

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA – CIVIL ACTION – LAW

MICHELLE M. SCHELLBERG, *et al.*, :

Appellants, :

v. :

CENTRE COUNTY BOARD OF
ELECTIONS, :

Appellee. :

Docket No. 2024-CV-1220-CI

TYPE OF CASE:

Civil Action

TYPE OF PLEADING:

Expedited Motion to Prevent
Disclosure of Ballot Outer Envelopes
and Supplement to Motion to Quash
Appeal Recast as “Election Contest”

FILED ON BEHALF OF:

Centre County Board of Elections

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MICHELLE M. SCHELLBERG, *et al.*, :
: Appellants, : Docket No. 2024-CV-1220-CI
: v. :
: CENTRE COUNTY BOARD OF :
: ELECTIONS, :
: Appellee. :
:

**EXPEDITED MOTION TO PREVENT DISCLOSURE OF BALLOT
OUTER ENVELOPES AND SUPPLEMENT TO MOTION TO QUASH
APPEAL RECAST AS “ELECTION CONTEST PETITION”**

Twenty-seven days have elapsed since the General Primary Election (“Primary”), and only one of the Commonwealth’s 67 counties has not finally certified the results—Centre County—all because of a vaguely asserted Appeal that (1) is irredeemably deficient, (2) threatens to disenfranchise voters, and (3) impermissibly seeks prospective relief in a tag-along claim that hinges on a yet-to-be-determined legal landscape. To rectify the needless and unjustified dragging-on of the certification process perpetrated by Appellants—and to prevent Appellants from obtaining ballot outer envelopes that have no impact on the disposition of Appellants’ claims—Appellee Centre County Board of Elections (the “Board”)

respectfully files this submission in the wake of Appellants' recasting of its Appeal as an election contest under 25 P.S. § 3456.¹

1. The Board incorporates the background of these proceedings provided in its Motion to Quash Appeal as Untimely. (Mot. to Quash Appeal as Untimely.)

2. The Board adds, however, that in Appellants' "Brief in Support of Petition," they asserted for the first time that their Appeal is an election contest filed pursuant to 25 P.S. § 3456. (Br. in Supp. of Pet. at 1.)

3. The Board further notes that, upon Appellants' request at the May 16, 2024 hearing, the Court directed the Board to produce the 95 mail-in or absentee ballots (the "Ballots") at the center of this Appeal.

4. Also relevant to this submission, Appellants filed a Praeceptum to Attach, on May 16, 2024, twenty-three days after the Primary, asking the Centre County Prothonotary to attach to the Appeal verifications ("Verifications") signed by eight Appellants (as "petitioners"). (Praeceptum to Attach at 4–11.)

5. For the reasons discussed below—and to prevent Appellants from needlessly prolonging the Commonwealth's completion of final certification as to all its counties and from forcing the Board to produce discovery that cannot possibly

¹ Given that the timeliness of election results is critical, and that Centre County is the only county in the Commonwealth to have not certified its election results, the Appellee desired to put these matters before the Court's current briefing schedule to advance an earlier decision on the issues raised herein and allow the Board to certify its election results.

affect this Appeal and pertains to Ballots that have no effect on the outcome of the Primary²—the Board respectfully requests that the Court grant the Expedited Motion to Prevent Production of the Ballots’ outer envelopes and dismiss the Appeal for the reasons addressed herein.

6. With this submission, the Board respectfully requests that the Court order Appellants to pay costs to the Board under 25 P.S. § 3469(a) (“In contested nominations or elections of all classes, if the committee or court or judge shall decide that the complaint is without probable cause, the petitioners, and every one of them, shall be jointly and severally liable for all the costs . . .”), or, if the Court determines that the Appeal asserts an appeal under 25 P.S. § 3157, then for fees and costs under 25 P.S. § 3157 (b) (“The court of common pleas . . . may compel the appellant or any opposing party, other than the county board, to pay all the witness fees, if any, or other legal costs of the hearing, which costs may be taxed by the prothonotary in the usual manner.”).

7. Attached as “**Exhibit A**” is a proposed order granting the relief sought herein.

8. The Board has incorporated all its legal arguments in this submission and, for brevity and given the expedited nature of the discovery-related request, not

² Appellants’ counsel stated numerous times on the record that the 95 contested votes would not affect the outcome of the election.

also filed a separate brief—however, the Board will supplement this submission with a separately filed brief at the Court’s direction.

**EXPEDITED MOTION TO PREVENT PRODUCTION OF BALLOT
OUTER ENVELOPES**

9. As discussed in the following section, because the Appeal—which Appellants now assert is an election-contest petition—is substantively, procedurally, and jurisdictionally deficient, and given that Appellants are now time-barred from curing the Appeal’s deficiencies, the Board respectfully requests that the Court prevent Appellants from seeking the 95 Ballots’ outer envelopes.

10. The only reason for Appellants to seek production of the outer envelopes would be to unduly burden, annoy, or harass the Board and potentially the affected voters, as there is no possible argument to be made that anything reflected on the outer envelopes can save their claims, much less provide the Court with jurisdiction to hear them. *Cf. Case of Bertolet*, 1895 WL 3694, at *2 (Pa. Quar. Sess. 1895) (“[N]owhere and never has it been deemed permissible to scrutinize the ballots themselves, in the first instance, to determine whether or not there is just cause for contesting the election.”).

11. Indeed, because the Ballots’ outer envelopes have no effect on either the Primary’s results or the disposition of this Appeal, Appellants’ request for the envelopes is nothing more than a “futile and fruitless inquiry” that can do nothing more than “engag[e] the parties in protracted litigation,” cast “doubt on the title to

public office, involving the disfranchisement of many honest voters, not only as to the office involved but all the other offices voted for,” and “conceivably tain[t] the title of other elected officers unconcerned in the contest.” *In re Gollmar’s Election*, 175 A. 510, 513 (Pa. 1934).

12. Further, to the extent the Court would, if it decided to grant the Appeal, direct the Board to throw out all 95 Ballots if even one outer envelope is deemed not to comply with the date requirement, it would disenfranchise all 95 voters based on one category of Ballots, *e.g.*, those received in outer envelopes on which the day, month, or year was omitted (date ballot issues). *Cf. In re Canvass of Absentee Ballots of 1967 Gen. Election*, 245 A.2d 258, 262 (Pa. 1968) (noting unconscionability of disenfranchising voters where the “appellants d[id] not contend that they were the victims of fraud, or even mistake”).

13. For all these reasons, the Court should prohibit Appellants from seeking disclosure of the 95 Ballots’ outer envelopes.

SUPPLEMENT TO MOTION TO QUASH APPEAL RECAST AS
“ELECTION CONTEST PETITION”

14. Now that Appellants have clarified that they intended for their Appeal to be an election contest, it is abundantly clear that the Appeal is substantively, procedurally, and jurisdictionally insufficient—and Appellants are now time-barred

from attempting to cure the Appeal.³

A. Applicable Law

15. Section 3456 of the Pennsylvania Election Code—pertaining to election contests—provides as follows:

The commencement of proceedings in the case of contests of the second, third, fourth and fifth classes shall be by petition, which shall be made and filed, as herein required, within *twenty days* after the day of the primary or election, as the case may be. The petition shall concisely set forth the cause of complaint, showing wherein it is claimed that the primary or election is illegal, and after filing may be amended with leave of court, so as to include additional specifications of complaint. After any such amendment, a reasonable time shall be given to the other party to answer.

25 P.S. § 3456 (emphasis added).

16. The statute has numerous substantive and procedural requirements that *must* be satisfied.

1. Substantive Requirements

17. A petition under 25 P.S. § 3456 must be “presented to the court having jurisdiction, except where otherwise provided . . . , and *if it shall set out a prima facie case*, it shall be filed of record in the proper court, and thereupon a time shall be fixed for hearing.” *Id.* § 3458 (emphasis added); *see also Pfuhl v. Coppersmith*,

³ In the event Appellants should change course again and state that they actually intended to bring an appeal under 25 P.S. § 3157, the Board rests on the arguments raised in its Motion to Quash Appeal as Untimely.

253 A.2d 271, 273 (Pa. 1969) (“[T]he petition shall set out a *prima facie* case.”).

18. “[I]t is *absolutely essential* that [the] . . . petition ‘aver plainly and distinctly such facts which if sustained by proof would require the court to set aside the result.’” *Pfuhl*, 253 A.2d at 273 (emphasis added) (quoting *In re Pazdrak’s Contested Election*, 137 A. 109, 109 (Pa. 1927)).

19. An election-contest petition is insufficient when “the particular averments fail to carry conviction that, if proved, the result of the election would be changed,” where “fraud is not alleged, or that the presence of others than the election board at the count caused any error in the result,” or where the petition fails to “aver facts from which it might be fairly inferred that ballots similarly marked were not rejected as to all candidates, or that, if so rejected, what the net result would be.” *In re Warren Borough’s Election*, 118 A. 256, 256 (Pa. 1922); *see also Pfuhl*, 253 A.2d at 274 (citing *In re Warren Borough’s Election*, 118 A. at 256) (“[E]ven if all of these ballots were counted in favor of Green and added to the total vote he received, it would not change the result of the election.”)

20. If the petition is insufficiently pleaded, “[i]t is not necessary . . . t[o] decide whether the ballots complained of were correctly marked.” *In re Warren Borough’s Election*, 118 A. at 256.

21. Unless “the original petition set[s] forth a cause of action, [a court is] without jurisdiction to hear and determine the matters therein set forth.” *In re*

Morganroth Election Contest, 50 Pa. D. & C. 143, 178 (Northumberland Cnty. Ct. Com. Pl. 1944).

2. Procedural Requirements

22. Every petition for an election contest under 25 P.S. § 3456 must be lodged by a requisite number of registered electors, *i.e.*, petitioners. *See id.* §§ 3351 (requiring 100 registered electors for Class II election-contest petition), 3377 (50 electors in Class III election contests), 3402 (20 electors in Class IV election contests), 3431 (20 electors in Class V election contests).

23. The fewest number of petitioners required is 20, as is the case in Class IV and V contests. *See id.* §§ 3402, 3431.

24. The petition must also be verified by the affidavits of a requisite number of the same petitioners. *See* 25 P.S. § 3457 (“In cases of the third class, each petition shall be verified by the *affidavits of at least ten of the petitioners*; in the second, fourth and fifth classes, by the *affidavit of at least five of the petitioners*.” (emphasis added)).

25. The affidavits required under 25 P.S. § 3457 must set “forth that the[] [petitioners] believe the facts stated therein are true, that according to the best of their knowledge and belief, the primary or election was illegal and the return thereof not correct, and that the petition to contest the same is made in good faith.” *Id.*; *see also In re Primary Election of May 15, 2018*, No. 1009 C.D. 2018, 2018 WL

3738081, at *7 & n.9 (Pa. Commw. Ct. Aug. 7, 2018); *Rinaldi v. Ferrett*, 941 A.2d 73, 78 (Pa. Commw. Ct. 2007) (noting that the affidavits must state the petitioners' belief that the "[1] the facts stated in the petition are true, [2] the election was illegal, and [3] the return thereof is not correct and that the contest is made in good faith").

26. The fewest number of affidavits required is five, as is the case in Class II, IV, and V contests. *See* 25 P.S. § 3457; *see also Rinaldi*, 941 A.2d at 78.

27. All petitioners must not only have "voted at the primary . . . so contested," *In re Primary Election of May 15, 2018*, 2018 WL 3738081, at *7, they must also be "'registered electors' of their respective party,"⁴ *In re May 15, 2001 Mun. Primary*, 785 A.2d 146, 150–51 (Pa. Commw. Ct. 2001).

28. As a separate requirement, petitioners who present a "petition to contest nomination or contest election of *any class*" must, "*within five days thereafter, [] file a bond . . .*" 25 P.S. § 3459 (emphasis added)).

29. Another procedural requirement relates to timing and provides that an election contest can only be presented "within twenty days after the day of the primary or election." 25 P.S. § 3456 (emphasis added).

⁴ This means that only registered republicans can challenge a republican primary, and only registered democrats can challenge a democratic primary. *In re May 15, 2001 Mun. Primary*, 785 A.2d at 150–51 (affirming dismissal of election contest as jurisdictionally deficient because, although over 20 registered electors presented the contest, there were only "nineteen registered electors of the Republican Party and seven registered electors of the Democratic Party").

30. While 25 P.S. § 3456 “permits a party to amend a petition to aver ‘additional specifications of complaint,’ it does not permit amendments to meet expressed jurisdictional requirements.” See *In re Phila. Democratic Mayoralty Primary Election Contest*, 11 Pa. D. & C.3d at 390 (quoting 25 P.S. § 3456) (first citing *In re Snodgrass*, 110 A. 293, 293 (Pa. 1920) (“[A]ll matters which merely concern exactness or particularity in the petition, *as distinguished from the omission of facts expressly required to be originally pleaded therein*, may, on cause shown, be amended, even after the time limit for initiating the proceedings has expired.” (emphasis added))); then citing *Bayuk v. Bucks Co. Bd. of Election*, 5 Pa. D. & C.3d 328 (Bucks Cnty. Ct. Com. Pleas 1977), explaining the court in *Bayuk* held that “there could be no amendment of matters required to be pleaded upon the expiration of the 20-day time limit”; and then citing *In re Dunmore Borough’s Contested Election*, 107 A. 725 (Pa. 1919)); see also *In re May 15, 2001 Mun. Primary*, 785 A.2d 146, 151 (Pa. Commw. Ct. 2001) (concluding that the “common pleas court properly concluded that it did not have jurisdiction” where “the required number of twenty ‘registered electors’ was not satisfied”); *Appeal of Orsatti*, 598 A.2d 1341, 1342 (Pa. Commw. Ct. 1991) (holding, in election-contest context, that “the timeliness of an appeal goes to the jurisdiction of the [c]ourt and may not be extended absent fraud or a breakdown in the court’s operation due to a default of its officers”).

31. As the Pennsylvania Supreme Court stated long ago, “[w]hatever has

been said by our appellate courts as to the liberality with which amendments should be allowed in contested election cases, it must be understood that amendments which affect the jurisdiction of the court cannot be allowed after the expiration of the statutory period” *In re Dunmore Borough’s Contested Election*, 107 A. at 725; *see also In re Pazdrak’s Contested Election*, 137 A. at 111 (“So far as it went to the question of jurisdiction it could not be filed after the expiration of [the statutory deadline for contesting an election].”).

32. To allow such amendments “would create a new cause of action,” *In re Morganroth Election Contest*, 50 Pa. D. & C. at 178, by allowing the “fil[ing] [of] an election contest petition well beyond the [20-day], post-election period,” *Pfuhl*, 253 A.2d at 274 (affirming denial of amendment).

B. The Appeal—Recast as an Election Contest—Is Deficient in Numerous, Independently Dispositive Respects

33. The Appeal—even under Appellants’ recasting of it as a petition asserting an election contest—does not satisfy the above substantive and procedural requirements.⁵

1. The Appeal does not state a *prima facie* election contest.

34. The Appeal does not “concisely set forth the cause of complaint,

⁵ Again, even if Appellants fall back on 25 P.S. § 3157 upon reading the arguments in this submission, their Appeal is untimely and should be quashed. And the Board should not be compelled to produce discovery that cannot possibly save their Appeal.

showing wherein it is claimed that the primary or election is illegal,” 25 P.S. § 3456, because it does not “aver plainly and distinctly such facts which if sustained by proof would require the court to set aside the result,” *Pfuhl*, 253 A.2d at 273.

35. Indeed, the Appeal does not even attempt to identify which “class[] of nominations at primaries” Appellants purport to “contest[]”⁶ 25 P.S. § 3291.

36. Appellants merely challenge the canvassing and computation of ballots wholly detached from any contest, which is why their Appeal is nothing more than a thinly veiled attempt to fit a square peg (alleged improper counting of ballots) in a round hole (an election contest).

37. For this reason alone—failure to allege a contested class—Appellants necessarily fail to aver facts that, “if sustained by proof[,] would require the court to set aside the result.” *Pfuhl*, 253 A.2d at 273.

38. Separately, Appellants do not allege in their Appeal that “their candidate would have been elected instead of [an] opponent” (in fact they concede to the contrary), they do not allege “fraud,” and they do not allege “that the presence of others than the election board at the count caused any error in the result.” *See In re Warren Borough’s Election*, 118 A. at 256; *see also Pfuhl*, 253 A.2d at 274.

39. Appellants similarly do not “aver facts from which it might be fairly

⁶ This omission strongly suggests—if not wholly demonstrates—that the Appeal was never intended to be an election contest.

inferred that ballots similarly marked were not rejected as to all candidates, or that, if so rejected, what the net result would be.” See *In re Warren Borough’s Election*, 118 A. at 256; see also *Pfuhl*, 253 A.2d at 274.

40. In fact, Appellants do not even refer to any “candidate”—from any party—further demonstrating that they woefully failed to assert an election contest, and they *concede* that the 95 Ballots have no effect on the Primary’s results, whether they are counted are not.

41. Failure to allege these circumstances is an independent reason for which the Appeal does not state *prima facie* election contest.

42. Lastly, where, as here, “there is no allegation in the instant petition that any voter acted illegally or that his vote was not cast according to his will,” the Pennsylvania Supreme Court has refused to “allow the carelessness or even fraud of the election officers to defeat the election and frustrate the will of the electorate,” as “[t]his can be done only when the illegal acts are so irregular and the election so infected with fraud that *the result cannot be ascertained*.” *In re Contest of Election for Off. of City Treasurer from Seventh Legislative Dist. (Wilkes-Barre City) of Luzerne Cnty.*, 162 A.2d 363, 365 (Pa. 1960) (emphasis added).

2. The Appeal is not supported by the requisite number of petitioners and petitioner affidavits.

43. Even if Appellants alleged a contested class and stated a *prima facie* election contest, they have neither the requisite number of petitioners nor the

requisite number of affidavits.

44. As discussed above, *at a very minimum*, at least 20 registered electors must file the petition for an election contest under 25 P.S. § 3456,⁷ and no fewer than five of those petitioners must also provide specifically worded affidavits. *See* 25 P.S. §§ 3402, 3431, 3457; *see also In re Primary Election of May 15, 2018*, 2018 WL 3738081, at *7 & n.9 (Pa. Commw. Ct. Aug. 7, 2018); *Rinaldi*, 941 A.2d at 78.

45. As Appellants concede, and as reflected in Exhibit 1 to the Appeal (Appeal, Ex. 1), their Appeal “is joined by eighteen other registered Centre County voters, all of whom were *eligible* to vote in the April 23, 2024[] primary election” (Br. in Supp. of Pet. at 1–2 (emphasis added)).

46. Therefore, including Appellant Schellberg, the Appeal is supported, at best, by 19 registered electors, and thus, by Appellants’ own admission, they do not have enough petitioners to present an election contest under 25 P.S. § 3456.

47. Further, while Appellants filed an untimely Praecipe to Attach purporting to attach eight Verifications to their Appeal, seven of the individuals who signed the Verifications are included within the 18 who signed Exhibit 1 to the Appeal (*Compare* Praecipe to Attach at 4–11, *with* Appeal, Ex. 1), and one is Appellant Schellberg (Praecipe to Attach at 11), which means that the Verifications

⁷ Again, this affords Appellants the most liberal and generous reading of their Appeal because it assumes that only 20 registered electors are required to lodge a contest, five of whom must submit affidavits, as is the case in Class IV and V contests.

do not bring the total number of purported petitioners above 19.

48. But even if Appellants had, in fact, presented an election contest joined by 20 petitioners, they failed to provide—within the 20-day timeframe provided in 25 P.S. § 3456—affidavits “of at least five of the petitioners.” *See id.* § 3457.

49. While, as noted above, Appellants submitted Verifications, they did so on May 16, 2024, as part of their Praeceptum to Attach, and they were required to do so no later than 20 days from the date of the Primary, *i.e.*, May 13, 2024—as discussed below, the jurisdictional defect arising from the failure to provide proper affidavits cannot be cured after the 20-day deadline.

50. Even so, the Verifications attached to the Praeceptum to Attach do not contain all three statutorily mandated averments—*i.e.*, that each petitioner believes “[1] the facts stated in the petition are true, [2] the election was illegal, and [3] the return thereof is not correct and that the contest is made in good faith.” *Rinaldi*, 941 A.2d at 78 (setting forth elements of affidavits required under 25 P.S. § 3457).

51. The identically worded Verifications, set forth verbatim below, contain only the first of the averments, *i.e.*, the facts stated in the Appeal are true.

[Petitioner] hereby states that he/she is one of the petitioners in this action and that the statements of fact made in the foregoing document are true and correct to the best of his/her knowledge, information and belief. The undersigned understands that the statements herein are made subject to the penalties of 18 Pa. Cons. Stat. §4909 relating to unsworn falsification to authorities.

(Praeceptum to Attach at 4–11.)

52. The Verifications clearly do not state that “the primary or election was illegal and the return thereof not correct” or “that the petition [*i.e.*, the Appeal] to contest the same is made in good faith,” as is required under 25 P.S. § 3457.

53. The Appeal is therefore deficient, and jurisdictionally so, for this reason alone, particularly given the “well-established case law dictat[ing] strict adherence to the statutory requirements for pursuing” an election contest. *See, e.g., Rinaldi*, 941 A.2d at 78 (discussing cases holding that failure to comply with verification requirements gives rise to a fatal jurisdiction defect); *In re May 15, 2001 Mun. Primary*, 785 A.2d at 151 (concluding that the “common pleas court properly concluded that it did not have jurisdiction” where “the required number of twenty ‘registered electors’ was not satisfied”; *see also In re Phila. Democratic Mayoralty Primary Election Contest*, 11 Pa. D. & C.3d at 387.

54. And yet another fatal flaw is the fact that neither the Appeal, its exhibits, Appellants’ “Brief in Support of Petition,” the Praeceptum to Attach, nor the Verifications attached to the Praeceptum to Attach aver that any of the Appellants actually voted in the Primary or identify their registered party, presenting yet more jurisdictional impediments to the Appeal. *In re Primary Election of May 15, 2018*, 2018 WL 3738081, at *7 (noting petitioners must have “voted at the primary or election so contested . . .”); *In re May 15, 2001 Mun. Primary*, 785 A.2d at 150–51 (affirming dismissal of election contest as jurisdictionally deficient because,

although over 20 registered electors presented the contest, there were only “nineteen registered electors of the Republican Party and seven registered electors of the Democratic Party”).

3. Appellants failed to file a bond.

55. Appellants also failed to file a bond within five days of presenting their purported election contest. 25 P.S. § 3459 (“Whenever a petition to contest nomination or contest election of any class shall be presented to the General Assembly or to the court, it shall be the duty of said petitioners, *within five days* thereafter, to *file a bond . . .*” (emphasis added)). *See Rinaldi*, 941 A.2d at 75, 77–78 (noting bond requirement in context of primary).

56. This is yet another *jurisdictional* basis for dismissing the Appeal. *See, e.g., Olshansky v. Montgomery Cnty. Election Bd.*, 412 A.2d 552, 553 (Pa. 1980) (“[T]he filing of a bond . . . is [] a condition of the lower court’s jurisdiction to hear and adjudicate the contest.”).

C. Appellants Are Time-Barred from Attempting to Cure the Appeal’s Deficiencies

57. Although Appellants have not sought the Court’s permission to amend their Appeal to conform with the requirements of an election-contest petition,⁸ even

⁸ While not necessary to demonstrate that the Appeal should be dismissed, the Board notes that Appellants impermissibly filed the Praeceptum to Attach the Verifications *after* the 20-day period expired without first seeking leave to amend the Appeal.

if they did, they are now time-barred from curing the Appeal's deficiencies.

58. Any amendments Appellants need to make to cure the deficiencies in their Appeal—on both substantive *and* procedural grounds—would “affect the jurisdiction of the court” and “cannot be allowed after the expiration of the statutory period” *In re Dunmore Borough's Contested Election*, 107 A. at 725 (quoting and adopting lower court's reasoning); *see In re Snodgrass*, 110 A. at 293 (noting that untimely amendments can be permitted concerning the omission of facts pertaining to the “exactness or particularity in the petition,” as distinguished from the “omission of facts *expressly required to be originally pleaded therein*” (emphasis added)); *see also In re Pazdrak's Contested Election*, 137 A. at 111 (“So far as it went to the question of jurisdiction it could not be filed after the expiration of the [filing window].”); *In re Contest of Nov. 7, 2023 Election of Towamencin Twp.*, No. 1482 C.D. 2023, 2024 WL 1515769, at *4 (Pa. Commw. Ct. Apr. 8, 2024) (“[C]ompliance with any mandatory appeal or filing period is a prerequisite to Common Pleas’ ability to grant any relief to Appellants.”); *In re May 15, 2001 Mun. Primary*, 785 A.2d at 151 (concluding that the “common pleas court properly concluded that it did not have jurisdiction” where “the required number of twenty ‘registered electors’ was not satisfied”); *Appeal of Orsatti*, 598 A.2d at 1342 (“[T]he

Those Verifications are therefore untimely and were filed in violation of a jurisdictional bar.

timeliness of an appeal goes to the jurisdiction of the [c]ourt and may not be extended absent fraud or a breakdown in the court's operation due to a default of its officers."); *In re Phila. Democratic Mayoralty Primary Election Contest*, 11 Pa. D. & C.3d at 390 (noting case law under which "there c[an] be no amendment of matters required to be pleaded," adding, "[t]his court itself has searched to find case law which would have permitted it to allow an amendment such as the one in question after the expiration of the time limit; however, the court was unable to find any such case"); *In re Morganroth Election Contest*, 50 Pa. D. & C. at 178 (refusing to permit amendments to an election-contest petition, which lacked "particularity and precision" and did not "state a cause of action," because to permit amendment "would create a new cause of action" and run afoul of jurisdictional limitations).

59. For all the above reasons, any attempt by Appellants to recast their Appeal as an election contest falls on substantive and procedural deficiencies, and they can no longer amend their Appeal to attempt to cure them, even if they could.

D. Appellants' Request for Prospective Relief Is Not Cognizable in an Election Contest, and They Lack Standing to Seek Such Relief

60. Appellants also seek prospective relief (Appeal at 3 (Wherefore Clause)), purportedly under the Declaratory Judgments Act (42 Pa. C.S.A. §§ 7531–7541) (Br. in Supp. of Pet. at 6–7)—although they do not mention the Declaratory Judgments Act in their Appeal (*see Appeal passim*)—seeking an order directing the Board to reject all November 2024 ballots that fail comply with the outer-envelope

date requirement as Appellants construe the requirement (Appeal; Br. in Supp. of Pet. at 6–7).

61. The belated invocation of the Declaratory Judgments Act is, at best, disingenuous, as Appellants unequivocally assert that they filed their Appeal—now recast as an election contest—“pursuant to 25 P.S. § 3456”

62. Section 3456 is a vehicle for contesting elections and primaries and does not provide for prospective declaratory relief. *See* 25 P.S. § 3456.

63. In any event, Appellants lack standing to pursue relief under the Declaratory Judgments Act.

64. Standing requires a “real and concrete” controversy and a party who is *actually* aggrieved. *Office of Governor v. Donahue*, 98 A.3d 1223, 1229 (Pa. 2014). The litigant’s “concern in the outcome of the challenge” must “surpass the common interest of all citizens in procuring obedience to the law.” *See Bonner v. Chapman*, 298 A.3d 153, 162 (Pa. Commw. Ct. 2023) (quoting *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016)).

65. To “sustain an action under the Declaratory Judgment[s] Act,” there must be an alleged “interest which is direct, substantial and immediate, and must demonstrate the existence of a real or actual controversy, as [] courts . . . are generally proscribed from rendering decisions in the abstract or issuing purely advisory opinions.” *Donahue*, 98 A.3d at 1229. While the Declaratory Judgments

Act is liberally construed, Petitioners must satisfy these fundamental justiciability requirements in order to invoke it. *Id.*

66. In the context of this Appeal, Appellants concede that the counting of the 95 Ballots had no effect on the outcome of the Primary.

67. Further, Appellants clearly assert claims solely in their capacity of Centre County citizens and voters (Appeal ¶¶ 1–2 & Ex. 3), which means that their concern in the outcome of their challenges does not surpass the interest of the public at large.

68. Rather, their interest is the same “interest of all citizens in procuring obedience to the law.” *See Bonner*, 298 A.3d at 162; *see also, e.g., Ball*, 289 A.3d at 20 (holding that voters lacked standing to challenge 25 P.S. § 3146.6(a) where they failed to establish that the statute diluted their votes).

69. In sum, because there is no statutory mechanism for asserting prospective relief in an election contest—and because Appellants lack standing to seek such relief—the Appeal is deficient as to such relief.

REQUEST FOR FEES AND COSTS

70. Finally, because it is abundantly clear that the Appeal is wholly deficient and lacks “probable cause” for an election contest, the Board respectfully requests that the Court order Appellants to pay costs to the Board under 25 P.S. § 3469(a) (“[I]f the committee or court or judge shall decide that the complaint is

without probable cause, the petitioners, and every one of them, shall be jointly and severally liable for all the costs”).⁹

Respectfully submitted,

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*Attorneys for the Centre County Board of
Elections*

⁹ If the Court deems the Appeal one filed pursuant to 25 P.S. § 3157, the Board seeks fees and costs under 25 P.S. § 3157(b) (“The court of common pleas . . . may compel the appellant or any opposing party, other than the county board, to pay all the witness fees, if any, or other legal costs of the hearing, which costs may be taxed by the prothonotary in the usual manner.”).

EXHIBIT A

Proposed Order

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

MICHELLE M. SCHELLBERG, *et al.*,

Appellants,

v.

CENTRE COUNTY BOARD OF
ELECTIONS,

Appellee.

Docket No. 2024-CV-1220-CI

ORDER

AND NOW, on this ____ day of _____, 2024, upon review of Appellee Centre County Board of Elections' (the "Board") Expedited Motion to Prevent Disclosure of Ballot Outer Envelopes and Supplement to Motion to Quash Appeal Recast as "Election Contest" ("Motion"), it is hereby **ORDERED** that the Motion is **GRANTED**, the Board is not required to produce the outer envelopes of the 95 ballots at issue in this action, the "Appeal from the April 23, 2024 Primary Election as May Be Confirmed by the Centre County Elections on May 7, 2024" filed on May 7, 2024, is **DISMISSED WITH PREJUDICE**, and the Board is **AWARDED** reasonable fees and costs relating to this Appeal. The Board shall file copies of the invoices substantiating the fees and costs to be awarded within three days of this Order.

BY THE COURT:

J.

CERTIFICATE OF COMPLIANCE

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

By: /s/ Elizabeth A. Dupuis
Elizabeth A. Dupuis, Esquire
*Attorney for the Centre County Board of
Elections*

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IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA – CIVIL ACTION – LAW

MICHELLE M. SCHELLBERG, *et al.*, :
:
Appellants, : Docket No. 2024-CV-1220-CI
:
v. :
:
CENTRE COUNTY BOARD OF :
ELECTIONS, :
:
Appellee. :

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Expedited Motion to Prevent Disclosure of Ballot Outer Envelopes and Supplement to Motion to Quash Appeal Recast as “Election Contest” was served on the 20th day of May 2024, via First Class U.S. Mail and E-Mail upon the following:

Louis T. Glantz, Esquire
GLANTZ, JOHNSON & ASSOCIATES
1901 E. College Avenue
State College, PA 16801
louis.glantz@gmail.com

BABST, CALLAND, CLEMENTS
AND ZOMNIR, P.C.

By: /s/ Elizabeth A. Dupuis
Elizabeth A. Dupuis, Esquire

Date: May 20, 2024

cc: Centre County