

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Recount of Berks County : **CASES CONSOLIDATED**
General Election of November 8, :
2022 :

Limited to: Exeter Township Precinct No. 6 : No. 1426 C.D. 2022
Robesonia Borough :
Ruscombmanor Township No. 1 :

Appeal of: Berks County Republican :
Committee :

In Re: Recount of Berks County :
General Election of November 8, 2022 :
: No. 1427 C.D. 2022

Limited to: : Submitted: December 27, 2022
Bern Township Precinct No. 1 :
Bethel Township :
Centre Township Precinct No. 1 :
Cumru Township Precinct No. 2 :
Earl Township Precinct No. 2 :
Exeter Township Precinct No. 3 :
Exeter Township Precinct No. 8 :
Greenwich Township Precinct No. 1 :
Hamburg Borough Precinct No. 2 :
Kutztown Borough Ward No. 1 :
Kutztown Borough Ward No. 2 :
Leesport Borough :
Lower Heidelberg Precinct No. 1 :
Lower Heidelberg Precinct No. 2 :
Lower Heidelberg Precinct No. 3 :
Maidencreek Township Precinct No. 3 :
Maxatawny Township Precinct No. 3 :
Mohnton Borough :
North Heidelberg Township :
Perry Township :
City of Reading Precinct No. 16-5 :

Rockland Township Precinct No. 2 :
 Ruscombmanor Township Precinct No. 2 :
 Spring Township Precinct No. 7 :
 Tilden Township :
 Washington Township Precinct No. 2 :
 Wyomissing Borough Precinct No. 2 :
 :
 Appeal of: Berks County :
 Republican Committee :
 Heather M. Bouchard :
 Linda J. Brancadora :
 Samuel F. Brancadora :
 Ronald E. Bush, Jr. :
 Caroline L. Cable :
 Robert S. Cable :
 Mary Beth Clarke :
 Heidi Fiedler :
 Gwyneth P. Fowler :
 Scott D. Fowler :
 Kyra Genell :
 Kimberly A. Gesicki-Giambrone :
 David Golowski :
 Dennis E. Greth :
 Sally Ann Greth :
 Michele Hamlin :
 Randall J. Hamlin :
 Edward C. Kehs :
 Kim Louise Kehs :
 Nancy M. Leatherman :
 Debora M. Letz :
 Donna Lea Merritt :
 Garret A. Miller :
 William Henry Moody, Jr. :
 William J.P. Mulgrew, III :
 Bobbi Ortiz :
 Terry Ortiz :
 Marie G. Perry :
 Bret Sarge :
 Derek Sarge :
 Lucas Charles Sarge :

Jeri K. Sievert :
Ralph Sievert :
Marlene A. Skoloda :
Victoria B. Solberg :
Ericka M. Thomas-Ernst :
Dwight D. Wegman :
Shawnee M. Wilson :
Steve Wilson :
John A. Wojcik :
Frederick W. Zentgraf, Sr. :
Ruth Zentgraf :

BEFORE: HONORABLE STACY WALLACE, Judge

OPINION BY
JUDGE WALLACE

FILED: January 31, 2023

Fraud in elections is a serious concern. That is why our General Assembly¹ has created procedures (rules) to follow when people think fraud may have occurred. When people’s votes are not counted, or even if people fear their votes do not matter, it can have a crippling effect on our democracy. For this reason, it is important that people know and understand how to follow the rules to allege suspected fraud. These concerns must be resolved quickly, so voters, especially community leaders, elected

¹ The Pennsylvania General Assembly is our Commonwealth’s state legislature. Pa. Const. art. II, § 1. This is the body that writes our laws, and it consists of our state House of Representatives and state Senate (collectively called “legislators”). *See id.* This Court’s role is to evaluate and apply the laws, including the rules the legislature has created on how to raise an allegation of fraud in an election case. The Pennsylvania Constitution establishes the three branches of government: legislative, executive, and judicial. *Id.* arts. II, IV-V; *see also* U.S. Const. arts. I-III. It is important that each branch stays in its lane to ensure that none of the branches becomes too powerful. For this reason, this Court will not change or re-write the rules. Rather, if voters want the rules to be changed, they need to approach those people who are elected to write the laws (our legislators).

officials, lawyers, and judges, should know the rules before an upcoming election. Although the rules to allege fraud were not followed in this case, this Court’s opinion will hopefully shed light on what must happen when people believe fraud is in play in an election in this Commonwealth. Because elections are a matter of great public importance, the Court will emphasize some important takeaways with bold font. The bolded portions will serve as an educational summary.

The petitioners in these consolidated appeals are the Berks County Republican Committee and various electors residing in Berks County (collectively, Petitioners). On November 21, 2022, Petitioners filed two petitions in the Berks County Court of Common Pleas (Common Pleas), alleging fraud or error in the computation of votes cast during the November 8, 2022 General Election, and requesting a hand recount, among other things.² By order dated December 5, 2022, and entered December 6, 2022, Common Pleas dismissed the recount petitions and denied Petitioners’ other requested relief. Petitioners timely appealed to this Court. After careful review, this Court agrees with Common Pleas. **The Court concludes that Petitioners needed to (1) file their petitions as to each election district in which ballots were cast for the offices in question or (2) plead and offer prima facie evidence that a particular act of fraud or error occurred.**³ As Petitioners did not satisfy either requirement, the Court affirms Common Pleas’ order.

² As further explained below, not every elector who participated in the filing of the November 21, 2022 recount petitions is now participating in these appeals. The discrepancy has no effect on the Court’s analysis, however, so this opinion will refer to both the petitioners before Common Pleas and the appellants in this Court as “Petitioners” for ease of discussion.

³ As mentioned above, if voters do not like these rules, they should speak with their legislators. However, this Court points out that the authors of the Pennsylvania Election Code carefully offered two avenues to pursue if fraud is suspected. At the same time, the authors needed to prevent folks from abusing the system and falsely claiming fraud. That too would cripple the election process. Just imagine the chaos if the threshold to allege fraud were much lower. As it stands now, voters **(Footnote continued on next page...)**

I. Procedural History

The recount petitions at issue in this matter are Consolidated Recount Petition No. 1, on appeal at 1427 C.D. 2022, and Consolidated Recount Petition No. 2, on appeal at 1426 C.D. 2022. The petitions were substantively identical and varied only in that they involved different electors and different election districts. In the recount petitions, Petitioners averred, “[u]pon information which they consider[ed] reliable . . . that fraud or error, although not manifest on the general return of votes made therefrom, was committed in the computation of the votes cast” in the November 8, 2022 General Election. Consolidated Recount Pets. Nos. 1 & 2, 11/21/22 (Pets.) ¶ 9. Petitioners did not allege any specific fraud or error but cited Section 1701 of the Pennsylvania Election Code⁴ for the proposition that no specific allegation of fraud or error, and no evidence to substantiate such an allegation, was necessary. *Id.* ¶ 10. Moreover, Petitioners averred that they complied with the other requirements of the Election Code by posting the required sum of \$50 and filing the petitions within five days after the Berks County Board of Elections (Board) completed its computational canvassing of returns for the county. *Id.* ¶ 11.

Various Berks County electors, who also served as Petitioners below, signed and notarized verifications attached to the recount petitions. Consolidated Recount Petition No. 1 included three verifications for nearly all the election districts listed in the caption at 1427 C.D. 2022, with coversheets clarifying which election districts

can petition a court without evidence of fraud but must aver fraud in every election district. Alternatively, voters do not need to aver fraud in every election district but must have **specific** allegations of fraud **and** offer evidence that at first appearance supports the allegations of fraud. *See* Black’s Law Dictionary 701 (11th ed. 2019) (defining “prima facie evidence” as “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced”).

⁴ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. § 3261.

related to which verifications.⁵ Consolidated Recount Petition No. 2 included four verifications for the three election districts listed in the caption at 1426 C.D. 2022, without clarifying coversheets. Each of the verifications contained a statement that the signer was a qualified and registered elector “in the Election District recited in the Petition,” and that the petition was “based upon information that I consider to be reliable and that makes me believe that fraud or error, although not manifest on the general return of votes made therefrom, was committed” in the counting of votes “in the foregoing Election District.” *Id.*, Attachs.

Based on the above averments and verifications, Petitioners requested various forms of relief. Petitioners’ requested relief included (1) a hand recount of all ballots cast in the relevant election districts, including mail-in and absentee ballots, with the results of the recount compared against “the computation canvassing and the printed tapes on Election Day from the ES&S ExpressVote Universal Voting System,”⁶ (2) the disclosure of all persons who voted in the election districts on November 8, 2022, separated out into lists based on whether they voted in person, by mail-in or absentee ballot, or by provisional ballot, (3) a review of the outer envelopes of mail-in and absentee ballots cast in the election districts to determine whether the dates on the envelopes fell outside certain ranges and to compare the signatures on the envelopes with signatures of record, and (4) an inspection of the ES&S ExpressVote Universal Voting System and any “related voting devices” used in the elections districts, “with

⁵ The only election districts listed in Consolidated Recount Petition No. 1 that did not have three verifications were Greenwich Township Precinct 1 and Hamburg Borough Precinct 2. This may have been a simple mistake, as Greenwich Township Precinct 1 had five verifications, Hamburg Borough Precinct 2 had one, and the two precincts appeared consecutively in the petition.

⁶ Petitioners requested a recount “for all public offices shown on the official ballot,” which they described as including “the offices of U.S. Senat[or], Governor and Lieutenant Governor, U.S. Representative, State Senat[or], and State Representative.” Pets. ¶¶ 14, 30.

test ballots to verify that such are not improperly recording votes which differ from the user’s selection.”⁷ *Id.* ¶¶ 12-27. Additionally, Petitioners asked that Common Pleas order the Board to provide notice of the proposed recount to various interested persons and entities, including the custodian of the voting equipment, candidates for office in the election districts, and specified political parties and committees. *Id.* ¶ 30.

The Board filed answers with new matter on November 30, 2022, which were also substantively identical. It argued that deficiencies in the recount petitions and attached verifications divested Common Pleas of jurisdiction. Answers with New Matter, 11/30/22, ¶¶ 1-3, 13, 17, 21, 25, 35, 39. Specifically, the Board denied that any fraud or error occurred in the election districts and observed that Petitioners did not allege any particular act of fraud or error, or present evidence of any particular act of fraud or error. *Id.* ¶¶ 9-10, 36. The Board argued that 1703 of the Election Code⁸ required Petitioners to include every election district in Berks County in their petitions if they did not allege and present evidence of a particular act of fraud or error, and that Petitioners did not meet this requirement.⁹ *Id.* ¶¶ 10, 36. Moreover, it described Petitioners’ requested relief as “antithetical to the scope and purpose of a recount.” *Id.* ¶ 12. Generally, the Board challenged Petitioners’ requests as not required under the Election Code, available through means other than a Section 1701 recount proceeding, or illegal. *Id.* ¶¶ 14-27.

⁷ As part of Petitioners’ fourth request for relief, they also sought the disclosure of “all preparation and calibration procedures for the ES&S ExpressVote Universal Voting System, including the tabulator.” *Pets.* ¶ 26.

⁸ 25 P.S. § 3263.

⁹ Petitioners acknowledge in their brief on appeal that they filed their petitions as to only 30 of the 202 election districts in Berks County. *Petitioners’ Br.* at 4.

Finally, Petitioners filed replies to the Board’s new matter on December 2, 2022, which were substantively identical except for two paragraphs. In their replies, Petitioners defended the sufficiency of the recount petitions and verifications, as well as their requested relief. Replies, 12/2/22, ¶¶ 32-45. In response to an averment by the Board that there was “no factual or legal basis” for this relief, Petitioners attached two affidavits. *See Answers with New Matter*, 11/30/22, ¶ 45; Replies, 12/2/22, ¶ 45, Exs. A & B. The first affidavit was from Ericka Thomas-Ernst (Thomas-Ernst), a Petitioner before Common Pleas and an appellant in this Court. The second was from Leonard A. Krug (Krug), who has not participated in this case personally, but, based on statements in his affidavit, is involved with the Berks County Republican Committee.

Thomas-Ernst averred that she served as the Clerk for the Rockland Township Precinct 2 District Election Board on November 8, 2022. Replies, 12/2/22, Ex. A ¶ 2. She explained that the Board provided Rockland Township Precinct 2 with the ES&S ExpressVote Universal Voting System to use during the election. *Id.* ¶ 5. To vote with this system, electors select their preferred candidates on a touchscreen. *Id.* ¶ 6. The system then prints out a paper ballot containing a barcode and text listing the candidates selected. *Id.* According to Thomas-Ernst, this “creates a risk whether the barcode does not match a voter’s selections and the voter is unaware of such a [sic] happening,” because the system tabulates votes by scanning only the barcode of the paper ballot, rather than the text of the elector’s selections. *Id.* ¶ 7. Thomas-Ernst averred that, when she tried to tabulate her own vote on November 8, 2022, “the machine counter failed to record [it].” *Id.* ¶ 9. Similarly, after the polls closed, she compared the machine counter with her “manually maintained” logbook, which revealed that the machine counter “had failed to record three ballots.” *Id.* ¶ 10. Thus,

Thomas-Ernst concluded that there was “a material and probable risk of error that occurred on Election Day” as to the ES&S ExpressVote Universal Voting System. *Id.* She expressed support for a hand recount as the only way to ensure that all votes were tabulated accurately. *Id.* ¶¶ 14-18.

Next, Krug averred that the Berks County Republican Committee appointed him to be one of its representatives during the Board’s statutory audit of votes, which occurred on November 22, 2022, and involved recounting two percent of the votes cast.¹⁰ Replies, 12/2/22, Ex. B ¶¶ 2-4. Krug alleged that the Board did not comply with the Election Code when conducting the audit because a Berks County employee selected the precincts to be audited deliberately, rather than through a “system of chance.” *Id.* ¶ 6. In addition, Krug averred that the Board audited the votes in four of the eight precincts by rescanning the barcodes on paper ballots through an ES&S ExpressVote Universal Voting System tabulator. *Id.* ¶ 7. As a result, he averred, the Board “did not audit whether the barcodes on those paper ballots matched the voter’s selection of candidates reflected on the text of the paper ballot.” *Id.* ¶ 9. Krug explained that he was not able to inspect the original tapes from the tabulators, which in his opinion “defeated the purpose” of the audit. *Id.* ¶ 10. He added that no signature verification of mail-in ballots occurred during the audit and expressed support for using signature verification in a recount.¹¹ *Id.* ¶ 13-15.

¹⁰ Krug described the audit as “colloquially known as the Risk-Limiting Audit.” Replies, 12/2/22, Ex. B ¶ 2. In its brief, the Board maintains that he was mistaken, asserting that Petitioners “conflate the 2% audit with the Risk-Limiting Audit, which are two distinct post-election audits . . . Berks County was not assigned any ballot batches to audit for the Risk-Limiting Audit . . . but did conduct the 2% audit, as statutorily required.” Board’s Br. at 30 n.12.

¹¹ Krug further averred that he is a retired teacher with experience proctoring standardized testing. Replies, 12/2/22, Ex. B ¶ 11. Krug explained that he inspected mail-in ballots during the audit, **(Footnote continued on next page...)**

By order dated December 5, 2022, and entered December 6, 2022, Common Pleas dismissed Petitioners' recount petitions. Order, 12/6/22. Citing Section 1703 of the Election Code, Common Pleas explained that Petitioners failed to "plead and verify a specific act[] of fraud or error while not requesting a recount or recanvassing of all votes for the office in question." *Id.* Common Pleas also denied Petitioners' other requested forms of relief. *Id.* The Berks County Republican Committee and some, but not all, of the electors who signed verifications attached to the petitions, timely appealed to this Court.^{12, 13}

which featured ovals electors filled in to select their preferred candidates, similar to ovals students fill in on standardized tests. *Id.* ¶¶ 11-12. He continued:

During my inspection of the mail-in paper ballots . . . I observed that nearly all the ovals in the mail-in paper ballots were perfectly filled-in, that is to say, without marking outside the oval. In my training and experience as a teacher proctoring standardized tests, in my opinion it is unusual that persons submitting mail-in ballots will perfectly fill-in ovals, with their pen or pencil, and without marking outside the oval. Markings outside the oval is an ordinary feature on those documents as a matter of human behavior, including persons with below-average eyesight as well as a weakening [sic] dexterity of the hand as a product of aging.

Id. ¶ 12.

¹² Although some of the electors who signed the verifications attached to Consolidated Recount Petition No. 1 appeared on the notice of appeal at 1427 C.D. 2022, none of the electors who signed the verifications attached to Consolidated Recount Petition No. 2 appeared on the notice of appeal at 1426 C.D. 2022. In addition, Petitioners filed a notice of non-participation in this Court, listing electors who signed verifications and support the appeals but have declined to participate directly. A footnote on the front cover of Petitioners' brief lists several electors whose names did not appear on Petitioners' notices of appeal or on the notice of non-participation. According to the footnote, these electors "joined or otherwise adopt by reference this brief." Counsel for Petitioners entered his appearance on behalf of these electors on January 5, 2023.

¹³ During the proceedings below, an attorney entered his appearance on behalf of the Berks County Democratic Committee and the "PA Dems," i.e., the Pennsylvania Democratic Party. The attorney submitted a memorandum of law in opposition to the recount petitions before Common Pleas and **(Footnote continued on next page...)**

Shortly after Petitioners filed their appeals, on December 27, 2022, Common Pleas issued a memorandum opinion further detailing its reasoning. Common Pleas observed that Section 1703(a)(1)(i)(A) requires recount petitions under Section 1701 to “include all election districts in which ballots were cast for the office in question.” Common Pleas Op., 12/27/22, at 3-4 (quoting 25 P.S. § 3263(a)(1)(i)(A)). Common Pleas explained that Petitioners did not satisfy this requirement. *Id.* at 5. Although Section 1703(a)(1)(ii) contains an exception if a petitioner pleads a particular act of fraud or error and offers prima facie evidence in support, Common Pleas explained that Petitioners did not plead any fraud or error and offered no evidence. *Id.* at 3-5 (quoting 25 P.S. § 3263(a)(1)(ii)). Common Pleas therefore concluded that it lacked jurisdiction. *Id.* at 5 (citing *In re 2003 Gen. Election for the Off. of Prothonotary, Wash. Cnty.*, 849 A.2d 230, 240 (Pa. 2004); *In re Opening of Ballot Boxes, Montour Cnty.*, 718 A.2d 774, 777 (Pa. 1998)). As for Petitioners’ other requested relief, Common Pleas reasoned that there was no basis in the Election Code to support these requests, and that signature verifications in particular “would invoke concerns of confidentiality and privacy if disclosed to the public.”¹⁴ *Id.* at 5-6.

filed a brief in this Court opposing Petitioners’ appeals. Moreover, after Petitioners appealed, the Acting Secretary of the Commonwealth, Leigh M. Chapman, and the Pennsylvania Department of State filed an application for leave to intervene and proposed brief in this Court. The Court entered a per curiam memorandum and order on January 9, 2023, denying the petition to intervene but accepting the proposed brief as an amicus brief.

¹⁴ On December 19, 2022, Petitioners filed a motion asking that Common Pleas order the Board to impound election returns and secure voting systems without alteration pending the outcome of these appeals. Common Pleas directed the Board to file an answer, and it complied on December 28, 2022. The original record that this Court received does not reveal Common Pleas’ resolution of Petitioners’ motion.

II. Discussion

On appeal, Petitioners challenge Common Pleas' interpretation of the Election Code. This is an issue of statutory construction, for which the Court's standard of review is *de novo* and scope of review is plenary. *In re Benkoski*, 943 A.2d 212, 215 n.2 (Pa. 2007) (citing *In re Carroll*, 896 A.2d 566, 573 (Pa. 2006)). In other words, the Court does not defer to Common Pleas when reaching a decision and reviews the entire record on appeal. *Mercury Trucking, Inc. v. Pa. Pub. Util. Comm'n*, 55 A.3d 1056, 1082 (Pa. 2012) (citing *Heath v. Workers' Comp. Appeal Bd. (Pa. Bd. of Prob. & Parole)*, 860 A.2d 25, 29 n.2 (Pa. 2004)). "The object of statutory construction is to ascertain and effectuate the General Assembly's intent. **The plain language of a statute is, as a general rule, the best indicator of such legislative intent.**" *Id.* at 1067-68 (citing *Bd. of Revision of Taxes, City of Phila. v. City of Phila.*, 4 A.3d 610, 622 (Pa. 2010)) (emphasis added).

A. Sections 1701 and 1703 of the Election Code

Petitioners' first issue, and the crux of their entire appeal, challenges Common Pleas' interpretation of Sections 1701 and 1703 of the Election Code. Critical to the Court's analysis is Section 1701(a), which Petitioners cited when filing their recount petitions:

(a) Except as set forth in subsection (a.1), the court of common pleas, or a judge thereof, of the county in which any election district is located in which ballots were used, shall open the ballot box of such election district used at any general, municipal, special or primary election held therein, and cause the entire vote thereof to be correctly counted by persons designated by such court or judge, if three qualified electors of the election district shall file, as hereinafter provided, a petition duly verified by them, alleging that upon information which they consider reliable they believe that fraud or error, although not manifest on the general return of votes made therefrom, was committed in the computation of the votes cast for all offices or for any particular office or offices in such election district, or in the marking of the ballots, or

otherwise in connection with such ballots. It shall not be necessary for the petitioners to specify in their petition the particular act of fraud or error which they believe to have been committed, nor to offer evidence to substantiate the allegations of their petition.

25 P.S. § 3261(a).¹⁵

Equally significant is Section 1703(a)(1)-(2), which the Board cited in its defense, and which Common Pleas relied on when dismissing the recount petitions:

(a)(1) Any 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 shall be filed no later than five (5) days after the completion of the computational canvassing of all returns of the county by the county board. If any error or fraud is found the court shall grant the interested parties an additional five (5) days to file petitions requesting additional ballot boxes to be opened or voting machines or electronic voting systems to be recanvassed.

(i) Except as set forth in subclause (ii):

(A) a recount or recanvass shall include all election districts in which ballots were cast for the office in question; and

(B) petitions, accompanied by the appropriate money or bond, must be filed in each election district in accordance with this act.

(ii) Subclause (i) shall not apply if 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.

(2) If any petition to open a ballot box or to recanvass the votes on a voting machine or an electronic voting system shall have been

¹⁵ Section 1702 of the Election Code, 25 P.S. § 3262, contains language similar to Section 1701, except it governs the recanvassing of voting machines following an allegation of fraud or error, rather than the opening of ballot boxes. According to Section 1118-A of the Election Code, added by Section 4 of the Act of July 11, 1980, P.L. 600, 25 P.S. § 3031.18, Section 1701 applies when an “election district uses an electronic voting system utilizing paper ballots,” while Section 1702 applies when an “election district uses any other type of electronic voting system.”

presented, under the provisions of sections 1701 and 1702 of this act and the court shall discover therein any fraud or error, the court shall correct, compute and certify to the county board the votes justly, regardless of any fraudulent or erroneous entries made by the election officers thereof, and the county board shall correct accordingly any entries previously made in the returns of the county being prepared by it, or which have been prepared and not yet certified.

25 P.S. § 3263(a)(1)-(2).

Preliminarily, it is important to clarify what Petitioners are and are not arguing in this matter. Petitioners contend that Common Pleas should have ordered a recount under Section 1701(a) of the Election Code based on the averments in their recount petitions that, “[u]pon information which they consider reliable . . . fraud or error, although not manifest on the general return of votes made therefrom, was committed in the computation of the votes cast” in the General Election on November 8, 2022. Pets. ¶ 9. Petitioners further contend that Common Pleas erred by applying Section 1703(a)(1)(i)-(ii) and concluding that they were not entitled to a recount as they did not “plead and verify a specific act[] of fraud or error while not requesting a recount or recanvassing of all votes for the office in question.” Order, 12/6/22. Petitioners insist that they were entitled to a recount without having to plead or present evidence of fraud or error. They do not allege that they pled and produced evidence of fraud or error successfully, nor do they allege that the affidavits attached to their replies to the Board’s new matter, from Thomas-Ernst and Krug, corrected any deficiencies in their petitions and constituted sufficient evidence of fraud or error to satisfy Section 1703(a)(1)(i)-(ii)’s requirements.

In substance, Petitioners’ argue that the recount provisions of Section 1701(a) apply to initial recounts, like the one requested here, while the limitations in Section 1703(a)(1)(i)-(ii) apply to subsequent recounts, as described in the second sentence of Section 1703(a)(1), which an interested party may request “[i]f any error or fraud

is found” in an initial recount. Petitioners’ Br. at 16, 21, 25-27 (quoting 25 P.S. § 3263(a)(1)). By concluding otherwise, Petitioners argue, Common Pleas interpreted Section 1703(a)(1)(i)-(ii) to “nullify[]” Section 1701(a). *Id.* at 21. They support this view by summarizing legislative history, including the 2004 amendment that added Section 1703(a)(1)(i)-(ii) to the Election Code.¹⁶ *Id.* at 20-25. Petitioners emphasize that recount proceedings are fundamental to democracy, and that the Election Code is a “highly remedial statute” which courts should construe liberally. *Id.* at 22, 27 (quoting *In re Recanvassing of Certain Voting Machs. for the Election of Republican Candidate for Cnty. Comm’r in the Nov., 1983 Gen. Election*, 475 A.2d 1325, 1328 (Pa. 1984)).

This Court concludes that Petitioners’ proposed interpretation contradicts the **plain language** of Section 1703(a)(1). The Court reaches this conclusion for three reasons: (1) the structure of Section 1703(a)(1) indicates that Section 1703(a)(1)(i)-(ii) applies to both initial and subsequent recount petitions; (2) Section 1703(a)(1)(ii) expressly provides that Section 1703(a)(1)(i) “shall not apply if 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); and (3) research has uncovered no support for Petitioners’ legislative history argument and, if anything, contradicts it.

Regarding structure, nothing about the placement of Section 1703(a)(1)(i)-(ii) suggests that the General Assembly intended those subsections to modify the second sentence of Section 1703(a)(1), rather than Section 1703(a)(1) as a whole. Section 1703(a)(1)(i)-(ii) appears directly under Section 1703(a)(1), which consists of two sentences in a single, unbroken paragraph. If the General Assembly had intended

¹⁶ See Act of October 8, 2004, P.L. 807.

Section 1703(a)(1)(i)-(ii) to modify only a part of Section 1703(a)(1), it could have split Section 1703(a)(1) into separate subsections in its 2004 amendment and placed the language found in Section 1703(a)(1)(i)-(ii) under only one of those subsections. Instead, the General Assembly left Section 1703(a)(1) intact when it added Section 1703(a)(1)(i)-(ii). This demonstrates that Section 1703(a)(1)(i)-(ii) applies to both sentences of 1703(a)(1) and, therefore, to both initial and subsequent recounts.

More compellingly, the plain language of Section 1703(a)(1)(i)-(ii) states that it applies to initial recount petitions under Section 1701(a). As quoted in full above, Section 1703(a)(1)(i) imposes certain limitations on recount petitions “[e]xcept as set forth in” Section 1703(a)(1)(ii). 25 P.S. § 3263(a)(1)(i). Section 1703(a)(1)(ii) then states that Section 1703(a)(1)(i) “shall not apply **if 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) (emphasis added). It is impossible to square this express reference to Section 1701 in the text of Section 1703(a)(1)(ii) with Petitioners’ insistence that the General Assembly did not intend for Section 1703(a)(1)(i)-(ii) to apply to Section 1701 at all. *See City of Johnstown v. Workers’ Comp. Appeal Bd. (Sevanick)*, 255 A.3d 214, 220 (Pa. 2021) (“Where statutory language is clear and unambiguous, this Court must give effect to the words of the statute. When interpreting a statute, courts may not look beyond the plain meaning of a statute under the guise of pursuing its spirit.”) (citations omitted).

Although Petitioners spend much of their argument on this issue summarizing the legislative history of Section 1703(a)(1)(i)-(ii), this Court cannot ignore the plain language of the Election Code. *See Commonwealth v. Lynn*, 114 A.3d 796, 827 (Pa. 2015) (citing 1 Pa.C.S. § 1921) (“[L]egislative history is not to be consulted where, as here, the statute is explicit.”). Even if the statute was not explicit, this Court’s

research of legislative history provides no support for Petitioners' argument. The 2004 amendment adding Section 1703(a)(1)(i)-(ii) also added an automatic recount procedure, which is now found at Section 1404(g) of the Election Code.^{17, 18} Then-Governor Edward Rendell issued a message when signing the amendment into law, explaining the two provisions:

The bill, approved with overwhelming bipartisan support by the state's General Assembly, authorizes the Secretary of the Commonwealth to order each county election board to recount all ballots cast in a specific race in the event that results are within 0.5 percent between the winning and losing candidate.

....

In addition to the automatic recount, candidates in statewide offices can seek a recount on their own when they have lost by more than 0.5 percent and candidates in non-statewide races may still file for recounts as before. However, **in order to ensure that all people have their**

¹⁷ 25 P.S. § 3154(g).

¹⁸ The automatic recount procedure is as follows, in relevant part:

(g) This subsection relates to recounts and recanvasses ordered by the secretary.

(1) Except as set forth in subsection (h), the secretary shall order a recount and recanvass to all county boards if the unofficial returns prepared in accordance with subsection (f) reflect any of the following:

(i) A candidate for a public office which appears on the ballot in every election district in this Commonwealth was defeated by one-half of a percent or less of the votes cast for the office. This subclause includes a candidate for retention to a Statewide judicial office.

(ii) A ballot question appearing on the ballot in every election district in this Commonwealth was approved or rejected by one-half of a percent or less of the votes cast on the question.

25 P.S. § 3154(g)(1)(i)-(ii).

vote counted equally, a candidate will have to seek a recount of all votes cast unless the candidate can claim that a particular act of fraud or a mistake occurred. In instances where a specific allegation can be made, a total recount is not necessary, and a recount may be sought only where the irregularity allegedly took place.

Governor's Message, Oct. 31, 2004 (emphasis added).

This demonstrates that the General Assembly added Section 1703(a)(1)(i)-(ii) to promote the fairness of recount procedures when the automatic recount in Section 1404(g) does not apply. To obtain a recount under Section 1701(a), petitioners must seek a recount of "all votes cast." *Id.* This requirement does not "nullify[]" Section 1701(a), as Petitioners argue. *See* Petitioners' Br. at 21. Rather, it ensures that "all people have their vote counted equally." Governor's Message, Oct. 31, 2004. If the petitioners show "a particular act of fraud or a mistake," in contrast, only a recount of votes that the fraud or mistake affected is necessary. *Id.* This is logical because there is no reason to believe that people did not "have their vote counted equally" in election districts unrelated to the fraud or mistake identified. *See id.*

Based on the foregoing, Petitioners needed to file their recount petitions as to "all election districts in which ballots were cast for the office in question" to comply with Section 1703(a)(1)(i)(A). 25 P.S. § 3263(a)(1)(i)(A). The Election Code makes this doubly clear in Section 1703(a)(1)(i)(B), which instructs that petitions "must be filed in each election district in accordance with this act." 25 P.S. § 3263(a)(1)(i)(B). In their petitions, Petitioners requested recounts of "all public offices shown on the official ballot," which included statewide offices, such as "U.S. Senat[or], Governor and Lieutenant Governor." Pets. ¶¶ 14, 30. **It is undisputed that Petitioners did not file petitions for "all election districts in which ballots were cast" for these offices. Indeed, Petitioners candidly acknowledge that they filed their petitions as to only 30 of the 202 election districts in Berks County. Petitioners' Br. at 4.**

To satisfy the exception to this requirement, Petitioners needed to “plead[] that a particular act of fraud or error occurred and offer[] prima facie evidence supporting the allegation,” under Section 1703(a)(1)(ii). 25 P.S. § 3263(a)(1)(ii). Petitioners made no effort to plead or produce evidence of fraud or error in their petitions. Moreover, Petitioners do not propose that the affidavits attached to their replies to the Board’s new matter, from Thomas-Ernst and Krug, remedied their noncompliance with the pleading and evidentiary requirements of Section 1703(a)(1)(ii). For all these reasons, Petitioners are not entitled to a recount under Section 1701(a).¹⁹

B. Petitioners’ Other Requested Relief

In Petitioners’ second, sixth, and seventh issues, as well as part of their third issue, they seek a variety of relief, including “overrul[ing] the remaining objections by the [Board], the Berks County Democratic Committee, and PA Dems,” ordering recounts, and setting aside any certification of the election results. Petitioners’ Br. at 16-17, 29-35. They also defend the relief they requested in their recount petitions, which they argue was available under Common Pleas’ broad jurisdiction in election

¹⁹ Although this Court agrees with the Board and Common Pleas that Petitioners’ recount petitions failed to satisfy the requirements of the Election Code, the Court does not accept the conclusion that this failure divested Common Pleas of jurisdiction to hear the case. Subject matter jurisdiction relates to “the competency of the court to determine controversies of the general class to which the case presented for consideration belongs. . . . not whether [the court] might ultimately decide that it was unable to grant the relief sought in the particular case.” *Domus, Inc. v. Signature Bldg. Sys. of Pa., LLC*, 252 A.3d 628, 636 (Pa. 2021) (citations and quotation marks omitted). The Board and Common Pleas rely on case law indicating that the failure to properly verify a recount petition is a jurisdictional defect. *See* Answers with New Matter, 11/30/22, ¶ 1 (citing *2003 Gen. Election*, 849 A.2d at 240; *Opening of Ballot Boxes*, 718 A.2d at 777); Common Pleas Op., 12/27/22, at 5 (same). In this case law, our Supreme Court defines “duly verified” under Section 1701 “to mean that the three electors bringing the [recount petition] have confirmed the averments in the [p]etition by means of an oath or affirmation before a notary public or similar public official.” *2003 Gen. Election*, 849 A.2d at 238 (footnote omitted). Here, the verifications clearly satisfy our Supreme Court’s definition, as they were sworn before a notary public.

proceedings. *Id.* at 18, 45-46. Petitioners argue that any recount should include, in relevant part, (1) a recount of ballots by hand, (2) including mail-in, absentee, and provisional ballots, (3) a signature and date verification of outer envelopes of mail-in and absentee ballots, (4) the ability to challenge ballots, (5) an inspection of voting equipment, and (6) the disclosure of any electors who voted in the election districts during the November 8, 2022 General Election, divided into lists based on “manner of voting.” *Id.* at 18-19, 43-54.

As the Court has concluded that Petitioners are not entitled to a recount under Section 1701(a), it must also conclude that Petitioners are not entitled to relief they requested as part of a proposed recount. Petitioners assert in their brief that they are entitled to at least some relief “regardless of the merits of their request for a recount.” *Id.* at 17, 27-28. Upon review, Petitioners did not request relief in the alternative or outside the context of a recount proceeding before Common Pleas, but cited Section 1701(a), among other provisions, in their petitions when describing the relief sought. *Pets.* ¶¶ 14, 17, 21, 25. They emphasized that Common Pleas has broad legal and equitable powers, and that “[t]he purpose of the Election Code’s recount procedures ‘is to give an opportunity to correct and investigate all errors and discrepancies in the returns of any election district.’” *Id.* ¶¶ 12-13 (quoting *In re Reading Sch. Bd. Election*, 634 A.2d 170, 172 (Pa. 1993)). Petitioners did not suggest that they were entitled to alternative relief or relief outside of a recount proceeding even in a brief submitted to Common Pleas in support of their petitions. There, they defended the “scope of the recount” and argued that “the recount includes” or “may include” relief they requested. *Petitioners’ Br. in Supp. of Pets.* at 19-23 (unnecessary capitalization omitted). Petitioners cannot now claim that they should receive relief “regardless of

the merits of their request for a recount” when they presented their case to Common Pleas solely in terms of a recount proceeding. *Id.* at 28.

Even considering Petitioners’ request for alternative relief or relief outside of a recount, this Court would find the request meritless. Appropriately, Petitioners do not argue that they are entitled to a recount by hand; a recount of mail-in, absentee, and provisional ballots; a signature and date verification; or the ability to challenge ballots, regardless of the merits of the recount request. **Because Petitioners are not entitled to a recount, they are not entitled to have the recount occur in a certain way.** Instead, Petitioners limit this argument to the inspection of voting equipment and disclosure of electors.

Regarding the inspection of voting equipment, Petitioners direct the Court to Section 1230 of the Election Code.²⁰ Section 1230 is inapplicable to this matter, as it governs the removal and storage of “voting machines.” In the Election Code, “the term ‘voting machines’ applies to paperless mechanical level systems.” *Banfield v. Cortes*, 110 A.3d 155, 170 (Pa. 2015) (citing *In re Gen. Election for Twp. Supervisor of Morris Twp., Wash. Cnty.*, 620 A.2d 565, 568-69 (Pa. Cmwlth. 1993)); *see also Dayhoff v. Weaver*, 808 A.2d 1002, 1010 n.21 (Pa. Cmwlth. 2002) (“The ‘voting machine’ referenced is a mechanical device, not an electronic device. . . . [B]y using a voting machine, the voter will vote by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed.”).²¹ Additionally,

²⁰ 25 P.S. § 3070.

²¹ Based on Thomas-Ernst’s affidavit, the equipment at issue in this dispute is more accurately part of an “electronic voting system,” which is “a system in which one or more voting devices are used to permit the registering or recording of votes and in which such votes are computed and tabulated by automatic tabulating equipment. The system shall provide for a permanent physical record of **(Footnote continued on next page...)**

Section 1230 requires that any order to open and examine voting machines proceed “under the provisions of this act.” 25 P.S. § 3070. It does not permit a court to order the opening and examination of voting machines without any underlying legal basis, as Petitioners suggest.

Turning to disclosure of electors, Petitioners requested “the names of electors in such [e]lection [d]istrict who voted on November 8, 2022, segregated as follows: (1) in-person; (2) by mail-in or absentee ballot and (3) by provisional ballot.” Pets. ¶ 17. To support the position that they should receive this information even outside of a recount proceeding, Petitioners cite to Section 1307-D of the Election Code,²² pertaining to mail-in ballots, and Section 1309 of the Election Code,²³ pertaining to absentee ballots. Although both sections provide that certain information regarding mail-in and absentee electors is “publicly available” from the Board upon request, the sections do not support the broad relief sought here. 25 P.S. § 3150.17; 25 P.S. § 3146.9. Most clearly, neither section references electors who voted in person or by provisional ballot. It is important to add that records of a county election board “shall be open to public inspection” under Section 308 of the Election Code, 25 P.S. § 2648, but only subject to exceptions and limitations. **To the extent Petitioners would still like to access the information available under Sections 1307-D and**

each vote cast.” Section 1101-A of the Election Code, added by Section 4 of the Act of July 11, 1980, P.L. 600, 25 P.S. § 3031.1.

²² Added by Section 8 of the Act of October 31, 2019, P.L. 552, 25 P.S. § 3150.17.

²³ Added by Section 11 of the Act of March 6, 1951, P.L. 3, 25 P.S. § 3146.9.

1309, regarding mail-in and absentee electors, they maintain the ability to seek that information from the Board in the first instance.²⁴

III. Conclusion

For all the above reasons, the Court concludes that Petitioners failed to satisfy the requirements of the Election Code at Section 1703(a)(1)(i)-(ii), and that they are not entitled to a recount under Section 1701(a). Thus, the Court will affirm Common Pleas' order, dated December 5, 2022, and entered December 6, 2022, dismissing the recount petitions and denying Petitioners' other requested relief.

STACY WALLACE, JUDGE

²⁴ Generally, Petitioners' remaining issues involve challenges to arguments the Board made during the Common Pleas proceedings. Petitioners argue that this Court should consider the "remaining objections by the Board," which the issues listed above ostensibly address, because they are of great public importance and "capable of repetition yet evading review." Petitioners' Br. at 28-29. (quoting *Ass'n of Pa. State Coll. & Univ. Facs. v. Pa. Lab. Rels. Bd.*, 8 A.3d 300, 305 (Pa. 2010)). The Court disagrees. The "remaining objections by the Board" are readily capable of reoccurring in a later appeal under circumstances more appropriate for appellate review. Surely, for example, parties alleging fraud in the future will follow the rules for doing so explained at length and placed in bold font above.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Recount of Berks County : **CASES CONSOLIDATED**
General Election of November 8, :
2022 :

Limited to: Exeter Township Precinct No. 6 : No. 1426 C.D. 2022
Robesonia Borough :
Ruscombmanor Township No. 1 :

Appeal of: Berks County Republican :
Committee :

In Re: Recount of Berks County :
General Election of November 8, 2022 :
: No. 1427 C.D. 2022

Limited to: :
Bern Township Precinct No. 1 :
Bethel Township :
Centre Township Precinct No. 1 :
Cumru Township Precinct No. 2 :
Earl Township Precinct No. 2 :
Exeter Township Precinct No. 3 :
Exeter Township Precinct No. 8 :
Greenwich Township Precinct No. 1 :
Hamburg Borough Precinct No. 2 :
Kutztown Borough Ward No. 1 :
Kutztown Borough Ward No. 2 :
Leesport Borough :
Lower Heidelberg Precinct No. 1 :
Lower Heidelberg Precinct No. 2 :
Lower Heidelberg Precinct No. 3 :
Maidencreek Township Precinct No. 3 :
Maxatawny Township Precinct No. 3 :
Mohnton Borough :
North Heidelberg Township :
Perry Township :
City of Reading Precinct No. 16-5 :

Rockland Township Precinct No. 2 :
Ruscombmanor Township Precinct No. 2 :
Spring Township Precinct No. 7 :
Tilden Township :
Washington Township Precinct No. 2 :
Wyomissing Borough Precinct No. 2 :
:
Appeal of: Berks County :
Republican Committee :
Heather M. Bouchard :
Linda J. Brancadora :
Samuel F. Brancadora :
Ronald E. Bush, Jr. :
Caroline L. Cable :
Robert S. Cable :
Mary Beth Clarke :
Heidi Fiedler :
Gwyneth P. Fowler :
Scott D. Fowler :
Kyra Genell :
Kimberly A. Gesicki-Giambrone :
David Golowski :
Dennis E. Greth :
Sally Ann Greth :
Michele Hamlin :
Randall J. Hamlin :
Edward C. Kehs :
Kim Louise Kehs :
Nancy M. Leatherman :
Debora M. Letz :
Donna Lea Merritt :
Garret A. Miller :
William Henry Moody, Jr. :
William J.P. Mulgrew, III :
Bobbi Ortiz :
Terry Ortiz :
Marie G. Perry :
Bret Sarge :
Derek Sarge :
Lucas Charles Sarge :

Jeri K. Sievert :
Ralph Sievert :
Marlene A. Skoloda :
Victoria B. Solberg :
Ericka M. Thomas-Ernst :
Dwight D. Wegman :
Shawnee M. Wilson :
Steve Wilson :
John A. Wojcik :
Frederick W. Zentgraf, Sr. :
Ruth Zentgraf :

ORDER

AND NOW, this 31st day of January 2023, the order of the Court of Common Pleas of Berks County, dated December 5, 2022, and entered December 6, 2022, is hereby **AFFIRMED**.

STACY WALLACE, Judge