

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

MICHELLE M. SCHELLBERG, *et*
al.,

Petitioners,

v.

CENTRE COUNTY BOARD OF
ELECTIONS,

Respondent.

Docket No. 2024-CV-1220-CI

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Type of Case: Civil Action

Type of Filing: Motion for
Leave to File Amicus Brief in
Support of Respondent

Filed on Behalf of: Secretary of
the Commonwealth Al Schmidt
and the Department of State

Secretary of the Commonwealth Al Schmidt and the Pennsylvania Department of State respectfully move to file the Amicus Brief attached to this motion as Exhibit A. In support of this motion, Secretary Schmidt and the Department state as follows:

1. Secretary Schmidt is Pennsylvania's chief election officer. He and the Department have essential responsibilities for the administration of Pennsylvania's elections. 25 P.S. § 2621; 71 P.S. § 273.

2. The Secretary and Department's "obvious interest in election administration" are "highly salient" in post-election challenges such as this one. Memorandum Opinion, *In re: Contest of November 7, 2023*, No. 1482 CD 2023, Slip Op. at 5 n.5 (Pa. Cmwlth. Ct. Dec. 29, 2023).

3. The manner of adjudicating this petition directly bears on the orderly execution and resolution of Pennsylvania's elections, and thus the proper functioning of Pennsylvania's government.

4. As Pennsylvania's chief election officer, the Secretary has a strong interest in ensuring that post-election procedures for challenging election results are used only as the Election Code allows.

5. More than that, the Secretary has a strong interest in ensuring that all post-election challenges are timely resolved, just as the

Election Code requires. Prompt resolution of election challenges is necessary so that Pennsylvania's public offices are not left indefinitely open and so that public officials need not perform their duties under the indefinite risk of being required to re-run for their position midway through their term.

May 20, 2024

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CERTIFICATE OF COMPLIANCE

I certify that this motion 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.

Dated: May 20, 2024

/s/ Jacob B. Boyer

Jacob B. Boyer

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Exhibit A

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INTEREST OF AMICUS CURIAE

The Secretary of the Commonwealth and the Department of State file this amicus brief in support of dismissing this untimely challenge to the Centre County Board of Elections' April 25 canvassing decision. The Secretary's and the Department's "obvious interest in election administration" are "highly salient" here. Memorandum Opinion, *In re: Contest of November 7, 2023*, No. 1482 CD 2023, Slip Op. at 5 n.5 (Pa. Cmwlth. Ct. Dec. 29, 2023).

In particular, the Secretary and the Department have an interest in the prompt resolution of this matter based on their responsibilities related to the administration, and final certification, of Pennsylvania's elections. The belated filing of the Petition here, and the failure to dismiss it quickly, already have affected the Secretary's performance of his statutory duties.¹

¹ This brief was not authored or paid for, in whole or in part, by any person or entity other than *amici* and their counsel.

INTRODUCTION

Centre County is the only county in Pennsylvania that has not yet certified the results of any of its 2024 primary elections.² It has not yet done so because the patently defective petition filed in this case has not been promptly dismissed. Because Centre County has not yet concluded its certification, the Secretary cannot perform his statutory duty to certify the results of the statewide primary elections. This Court must swiftly dismiss the Petition filed in this case because the Election Code unquestionably requires dismissal and so Centre County—and the Commonwealth—can conclude the 2024 primary.

BACKGROUND

By statute, every county must certify the results of its elections within 20 days of Election Day. 25 P.S. § 2642(k). For the 2024 primary, the counties' certification deadline was May 13.

There are several tasks that must be accomplished after Election Day to meet the certification deadline.

² Luzerne County has not yet certified the results of a single state legislative race—the 117th House District—where the candidates are currently separated by fewer than five votes.

For example, county boards of elections, which are responsible for receiving and canvassing ballots, must submit unofficial election returns to the Secretary of the Commonwealth within a week of Election Day. 25 P.S. § 3154(f). County boards also need to examine all provisional ballots that were submitted during an election within a week of Election Day. *Id.* § 3050(a.4)(4). County boards then have just one week from their examination of provisional ballots to hold hearings on any challenges to those ballots. *Id.* § 3050(a.4)(4)(ii).

Within 15 days of Election Day, county boards are supposed to complete their computation of votes. *Id.* § 3154(f) (requiring five day waiting period before final certification). County boards may, on their own or upon petition of three voters of an election district, conduct a recount of the ballots cast in that election district before they finish the computation. *Id.* § 3154(e).

The counties' processes are subject to several forms of post-election challenge.

If a person aggrieved wishes to challenge any decision of a county board regarding computation or canvassing of ballots in a court of common pleas, such challenge must be filed within two days of the

relevant decision of the county board. 25 P.S. § 3157(a). If voters seek to petition a county board to conduct a recount of an election district, they must submit a petition before the board completes its computation. *Id.* § 3154(e). If voters seek to petition a court of common pleas to conduct a recount, they must submit a petition no later than five days after a county board completes its computation. *Id.* §§ 3263, 3154(f).

The strict timelines for these procedures are necessary and required by law so that a county can meet the certification deadline of just 20 days after Election Day. 25 P.S. § 2642(k).

The Election Code also permits groups of voters to file election contests for particular races. *Id.* § 3291. The procedures that apply depend on which specific race is being contested. *Id.* §§ 3291-3474. Election contests for any race other than Governor and Lieutenant Governor must be filed within 20 days of an election. *Id.* § 3456. Election contests related to the Governor or Lieutenant Governor are filed within 10 days of the General Assembly's organization. *Id.* § 3313.

The Secretary has his own post-election obligations for certain races. He must order a recount for any statewide race in which the margin of victory is one-half of one percent or less, and he must do so

within nine days of Election Day. *Id.* § 3154(g)(2). The recount needs to begin within 15 days of the election, *id.* § 3154(g)(5)(ii), and be completed by three weeks after Election Day, *id.* § 3154(g)(5)(iii).

The Secretary must also certify certain races, including races for U.S. Senators and Representatives, statewide office holders, Pennsylvania's legislators, Supreme Court justices, and appellate judges. *Id.* § 3158. For these races, the Secretary must complete certification "forthwith" after receiving certified returns from the counties. *Id.* § 3159.

County and state election officials strive to meet these timing demands and determine the final results of elections as quickly and as transparently as possible.

ARGUMENT

I. The Court Lacks Jurisdiction Over this Untimely Challenge.

Given the tight schedule between Election Day and counties' certification deadline, the Election Code sets strict deadlines for all post-election challenges. These deadlines serve a critical function:

[T]he General Assembly's imposition of time frames in the Code [is] a means of structuring the appeal and contest provisions of the Code to raise and resolve disputes **as early as possible**, consistent with the purpose of the **prompt resolution** of those disputes to **ensure the continuity in the operation of the government**. ... Our system depends

upon the timely certification of a winner and the operation of each of the three branches of government would be threatened in the absence of clear time limitations for the challenging of an election.

In re Contest of Nov. 7, 2023 Election of Towamencin Twp., No. 1482 CD 2023, 2024 WL 1515769, at *8 (Pa. Cmwlth. Ct. Apr. 8, 2024) (quoting *Koter v. Cosgrove*, 844 A.3d 29, 33 (Pa. Cmwlth. Ct. 2004)) (emphasis in original).

Further, compliance with these deadlines is a jurisdictional requirement. That is because the Election Code's provisions for post-election challenges "constitute the exclusive means for challenging the accuracy of election results," and require "strict adherence." *Rinaldi v. Ferrett*, 941 A.2d 73, 78 (Pa. Cmwlth. Ct. 2007). "[O]nly those procedures specified by the [Election] Code invoke the jurisdiction of the board or court and ... those provisions are strictly construed and *such jurisdiction will attach only if they are followed in all respects.*" *Id.* at 80 (emphasis added). Because the jurisdiction of courts in election matters "is not of common law origin but is founded entirely upon statute," Election Code deadlines "cannot be extended beyond the limits defined by the General Assembly." *Id.* at 78.

Consistent with the need to ensure the orderly and quick resolution of issues that may arise during an election, different types of post-election challenges are subject to different deadlines. But all of them demand that parties act promptly. If the parties do not, then the courts lack authority to hear the challenge.

For example, challenges to “any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election” must be filed in a court of common pleas within two days of when the decision was made. 25 P.S. § 3157.

Complying with the Election Code’s two-day deadline to challenge any computation or canvassing decision a county board makes is critically important as the deadline facilitates review of those disputes as early as possible and, ideally, without delaying certification.

In this case, Petitioners are challenging Centre County’s April 25 decision to canvass and count 95 mail ballots. Petition ¶¶ 4-5, 8-10. The challenge they have filed is plainly an appeal of “any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election.” 25 P.S. § 3157. As such, it is subject to § 3157’s two-day deadline. The Petition here, however, was filed 12 days after the

decision it appeals. As a result, this Court has no jurisdiction to hear the Petition and should promptly dismiss it. It is imperative that a challenge to a board's canvassing decision is brought within the applicable two-day window—and is promptly dismissed if it is not—so that counties can quickly resolve any dispute about which ballots will be included in their certified results.

Petitioners cannot avoid the applicable statutory provisions by simply omitting a reference to § 3157 from their pleading. Allowing challenges that should have been brought under § 3157 to proceed instead as election contests, or anything else, undoes the legislature's carefully designed framework.

In fact, just last month, Commonwealth Court rejected another group of petitioners' effort to do precisely what Petitioners attempt here. In *Towamencin Township*, a collection of voters filed an action that they styled as an election contest, challenging (as here) a county's decision to canvass and count certain mail ballots. *Towamencin Twp.*, No. 1482 CD 2023, 2024 WL 1515769, at *1-2. The voters filed their pleading well after the two-day deadline to challenge a board's canvassing decisions (and also after the deadline for an election contest).

As Commonwealth Court ruled, no matter what petitioners called their pleading, it was in substance an appeal of the board's canvassing decision. *Id.* at *5. As such, it had to be filed within two days of the relevant decision, pursuant to § 3157. *Id.* Because petitioners had not complied with that deadline, the Court of Common Pleas lacked jurisdiction over the petition. *Id.* at *6.

The material facts here are indistinguishable.

Failing to enforce the Election Code's clear requirement of prompt action can be extremely damaging to sound election administration and the smooth operation of Pennsylvania's government, *Koter*, 844 A.3d at 33. That is particularly true and especially concerning here.

In a general or municipal election, for example, elected officials assume office not long after Election Day. Members of the General Assembly begin their terms on December 1. *See* Pa. Const. art. II, § 2. Members of the U.S. Congress begin their terms on January 3. *See* U.S. Const. amend. XX. In years with a presidential election, the Electoral College meets in mid-December, *see* 3 U.S.C. § 7, and a state is now required under federal law to issue a certificate of ascertainment of electors six days before the College meets, *id.* § 5. In a primary election,

it is important to get the results certified promptly so that elected party officers can assume office and nominated candidates can have certainty and proceed with their campaign planning for the November election.

Given the importance that the Election Code places on every party involved in post-election processes to work as quickly as possible, Petitioners' delayed filing cannot be countenanced (even for a short time) and such late filings must be dismissed quickly so that elections can be certified.

II. This Matter Is Not an Election Contest

Presumably, because they know that they filed their petition well after the two-day deadline to challenge Centre County's April 25 canvassing decision, Petitioners' May 16 brief describes their petition as an election contest under 25 P.S. § 3456. Again, no matter what it is called, the Petition is an appeal from a board's canvassing decision under § 3157. *Towamencin Twp.*, No. 1482 CD 2023, 2024 WL 1515769, at *5.

And both the substance and form of the petition confirm it is not an election contest.

Most obviously, election contests are challenges to certain *races* on the grounds that the race is illegal. 25 P.S. § 3456. Election contests are

organized into five different classes, and the procedures that apply depend on which race is being contested. *Id.* § 3291. For example, a contest of the election of Governor or Lieutenant Governor is a contest of the first class, *id.* § 3291, subject to one set of rules, *id.* §§ 3312-3330. Contests of any race for a seat in the Pennsylvania General Assembly, or for a seat the U.S. House of Representatives are contests of the fourth class and subject to another set of rules. *Id.* §§ 3401-3409.

The Petition here, because it is in fact a challenge to a board's canvassing decision, does not identify any race being contested. Nor, for that matter, does the brief that tries to describe the Petition as a contest come close to doing so. So, in the first instance, it would be impossible to determine which review procedures even apply here.

Further, there are certain procedures that apply to election contests of the second, third, fourth, and fifth class, 25 P.S. §§ 3456-3474, and these Petitioners have failed to satisfy those as well. As one example, an election contest petition must be filed within 20 days of the election. *Id.* § 3456. An indispensable component of that petition is that a requisite number (a number that depends on the class of contest being filed) of registered electors verified the petition with an affidavit stating that they

believe the “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.* § 3457.

Here, the Petition filed on May 7 did not include a single affidavit that complied with § 3457. Therefore, by the time the deadline to file an election contest for the 2024 primary passed (May 13), no statutorily compliant petition had been filed.

The verifications submitted on May 15 do not change that fact.

First, the verifications, which are a statutorily required part of the petition, were not submitted by the statutory deadline. By failing to submit the necessary verifications by the statutory deadline, the Petition failed to comply with the procedures needed to invoke the jurisdiction of the court. *Rinaldi*, 941 A.2d at 78. Petitions can be amended to include additional allegations of illegal conduct, *id.* § 3456, but in this case there was not a properly filed petition to amend.

Second, the Petition’s affiants must swear, under oath, that “according to the best of their knowledge and belief, the primary or election was illegal and the return thereof not correct.” 25 P.S. § 3457.

That important requirement guards against frivolous election contests. The untimely verifications filed in this case do not include these necessary attestations under oath. Where an Election Code petition is “not verified as required by the Act of Assembly,” then the court lacks jurisdiction to hear it. *Giacobello v. Bd. of Elections of Borough of Mount Union, Huntingdon Cnty.*, 322 A.2d 429, 430 (Pa. Cmwlth. 1974).

Even treated as an election contest, the Petition here does not satisfy the exacting standard under § 3456 or § 3457. Short of allegations “that any voter acted illegally or that his vote was not cast according to his will,” *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), a challenge to a decision of the election board cannot support an election contest. An election contest requires proof of “fraud, coercion, intimidation or other unlawful conduct as to make the election a mere travesty tending to defeat the will of the voters.” *Election of Tax Collector of W. Bethlehem Twp.*, 41 Pa. D. & C. 3d 37, 40-41 (Pa. Com. Pl. 1986). Petitioners make no such showing here.

CONCLUSION

For all the reasons set forth above, this Court must dismiss the Petition filed in this case without any further delay. Not only is doing so required under the Election Code, but it is necessary for Centre County to join every other county in the Commonwealth and certify the 2024 primary results and for the Secretary to perform his duty and finally certify the 2024 primary.

May 20, 2024

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/s/ Jacob B. Boyer

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Exhibit B

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion
was served on May 20, 2024, via first class U.S. Mail and email on the
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