

IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY,
PENNSYLVANIA

JIM BOGNET,

No. 2022-10514

Plaintiff,

v.

LUZERNE COUNTY BOARD OF
ELECTIONS,

Defendant.

**BRIEF IN SUPPORT OF EMERGENCY PETITION FOR PEREMPTORY
JUDGMENT AND SUMMARY, DECLARATORY AND INJUNCTIVE RELIEF**

Every voter in Pennsylvania has “the right to vote and the right to have one’s vote counted.” *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 994 (Pa. 2002); *see also In re Fitzpatrick* 827 A.2d 374 (Pa. 2003) (Castille, J., dissenting) (describing this right as “the most sacred and foundational aspect of our democratic process). The Luzerne County Board of Elections’ inadequate preparation for in-person voting at many of its polling places jeopardized that sacred and foundational right, as an untold number of voters were turned away—even in the morning on Election Day—because polling places had no means for voters to cast a ballot. When more ballots could not be obtained, some polling places resorted to generating ballots on copier paper in a last-ditch effort to afford voters with the opportunity to vote.

The Board’s conduct during the canvass threatens to compound the risk of countless voters not having their votes counted. The Election Code requires all county

boards of elections to complete a reconciliation process prior to certifying the results of any election: boards must compare the numbered list of voters to the votes cast at the polls, 25 P.S. § 3154(b), account for and reconcile all balloting materials, § 3154(c), and the reconcile all tally papers and district totals cards with the results on the general return sheets, 25 P.S. § 3154(d). When a board finds discrepancies, it is required to investigate, and in certain circumstances, report same to the district attorney. 25 P.S. §§ 2642(i), 3154(b)–(d). These basic safeguards are designed to preserve the integrity of elections and give the populace confidence that each vote was counted. The failure of a board to complete the reconciliation process not only directly violates the Election Code, but also needlessly casts even greater doubt about whether the election in Luzerne County was “honestly, efficiently, and uniformly conducted.” *See* 25 P.S. § 2642(g).

There is no discretion here. The Election Code frames each aspect of the reconciliation process with mandatory “shall” language. *See* 25 P.S. § 3154(b)–(d), (f); *see also In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of Pierce*, 843 A.2d 1223, 1231 (Pa. 2004) (“The word ‘shall’ carries an imperative or mandatory meaning.”); *see also In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1084 (Pa. 2020) (Wecht, J., concurring in part and dissenting in part) (“shall means *shall*” (emphasis in original)). Especially in light of the disastrous and chaotic experiences of Luzerne County voters at the polls on Election Day, the imperative of the Board to follow the Election Code’s mandatory reconciliation procedure is even stronger. But the Board refuses to complete this

process. Accordingly, with this motion, Plaintiff seeks to compel the Board to perform its statutory obligation to complete the reconciliation process prior to certifying the election results.

STATEMENT OF THE CASE

The Reconciliation Process

Under the Election Code, county boards of elections are required to “inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.” 25 P.S. § 2642(g). To help ensure that elections are “honestly, efficiently, and uniformly conducted,” the Election Code requires county boards of elections to conduct a reconciliation process during the canvass of votes following each election, to ensure that there is a ballot for every voter that signed in to vote at his or her polling place. *See* 25 P.S. § 3154(b)–(d); *see also* Pennsylvania Department of State, *Post-Election General Reconciliation Checklist* (November 2016), *at* www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Post-election%20Reconciliation_November%202016.pdf.

First, “before computing the votes cast in any election district,” county boards of elections must compare the number of registered voters in each precinct to the numbered list of voters created at the polls on Election Day. 25 P.S. § 3154(b). Next, county boards of elections must compare the numbered list of voters to the number of

votes recorded on the voting machines that appear on the results tapes printed at the close of polls. *Id.*

In addition, when paper ballots are used, boards must account for and reconcile all balloting materials, including extra ballots printed in accordance with the Election Code, the number of ballots used, the number of spoiled ballots, and the number of ballots cast. 25 P.S. § 3154(c). Boards must also verify the number of canceled ballots. *Id.*

Lastly, in districts in which paper ballots were used, “[t]he figures announced for all districts ***shall*** be compared by one of the clerks with the tally papers from the respective districts. If any discrepancies are discovered, the county board ***shall*** thereupon examine all of the return sheets, tally papers and other papers in its possession relating to the same election district.” 25 P.S. § 3154(d)(1) (emphases added). Similarly, in districts in which voting machines were used, “[t]he figures announced for all districts ***shall*** be compared by other clerks with the duplicate return sheet which has been returned sealed, and if the voting machine is of the type equipped with mechanism for printing paper proof sheets, said general and duplicate return sheets shall also be compared with said proof sheets, which have been returned as aforesaid. If any discrepancies are discovered, the county board ***shall*** thereupon examine all of the return sheets, proof sheets and other papers in its possession relating to the same election district.” 25 P.S. § 3154(d)(2) (emphases added).

The Board must investigate any discrepancies or irregularities uncovered during the reconciliation process. 25 P.S. § 3154(b)–(d); *see also* 25 P.S. § 2642(i) (requiring boards to “investigate election frauds, irregularities and violations of this act, and to report all suspicious circumstances to the district attorney”). The Election Code prohibits boards from computing election returns if the total number of ballots cast exceeds the number of persons who voted:

If, upon consideration by said return board of the returns before it from any election district and the certificates aforesaid, it shall appear that the total vote returned for any candidate or candidates for the same office ... exceeds the number of registered or enrolled electors in said election district or exceeds the total number of persons who voted in said election district or the total number of ballots cast therein . . . in any such case, such excess shall be deemed a discrepancy and palpable error, and ***shall be investigated*** by the return board, and ***no votes shall be recorded*** from such district until such investigation shall be had . . .

25 P.S. 3154(b) (emphases added).

This reconciliation process is a mandatory prerequisite to the Board’s certification of results. The Board may sign the unofficial returns only after “the returns from each election district are read, computed and found to be correct or corrected” as set forth in § 3154(d), and five days must elapse between the submission of the unofficial returns and the Board’s issuance of certificates of election. 25 P.S. § 3154(f).

The 2022 General Election

In the lead-up to and during the November 8, 2022 General Election, the Board failed to supply a significant portion of its voting precincts with sufficient ballot paper (“ballot shortage”).

Upon information and belief, at least 50 voting precincts in Luzerne County experienced a ballot shortage. Although identification of each precinct so impacted was made with Solicitor Harry Skene, Mr. Skene has not responded to this request. *See* Letter from Kathleen Gallagher letter to Harry Skene (Nov. 10, 2022), a true and correct copy of which is attached as Exhibit A.

Voters reported that many precincts were out of Ballot Paper early in the morning of the Election:

- a. "The voting precinct was 'out of paper since 8 or 9 am' according to the pole [sic] worker who greeted me. (Declaration of David Hage, regarding Harvey's Lake).
- b. "My husband and I arrived at Dorrance Twp Municipal Bldg on Nov. 8, 2022 at approx.. 9:30 a.m. We were informed that the machines were not being used because they did not come with any paper, and we would have to fill out a write-in ballot." (Declaration of Kelly A. Halchak, regarding Dorrance Township).
- c. "They ran out [of] paper. Asking you to return later." (Declaration of Linda Lou DeAndrea, regarding Hazleton Ward 8).
- d. "Arrived at polling place approximately 11:30 a.m. with my husband. We were told that there was no paper nor any provisional ballots." (Declaration of Barbara Rupert, regarding Hunlock Creek).
- e. "Called for paper for machines at 10:00 a.m. Got it about 6-7 p.m. Ran out of paper emergency and provisional ballots at 1:30 p.m." (Declaration of Brian Dwyer, regarding Larksville Ward 2).
- f. "Ran out of paper. Minority inspector grabbed his own paper." (Declaration of Ian Kennedy, regarding Nanitcoke Ward 2).
- g. "Showed up to vote a little after 11:00 a.m. on Tues. Nov. 8, 2022, was told they ran out of paper and that I and my 96 year old mother would have to fill out another paper ballot and they would put them through later." (Declaration of Frank A. Lutinski, regarding Harvey's Lake).

True and correct copies of these Declarations are collectively attached as Exhibit B.

Nationwide reports detailed the chaos of the Election and the impact on voters. See, e.g., <https://www.foxnews.com/politics/pennsylvania-judge-orders-county-keep-polls-open-until-10-running-out-ballot-machine-paper>; <https://www.cbsnews.com/philadelphia/news/small-hitches-at-polling-places-in-pennsylvania-new-jersey/>; <https://thehill.com/homenews/campaign/3725562-judge-extends-voting-hours-in-luzerne-county-pennsylvania-after-paper-shortage/>; <https://www.pennlive.com/news/2022/11/voting-hours-extended-in-luzerne-county-after-paper-ballot-shortage.html>. Social media likewise reflected voters experiences, including, for example:

← Thread



Chelsea Strub
@chelseastrub

Voters in Harveys Lake, #LuzerneCounty #PA waiting to cast their ballots. This polling place ran out of paper at 9:30am and voters had to vote by provisional ballot causing many questions and concerns among voters this #ElectionDay (THREAD)



12:37 PM · Nov 8, 2022 from Harveys Lake, PA · Twitter for iPhone

See <https://twitter.com/chelseastrub/status/1590035837332639744>.

← Thread



Chelsea Strub
@chelseastrub

Poll workers said they ran out of paper at 9:30am. When they went to the Elections Office for more, it was also out and officials had to go to @SamsClub to get more.

12:42 PM · Nov 8, 2022 from Pennsylvania, USA · Twitter for iPhone

18 Retweets 11 Quote Tweets 23 Likes

See <https://twitter.com/chelseastrub/status/1590036948181082112>.

The ballot shortage became so severe that at 1:03 p.m. on Election Day, the Board filed an Emergency Petition to keep the polls open until 10:00 p.m. See Emergency Petition, a true and correct copy of which is attached as Exhibit C. In the Emergency Petition, the Board stated that as a result of the ballot shortage, “electors of Luzerne County may be deprived of their opportunity to participate because of circumstances beyond their control if the time for closing is not extended.” See Ex. C. ¶ 10. At 2:19 p.m. on Election Day, the Court entered an order granting the Emergency Petition and extending voting hours until 10:00 p.m. In the order, the Court found that “[v]oters in Luzerne County through no fault of their own, were disenfranchised and denied the fundamental right to vote.” Despite the extension, voters continued to experience challenges when attempting to cast their votes.

On November 14, 2022, Attorney Gallagher again called Solicitor Skene to ask when the required reconciliation would take place. A true and correct copy of Attorney

Gallagher's email to Solicitor Skene confirming that conversation is attached as Exhibit D. On November 14, 2022, undersigned counsel for plaintiff also emailed Solicitor Skene joining in Attorney Gallagher's letter and asking Solicitor Skene when and where the reconciliation would occur. A copy of Attorney Zimolong's email to Solicitor Skene is attached at Exhibit E. Solicitor Skene did not respond to either of those emails.

Also on November 14, 2022, the Luzerne County Council held a public meeting regarding the ballot shortage. During the course of that meeting, the public had the opportunity to comment. A recording of the Council meeting can be accessed at: <https://youtu.be/mj91M3WtIJg> ("Nov. 14 Meeting Link"). During that Council meeting, numerous Luzerne County residents addressed the Council to express their experiences in attempting to cast their votes on Election Day. A significant number of voters were concerned whether the provisional ballots and Voter-Created Emergency Ballots voters were forced to cast due to the ballot shortage would count:

- "[T]he copy paper was not the correct weight for the voting machine so exactly how is my vote counted? I went to the borough building on Thursday and the tally sheets were all zeros . . . then on the um I think it's a state site it said that there were 619 voters at Harvey's Lake. I was voter 816. So how was my vote counted?" (Nov. 14 Meeting Link at 49:15–49:42)
- "County Board of Elections and the Luzerne County Bureau of Elections cannot in any means of good faith to the public and the citizens of Luzerne County certify the results of the election held in Luzerne County on the 8th of November, 2022. There needs to be a competent investigation into what transpired on Election Day in this county." (Nov. 14 Meeting Link at 1:03:14–1:03:26)

- “I do not feel we could go forward with certification of this election. There’s [sic] too many discrepancies. Voters did not vote, [they were] turned away.” (Nov. 14 Meeting Link at 1:39:23–1:39:21).

During that meeting, the Luzerne County Council agreed that there were irregularities in the election and voted unanimously to refer the matter to the Luzerne County district attorney for a criminal investigation. (Nov. 14 Meeting Link at 2:16:35–2:17:30).

As a result of these deficiencies, many voters were simply turned away from the polling places and outright denied their opportunity to vote:

- “Voters had been turned away in the morning when the voting machines were inoperable because they had to go to work.” (Nov. 14 Meeting Link at 1:05:39–1:05:46).
- “Twice I was turned away from voting. My constitutional rights were violated twice.” (Nov. 14 Meeting Link at 1:11:21–1:11:28).
- “I was denied my civil liberties, my civil rights to vote in Luzerne County and it is deplorable that’s all I have to say.” (Nov. 14 Meeting Link at 1:18:07–1:18:14).
- “I was there so often during the course of the day trying to cast my vote, I saw several people just walk away in disgust. So, you know, the 1500 number that was quoted earlier as votes that needed to be counted from the provisional that to me is just ... not valid.” (Nov. 14 Meeting Link at 1:38:28–1:38:51).
- “Turned approx. 50 voters away. Maybe only 20 came back. *See* Ex. B (Declaration of Brian Dwyer).

To these voters who were turned away from the polls due to the ballot shortage, the polls were effectively closed to them for the Election.

In light of the expressed concerns of Luzerne County voters as to whether or not their "provisional" ballots had counted, on November 16, 2022, undersigned counsel sent a letter to Solicitor Skene, inquiring when the reconciliation process would be completed. A true and correct copy of Attorney Zimolong's letter is attached as Exhibit F. On November 17, 2022, Attorney Gallagher again reached out to Solicitor Skene regarding the need for the poll book reconciliation as part of the canvass process. A true and correct copy of Attorney Gallagher's letter is attached as Exhibit G. Again, Solicitor Skene chose not to respond.

In further response to what can only be described as an Election Day morass, the Luzerne County Council scheduled an emergency meeting for November 17, 2022. During the course of that meeting On November 17, 2022, the Luzerne County Council held an emergency meeting at which time, Council member Thorton stated:

Having a widespread shortage of paper at the polling sites is unthinkable. The missteps that followed that day are inexcusable: shredded ballots, double-sided printed ballots, lack of or no meaningful communications to the field, improperly trained poll workers, loss of chain of custody of the ballots, voters told they cannot vote and turned away by the hundreds if not thousands. How on Earth can anyone certify these election results to be true and accurate? They cannot. All of this falls squarely on the lack of leadership. A level of ineptitude and incompetency has risen to a level never before seen in this county. Once again, the trust of the people has been crippled.

A recording of the Council meeting can be accessed at: <https://youtu.be/MXxrKeYhpPo>, at 13:40–14:35.

Not only is the Board required to perform the reconciliation process as part of the canvass process, but completing the reconciliation process to confirm that there is a cast and counted ballot for every voter who signed into a polling place to vote on

November 8, 2022, would add some sense of integrity to what is by all accounts a failed election process.

LEGAL STANDARD

Both a motion for peremptory judgment in mandamus and motion for summary relief are resolved under the same standard, which is that Plaintiff prevails if there are no genuine disputes of material fact and the right to relief is clear as a matter of law. *MFW Wine Co., LLC v. Pennsylvania Liquor Control Bd.*, 231 A.3d 50, 52 n.2 & 56 (Pa. Commw. 2020).

ARGUMENT

I. Plaintiffs Meet the Standard for a Writ of Mandamus

A writ of mandamus is used to “compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and a want of any other appropriate and adequate remedy.” *Jackson v. Vaughn*, 777 A. 2d 436, 438 (Pa. 2001); *see also MFW Wine Co., LLC v. Pennsylvania Liquor Control Bd.*, 231 A. 3d 50, 56 (Pa. Commw. Ct. 2020). “A ministerial act is one which a public officer is required to perform upon a given state of facts and in a prescribed manner in obedience to the mandate of legal authority.” *Philadelphia Firefighters’ Union, Loc. 22 v. City of Philadelphia*, 119 A. 3d 296, 303 (Pa. 2015) (internal citations omitted). Plaintiffs are entitled to a writ of mandamus compelling the Board to perform its obligations and complete its reconciliation process for the General Election because Plaintiff can establish its clear right to relief,

the Board's corresponding duty, and the lack of an adequate remedy. *MFW Wine Co.*, 231 A.3d at 56.

"A clear legal right to relief is shown where the right to require performance of the act is clear, and a corresponding duty is shown where the governing law contains directory language, requiring that an act shall be done." *Philadelphia Firefighters' Union*, 119 A.3d at 304 (internal citations omitted). "A want of any other adequate remedy is established where there is no alternative form of relief." *Id.*

A. The Board Is Required to Complete the Reconciliation Process Before Certifying the Results of the Election.

The Election Code requires county boards of elections to complete the reconciliation process—including the comparison of the numbered list of voters to the votes cast at the polls, 25 P.S. § 3154(b), a reconciliation of all balloting materials, § 3154(c), and the reconciliation of tally papers and district totals cards with the results on the general return sheets, 25 P.S. § 3154(d)—before the Board may sign the unofficial returns only after "the returns from each election district are read, computed and found to be correct or corrected." 25 P.S. § 3154(f). The Election Code also requires county boards of elections to complete the reconciliation process before issuing certificates of election. *Id.*

The Board has not completed this mandatory process and has not stated that it intends to follow this statutory requirement. By failing to complete the reconciliation process, the Board is failing to perform its mandatory statutory duty. Plaintiff does not have any alternative remedy to require the Board to complete the reconciliation process. Plaintiffs have requested the Board submit this information

on numerous occasions, but the Board has failed to do so. By failing to complete the reconciliation process, the Board is failing to perform its mandatory statutory duty. Accordingly, the Court should issue a writ of mandamus directing the Board to complete its statutorily prescribed reconciliation process before certifying the results of the General Election.

B. Plaintiff Has No Alternative Remedy

Plaintiff does not have any alternative avenue of requiring the Board to complete the reconciliation process before certifying the results of the 2022 General Election. Numerous inquiries have been made to the Board regarding whether and when the reconciliation process will occur, and to date, the Board has been non-committal in its occasional responses. Finally, Plaintiff's request for declaratory and injunctive relief does not defeat the request for a writ of mandamus as those forms of relief may be awarded along with a writ of mandamus. *See, e.g., MFW Wine Co.*, 231 A.3d at 58–59.

II. Plaintiffs Meet the Standard for Declaratory and Injunctive Relief

Additionally, this Court should declare that the reconciliation process is a required component of the canvass that must occur before boards can certify election results. And this Court should order the Board to timely complete the reconciliation before certifying the results of the 2022 General Election. Plaintiff meets the standard for an injunction because he has a clear right to relief, an injunction is needed to avoid an injury that cannot be compensated by damages, and a greater

injury will result from refusing the injunction. *City of Philadelphia v. Armstrong*, 271 A.3d 555, 560 (Pa. Commw. 2022).

A. The Election Code's Reconciliation Process Is Mandatory

The Election Code requires county boards of elections to complete the reconciliation process—including the comparison of the numbered list of voters to the votes cast at the polls, 25 P.S. § 3154(b), a reconciliation of all balloting materials, § 3154(c), and the reconciliation of tally papers and district totals cards with the results on the general return sheets, 25 P.S. § 3154(d)—before the Board may sign the unofficial returns only after “the returns from each election district are read, computed and found to be correct or corrected.” 25 P.S. § 3154(f). The Election Code also requires county boards of elections to complete the reconciliation process before issuing certificates of election. *Id.* The Board must investigate any discrepancies or irregularities uncovered during the reconciliation process. 25 P.S. § 3154(b)–(d).

The Board has not completed the required reconciliation process. By failing to complete the reconciliation process, the Board is failing to perform its mandatory statutory duty. This failure implicates a direct, substantial, and present interest of the Plaintiffs, as the reconciliation process is a required prerequisite to the certification of the results of the election and ensures that voters were not improperly disenfranchised. *See* 25 P.S. § 3154(f). The Court should declare that the Board cannot certify the results of the 2022 General Election until such time as it has completed the reconciliation process. 25 P.S. § 3154(f).

Further, the Court should order the Board not to submit results of the election to the Secretary of the Commonwealth or certify such results until it has completed the reconciliation process. The Board lacks the discretion to decide whether to complete the reconciliation process, or whether to complete same before certifying the results. The Election Code frames each aspect of the reconciliation process with mandatory “shall” language. *See* 25 P.S. § 3154(b)–(d), (f); *see also In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of Pierce*, 843 A.2d 1223, 1231 (Pa. 2004) (“The word ‘shall’ carries an imperative or mandatory meaning.”); *see also In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1084 (Pa. 2020) (Wecht, J., concurring in part and dissenting in part) (“shall means *shall*” (emphasis in original)). Especially in light of the disastrous and chaotic experiences of Luzerne County voters at the polls on Election Day, the imperative of the Board to follow the Election Code’s mandatory reconciliation procedure is even stronger. Accordingly, with this motion, Plaintiff seeks to compel the Board to perform its statutory obligation to complete the reconciliation process prior to certifying the election results.

B. Plaintiff Satisfies the Remaining Injunction Factors

Failure to complete the reconciliation process before certifying the results is a harm that cannot be compensated by damages. Such a failure to follow the Election Code jeopardizes the sacred and foundational “right to vote and the right to have one’s vote counted.” *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d at 994; *see also In re Fitzpatrick*, 827 A.2d 374 (Castille, J., dissenting) (describing this right

as "the most sacred and foundational aspect of our democratic process). A failure to complete the reconciliation process, including investigation of any discrepancies, risks depriving certain voters of their fundamental right to vote and could distort the tallies of Pennsylvania's elections.

The Board would suffer no injury from being ordered to complete the reconciliation process before certifying the election returns. In fact, the Board is already required to do so under the Election Code. An order confirming same would not require any additional work on the part of the Board. And the order's effect would only require the Board to complete the reconciliation process before certifying the results of this election (in accordance with existing law).

CONCLUSION

For all of these reasons, this Court should grant the petition.

Respectfully submitted,

Dated: November 21, 2022

/s/ Walter S. Zimolong, III

Walter S. Zimolong, III (PA #89151)

ZIMOLONG LLC

P.O. Box 552

Villanova, PA 19085

215.665.0842 (Phone)

wally@zimolonglaw.com

Counsel for James Bognet

IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY,
PENNSYLVANIA

JIM BOGNET,

No.

Plaintiff,

v.

LUZERNE COUNTY BOARD OF
ELECTIONS,

Defendant.

CERTIFICATE OF SERVICE

I, Walter S. Zimolong III, certify that on the date indicated below, I caused to
be served a copy of the foregoing by email as follows:

Harry W. Skene, Chief Solicitor
Luzerne County Board of Elections
20 North Pennsylvania Avenue, Suite 215
Wilkes-Barre, PA 18701
Via Email (Harry.Skene@LuzerneCounty.org)

Date: November 21, 2022

/s/ Walter S. Zimolong III

Gallagher Giancola

ATTORNEYS AT LAW

Kathleen A. Gallagher

kag@glawfirm.com

412.717.1920

November 10, 2022

Via Email – Harry.Skene@LuzerneCounty.org

Harry W. Skene, Chief Solicitor
Luzerne County Board of Elections
20 North Pennsylvania Avenue, Suite 215
Wilkes-Barre, PA 18701

Re: Luzerne County 2020 General Election Canvass/Emergency Ballots

Dear Mr. Skene:

I represent the National Republican Congressional Committee ("NRCC") and the Pennsylvania House Republican Campaign Committee ("HRCC") in conjunction with the above-referenced matter. As I stated during the public comment portion of yesterday's meeting of the Luzerne County Board of Elections (the "BOE"), the ballots cast as the result of the failure of the BOE to provide a sufficient number of machine ballots and provisional ballots **are not** provisional ballots. Rather, such ballots, regardless of the medium on which they are written and cast, were cast as a result of electronic voting systems (or components thereof) becoming inoperable during the election. See 25 P.S. § 3031.20(b).

The Election Code provides that those ballots cast due to the BOE's failure to properly equip polling places with sufficient machine ballots and provisional ballots ("Voter-Created Emergency Ballots") may be "paper ballots, either printed or written and of any suitable form" to register the votes. *Id.* Because the Voter-Created Emergency Ballots are paper ballots, they must be counted in accordance with 25 P.S. § 3031.14(d), which provides:

If for any reason it becomes impracticable to count all or a part of the ballots or district totals cards with automatic tabulating equipment, the county board of elections may direct that such ballots or cards be counted manually, following as far as practicable the provisions of this act governing the counting of paper ballots.

25 P.S. 3031.14(d). In addition, the BOE must follow 25 P.S. § 3154(d)(1) during the computation of the Voter-Created Emergency Ballots.

Given the irregularities resulting from the lack of sufficient machine and provisional ballots, and in an attempt to lend some sense of election integrity and transparency to the situation, the NRCC and HRCC posit that the Voter-Created Emergency Ballots must be canvassed as follows:

3100 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219



Main: 412.717.1900

Fax: 412.717.1901

www.glawfirm.com

Each ballot shall be reviewed by two (2) employees of the BOE or County Employee, one of whom is a registered Democrat and one a registered Republican. One County employee shall read the vote cast for each candidate which is recorded on the Voter-Created Emergency Ballot to the other who shall mark each vote. Upon agreement of the two employees as to the record of each vote cast via the Voter-Created Emergency Ballot, a third County Employee shall read the results of each vote out loud so that all attorneys, watchers, authorized representatives, and candidates in attendance can hear the vote being recorded.

Please confirm prior to commencement of the canvassing of the Voter-Created Emergency Ballots that this procedure will be followed. Please also confirm the number of employees who will participate in the canvassing of the Voter-Created Emergency Ballots, the date and location of the canvassing of the Voter-Created Emergency Ballots, and that the canvassing of the Voter-Created Emergency Ballots will be open to attorneys, watchers, and candidates.

Also, given the circumstances giving rise to the need for Voter-Created Emergency Ballots, the sole basis for not counting a Voter-Created Emergency Ballot should be if the identification of the voter is included on the ballot. *See* 25 P.S. § 3063(a). Any Voter-Created Emergency Ballots which contain voter identification information should be segregated, and the identified voter contacted to determine if the voter was instructed to place such information on the ballot. Please confirm prior to the commencement of the canvassing of the Voter-Created Emergency Ballots that this standard will be utilized.

We also request that the BOE provide the following information no later than the close of business on Monday, November 14, 2022:

1. The total number of "Voter-Created Emergency Ballots" cast in the November 8, 2022 General Election.
2. The identification of each precinct which did not have sufficient machine or provisional ballots for the November 8, 2022 General Election.
3. Lists of all voters registered to vote at each precinct identified in #2 above, organized by party registration.
4. The number of machine ballots and provisional ballots provided to each precinct identified in #2 above in the Primary and General Elections for 2020, 2021, and 2022.
5. The number of "Emergency Paper Ballots" provided to each precinct for the November 8, 2022 General Election, in accordance with the Secretary of the Commonwealth's September 15, 2006 Directive Concerning the Use, Implementation and Operation of Electronic Voting Systems by the County Boards

Harry W. Skene, Chief Solicitor

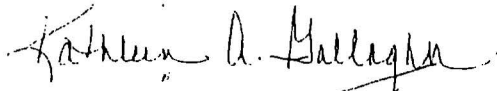
Page 3

November 10, 2022

of Elections, as well as the Pennsylvania Department of State's August 2008 publication regarding Emergency Paper Ballots, a copy of which is attached.

As you are undoubtedly aware, time is of the essence with respect to this issue. We anticipate your client's prompt compliance.

Kindest regards,

A handwritten signature in cursive script, appearing to read "Kathleen A. Gallagher".

Kathleen A. Gallagher

cc: James Fitzpatrick, Esq.
Britain Henry, Esq.
Walley Zimlong, Esq.

RETRIEVED FROM DEMOCRACYDOCKET.COM

WITNESS STATEMENT

Name: BRIAN DWYER

Address: 94 EAST BROADWAY ST. LARKSVILLE PA 18651.

Phone: () (Election Day) (570) 899-9191 (After Election)

Official Position (if any): CONSTABLE LARKSVILLE WARD-2

Party Registration: NON AFFILIATED- INDEPENDENT

The incident being reported occurred in:

County: LUZERNE Ward/Precinct: LARKSVILLE - WARD-2

Polling Location: FIRE/AMBULANCE BLDG - STATE ST. LARKSVILLE PA. 18651.

Please record your statement in the space provided below (attach additional sheets if necessary) with as much detail as possible. Include the date and time of the incident as well as the names of the person(s) involved (if possible).

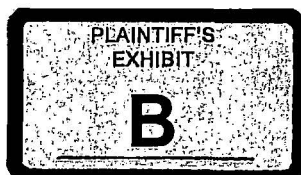
- POLLS OPENED. MACHINES DID NOT WORK - TOOK 2 HRS TO FIX
- CALLED FOR PAPER FOR MACHINES AT 10:00 AM. GOT IT ABOUT 6-7 PM
- RAN OUT OF PAPER EMERGENCY AND PROVISIONAL BALLOTS AT 1:30 PM.
- TURNED APPROX 50 VOTERS AWAY. MAYBE ONLY 20 CAME BACK.
- NO OR LITTLE INSTRUCTION FROM THE COUNTY ELECTION BUREAU.
- FOUND OUT MOST INFORMATION FROM VOTERS IN LINE - NEWS REPORTS FROM THEIR PHONES. WOULD CALL COUNTY TO CONFIRM.
- VOTING DIRECTIONS FOR BALLOTS AFTER 8:00 PM WAS CONTRARY TO VOTER LAW AND PROCEDURE - WHY WERE THEY SEPARATE ON PROVISIONAL ~~AND~~ PAPER BALLOTS

I, BRIAN DWYER, have read the above and certify it is true and
(Print Name)

accurate. I make this unsworn statement subject to the penalties of 18 PA.C.S. Section 4904 relating to unsworn falsification to authorities.

Brian Dwyer
(Signature)

14 NOV 22
(Date)



WITNESS STATEMENT

Name: Ian Kennedy

Address: 103 E. Overbrook Road Shavertown, PA 18708

Phone: (570) 371-8377 (Election Day) () (After Election)

Official Position (if any): _____

Party Registration: Republican

The incident being reported occurred in:

County: LuZerne Ward/Precinct: Nanticoke Ward 2

Polling Location: ~~Ball~~ Poll Worker

Please record your statement in the space provided below (attach additional sheets if necessary) with as much detail as possible. Include the date and time of the incident as well as the names of the person(s) involved (if possible).

Machines stopped working 7-8AM

Run out of paper. Municipality inspector grabbed his own paper.

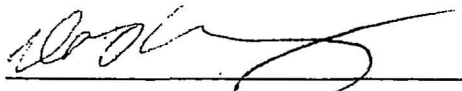
Machines last calibrated 2017

people signed in that didn't vote because machines were not working

Books didn't meet tabulator

I, Ian Kennedy, have read the above and certify it is true and
(Print Name)

accurate. I make this unsworn statement subject to the penalties of 18 PA.C.S. Section 4904 relating to unsworn falsification to authorities.


(Signature)

11/14/2022
(Date)

WITNESS STATEMENT

Name: Barbara Rupert
Address: 56 Sunset Lake Rd Springfield
Phone: (570) 256-3819 (Election Day) () (After Election)
Official Position (if any): None Voter
Party Registration: Independent

The incident being reported occurred in:

County: Luzerne Ward/Precinct: _____
Polling Location: Hunkley Tap Fire Hall

Please record your statement in the space provided below (attach additional sheets if necessary) with as much detail as possible. Include the date and time of the incident as well as the names of the person(s) involved (if possible).

Arrived at polling place approximately 11:30am with my husband. He was told that there was no paper nor any provisional ballots. The volunteers were told to write provisional on ballots, but the scanner would not accept them. He left. I reported the issue to the DOJ. I went back at 5:30pm. The volunteers were using photocopied provisional ballots and collecting them into manila envelopes. The ballots had no identifying marks. When asked about it, the volunteer indicated that she did not know.

After the election, I checked to see if my "provisional ballot" was counted. Not on list.

I, Barbara Rupert, have read the above and certify it is true and

(Print Name)

accurate. I make this unsworn statement subject to the penalties of 18 PA.C.S. Section 4904 relating to unsworn falsification to authorities.

Barbara Rupert
(Signature)

11/14/22
(Date)

WITNESS STATEMENT

Name: Kelly A Halchak

Address: 53 Subyak RD Wapwallopen Pa 18660

Phone: (570) 417-2575 (Election Day) (570) 417-2575 (After Election)

Official Position (if any): N/A

Party Resignation: _____

The incident being reported occurred in:

County: Luzerne Ward/Precinct: Dorance Twp

Polling Location: DORANCE Township Municipal Bldg - 7844 Blue Ridge Trail
MT top Pa 18707

Please record your statement in the space provided below (attach additional sheets if necessary) with as much detail as possible. Include the date and time of the incident as well as the names of the person(s) involved (if possible).

My husband & I arrived at Dorance Twp Municipal Bldg on Nov 8, 2022 at approx 9:30 am. We were informed that the machines were not being used because they did not come with any paper, and we would have to fill out a write-in ballot, and they only received 1 package. My husband and I were 175-176 and we were told they were almost out of ballots and were getting nervous. We returned in approx 1/2 hour to check if they had received more ballots and people were walking out & leaving. I was told by one lady she came in the morning because she didn't want to drive in the evening due to darkness & deer crossing roads at night. We were told by poll worker they called twelve times for someone to bring paper to this location.

I, Kelly A Halchak, have read the above and certify it is true and
(Print Name)

accurate. I make this unsworn statement subject to the penalties of 18 PA.C.S. Section 4904 relating to unsworn falsification to authorities.

Kelly A Halchak
(Signature)

11-16-2022
(Date)

WITNESS STATEMENT

Name: Frank A. Lutinski

Address: 10 Oak St., Harveys Lake, PA. 18618

Phone: (570) 639-2929 (Election Day) (570) 639-2929 (After Election)

Official Position (if any): _____

Party Registration: R

The incident being reported occurred in:

County: Luzerne Ward/Precinct: Harveys Lake Boro.

Polling Location: Harveys Lake Municipal Bldg.

Please record your statement in the space provided below (attach additional sheets if necessary) with as much detail as possible. Include the date and time of the incident as well as the names of the person(s) involved (if possible).

Showed up to vote a little after 11:00 A.M. on Tues
Nov. 8, 2022, was told they ran out of paper and that I
and my 96 year old mother would have to fill out another paper
ballot and they would put them through later. On the radio
on the way over I heard people from a number of locations
in Luzerne County saying their polling place was out of
paper too. With no reference, on the paper we used, to
verify legitimacy how could we be sure that our ballots
were not switched out with other ballots?

I, Frank A. Lutinski, have read the above and certify it is true and
(Print Name)

accurate. I make this unsworn statement subject to the penalties of 18 PA.C.S. Section 4904 relating to
unsworn falsification to authorities.

[Signature]
(Signature)

11/14/22
(Date)

WITNESS STATEMENT

Name: David Hage

Address: 14 Brook St. Harvey's Lake, PA 18618

Phone: (570) 592-1783 (Election Day) () (After Election)

Official Position (if any): voter

Party Registration: Republican

The incident being reported occurred in:

County: Luzerne Ward/Precinct: Harvey's Lake

Polling Location: _____

Please record your statement in the space provided below (attach additional sheets if necessary) with as much detail as possible. Include the date and time of the incident as well as the names of the person(s) involved (if possible).

I voted around 10 AM on election day I was forced to vote by Ballot Paper because the voting precinct was "out of paper" since 8 or 9 AM according to the poll worker who greeted me. Another poll worker stated "make sure you fill out the bubble next to your candidate's name so your vote counts" the ballot box was also unattended by a poll worker at the time of my vote while I sat at the registration table.

I, David Hage, have read the above and certify it is true and
(Print Name)

accurate. I make this unsworn statement subject to the penalties of 18 PA.C.S. Section 4904 relating to unsworn falsification to authorities.

David Hage
(Signature)

11/14/22
(Date)

WITNESS STATEMENT

Name: Linda Lou DeAndrea

Address: 191 N Lee Ct Hazleton PA 18201

Phone: 570 578-5110 (Election Day) () (After Election)

Official Position (if any): _____

Party Registration: Republican

The incident being reported occurred in:

County: Luzerne Ward/Precinct: _____

Polling Location: Church St, City Hall

Please record your statement in the space provided below (attach additional sheets if necessary) with as much detail as possible. Include the date and time of the incident as well as the names of the person(s) involved (if possible).

- ① They ran out paper asking you to return later
- ② They did not ask for ID.
- ③ The electronic machine where you sign was not there.

I, Linda Lou DeAndrea, have read the above and certify it is true and
(Print Name)

accurate. I make this unsworn statement subject to the penalties of 18 PA.C.S. Section 4904 relating to unsworn falsification to authorities.

[Signature]
(Signature)

11/17/22
(Date)

IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY, PENNSYLVANIA

**IN RE:
EXTENSION OF TIME FOR
POLLS TO REMAIN OPEN
IN THE 2022 GENERAL ELECTION**

CIVIL ACTION-LAW

No. 09970 2022

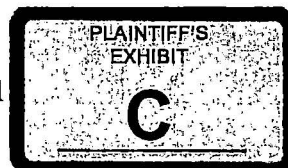
PROTHONOTARY LUZERNE COUNTY
FILED NOV 8 '22 PM 1:03

**EMERGENCY PETITION OF THE LUZERNE COUNTY BUREAU OF ELECTIONS
AND LUZERNE COUNTY BOARD OF
ELECTIONS REQUESTING AN EXTENSION OF TIME FOR POLLS TO REMAIN
OPEN UNTIL 10:00 P.M. FOR THE NOVEMBER 8, 2022 GENERAL ELECTION**

Petitioner, the Luzerne County Bureau ("Bureau") and the Luzerne County Board of Elections ("Board of Elections"), by its undersigned attorneys, the Luzerne County County Office of Law, hereby petitions this Honorable Court for permission to extend the deadline for the time the polls are to be closed by 2 hours. In support of this Petition, the Luzerne County Bureau of Elections and Luzerne County Board of Elections avers as follows:

1. In the process of administering the election on November 8th, the Luzerne County Bureau of Elections has experienced a paper shortage at the polling locations that have resulted in serious delays in the polling locations.
2. Upon arriving at the polling locations to set up machines on Election Day poll workers at the Luzerne County polling locations discovered that the voting machines were seriously deficient of paper to print out the ballot after the voter uses the machine to vote.
3. As a result of this issue, emergency and provisional ballots had to be used for the voters causing a shortage of the supply of those ballots.
4. Upon being notified, Luzerne County immediately mobilized to get paper to the polling locations.
5. The Luzerne County Election Bureau is attempting to obtain the paper to supply all of the polling locations sufficiently.

1



6. Some voters have indicated that they were not able to remain at the polls and voters have indicated an inability to return to vote until after polls had closed.

7. It is the purpose of the court of common pleas on any election day to decide such "matters pertaining to the election as may be necessary to carry out the intent of this act." 25 P.S. § 3046.

8. It is well-settled that the purpose of election laws is to ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process. *In re General Election – 1985*, 109 Pa.Cmwlth. at 608, 531 A.2d at 839 (Court postponed the date of the General Election for 11 precincts that suffered extensive flooding, loss of electricity, heat, and water during extreme weather conditions) (citing, *In re Mayor, City of Altoona, Blair County*, 413 Pa. 305, 196 A.2d 371 (1964)).

9. In prior instances where a request for an extension of time to allow electors to cast votes in an election the courts have found that allowing an election to be conducted "where members of the electorate could be deprived of their opportunity to participate because of circumstances beyond their control ... would be inconsistent with the purpose of the election laws." *In re General Election*, 839.

10. In the immediate instance electors of Luzerne County may be deprived of their opportunity to participate because of circumstances beyond their control if the time for closing the polls is not extended.

11. The Pennsylvania Election Code states that "At all primaries and elections the polls shall be opened at 7 A.M., Eastern Standard Time, and shall remain open continuously until 8 P.M., Eastern Standard Time, at which point they shall be closed." 25 P.S. § 3045.

12. After review, the Luzerne County Bureau and the Luzerne County Board of Elections now petitions this Honorable Court to extend the statutory deadline at which the polls are required to close from 8:00PM on Tuesday November 8st to 10:00 p.m.

13. Luzerne County has discussed the present issues with the Pennsylvania Department of State and the Department of State has expressed it would defer to the Luzerne County Bureau and Luzerne County Board of Elections as to the necessity for an extension.

14. The Luzerne County Democratic Party supports the Luzerne County Bureau and Luzerne County Board of Elections request made herein.

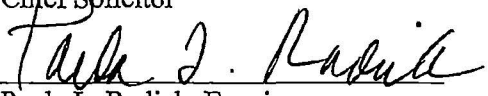
15. The Luzerne County Republican Party supports the Luzerne County Bureau and Luzerne County Board of Elections request made herein.

16. The Luzerne County Board of Elections and Luzerne County Bureau of Elections seeks this extension so that all of the duly qualified electors of Luzerne County are able to participate in the election process.

WHEREFORE, the Luzerne County Bureau of Elections and Luzerne County Board of Elections respectfully requests this Honorable Court to GRANT its Emergency Petition to extend the deadline for the time the polls are to be closed for the November 8th General Election by 2 hours.

Respectfully submitted,


Harry S. Skene, Esquire
Chief Solicitor


Paula L. Radick, Esquire
Assistant Solicitor

Luzerne County Office of Law
Luzerne County Penn Place Building
20 North Pennsylvania Avenue
Wilkes-Barre, PA 18701

(570)706.3199

*Attorneys for Petitioner,
Luzerne County Bureau and Luzerne County
Board of Elections*

Dated: November 8, 2022

IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY, PENNSYLVANIA

IN RE:	:	
EXTENSION OF TIME FOR	:	CIVIL ACTION-LAW
POLLS TO REMAIN OPEN	:	No. <u>09970</u> 2022
IN THE 2022 GENERAL ELECTION	:	
	:	

ORDER

AND NOW, this 8th day of November, 2022, upon consideration of the Emergency Petition of the Luzerne County Bureau and Luzerne County Board of Elections for an Extension of Time for Polls to Remain Open in the 2022 General Election, and any opposition thereto, it is hereby ORDERED and DECREED, that said Petition is GRANTED as follows:

Luzerne County shall extend the time of the closing of the polls at the County polling places by 2 hours to 10:00 p.m.

BY THE COURT:

J.

Kathleen A. Gallagher

Gallagher Giancola LLC

kag@glawfirm.com

412.717.1920 (Direct)

412.717.1901 (Fax)

3100 Koppers Building

436 Seventh Avenue

Pittsburgh, PA 15219

Gallagher Giancola

ATTORNEYS AT LAW

From: Kathleen Gallagher

Sent: Monday, November 14, 2022 3:30 PM

To: 'Harry.Skene@LuzerneCounty.org' <Harry.Skene@LuzerneCounty.org>

Cc: Russell Giancola <rdg@glawfirm.com>

Subject: Luzerne County November 8, 2020 General Election

Dear Mr. Skeene:

I write to confirm our telephone conversation of earlier today. Initially, you confirmed that the Luzerne County Board of Elections will, as required by Section 25 P.S. § 3050(a.4)(4), hold a hearing to adjudicate all challenges asserted to provisional ballots during the canvass. I also understand from our discussion that the date for the hearing has not yet been set but that all statutory requirements regarding the same will be met, including the notice requirements required by the Sunshine Act.

We also discussed the reconciliation of the poll books for Luzerne County. As I mentioned, we believe that it is very important that the reconciliation take place prior to the Board's hearing. I understand that while you did not know when the reconciliation will be completed that you would inquire as to that issue and let me know the anticipated completion date for the poll book reconciliation.

If my understanding is incorrect on any of these points, I ask that you advise me of the same at your



earliest convenience.

Finally, you may recall that I sent a letter last week, setting forth my clients' positions regarding the counting of what we believe are "Voter-Created Emergency Ballots." A copy of that letter is attached for your convenience. The letter also sets forth certain requests for specific information. Would you also kindly let me know when we can expect to receive the responses to those requests?

I appreciate your prompt response.

Kindest regards,
Kathy

Kathleen A. Gallagher

Gallagher Giancola LLC

kag@glawfirm.com

412.717.1920 (Direct)

412.717.1901 (Fax)

3100 Koppers Building

436 Seventh Avenue

Pittsburgh, PA 15219

Gallagher Giancola

ATTORNEYS AT LAW

RETRIEVED FROM DEMOCRACYDOCKET.COM

From: Wally Zimolong
To: Harry.Skene@LuzerneCounty.org
Bcc: Joe Defillitis; James Fitzpatrick; James Bognet; Clio Manage (01031-Bognet for Congress
Subject: Luzerne County November 8, 2020 General Election
Date: Monday, November 14, 2022 4:57:00 PM
Attachments: 2022-11-10 Letter to Harry Skene, Luzerne County Solicitor.docx

Mr. Skene:

As you might know, I represent Jim Bognet and Bognet for Congress. I am writing for two reasons. First, I write to notify you that my clients join in the letter from Attorney Gallagher that is attached to this email. I understand that Attorney Gallagher has requested that the county respond to the questions in that letter. I respectfully request that I be copied on the response from the county to her.

Second, I am writing to regarding the Board of Election's obligations under 25 P.S. 3154 (d)(1) regarding poll book reconciliation. I understand that you have confirmed that the Board of Elections will follow that statutorily required process. I join in Attorney Gallagher's request for that process to occur before any hearing on disputed ballots. I understand that the meeting for poll book reconciliation has not yet been scheduled. So, I likewise request that you kindly provide me with notice of the date, time, and location of the poll book reconciliation process once it is known.

Should you have any questions or, if any of my understandings are incorrect, please do not hesitate to contact me.

Wally Zimolong, Esquire

Main Office

353 West Lancaster Avenue, Suite 300, Wayne, PA 19087

Mailing Address

P.O. Box 552, Villanova, PA 19085-0552

Office: 215.665.0842 | Mobile: 609.932.8836 | Email: wally@zimolonglaw.com |

www.zimolonglaw.com



From: [Wally Zimolong](#)
To: [Wally Zimolong](#)
Subject: FW: Luzerne County Poll Book Reconciliation/Board of Elections Hearing
Date: Monday, November 21, 2022 11:51:05 AM
Attachments: [image001.png](#)
Importance: High

From: Kathleen Gallagher
Sent: Thursday, November 17, 2022 6:35 AM
To: Harry.Skene@LuzerneCounty.org
Cc: Russell Giancola <rdg@glawfirm.com>; Britain Henry <bhenry@goldsteinlp.com>
Subject: Luzerne County Poll Book Reconciliation/Board of Elections Hearing
Importance: High

Dear Mr. Skene:

I write in follow up to our telephone conversation of Monday, November 14, 2022, and my confirmation email below of that same date. Despite my requests of Monday, November 14, 2022, I have yet to receive confirmation as to whether or not the required poll book reconciliation will be completed prior to the Board of Elections (the "Board") hearing which is scheduled for 1:00 p.m. today, November 17, 2022. Additionally, Wally Zimolong, counsel for Jim Bognet and Bognet for Congress again requested, inter alia, confirmation that the poll book reconciliation has been completed via letter of this date. (A copy of Attorney Zimolong's letter is attached for your convenience)

As you are aware, Section 3154 of Pennsylvania's Election Code (the "Election Code") governs the canvass process. (25 P.S. § 3154 et seq). As we discussed and as pointed out by Attorney Zimolong, poll book reconciliation is a mandatory component of the canvass process pursuant to Section 3154 (d) (1) of the Code. Section 3154(d)(1) provides in pertinent part, "[t]he figures announced for all districts **shall** be compared by one of the clerks with the tally papers from the respective districts. If any discrepancies are discovered, the county board **shall** thereupon examine all of the return sheets, tally papers and other papers in its possession relating to the same election district." 25 P.S. § 3154(d)(1) (emphasis added).

That the poll book reconciliation is a mandatory component of the canvass process is readily established via the Legislature's use of the term "shall" in Section 3154(d)(1). The import of the Legislature's use of the term "shall" in the Election Code was specifically addressed by Justice Wecht in , *IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL Election*, 241 A.3d 1058 (Pa. 2020)

Justice Wecht wrote, "While we did not go out of our way to express as jaundiced a view of our cases holding that "minor irregularities" might be overlooked, the gravamen of our decision in that case, as in *Pierce*, was clear: shall means *shall*." *Id* at 1061.



Given the mandatory nature of the poll book reconciliation as a component of the canvass, the canvass is not, as a matter of law, complete until such time as the poll book reconciliation process is complete.

During the course of Monday's public meeting, numerous residents of Luzerne County expressed their concerns regarding whether their votes had been counted due to Luzerne County's abysmal failure to prepare properly for the November 8, 2022 General Election by failing to have sufficient ballot paper, and emergency ballots in as many as 50 precincts.

Others claimed actual disenfranchisement as the result of the same with reports of voters being turned away from the polls due to Board's failures, effectively closing the polls to those voters. The calls for resignations, a "do-over of the election" and investigations were so compelling that Council referred the situation to the Luzerne County District Attorney for a criminal investigation by a unanimous vote. Luzerne County and the Board may never know how many voters were denied the right to cast their vote in the 2022 General Election due to the Board's actions. What the Board can do and must do pursuant to the Election Code is to reconcile the poll books. That is the sole mechanism by which the Board can establish that for every voter who signed into vote, there is a corresponding cast and counted ballot. The Election Code mandates the reconciliation and the voters of Luzerne County deserve no less.

Accordingly, prior to the commencement of the 1:00 p.m. Board hearing today I shall expect written confirmation that the poll book reconciliation process been completed. In the event I do not receive the same, it is the position of our clients that the canvass is not complete and the hearing cannot take place. To the extent the Board proceeds with the hearing absent the completion of the poll book reconciliation, it is the further position of our clients that any such hearing, for the reasons set forth above, is void ab initio

The RNC and the NRCC reserve all rights and remedies in this regard.

Kindest regards,

Kathy

Kathleen A. Gallagher

Gallagher Giancola LLC

kag@glawfirm.com

412.717.1920 (Direct)

412.717.1901 (Fax)

3100 Koppers Building

436 Seventh Avenue

Pittsburgh, PA 15219

Gallagher Giancola

ATTORNEYS AT LAW



Wally Zimolong, Esq.
Admitted in PA & NJ
Wally@ZimolongLaw.com

November 16, 2022

Via Email (Harry.Skene@LuzerneCounty.org)

Harry W. Skene, Chief Solicitor
Luzerne County Board of Elections
20 North Pennsylvania Avenue, Suite 215
Wilkes-Barre, PA 18701

Re: Luzerne County 2022 General Election Canvass

Dear Mr. Skene:

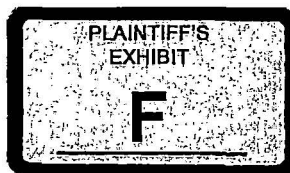
I represent Jim Bognet and Bognet for Congress. I understand that the Luzerne County Board of Elections plans on voting on and submitting its unofficial results for the above to the Commonwealth Department of State today. I am writing to object to any unofficial results being reported before the Board of Elections has complied with all conditions precedent set forth the Pennsylvania Election Code, 25 P.S. 2600, et. seq.

I understand that, as required under 25 P.S. § 3154(a), the Board of Elections is currently canvassing the returns of the 2022 general election. Canvassing means "to gather, count, *compute*, and tally the votes reflected." *Chapman v. Berks Cnty. Bd. of Elections*, 2022 WL 4100998, at *2 (Pa.Cmwlt. Aug. 19, 2022) (emphasis added). The Board of Elections has not completed its canvass and, despite, repeated requests it has not stated when it will complete its canvas. The Board of Elections has not completed its canvass because it has not performed the ballot reconciliation process required by 25 P.S. § 3154(c) and has not completed the poll book reconciliation process required by 25 P.S. § 3154(d)(1).

Section 3154(c) requires the Board of Election to "first publicly account for all extra official ballots printed under the provisions of section 1007 of this act." 25 P.S. § 3154(c). There is no dispute that the Board has not completed that process. Section 3154(c) then states:

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“general returns made by the election officers from the various election districts ***shall then be read one after*** another in the usual order, ***slowly and audibly***, by one of the clerks who shall, in each case of a return from a district in which ballots were used, ***read therefrom the number of ballots (in the case of primaries the number of ballots of each party) issued, spoiled and cancelled, and cast, respectively***, whereupon the clerk having charge of the records of the county board showing the number of ballots furnished for each election district, including the number of extra official ballots as provided by section 1007 of this act as so furnished, and the number of unused ballots and spoiled and cancelled ballots returned, shall publicly announce the number of the same respectively, and unless it appears by said number or calculations therefrom that said records, and the said general return correspond.”

25 P.S. § 3154(c). The Board of Elections has not completed that mandatory process either and has not stated it intends to follow that statutory mandate.

Importantly, if there are any discrepancies uncovered in this process, “no further returns shall be read from the latter until all discrepancies are explained to the satisfaction of the county board.” *Id.* So, it is clear from the text of the statute that the Board cannot proceed until this mandatory process is completed and that ***all*** irregularities are explained.

In addition to completing the ballot reconciliation process, the Board of Elections must conduct a *poll book* reconciliation process. Under 25 P.S. § 3154(d)(1) “[t]he figures announced for all districts ***shall be compared*** by one of the clerks ***with the tally papers from the respective districts***. If ***any*** discrepancies are discovered, the county board ***shall*** thereupon examine all of the return sheets, tally papers and other papers in its possession relating to the same election district.” The Board has confirmed on multiple occasions that it intends to comply with this statutory mandate. But it has steadfastly refused to identify when it will.

There is a critical nexus between this poll book reconciliation process and the unofficial returns because if that process reveals discrepancies, then “the county board ***shall*** forthwith cause ***the ballot box of the district to be opened and the vote therein to be recounted in the presence of attorneys, watchers, and candidates interested***, and if the recount shall not be sufficient to correct the error, the county



Wally Zimolong, Esq.
Admitted in PA & NJ
Wally@ZimolongLaw.com

board may summon the election officers and overseers, if any, to appear forthwith with all election papers in their possession." *Id.*

Moreover, under 25 P.S. § 3154(d)(4) "[i]n districts where electronically tabulated ballots are used in conjunction with central ballot tabulation, the return board shall compare the number of persons voting as indicated on the computer return sheets, with the number voting as indicated on the sealed general return from the election district. In the case of a discrepancy, the procedures specified for paper ballots in subsection (d)(1) shall be followed."

Section 3154(f) states that these procedures must be completed before the unofficial return is transmitted to the Secretary of State. Section 3154(f) requires that the returns be tabulated only after the returns for each election precinct are "read, computed, and found to be correct or corrected." Section 3154(f) also requires that the results for all precincts must be "read, computed, and found to be correct or corrected" before "they are added together, announced, and attested by the clerks who made and computed the entries respectively *and signed by the member of the county board.*"

I expect the Board of Elections to follow the Election Code. No unofficial returns can be submitted to the Secretary of State until it does. Finally, when the unofficial results are properly reported to the Secretary, we ask that you make them publicly available.

Respectfully,

A handwritten signature in black ink, appearing to be 'Wally Zimolong', written in a cursive style.

Wally Zimolong, Esquire

cc: Kathleen A. Gallagher, Esquire
James J. Fitzpatrick, Esquire
Darin Gibbons, Esquire
Britain Henry, Esquire
Jim Bognet

353 West Lancaster Avenue, Suite 300, Wayne, PA 19087

215.665.0842 | ZimolongLaw.com

From: Wally Zimolong
To: Wally Zimolong
Subject: FW: Luzerne County Poll Book Reconciliation/Board of Elections Hearing
Date: Monday, November 21, 2022 11:51:05 AM
Attachments: image001.png
Importance: High

From: Kathleen Gallagher
Sent: Thursday, November 17, 2022 6:35 AM
To: Harry.Skene@LuzerneCounty.org
Cc: Russell Giancola <rdg@glawfirm.com>; Britain Henry <bhenry@goldsteinlp.com>
Subject: Luzerne County Poll Book Reconciliation/Board of Elections Hearing
Importance: High

Dear Mr. Skene:

I write in follow up to our telephone conversation of Monday, November 14, 2022, and my confirmation email below of that same date. Despite my requests of Monday, November 14, 2022, I have yet to receive confirmation as to whether or not the required poll book reconciliation will be completed prior to the Board of Elections (the "Board") hearing which is scheduled for 1:00 p.m. today, November 17, 2022. Additionally, Wally Zimolong, counsel for Jim Bognet and Bognet for Congress again requested, inter alia, confirmation that the poll book reconciliation has been completed via letter of this date. (A copy of Attorney Zimolong's letter is attached for your convenience).

As you are aware, Section 3154 of Pennsylvania's Election Code (the "Election Code") governs the canvass process. (25 P.S. § 3154 et seq.). As we discussed and as pointed out by Attorney Zimolong, poll book reconciliation is a mandatory component of the canvass process pursuant to Section 3154 (d) (1) of the Code. Section 3154(d)(1) provides in pertinent part, "[t]he figures announced for all districts **shall** be compared by one of the clerks with the tally papers from the respective districts. If any discrepancies are discovered, the county board **shall** thereupon examine all of the return sheets, tally papers and other papers in its possession relating to the same election district." 25 P.S. § 3154(d)(1) (emphasis added).

That the poll book reconciliation is a mandatory component of the canvass process is readily established via the Legislature's use of the term "shall" in Section 3154(d)(1). The import of the Legislature's use of the term "shall" in the Election Code was specifically addressed by Justice Wecht in, *IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL Election*, 241 A.3d 1058 (Pa. 2020)

Justice Wecht wrote, "While we did not go out of our way to express as jaundiced a view of our cases holding that "minor irregularities" might be overlooked, the gravamen of our decision in that case, as in *Pierce*, was clear: shall means *shall*." *Id* at 1061.



Given the mandatory nature of the poll book reconciliation as a component of the canvass, the canvass is not, as a matter of law, complete until such time as the poll book reconciliation process is complete.

During the course of Monday's public meeting, numerous residents of Luzerne County expressed their concerns regarding whether their votes had been counted due to Luzerne County's abysmal failure to prepare properly for the November 8, 2022 General Election by failing to have sufficient ballot paper, and emergency ballots in as many as 50 precincts.

Others claimed actual disenfranchisement as the result of the same with reports of voters being turned away from the polls due to Board's failures, effectively closing the polls to those voters. The calls for resignations, a "do-over of the election" and investigations were so compelling that Council referred the situation to the Luzerne County District Attorney for a criminal investigation by a unanimous vote. Luzerne County and the Board may never know how many voters were denied the right to cast their vote in the 2022 General Election due to the Board's actions. What the Board can do and must do pursuant to the Election Code is to reconcile the poll books. That is the sole mechanism by which the Board can establish that for every voter who signed into vote, there is a corresponding cast and counted ballot. The Election Code mandates the reconciliation and the voters of Luzerne County deserve no less.

Accordingly, prior to the commencement of the 1:00 p.m. Board hearing today I shall expect written confirmation that the poll book reconciliation process been completed. In the event I do not receive the same, it is the position of our clients that the canvass is not complete and the hearing cannot take place. To the extent the Board proceeds with the hearing absent the completion of the poll book reconciliation, it is the further position of our clients that any such hearing, for the reasons set forth above, is void ab initio

The RNC and the NRCC reserve all rights and remedies in this regard.

Kindest regards,
Kathy

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