IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

FAITH GENSER and FRANK MATIS,

Petitioners,

v.

BUTLER COUNTY BOARD OF ELECTIONS,

Respondent.

CIVIL DIVISION

No. 24-40116

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

Filed on behalf of:
Proposed Intervenor-Respondents, Republican National Committee and Republican Party of Pennsylvania

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FAITH GENSER and FRANK MATIS,	:	CIVIL DIVISION
Petitioners,	:	No. 24-40116
v.	:	***ELECTION APPEAL***
BUTLER COUNTY BOARD OF ELECTIONS,	:	
Respondent.	:	

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

Proposed Intervenor-Respondents, the Republican National Committee and the Republican Party of Pennsylvania (collectively, "Republican Committees"), by and through their undersigned counsel, submit this Brief in Support of their Motion to Dismiss[1] Petitioners Faith Genser ("Petitioner Genser") and Frank Matis' ("Petitioner Matis") (hereinafter collectively referred to as the "Petitioners") Petition for Review in the Nature of a Statutory Appeal (the "Petition").

I. INTRODUCTION

Proposed Intervenor-Respondents support and seek to uphold free, equal, and legally compliant elections on behalf of all Pennsylvanians. For that reason, Proposed Intervenor-Respondents file this Motion to Dismiss the instant appeal which seeks to circumvent and perhaps

[1] The Republican Committees have styled the motion supported by this brief as a Motion to Dismiss based on the Pennsylvania Commonwealth Court's decision in *Schimes v. City of Scranton Non-Uniform Pension Bd.*, No. 1526 C.D. 2018, 2019 Pa. Commw. Unpub. LEXIS 438 at *9 (Pa. Commw. Aug. 1, 2019), which found that "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 Pa. Commw. Unpub. LEXIS 466 at *7 n. 4 (Pa. Commw. Feb. 17, 2012) ("Because preliminary objections are not permitted in statutory appeals, the common pleas court erred when it dismissed Barros' appeal on the City's preliminary objections. We find this error to be harmless, where the court could have treated the preliminary objections as a motion to dismiss . . . Accordingly, and because the parties are not prejudiced as a result, we will treat our review of the common pleas court's order as though the City filed a motion to dismiss. . .").

overturn the landmark holding of the Pennsylvania Supreme Court in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), by asking this Court to do that which the Pennsylvania Supreme Court unanimously held that it cannot do: force a county board of elections to provide a cure procedure for a legally deficient mail-in ballot. The impact of such relief, if granted, would effectively throw the administration of the upcoming, highly contested General Election into chaos and erode public trust and confidence in the integrity of Pennsylvania's elections at a vital moment in the electoral history of our Nation and the Commonwealth. For these reasons, and those set forth more fully herein, such a result is not only legally untenable, it is simply wrong. Accordingly, Petitioners' Appeal should be dismissed.

II. FACTUAL BACKGROUND

Petitioners appeal from the decision of the Butler County Board of Elections (the "Board") to reject the Petitioners' mail-in ballots that did not contain the required "secrecy envelopes" in the 2024 Primary Election on April 23, 2024 (the "Primary Election") without providing Petitioners with the opportunity to cure their deficiencies by counting their unauthorized provisional ballots.

Each Petitioner cast a mail-in ballot ("the Ballots") for the Primary Election. After doing so, on April 11, 2024, Petitioner Genser received an email from the Secretary of State of the Commonwealth advising her that her mail-in ballot had been rejected due to the lack of a secrecy envelope but that she could cast a provisional ballot on Election Day ("the "Secretary's Curing Notice").[2] Petition at ¶ 11. Similarly, Petitioner Matis learned that the Board of Elections rejected his mail-in ballot prior to Election Day. Petition at ¶ 14.

[2] The Republican Committees contend that the Secretary's Curing Notice is improper in multiple respects. However, as the Secretary is not a party to this Appeal, and because the Court and the legality of the Curing Notice is not relevant to the relief sought, the Republican Committees are not raising a challenge to the same at this juncture. The Republican Committees, however, reserve the right to raise such a challenge at the appropriate time and are prepared to present the basis for that challenge in this matter should the Court request it.

It is unclear at this time how the Board determined that Petitioners' Ballots lacked the required secrecy envelope. Upon information and belief, the Republican Committees believe that upon receipt of all mail-in ballots, the Board weighed the mail-in ballot return envelopes to determine whether they included a secrecy envelope. No other method appears to be available at the time ballots are received, as the Election Code prohibits boards of elections from opening mail-in ballot return envelopes until 7:00 a.m. on Election Day, 25 P.S. § 3146.8(g)(1.1), and requires boards of elections to "keep" (unopened) return envelopes "safely ... in sealed or locked containers" until then. *Id.* at § 3146.8(a). Thus, until the sealed ballot return envelopes are opened on Election Day, there can be no actual determination as to whether or not the secrecy envelope is present. It further appears likely that as part of the 2024 Primary Election, if the Board suspected that a secrecy ballot was missing based on the returned ballot's weight, it included a notation to that effect in the SURE system.

Thereafter, a "Bureau official" contacted Mr. Matis via a telephone call and recommended that Mr. Matis submit a provisional ballot on Election Day, which he did. Petition at ¶ 14. Both Petitioners' Ballots were rejected because they failed to include the inner secrecy envelope, not due to any inaccuracies on the outer return envelope, which contains the voter declaration and is visible to election officials before the return envelope is opened. Petition at ¶ 2. Subsequently, on April 26, 2024, the Board notified Petitioners that their provisional ballots had been rejected. Petition at ¶ 17. As set forth in footnote 3 below, the Board adopted a limited curing policy for the

Primary Election; however, that policy does not contemplate curing by means of a voter casting a provisional ballot.[3]

Under the Pennsylvania Election Code, voters casting an absentee or mail-in ballot are required to: (1) place their marked ballots in a sealed envelope ("secrecy envelope"), (2) place the secrecy envelope inside a second envelope, which is marked with a "declaration of the elector" form (the "Declaration Envelope"), (3) "fill out" and "sign the declaration printed on such envelope," and (4) return the ballot by 8:00 p.m. on Election Day. 25 P.S. § 3146.6(a); § 3150.16(a). If a voter fails to comply with any of these requirements, the voter's absentee or mail-in ballot must be set aside and not counted. 25 P.S. § 3146.8.

It is undisputed that the Petitioners' mail-in ballots did not include the required secrecy envelope in accordance with the Election Code. Petition at ¶ 2. Nonetheless, Petitioners now contend that the Board's refusal to count their provisional ballots violated the Pennsylvania Election Code and the Free and Equal Elections clause of the Pennsylvania Constitution. Petition at ¶ 2. Petitioners' contention is erroneous.

As more fully set forth below, the Petition must be denied.

[3] In conjunction with the 2024 Primary Election, the Board adopted a Ballot Curing Policy that allows registered voters the opportunity to cure ***certain*** immaterial deficiencies on their mail-in ballot Declaration Envelopes. *See,* https://www.butlercountypa.gov/DocumentCenter/View/8405/Butler-County-Ballot-Curing-Policy-Effective-5223 (the "Curing Policy") (emphasis added). The Curing Policy ***does not provide*** an opportunity to cure a deficiency related to the failure to include a ***secrecy envelope*** with a mail-in ballot. To the contrary, the Curing Policy only defines a "Declaration Envelope" as the larger of the two envelopes that are mailed to each absentee or mail-in elector, which contains a declaration which the voter must sign. The Curing Policy permits the party committees to contact the voter who submitted a Declaration Envelope, and states that the voter is permitted to appear at the bureau to remedy such a Deficiency by means of an attestation. *See*, Curing Policy at § III(C.). It does not authorize casting a provisional ballot as a cure for any Deficiency. *See id.* The Curing Policy also defines "Deficiency" as "a defect on the Declaration Envelope recognized by the Department of State as curable by applicable law, i.e. a lack of signature." It is telling that the Petitioners' deficiencies in their mail-in ballots — the failure to include a secrecy envelope — is not a Deficiency as defined by the Curing Policy because it is not a defect on the Declaration Envelope. Accordingly, a plain reading of the Curing Policy does not permit a voter who casts a mail-in ballot without a secrecy envelope to cure the deficiency via a provisional ballot.

III. LEGAL STANDARD

A Court of Common Pleas can reverse the decision of a county board of elections "only for an abuse of discretion or error of law." *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1070 (Pa. 2020) (citing *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952)); *see also*, 25 P.S. § 3157(b) (confining Court of Common Pleas' review of decision of board of elections to matters involving "fraud or error"). 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. . . [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

As the Pennsylvania Supreme Court Held in *Pa. Democratic Party v. Boockvar*, Courts Cannot Force County Boards of Elections to Adopt Notice and Cure Procedures.

Pennsylvania law is clear that "a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope ***must be disqualified***." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020). "[T]he secrecy provision language in § 3150.16(a) [of the Election Code] is ***mandatory*** and the failure to comply with such requisite renders the ballot invalid. *Id.* (emphasis added). In light of the Pennsylvania Supreme Court's holding in *Pa. Democratic Party v. Boockvar*, the Board's rejection of the Ballots without the secrecy envelope was not only proper; it was the only decision the Board could make.

Section 2641(a) of the Election Code, 25 P.S. § 2641, vests county boards of elections with "jurisdiction over the conduct of primaries and elections in such count(ies) in accordance with the provisions of the [Election Code]." *Id.* at § 2641(a). The generalized powers and duties of the county boards of elections are set forth in § 2642 of the Election Code. 25 P.S. § 2642. Those

powers, however, are not without limitation. Indeed, "[t]he duties of a board of elections under the Election Code are ministerial and allow for no exercises of discretion." *In Re Municipal Reapportionment of Township of Haverford*, 873 A.2d 821, 833 n. 18 (Pa. Commw. 2005), appeal denied, 897 A.2d 462 (Pa. 2006). In short, the county boards of elections are required to follow the provisions of the Election Code and attendant case law.

Accordingly, in light of the Pennsylvania Supreme Court's holding in *Pa. Democratic Party v. Boockvar*, there can be no dispute that the Board's refusal to count the Ballots was proper. Petitioners, however, attempt to circumvent the legality of the Board's decision by asserting that they should have been afforded the opportunity to "cure" their defective ballots by casting provisional ballots. Petition at ¶ 6. Petitioners' assertion in this regard likewise fails as a matter of law.

There is no absolute wholesale right to cure a defective mail-in ballot in Pennsylvania. To the contrary, the Election Code only authorizes boards of elections to cure a mail-in ballot in one narrow circumstance, specifically, "[f]or those absentee or mail-in ballots for which proof of identification has not been received or could not be verified." 25 P.S. § 3146.8(b). In that circumstance, the voter may cure only the lack of identification, not any other defect. *Id.*

The lack of a notice and cure procedure for any deficiency in a mail-in ballot beyond the narrow specific authorization in the Election Code was specifically addressed by the Pennsylvania Supreme Court in *Pa. Democratic Party v. Boockvar*. There, citing the Free and Equal Elections Clause, PA. CONST. art. I, § 5, and the Supreme Court's "broad authority to craft meaningful remedies," *League of Women Voters v. Commonwealth,* 178 A.3d 737, 822 (Pa. 2018), the Pennsylvania Democratic Party argued that the Supreme Court should require county boards of elections to implement a "notice and opportunity to cure procedure" for mail-in and absentee

ballots that voters have filled out incompletely or incorrectly. The Supreme Court specifically rejected that request. In doing so, the Supreme Court unanimously held that "the Election Code provides procedures for casting and counting a vote by mail" but does not provide for a notice and opportunity to cure procedure for a voter who fails to comply with the requirements for voting by mail or absentee. *Id.* at 374. The Supreme Court further stated that "[t]o the extent that a voter is at risk of having his or her ballot rejected" due to their failure to comply with the Election Code's signature and secrecy ballot requirements for mail-in and absentee ballots, "the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk is one best suited for the Legislature." *Id.* The Supreme Court "express[ed] this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania's government." *Id.*

The Supreme Court's holding in this regard is well founded as it is settled law that "[t]he power to regulate elections is a legislative one and has been exercised by the General Assembly since the foundation of the government." *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v. Barlow*, 60 Pa. 54 (1869)); *see also, Agre v. Wolf*, 284 F.Supp.3d 591, 620 (E.D. Pa. 2018) (Smith, C.J.) ("The process for crafting procedural regulations is textually committed to state legislatures and to Congress.").

At its core, the Petition effectively seeks to have this Court do that which the Pennsylvania Supreme Court has held it cannot do: rewrite the Election Code to force the Board to provide a cure for a mail-in ballot that does not contain a secrecy envelope. This Court cannot take such unilateral action to rewrite the law, as that would overstep the bounds of its authority. *See Robinson*

Twp. v. Commonwealth, 147 A.3d 536, 583 (Pa. 2016); *Cali v. Phila.*, 177 A.2d 824, 835 (Pa. 1962). "[E]diting a statute" by the Court "would amount to judicial legislation." *State Bd. of Chiropractic Exam'rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971). For the Court to assume "the power to write legislation would upset the delicate balance in our tripartite system of government." *Pap's A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998), rev'd on other grounds, 529 U.S. 277 (2000). Moreover, such a result would directly contradict the well-settled holding of the highest court in the Commonwealth on this exact issue.

Accordingly, the Pennsylvania Supreme Court's unanimous decision in *Pa. Democratic Party v. Boockvar* clearly and unequivocally establishes that the inclusion of a secrecy envelope with a mail-in ballot is mandatory, and the decision of whether or not to permit a party to cure a deficiency with a mail-in ballot must be decided by the Legislature and cannot be judicially mandated by the courts. If the Pennsylvania Supreme Court does not have the authority to require county boards of elections to afford electors the opportunity to cure their defective ballots for, *inter alia*, lack of a secrecy envelope, this Court likewise cannot do so.

V. CONCLUSION

For all of these reasons, Petitioners' Petition for Review in the Nature of a Statutory Appeal should be dismissed.

Dated: May 7, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY

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

Dated: May 7, 2024

THE GALLAGHER FIRM, LLC

Kathleen A. Gallagher by T.W. Kerr Jr.

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the within ***BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL*** has been served on all counsel of record listed below via email this 6th day of May 2024:

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