

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

FAITH GENSER and FRANK MATIS, : CIVIL DIVISION
 :
 Petitioners, : No. 34-40116
 :
 v. :
 :
 BUTLER COUNTY BOARD OF :
 ELECTIONS, :
 :
 Respondent. :

PROthonotary's
OFFICE - BUTLER CO.
ENTERED & FILED
2024 MAY -6 P 3:21

I. NOTICE

You are herewith notified that the attached matter will be presented to Assigned Judge Yeager on **Tuesday, May 7, 2024, at 9:00 a.m.**

II. CERTIFICATE OF NOTICE/SERVICE

I gave reasonable prior notice of filing and a copy of this document to all Counsel of Record on **May 6, 2024** by: Personal Service Fax Mail Other (explain) Email

III. INFORMATION FOR COURT ADMINISTRATOR

Is this an original filing in this case? Yes No

Judge Assignment:

Joseph Kubit (courtroom 1) William Robinson (courtroom 2) Michael Yeager (courtroom 3) William Shaffer (courtroom 7) Robert Yeatts (courtroom 7)
 Other _____

Adverse party position? OPPOSED CONSENTS UNOPPOSED Unknown

(TO RELIEF) (TO INTERVENTION)

I certify all the above statements are true and correct.

Date: 5/6/24, 2024 Thomas W. King III
Thomas W. King, III, Esq.
Kathleen A. Gallgher, Esq.

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA

FAITH GENSER and FRANK MATIS,

Petitioners,

v.

BUTLER COUNTY BOARD OF
ELECTIONS,

Respondent.

CIVIL DIVISION

No. 24-40116

**PETITION FOR LEAVE
TO INTERVENE**

Filed on behalf of:

**Proposed Intervenor-Respondents,
Republican National Committee and
Republican Party of Pennsylvania**

Counsel of Record for this Party

Kathleen A. Gallagher (PA #37950)

kag@gallagherlawllc.com

Brian M. Adrian (PA #81461)

bma@gallagherlawllc.com

THE GALLAGHER FIRM, LLC

436 Seventh Avenue, 31st Floor

Pittsburgh, PA 15219

412.308.5512 (Phone)

John M. Gore *

jmgore@jonesday.com

E. Stewart Crosland

scrosland@jonesday.com

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

202.879.3939 (Phone)

Thomas W. King, III (PA #21580)

tking@dmkcg.com

Thomas E. Breth (PA #66350)

tbreth@dmkcg.com

DILLON, McCANDLESS, KING,

COULTER & GRAHAM, LLP

128 W. Cunningham Street

Butler, PA 16001

724.283.2200 (Phone)

* *Pro hac vice application forthcoming*

**IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA**

FAITH GENSER and FRANK MATIS,	:	CIVIL DIVISION
	:	
Petitioners,	:	No. 24-40116
	:	
v.	:	<i>ELECTION APPEAL</i>
	:	
BUTLER COUNTY BOARD OF	:	
ELECTIONS,	:	
	:	
Respondent.	:	

NOTICE OF PRESENTATION

TAKE NOTICE, that the Republican National Committee and the Republican Party of Pennsylvania (“Proposed Respondent-Intervenors”) will present the attached PETITION FOR LEAVE TO INTERVENE to the Honorable Dr. S. Michael Yeager, President Judge, in the Court of Common Pleas of Butler County, Pennsylvania, Courtroom #3, 124 West Diamond Street, Butler, Pennsylvania 16001, on Tuesday, May 7, 2024, at 9:00 a.m., or as soon thereafter as suits the convenience of the Court.


Counsel for Proposed Respondent-Intervenors has consulted with Benjamin Geffen, counsel for Petitioners, Faith Genser and Frank Matis, and Kathleen Goldman, counsel for Respondent Butler County Board of Elections, the parties in this matter. Attorneys Geffen and Goldman have indicated that their respective clients consent to Proposed Respondent-Intervenors’ request for leave to intervene in this matter.

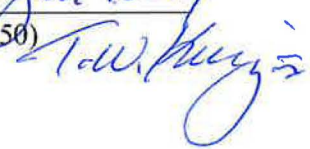
As this matter is scheduled for a hearing at 10:30 a.m. on May 7, 2024, and in light of the above-referenced consent of counsel for the parties to the requested relief, ask that the attached Petition be considered on an emergency basis pursuant to Local Rule L208.3(a)(3). Proposed Respondent-Intervenors are unable to provide the five days advance notice of the presentation of

a motion required pursuant to Local Rule L208.3(a)(5), and in light of the foregoing and the consent of the parties to the relief requested, ask that the attached Petition be considered on an emergency basis pursuant to Local Rule L208.3(a)(3).

Dated: May 6, 2024

Respectfully submitted,
THE GALLAGHER FIRM, LLC

By: 
Kathleen A. Gallagher (PA #37950)
kag@gallagherlawllc.com
Brian M. Adrian (PA #81461)
bma@gallagherlawllc.com
3100 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219
412.308.5512 (Phone)



RETRIEVED FROM DEMOCRACYDOCS.COM

**IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA**

FAITH GENSER and FRANK MATIS,	:	CIVIL DIVISION
	:	
Petitioners,	:	No. 24-40116
	:	
v.	:	<i>ELECTION APPEAL</i>
	:	
BUTLER COUNTY BOARD OF ELECTIONS,	:	
	:	
Respondent.	:	

PETITION FOR LEAVE TO INTERVENE

Proposed Intervenor-Respondents, the Republican National Committee and the Republican Party of Pennsylvania (collectively, “Republican Committees”), by and through undersigned counsel, respectfully submit the following Petition for Leave to Intervene as Respondents in this statutory appeal filed by Petitioners Faith Genser and Frank Matis (“Petitioners”) under 25 P.S. § 3157, and aver the following in support thereof:

PRELIMINARY STATEMENT

Petitioners have filed the instant statutory appeal in an attempt to turn the law as it relates to curing mail-in and absentee ballots on its head. Petitioners seek a ruling from the Court which forces the Butler County Board of Elections (the “Board”) to permit them to cure their mail-in ballots, which they admit were defective under existing Pennsylvania law. Petitioners acknowledge that they submitted their mail-in ballots without the required secrecy envelope and further admit that the Board (rightfully) rejected the same.

There can be no dispute that the unequivocal law of Pennsylvania is that secrecy envelopes are required, and any mail-in ballot received without a secrecy envelope cannot be counted. Knowing this, the Department of State has taken it upon itself to unilaterally reach out to voters

whose mail-in ballots have been rejected due to a perceived lack of a secrecy envelope and encourage them to cure such ballots by appearing in person and voting provisionally.¹ Petitioners here are voters whose ballots were unquestionably legally deficient, and yet after being contacted by the Department of State, now believe that they have a legal right to cure those deficiencies. Petitioners further allege that the Board deprived them of such right when the Board declined to count their illegitimate provisional ballots which they cast in an improper attempt to cure the deficient mail-in ballots.

To be clear, there is no right under Pennsylvania law to cure mail-in ballots which lack a secrecy envelope and Petitioners' attempt to create such a right where none exists should be rejected. Indeed, the Pennsylvania Supreme Court has already concluded that naked ballots, *i.e.* mail-in ballots which were submitted without the required secrecy envelope, are defective and cannot be counted. *Pa. Democratic Party v. Sockvar*, 238 A.3d 345, 378 (Pa. 2020) (“[W]e conclude that the Legislature intended for the secrecy envelope provision to be mandatory.”) (hereinafter “*Pa. Dems*”). In addition, the Supreme Court concluded that while county boards of elections are *permitted* to allow voters to cure certain deficiencies in their mail-in ballots if they are so inclined, no court—even the Pennsylvania Supreme Court—can *require* them to do so.

¹ It is unclear at this time how the Board concluded prior to the pre-canvass that Petitioners' ballots lacked the required secrecy envelope. On information and belief, various boards of elections across the Commonwealth weigh mail-in ballots as they are received. Those boards use this weighing process to identify mail-in ballots which they suspect lack a secrecy envelope, as they are prohibited under the Pennsylvania Election Code from opening mail-in ballots before 7:00 a.m. on Election Day. See 25 P.S. § 3146.8(g)(1.1). It is believed that the Board is one such county board of elections. It is also known that the Department of State recently modified the SURE system to require that county boards of elections provide additional information, where possible, regarding mail-in ballots and why they were rejected. It appears likely that as part of the 2024 Primary Election, the Board weighed mail-in ballots as they were received, and where it suspected that a secrecy ballot was missing based on the returned ballot's weight, included a notation in the SURE system indicating that the ballot was likely missing a secrecy envelope. This information is available to the Department, which has apparently set up an automatic email notice to voters through the SURE system informing them that their mail-in ballot had been rejected, and further advising such voters to appear in person and cast a provisional ballot. The Republican Committees believe that such a practice constitutes a clear violation of the Pennsylvania Election Code, which prohibits anyone from disclosing the results of the pre-canvass, and exceeds the Department's authority under the Election Code. The Republican Committees reserve the right to challenge any unlawful actions in this regard.

Instead, the Supreme Court concluded that any requirement to provide a curing opportunity is the province of the General Assembly. Yet this is exactly what Petitioners seek here: a Court Order which requires the Board to permit voters to cure materially defective mail-in ballots when the Board has already considered the issue, created a policy governing what defects it will permit to be cured, and has determined that the lack of a secrecy envelope is not something which can be cured. The Board's decision in this matter is sacrosanct, and neither Petitioners, nor the Court, may override it.

The Republican Committees have a clear and obvious interest in the issues presented in this suit—and in ensuring that this issue is properly and fairly litigated to ensure that Pennsylvania law regarding a county board of elections' right to govern how it will conduct elections is followed. For this reason alone, the Court should grant intervention.

The Republican Committees also have a right to intervene in this suit for another, independent reason: they seek to uphold the Election Code under which they, their voters, their members, and their candidates exercise their constitutional rights to vote and to participate in elections in Pennsylvania.

As explained more fully below, political committees have a recognized interest in asserting and protecting the rights of their members in upcoming elections and to protect their own agendas and resources from such changes to election laws. Moreover, the Republican Committees have made significant investments in support of Republican candidates up and down the ballot and in connection with voter mobilization and education efforts in Pennsylvania for the past many election cycles and intend to do so again in 2024. If Petitioners' request were granted, it would have a profound impact on the Republican Committees, which would be forced to significantly modify how they prepare for elections in Pennsylvania by creating a system for educating voters,

developing their own process for contacting voters who submit defective mail-in ballots, coaching them regarding how to cure such ballots after they have been rejected, and encouraging and facilitating the curing of such ballots. The Republican Committees will be required to divert resources from other mission-critical election activities toward such curing activities.

The Republican Committees thus have a substantial and particularized interest in defending this action to preserve the structure of the competitive environment in which their supported candidates participate and ensure that Pennsylvania conducts free and fair elections. No other party to this action represents these private interests, and therefore, this timely Petition for Leave to Intervene should be granted.

For these reasons, the Republican Committees respectfully request that the Court grant their Petition for Leave to Intervene as Respondents and permit them to file of record the Motion to Dismiss the Petition for Review in the Nature of a Statutory Appeal and Brief in Support of Motion to Dismiss, attached hereto.

I. BACKGROUND

A. The Republican Committees.

1. The Republican National Committee (“RNC”) is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The RNC manages the Republican Party’s business at the national level, including development and promotion of the Party’s national platform and fundraising and election strategies; supports Republican candidates for public office at all levels across the country, including those on the ballot in Pennsylvania; and assists state parties throughout the country, including the Republican Party of Pennsylvania, to educate, mobilize, assist, and turn out voters. The RNC has made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters

in Pennsylvania in the past many election cycles and intends to do so again in 2024. The RNC has a substantial and particularized interest in ensuring that Pennsylvania conducts free and fair elections.

2. The Republican Party of Pennsylvania is a major political party, 25 P.S. § 2831(a), and the “State committee” for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered “State Committee” of the Republican Party as defined by 52 U.S.C. § 30101(15). The Republican Party of Pennsylvania on behalf of itself and its members nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania. It works to accomplish this purpose by, among other things, devoting substantial resources toward educating, mobilizing, assisting, and turning out voters in Pennsylvania. The Republican Party of Pennsylvania has made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters in Pennsylvania in the past many election cycles and intends to do so again in 2024. The Republican Party of Pennsylvania has a substantial and particularized interest in ensuring that Pennsylvania conducts free and fair elections.

B. History of Mail-In Ballots and Curing.

3. The enactment of Act 77 in 2019 fundamentally changed the manner in which Pennsylvania voters are permitted to vote, most notably by providing a new universal no-excuse mail-in voting franchise.

4. Under the Pennsylvania Election Code, voters casting an absentee or mail-in ballot are required to: (1) place their marked ballots in a sealed envelope (“secrecy envelope”), (2) place the secrecy envelope inside a second envelope, which is marked with a “declaration of the elector”

form, (3) “fill out” and “sign the declaration printed on such envelope,” and (4) return the ballot by 8:00 p.m. on Election Day. 25 P.S. § 3146.6(a); § 3150.16(a).

5. If a voter fails to comply with these requirements, the voter’s absentee or mail-in ballot must be set aside and not counted. 25 P.S. § 3146.8.

6. In 2020, after enactment of Act 77, the Pennsylvania Democratic Party sought an injunction to require county boards of elections to contact voters whose mail-in or absentee ballots contained facial defects and to provide those voters with an opportunity to cure the same. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 378 (Pa. 2020).

7. There, citing the Free and Equal Elections Clause, PA. CONST. art. I, § 5, and the Court’s “broad authority to craft meaningful remedies,” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2018), the Pennsylvania Democratic Party argued that the Court should require county boards of elections to implement a “notice and opportunity to cure procedure” for mail-in and absentee ballots that voters have filled out incompletely or incorrectly.

8. The Pennsylvania Supreme Court unanimously held that the boards of elections “are not required to implement a ‘notice and opportunity to cure’ procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly. Put simply, as argued by the parties in opposition to the requested relief, Petitioners have cited no constitutional or statutory basis that would countenance imposing the procedure Petitioners seek to require (i.e., having the Boards contact those individuals whose ballots the Boards have reviewed and identified as including ‘minor’ or ‘facial’ defects—and for whom the Boards have contact information—and then afford those individuals the opportunity to cure defects until the UOCAVA deadline).” 238 A.3d at 374.

9. The Court further concluded that “[w]hile the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.” *Id.* It further noted that “although the Election Code provides the procedures for casting and counting a vote by mail [ballot], it does not provide for the ‘notice and opportunity to cure’ procedure sought by the Petitioner.” *Id.*

10. Finally, the Supreme Court concluded that “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk [of a voter having his or her ballot rejected due to minor errors] is one best suited for the Legislature.” *Id.* It reasoned that the Legislature was best positioned to resolve the “open policy questions” attendant with a notice and opportunity to cure procedure, including “what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots.” *Id.*

C. Butler County’s Curing Practice and Petitioners’ Claims.

11. Following the Pennsylvania Supreme Court holding in *Pa. Dems*, some counties have chosen to engage in curing, while others have not. For purposes of this proceeding, the Republican Committees take no position with respect to the legality of the notice and cure provisions adopted by county boards of elections and reserve all rights regarding them.

12. Upon information and belief, the Board has not historically adopted a notice and cure policy for mail-in ballots. However, in May 2023, the Board first adopted the “Ballot Curing Policy” which is posted on its website. A true and correct copy of the Ballot Curing Policy is attached hereto as **Exhibit A**. On its face, the Ballot Curing Policy was most recently modified on February 14, 2024, in advance of the 2024 Primary Election.

13. The Ballot Curing Policy provides that voters who submitted a mail-in ballot which contained a defect on the face of the Declaration Envelope which is capable of curing under Pennsylvania law, such as a lack of signature, can be cured. Such defective, but curable ballots are identified and segregated by the Bureau, and placed on a list which is provided to the Party Committees upon request. The Party Committees are then free to contact the voters at issue and inform them of their ability to cure the defect. The voter is permitted to cure such defect by appearing at the Butler County Bureau of Elections and signing an attestation to correct the lack of signature. Notably, this is not the same as casting a provisional ballot.

14. Indeed, the Butler County Ballot Curing Policy does not allow curing by the casting of a provisional ballot.

15. As noted above, the law is clear in Pennsylvania that not even the Pennsylvania Supreme Court can force a county to adopt any notice and cure procedure, let alone a notice and cure procedure for a ballot which lacks the required secrecy ballot.

16. Yet, that is exactly what Petitioners ask this Court to do; that is, to force the Board to cure legally deficient ballots by counting unauthorized provisional ballots.

D. Procedural History.

17. On April 29, 2024, Petitioners filed the instant Petition for Review in the Nature of a Statutory Appeal. Therein, Petitioners appeal the Board's April 26, 2024 decision to not count Petitioners' provisional ballots in the 2024 Primary Election.

18. That same day, April 29, 2024, the Court issued an Order of Court, issuing a Rule for the Board to appear and show cause why Petitioners are not entitled to the relief requested. The Court ordered a hearing on the matter for May 7, 2024 at 10:30 a.m. in Courtroom #3 of the Butler County Government Center.

II. THE GOVERNING INTERVENTION STANDARD

19. A nonparty may file an application for leave to intervene. Pa. R.C.P. 2328.

20. “The right to intervention should be accorded to anyone having an interest of his own which no other party on the record is interested in protecting.” *Keener v. Zoning Hearing Bd. of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw. 1998) (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty.*, 44 A.2d 250 (Pa. 1945)).

21. Pennsylvania Rule of Civil Procedure 2327(4) is permissive and provides 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 . . . the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa. R.C.P. 2327(4) (emphasis added); see also *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Human Servs.*, No. 26 M.D. 2019, 2020 Pa. Commw. LEXIS 104 at *12 (Pa. Commw. Jan. 28, 2020) (“Pennsylvania Rule of Civil Procedure No. 2327(4) . . . permits intervention where the determination ‘may affect any legally enforceable interest’ of a proposed intervenor.” (quoting Pa. R.C.P. 2327(4) and emphasis in original)).

22. If the determination may affect the intervenor’s legally enforceable interest, and no exception applies, approving intervention is mandatory, not discretionary. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. 1999).

23. Moreover, the Court may, in its discretion, allow intervention even if it determines that one of the Rule 2329 exceptions applies. See Pa. R.C.P. 2329 (instructing that “an application for intervention may be refused” if an exception applies (emphasis added)); see also 7 Goodrich Amram 2d § 2329:7 (“Even though the petitioner’s interest is adequately represented in the

pending action, this fact does not mandate the refusal of intervention since the refusal of intervention on the ground of the adequacy of the representation is permissive in nature.”).

24. Both major political parties have been permitted to intervene in cases addressing the conduct of the general election. *See, e.g., Pierce v. Allegheny County Bd. of Elections*, 324 F.Supp.2d 684 (W.D. Pa. 2003) (addressing Republican challenge to third-party delivery of absentee ballots and noting the intervention of the Pennsylvania Democratic Party); *Stein v. Cortes*, 223 F.Supp.3d 423 (E.D. Pa. 2016) (addressing recount demand for 2016 general election ballots and noting the intervention of the Pennsylvania Republican Party). State parties, their voters, and their candidates have a cognizable interest in intervening in lawsuits regarding general election procedure.

25. Further, intervention has been permitted in strikingly similar circumstances where a political party has sought to intervene in a statutory appeal of a county board of elections' decision regarding whether to accept or reject mail-in votes. There, the Court of Common Pleas of Allegheny County permitted the Pennsylvania Democratic Party to intervene in a statutory appeal filed by Nicole Zicarelli, a candidate for the Senate of Pennsylvania, who filed a Petition for Review seeking to challenge a decision by the Allegheny County Board of Elections which overruled her attempt to invalidate mail-in ballots which were not properly dated. *See Zicarelli v. Allegheny County Bd. of Elections* (No. G.D. 20-011654).

26. The Court should grant the Republican Committees' Petition for Leave to Intervene here because the Court's determination of this action may affect the Republican Committees' legally enforceable interests, no exception applies under Pennsylvania R.C.P. 2329, and the Republican Committees' participation will aid the Court.

III. BASIS FOR THE REPUBLICAN COMMITTEES' INTERVENTION

A. The Republican Committees Have a Substantial Interest in this Action.

27. The Republican Committees, on behalf of their supported candidates, voters, and own institutional interests, have a substantial and particularized interest in preserving the state election laws challenged in this action, which were enacted to ensure the structure and integrity of Pennsylvania's elections.

28. There can be no question that the Republican Committees have direct and significant interests in the continued enforcement of Pennsylvania's laws governing mail-in ballots, as those laws are designed to ensure "the integrity of [the] election process," *Eu v. San Fran. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and the "orderly administration" of elections, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (op. of Stevens, J.). Were these validly enacted laws to be cast aside, the current competitive electoral environment in Pennsylvania, in which the Republican Committees invest substantial resources in support of Republican candidates to try to win elections, would be altered or impaired. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5, 800 (Pa. 2018); *see also* ¶¶ 1–4, *supra*.

29. Courts routinely recognize that political parties have interests supporting intervention in litigation concerning elections and election procedures. *See, e.g., Siegel v. LePore*, 234 F.3d 1163, 1169 n.1 (11th Cir. 2001); *Trinsey v. Pennsylvania*, 941 F.2d 224, 226 (3d Cir. 1991); *Anderson v. Babb*, 632 F.2d 300, 304 (4th Cir. 1980); *Democratic Nat'l Comm.*, 2020 U.S. Dist. LEXIS 76765, 2020 WL 1505640, at *5; *Citizens United v. Gessler*, No. 14-002266, 2014 U.S. Dist. LEXIS 128669, 2014 WL 4549001, at *2 (D. Colo. Sept. 15, 2014); *Libertarian Party of Mich. v. Johnson*, No. 12-12782, 2012 U.S. Dist. LEXIS 126096 (E.D. Mich. Sept. 5, 2012); *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 U.S. Dist. LEXIS 134520, 2011

WL 5868225, *1 (N.D. Ill. Nov. 22, 2011); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 639 (N.D. Ill. 1991). Indeed, courts generally recognize that political parties have “an interest in the subject matter of [a] case,” when “changes in voting procedures could affect candidates running as Republicans and voters who [are] members of the . . . Republican Party.” *Ohio Democratic Party v. Blackwell*, No. 04-1055, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005).

30. If Petitioners’ action succeeds, the orderly administration of Pennsylvania’s elections will be significantly changed retroactively **after** an election has already occurred.

31. Not only would this undercut democratically enacted laws that protect voters and candidates (including the Republican Committees’ members), *Caba v. Weaknecht*, 64 A.3d 39, 50 (Pa. Commw. 2013) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008)), it would change the “structur[e] of [the] competitive environment” in Pennsylvania’s elections and “fundamentally alter the environment in which [the Republican Committees] defend their concrete interests (e.g. their interest in . . . winning [elections]).” *Shays v. Fed. Elec. Comm’n*, 414 F.3d 76, 86 (D.C. Cir. 2005).

32. Such extremely late changes also risk confusing voters and undermining confidence in the electoral process. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (“Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”). The Republican Committees will further be forced to spend substantial resources informing their Republican voters of changes in the law, fighting inevitable confusion, and galvanizing participation as a result of such a change.

33. Such interference with Pennsylvania’s election scheme—and with the Republican Committees’ electoral activities—would impair the Republican Committees’ interests on behalf of their candidates, members, and themselves, and thus warrants intervention.

B. There is No Basis to Refuse the Republican Committees’ Petition for Leave to Intervene.

34. Pennsylvania Rule of Civil Procedure 2329 provides that an application for intervention may be refused if: (1) the petitioner’s claim or defense “is not in subordination to and in recognition of the propriety of the action”; (2) the petitioner’s interest is already adequately represented; or (3) “the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.”

35. None of these factors applies to the Republican Committees.²

36. First, the Republican Committees’ participation in this action is in subordination to and in recognition of the action’s propriety.

37. Second, no existing party adequately represents the Republican Committees’ particularized interests. *See* Pa. R.C.P. 2329(2). Petitioners clearly do not represent the Republican Committees’ interests in this case, and Respondent does not adequately represent them either.

38. Although the Republican Committees and Respondent putatively share some of the same goals in upholding Pennsylvania’s election laws, their interests are not identical.

² As explained above, the Court retains discretion to allow the Republican Committees to intervene even if it concludes that an exception under Rule 2329 applies. *See* Pa. R.C.P. 2329; 7 Goodrich Amram 2d § 2329:7.

39. Respondent, as an executive agency created under the authority of, *inter alia*, Pennsylvania's Election Code, does not represent the private interests of the Republican Committees at stake in this litigation, which are fundamentally different from, and far broader than the public interests represented by Respondent. Indeed, "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [private movant] merely because both entities occupy the same posture in the litigation." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001); *see also, e.g., Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 321 (D.C. Cir. 2015) ("[W]e look skeptically on government entities serving as adequate advocates for private parties.") (*citing Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003)).

40. Whereas the Republican Committees have particularized interests in maintaining the competitive electoral environment adopted through Act 77, Respondent has no interest in the election of particular candidates. *See, e.g., Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (holding that the government's representation of the general public interest did not adequately represent the intervenor's narrower private interests, despite the similarity in their goals). Instead, in acting on behalf of all Butler County residents, Respondent must consider "a range of interests likely to diverge from those of the intervenors." *Meek v. Metro. Dade Cty.*, 985 F.2d 1471, 1478 (11th Cir. 1993). In other words, "[i]n litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of [a private party] intervenor." *Utah Ass'n of Ctys.*, 255 F.3d at 1256. These considerations may include "the expense of defending the current [laws] out of [state] coffers," *Clark v. Putnam Cty.*, 168 F.3d 458, 461-62 (11th Cir. 1999), "the social and political divisiveness of the election issue," *Meek*, 985 F.2d at 1478, "their own desires to remain politically

popular and effective leaders,” *id.*, and the interests of opposing parties, *In re Sierra Club*, 945 F.2d 776, 779–80 (4th Cir. 1991). Given that Respondent may take these other interests into account, their interests may diverge with the Republican Committees’ interests throughout this litigation.

41. Moreover, the Republican Committees have not unduly delayed submitting their Petition for Leave to Intervene in this action, which remains in its infancy. The Petition was filed on April 29, 2024, and the Republican Committees filed this Petition, together with its proposed Motion to Dismiss the Petition for Review in the Nature of a Statutory Appeal, in advance of the hearing scheduled for May 7, 2024. Accordingly, the Republican Committees’ intervention will not cause any undue delay, embarrassment, or prejudice to any party, but instead will aid the Court in resolving the important legal and factual questions before it.

IV. CONCLUSION

42. For the reasons set forth above, the Republican Committees have a clear right to intervene in this case challenging important state laws governing the administration of Pennsylvania’s elections.

43. Pursuant to Pennsylvania Rule of Civil Procedure 2328, the Republican Committees attach a copy of their proposed responsive pleading, in the form of a Motion to Dismiss (attached as **Exhibit 1**), and Brief in Support thereof (**Exhibit 2**), which will be filed in the action if permitted to intervene.

WHEREFORE, for the foregoing reasons, the Republican National Committee and the Republican Party of Pennsylvania respectfully request that this Honorable Court GRANT this Petition for Leave to Intervene, and DIRECT the Butler County Prothonotary to enter the names of the Republican National Committee and the Republican Party of Pennsylvania on the docket in

this matter as Intervenor-Respondents, and DOCKET the Intervenor-Respondents' Motion to Dismiss the Petition for Review in the Nature of a Statutory Appeal and attendant Brief in Support.

Dated: May 6, 2024

Respectfully submitted,
THE GALLAGHER FIRM, LLC

By: 
Kathleen A. Gallagher (PA #37950)
kag@gallagherlawllc.com
Brian M. Adrian (PA #81461)
bma@gallagherlawllc.com
3100 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219
412.308.5512 (Phone)

John M. Gore *
jmgore@jonesday.com
E. Stewart Crosland
scrosland@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
202.879.3939 (Phone)

Thomas W. King, III (PA #21580)
tking@dmkcg.com
Thomas E. Breth (PA #66350)
tbreth@dmkcg.com
DILLON, McCANDLESS, KING,
COULTER & GRAHAM, LLP
128 W. Cunningham Street
Butler, PA 16001
724.283.2200 (Phone)

*Counsel for Proposed Intervenor-Respondents,
Republican National Committee and Republican
Party of Pennsylvania*

EXHIBIT A

RETRIEVED FROM DEMOCRACYDOCKET.COM

**BUTLER COUNTY
BALLOT CURING POLICY**

I. Introduction

This ballot curing policy for Butler County is established to allow registered voters the opportunity to cure immaterial deficiencies on their absentee or mail-in ballot declaration envelopes.

II. Definitions

As used herein, the following terms shall have the meanings indicated:

Attestation: The form at the Bureau which a Voter can correct information deemed as defective on the Declaration Envelope.

Ballot: An absentee or mail-in ballot which a Voter may use to cast a vote in an election.

Bureau: The Butler County Bureau of Elections.

County: Butler County.

County Board: Butler County Board of Elections.

Deficiency: A defect on the Declaration Envelope recognized by the Department of State as curable by applicable law, i.e. a lack of signature

Declaration Envelope: Pennsylvania law provides that two envelopes shall be mailed to each absentee or mail-in elector; the larger of these envelopes is referred to alternatively as the Declaration Envelope. This envelope contains a declaration which the Voter must sign.

Designated Agent: An individual which the Voter has authorized to transport the Attestation and witness the Voter's signature or mark upon said Attestation. The Designated Agent is **only** allowed to serve as a Designated Agent for **one** Voter, unless the additional voter(s) live in the same household and similarly require a Designated Agent due to a Disability.

Disability: A disability as defined in the Americans with Disabilities Act.

Party Committee: The Butler County Democratic Committee and the Butler County Republican Committee, as designated by their respective state organizations.

Voter: Any person who shall possess all the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth.

III. Cure Procedure

- A. Upon identifying a Deficiency on a Declaration Envelope submitted by a Voter, the Bureau will segregate said Declaration Envelope and place the Voter's name and contact information (including phone number, if one is provided) on a list.
- B. During a Primary Election, the list of Voters who submitted Deficient Declaration Envelopes shall be made available to the Party Committees once a day upon request of the Party Committee.
- C. The Party Committees may contact the Voter who submitted a Declaration Envelope with a Deficiency to advise that there is a Deficiency with their Declaration Envelope and that the Voter is permitted to appear at the Bureau to remedy such Deficiency by means of an Attestation.
- D. During a General Election, in addition to Party Committees, the list of Voters who submitted Declaration Envelopes with Deficiencies will be made available to any duly authorized representative of any recognized political party other than the Party Committees which have a candidate on the Ballot.

It is acknowledged that Voters registered as Independent will not have a duly authorized party representative. The Bureau will publicize through its regular course that any Voter can check the status of their Ballots via the Department of State website and that cure procedures are available.

- E. To effect a cure, a Voter must appear in person at the Bureau before 8:00 P.M. on Election Day and sign an Attestation that includes the Deficiency; which shall be recorded with their Ballot.

In such case as a Voter with a Disability as recognized by the American Disability Act may not be able to appear in person at the Bureau, a Witness Form shall be used to allow a Designated Agent to transport the Attestation to and from the Bureau in order to obtain a signature or mark from the Voter.

- F. The Bureau shall not perform any remedy on behalf of the Voter but will only provide the opportunity for the Voter to remedy the defect.
- G. The Bureau shall not send the Ballot back to the Voter or issue the Voter a new Ballot due to the Deficiency.
- H. This Policy shall not modify any procedures regarding Provisional Ballots with the exception of allowing a Provisional Ballot to be counted for a Voter who cannot come into the Bureau to remedy a Deficiency on the Ballot envelope but is able to go to their polling place on Election Day.

Adopted by the Butler County Board of Elections on 5/2/2023.

Appointed Board of Elections: Michael English (Chairman), Patrick Casey, and Carol McCarthy

Modified by the Butler County Board of Elections on 2/14/24.

Board of Elections: Leslie Osche (Chairman), Kimberly Geyer, and Kevin Boozel

RETRIEVED FROM DEMOCRACYDOCKET.COM

EXHIBIT 1

RETRIEVED FROM DEMOCRACYDOCKET.COM

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA

FAITH GENSER and FRANK MATIS,

Petitioners,

v.

BUTLER COUNTY BOARD OF
ELECTIONS,

Respondent.

CIVIL DIVISION

No. 24-40116

***MOTION TO DISMISS PETITION
FOR REVIEW IN THE NATURE OF
A STATUTORY APPEAL***

Filed on behalf of:

**Proposed Intervenor-Respondents,
Republican National Committee and
Republican Party of Pennsylvania**

Counsel of Record for this Party

Kathleen A. Gallagher (PA #37950)

kag@gallagherlawllc.com

Brian M. Adrian (PA #81461)

bma@gallagherlawllc.com

THE GALLAGHER FIRM, LLC

436 Seventh Avenue, 31st Floor

Pittsburgh, PA 15219

412.308.5512 (Phone)

John M. Gore *

jmgore@jonesday.com

E. Stewart Crosland

scrosland@jonesday.com

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

Thomas W. King, III (PA #21580)

tking@dmkcg.com

Thomas E. Breth (PA #66350)

tbreth@dmkcg.com

DILLON, McCANDLESS, KING,

COULTER & GRAHAM, LLP

128 W. Cunningham Street

Butler, PA 16001

724.283.2200 (Phone)

* *Pro hac vice application forthcoming*

**IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA**

FAITH GENSER and FRANK MATIS,	:	CIVIL DIVISION
	:	
Petitioners,	:	No. 24-40116
	:	
v.	:	<i>ELECTION APPEAL</i>
	:	
BUTLER COUNTY BOARD OF	:	
ELECTIONS,	:	
	:	
Respondent.	:	

**MOTION TO DISMISS PETITION FOR REVIEW
IN THE NATURE OF A STATUTORY APPEAL**

Proposed Intervenor-Respondents, the Republican National Committee and the Republican Party of Pennsylvania (collectively, “Republican Committees”), by and through their undersigned counsel, hereby move this Court for an Order dismissing Petitioners Faith Genser (“Petitioner Genser”) and Frank Matis’ (“Petitioner Matis”) (hereinafter collectively referred to as the “Petitioners”) Petition for Review in the Nature of a Statutory Appeal (the “Petition”).¹ The Republican Committees incorporate by reference their concurrently filed Brief in Support of Motion to Dismiss Petition for Review in the Nature of a Statutory Appeal.

¹ The Republican Committees have styled this response to the Petition as a Motion to Dismiss based on the Pennsylvania Commonwealth Court’s decision in *Schimes v. City of Scranton Non-Uniform Pension Bd.*, No. 1526 C.D. 2018, 2019 Pa. Commw. Unpub. LEXIS 438 at *9 (Pa. Commw. Aug. 1, 2019) which found that “the Pennsylvania Rules of Civil Procedure are not applicable to statutory appeals; thus, preliminary objections, the grounds for which are set forth in Pa. R.C.P. 1028, cannot be used as a vehicle for challenging such an appeal” (*citing Appeal of Borough of Churchill*, 575 A.2d 550, 553 (Pa. 1990)). *See also, Barros v. City of Allentown*, No. 1592 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 466 at *7 n. 4 (Pa. Commw. Feb. 17, 2012) (“Because preliminary objections are not permitted in statutory appeals, the common pleas court erred when it dismissed Barros’ appeal on the City’s preliminary objections. We find this error to be harmless, where the court could have treated the preliminary objections as a motion to dismiss . . . Accordingly, and because the parties are not prejudiced as a result, we will treat our review of the common pleas court’s order as though the City filed a motion to dismiss. . .”).

1. Petitioners have filed the instant statutory appeal challenging the decision of the Butler County Board of Elections (the “Board of Elections”) rejecting Petitioners’ mail-in ballots and/or provisional ballots in the 2024 Primary Election on April 23, 2024 (the “Primary Election”).

2. Petitioners admit that they submitted their mail-in ballots without the required secrecy envelope which rendered those ballots defective.

3. There can be no dispute that the unequivocal law of Pennsylvania is that secrecy envelopes are required, and any mail-in ballot received without a secrecy envelope cannot be counted. *See, Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020).

4. As the result of a notification from the Pennsylvania Department of State which advised Petitioners whose mail-in ballots were rejected due to a perceived lack of a secrecy envelope, and further advised Petitioners to cure such ballots by appearing in person and voting provisionally, Petitioners believe they have a legal right to cure such deficiency via their provisional ballots.

5. The Butler County Board of Elections correctly chose not to count Petitioners’ provisional ballots because those ballots are null under Pennsylvania law.

6. To be clear, there is no right to cure defective mail-in ballots under Pennsylvania law.

7. Indeed, the Pennsylvania Supreme Court has already concluded that “naked ballots” — mail-in ballots which were submitted without the required secrecy envelope — are defective and cannot be counted. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 378 (Pa. 2020) (“[W]e conclude that the Legislature intended for the secrecy envelope provision to be mandatory.”).

8. Further, in *Pa. Democratic Party v. Boockvar*, the Pennsylvania Supreme Court held that it cannot require county boards of elections to adopt notice and cure procedures as such decisions are best left to the Legislature.

9. Yet this is exactly what Petitioners seek here, a Court Order which requires the Butler County Board of Elections to permit Petitioners to cure their defective mail-in ballots when the Board has already considered the issue, created a policy governing what defects it will permit to be cured, and has determined that the lack of a secrecy envelope is not something which can be cured.


10. The Butler County Board of Election's decision in this matter was in accordance with clear Pennsylvania law, and Petitioners' appeal challenging that decision should, accordingly, be dismissed.

WHEREFORE, for the reasons stated herein, those contained in Proposed Intervenor-Respondents' accompanying Brief in Support of this Motion to Dismiss, and those that may be urged upon this Court at oral argument of this Motion, Proposed Intervenor-Respondents, the Republican National Committee and the Republican Party of Pennsylvania, respectfully request that this Honorable Court grant their Motion to Dismiss, enter an order dismissing Petitioners' Petition for Review in the Nature of a Statutory Appeal, and grant any such other relief that the Court may deem just and fair.

Dated: May 6, 2024

Respectfully submitted,

THE GALLAGHER FIRM, LLC

By: 
Kathleen A. Gallagher (PA #37950)
kag@gallagherlawllc.com
Brian M. Adrian (PA #81461)
bma@gallagherlawllc.com
3100 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219
412.308.5512 (Phone)



John M. Gore *
jmgore@jonesday.com
E. Stewart Crosland
scrosland@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
202.879.3939 (Phone)

Thomas W. King, III (PA #21580)
tking@dmkcg.com
Thomas E. Breth (PA #66350)
tbreth@dmkcg.com
DILLON, McCANDLESS, KING,
COULTER & GRAHAM, LLP
128 W. Cunningham Street
Butler, PA 16001
724.283.2200 (Phone)

RETRIEVED FROM DEMOCRACYDOCS.COM

*Counsel for Proposed Intervenor-Respondents,
Republican National Committee and Republican
Party of Pennsylvania*

VERIFICATION

I hereby aver that the statements of fact contained in the attached *Motion to Dismiss Petition for Review in the Nature of a Statutory Appeal* are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: 
Republican National Committee

RETRIEVED FROM DEMOCRACYDOCKET.COM

VERIFICATION

I hereby aver that the statements of fact contained in the attached *Motion to Dismiss Petition for Review in the Nature of a Statutory Appeal* are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: 

Angela Alleman, Executive Director
Republican Party of Pennsylvania

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the within ***MOTION TO DISMISS
PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL*** has been served on
all counsel of record listed below via email this 6th day of May 2024:

Marian K. Schneider
Stephen A. Loney
Kate Steiker-Ginzberg
ACLU of Pennsylvania
P.O. Box 60173
Philadelphia, PA 19102
mschneider@aclupa.org
sloney@aclupa.org
ksteiker-ginzberg@aclupa.org
(Counsel for Petitioners)


Mary M. McKenzie
Benjamin D. Geffen
Public Interest Law Center
1500 JFK Boulevard, Suite 802
Philadelphia, PA 19102
mmkenzie@pubintl.org
bgeffen@pubintl.org
(Counsel for Petitioners)

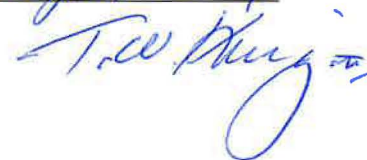
Witold J. Walczak
Richard T. Ting
ACLU of Pennsylvania
P.O. Box 23058
Pittsburgh, PA 15222
vwalczak@aclupa.org
rting@aclupa.org
(Counsel for Petitioners)

Martin J. Black
Steven F. Oberlander
Dechert LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
martin.black@dechert.com
steven.oberlander@dechert.com
(Counsel for Petitioners)

Kathleen Jones Goldman
Buchanan Ingersoll & Rooney P.C.
Union Trust Building
501 Grant Street, Suite 200
Pittsburgh, PA 15219
kathleen.goldman@bipc.com
(Counsel for Respondent)

THE GALLAGHER FIRM, LLC


Kathleen A. Gallagher



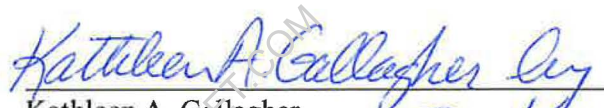
RETRIEVED FROM DEMOCRACYDOCS.COM

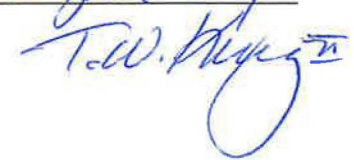
**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

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

Dated: May 6, 2024

THE GALLAGHER FIRM, LLC


Kathleen A. Gallagher



RETRIEVED FROM DEMOCRACYDOCS.COM

EXHIBIT 2

RETRIEVED FROM DEMOCRACYDOCKET.COM

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA

FAITH GENSER and FRANK MATIS,

Petitioners,

v.

BUTLER COUNTY BOARD OF
ELECTIONS,

Respondent.

CIVIL DIVISION

No. 24-40116

**BRIEF IN SUPPORT OF MOTION
TO DISMISS PETITION FOR
REVIEW IN THE NATURE OF A
STATUTORY APPEAL**

Filed on behalf of:

**Proposed Intervenor-Respondents,
Republican National Committee and
Republican Party of Pennsylvania**

Counsel of Record for this Party

Kathleen A. Gallagher (PA #37950)
kag@gallagherlawllc.com
Brian M. Adrian (PA #81461)
bma@gallagherlawllc.com
THE GALLAGHER FIRM, LLC
436 Seventh Avenue, 31st Floor
Pittsburgh, PA 15219
412.308.5512 (Phone)

John M. Gore *
jmgore@jonesday.com
E. Stewart Crosland
scrosland@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001

Thomas W. King, III (PA #21580)
tking@dmkcg.com
Thomas E. Breth (PA #66350)
tbreth@dmkcg.com
DILLON, McCANDLESS, KING,
COULTER & GRAHAM, LLP
128 W. Cunningham Street
Butler, PA 16001
724.283.2200 (Phone)

* *Pro hac vice application forthcoming*

RETRIEVED FROM DEMOCRACYDOCKET.COM

**IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA**

FAITH GENSER and FRANK MATIS,	:	CIVIL DIVISION
	:	
Petitioners,	:	No. 24-40116
	:	
v.	:	<i>ELECTION APPEAL</i>
	:	
BUTLER COUNTY BOARD OF ELECTIONS,	:	
	:	
Respondent.	:	

**BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR
REVIEW IN THE NATURE OF A STATUTORY APPEAL**

Proposed Intervenor-Respondents, the Republican National Committee and the Republican Party of Pennsylvania (collectively, “Republican Committees”), by and through their undersigned counsel, submit this Brief in Support of their Motion to Dismiss¹ Petitioners Faith Genser (“Petitioner Genser”) and Frank Matis’ (“Petitioner Matis”) (hereinafter collectively referred to as the “Petitioners”) Petition for Review in the Nature of a Statutory Appeal (the “Petition”).

I. INTRODUCTION

Proposed Intervenor-Respondents support and seek to uphold free, equal, and legally compliant elections on behalf of all Pennsylvanians. For that reason, Proposed Intervenor-Respondents file this Motion to Dismiss the instant appeal which seeks to circumvent and perhaps

¹ The Republican Committees have styled the motion supported by this brief as a Motion to Dismiss based on the Pennsylvania Commonwealth Court’s decision in *Schimes v. City of Scranton Non-Uniform Pension Bd.*, No. 1526 C.D. 2018, 2019 Pa. Commw. Unpub. LEXIS 438 at *9 (Pa. Commw. Aug. 1, 2019), which found that “the Pennsylvania Rules of Civil Procedure are not applicable to statutory appeals; thus, preliminary objections, the grounds for which are set forth in Pa. R.C.P. 1028, cannot be used as a vehicle for challenging such an appeal” (citing *Appeal of Borough of Churchill*, 575 A.2d 550, 553 (Pa. 1990)). See also *Barros v. City of Allentown*, No. 1592 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 466 at *7 n. 4 (Pa. Commw. Feb. 17, 2012) (“Because preliminary objections are not permitted in statutory appeals, the common pleas court erred when it dismissed Barros’ appeal on the City’s preliminary objections. We find this error to be harmless, where the court could have treated the preliminary objections as a motion to dismiss . . . Accordingly, and because the parties are not prejudiced as a result, we will treat our review of the common pleas court’s order as though the City filed a motion to dismiss. . .”).

overturn the landmark holding of the Pennsylvania Supreme Court in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), by asking this Court to do that which the Pennsylvania Supreme Court unanimously held that it cannot do: force a county board of elections to provide a cure procedure for a legally deficient mail-in ballot. The impact of such relief, if granted, would effectively throw the administration of the upcoming, highly contested General Election into chaos and erode public trust and confidence in the integrity of Pennsylvania's elections at a vital moment in the electoral history of our Nation and the Commonwealth. For these reasons, and those set forth more fully herein, such a result is not only legally untenable, it is simply wrong. Accordingly, Petitioners' Appeal should be dismissed.

II. FACTUAL BACKGROUND

Petitioners appeal from the decision of the Butler County Board of Elections (the "Board") to reject the Petitioners' mail-in ballots that did not contain the required "secrecy envelopes" in the 2024 Primary Election on April 23, 2024 (the "Primary Election") without providing Petitioners with the opportunity to cure their deficiencies by counting their unauthorized provisional ballots.

Each Petitioner cast a mail-in ballot ("the Ballots") for the Primary Election. After doing so, on April 11, 2024, Petitioner Genser received an email from the Secretary of State of the Commonwealth advising her that her mail-in ballot had been rejected due to the lack of a secrecy envelope but that she could cast a provisional ballot on Election Day ("the "Secretary's Curing Notice").² Petition at ¶ 11. Similarly, Petitioner Matis learned that the Board of Elections rejected his mail-in ballot prior to Election Day. Petition at ¶ 14.

² The Republican Committees contend that the Secretary's Curing Notice is improper in multiple respects. However, as the Secretary is not a party to this Appeal, and because the Court and the legality of the Curing Notice is not relevant to the relief sought, the Republican Committees are not raising a challenge to the same at this juncture. The Republican Committees, however, reserve the right to raise such a challenge at the appropriate time and are prepared to present the basis for that challenge in this matter should the Court request it.

It is unclear at this time how the Board determined that Petitioners' Ballots lacked the required secrecy envelope. Upon information and belief, the Republican Committees believe that upon receipt of all mail-in ballots, the Board weighed the mail-in ballot return envelopes to determine whether they included a secrecy envelope. No other method appears to be available at the time ballots are received, as the Election Code prohibits boards of elections from opening mail-in ballot return envelopes until 7:00 a.m. on Election Day, 25 P.S. § 3146.8(g)(1.1), and requires boards of elections to "keep" (unopened) return envelopes "safely ... in sealed or locked containers" until then. *Id.* at § 3146.8(a). Thus, until the sealed ballot return envelopes are opened on Election Day, there can be no actual determination as to whether or not the secrecy envelope is present. It further appears likely that as part of the 2024 Primary Election, if the Board suspected that a secrecy ballot was missing based on the returned ballot's weight, it included a notation to that effect in the SURE system.

Thereafter, a "Bureau official" contacted Mr. Matis via a telephone call and recommended that Mr. Matis submit a provisional ballot on Election Day, which he did. Petition at ¶ 14. Both Petitioners' Ballots were rejected because they failed to include the inner secrecy envelope, not due to any inaccuracies on the outer return envelope, which contains the voter declaration and is visible to election officials before the return envelope is opened. Petition at ¶ 2. Subsequently, on April 26, 2024, the Board notified Petitioners that their provisional ballots had been rejected. Petition at ¶ 17. As set forth in footnote 3 below, the Board adopted a limited curing policy for the

Primary Election; however, that policy does not contemplate curing by means of a voter casting a provisional ballot.³

Under the Pennsylvania Election Code, voters casting an absentee or mail-in ballot are required to: (1) place their marked ballots in a sealed envelope (“secrecy envelope”), (2) place the secrecy envelope inside a second envelope, which is marked with a “declaration of the elector” form (the “Declaration Envelope”), (3) “fill out” and “sign the declaration printed on such envelope,” and (4) return the ballot by 8:00 p.m. on Election Day. 25 P.S. § 3146.6(a); § 3150.16(a). If a voter fails to comply with any of these requirements, the voter’s absentee or mail-in ballot must be set aside and not counted. 25 P.S. § 3146.8.

It is undisputed that the Petitioners’ mail-in ballots did not include the required secrecy envelope in accordance with the Election Code. Petition at ¶ 2. Nonetheless, Petitioners now contend that the Board’s refusal to count their provisional ballots violated the Pennsylvania Election Code and the Free and Equal Elections clause of the Pennsylvania Constitution. Petition at ¶ 2. Petitioners’ contention is erroneous.

As more fully set forth below, the Petition must be denied.

³ In conjunction with the 2024 Primary Election, the Board adopted a Ballot Curing Policy that allows registered voters the opportunity to cure *certain* facial deficiencies on their mail-in ballot Declaration Envelopes. See, <https://www.butlercountypa.gov/DocumentCenter/View/8405/Butler-County-Ballot-Curing-Policy-Effective-5223> (the “Curing Policy”) (emphasis added). The Curing Policy *does not provide* an opportunity to cure a deficiency related to the failure to include a *secrecy envelope* with a mail-in ballot. To the contrary, the Curing Policy only defines a “Declaration Envelope” as the larger of the two envelopes that are mailed to each absentee or mail-in elector, which contains a declaration which the voter must sign. The Curing Policy permits the party committees to contact the voter who submitted a Declaration Envelope, and states that the voter is permitted to appear at the bureau to remedy such a Deficiency by means of an attestation. See, Curing Policy at § III(C.). It does not authorize casting a provisional ballot as a cure for any Deficiency. See *id.* The Curing Policy also defines “Deficiency” as “a defect on the Declaration Envelope recognized by the Department of State as curable by applicable law, i.e. a lack of signature.” It is telling that the Petitioners’ deficiencies in their mail-in ballots — the failure to include a secrecy envelope — is not a Deficiency as defined by the Curing Policy because it is not a defect on the Declaration Envelope. Accordingly, a plain reading of the Curing Policy does not permit a voter who casts a mail-in ballot without a secrecy envelope to cure the deficiency via a provisional ballot.

III. LEGAL STANDARD

A Court of Common Pleas can reverse the decision of a county board of elections “only for an abuse of discretion or error of law.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1070 (Pa. 2020) (citing *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952)); *see also*, 25 P.S. § 3157(b) (confining Court of Common Pleas’ review of decision of board of elections to matters involving “fraud or error”). In reviewing the decision of a board of elections, “[i]t is not the function of [the trial] court to substitute its judgment for that of the board’s. . . [the trial court is] bound to uphold the decision of the board unless it is in violation of the law.” *Lower Saucon Twp. v. Election Bd. of Northampton Cty.*, 27 Pa. D. & C.3d 387, 393 (Northampton C.P. 1983).

IV. ARGUMENT

As the Pennsylvania Supreme Court Held in *Pa. Democratic Party v. Boockvar*, Courts Cannot Force County Boards of Elections to Adopt Notice and Cure Procedures.

Pennsylvania law is clear that “a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope *must be disqualified*.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020). “[T]he secrecy provision language in § 3150.16(a) [of the Election Code] is *mandatory* and the failure to comply with such requisite renders the ballot invalid. *Id.* (emphasis added). In light of the Pennsylvania Supreme Court’s holding in *Pa. Democratic Party v. Boockvar*, the Board’s rejection of the Ballots without the secrecy envelope was not only proper; it was the only decision the Board could make.

Section 2641(a) of the Election Code, 25 P.S. § 2641, vests county boards of elections with “jurisdiction over the conduct of primaries and elections in such count(ies) in accordance with the provisions of the [Election Code].” *Id.* at § 2641(a). The generalized powers and duties of the county boards of elections are set forth in § 2642 of the Election Code. 25 P.S. § 2642. Those

powers, however, are not without limitation. Indeed, “[t]he duties of a board of elections under the Election Code are ministerial and allow for no exercises of discretion.” *In Re Municipal Reapportionment of Township of Haverford*, 873 A.2d 821, 833 n. 18 (Pa. Commw. 2005), appeal denied, 897 A.2d 462 (Pa. 2006). In short, the county boards of elections are required to follow the provisions of the Election Code and attendant case law.

Accordingly, in light of the Pennsylvania Supreme Court’s holding in *Pa. Democratic Party v. Boockvar*, there can be no dispute that the Board’s refusal to count the Ballots was proper. Petitioners, however, attempt to circumvent the legality of the Board’s decision by asserting that they should have been afforded the opportunity to “cure” their defective ballots by casting provisional ballots. Petition at ¶ 6. Petitioners’ assertion in this regard likewise fails as a matter of law.

There is no absolute wholesale right to cure a defective mail-in ballot in Pennsylvania. To the contrary, the Election Code only authorizes boards of elections to cure a mail-in ballot in one narrow circumstance, specifically, “[f]or those absentee or mail-in ballots for which proof of identification has not been received or could not be verified.” 25 P.S. § 3146.8(b). In that circumstance, the voter may cure only the lack of identification, not any other defect. *Id.*

The lack of a notice and cure procedure for any deficiency in a mail-in ballot beyond the narrow specific authorization in the Election Code was specifically addressed by the Pennsylvania Supreme Court in *Pa. Democratic Party v. Boockvar*. There, citing the Free and Equal Elections Clause, PA. CONST. art. I, § 5, and the Supreme Court’s “broad authority to craft meaningful remedies,” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2018), the Pennsylvania Democratic Party argued that the Supreme Court should require county boards of elections to implement a “notice and opportunity to cure procedure” for mail-in and absentee

ballots that voters have filled out incompletely or incorrectly. The Supreme Court specifically rejected that request. In doing so, the Supreme Court unanimously held that “the Election Code provides procedures for casting and counting a vote by mail” but does not provide for a notice and opportunity to cure procedure for a voter who fails to comply with the requirements for voting by mail or absentee. *Id.* at 374. The Supreme Court further stated that “[t]o the extent that a voter is at risk of having his or her ballot rejected” due to their failure to comply with the Election Code’s signature and secrecy ballot requirements for mail-in and absentee ballots, “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature.” *Id.* The Supreme Court “express[ed] this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania’s government.” *Id.*

The Supreme Court’s holding in this regard is well founded as it is settled law that “[t]he power to regulate elections is a legislative one and has been exercised by the General Assembly since the foundation of the government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v. Barlow*, 60 Pa. 54 (1869)); *see also*, *Agre v. Wolf*, 284 F.Supp.3d 591, 620 (E.D. Pa. 2018) (Smith, C.J.) (“The process for crafting procedural regulations is textually committed to state legislatures and to Congress.”).

At its core, the Petition effectively seeks to have this Court do that which the Pennsylvania Supreme Court has held it cannot do: rewrite the Election Code to force the Board to provide a cure for a mail-in ballot that does not contain a secrecy envelope. This Court cannot take such unilateral action to rewrite the law, as that would overstep the bounds of its authority. *See Robinson*

Twp. v. Commonwealth, 147 A.3d 536, 583 (Pa. 2016); *Cali v. Phila.*, 177 A.2d 824, 835 (Pa. 1962). “[E]diting a statute” by the Court “would amount to judicial legislation.” *State Bd. of Chiropractic Exam’rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971). For the Court to assume “the power to write legislation would upset the delicate balance in our tripartite system of government.” *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998), rev’d on other grounds, 529 U.S. 277 (2000). Moreover, such a result would directly contradict the well-settled holding of the highest court in the Commonwealth on this exact issue.

Accordingly, the Pennsylvania Supreme Court’s unanimous decision in *Pa. Democratic Party v. Boockvar* clearly and unequivocally establishes that the inclusion of a secrecy envelope with a mail-in ballot is mandatory, and the decision of whether or not to permit a party to cure a deficiency with a mail-in ballot must be decided by the Legislature and cannot be judicially mandated by the courts. If the Pennsylvania Supreme Court does not have the authority to require county boards of elections to afford electors the opportunity to cure their defective ballots for, *inter alia*, lack of a secrecy envelope, this Court likewise cannot do so.

V. CONCLUSION

For all of these reasons, Petitioners’ Petition for Review in the Nature of a Statutory Appeal should be dismissed.

Dated: May 6, 2024

Respectfully submitted,

THE GALLAGHER FIRM, LLC

By: Kathleen A. Gallagher Leary
Kathleen A. Gallagher (PA #37950)
kag@gallagherlawllc.com
Brian M. Adrian (PA #81461)
bma@gallagherlawllc.com

3100 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219
412.308.5512 (Phone)

John M. Gore *
jmgore@jonesday.com
E. Stewart Crosland
scrosland@jonesday.com
JONES DAY

51 Louisiana Avenue, N.W.
Washington, D.C. 20001
202.879.3939 (Phone)

Thomas W. King, III (PA #21580)
tking@dmkcg.com

Thomas E. Breth (PA #66350)
tbreth@dmkcg.com

DILLON, McCANDLESS, KING,
COULTER & GRAHAM, LLP
128 W. Cunningham Street
Butler, PA 16001
724.283.2200 (Phone)

*Counsel for Proposed Intervenor-Respondents,
Republican National Committee and Republican
Party of Pennsylvania*

**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

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

Dated: May 6, 2024

THE GALLAGHER FIRM, LLC


Kathleen A. Gallagher



RETRIEVED FROM DEMOCRACYDOCK

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the within ***BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL*** has been served on all counsel of record listed below via email this 6th day of May 2024:

Marian K. Schneider
Stephen A. Loney
Kate Steiker-Ginzberg
ACLU of Pennsylvania
P.O. Box 60173
Philadelphia, PA 19102
mschneider@aclupa.org
sloney@aclupa.org
ksteiker-ginzberg@aclupa.org
(Counsel for Petitioners)


Mary M. McKenzie
Benjamin D. Geffen
Public Interest Law Center
1500 JFK Boulevard, Suite 802
Philadelphia, PA 19102
mmkenzie@pubintl.org
bgeffen@pubintl.org
(Counsel for Petitioners)

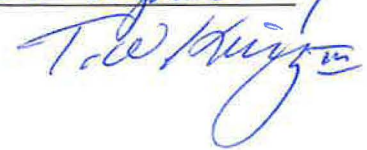
Witold J. Walczak
Richard T. Ting
ACLU of Pennsylvania
P.O. Box 23058
Pittsburgh, PA 15222
vwalczak@aclupa.org
rting@aclupa.org
(Counsel for Petitioners)

Martin J. Black
Steven F. Oberlander
Dechert LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
martin.black@dechert.com
steven.oberlander@dechert.com
(Counsel for Petitioners)

Kathleen Jones Goldman
Buchanan Ingersoll & Rooney P.C.
Union Trust Building
501 Grant Street, Suite 200
Pittsburgh, PA 15219
kathleen.goldman@bipc.com
(Counsel for Respondent)

THE GALLAGHER FIRM, LLC


Kathleen A. Gallagher



RETRIEVED FROM DEMOCRACYDOCKET.COM

VERIFICATION

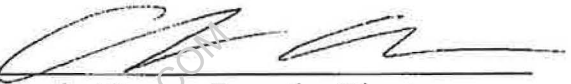
I hereby aver that the statements of fact contained in the attached *Petition for Leave to Intervene* are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: 
Republican National Committee

RETRIEVED FROM DEMOCRACYDOCKET.COM

VERIFICATION

I hereby aver that the statements of fact contained in the attached *Petition for Leave to Intervene* are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: 
Angela Alleman, Executive Director
Republican Party of Pennsylvania

RETRIEVED FROM DEMOCRACYDOCS.COM

**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

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

Dated: May 6, 2024

THE GALLAGHER FIRM, LLC



Kathleen A. Gallagher



RETRIEVED FROM DEMOCRACYDOCK.COM

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the within ***PETITION FOR LEAVE TO INTERVENE*** has been served on all counsel of record listed below via email this 6th day of May 2024:

Marian K. Schneider
Stephen A. Loney
Kate Steiker-Ginzberg
ACLU of Pennsylvania
P.O. Box 60173
Philadelphia, PA 19102
mschneider@aclupa.org
sloney@aclupa.org
ksteiker-ginzberg@aclupa.org
(Counsel for Petitioners)

Mary M. McKenzie
Benjamin D. Geffen
Public Interest Law Center
1500 JFK Boulevard, Suite 802
Philadelphia, PA 19102
mmkenzie@pubintl.org
bgeffen@pubintl.org
(Counsel for Petitioners)

Witold J. Walczak
Richard T. Ting
ACLU of Pennsylvania
P.O. Box 23058
Pittsburgh, PA 15222
vwalczak@aclupa.org
rting@aclupa.org
(Counsel for Petitioners)

Martin J. Black
Steven F. Oberlander
Dechert LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
martin.black@dechert.com
steven.oberlander@dechert.com
(Counsel for Petitioners)

Kathleen Jones Goldman
Buchanan Ingersoll & Rooney P.C.
Union Trust Building
501 Grant Street, Suite 200
Pittsburgh, PA 15219
kathleen.goldman@bipc.com
(Counsel for Respondent)

THE GALLAGHER FIRM, LLC


Kathleen A. Gallagher


RETRIEVED FROM DEMOCRACYDOCKET.COM

**IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA**

FAITH GENSER and FRANK MATIS,	:	CIVIL DIVISION
	:	
Petitioners,	:	No. 24-40116
	:	
v.	:	<i>ELECTION APPEAL</i>
	:	
BUTLER COUNTY BOARD OF ELECTIONS,	:	
	:	
Respondent.	:	

PROPOSED ORDER OF COURT

AND NOW, this _____ day of _____ 2024, upon consideration of the Petition for Leave to Intervene filed on behalf of Proposed Intervenor-Respondents, the Republican National Committee and the Republican Party of Pennsylvania, and the consent of Petitioners, Faith Genser and Frank Matis, and Respondent Butler County Board of Elections, as evidenced by the signatures of their respective counsel below, it is hereby ORDERED, ADJUDGED, and DECREED that said Petition is GRANTED. The Butler County Prothonotary is DIRECTED to enter the names of the Republican National Committee and the Republican Party of Pennsylvania on the docket in this matter as Intervenor-Respondents and DOCKET the Intervenor-Respondents' Motion to Dismiss the Petition for Review in the Nature of a Statutory Appeal and attendant Brief in Support.

CONSENTED BY:

Benjamin D. Geffen
*Counsel for Petitioners, Faith Genser and
Frank Matis*

Kathleen Jones Goldman
*Counsel for Respondent Butler County
Board of Elections*

BY THE COURT:

J.

RETRIEVED FROM DEMOCRACYDOCKET.COM