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* Pro hac vice application forthcoming

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA

DSCC,
120 Maryland Ave. NE
Washington, DC 20002,
 	
Bob Casey for Senate, Inc.,
PO Box 58746
Philadelphia, PA 19102,
 	
    Petitioners,
 	
        v.
 	
Montgomery County Board of Elections,
One Montgomery Plaza,
425 Swede St., Suite 602,
Norristown, PA 19401,
 	
    Respondent.
	Civil Action
	
	No. _____
	
	Election Appeal

PETITION FOR REVIEW
IN THE NATURE OF A STATUTORY APPEAL

INTRODUCTION

1.   On November 14, 2024, the Montgomery County Board of Elections (the "Board") violated both federal law and the due process rights of voters when it decided not to count 188 provisional ballots in the 2024 General Election solely based on flaws that were the direct product of poll worker error.

2.   These 188 provisional ballots were rejected simply because the provisional ballot was not enclosed in a secrecy envelope.

3.   Voters who cast provisional ballots do so in person, in a process that requires the express direction of poll workers. In this environment, procedural errors made by voters in casting their ballots are necessarily a result of a poll worker's failure to provide required material or correct and accurate instructions to voters. Where election authority error leads a voter to make a mistake in voting, or election authorities have induced voters to vote in a manner that is unlawful, rejecting those votes violates the federal Due Process Clause. The Board's ruling also violates the Help America Vote Act, which states that an individual's provisional ballot "shall be counted . . . in accordance with state law" if election officials determine that the individual is eligible to vote. 52 U.S.C. § 21082(a)(2). Denying qualified voters the right to have their provisional ballot counted, even when election officials have determined that the voter is eligible, and the voter has signed a "written affirmation" confirming that they are properly registered, *id*., would violate these federal

protections of the right to vote; thus this Court should reverse the decision of the Montgomery County Board of Elections.

JURISDICTION

4.   The Court has jurisdiction over this statutory appeal pursuant to 25 P.S. § 3157(a).

PARTIES

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 to the U.S. Senate. In Pennsylvania, among other states, DSCC works to accomplish its mission by assisting state parties and mobilizing and supporting voters. DSCC has spent millions of dollars in contributions and expenditures to persuade and mobilize voters to support U.S. Senate candidates who affiliate with the Democratic Party, including Senator Bob Casey Jr. If relief is not granted, DSCC will suffer injury both because Democratic voters will be disenfranchised and Senator Casey's reelection efforts will be harmed.

6.   Bob Casey for Senate, Inc. (the "Casey Campaign") is the duly organized political campaign in support of the election of Bob Casey Jr. to the office of U.S. Senator for Pennsylvania in the November 2024 general election. Senator Casey is the Democratic Party candidate for Senate in Pennsylvania and a sitting U.S. Senator in Pennsylvania. The Casey Campaign has a core interest in ensuring

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that its supporters' votes are counted and that Senator Casey is elected to the U.S. Senate. The Board's decision not to count provisional ballots where the purported deficiencies were the result of poll worker error harms the Casey Campaign because it unlawfully disenfranchises supporters of Senator Casey and impairs his electoral prospects.

7.   Respondent, the Montgomery County Board of Elections, is a local government agency responsible for overseeing the conduct of all elections in Montgomery County. This function includes adjudicating provisional ballots in accordance with the Pennsylvania Election Code. *See* 25 P.S. § 3050(a.4)(5).

DECISION OF THE BOARD AT ISSUE

8.   On November 14, the Montgomery County Board of Elections (the "Board") held a meeting to review provisional ballots cast for the 2024 General Election. At that meeting, the Board voted not to count 188 provisional ballots solely because the ballots were not enclosed in a secrecy envelope. Petitioners appeal from the Board's decision not to count these 188 ballots.

FACTUAL BACKGROUND

9.   In Pennsylvania, voters who appear ineligible to cast a standard ballot at a polling place may, in certain circumstances, cast a provisional ballot. Among those voters who may be required to cast a provisional ballot are those who requested an absentee or mail-in ballot but have not voted it, 25 P.S §§ 3150.16(b),

3146.6(b)(2); those who claim to be registered but whose name does not appear on the list of voters, *id.* § 3050(a.4)(1); those who are unable to satisfy identification requirements, *id.*; and people who are voting pursuant to a court order such as one extending the hours of voting at a polling place, *id.*

10. The provisional voting process is initiated by a poll worker's determination that an in-person voter is not eligible to cast a standard ballot. 25 P.S. § 3050(a.4)(1). After making that determination, a poll worker must steer a provisional voter through a carefully choreographed set of steps starting by requiring the voter to sign an affidavit printed on the outermost of two envelopes that will eventually hold the ballot (the "provisional ballot envelope").[1] 25 P.S. § 3050(a.4)(2). The affidavit affirms (1) the voter's name, date of birth, and residence at the time of registration, and (2) that the provisional ballot is the only ballot the individual has cast in that election. *Id*.

11. After the voter signs the affidavit, the poll worker then provides the voter with their provisional ballot.[2] Once the provisional ballot has been voted, it must be placed in a secrecy envelope provided by the poll worker, which must in

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[1] *See Pennsylvania Provisional Voting Guidance* at 3, Pa. Dep't of State (Oct. 24, 2024), https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-provisionalballots-guidance-v2.2.pdf.

[2] *Id.*

turn be placed in the provisional ballot envelope bearing the signed affidavit.[3]

Finally, the voter must sign that same provisional ballot envelope a second time "in

front of the Judge of Elections and the Minority Inspector" (both statutory election

officials).[4]

12.   At the November 14 hearing, the Board reviewed various categories of

ballots and determined whether they would be counted for the 2024 General

Election.

13.   The Board rejected an additional 188 provisional ballots solely on the

grounds that the provisional ballot was not placed in a secrecy envelope.

14.   No other reason was given for the rejection of these 188 ballots, nor did

the Board contest that these ballots were otherwise valid.

GROUNDS FOR APPEAL

I.   Denial of the franchise due to poll worker errors violates the Due Process clause of the U.S. Constitution.

15.   The Due Process Clause of the U.S. Constitution's Fourteenth

Amendment protects voters from "state actions that induce voters to miscast their

votes." *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012)

("*NEOCH*"); *see also Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978) (finding

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[3] *Id.*

[4] *Id.*; *see also* 25 P.S. § 3050(a.4)(3).

that voters' due process rights were violated when the state induced voters to use an invalid voting procedure).

16.   When a poll worker's erroneous instruction causes a voter to cast a faulty provisional ballot, the voter's due process rights have been denied. *NEOCH*, 696 F.3d at 598; *Hoblock v. Albany Cnty. Bd. of Elections*, 487 F. Supp. 2d 90, 97 (N.D.N.Y. 2006) (finding that when voters relied on election officials' instructions when casting improper ballots "the election officials violate the constitutional rights of the voters"). Provisional ballots are cast under the direction of poll workers, and it can be presumed "as a matter of law" that mistakes that would invalidate a provisional ballot are the result of poll worker error because it would be "irrational and futile" for a voter to deliberately disregard correct instructions and cast a ballot that could not be counted. *NEOCH,* 696 F.3d at 594.

17.   The voter's execution of the provisional voting process requires direct engagement by poll workers and procedural faults in that process almost certainly reflect an error or omission by a poll worker, so the Board's decision to reject ballots solely on those grounds violates the Due Process rights of the 188 disenfranchised voters. The Pennsylvania Supreme Court's decision in *In re Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900 (Pa. 2024), does not mandate a contrary conclusion. While that court held that the requirement that a voter "shall" sign a provisional ballot's outer envelope is mandatory under Pennsylvania law, the

court's decision was one of statutory interpretation and the court was not presented with the question of whether the refusal to count such ballots—where election officials have failed to ensure that the voter casting the provisional ballot at their direction completes this step—would violate federal law. *See id.* at 904–09.

18.   Here, every step of the provisional voting process is mediated by poll workers thus procedural faults in that process are almost always attributable to poll worker error. For example, only the poll worker can provide—and instruct the voter on the use of—the secrecy envelope. *See* 25 P.S. § 3050(a.4)(3). As courts should assume that a voter would not deliberately cast a defective ballot by refusing a poll worker's instructions, when a voter does not place a ballot inside a secrecy envelope it strongly indicates that the poll worker did not provide the voter with a secrecy envelope or did not adequately instruct the voter on its required use. To find otherwise the Court must assume that, after going through the effort of voting in-person and bearing the additional burdens of voting provisionally, the voter has made the "irrational and futile" decision to cast a ballot that they know will not be counted. *See NEOCH*, 696 F.3d at 594.

19.   That these voters were victims of poll worker error rather than people who dismissed proper instructions regarding signing or envelopes is evidenced by the fact that they all complied with identical requirements elsewhere during the

voting process. Voters who did not enclose their ballot in a secrecy envelope were clearly willing to seal the ballot in the provisional ballot envelope.

20.   By rejecting the provisional ballots at issue here, the Board has punished voters for the errors of the poll workers who failed a statutory obligation to guide the voters. "To disenfranchise citizens whose only error was relying on poll-worker instructions" is "fundamentally unfair" and violates the Due Process Clause. *NEOCH*, 696 F.3d at 597 (citation omitted); *see also Hoblock*, 487 F. Supp. 2d at 97–98 (holding voters' rights were violated where they were "induced to vote" by county board via an invalid method).

II.   **Federal law requires that the ballot of an eligible voter who has signed the provisional ballot affidavit must be counted.**

21.   Among other things the Help America Vote Act ("HAVA") establishes protections for provisional voters. 52 U.S.C. § 21802. The primary protection is the right to cast a provisional ballot and, once the voter's eligibility has been confirmed, to have that ballot counted. *Id.* The only requirement a voter must satisfy to cast a provisional ballot under HAVA is that they sign a "written affirmation before an election on official" that the voter is (1) registered to vote in that jurisdiction, and (2) eligible to vote in that election, *Id.* at 21802(a)(2); that requirement is satisfied when a Pennsylvania voter signs the pre-printed affidavit on the provisional ballot envelope in order to receive their ballot, 25 P.S. § 3050(a.4)(2). Having done so, a voter's ballot "**shall** be counted" once election officials determine that the person

was, in fact, eligible to vote. 52 U.S.C. § 21802(a)(4) (emphasis added). Only weeks ago, the Supreme Court of Pennsylvania recently confirmed that officials are required to count a provisional ballot cast under HAVA once "the individual is deemed eligible under state law to vote." *Genser v. Butler Cnty. Bd. of Elections*, No. 26 WAP 2024, 2024 WL 4553285, *11 (Pa. Oct. 23, 2024).

22.   Because the only prerequisite HAVA allows for eligible voters to cast a provisional ballot under the law is the affidavit signature, any provisional ballots that were cast by an eligible voter who signed the affidavit must be counted, regardless of whether the ballot was placed in a secrecy envelope.

* * *

WHEREFORE, Petitioners respectfully request that this Honorable Court enter an order reversing the decision of the Montgomery County Board of Elections; declaring that the 188 provisional ballots at issue here must be counted; and entering such other and further relief as provided by the Pennsylvania Election Code and Pennsylvania Constitution, or as this Court deems just and appropriate.

Dated: November 18, 2024   Respectfully submitted,

                                            /s/ Adam C. Bonin

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** Pro hac vice application
forthcoming*

Counsel for Petitioners DSCC and Bob Casey for Senate, Inc.

CERTIFICATE OF COMPLIANCE WITH CASE RECORDS PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Adam C. Bonin
Adam C. Bonin (PA 80929)

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2024, I caused a true and correct copy of this document to be served on all counsel of record.

/s/ Adam C. Bonin
Adam C. Bonin (PA 80929)

VERIFICATION

I verify that the fact averments made in the foregoing Petition for Review in the Nature of a Statutory Appeal are true and correct to the best of my knowledge, information, and belief. I understand that false statements made therein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification and authorities.

*Christie Roberts*_____   Dated: November 18, 2024
Christie Roberts
Executive Director, DSCC

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_Tiernan Donohue_____   Dated: November 18, 2024
Tiernan Donohue
Campaign Manager, Bob Casey for Senate, Inc.