

A. The County Boards are Already Counting Undervotes & Overvotes

2. Petitioners assert that a hand recount is necessary due to “errors related to ballots containing undervotes or overvotes.” *See* Amended Petition for Recount and Recanvass (“Petition”) at ¶ 6.¹

3. The County Boards are already performing recounts that capture these votes.

4. For example, in Delaware, all undervotes and overvotes for the Pennsylvania Republican Senate Primary (the “Primary”) have been separated and adjudicated manually along with any ballots containing stray marks.

5. Similarly, in York, all undervotes were pulled and were reviewed via scan.

6. In total, the following counties have confirmed that they are reviewing or have already reviewed all undervote and stray mark ballots in this contest: Bucks, Centre, Chester, Cumberland, Delaware, Lancaster, Monroe, Schuylkill, Westmoreland, and York.

7. In addition, all County Boards are already reviewing or have reviewed overvotes, as required by statute.

8. This is the exact relief Petitioners seek.

9. As discussed below, Petitioners have identified no law authorizing, specifically, a “hand recount” of these ballots.

10. Because Petitioners are already obtaining the relief they seek, to the extent this Honorable Court determines such relief is authorized by statute, the Petition should still be dismissed as a duplicative request.

¹ Petitioners’ true request for relief is unclear. In conversations between counsel for the various County Boards and Petitioners’ counsel, Petitioners’ counsel represented that they were seeking only a tally of undervotes and unclear markings without a full manual recount. Petitioners’ counsel also reserved the right to pursue further relief if a recount proceeded in favor of the McCormick campaign. The County Boards here address the content of Petitioners’ written claim notwithstanding these other representations.

B. The County Boards are Already Incurring Significant Costs in Conducting the Recount

11. Further, the County Boards are already conducting a recount as ordered by the Secretary of the Commonwealth and are incurring significant costs to do so.

12. The imposition of a hand recount at this juncture, without any statutory mandate, is an unneeded and unauthorized burden on the County Boards.

13. In Allegheny, the Board anticipates spending \$80,000 in additional costs to conduct the recount, with an unknown amount to be reimbursed by the state.

14. In Bucks, the Board anticipates the recount ordered by the Secretary will result in at least \$31,000 in additional costs beyond what will be reimbursed by the state.

15. In Centre, the Board expects to incur approximately \$25,000 in additional costs beyond what will be reimbursed by the state to conduct the recount.

16. In Chester, the Board expects to spend \$94,921 in additional costs to conduct the recount ordered by the Secretary. Chester anticipates that it will not be reimbursed in full by the Department of State based on past recounts.²

17. In Cumberland, the Board expects to incur approximately \$25,000 in unreimbursed costs to conduct the recount.

18. In Delaware, the Board expects to incur approximately \$49,460 in additional costs to conduct the recount ordered by the Secretary, and expects to be reimbursed for only \$22,000 of those costs by the Department of State.

19. In Erie, the Board continues to assess the exact amount of its additional costs to conduct the recount.

² For the statewide recount ordered by the Secretary in the General Election of 2021, Chester County expended \$58,225.00 and was reimbursed in the amount of \$41,065.00.

20. In Lancaster, the Board expects to incur approximately \$21,000 in unreimbursed additional costs to conduct the recount ordered by the Secretary.

21. In Monroe, the Board expects to incur approximately \$11,000 in unreimbursed additional costs to conduct the recount ordered by the Secretary.

22. In Schuylkill, the Board has completed its initial recount at a cost of \$16,458.26.

23. In Westmoreland, the Board anticipates that the recount ordered by the Secretary will result in at least \$33,000 in additional costs, with an unknown amount to be reimbursed by the state.

24. In York, the Board expects to incur approximately \$46,000 in additional costs to conduct the recount ordered by the Secretary, with an unknown amount to be reimbursed by the state.

25. In the event a hand recount is ordered, all County Boards expect to incur significant costs in addition to those itemized above, including overtime for employees involved in conducting the recount.

26. These costs are already over and above the anticipated cost of administering the election. These costs also do not fully reflect the additional time and effort that employees of each County Board have already expended and expect to expend in finishing the recount already underway.

27. Imposing a hand recount on the County Boards is an unnecessary burden at this juncture, particularly where Petitioners show no proof one is necessary or authorized.

28. Further, a hand recount of every single ballot in this race would introduce the possibility of human error into the process, particularly where counties have already concluded both an original count on election night and the statutorily required recount.

29. Accordingly, the County Boards respectfully request that this Court alleviate that burden and deny the Petitions.

II. Petitioners Failed to Comply With the Pennsylvania Election Code

30. Aside from the burden a hand recount would impose on the County Boards, the Petition fails as a matter of law because Petitioners are not entitled to a hand recount under the Election Code, have failed to identify any Code provision authorizing such a recount, and have failed to comply with the Election Code's provisions for filing their Petition.

31. Because "[j]urisdiction to resolve election disputes is not of common law origin but is founded entirely upon statute," it "cannot be extended beyond the limits defined by the General Assembly...[W]ell-established case law dictates strict adherence to the statutory requirements of the Election Code." *Rinaldi v. Ferrett*, 941 A.2d 73, 78 (Pa. Cmwlth. 2007).

32. Because the Petition here extends the Code beyond its limits, and this Court lacks jurisdiction to grant the relief Petitioners seek. *See Tartaglione v. Graham*, 573 A.2d 679, 680 n. 3 (Pa. Cmwlth. 1990) (noting proceedings under the Election Code "are wholly statutory, and jurisdiction must be found in the Code or in some other statute incorporating the Code by reference") (citing *Reese v. County Board of Elections of Lancaster County*, 307 A.2d 154 (Pa. Cmwlth. 1973)).

33. Although there are detailed Code provisions on conducting a recount, as discussed below, Petitioners seek to end-run these provisions by requesting a hand recount without statutory authority.

34. Petitioners' failure to provide authority for the relief they seek is a fatal defect to this Court's jurisdiction over their Petition.

35. Moreover, Petitioners' failure to strictly comply with the Election Code demands dismissal of their Petition.

36. Petitioners failed to post the required cash deposit or bond, failed to file this action with the prothonotaries of the counties in question, failed to properly serve any County Board, prematurely filed in violation of the Election Code and this Court’s May 27th, 2022 Order, and filed their Petition with deficient elector verifications.

37. Each of these grounds provides an independent and sufficient basis to dismiss the Petition.

A. Petitioners Are Not Entitled to a Hand Recount Under the Election Code

38. The Election Code already specifies the procedures for a recount, and a “hand recount” is not included.

39. Under 25 P.S. § 3154(e)(1), counties which use voting machines shall make a record of the number of the seal on the voting machine, make visible the registering counters of such machine, and shall – without unlocking the machine against voting – recanvass the votes cast on that machine.

40. Under 25 P.S. § 3154(e)(2), counties which use paper ballots shall open the ballot box and recount the votes inside.

41. Under 25 P.S. § 3154(e)(3), counties which use an electronic voting system utilizing paper ballots shall recount all ballots using “manual, mechanical or electronic devices” and manually count any ballot containing an overvote.

42. The County Boards are already following these statutory procedures in conducting their recount.

43. Petitioners rely on inapplicable Code provisions to obtain the hand recount they seek.

44. Under 25 P.S. § 3261(a.1)(1), regarding paper ballots, the County Boards are only required to open the ballot box and the Commonwealth Court shall “cause the entire vote of the election district to be correctly counted by persons designated by the Court.”

45. This provision does not specify the method of recount.

46. Similarly, under 25 P.S. § 3262(2)(i), regarding electronic voting machines, the County Boards are only required to make visible the registering counter of the voting machine used and recanvass the vote cast without unlocking the machine against voting.

47. This provision does not require a hand recount.

48. Pennsylvania law requires that, when statutes are in apparent conflict, the more specific provision controls. 1 Pa. C.S. § 1933.

49. Therefore, the recount provisions of 25 P.S. § 3154 control the method of recount here.

50. Because 25 P.S. § 3154 does not allow for a hand recount, Petitioners are not entitled to the relief they seek.

B. Petitioners Failed to Comply With the Election Code’s Filing Requirements

51. Even if Petitioners had authority for their request, they failed to comply with the Election Code’s requirements for filing their Petition.

52. Because the Election Code is a creature of statute, the “statutory provisions...constitute the exclusive means for challenging the accuracy of election results.” *Rinaldi*, 941 A.2d at 78.

53. “Moreover, well-established case law dictates strict adherence to the statutory requirements” for challenging election results. *Id.* (collecting cases).

54. Petitioners here failed to comply with the statutory requirements.

55. Specifically, Petitioners did not file cash deposits or bonds with their petition; did not file their petitions in the proper courts of common pleas and/or with county prothonotaries; did not properly serve the County Boards; and filed their Petition prematurely.

i. Petitioners Failed to File their Cash Deposits or Bonds

56. First, as Petitioners acknowledge, Petitioners failed to file their cash deposits or bonds in compliance with the Election Code. *See* Petition at 8-11.

57. The Election Code requires that, for petitions to recanvass votes cast in a voting machine, “[e]very” petition must be “accompanied by a deposit of cash in the amount of fifty dollars, or by a bond signed by the petitioners as principals and by a corporate surety to be approved by the court in the amount of one hundred dollars.” 25 P.S. § 3262(2)(a.1).

58. For petitions to recount or recanvass paper ballots, the requirement is identical. “Every petition” must be “accompanied by a deposit of cash in the amount of fifty dollars, or by a bond signed by the petitioners as principals and by a corporate surety to be approved by the court, in the amount of one hundred dollars.” 25 P.S. § 3261(b).

59. These bond requirements apply regardless of whether a petitioner uses the procedure for filing in a court of common pleas – which is set out in its own subsection of each section of the statute – or for filing as a result of a recanvass ordered under Section 1404(g).³

60. There is nothing in the statute to suggest that a filing subject to a recount ordered under Section 1404(g) does not require an accompanying bond or cash deposit.

61. It is not enough to state, as Petitioners do, that they will file the requisite bonds or cash deposits upon Order of this Court. *See* Petition at ¶ 9. Similarly, Petitioners cannot escape the mandatory bonds or cash deposits by stating that the Election Code conflicts with itself.

³ 25 P.S. § 3154(g).

62. Indeed, the Election Code does not conflict with itself, and is clear that a cash deposit or bond is required. For example, under 25 P.S. § 3261(b) requires that “[e]very petition for the opening of a ballot box under the provisions of **this section** shall be filed in the office of the prothonotary, accompanied by a deposit of cash . . . or a bond” 25 P.S. § 3261(b) (emphasis added). The term “this section” does not mean the subsection, (b) in which that term appears. It means the entire section, Section 3261.

63. Further, the remainder of Section 3261(b) and subsections (d)-(e) discuss the return or forfeit of the deposits based on the outcome of the recount. If a deposit of cash or bond were not required upon the filing of a petition, these subsections would be meaningless.

64. Moreover, the bond requirements, by being set forth as separate sections in each Code provision, are specific in that they apply to every petition for a recount, regardless of whether it is filed sua sponte in a court of common pleas or directly into this Court.

65. Petitioners’ claim that there is no requirement for filing such a bond where a recount is ordered by the Secretary of the Commonwealth is therefore unsupported by the text of the statute itself. *See* Petition at ¶ 9.

66. Petitioners’ failure to accompany their Petition with the simple, yet fundamental prerequisite of either a cash deposit or bond mandates dismissal. *See In re Recanvassing Votes in Philadelphia*, 35 Pa. D.&C.2d 384, 387, 1964 WL 6457, at *3 (C.P. Phila. Jan. 1, 1964) (holding that where “there [was] no indication that either the sum of \$50 or a bond in the amount of \$100 was filed with the prothonotary,” petitioners could not “proceed under section 1702 of the act”).

ii. Petitioners Failed to File in the Proper Counties

67. Next, Petitioners did not file their Petition in the proper counties, and instead filed directly in the Commonwealth Court.

68. “Every petition for the opening of a ballot box under the provisions of [25 P.S. § 3261] shall be filed in the office of the prothonotary of the proper county,” and accompanied by a bond or cash deposit. *See* 25 § P.S. 3261(b).

69. Further, “[e]very petition for the recanvassing of votes cast in the voting machine, or voting machines of an election district, under the provisions of [25 P.S. § 3262] shall be filed in the office of the prothonotary of the proper county,” and accompanied by a bond or cash deposit. 25 P.S. § 3262(2)(a.1).

70. Petitioners filed their Petition pursuant to each of these Code provisions. *See* Petition at p. 1.

71. Yet Petitioners filed their Petition in the Commonwealth Court instead of with each of the county prothonotaries as is required by the Election Code. *See* 25 § P.S. 3261(b).

72. A petition to this Court is an accompaniment to, not a substitute for, properly filing petitions with the affected counties and alerting the respective County Boards to the request for recount.

73. As with Petitioners’ failure to make a deposit of cash or bond, Petitioners’ non-compliance with the unambiguous language of the Election Code warrants dismissal of their Petition. *See Rinaldi*, 941 A.2d at 78.

iii. Petitioners Did Not Properly Serve the County Boards

74. Petitioners also failed to serve the County Boards according to the Pennsylvania Rules of Civil Procedure.

75. Absent a conflicting provision of the Election Code, the Pennsylvania Rules of Civil Procedure apply to election proceedings. *See In re Wilson*, 728 A.2d 1025, 1028 (Pa. Cmwlth. 1999); *Pfuhl v. Coppersmith*, 253 A.2d 271, 274 (Pa. 1969).

76. Pennsylvania Rule of Civil Procedure 402(a) requires service of original process by hand to a defendant, an adult at the defendant's residence, or to an agent of the defendant at his or her usual place of business.

77. Likewise, Pennsylvania Rule of Appellate Procedure require that, in the event service is made upon a party represented by counsel, the certificate of service must state the agreement of the party being served. Pa. R.A.P. 121(c)(4).

78. Here, Petitioners followed neither rule when serving their Petition.

79. Petitioners filed their Petition in this Court and served it via e-filing and via e-mail upon certain (but not all) counsel of record in the other related litigation pending from the recount.

80. Petitioners did not seek the agreement of counsel before serving it via e-mail as required by Pa. R.A.P. 121(c)(4).

81. Petitioners did not attempt personal service upon the County Board of any county.

82. These failures to comply with the service requirements violate the Pennsylvania Rules of Civil Procedure and deprive this Court of jurisdiction over the County Boards. *See City of Philadelphia v. Berman*, 863 A.2d 156, 160 (Pa. Cmwlth. 2004) ("Service of process is the mechanism by which a court obtains jurisdiction over a defendant...The rules relating to service of process must be strictly followed.") (citations omitted); *see also Ryckman v. Crawford County Board of Elections*, 2018 WL 6005779, at **2-3 (Pa. Cmwlth. Nov. 16, 2018) (applying Pennsylvania Rules of Appellate Procedure to election contest).

83. As a result, the Petition should be dismissed.

iv. The Petition is Premature

84. This Petition is also premature owing to both the recount ordered by the Secretary of the Commonwealth as well as this Court's Order issued on May 27th, 2022.

85. The Secretary of the Commonwealth ordered a recount of this contest under Section 1404(g) of the Election Code. *See* § 25 P.S. 3154(g).

86. As a result, and presumably to effect the orderly resolution of any recount challenges, this Court issued the Order with certain requirements for conducting such a challenge.

87. In paragraph 1 of the Order, this Court stated that “[a]ny appeal of the recount or recanvass governed by Section 1407 of the Election Code...shall be filed with the Commonwealth Court’s Prothonotary in Harrisburg, Pennsylvania and shall be accompanied by the Court’s filing fee in the amount of \$70.25.”

88. Petitioners filed directly into this Court several days later.

89. This action is not an appeal of a recount or recanvass – in fact, many of those recounts and recanvasses are still underway.

90. Petitioners seek to challenge the conduct of the recount before it has even ended.

91. Instead of filing at this time, Petitioners’ recourse is to wait for the decisions of the County Boards and then properly appeal those decisions to this Court, according to the Election Code, Rules of Civil Procedure, and rules set out in the Order.

92. This Court should dismiss this Petition, allow the County Boards to conduct their recounts according to the procedure set forth in the Election Code, and then – assuming there is a factual and legal basis to do so – permit Petitioners to appeal those decisions.

v. Petitioners Failed to Challenge All Election Districts or Present Prima Facie Evidence of Fraud or Error

93. Finally, Petitioners violated 25 P.S. § 3263 by requesting a recount only in certain election districts in a statewide race rather than in every election district in the Commonwealth without providing prima facie evidence that a particular act of fraud or error occurred.

94. Section 1703 of the Election Code governs “[a]ny petition to open a ballot box or to recanvass the votes on a voting machine or an electronic voting system pursuant to sections 1701 and 1702” of the Code. *See* 25 P.S. § 3263(a)(1).

95. Petitioners filed their Amended Petition pursuant to both sections 1701 and 1702 of the Code. *See* Petition at p. 1

96. Any recount or recanvass under this provision “shall include all election districts in which ballots were cast for the office in question.” 25 P.S. § 3263(a)(1)(i)(A).

97. The only exception to this rule is where a “petitioner under section 1701 or 1702 pleads that a particular act of fraud or error occurred and offers prima facie evidence supporting the allegation.” 25 P.S. § 3263(a)(1)(ii).

98. Petitioners here challenge only certain electoral districts, rather than all districts where ballots were cast statewide, and were thus required to plead a particular act of fraud or error occurred and offer evidence to support it. *See* Petition at Ex. 1; *see also id.*

99. Petitioners failed to make any allegation of particular act or fraud.⁴ *See generally* Petition.

100. Petitioners also attached boilerplate affidavits by electors in each of the affected counties which stated only a generalized belief that fraud or error occurred without any factual support. *See generally* Petition at Ex. 2.

101. These are violations of the Election Code which require dismissal. *See Gaddy v. Montgomery Cty. Bd. of Elections*, No. 16-28344, 2016 WL 9461761, at *5 (C.P. Montgomery,

⁴ The Counties also note that in argument before this Court on May 31, 2022 in the matter of *Dave McCormick for U.S. Senate, et al. v. Leigh M. Chapman, et al.*, Docket No. 286 M.D. 2022, Counsel for Petitioners stated that this election was free and fair, and made no allegations of fraud. The Honorable Renée Cohn Jubilerer noted this lack of allegation of fraud with particularity in her comments at the conclusion of argument and in her Memorandum Opinion filed June 2, 2022. *See* Memorandum Opinion, *Dave McCormick for U.S. Senate, et al. v. Leigh M. Chapman, et al.*, Docket No. 286 M.D. 2022, 286 M.D. 2022 at 21.

Dec. 7, 2016) (“Since the elections Petitioners challenged were statewide races for President, Vice President, and United States Senator, Petitioners, without prima facie evidence of a particular act of fraud or error, had to bring petitions complying with the Code in each electoral district statewide to get the “recount or recanvass” they sought under the Code.”).

102. Moreover, even in the districts Petitioners challenge, Petitioners used out-of-district voters to challenge the procedures in a certain district.

103. For example, in Delaware, Petitioners submitted four verifications from voters registered in the Radnor Township precinct.⁵ *See* Petition at Ex. 2.

104. Yet Petitioners do not challenge the count in the Radnor Township Precinct. *See* Petition at Ex. 1.

105. Similarly, three verifications submitted by Centre voters are not for the representative districts in Centre County in which a hand count was requested. *See* Petition at Ex. 2.

106. The same applies for Chester, where the three Petitioners who submitted verifications are not from any of the precincts Petitioners seek to be recounted by hand. *See id.*

107. In Westmoreland County, Petitioners submitted three verifications from voters registered in South Huntingdon Hixson and Newslonburg #2, when Petitioners do not seek to challenge these precincts.

108. It would be unjust and contrary to the Election Code to permit Petitioners to cherry-pick voters from one district to challenge votes in another. *See* 25 P.S. § 3263(a)(1)(i)(A); *see generally* *Gaddy*, No. 16-28344, 2016 WL 9461761.

⁵ In the interest of maintaining the privacy of the voters, the County Boards submit this representation as an offer of proof rather than provide the physical voter registration records. Should the Court wish to see such evidence the County Boards will promptly submit it either in camera or as redacted copies.

109. The Petition should be dismissed accordingly.

III. CONCLUSION

For the reasons set forth above, the County Boards respectfully request that this Court deny the Petition for Recount & Recanvass and dismiss this action.

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Respectfully submitted,

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