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.	:	

TYPE OF CASE:
Civil Action

TYPE OF PLEADING:
Appellee's Omnibus Brief and Answer in Response to Appeal and in Support of Motion to Quash as Untimely

FILED ON BEHALF OF:
Centre County Board of Elections

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APPELLEE'S OMNIBUS BRIEF AND ANSWER IN RESPONSE TO APPEAL AND IN SUPPORT OF MOTION TO QUASH AS UNTIMELY

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TABLE OF CONTENTS

Appellee Centre County Board of Elections (the "Board"), by and through its attorneys, Babst, Calland, Clements, and Zomnir, P.C., submits the following Post-Hearing Brief in Opposition to Appeal and in Support of Motion to Quash Appeal as Untimely with respect to the "Appeal from the April 23, 2024 Primary Election as May Be Confirmed by the Centre County Elections on May 7, 2024" ("Appeal") filed by Appellant Michelle M. Schellberg ("Schellberg") and eighteen Centre County registered voters (collectively, "Appellants") on May 7, 2024.

I. INTRODUCTION

Appellants challenge the Board's April 25, 2024 decision to accept 95 mail-in or absentee ballots ("Ballots") during its canvassing of votes for the April 23, 2024 General Primary Election (the "Primary"). (Appeal.) They allege that the Board's decision violated the outer-envelope date requirement provided in 25 P.S. § 3146.6(a). One week after filing their Appeal, Appellants asserted that the Appeal is an election contest under 25 P.S. § 3456—but if so, there are a litany of deficiencies that bar their Appeal, and Appellants are time-barred from curing those deficiencies.

Further, as the Board has contended from the outset, Appellants appear not to be contesting a specific race (*i.e.*, an election contest) but rather the Board's canvassing and counting of the Ballots. And so, their Appeal is more accurately characterized as an appeal from the Board's "decision . . . regarding the computation

or canvassing of the returns of [the] [P]rimary." 25 P.S. § 3157(a). Properly characterized, the Appeal, brought pursuant to § 3157(a), is untimely and, as with any election contest, jurisdictionally barred.

II. FACTUAL AND PROCEDURAL BACKGROUND

In April 2024, in connection with the April 23, 2024 General Primary Election, the Board's staff canvassed and flagged 95 Ballots for further review because, as to 93 of them, although dated pursuant to 25 P.S. § 3146.6(a), 57 were missing the last two digits of the year ("24"), 23 reflected the wrong date, and 13 were missing either the day or the month of the date. (Appeal ¶ 10; *id.*, Ex. 1.) As to the other two of the 95, the Board flagged them but ultimately concluded that those two "[s]hould have been counted" and were inadvertently flagged. (Appeal, Ex. 1; *see* Motion to Quash as Untimely ("Mot.") ¶ 3.)

At an April 25, 2024 public meeting at which it canvassed ballots, the Board voted unanimously to accept the 95 Ballots, and its decision was memorialized in the meeting's minutes. (Appeal ¶¶ 3–4; Board of Elections Minutes of 4/25/24 public meeting ("4/25/24 Minutes"), *see* Mot., Ex. A at VII(A)(4).) Appellants did not object to the Board's decision (Appeal *passim*; 4/25/24 Minutes), but at a subsequent Board meeting held on April 30, 2024, Appellant Schellberg and Appellants' counsel, Louis T. Glantz, Esquire ("Attorney Glantz"), appeared and offered public comments. (Appeal ¶ 11 & Ex. 2; Board of Elections Minutes of

4/30/24 public meeting ("4/30/24 Minutes"), *see* Mot., Ex. B at III.)

Attorney Glantz, for his comments, "advised [the Board] in person" of Appellants' present contention that the Board should not have accepted the Ballots due to date-related deficiencies on the outer return envelopes. (Appeal ¶¶ 10–11.) Attorney Glantz also submitted a one-page, memorandum-styled document to the Board. (Appeal ¶ 11 & Ex. 2.) In that submission, Glantz concluded that "[a]bsentee ballots which are undated, incorrectly dated, or unsigned, are invalid under Pennsylvania law which has been affirmed by the Pennsylvania Supreme Court and the Federal Third Circuit." (Appeal, Ex. 2.)

Also at the April 30, 2024 meeting, the Chair of the Board announced the unofficial results for the General Primary Election, and the Board voted unanimously to pre-certify the unofficial results to the Department of State, which results included the 95 Ballots. (4/30/24 Minutes at VII(A)(C).) Appellants did not object to pre-certification. (*See* Appeal *passim*; 4/30/24 Minutes.) Nor did Appellants file a petition for recount or recanvass. (*See* Appeal *passim*; 4/30/24 Minutes.)

One week later, on May 7, 2024, the Board was scheduled to certify the results of the April 23, 2024 General Primary Election. (Board of Elections Agenda of 5/7/24 public meeting, *see* Mot. at VII(A).) But Appellants filed their Appeal that same day, at 2 p.m. before the Board's meeting, seeking an order directing that: (1) that the "2024 election results not be certified"; and (2) that, in "all future

elections[,] [the Board] [] reject all mail-in ballots not in compliance with Pennsylvania law specifically 3156 P.S. §3146(a) [*sic*] . . . ." (Appeal at 3 (Wherefore Clause).) Out of an abundance of caution, the Board then temporarily postponed certifying the General Primary Election results, although the Board maintains that postponement is unnecessary given the jurisdictional deficiencies in the Appeal and the lack of merit therein.

One day after Appellants filed their Appeal, this Court scheduled a May 16, 2024 hearing. (Docket; 5/8/24 Order Scheduling Hr'g.)

Meanwhile, because the Appeal challenged the Board's canvassing and computation of the Ballots, the Board filed—on May 13, 2024—a Motion to Quash Appeal as Untimely because any such challenge needed to be asserted in an appeal before this Court no later than two days after the Board decided to canvass and accept the Ballots. (Docket; Mot. to Quash Appeal as Untimely ("Motion to Quash").) The Board also requested that the Court either cancel the May 16, 2024 hearing given the untimeliness of the Appeal or convert it to oral argument on the Board's Motion to Quash. (*Id.*) Appellants did not respond to the Board's Motion to Quash but the next day served a Subpoena to Attend and Testify upon the Board's Director. (May 14, 2024 Subpoena.)

On May 14, 2024, the Court issued an Order denying the Board's request that the May 16, 2024 hearing be cancelled or converted. (Docket; May 14, 2024 Order

¶ 1.) The same Order directed a hearing on the Board's Motion to Quash to be held the same day as the hearing on the Appeal. (*Id.* ¶¶ 2–3.)

The morning of the May 16, 2014 hearing, Appellants filed a "Brief in Support of Petition," asserting that their Appeal is an election-contest petition submitted pursuant to 25 P.S. § 3456 and that the Appeal "seek[s] to stop the certification of 95 mail-in votes cast in the April 23, 2024, primary election . . . ." (Docket; Br. in Supp. of Pet. at 1.) Appellants' Brief stated that their counsel, Louis T. Glantz, Esquire, had "made public comments" at the Board's April 25, 2024 meeting and provided his one-page submission. (*Id.* at 4.) The Brief went on to assert that Attorney Glantz "inform[ed] [the Board] of the legal requirements that ballots contained within incorrectly- and incompletely-dated envelopes should not be counted, specifically referencing the 95 ballots at issue in this case." (*Id.*) Appellants then asserted that, "[d]espite the public comment," the "County Commissioner[s] still made a motion to pre-certify the unofficial results for the April 2024 primary, including the 95 ballots at issue in this case." (*Id.* at 5.) As a point of clarification, Attorney Glantz was not present at the April 25, 2024 meeting of the Board, but he *was* present and made public comments at the subsequent, April 30, 2024 meeting of the Board.

Also, just before the hearing on May 16, 2024, *i.e.*, twenty-three days after the Primary, Appellants filed a Praecipe to Attach requesting that the Centre County

Prothonotary attach verifications ("Verifications")—signed by eight Appellants (as "petitioners")—to the Appeal. (Praecipe to Attach at 4–11.)

At the May 16, 2024 hearing before this Court, the parties offered oral argument, but no witnesses were called. Appellants' counsel argued, among other things, that their Appeal was a timely petition asserting an election contest, as was alleged in their pre-hearing Brief. Although the word "object" does not appear once in their pre-hearing Brief nor in the one-page submission provided to the Board at the April 30, 2024 meeting, Appellants' counsel asserted that Appellants timely objected to the Board's canvassing and counting of the 95 Ballots. The Board disagreed and asserted its counterarguments, also noting the untimeliness of Appellants' attempt to appeal the Board's April 25, 2024 decision to canvass and count the Ballots. Upon Appellants' request, the Court, without order, then requested that the Board produce the Ballots to Appellants' counsel and the Court. At the conclusion of the hearing, the Court directed the parties to submit post-hearing briefs by May 21, 2024.

In the interim, on May 20, 2024, and in light of Appellants' recasting of their Appeal as an election contest, the Board filed an Expedited Motion to Prevent Disclosure of Ballot Outer Envelopes and Supplement to Motion to Quash Appeal Recast as "Election Contest." (Docket.) The Board filed that submission to ensure that Appellants would not be able to obtain election-related discovery (the Ballots'

outer envelopes) to support a plainly deficient (and time-barred beyond curing) "election contest." It also supplemented the Motion to Quash by addressing Appellants' argument—not raised in their Appeal—that the Appeal is a "timely filed" petition "pursuant to 25 P.S. § 3456." (Br. in Supp. of Pet. at 1.)

Appellants responded to the Board's Motion by accusing undersigned counsel of reneging on a promise to produce the Ballots' outer envelopes. To clarify, and even ignoring the fact that undersigned counsel argued that the envelopes should not be produced, undersigned counsel and the Board were sandbagged by Appellants' last-minute recasting of what is clearly a § 3157 appeal as an election contest under § 3456. The Board was not aware of the deficiencies of the "election contest" argument at the hearing until it could further review the Election Code and applicable law and upon doing so, was even more concerned that the jurisdictional arguments had to be resolved before any further consideration of evidence of the merits. If the Court denies the Board's Expedited Motion to Prevent Disclosure of Ballot Outer Envelopes, the Board will comply with all due haste.

III. THIS ACTION IS UNTIMELY AND JURISDICTIONALLY DEFICIENT REGARDLESS OF HOW APPELLANTS STYLE IT

While the Board maintains, as it did in its Motion to Quash, that the Appeal is one filed pursuant to 25 P.S. § 3157, this Post-Hearing Brief first addresses the Appeal as Appellants see it: an election-contest petition that does not allege an election contest.

A. Appellants Failed to Assert a *Prima Facie* Election Contest, They Failed to Comply with the Necessary Procedural Prerequisites to Lodging an Election-Contest Petition, and They are Time-Barred from Curing those Substantive and Procedural Defects.

The Appeal is substantively, procedurally, and jurisdictionally deficient, and Appellants are now time-barred from curing the Appeal's deficiencies.

1. Applicable Law

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).

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

a) Substantive Requirements

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

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.")

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. And 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).

b) Procedural Requirements

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

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)). 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.

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").

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,"[1] *In re May 15, 2001 Mun. Primary*, 785 A.2d 146, 150–51 (Pa. Commw. Ct. 2001). Further, 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)).

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).

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*

[1] 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"). Notably, there were primaries for both parties in this Primary.

Election Contest, 11 Pa. D. & C.3d 381, 390 (Phila. Cnty. Ct. Com. Pl. 1979) (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 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 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").

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]."). 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).

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

The Appeal—recast as an election contest—does not satisfy the above substantive and procedural requirements. The Appeal does not specify which type of election or race it is challenging, it is not supported by a sufficient number of qualified (as described hereafter) voters and voter affidavits, and Appellants failed to post a bond as required by statute.

As a preliminary matter, *there is absolutely no possibility that Appellants have properly brought an election contest relating to the Primary in this Court.* Registered electors can assert either a Class II, III, IV, or V election contest under 25 P.S. § 3456, but only Class IV and V contests can be brought in this Court.[2]

[2] The Commonwealth Court has exclusive jurisdiction over Class II contests, *see* 42 Pa. C.S.A. § 764(1), and a Class III contest must be "presented to the Governor of the Commonwealth" and heard by "the three president judges residing nearest to the courthouse of the county composing the district, or, if more than one county

Further, in a Class IV contest, . . . 'the petitioners complaining of nomination or the election, *and the person returned as nominated or elected*, shall be the parties thereto.'" *In re Primary Election of May 15, 2018*, No. 1009 C.D. 2018, 2018 WL 3738081, at *7 (Pa. Commw. Ct. Aug. 7, 2018) (footnote omitted) (emphasis added) (quoting 25 P.S. § 4203). There is no "person returned as nominated" who is a party to this action. (*See* Appeal.) The only possibility, therefore, is that Appellants believe they have brought a Class V contest—and yet, Class V contests relate to all other county-wide and local races, a category not implicated in this Primary. *See* 25 P.S. § 3291. For this reason alone, Appellants simply have no possible basis for pursuing their purported election contest in this Court. Add this reason to the additional reasons below, and it becomes abundantly clear that the Appeal is wholly deficient and at this point frivolous.

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

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

Indeed, the Appeal does not even attempt to identify which "class[] of

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composes the judicial district, then those nearest the courthouse of the most populous county of the district," 25 P.S. § 3377.

nominations at primaries" Appellants purport to "contest[] . . . ."[3] 25 P.S. § 3291. 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). 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.

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)[4], 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. Appellants similarly do not "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." *See In re Warren Borough's Election*, 118 A. at 256; *see also Pfuhl*, 253 A.2d at 274.

In fact, Appellants do not even refer to any "candidate" (or specify which

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

[4] Appellants' counsel stated in oral argument that he did not believe the 95 votes would affect the outcome of any race.

party's election is challenged)[5], further demonstrating that they woefully failed to assert an election contest, and they even *concede* that the 95 Ballots have no effect on the Primary's results, whether they are counted are not. Failure to allege these circumstances is an independent reason for which the Appeal does not state *prima facie* election contest.

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).

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

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. As discussed above, *at a very minimum*, at least 20 registered electors of the party connected to the "race" challenged must file the petition for an

[5] For an election challenge of a primary election, the challenger must challenge one election or the other based upon his or her party affiliation.

election contest under 25 P.S. § 3456,[6] and no fewer than five of those petitioners must also provide 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; *Rinaldi*, 941 A.2d at 78.

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

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. While, as

[6] 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.

noted above, Appellants submitted Verifications, they did so on May 16, 2024, as part of their Praecipe 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.

Even so, the Verifications attached to the Praecipe 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). 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.

(Praecipe to Attach at 4–11.)

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. Therefore, the Appeal is 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.

And yet another fatal flaw is the fact that neither the Appeal, its exhibits, Appellants' "Brief in Support of Petition," the Praecipe to Attach, nor the Verifications attached to the Praecipe to Attach aver that any of the Appellants actually voted in the 2024 Primary[7] 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 (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 contest as jurisdictionally deficient because, although over 20 registered electors presented the contest, the petitioners were "nineteen registered

[7] The Board has confirmed that three of the Appellants did not vote in the 2024 Primary.

electors of the Republican Party and seven registered electors of the Democratic Party").

c) Appellants failed to file a bond.

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). 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.").

3. Appellants Are Time-Barred from Attempting to Cure their Patently Deficient "Election Contest"

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

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[8] While not necessary to demonstrate that the Appeal should be dismissed, the Board notes that Appellants impermissibly filed the Praecipe to Attach the Verifications *after* the 20-day period expired without first seeking leave to amend the Appeal. Those Verifications are therefore untimely and were filed in violation of a jurisdictional bar.

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 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 (citing 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).

For all the above reasons, Appellants attempt to pursue a petition asserting 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.

B. Any Appeal Under 25 P.S. § 3157(a) Is Untimely

As the Board noted in its Motion to Quash Appeal as Untimely, Appellants challenge to the Board's "decision . . . regarding the computation or canvassing of the returns of [the] [P]rimary," 25 P.S. § 3157(a), is in the Board's view an appeal brought pursuant to 25 P.S. § 3157(a). The Appeal is therefore subject to the strict time limitations provided in the statute, in light of which the Appeal is clearly and irredeemably untimely.

1. Applicable Law

Section 1407(a) of the Pennsylvania Election Code, 25 P.S. § 3157(a), which

reads, in relevant part:

> Any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election . . . *may appeal therefrom within two days after such order or decision shall have been made, whether then reduced to writing or not*, to the [court of common pleas of the proper county], setting forth why he feels that an injustice has been done, and praying for such order as will give him relief.

25 P.S. § 3157(a) (emphasis added).[9]

The two-day deadline for filing an appeal under 25 P.S. § 3157(a) is a jurisdictional requirement. *See In re Contest of Nov. 7, 2023 Election of Towamencin Twp.*, 2024 WL 1515769, at *8 n.9 ("Because we conclude the [p]etition was not timely filed and there was no jurisdiction, we do not address mootness or the underlying merits of [a]ppellants' [p]etition."); *id.* at *8 (first citing *In re James*, 944 A.2d 69, 73 (Pa. 2008); then citing *Pa. Dental Ass'n v. Com. Ins. Dep't*, 516 A.2d 647, 654 (Pa. 1986) ("Periods of time set for filing appeals are jurisdictional."); then citing *In re Granting Malt Beverage Licenses in Greene Twp., Franklin Cnty.*, 1 A.2d 670, 671 (Pa. 1938) ("The jurisdiction of the courts in election contests is not of common law origin but is founded entirely upon statute,

[9] Not implicated in this Appeal is another set of provisions in 25 P.S. § 3157(a) that permit appeals of orders or decisions of county board of elections "regarding any recount or recanvass thereof under [25 P.S. §§ 1701–03]" and further provides that, "if a recount or recanvass is made under 1404(g), the appeal must be made to the Commonwealth Court." *Id.* Appellants did not seek (nor did the Board conduct) a recount or recanvass in connection with the Ballots.

and therefore it cannot be extended beyond the limits defined by Acts of Assembly."); and then citing *Appeal of Orsatti*, 598 A.2d at 1342 ("[T]he timeliness of an appeal goes to the jurisdiction of the Court and may not be extended absent fraud or a breakdown in the court's operation due to a default of its officers.")).

Failure to comply with the two-day filing requirement therefore deprives a court of jurisdiction to hear an appeal under 25 P.S. § 3157(a).

2. Appellants failed to file their Appeal Within Two Days of the Board's Decision to Accept the Ballots

The Board publicly announced its decision to accept the Ballots on April 25, 2024, and memorialized that decision in writing. (*See* 4/25/24 Minutes.) Appellants "had two days from . . . the date the Board publicly announced its decision[] [to accept the 95 Ballots] to file their [Appeal]," *i.e.*, until April 27, 2024, at the latest. *See In re Contest of Nov. 7, 2023 Election of Towamencin Twp.*, 2024 WL 1515769, at *4; *see also id.* at *5-7. But Appellants did not file their Appeal until May 7, 2024, ten days too late (*see* Appeal), rendering it untimely as a matter of law and depriving the Court of jurisdiction to entertain it on the merits.

In re Contest of Nov. 7, 2023 Election of Towamencin Twp. is analogous. In that case, which involved a "close race for the office of Township Supervisor," the Montgomery County Board of Elections ("MC BOE") "issued a [November 22, 2023] public statement postponing its certification" in order "to canvass six mail-in and absentee ballots it had previously determined to be defective and void for lack

of a date or an incorrect date." *Id.* at *1–2. Twelve days later, on December 4, 2023, a group of individuals filed an appeal challenging the MC BOE's decision to canvass the ballots. *Id.* at *2. One of the candidates then intervened and moved to quash the appeal, arguing that it was untimely filed after the two-day period in 25 P.S. § 3157(a) had expired. *Id.*

The Court of Common Pleas held—and the Commonwealth Court agreed—that the appeal was untimely because it was not filed "within the two-day period" in 25 P.S. § 3157(a). *Id.* at *3. The Commonwealth Court held that the two-day period began to run when the MC BOE issued its November 22, 2023 public statement that it would "canvass all 349 disputed mail-in ballots it had received throughout the [c]ounty, including the 6 at issue in th[e] race . . . ." *Id.* at *4–5. The MC BOE's decision at the November 22, 2023 public meeting was a "decision of [the B]oard" for purposes of commencing the two-day appeal period under . . . 25 P.S. § 3157(a)." *Id.* at *5 (alteration in original). The Commonwealth Court further held that, even assuming the date of "actual recanvassing" started the two-day appeal period, the appellants still failed to file an appeal within two days of that date. *Id.*

The reasoning of *In re Contest of Nov. 7, 2023 Election of Towamencin Twp.* applies with equal force here. On April 25, 2024, the Board publicly announced its decision to accept and canvass the Ballots. Any appeal from the Board's decision was therefore due no later than April 27, 2024. Even assuming the Board's April

30, 2024 pre-certification somehow started the two-day period,[10] the Appeal would still be untimely, as it was not filed until one week later, on May 7, 2024. And *In re Contest of Nov. 7, 2023 Election of Towamencin Twp.* forecloses any argument by Appellants that the two-day period began to run at some later date. Moreover, although courts have at least considered the availability of *nunc pro tunc* relief as an exception to § 3157's two-day filing requirement, Appellants are not entitled to such relief, which "is more strictly applied in election cases." *See In re Contest of Nov. 7, 2023 Election of Towamencin Twp.*, 2024 WL 1515769, at *4. This is so because "Appellants knew or should have known about the Board's decision[] with which they disagree[] [ten days] before they filed the[ir] [Appeal]," *i.e.*, when the Board publicly announced its decision to canvass and accept the Ballots. *Id.* at *4. At a very minimum, Appellant Schellberg and Attorney Glantz had actual knowledge of the Board's decision to accept the Ballots no later than April 30, 2024,[11] when they appeared and made public comments before the Board. (Appeal ¶ 11; 4/30/24 Minutes.)

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[10] Appellants' counsel asserted that he publicly "objected" at the April 30, 2024 Board meeting, although that assertion is not reflected in the Board's meeting minutes or the one-page submission counsel provided to the Board at the meeting. Assuming *arguendo* that Appellants' counsel is correct, the Appeal still fails because it was not brought within two days of the April 30, 2024 Board meeting.

[11] Even if Appellants were to argue that April 30, 2024, was the date on which the two-day filing requirement began to run, their Appeal was due no later than Thursday, May 2, 2024, and their May 7, 2024, appeal would still be untimely.

In short, Appellants' Appeal, insofar as it is an application filed pursuant to 25 P.S. § 3157, is untimely, presenting a jurisdictional bar that mandates dismissal of the Appeal. *See In re May 15, 2001 Mun. Primary*, 785 A.2d at 151 (holding 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 Rinaldi*, 941 A.2d at 78; *In re Phila. Democratic Mayoralty Primary Election Contest*, 11 Pa. D. & C.3d at 387.

IV. APPELLANTS LACK THE STATUTORY AUTHORITY AND ALSO LACK STANDING TO PURSUE THEIR PROSPECTIVE RELIEF

Regardless of whether cast as an election contest under 25 P.S. § 3456 or an appeal from the Board's decision to accept the Ballots under 25 P.S. § 3157, the Election Code does not authorize parties to seek prospective relief as Appellants do here. *See* 25 P.S. §§ 3157, 3456.

But even so, Appellants lack standing to seek the prospective relief asserted in the Appeal. The principles of standing under Pennsylvania law, and in the election context specifically, are well-settled:

> Pennsylvania standing doctrine stems from the principle that judicial intervention is appropriate only where the underlying controversy is real and concrete, rather than abstract, and its touchstone is protect[ing] against improper plaintiffs. To support standing, a plaintiff's interest in the outcome of a given suit must be substantial, direct, and immediate. An interest is substantial when it surpasses the interest of all citizens in procuring obedience to the law; it is direct when the asserted violation shares a causal connection with the alleged harm; and it is immediate when the causal connection with the alleged harm is

neither remote nor speculative.

Ball v. Chapman, 289 A.3d 1, 18–19 (Pa. 2023) (alteration in original) (footnotes and internal quotation marks omitted). To demonstrate that they have standing, Appellants must show that their "concern in the outcome" of their Appeal "surpass[es] 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) (internal quotation marks omitted) (quoting *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016)).

In the context of this Appeal, 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. Their interest is the same "interest of all citizens in procuring obedience to the law." *See Bonner*, 298 A.3d at 162. Appellants also concede that the 95 Ballots did not in any way affect the results of the Primary, and so they cannot even argue that the Ballots diluted or somehow affected their own votes—and *even then*, they would lack standing. *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).

Appellants simply lack standing to seek prospective relief in their Appeal.

V. EVEN IF THE APPEAL DID NOT SUFFER FROM UNSAVABLE JURISDICTIONAL DEFICIENCIES, APPELLANTS' ARGUMENT THAT THE BOARD IMPERMISSIBLY COUNTED THE 95 BALLOTS IN QUESTION IS MERITLESS

Because the Appeal—however styled (or restyled)—presents myriad deficiencies and jurisdictional bars, any analysis of the 95 Ballots in question is unnecessary to the disposition of this action. Put differently, because of Appellants' failures, the Court lacks jurisdiction to even begin to determine whether each of the Ballots was properly counted (and the Board maintains they were). This is the very reason the Board filed the Expedited Motion to Prevent Disclosure of Ballot Outer Envelopes—that is, the Board respectfully submits that, lacking jurisdiction, the Court cannot direct the Board to produce the Ballots to Appellants, and Appellants are not entitled to discovery relating to their Appeal.

Nevertheless, as a general matter, Appellants' merits-based challenges to the Ballots are based on a misguided reading of the applicable case law. The statutory provisions relevant to Appellants' arguments are 25 P.S. §§ 3146.6(a) (absentee ballots) and 3150.16(a) (no-excuse mail-in ballots), both of which require that "[t]he elector . . . date" the ballot's outer envelope. *See id.* §§ 3146.6(a), 3150.16(a). The Board does not dispute—nor could it—that the outer-envelope date requirement is mandatory following *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023).[12] This narrow

[12] It is notable that, contrary to Appellants' apparent position (*see, e.g.*, Br. in Supp. of Pet at 4), when the Board canvassed and counted the 95 Ballots, the Third Circuit

proposition—that electors must date outer envelopes—is what Appellants hang their proverbial hat on—upon which their entire claim rests.

What Appellants overlook is the fact that, in *Ball*, the Pennsylvania Supreme Court left untouched the county boards of elections' authority to determine whether a ballot's outer envelope is correctly dated. Not addressed anywhere in Appellants' briefing (*see* Br. in Supp. of Pet. *passim*), the *Ball* court qualified its holding with the statement: "How county boards are to verify that the date an elector provides is, in truth, the day upon which he or she completed the declaration is a question that falls beyond our purview." *Ball*, 289 A.3d at 23. The court then stated—without any ambiguity—that "***county boards of elections retain authority to evaluate the ballots that they receive in future elections***," including (but not limited to) "those that fall within the date ranges derived from statutes indicating when it is possible to send out mail-in and absentee ballots," for "compliance with the Election Code." *See id.* at 23 (emphasis added).

Court of Appeals' decision in *Pennsylvania State Conf. of NAACP Branches v. Sec'y Commonwealth of Pennsylvania*, 97 F.4th 120 (3d Cir. 2024), was not final because the Third Circuit did not issue its Mandate until on May 8, 2024. *See* Mandate, *Pennsylvania State Conf. of NAACP Branches v. Sec'y Commonwealth of Pennsylvania*, No. 23-3166 (3d Cir. May 8, 2024), ECF No. 266; Fed. R. App. P. 41(b)–(c); *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97–98 (3d Cir. 1988) ("An appellate court's decision is not final until its mandate issues."); Fed. R. App. P. 41(c) advisory committee's note to 1998 amendment ("A court of appeals' judgment or order is not final until issuance of the mandate[.]").

Thus, the court in *Ball* did *not* decide for all purposes and for every county how each board of elections *must* determine whether a ballot is correctly dated. In fact, the court did the opposite and left that role to the county boards of elections alone. And this point demonstrates the problematic nature of this Appeal. The Board is tasked with flagging potentially misdated outer envelopes to determine whether they comply with the Election Code and with *Ball*. That is exactly what the Board did in April. To say that the Board, by its staff having flagged ballots' outer envelopes to ensure they comply with the Election Code, impermissibly counted them *merely because the staff flagged* them would open up every county board of elections' canvassing process to attack and threaten to disenfranchise voters even though the boards' ultimate decisions as to whether to count the ballots are perfectly aligned with the requirements of the Election Code under the case law.

As Justice Brobson noted in a concurring opinion in *Ball*, "a ballot that contains a facially valid date remains subject to scrutiny under the canvassing procedures set forth in Section 1308 of the Code, 25 P.S. § 3146.8." *Id.* at 36 (Brobson, J., concurring). There is no bright-line rule for determining the facial validity of a date on the outer envelope enclosing a registered elector's ballot, and the Board—like all other county boards of elections in the Commonwealth—must determine whether, despite potential irregularities—the date on the envelope complies with the Election Code.

VI. CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court dismiss the Appeal with prejudice, whether based on a grant of the Board's Motion to Quash Appeal as Untimely or its Supplement to Motion to Quash Appeal, or simply based on the fact that Appellants have failed to establish entitlement to relief.

Respectfully submitted,

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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*
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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 Appellee's Omnibus Brief and Answer in Response to Appeal and in Support of Motion to Quash as Untimely was served on the 21st day of May 2024, via First Class U.S. Mail and E-Mail upon the following:

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

Date: May 21, 2024

cc: Centre County