AND PROCEDURAL BACKGROUND

7. In 2019, the Pennsylvania legislature enacted Act 77, an omnibus election bill that, among other things, authorized a \$90 million bond to fund the purchase of new voting systems, provided for additional compensation for election officials, extended the voter registration deadline, and required counties to post sample ballots online before each election. Act 77 also greatly expanded voting access by establishing no-excuse mail-in voting. *See* 25 P.S. § 3150.11 (providing that any qualified voter in Pennsylvania “shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth”). The bill enjoyed bipartisan support, passing the House with a vote of 138-61, and the Senate, 30-20.⁴

8. Act 77 also included a series of instructions and procedures for voting by mail:

At any time after receiving an official mail-in ballot, but on or before eight o’clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed “Official Mail-in Ballot.” This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector. The elector shall then fill out, date and

⁴ Pennsylvania Senate Bill 421, LEGISCAN, available at <https://legiscan.com/PA/rollcall/SB421/id/895746>; <https://legiscan.com/PA/rollcall/SB421/id/887402>.

sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

Act 77 § 6 (amending Act of June 3, 1937 § 1306.06(a)).

9. In *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, the Pennsylvania Supreme Court considered the provision of Act 77 instructing electors to date the outer envelope of the mail ballots (the “Date Provision”). 241 A.3d 1058, 1062 (Pa. 2020) (opinion announcing judgment) (hereinafter “*In re Canvass of Absentee and Mail-In Ballots*”). Presidential candidate Donald Trump’s campaign committee challenged the decisions of the Allegheny and Philadelphia County Boards of Elections decision to canvass 10,678 mail ballots that arrived in envelopes on which the voters had failed to handwrite some of the prescribed information, including, in some instances, a date. *Id.* Announcing the judgment of the court, Justice Donohue concluded in a lead opinion for three of the Court’s seven justices that “dating the declaration is a directory, rather than a mandatory, instruction, and thus the inadvertent failure to comply does not require that ballots lacking a date be excluded from counting.” *Id.* at 1076. In doing so, Justice Donohue reasoned that the Date Provision did not serve any “weighty interest,” and she noted that an interpretation of the Pennsylvania Election Code requiring that mail ballots be rejected any time a voter does not strictly comply with official directions when filling out the envelope would likely violate the Materiality

Provision of the Civil Rights Act. *Id.* at 1074 n.5 (citing 52 U.S.C. § 10101(a)(2)(B)). In a concurrence providing the fourth vote in favor of counting the undated ballots in the 2020 election, Justice Wecht noted that the application of the Materiality Provision raised “complex[]” questions and reserved judgment on whether undated ballots could be discarded in future elections. *Id.* at 1089 n.54 (Wecht, J., concurring in part).

10. The November 2021 election for Judge of the Common Pleas of Lehigh County prompted yet another challenge to the Date Provision. There, the Lehigh County Election Board voted to count 257 undated ballots from registered, eligible voters that had been timely received. While the trial court affirmed the Board of Elections decision, this Court overturned that ruling, and the Supreme Court of Pennsylvania denied allocatur. *See Ritter v. Lehigh Cnty. Bd. of Elections*, 271 A.3d 1285, 1286 (Pa. 2022). Thereafter, five of the affected voters whose votes were not being counted sued the Board in federal court, arguing that the rejection of these undated mail ballots violated the Materiality Provision. *See Migliori v. Lehigh Cnty. Bd. of Elections*, No. 5:22-CV-00397, 2022 WL 802159, at *1 (E.D. Pa. Mar. 16, 2022).

11. In the ensuing litigation, the Third Circuit ultimately held, in a unanimous decision, that “the dating provisions under 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a) are immaterial under the Materiality Provision,”

barring the county from rejecting otherwise valid ballots for noncompliance with the Date Provision. *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022), stay denied, *Ritter v. Migliori*, 142 S. Ct. 1824 (2022). The Third Circuit determined the Date Provision was not material to a voter’s qualifications because there was no conceivable way in which it helped to “determine[e] age, citizenship, residency, or current imprisonment for a felony.” *Id.* at 163. And while that alone was enough to preclude the rejection of ballots in undated envelopes, “[t]he nail in the coffin” was that “ballots were only to be set aside if the date was *missing*—not incorrect,” confirming that the content of what a voter supplied on the date line was meaningless. *Id.* at 164.

12. Shortly thereafter, this Court adopted the reasoning of *Migliori* in a dispute arising from the refusal of some county boards of elections to count otherwise-qualifying ballots cast in undated mailing envelopes in the May 17, 2022 primary elections. As a result, on May 23, 2022, David H. McCormick, a candidate in the Republican U.S. Senate primary, and his campaign sued in Commonwealth Court to enjoin the county boards to count the undated mail ballots. On May 31, the Commonwealth Court granted a preliminary injunction, finding McCormick was likely to prevail on his claims that failure to count the undated ballots would violate the Materiality Provision and the Pennsylvania Constitution’s Free and Equal Elections Clause. *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022

WL 2900112 (Pa. Commw. Ct. June 2, 2022). Adopting *Migliori*'s reasoning, *McCormick* held that a voter's failure to comply with the Date Provision was unlikely to be "material" to determining the voter's qualification to vote. *Id.* at 25-27. While the action was voluntarily discontinued, the preliminary injunction was never disturbed and this Court did not vacate its opinion despite pleas that it do so.

13. Arguing that the *Migliori* decision triggered Act 77's nonseverability provision, Petitioners initiated these proceedings on July 20, 2022 by filing a Petition for Review in the Nature of an Action for a Declaratory Judgment, seeking a declaration that "Act 77 and all amendments thereto" are void.

14. For the reasons stated above and herein, DSCC and DCCC file this Application for Leave to Intervene in accordance with Pennsylvania Rules of Appellate Procedure 106, 1517, and 1531(b), and Pennsylvania Rules of Civil Procedure 2326 *et seq.*

LEGAL STANDARD AND ANALYSIS

15. Pennsylvania Rule of Appellate Procedure 1531(b) allows a person not named as a respondent in an original jurisdiction petition to seek leave to intervene by filing an application with the court.

16. Pennsylvania Rules of Appellate Procedure 106 and 1517, in turn, provide that the practices and procedures relating to original jurisdiction petitions for review are to be in accordance with the Pennsylvania Rules of Civil Procedure.

17. DSCC and DCCC seek to intervene under Pennsylvania Rule of Civil

Procedure 2327, which states, 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 . . .

(3) such person could have joined as an original party in the action or could have been joined therein; or

(4) 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.

18. “[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. Pa. Dep’t of Hum. Servs.*, 225 A.3d 902, 908 (Pa. Commw. Ct. 2020).

19. DSCC and DCCC meet the requirements for intervention under Pennsylvania Rule of Civil Procedure 2327(3) because they could have joined as original parties in this action. *See, e.g., Koter v. Cosgrove*, 844 A.2d 29, 32 (Pa. Commw. Ct. 2004) (allowing intervention where organization “could certainly have joined in the original action and it clearly had a stake in protecting the reforms it had sought”).

20. DSCC and DCCC also meet the requirements for intervention under Pennsylvania Rule of Civil Procedure 2327(4) because their “interests may be

affected by a judgment.” *Appeal of Austerlitz*, 437 A.2d 804, 805 (Pa. Commw. Ct. 1981) (citing Pa. R.C.P. No. 2327(4)).

21. “[B]ecause a political party, by statutory definition, is an organization representing qualified electors, it maintains the same interest as do its members in” ensuring compliance with election laws to prevent unfair elections. *In re Barlip*, 428 A.2d 1058, 1060 (Pa. Commw. Ct. 1981). Thus, courts routinely find that political party committees like DSCC and DCCC are entitled to intervene in cases where voting rules are challenged. *See, e.g., Parnell v. Allegheny Bd. of Elections*, No. 20-cv-01570 (W.D. Pa. Oct. 22, 2020), ECF No. 34 (granting intervention to DCCC); *Pierce v. Allegheny Cnty. Bd. of Elections*, 324 F.Supp.2d 684 (W.D. Pa. 2003) (recognizing intervention granted to Pennsylvania Democratic Party); *Stein v. Cortés*, 223 F.Supp.3d 423 (E.D. Pa. 2016) (recognizing intervention granted to Pennsylvania Republican Party); *Orloski v. Davis*, 564 F. Supp. 526, 529 (M.D. Pa. 1983) (recognizing intervention granted to Pennsylvania Democratic State Committee); *In re Appointment of Dist. Att’y*, 756 A2d 711, 713 n.5 (Pa. Commw. Ct. 2000) (recognizing intervention granted to Lackawanna County Democratic Party); *see also League of Woman Voters v. Commonwealth*, 178 A.3d 737, 741 n.5 (Pa. 2018) (recognizing intervention granted to collection of Republican voters, candidates, and members).

22. DSCC and DCCC expend substantial resources on assisting candidates in navigating rules that govern elections and on educating voters about the voting process. Petitioners' attempt to eliminate Act 77 would not only "change the entire election landscape" in which DSCC's and DCCC's candidates must compete for elected office, but it would also alter how Pennsylvania voters may support and affiliate with those candidates in each election. *La Union Del Pueblo Entero v. Abbott*, 29 F.4th 299, 307 (5th Cir. 2022).

23. Specifically, if Petitioners prevail in this challenge, the voting process in Pennsylvania will change radically.

24. *First*, no-excuse mail voting would be abolished, requiring millions of Pennsylvanians who previously voted by mail to vote in person, or to assess whether they are among the few categories of individuals who may vote absentee. *See* 25 P.S. § 3146.1 (enumerating categories of voters eligible for absentee voting); Act 77 § 8 (2019) (codified at 25 P.S. § 3150.11) (permitting any qualified voter "not eligible to be a qualified absentee elector" to vote by mail). A change in this process would be especially confusing for the thousands of voters who have already requested a mail ballot for this November's elections.

25. *Second*, those voters who are still able to vote absentee will have less time to cast their ballot. Under Act 77, mail-in ballots may be received until "eight o'clock P.M. the day of the primary or election." Act 77 § 6 (2019) (codified at 25

P.S. § 3146.6(a)). But should Petitioners prevail, a completed “official absentee ballot” must be received by election officials “on or before five o’clock P.M. on the Friday prior to the primary or election.” 25 P.S. § 3146.6(a) (2019).

26. Further, if Petitioners are successful, DSCC and DCCC would have to redirect their limited resources from other programs to address the law’s impact on voters who face substantial barriers to voting in person on election day. This will include diverting staff and funds to educating voters about the change in the law, mobilizing supporters to vote in person at the polls, and developing new programs to engage the electorate and enhance turnout with fewer avenues for voting. *See, e.g., Pa. Democratic Party v. Republican Party of Pa.*, No. 16-5664, 2016 WL 6582659, *3 (E.D. Pa. Nov. 7, 2016) (recognizing Democratic party committee had standing “to protect the interests of both Democratic candidates running for office and Democratic voters”); *Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (finding a political party has a “significant protectable interest” in intervening to defend its voters’ interests in vote-by-mail and its own resources spent in support of vote-by-mail).

27. Petitioners’ challenge to Act 77 also imperils DSCC’s and DCCC’s significant protectable interests in “advancing [their candidates’] overall electoral prospects.” *Pa. Democratic Party*, 2016 WL 6582659, at *3; *Issa* 2020 WL 3074351, at *3. Democrats in Pennsylvania voted by mail at disproportionately

higher rates than supporters of other political parties. Indeed, in the 2020 general election, registered Democrats returned nearly three times as many mail ballots as registered Republicans.⁵ DSCC and DCCC therefore have a cognizable interest in asserting the rights of Democratic voters who have relied on mail-in voting in prior elections. Because these and other Democratic voters risk disenfranchisement in November's general election if Petitioners' challenge succeeds, the results of this action also threaten to impede DSCC's and DCCC's missions of electing Democratic candidates to the U.S. Senate and the U.S. House of Representatives. *See, e.g., Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365, at *2 (D. Nev. Apr. 28, 2020) (proposed intervenors, Democratic organizations, had significant protectable interests in ensuring election of Democratic Party candidates).

28. Because the DSCC and DCCC meet the requirements for intervention under Pennsylvania Rule of Civil Procedure 2327(3) and (4), "the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present." *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999). Considering Rules 2327 and 2329 together, DSCC and DCCC's application for leave to intervene may only be rejected if (1) their claim or defense "is not in subordination to and in recognition of the propriety

⁵ *See* Otterbein, *supra* note 3.

of the action”; (2) their interest is already adequately represented; or (3) they have “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. None of these exceptions apply in this case.

29. First, DSCC’s and DCCC’s claims are “in subordination to and in recognition of the propriety of the action.” The purpose of this requirement is to ensure an “intervenor must take the suit ‘as he finds it,’” *Commonwealth ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867, 870 (Pa. 1950), and to “prevent[] an intervenor from “becom[ing] party to the suit merely to review what the court has done and to require demonstration of the legality and propriety of its action.” *Wells Fargo Bank N.A. v. James*, 90 A.3d 813, 822 (Pa. Commw. Ct. 2014) (quoting *Chidsey*, 76 A.2d at 870). Here, DSCC’s and DCCC’s intervention conforms with these principles: DSCC and DCCC do not challenge the jurisdiction of this Court, nor—because the Court has yet to render any substantive rulings—do they seek to “review what the court has done.” 90 A.3d at 822; *cf. Pierce Junior Coll. v. Schumacker*, 333 A.2d 510, 513 (Pa. Commw. Ct. 1975) (finding intervention for purpose of quashing appeal “clearly not in subordination to nor in recognition of the propriety of the appeal”).

30. Second, neither DSCC’s nor DCCC’s interests in the rights of Democratic voters, the electoral prospects of Democratic candidates, or the

resources they must expend to mobilize voters and enhance turnout are adequately represented by any of the parties to this action. *See, e.g., In re Barlip*, 59 Pa. Commw. at 182 (recognizing interest of political party in preventing “impair[ment of] its effectiveness”); *Issa*, 2020 WL 3074351, at *3 (recognizing political party’s unique interests in “ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures”).

31. Where an original party to the suit is a government entity, whose position is “necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it,” the burden of establishing inadequacy of representation by existing parties is “comparatively light.” *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (citing *Conservation L. Found. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992), and *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996)); *see also D.G.A. v. Dep’t of Human Servs.*, No. 1059 C.D. 2018, 2020 WL 283885, at *7 (Pa. Commw. Ct. Jan. 21, 2020) (reversing denial of intervention where intervenors were aligned with the government’s litigation position but possessed unique and personal interests not adequately represented by government respondents); *Larock* at 314 (Pa. Commw. Ct. 1999) (similar).

32. Finally, DSCC and DCCC have promptly filed their Application to Intervene and permitting their intervention will neither delay the resolution of this matter nor prejudice any party. Petitioners filed their action only 16 days ago, and Respondents have yet to file a response or otherwise meaningfully litigate this case. No party will be prejudiced by DSCC's or DCCC's participation, which will aid the Court in understanding the factual and legal issues involved. Because DSCC and DCCC meet two of the requirements of Pennsylvania Rule of Civil Procedure 2327 and none of the exceptions of Pennsylvania Rule of Civil Procedure 2329 apply, intervention is proper.

CONCLUSION

33. For the reasons stated above, DSCC and DCCC have a right to intervene in this case.

34. Pursuant to Pennsylvania Rule of Civil Procedure 2328, DSCC and DCCC are attaching a copy of the pleading that they will file in the action if permitted to intervene.

35. DSCC and DCCC request a Hearing on this Application if deemed necessary.

WHEREFORE, DSCC and DCCC respectfully request this Honorable Court to grant their Application to Intervene in this matter, and accept their Preliminary Objections attached hereto as their first filing.

Dated: August 5, 2022

Respectfully submitted,

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