

IN THE COURT OF COMMON PLEAS OF BERKS COUNTY,
PENNSYLVANIA

DSCC, BOB CASEY FOR SENATE, INC.

CIVIL DIVISION

Petitioner(s),

No. 24-17101

v.

***PETITION FOR LEAVE
TO INTERVENE***

BERKS COUNTY BOARD OF
ELECTIONS,

Respondent.

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**

Counsel of Record for this Party

Joel L. Frank

PA Attorney ID No. 46601

Daniel L. Sulvetta

PA Attorney ID No. 328010

Curtis L. Sebastian, II

PA Attorney ID No. 328721

LAMB McERLANE PC

24 E. Market Street – PO Box 565

West Chester, PA 19381

PETITION FOR LEAVE TO INTERVENE

Proposed Intervenor-Respondents Senator-elect David McCormick, the Republican National Committee (“RNC”), the National Republican Senatorial Committee (“NRSC”), and the Republican Party of Pennsylvania (“RPP”), by and through undersigned counsel, respectfully submit the following Petition for Leave to Intervene as Respondents in this statutory appeal filed by Petitioners Democratic Senatorial Campaign Committee (“DSCC”) and Bob Casey for Senate Inc. (“Petitioners”) under 25 P.S. § 3157, and aver the following in support thereof:

PRELIMINARY STATEMENT

Senator-elect David McCormick, the Republican National Committee, the National Republican Senatorial Committee, and the Republican Party of Pennsylvania (collectively, “Proposed Intervenor-Respondents”) support and seek to uphold free and fair elections for all Pennsylvanians and the laws that guarantee the integrity of those elections. They therefore seek to intervene in this statutory appeal to protect their interests, including Senator-elect McCormick’s election victory in the November 5, 2024 general election for United States Senate (the “Election”).

Pennsylvania’s voters have clearly spoken: They have elected Senator-elect McCormick to represent the Commonwealth in the U.S. Senate. Senator-elect McCormick currently leads his Democrat opponent, Bob Casey, by an insurmountable margin of more than 17,000 votes. On November 7, 2024, the AP declared Senator-elect McCormick the winner of the Election.¹ On November 14, 2024, after a substantial number of provisional ballots had been counted, Decision Desk HQ declared Senator-elect McCormick the winner of the Election.² Regrettably, despite a

¹ See *AP Race Call: Republican Dave McCormick wins election to U.S. Senate from Pennsylvania, beating incumbent Bob Casey*, Associated Press (Nov. 7, 2024), <https://apnews.com/article/race-call-mccormick-wins-pennsylvania-senate-49bdac09ba654d07b88bc62b10b49154>.

² See, e.g., Bo Erickson, *Republican Dave McCormick wins US Senate seat in Pennsylvania, DDHQ projects*, Reuters (Nov. 14, 2024), <https://www.reuters.com/world/us/republican-dave-mccormick-wins-us-senate-seat-pennsylvania-ddhq-projects-2024-11-14/>.

long and distinguished career in public service, outgoing Senator Casey has chosen to deny the results of the Election and refused to concede. In fact, outgoing Senator Casey has chosen to undermine the integrity of the Election and Senator-elect McCormick's victory—and to inflict wasteful costs on the Commonwealth and its taxpayers—by filing numerous legal actions across Pennsylvania asking courts to order that election officials count legally deficient ballots in contravention of the Election Code and governing Pennsylvania law.

For example, outgoing Senator Casey sought judicial orders directing election officials to count mail ballots that do not comply with the General Assembly's date requirement. The Pennsylvania Supreme Court, however, slammed the door on that effort, in accordance with its long and unbroken line of precedent upholding the date requirement as mandatory and precluding election officials from counting mail ballots that fail to comply with it. *See Republican National Committee v. All 67 County Boards of Elections*, No. 136 MM. 2024 (Nov. 18, 2024) (rejecting arguments from Casey and ordering all county boards to comply with date requirement); *see also Baxter v. Philadelphia Bd. of Elections*, __ A.3d __, 2024 WL 4650792, at *1 (Pa. Nov. 1, 2024) (staying lower court order against date requirement); *New Pa. Project Education Fund v. Schmidt*, No. 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024) (per curiam) (“*New Pa.*”) (declining to exercise King's Bench jurisdiction over state constitutional challenge to date requirement); *Black Political Empowerment Project v. Schmidt*, 322 A.3d 221, 222 (Pa. 2024) (per curiam) (“*BPEP Order*”) (vacating order striking down date requirement under state constitution); *Ball v. Chapman*, 289 A.3d 1, 14-16 & n.77 (Pa. 2022) (rejecting host of challenges to date requirement); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (rejecting state constitutional challenge to sign-and-date mandate, of which date requirement is a part); *In re: Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058, 1085-

89 (Pa. 2020) (Wecht, J., concurring in part) (deciding vote making clear date requirement is mandatory and enforceable for all elections after 2020).

This Statutory Appeal filed by outgoing Senator Casey and the DSCC is equally meritless and should be dismissed. Petitioners appeal the decisions of the Berks County Board of Elections (the “Board”) not to count (1) 101 provisional ballots that lack one of the two voter signatures the Election Code requires; and (2) 44 provisional ballots that were not enclosed in a secrecy envelope as the Election Code requires. As is set forth more fully below and in the attached Motion to Dismiss, the Board’s decisions comport with controlling Pennsylvania law and this Statutory Appeal should be dismissed.

Moreover, the Court should grant intervention to Proposed Intervenor-Respondents. Proposed Intervenor-Respondents have substantial interests in this case and should be permitted to intervene. Senator-elect McCormick has obvious interests in defending his election to the U.S. Senate. In fact, all Intervenor-Respondents have concrete interests in protecting Senator-elect McCormick’s victory in the Election and ensuring that Proposed Intervenor-Respondents, their voters, their candidates, and their members compete for office in Pennsylvania’s elections subject to the laws duly enacted by the General Assembly. No other party to this action represents these private interests, and therefore this timely petition for intervention should be granted.

Petitioners outgoing Senator Casey and the DSCC have consented to Proposed Intervenor-Respondents’ intervention in this matter. Proposed Intervenor-Respondents therefore respectfully request that the Court grant their petition to intervene as Respondents, and to permit them to file their Motion to Dismiss Petitioners’ Statutory Appeal, which is attached as Exhibit A.

I. BACKGROUND

A. The Proposed Intervenor-Respondents

1. David McCormick is a Pennsylvania voter, prevailed in the Election, and is the Senator-elect for the Commonwealth. The provisional ballots which Petitioners seek to have counted impact Senator-elect McCormick's margin of victory by adding legally deficient provisional ballots to his opponent's vote count. Senator-elect McCormick accordingly has standing in this action. *See In re Gen. Election-1985*, 531 A.2d 836, 838 (Pa. Commw. 1987); *see also McLinko v. Commonwealth*, 270 A.3d 1278, 1282 (Pa. Commw. Ct. 2022) ("In sum, a candidate has an interest beyond the interest of other citizens and voters in election matters.").

2. The RNC is the primary committee of the Republican Party of the United States as defined by 52 U.S.C. § 30101(14). The RNC manages the Republican Party's business at the national level, including development and promotion of the Party's national platform, fundraising, and election strategies; supports Republican candidates for public office at the federal, state, and local levels across the country, including those on the ballot in Pennsylvania; and helps state parties throughout the country, including the RPP, educate, mobilize, assist, and turn out voters. The RNC has made significant contributions and expenditures in support of Republican candidates up and down the ballot in Pennsylvania, including critically, Senator-elect McCormick. The RNC has a substantial and particularized interest in ensuring its candidates compete only under the rules duly enacted by the General Assembly—and not "an illegally structured competitive environment." *Mecinas v. Hobbs*, 30 F.4th 890, 898 (9th Cir. 2022) (cleaned up) (collecting cases); *see, e.g., Nelson v. Warner*, 12 F.4th 376, 384 (4th Cir. 2021); *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544 (6th Cir.

2014); *Shays v. FEC*, 414 F.3d 76, 84–85 (D.C. Cir. 2005); *Smith v. Boyle*, 144 F.3d 1060, 1062–63 (7th Cir. 1998).

3. The NRSC is a national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). Its mission is to elect Republican candidates such as Senator-elect McCormick to the United States Senate. It supports Republican candidates for U.S. Senate throughout the country and helps state parties throughout the country, including the RPP, educate, mobilize, assist, and turn out voters. The NRSC has made significant contributions and expenditures in support of Senator-elect McCormick in the Election. Like the RNC, the NRSC has a substantial and particularized interest in ensuring its candidates compete in a fair and legitimate competitive environment. *See, e.g., Mecinas*, 30 F.4th at 890; *Shays*, 414 F.3d at 85.

4. The RPP is a major political party, 25 P.S. § 2831(a), and the “State committee” for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered “State Committee” of the Republican Party as defined by 52 U.S.C. § 30101(15). The RPP, on behalf of itself and its members, nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania. It works to accomplish this purpose by, among other things, devoting substantial resources toward educating, mobilizing, assisting, and turning out voters in Pennsylvania. The RPP has made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters in Pennsylvania in the past many election cycles and intends to do so again in 2024. Like the RNC and NRSC, the RPP has a substantial and particularized interest in ensuring its candidates compete in a fair and legitimate competitive environment. *See, e.g., Mecinas*, 30 F.4th at 890; *Shays*, 414 F.3d at 85.

B. Procedural History

5. On November 18, 2024, Petitioners filed this Petition for Review in the Nature of a Statutory Appeal in the Court of Common Pleas of Berks County, Pennsylvania. Petitioners appeal the Board's November 14, 2024 decision not to count 145 provisional ballots in the Election.

6. This case is still in its infancy. As of the filing of this Petition for Leave to Intervene, the only pleading that has been filed in this proceeding is the Petitioners' Petition for Review.

II. THE GOVERNING INTERVENTION STANDARD

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

8. Intervention in a Court of Common Pleas is governed by Pennsylvania Rules of Civil Procedure 2326 through 2329. A proposed intervenor who satisfies these rules "shall be permitted to intervene." Pa. R. Civ. P. 2327.

9. Moreover, Pennsylvania law affords a proposed intervenor an absolute right to intervene in an action if the proposed intervenor can satisfy any one of the categories specified in Rule 2327. Pa. R. Civ. P. 2329; *see also Larock v. Sugarloaf Township Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

10. Proposed Intervenor-Respondents seek to intervene under Pennsylvania Rule of Civil Procedure 2327(3) and (4), which provide in pertinent part:

At any time during the pendency of an action, a person not a party thereto *shall be permitted to intervene therein*, subject to these rules if

(3) such person could have joined as an original party in the action or could have been joined therein; or

(4) *the determination of such action may affect any legally enforceable interest of such person* whether or not such person may be bound by a judgment in the action.

Pa. R.C.P. No. 2327(3), (4) (emphasis added); *see also Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, No. 26 M.D. 2019, 2020 WL 424866, at *5 (Pa. Cmwlth. Jan. 28, 2020) (“Pennsylvania Rule of Civil Procedure No. 2327(4) . . . permits intervention where the determination ‘*may affect any legally enforceable interest*’ of a proposed intervenor.” (quoting Pa. R.C.P. No. 2327(4))).

11. The Court should grant this Petition because the Court’s determination of this action may affect Proposed Intervenor-Respondents’ legally enforceable interests, no exception applies under Rule 2329, and Proposed Intervenor-Respondents’ participation will aid the Court.

12. Indeed, Petitioners consented to the intervention of Proposed Intervenor-Respondents.

III. BASIS FOR THE INTERVENTION

A. Senator-elect McCormick, RNC, NRSC, and RPP have a substantial interest in this action.

13. Senator-elect McCormick, RNC, NRSC, and RPP have substantial and particularized interests in preserving Senator-elect McCormick’s victory in the Election, as well as in preserving the state election laws challenged in this action.

14. Indeed, there can be no question that Proposed Intervenor-Respondents have a direct and significant interest in preserving Senator-elect McCormick’s victory. *See, e.g., Bush v. Gore*, 531 U.S. 98 (2000); *McLinko*, 270 A.3d at 1282.

15. Furthermore, Proposed Intervenor-Respondents have a direct and significant interest in the proper enforcement of Pennsylvania’s election laws in which they, their members, their candidates, and their voters exercise their constitutionally protected rights to participate and to vote. Those laws are designed to ensure “the integrity of [the] election process,” *Eu v. San Fran. Cty. Democratic Centr. Comm.*, 489 U.S. 214, 231 (1989), and the “orderly administration of elections,” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (Op. of Stevens, J.). The relief sought by the Petitioners may alter or impair the current competitive electoral environment in Pennsylvania, in which Proposed Intervenor Respondents have invested, and will continue to invest, substantial resources. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5, 800 (Pa. 2018). When executive or judicial officials “set the rules of the [election] in violation of statutory directives,” *Shays*, 414 F.3d at 85, political entities have a cognizable basis for intervention. After all, “[t]he counting of votes that are of questionable legality does . . . threaten irreparable harm to” candidates and parties participating in elections. *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring).

16. If Petitioners’ suit is successful, ballots will be counted that the General Assembly has said cannot be counted, thus forcing Proposed Intervenor-Respondents to “participate in an illegally structured competitive environment.” *Mecinas*, 30 F.4th at 898; *Shays*, 414 F.3d at 85. Proposed Intervenor-Respondents thus have a cognizable interest that can be impaired by Petitioners’ suit. *See id.*

17. Further, if Petitioners’ action succeeds, the RNC, the NRSC, and the RPP will be forced, as they prepare for future elections, to divert resources to training candidates, poll watchers, volunteers, and voters on how to operate under new election rules; such diversions of resources will impair their core activities of getting Republican candidates elected. *Cf. La Union Del Pueblo*

Entero v. Abbott, 29 F.4th 299, 305-06 (5th Cir. 2022) (allowing intervention as of right under similar circumstances). For that reason as well, Proposed Intervenor-Respondents should be granted intervention.

B. There is no basis to deny the application for intervention.

18. Pennsylvania Rule of Civil Procedure 2329 provides that upon the filing of a petition for intervention and after a hearing, if the allegations of the petition are found to be sufficient (under Pennsylvania Rule of Civil Procedure 2327), then the Court shall enter an order allowing intervention unless certain enumerated categories in Rule 2329 are met. *See, e.g., Sugarloaf*, 740 A.2d at 313. Under Pennsylvania Rule of Civil Procedure 2329, an application for intervention may be refused if: (1) the proposed intervenor’s claim or defense “is not in subordination to and in recognition of the propriety of the action”; (2) the proposed intervenor’s interest is already adequately represented; or (3) the proposed intervenor “has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.”

19. None of these factors applies to Proposed Intervenor-Respondents.

20. First, Proposed Intervenor-Respondents’ defense in this action is in subordination to and in recognition of the action’s propriety. If permitted to intervene, Proposed Intervenor-Respondents’ arguments will simply be “the ‘mirror-image’” of Petitioners’ arguments. *See, e.g., Democratic Nat’l Comm. v. Bostelmann*, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020).

21. Second, no existing party adequately represents Proposed Intervenor-Respondents’ particularized interests. *See* Pa.R.C.P. No. 2329(2). The Board—rightfully—does not represent any particular candidate’s or campaign’s interests in this case and, therefore, does not represent the unique interests of Proposed Intervenor-Respondents. After all, as a public entity, the Board

has interests in applying and enforcing the law that can differ significantly from candidates and political parties. *See, e.g., Trbovich v. United Mine Workers*, 404 U.S. 528, 538-39 (1972). Petitioners have interests directly at odds with the Proposed Intervenor-Respondents, as they represent outgoing Senator Casey and his interests, which are diametrically opposed to Senator-elect McCormick's interests.

22. Third, Proposed Intervenor-Respondents have not unduly delayed the submission of their application to intervene in this action, which remains in its infancy. This Petition has been filed within the timeframe established by the Court. Thus, Proposed Intervenor-Respondents' intervention will not cause any undue delay, embarrassment, or prejudice to any party, but their intervention will aid the court in resolving the important legal and factual questions before it. Notably, Petitioners have consented to Proposed Intervenor-Respondents' intervention.

WHEREFORE, Proposed Intervenor Respondents respectfully request that this Honorable Court grant intervention to Proposed Intervenor and direct the Prothonotary to file on the docket Proposed Intervenor-Respondents' Motion to Dismiss and Brief in Support attached as Exhibit A.

Respectfully submitted,

LAMB McERLANE PC

Dated: November 20, 2024

By: /s/ Daniel L. Sulvetta

Joel L. Frank

PA Attorney ID No. 46601

Daniel L. Sulvetta

PA Attorney ID No. 328010

Curtis L. Sebastian, II

PA Attorney ID No. 328721

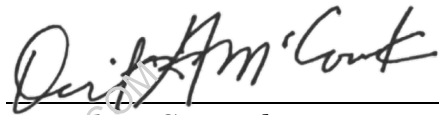
24 E. Market Street – PO Box 565

West Chester, PA 19381

Counsel for Proposed Intervenor-Respondents

VERIFICATION

I, David McCormick, verify that that the facts contained in the foregoing are true and correct based upon my knowledge, information, and belief. However, while the facts are true and correct based upon my knowledge, information, and belief, the words contained in the foregoing are those of counsel and not mine. I understand that statements herein are made subject to the penalties set forth in 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.



David McCormick

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**VERIFICATION OF
NATIONAL REPUBLICAN SENATORIAL COMMITTEE**

I, Ryan Dollar, General Counsel at the National Republican Senatorial Committee, am authorized to make this verification on behalf of the National Republican Senatorial Committee. I hereby verify that the factual statements set forth in the foregoing Petition For Leave To Intervene are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



Ryan Dollar
General Counsel
National Republican Senatorial Committee

Date: 11/19/24

VERIFICATION OF REPUBLICAN PARTY OF PENNSYLVANIA

I, Angela Alleman, Executive Director at the Republican Party of Pennsylvania, am authorized to make this verification on behalf of the Republican Party of Pennsylvania. I hereby verify that the factual statements set forth in the foregoing Petition For Leave To Intervene are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



Angela Alleman
Executive Director
Republican Party of Pennsylvania

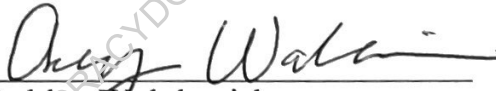
Date: 11/19/2024

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VERIFICATION OF REPUBLICAN NATIONAL COMMITTEE

I, Ashley Walukevich, Pennsylvania State Director at the Republican National Committee, am authorized to make this verification on behalf of the Republican National Committee. I hereby verify that the factual statements set forth in the foregoing Petition For Leave To Intervene are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



Ashley Walukevich
Pennsylvania State Director
Republican National Committee

Date: 11/19/2024

**CERTIFICATE OF COMPLIANCE WITH
CASE RECORDS PUBLIC ACCESS POLICY**

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.

Dated: November 20, 2024

By: /s/ Daniel L. Sulvetta

LAMB McERLANE PC

Joel L. Frank

PA Attorney ID No. 46601

Daniel L. Sulvetta

PA Attorney ID No. 328010

Curtis L. Sebastian, II

PA Attorney ID No. 328721

24 E. Market Street – PO Box 565

West Chester, PA 19381

Counsel for Proposed Intervenor-Respondents

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2024, I caused a true and correct copy of this document to be served on all counsel of record.

LAMB McERLANE PC

Dated: November 20, 2024

By: /s/ Daniel L. Sulvetta

Joel L. Frank

PA Attorney ID No. 46601

Daniel L. Sulvetta

PA Attorney ID No. 328010

Curtis L. Sebastian, II

PA Attorney ID No. 328721

24 E. Market Street -- PO Box 565

West Chester, PA 19381

Counsel for Proposed Intervenor-Respondents

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IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA

DSCC, BOB CASEY FOR SENATE, INC., Petitioners, v. BERKS COUNTY BOARD OF ELECTIONS, Respondent.	No. 24-17101
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ORDER OF COURT

AND NOW, this ____ day of November, 2024, upon consideration of the Petition for Leave to Intervene filed by David McCormick, the Republican National Committee, the National Republican Senatorial Committee, and the Republican Party of Pennsylvania, and any opposition thereto, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

The Petition is GRANTED. David McCormick, the Republican National Committee, the National Republican Senatorial Committee, and the Republican Party of Pennsylvania shall participate in this action as Intervenor-Respondents.

The Berks County Prothonotary is DIRECTED to enter the names of David McCormick, the Republican National Committee, the National Republican Senatorial Committee, and the Republican Party of Pennsylvania on the docket in this matter as Intervenor-Respondents and DOCKET the Intervenor-Respondents' Motion to Dismiss the Petition for Review in the Nature of a Statutory Appeal and attendant Brief in Support.

BY THE COURT:

, J.

Exhibit A

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IN THE COURT OF COMMON PLEAS OF BERKS COUNTY,
PENNSYLVANIA

DSCC,
BOB CASEY FOR SENATE, INC.,

CIVIL ACTION

Petitioners,

No. 24-17101

Election Appeal

v.

BERKS COUNTY BOARD OF ELECTIONS,

Respondent.

***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**

Counsel of Record for this Party

Joel L. Frank

PA Attorney ID No. 46601

Daniel L. Sulvetta

PA Attorney ID No. 328010

Curtis L. Sebastian, II

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LAMB McERLANE PC

24 E. Market Street – PO Box 565

West Chester, PA 19381

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

DSCC and BOB CASEY FOR SENATE, INC.,	:	
	:	CIVIL TERM
	:	
Petitioners,	:	No. 24-17101
	:	
	:	ELECTION APPEAL
v.	:	
	:	
BERKS COUNTY BOARD OF ELECTIONS,	:	
	:	
Respondent.	:	

**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, and the National Republican Senatorial Committee (collectively, “Intervenor-Respondents”) hereby move this Court for an Order dismissing Petitioners DSCC and Bob Casey for Senate, Inc.’s Petition for Review in the Nature of a Statutory Appeal (the “Petition”).¹ Intervenor-Respondents incorporate by reference their concurrently filed Brief in Support of Motion to Dismiss Petition for Review in the Nature of a Statutory Appeal.

¹ Intervenor-Respondents have styled this response to the Petition as a Motion to Dismiss based on the Pennsylvania Commonwealth Court’s decision in *Schimes v. City of Scranton Non-Uniform Pension Board*, No. 1526 C.D. 2018, 2019 WL 3477059, at *4 (Pa. Cmwlth. 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).

1. Petitioners have filed this statutory appeal challenging the decision of the Berks County Board of Elections (the “Board”) rejecting certain provisional ballots cast by individuals in the 2024 General Election.

2. Specifically, the Board voted not to count 145 provisional ballots in two categories: (1) 101 provisional ballots that lacked a legally required signature of the elector and (2) 44 provisional ballots that lacked a secrecy envelope.

3. The Board’s decision not to count these categories of provisional ballots was correct under controlling Pennsylvania law. Indeed, the Philadelphia Court of Common Pleas already has rejected on the merits an identical statutory appeal that Petitioners brought in that county. *See* Nov. 19, 2024 Philadelphia Order (Ex. A).

4. The Election Code expressly requires individuals casting provisional ballots to sign their name twice.

5. First, the Election Code states 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.*

6. Second, the Election Code states that the individual “shall place his signature on the front of the provisional ballot envelope.” *Id.* § 3050(a.4)(3).

7. The Election Code also requires individuals casting provisional ballots to place their ballots within a secrecy envelope. This command, too, is mandatory. “After the provisional ballot has been cast, the individual *shall* place it in a secrecy envelope.” *Id.* (emphasis added).

8. If that were not already clear enough, the Election Code later confirms that the consequences of failing to comply with these requirements is that the provisional ballot will be discarded.

9. The Election Code states that “[a] provisional ballot shall not be counted if . . . either the provisional ballot envelope . . . or the affidavit . . . is not signed by the individual.” *Id.* § 3050(a.4)(5)(ii)(A).

10. The Election Code also states 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).

11. The Pennsylvania Supreme Court is clear that, when the Election Code says “shall,” it means it. *See In re: Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1087 (Pa. 2020) (Opinion of 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). The use of the word “shall” indicates that the requirement is mandatory, and failure to comply with a mandatory requirement results in disqualification from voting. *Ball*, 289 A.3d at 28.

12. Indeed, a few months ago the Pennsylvania Supreme Court reached exactly this conclusion for the signature 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. Similarly, the Pennsylvania Supreme Court has held that the Election Code’s secrecy-envelope requirement is “mandatory” such that failure to comply “renders the ballot invalid” and ineligible to be counted. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020).

13. Petitioners do not meaningfully dispute that the Election Code requires individuals to sign twice to cast a provisional ballot that will be counted. Nor do they meaningfully dispute that the Election Code requires individuals to place their provisional ballots in secrecy envelopes. Rather, Petitioners argue that the Board, by complying with the Election Code, violated the Due Process Clause of the federal Constitution and the federal Help America Vote Act (“HAVA”), 52 U.S.C. § 21082.

14. 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)).

15. That challenge, moreover, fails on the merits because the Due Process Clause is not implicated by “[g]arden variety election irregularities.” *Northeast Ohio Coalition for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (citation omitted). Rather, the Due Process Clause is implicated only when the plaintiff can point to something that rises to the level of “state actions that induce voters to miscast their votes.” *Id.*

Nothing close to such misconduct is present in this case. Without any support, Petitioners presume 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 ¶ 21. 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.* ¶ 20. Similarly, Petitioners would have this Court believe that the Board’s decision “punishes voters for the errors of poll workers” when there is no evidence of such an assertion. *Id.* ¶ 22.

16. 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).

17. 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/copap/wp-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 at 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.").

18. Indeed, far from following the federal Constitution, acceding to Petitioners' demands would *violate* federal and state law.

19. 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.

20. 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 of elections—will result in “varying standards to determine what [i]s a legal vote” from “county to county” and will be improper. *Id.* at 106-07.

21. 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 missing a required signature of the elector or the secrecy envelope, which means reversing just the Board’s decision will result in unlawful unequal treatment of Pennsylvania voters.

22. HAVA also does not require the Board to count the noncompliant provisional ballots.

23. HAVA requires states to allow individuals to cast provisional ballots in certain instances. 52 U.S.C. § 21082. However, 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)).

24. Here, the Election Code permits provisional ballots to be counted only if (1) it is signed twice, on the affidavit and on the ballot envelope, and (2) it is 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.

25. Even if the Court is willing to credit Petitioners’ novel arguments as plausible (they are not), they 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.

26. 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).

27. 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).

28. 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). That confusion and chaos is only increased when courts sanction changes to election rules *after* polls have closed.

29. 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. *New Pa. Project*, 2024 WL 4410884, at *1.²

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

² The Court of Common Pleas of Philadelphia has already rejected the very same argument advanced by Petitioners here for the reasons stated in this Motion. See 11/19/24 Order, attached as Exhibit A.

Respectfully submitted,

LAMB McERLANE PC

Dated: November 20, 2024

By: /s/ Daniel L. Sulvetta

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EXHIBIT A

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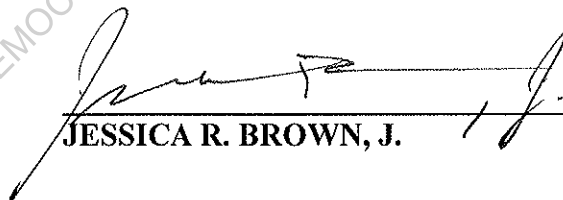
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

APPEAL FROM THE DECISION OF : NOVEMBER TERM, 2024
THE BOARD OF ELECTIONS :
: NO. 2214
IN RE: DSCC, ET AL. :
: ELECTION MATTER
: CONTROL NO. 24113832

ORDER

AND NOW, this 19th day of November, 2024, upon consideration of the Statutory Appeal of the DSSC and Bob Casey for Senate, Inc., it is **ORDERED** that the Appeal is **DENIED**.¹

BY THE COURT:


JESSICA R. BROWN, J.

¹ Under the Commonwealth of Pennsylvania's Election Code, provisional ballots shall not be counted if the individual voter has not signed the ballot envelope under both clauses (2) and (3) of the envelope or if the provisional ballot is not placed in the secrecy envelope. 25 P.S. § 3050(a.4)(5)(ii).

The Appellants have not sufficiently demonstrated that this provision of the Election Code violates the Pennsylvania Constitution, United States Constitution, or in conflict with the Help America Vote Act, 52 U.S.C. § 21082.

**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

LAMB McERLANE PC
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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2024, I caused a true and correct copy of this document to be served on all counsel of record.

LAMB McERLANE PC

Dated: November 20, 2024

By: /s/ Daniel L. Sulvetta

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IN THE COURT OF COMMON PLEAS OF BERKS COUNTY,
PENNSYLVANIA

DSCC,
BOB CASEY FOR SENATE, INC.

CIVIL ACTION

Petitioners,

No. 24-17101

Election Appeal

v.

**MEMORANDUM IN SUPPORT OF
INTERVENOR-DEFENDANTS'
MOTION TO DISMISS**

BERKS COUNTY BOARD OF ELECTIONS,

Filed on behalf of:

Respondent.

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

Counsel of Record for this Party

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

DSCC and BOB CASEY FOR SENATE, INC.,	:	
	:	CIVIL ACTION
	:	
Petitioners,	:	No. 24-17101
	:	
	:	ELECTION APPEAL
v.	:	
	:	
BERKS COUNTY BOARD OF ELECTIONS,	:	
	:	
Respondent.	:	

**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 Berks County Board of Elections (the “Board”) to decline to count 145 provisional ballots cast in the 2024 General Election by

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).

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. Indeed, the Philadelphia Court of Common Pleas already has rejected on the merits an identical statutory appeal that Petitioners brought in that county. *See* Nov. 19, 2024 Philadelphia Order (Ex. A).

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 145 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 ¶¶ 16-24. 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 Berks County Board of Elections met to decide whether to count certain categories of provisional ballots cast for the 2024 General Election. At that meeting, the members of the Board decided not to count 145 provisional ballots for failure to comply with the Election Code. In particular, the Board declined to count 101 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 44 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 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 ¶ 21. 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.* ¶ 20. Similarly, Petitioners would have this Court believe that the Board’s decision “punishes voters for the errors of poll workers” when there is no evidence of such an assertion. *Id.* ¶ 22.

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 at 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 only bind 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.

B. Petitioners’ HAVA claim is meritless.

Petitioners also claim that the Board’s compliance with the Election Code violates HAVA. See Petition ¶¶ 23-24. 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.²

V. CONCLUSION

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

Respectfully submitted,

LAMB McERLANE PC

Dated: November 20, 2024

By: /s/ Daniel L. Sulvetta

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² The Court of Common Pleas of Philadelphia has already rejected the very same argument advanced by Petitioners here for the reasons stated in this Motion. See 11/19/24 Order, attached as Exhibit A.

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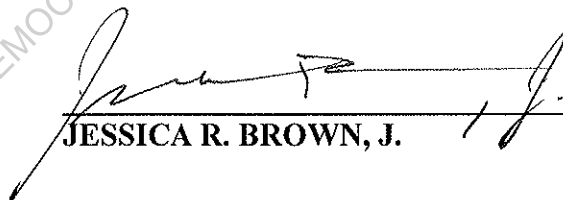
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
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APPEAL FROM THE DECISION OF : NOVEMBER TERM, 2024
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: CONTROL NO. 24113832

ORDER

AND NOW, this 19th day of November, 2024, upon consideration of the Statutory Appeal of the DSSC and Bob Casey for Senate, Inc., it is **ORDERED** that the Appeal is **DENIED**.¹

BY THE COURT:


JESSICA R. BROWN, J.

¹ Under the Commonwealth of Pennsylvania's Election Code, provisional ballots shall not be counted if the individual voter has not signed the ballot envelope under both clauses (2) and (3) of the envelope or if the provisional ballot is not placed in the secrecy envelope. 25 P.S. § 3050(a.4)(5)(ii).

The Appellants have not sufficiently demonstrated that this provision of the Election Code violates the Pennsylvania Constitution, United States Constitution, or in conflict with the Help America Vote Act, 52 U.S.C. § 21082.

**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.

LAMB McERLANE PC

Dated: November 20, 2024

By: /s/ Daniel L. Sulvetta

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2024, I caused a true and correct copy of this document to be served on all counsel of record.

LAMB McERLANE PC

Dated: November 20, 2024

By: /s/ Daniel L. Sulvetta

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