

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY,
PENNSYLVANIA

DSCC,
BOB CASEY FOR SENATE, INC.

CIVIL ACTION

Petitioners,

No. 24-cv-7895

Election Appeal

v.

LACKAWANNA COUNTY BOARD OF
ELECTIONS,

Respondent.

MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANTS'
MOTION TO DISMISS

Filed on behalf of:

**Proposed Intervenor Respondents Senator-elect David McCormick, the Republican
National Committee, the National Republican Senatorial Committee, and
the Republican Party of Pennsylvania**

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LACKAWANNA COUNTY

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

Proposed Intervenor-Respondents Senator-elect David McCormick, the Republican National Committee, the National Republican Senatorial Committee, and the Republican Party of Pennsylvania (collectively, “Intervenor-Respondents”), by and through their undersigned counsel, submit this Brief in Support of their Motion to Dismiss¹ Petitioners DSCC and Bob Casey for Senate, Inc.’s Petition for Review in the Nature of a Statutory Appeal (the “Petition”).

I. INTRODUCTION

This Petition represents the latest effort to achieve in the courts what could not be achieved in the polling booth. Petitioners appeal from the decision of the Lackawanna County

¹ Intervenor-Respondents have styled their response to the Petition as a Motion to Dismiss based on the Pennsylvania Commonwealth Court’s decision in *Schimes v. City of Scranton Non-Uniform Pension Board*, No. 1526 C.D. 2018, 2019 WL 3477059, at *4 (Pa. Commw. Ct. Aug. 1, 2019) (“the Pennsylvania Rules of Civil Procedure are not applicable to statutory appeals; thus, preliminary objections, the grounds for which are set forth in Pa. R.C.P. 1028, cannot be used as a vehicle for challenging such an appeal.”) (citing *Appeal of Borough of Churchill*, 575 A.2d 550, 553 (Pa. 1990)); see also *Barros v. City of Allentown*, No. 1592 C.D. 2011, 2012 WL 8685524, at *3 n. 4 (Pa. Commw. Ct. July 5, 2012) (treating a preliminary objection in a statutory appeal as if it were a motion to dismiss).

Board of Elections (the “Board”) to decline to count 110 provisional ballots cast in the 2024 General Election by individuals who (1) failed to sign either the affidavit or the provisional ballot envelope, or (2) failed to enclose the provisional ballot in a secrecy envelope.

The Board’s decision complies with unambiguous statutory law. The Election Code provides that “[p]rior to voting the provisional ballot, the elector shall be required to sign an affidavit.” 25 P.S. § 3050(a.4)(2). That affidavit affirms, among other things, that the individual resided in the election district “at the time that [he or she] registered,” and that the provisional ballot “is the only ballot that [he or she] cast in this election.” *Id.* The Election Code also states that the individual “shall place his signature on the front of the provisional ballot envelope.” *Id.* § 3050(a.4)(3). Finally, the Election Code requires individuals casting provisional ballots to place their ballots within a secrecy envelope. *Id.* This command, too, is phrased in mandatory terms: “After the provisional ballot has been cast, the individual *shall* place it in a secrecy envelope.” *Id.* (emphasis added).

The Election Code, moreover, is unambiguous about the consequences of failure to comply with either requirement. It expressly states that “[a] provisional ballot *shall not be counted* if . . . either the provisional ballot envelope . . . or the affidavit . . . is not signed by the individual.” 25 P.S. § 3050(a.4)(5)(ii)(A) (emphasis added). It further mandates, in plain terms, that “[a] provisional ballot *shall not be counted* if . . . a provisional ballot envelope does not contain a secrecy envelope.” *Id.* § 3050(a.4)(5)(ii)(C).

Petitioners cannot, and do not, dispute that the plain text of the Election Code requires that the Board reject the 110 provisional ballots. Instead, Petitioners argue that federal constitutional and statutory law somehow require the Board to ignore the Election Code and count noncompliant provisional ballots. *See* Petition ¶¶ 15–23. Petitioners ask the Court to do

so on the basis of nothing more than speculation that the individuals in question must have been misled by poll worker errors, and on the theory that the federal Help Americans Vote Act (“HAVA”) overrides all state rules on when a ballot must be counted.

Petitioners are wrong on the merits, and even if they were not, it is far too late to make novel changes to the rules that govern a past election. This Court should dismiss the Petition.

II. FACTUAL BACKGROUND

On November 14, 2024, the Board met to decide whether to count certain categories of provisional ballots cast for the 2024 General Election. At that meeting, the Board decided not to count 110 provisional ballots for failure to comply with the Election Code. In particular, the Board declined to count 97 provisional ballots because the individual did not provide one of the two required signatures on the provisional ballot envelope or affidavit. The Board declined to count another 13 provisional ballots for failure to place them in a secrecy envelope.

Petitioners filed this action on November 18, 2024, seeking to overturn the Board’s decision on federal constitutional and statutory grounds.

III. LEGAL STANDARD

In reviewing the decision of a board of elections, “[i]t is not the function of [the trial] court to substitute its judgment for that of the board’s,” and the trial court is “bound to uphold the decision of the board unless it is in violation of the law.” *Lower Saucon Twp. v. Election Bd. of Northampton Cty.*, 27 Pa. D. & C.3d 387, 393 (Northampton C.P. 1983).

IV. ARGUMENT

I. PETITIONERS’ CLAIMS FAIL ON THE MERITS.

A. The Election Code requires county boards of elections not to count provisional ballots that lack required signatures or a secrecy envelope.

The Board did exactly what the Election Code requires. Pennsylvania law requires that

individuals casting provisional ballots sign their names twice and enclose their ballots in secrecy envelopes. Those requirements are mandatory, and failure to comply meant that the provisional ballots in question could not lawfully be counted.

The Election Code is clear. As relevant here, an individual seeking to cast a provisional ballot that will be counted must do at least three things. First, “[p]rior to voting the provisional ballot,” that individual “shall be required to sign an affidavit,” affirming several important personal details. 25 P.S. § 3050(a.4)(2). Second, that individual “shall place his signature on the front of the provisional ballot envelope.” *Id.* § 3050(a.4)(3). And, third, the individual “shall place [the provisional ballot] in a secrecy envelope,” which is then placed into the provisional ballot envelope. *Id.*

Because “shall” is mandatory, that language alone confirms that the failure to comply with those commands means that the provisional ballot must not be counted. *See generally In re: Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1087 (Pa. 2020) (Wecht, J., casting the deciding vote) (“The only practical and principled alternative is to read ‘shall’ as mandatory.”); *Ball v. Chapman*, 289 A.3d 1 (Pa. 2022) (adopting this view). But if that were not enough, the Election Code makes the consequences of noncompliance with either requirement explicit. “A provisional ballot shall not be counted if . . . either the provisional ballot envelope . . . or the affidavit . . . is not signed by the individual.” 25 P.S. § 3050(a.4)(5)(ii)(A). Similarly, “[a] provisional ballot shall not be counted if . . . a provisional ballot envelope does not contain a secrecy envelope.” *Id.* § 3050(a.4)(5)(ii)(C).

Indeed, just a few months ago, the Pennsylvania Supreme Court reached this exact conclusion for the envelope-signing requirement for provisional ballots. *See In re: Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900 (Pa. 2024). That court held that

“the ‘shall place his signature’ language in paragraph 3050(a.4)(3) is equally clear and unambiguous” as the date requirement held to be mandatory in *Ball*. *Id.* at 907. And the Pennsylvania Supreme Court has similarly held that the Election Code’s secrecy-envelope requirement for mail ballots “is mandatory and the mail-in elector’s failure to comply ... renders the ballot invalid.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020).

In short, the Election Code unambiguously required the Board to do exactly as it did: reject provisional ballots that did not comply with the signature or secrecy-envelope requirements.

B. Petitioners’ Due Process Clause claim is meritless.

Petitioners do not meaningfully dispute the meaning of the Election Code. Nonetheless, they argue that this Court must disregard the Election Code in this case on account of the Due Process Clause of the federal Constitution. At the threshold, Petitioners have waived their constitutional challenge because they failed to give notice of it to the Attorney General. *See* Pa. R. Civ. P. 235, 521; *In Re: Nomination Petition of Joseph J. Vodvarka*, No. 85 M.D. 2024 (Pa. Commw. Ct. March 8, 2024) (citing *Kepple v. Fairman Drilling Company*, 615 A.2d 1298, 1303 (Pa. 1992)).

Their constitutional challenge, moreover, fails on the merits. The Due Process Clause protects against “state actions that induce voters to miscast their votes,” not against “[g]arden variety election irregularities.” *Northeast Ohio Coalition for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012).

Nothing in this case comes close to rising to the level of a constitutional violation. In Petitioners’ view, this Court should assume that any individual who cast a noncompliant provisional ballot “were victims of poll worker error,” such that they were not at fault for their

ballots' noncompliance. Petition ¶ 20. According to Petitioners' argument, a ballot's failure to comply with the Election Code should always be taken by courts as "strong[] indicat[ion] that the poll worker did not provide the voter with a secrecy envelope." *Id.* ¶ 19. Similarly, Petitioners would have this Court believe that failure to sign the provisional ballot is "definitionally poll worker error." *Id.* ¶ 18.

There is no support for Petitioners' novel argument, which would seek to turn every voter error into a constitutional violation. In reality, Petitioners are merely resurrecting the failed argument, already rejected in *In re: Canvass of Provisional Ballots in 2024 Primary Election*, that so long as "the voter's electoral intent is clear and there is no suggestion of fraud," the ballot must be accepted. 322 A.3d at 907–08. That argument did not carry the day, because "where the General Assembly has attached specific consequences to particular actions or omissions, Pennsylvania courts may not mitigate the legislatively prescribed outcome through recourse to equity." *Id.* at 908 (internal quotation marks omitted). And here, the General Assembly has been clear—crystal-clear. If the individual failed to include a secrecy envelope, or failed to apply his signature, his provisional ballot "shall not be counted." 25 P.S. § 3050(a.4). In those absolute words is no invitation to take part in Petitioners' proposed blame game.

Petitioners' argument is even less convincing given the Secretary of State's clear guidance on how to cast a provisional ballot. *See* Department of State, *Pennsylvania Provisional Voting Guidance*, <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-provisionalballots-guidance-v2.2.pdf> ("Guidance"). That Guidance expressly tells voters that he or she "must sign both the Voter Affidavit for Provisional Ballot and the front of the provisional ballot envelope." Guidance 3 (emphases in original). And that Guidance also directs voters that "they must seal their ballot in the secrecy

envelope and then place the secrecy envelope in the provisional ballot envelope.” *Id.* Due process simply requires nothing more. *Cf. Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 389 (Pa. 2020) (Wecht, J., concurring) (“So long as the Secretary and the county boards of elections provide electors with adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere—pre-deprivation notice is unnecessary.”).

Indeed, far from following the federal Constitution, acceding to Petitioners’ demands would *violate* the Constitution. Under the Equal Protection Clause of the U.S. Constitution, a “State may not, by . . . arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). Accordingly, at least where a “statewide” rule governs, such as in a statewide election, there must be “adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them.” *Id.* at 110. And counties cannot “use[] varying standards to determine what [i]s a legal vote.” *Id.* at 107.

Yet that is precisely what will happen if this Court reverses the Board’s decision here. Other county boards, like the Board here, have correctly decided to follow the law, which means that an order from this Court reversing the Board’s decision—which can bind only the Board and not any other county board in the Commonwealth—will result in “varying standards to determine what [i]s a legal vote” from “county to county” and will be improper. *See id.* at 106-07.

Granting Petitioners’ request will also violate the Pennsylvania Constitution, which decrees that “[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State,” Pa. Const. art. VII, § 6, the Free and Equal Elections Clause, which requires voting laws to “treat[] all voters alike” in “the same circumstances,” *Winston v. Moore*, 91 A. 520, 523 (Pa.

1914), and the Election Code, which requires that elections be “uniformly conducted” throughout the Commonwealth. 25 Pa. Stat. § 2642(g). Once again, other counties will follow the law and not count provisional ballots that lack a required voter signature or a secrecy envelope, which means reversing just the Board’s decision will result in unlawful unequal treatment of Pennsylvania voters.

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B. Petitioners' HAVA claim is meritless.

Petitioners also claim that the Board's compliance with the Election Code violates HAVA. *See* Petition ¶¶ 22-23. Once again, Petitioners are wrong. HAVA provides the circumstances in which an individual "shall be permitted to cast a provisional ballot." 52 U.S.C. § 21082. So, Petitioners' argument goes, under HAVA, the Board was required to count provisional ballots which HAVA permitted individuals to cast.

Petitioners conflate the right to *cast* a provisional ballot with the right to have it *counted*. While HAVA requires states to allow individuals to *cast* provisional ballots in some instances such ballots must be counted only if "the individual is eligible under State law to vote." *Id.*; *see also Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 571 (6th Cir. 2004) (explaining such ballots are only counted if "the person was indeed entitled to vote at that time and place" (cleaned up)). Here, the Election Code permits provisional ballots to be counted only if it is (1) signed twice, on the affidavit and on the ballot envelope, and (2) enclosed in a secrecy envelope. "[T]he ultimate legality of the vote cast provisionally is generally a matter of state law," *Sandusky*, 387 F.3d at 576, and enforcing the Election Code is entirely consistent with HAVA. Tellingly, Petitioners cite no cases suggesting HAVA somehow preempts all election integrity measures that facilitate provisional voting. None exist. For this reason as well, the Court should dismiss the Petition.

II. THE PURCELL PRINCIPLE FORECLOSES PETITIONERS' REQUEST.

Even if the Court were to credit Petitioners' novel theories for why the Election Code's plain language does not control—whether because of some constitutional theory or because of some federal law—those cannot carry the day at this late stage. The election is over, and now is not the time to attempt to rewind the election based on some newly discovered interaction between federal law and the Election Code.

The Pennsylvania Supreme Court was clear: Courts must “neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election.” *New Pa. Project Education Fund v. Schmidt*, No. 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024). By that statement, that court adopted for the Commonwealth the *Purcell* principle, which is a “common sense” rule against “disrupt[ing] imminent elections” with last-minute changes to the election laws. *Id.* (citation omitted). That principle recognizes that “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy,” and that such confidence is undermined when late-breaking alterations to the rules governing the election are sprung on voters. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

The *Purcell* principle “applies with much more force on the back end of elections.” *Trump v. Wis. Elections Comm’n*, 983 F.3d 919, 925 (7th Cir. 2020). “Last-minute changes to longstanding election rules . . . invit[e] confusion and chaos and erod[e] public confidence in electoral outcomes.” *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring). It almost goes without saying that a change to election rules after the election would cause even more confusion to voters.

It is now weeks after the election. Petitioners have placed this Court in the position of having to decide whether to override the Election Code with a novel theory of federal constitutional and statutory law. The Pennsylvania Supreme Court has already indicated that the only appropriate decision is not to “countenance” such a late-breaking attempt to change the results of an election. Thus, even aside from the merits, this Court should dismiss the Petition and bring the election to an end for all Pennsylvania voters.

V. CONCLUSION

The Court should dismiss the Petition for Review in the Nature of a Statutory Appeal.

Dated: November 20, 2024

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

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

Dated: November 20, 2024

Counsel of Record



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LACKAWANNA COUNTY BOARD OF
ELECTIONS

ELECTION APPEAL

Respondent.

CERTIFICATE OF SERVICE


I, Maxmilian Peters, Esquire, Attorney for Proposed Intervenor, hereby certify that I served a true and correct copy of Intervenor's Memorandum In Support Of Motion To Dismiss Petition For Review In The Nature Of A Statutory Appeal, on the following parties, by Electronic Mail, on the 20th day of November, 2024, as follows:

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