

**NOTICE TO RESPOND**

**To: Respondent Delaware County  
Board of Elections**

*Pursuant to the Court's June 20, 2023 Order, You  
Must File a Response to the Enclosed **Motion for  
Judgment on the Pleadings** by July 28, 2023*

*/s/ Marian K. Schneider  
Marian K. Schneider*

MARIAN K. SCHNEIDER

Attorney ID No. 50337

STEPHEN A. LONEY

Attorney ID No. 202535

KATE STEIKER-GINZBERG

Attorney ID No. 332236

ACLU OF PENNSYLVANIA

P.O. Box 60173

Philadelphia, PA 19102

215-592-1513

267-573-3054 (fax)

mschneider@aclupa.org

sloney@aclupa.org

ksteiker-ginzberg@aclupa.org

MARY M. MCKENZIE

Attorney ID No. 47434

BENJAMIN D. GEFFEN

Attorney ID No. 310134

PUBLIC INTEREST LAW CENTER

1500 JFK Blvd., Suite 802

Philadelphia, PA 19102

mmckenzie@pubintl.org

267-564-1319

bgeffen@pubintl.org

267-546-1308

MARTIN J. BLACK

Attorney ID No. 54319

ROGER A. DIXON

Attorney ID No. 320090

DECHERT LLP

Cira Centre

2929 Arch Street

Philadelphia, PA 19104

215-994-4000

215-994-2222 (fax)

martin.black@dechert.com

roger.dixon@dechert.com

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

**SONJA KEOHANE, RICHARD  
KEOHANE, and BARBARA WELSH,**

Petitioners,

v.

**DELAWARE COUNTY BOARD OF  
ELECTIONS,**

Respondent.

**CIVIL DIVISION**

**No. CV-2023-4458**

**ELECTION APPEAL**

**John J. Whelan, J.**

**PETITIONERS' MOTION FOR JUDGMENT ON THE PLEADINGS**

Petitioners Sonja Keohane, Richard Keohane, and Barbara Welsh ("Petitioners"),  
qualified registered electors of Delaware County, by and through their undersigned counsel,

move pursuant to Rule 1034 of the Pennsylvania Rules of Civil Procedure and Local Rule 1028(c) for judgment on the pleadings, stating in support as follows and fully incorporating by reference their accompanying Memorandum of Law:

**I. INTRODUCTION**

1. The Board refused to count the provisional ballots voted by each of the Petitioners, even though they were qualified electors who were registered to vote and who properly completed and submitted provisional ballots at their polling places on Primary Election Day, May 16, 2023 (“Primary Day”).

2. The Board’s sole basis for refusing to count the provisional ballots was that Petitioners had previously returned mail-in ballots to the Board, even though the Board had already determined not to accept their prior attempts to vote by mail and cancelled their mail-in ballots.

3. The Board rejected those mail-in ballots for various deficiencies on the envelope used to return them, namely that they did not have a valid handwritten date or they had not properly signed the declaration.

4. Then, the Board rejected Petitioners’ provisional ballots as if Petitioners had already voted in the election.

5. The Board’s unduly restrictive interpretation of the Election Code—resulting in denial of the right to vote under circumstances where all parties, including the Board, agree that Petitioners’ votes should be counted—fails to adhere to established principles protecting the fundamental right to vote under the Pennsylvania Constitution.

6. The statutory text, rules of statutory construction, and overarching principles of Pennsylvania election law require election boards to count a provisional ballot when they have disqualified a mail-in ballot due to errors on the outer envelope. That result harmonizes the

relevant Election Code sections, realizes the General Assembly’s intention that provisional ballots act as a safety net to protect the fundamental right to vote, and ensures the enfranchisement of all the Commonwealth’s voters.

## **II. BACKGROUND**

7. No material facts are disputed. And the facts that Respondent has admitted in its Answer to the Petition are sufficient to support judgment as a matter of law.

8. Petitioners are all qualified electors who are, and were, at the time of the 2023 Primary Election, registered to vote in Delaware County, Pennsylvania. (Petition ¶¶ 8-10, 18-19; Answer ¶¶ 8-10, 18-19.)

9. Respondent is the local government agency responsible for overseeing the conduct of all elections in Delaware County, including adjudicating and deciding whether to count provisional ballots in accordance with the Pennsylvania Election Code. (Petition ¶ 11; Answer ¶ 11.)

10. Initially, Petitioners all attempted to vote by mail-in ballot in the Municipal Primary Election on May 16, 2023. (Petition ¶¶ 8-10; Answer ¶¶ 8-10.)

11. Petitioners validly requested, received, and returned their mail ballots prior to Primary Day. (Petition ¶19; Answer ¶19.)

12. However, Petitioners made certain mistakes in completing the outer envelopes of their mail-in ballot packages. (Petition ¶ 18; Answer ¶ 18.)

13. Specifically, Petitioners Sonja and Richard Keohane inadvertently signed each other’s ballot envelopes and wrote the incorrect date; Petitioner Barbara Welsh wrote the incorrect date on the outer envelope. (Petition ¶¶ 38, 44; Answer ¶¶ 38, 44; *see also* Petition Ex. A, SK Declaration; *id.* Ex. B, RK Declaration, *id.* Ex. C, BW Declaration.)

14. Upon receipt of Petitioners' mail ballot packages, the Board reviewed the outer envelopes and determined that they contained technical errors that would prevent the ballots inside from being counted under current Pennsylvania law. (Petition ¶ 20; Answer ¶ 20.)

15. On or about May 10 and 11, 2023, the Board notified Petitioners via email and postal mail that it had cancelled their mail-in ballots on account of these errors. (Petition ¶¶ 8-10, 18, 21, 38, 44; Answer ¶¶ 8-10, 18, 21, 38, 44.) The Board's correspondence included guidance for how Petitioners could cure the defect. (Petition ¶¶ 24, 28; Answer ¶¶ 24, 28.) The Board's letter did not mention provisional ballot voting. (Petition ¶¶ 25, 28; Answer ¶¶ 25, 28.)

16. The Board's guidance regarding how to cure defective mail-in ballots was also posted to its website. (Petition ¶ 22; Answer ¶ 22.) The guidance states that voters could either (a) obtain and complete a replacement ballot in person at the office of the Bureau of Elections (the "Bureau") in Media, Pennsylvania, or (b) request that the Bureau mail a replacement ballot to the voter in advance of election day. (Petition ¶¶ 3, 22; Answer ¶¶ 3, 22.) The Board's online guidance also did not mention provisional ballots. (Petition ¶ 25; Answer ¶ 25.)

17. However, Pennsylvania's Department of State published guidance on its website stating that voters are entitled to request, receive, and vote a provisional ballot if, among other reasons, the voter returned a mail-in ballot that was rejected by the county board of elections. (Petition ¶¶ 27, 66; Answer ¶¶ 27, 66.)

18. Although not as well publicized, it is the Board's policy as well to permit voters to complete and submit provisional ballots under these circumstances. (Petition ¶ 36; Answer ¶ 36.)

19. Petitioners did not use the cure process outlined in the Board’s communications,<sup>1</sup> but instead appeared in person at their respective polling places on Primary Day, where they properly completed and submitted provisional ballots consistent with the Department of State’s guidance. (Petition ¶¶ 4, 8-10; Answer ¶¶ 4, 8-10.)

20. On May 17, 2023, the Board, through its designated provisional ballot review board, began review of the provisional ballots submitted on Primary Day. (Petition ¶ 47; Answer ¶ 47.)

21. On May 18, 2023, the Board’s provisional ballot review board held a closed “exhibition” session during which it disclosed its recommendations for counting or not counting provisional ballots to candidates, political parties and their representatives. (Petition ¶¶ 48, 50; Answer ¶¶ 48, 50.)

22. On May 23, 2023, the Board considered the recommended disposition of the provisional ballots at a public hearing. (Petition ¶ 55; Answer ¶ 55.) At the public hearing, the Board unanimously voted not to count Petitioners’ provisional ballots. (Petition ¶ 56; Answer ¶ 56.)

23. The Board based its decision on the unpublished and nonprecedential Commonwealth Court decision, *In re Allegheny County Provisional Ballots in the 2020 General Election*, No. 1161 C.D. 2020, 241 A.3d 695 (Table), 2020 WL 6867946 (Pa. Commw. Ct. Nov. 20, 2020). (Petition ¶ 58; Answer ¶ 58.)

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<sup>1</sup> Petitioners do not challenge the Board’s ability to establish notice and cure procedures for voters to correct problems with mail ballots prior to a primary or election. Nor do Petitioners claim that the specific procedures established by the Board for the May 2023 Primary are in any way contrary to law. Rather, Petitioners only challenge the Board’s decision to reject their provisional ballots voted on Primary Day. Under the correct reading of the Election Code, the Board must accept provisional ballots even if it also makes the commendable decision to establish additional options for voters to cure mail ballot defects before Election Day.

24. Nevertheless, various Board members repeatedly stated on the record that they were troubled by the result and hoped the courts would reconsider. (Petition ¶¶ 56-59; Answer ¶¶ 56-59.) Indeed, the Board has expressed the view that provisional ballots cast by voters who submitted mail-in ballots that were cancelled due to facial defects should, in fairness, be counted. (Petition ¶ 5; Answer ¶ 5.)

25. And the Board has now expressly asked this Court to rule in Petitioner's favor, requesting "an order declaring Petitioners' provisional ballots eligible to be counted and directing the Board to count them." (Answer at 17.)

### **III. ARGUMENT**

26. Judgment on the pleadings may be granted where, as here, the pleadings demonstrate that no genuine issue of fact exists and the moving party is entitled to judgment as a matter of law. *See* Pa. R. Civ. P. 1034(a); *Angino & Rovner v. Jeffrey R. Lessin & Assocs.*, 131 A.3d 502, 507 (Pa. Super. Ct. 2016).

27. As set forth above and in the accompanying memorandum of law, which is incorporated herein by reference, the essential facts of this case are not disputed, and the Court may decide the legal issues without further factual development.

28. A plain reading of the relevant statutory text, 25 P.S. § 3050(a.4)(5)(i), commands that the Board count Petitioners' provisional ballots.

29. The statutory language is mandatory and requires election boards to count provisional ballots so long as the voter "did not cast any other ballot."

30. A qualified voter who attempted to submit a mail-in ballot to the Board, only to have that attempt rejected by the Board, cannot sensibly be said to have "cast" their ballot within the ordinary meaning of that word.

31. There is no conflict between the mandatory language of § 3050(a.4)(5)(i) and § 3050(a.4)(5)(ii)(F).

32. To the extent there is any ambiguity between § 3050(a.4)(5)(i) and § 3050(a.4)(5)(ii)(F), Pennsylvania law demands that statutory provisions be read harmoniously to give effect to both provisions and should be construed in a way that does not nullify or exclude another provision. *See, e.g., In re Borough of Downingtown*, 161 A.3d 844, 871 (Pa. 2017) (noting that when two statutory provisions can be read as harmonious or in conflict, courts should construe them as in harmony with each other).

33. The mandatory counting provision of § 3050(a.4)(5)(i) is easily harmonized with § 3050(a.4)(5)(ii)(F): if a mail-in ballot package is returned but cancelled because of a defect in the outer envelope, no viable ballot has been “timely received” by the Board or “cast” by the voter. To be “timely received” or “cast” means that the ballot was *received, not cancelled, and able to be counted*. Under this construction, subsection (F) would not bar voters’ provisional ballots where those voters submitted their mail-in ballots in envelopes with purported defects that the Board rejected.

34. To the extent any question remains as to the correct interpretation of §3050(a.4)(5), the Pennsylvania Constitution dictates that the Court liberally construe this provision of the Election Code so as to enfranchise, not disenfranchise. “It is the longstanding and overriding policy in this Commonwealth to protect the elective franchise. The Election Code must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice. It is therefore a well-settled principle of Pennsylvania election law that *every rationalization within the realm of common sense should aim at saving the ballot rather than*

*voiding it.” In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058, 1071 (Pa. 2020) (emphasis added) (cleaned up).

35. The Board based its decision to the contrary on the unpublished and nonprecedential Commonwealth Court decision, *In re Allegheny County Provisional Ballots in the 2020 General Election*, No. 1161 C.D. 2020, 241 A.3d 695 (Table), 2020 WL 6867946 (Pa. Commw. Ct. Nov. 20, 2020). (Petition ¶ 58; Answer ¶ 58.) The Commonwealth Court failed to give due weight in that case to the constitutional imperative to uphold the right to vote.

36. *In re Allegheny County* does not bind this Court or the Board because it is not precedential by the Commonwealth Court’s own rules. *DeGrossi v. Commonwealth, Dep’t of Transp., Bureau of Driver Licensing*, 174 A.3d 1187, 1191 (Pa. Commw. Ct. 2017).

37. Moreover, the Commonwealth Court’s analysis was inadequate and ignored that § 3050(a.4)(5)(i) requires that a provisional ballot be counted if “the individual did not cast any other ballot, including an absentee ballot, in the election.”

38. Finally, the interpretation of the Election Code advanced by Petitioners is consistent with guidance from the Pennsylvania Department of State.

WHEREFORE, Petitioners respectfully request that the Court grant their Motion for Judgment on the Pleadings and enter an order declaring that the Pennsylvania Election Code requires the counting of Petitioners’ provisional ballots and directing the Delaware County Board of Elections to count them.



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BY:

DECHERT LLP  
Martin J. Black  
Roger A. Dixon  
Cira Centre  
2929 Arch Street  
Philadelphia, PA 19104  
215-994-4000  
215-994-2222 (fax)  
martin.black@dechert.com  
roger.dixon@dechert.com

/s/ Marian K. Schneider  
ACLU OF PENNSYLVANIA  
Marian K. Schneider  
Stephen A. Loney  
Kate Steiker-Ginzberg  
P.O. Box 60173  
Philadelphia, PA 19102  
215-592-1513  
267-573-3054 (fax)  
mschneider@aclupa.org  
sloney@aclupa.org  
ksteiker-ginzberg@aclupa.org

PUBLIC INTEREST LAW CENTER  
Mary M. McKenzie  
Benjamin D. Geffen  
1500 JFK Blvd., Suite 802  
Philadelphia, PA 19102  
mmckenzie@pubintl.org  
267-564-1319  
bgeffen@pubintl.org  
267-546-1308

*Attorneys for Petitioners*