

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Petition to Open Ballot Box :  
Pursuant to 25 P.S. §3261(a) : CASES CONSOLIDATED  
and for a correct account of the :  
General Election for the Governor :  
and Lieutenant Governor of :  
Pennsylvania, United States :  
Senator for Pennsylvania, United :  
States Representative for the 6<sup>th</sup> :  
District of Pennsylvania State :  
Representative for the :  
157th Legislative District :

Appeal of: Sally Ann Mininger, :  
Martina M. Gain and Robert C. Frank, :  
all of the Election District of :  
Tredyffrin Township M-4, : No. 1489 C.D. 2022  
Polling Place #617 :

In re: Petition to Open Ballot Box :  
Pursuant to 25 P.S. §3261(a) :  
and for a correct account of the :  
General Election for the Governor :  
and Lieutenant Governor of :  
Pennsylvania :

Appeal of: James Juric, Sarah :  
Juric and Linda R. McGlinn, :  
all of the Election District of :  
East Bradford, N-2 Polling : No. 1490 C.D. 2022  
Place #021 :

In re: Petition to Open Ballot Box :  
Pursuant to 25 P.S. §3261(a) :  
and for a correct account of the :  
General Election for the Governor :  
and Lieutenant Governor of :  
Pennsylvania :

Appeal of: Miriam G. Matrangola,  
Peter J. Matrangola and John DeVris,  
all of the Election District of  
Birmingham 1, Polling Place #014

No. 1491 C.D. 2022

In re: Petition to Open Ballot Box  
Pursuant to 25 P.S. §3261(a)  
and for a correct account of the  
General Election for the Governor  
and Lieutenant Governor of  
Pennsylvania

Appeal of: Kathleen Perri Dobson,  
Erin Kershaw and Marc Altman, all  
of the Election District of  
Birmingham 2, Polling Place #015

No. 1492 C.D. 2022

In re: Petition to Open Ballot Box  
Pursuant to 25 P.S. §3261(a) and  
for a correct account of the General  
Election for the Governor and  
Lieutenant Governor of Pennsylvania

Appeal of: Mary Maguire, Debra  
Swavelly and Barbara Ann Lawrie,  
all of the Election District of Upper  
Uwchlan 2, Polling Place #666

No. 1493 C.D. 2022

In re: Petition to Open Ballot Box  
Pursuant to 25 P.S. §3261(a) and  
for a correct account of the General  
Election for the Governor and  
Lieutenant Governor of Pennsylvania

Appeal of: Hobart L. Clark, Kathryne S.  
Clark and Deirdre C. Miller, all of the  
Election District of Willistown N-1,  
Polling Place #770

No. 1494 C.D. 2022  
Submitted: January 24, 2023

BEFORE: HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE FIZZANO CANNON

FILED: February 10, 2023

Appellants Sally Ann Mininger, Martina M. Gain and Robert C. Frank of the Election District of Tredyffrin Township M-4, Polling Place #617 (Tredyffrin Appellants); James Juric, Sarah Juric, and Linda R. McGlinn of the Election District of East Bradford, N-2 Polling Place #021 (East Bradford Appellants); Miriam G. Matrangola, Peter J. Matrangola, and John DeVris of the Election District of Birmingham 1, Polling Place #014 (Birmingham 1 Appellants); Kathleen Perri Dobson, Erin Kershaw, and Marc Altman of the Election District of Birmingham 2, Polling Place #015 (Birmingham 2 Appellants); Mary Maguire, Debra Swavely, and Barbara Ann Lawrie of the Election District of Upper Uwchlan 2, Polling Place #666 (Upper Uwchlan Appellants); and Hobart L. Clark, Kathryne S. Clark, and Deirdre C. Miller of the Election District of Willistown N-1, Polling Place #770 (Willistown Appellants) (collectively, Appellants)<sup>1</sup> appeal from the December 9, 2022 order of the Court of Common Pleas of Chester County (Trial Court) that collectively denied the individual Petitions to Open Ballot Box for Correct Recount Pursuant to 25 P.S. § 3261(a) (collectively, Petitions)<sup>2</sup> filed by Appellants in reference to Pennsylvania's November 8, 2020 General Election (General Election) for certain statewide offices.

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<sup>1</sup> By order exited January 11, 2023, this Court consolidated all six of Appellants' appeals under the above single caption.

<sup>2</sup> This matter originally involved 11 Petitions, all of which the Trial Court dismissed with prejudice. Only the dismissal of six Petitions were appealed to this Court.

Upon review, we vacate the Trial Court's order and remand the matter for further proceedings.

## I. Background

Following the General Election, the Chester County Board of Elections (Board of Elections) completed the computation of the election results on November 17, 2022. *See* Trial Court Decision and Order dated December 9, 2022 (Trial Court Decision) at 4. The next day, on November 18, 2022, Appellants individually filed the Petitions in the Trial Court. *See id.* Appellants completed and filed the Petitions *pro se* using identical fill-in-the-blank forms onto which was handwritten individual information pertaining to Appellants and their election districts. *See* Trial Court Decision at 4; *see also* Petitions. None of the Petitions put forth any allegations of specific fraud or error; instead, each forwarded the same general assertion:

To the best of Petitioners' information and belief, fraud or error, although not manifest on the general return of votes, was committed in the computation of votes cast, or in the marking of ballots, or otherwise in connection with said ballots for the General Election for the offices of [Governor and Lieutenant Governor<sup>3</sup>] of Pennsylvania, including the election district of Petitioners.

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<sup>3</sup> Each of the Petitions concerned the General Election for the offices of Governor and Lieutenant Governor of Pennsylvania. Additionally, the Tredyffrin Appellants' Petition further pertained to the offices of United States Senator for Pennsylvania, United States Representative for the 6th District of Pennsylvania, and Pennsylvania State Representative for the 157th Legislative District. *See* Tredyffrin Petition at 2 (pagination supplied), ¶ 5.

Petitions at 2 (pagination supplied), ¶ 5; *see also* Trial Court Decision at 4. The Petitions then requested, pursuant to Section 1701(a) of the Election Code,<sup>4</sup> 25 P.S. § 3261(a), that the ballot boxes for the election districts to which each Petition pertained be opened for the purpose of correctly counting the ballots for the specified offices. *See* Petitions at 2, ¶ 6. Additionally, the Petitions “expressly requested that the correct counting of the ballots by such persons be by hand and that no machines be employed, so that machine errors can be detected.” Petitions at 2, ¶ 7. The Petitions further alleged that Petitioners posted the requisite \$50.00 cash with the Chester County Prothonotary and that the Petitions were filed within five days of the completion of the computational canvassing of all voting returns by the Board of Elections. *See* Petition at 2-3, ¶¶ 8-9.

Upon the filing of the Petitions, the Trial Court issued orders in each case (collectively, the November 18 Order) scheduling a hearing to be conducted on the Petitions on December 5, 2022. *See* Trial Court Decision at 4.<sup>5</sup> The November 18 Order instructed Appellants to serve notice of the order upon each candidate for the offices which were to be recounted<sup>6</sup> and to file an Affidavit of Service within two days of the completion of such service on the various parties. *See* November 18 Order. The November 18 Order did not, however, provide the time and place of, or

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<sup>4</sup> Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. § 3261(a).

<sup>5</sup> The Trial Court’s opinion also refers to a second similar order purportedly issued on November 21, 2022. Inexplicably, however, the November 21, 2022 order contained in the Trial Court’s original record is an order from the common pleas court in Forest County, signed by the president judge of that court, apparently in a matter not involved here.

<sup>6</sup> The November 18 Order also required service of notice of the order on Chester County Voter Services and the Chester County Office of Solicitor. *See* November 18 Order.

otherwise schedule, the opening of the ballot boxes or the proposed recounts. *See id.* Specifically, the order stated:

AND NOW, this 18<sup>th</sup> day of November, 2022, upon consideration of the Petition to Open Ballot Box, filed on November 18, 2022, it is hereby ORDERED that:

1. A hearing on the Petition shall be held before the Honorable Jeffrey R. Sommer, on Monday, December 5, 2022 at 1:30 p.m. in Courtroom 8, Chester County Justice Center, 201 West Market Street, West Chester, Pennsylvania.

2. Notice of this Order, including the time and place of proposed recount, shall be given by Petitioners, either personally or by registered mail, to each candidate for the office or offices which are to be recounted, Chester County Voter Services, and the Chester County Office of Solicitor.

3. Each candidate for the office or offices which are to be recounted may be present at such recount, either in person or by his attorney or by his duly authorized representative.

4. An affidavit of Service of the Notice required in Paragraph 2, above shall be filed with the court within two (2) days of the completion of service of the Notice as directed.

5. The recanvassing of the voting machine shall proceed in accordance with 25 P.S. § 3262(a)(1).

November 18 Order.

On November 23, 2022, the Board of Elections filed preliminary objections to the Petitions. *See* Trial Court Decision at 5; *see also* Chester County Board of Elections' Preliminary Objections to Petition to Open Ballot Box and for

Correct Recount Pursuant to 25 P.S. § 3261(a).<sup>7</sup> On November 28, 2022, while the Petitions were still pending before the Trial Court, the Board of Elections certified to the Secretary of State of the Commonwealth the results of the vote for each office in the General Election.<sup>8</sup> *See* Trial Court Decision at 5.

While no evidence was taken, the Trial Court conducted argument on December 5, 2022 (December 5 Hearing), during which Appellants argued that “they were not challenging the election results (i.e., the winner or the loser) but instead wanted to audit the results to confirm they were not fraudulent.” Trial Court Decision at 5; *see also* Notes of Testimony, December 5, 2022 (N.T.) at 26-31. On December 9, 2022, the Trial Court denied the Petitions because Petitioners failed to either (1) make out a *prima facie* case that a particular act of fraud or error occurred, or (2) file the Petitions and appropriate fee in all election districts in the Commonwealth in which the elections were contested. *See id.* at 13-17. The Trial Court also put forth laches as a basis to dismiss two of the Petitions wherein the individual Appellants who verified the Petitions had also acted as election officials within the election districts the results of which they challenged through the filing

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<sup>7</sup> The trial court mistakenly indicated that Chester County Voter Services filed these preliminary objections. *See* Trial Court Decision at 5. As set forth in note 10, *infra*, Petitioners challenged the standing of the Board of Elections to object to the Petition in the Trial Court, and they reassert that challenge on appeal to this Court. Notably, neither the Trial Court’s opinion nor its order states whether or how the Trial Court disposed of the preliminary objections. However, because this Court addresses the issues raised in the preliminary objections as part of its disposition of the other issues on appeal, we deem it unnecessary to decide any standing issue or otherwise determine whether or precisely how the Trial Court disposed of the preliminary objections below.

<sup>8</sup> The trial court noted that November 28, 2022, was the deadline for county boards of elections to certify General Election results. *See* Trial Court Decision at 8.

of the Petitions.<sup>9</sup> *See id.* The Trial Court dismissed the Petitions with prejudice. *See id.* at 18. Appellants appealed to this Court.

## II. Issues

On appeal, Appellants argue<sup>10</sup> that the Trial Court erred in failing to follow mandated procedures required by the Election Code in reference to petitions

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<sup>9</sup> Those filed by the Birmingham 2 Appellants and the Willistown Appellants.

<sup>10</sup> Appellants stated the questions involved in this appeal as follows:

A. Did the Trial Court err as a matter of law in failing to follow the procedures mandated by 25 P.S. § 3261(a) by: (1) scheduling a hearing on the Petitions rather than scheduling the recount of the relevant ballot boxes, (2) ordering Petitioners to give notice of “the time and place of proposed recount” to the interested candidates without the [Trial] Court having set a time and place for the recount, thus peremptorily defeating Petitioners’ ability to comply with the [Trial] Court’s Order, and (3) by inviting, accepting, considering, and refusing to dismiss the Chester County Board of Elections’ preliminary objections to the Petition[s] because a county board of elections lacks standing to object to petitions filed under 25 P.S. §§ 3261, 3262, and 3263?

B. Did the Trial Court err as a matter of law and incorrectly interpret 25 P.S. § 3261(a) by: (1) requiring petitions under § 3261 to be filed in every election district in Pennsylvania where a state-wide office is on the ballot; (2) demanding that Petitioners specify the particular act of fraud or error and offer evidence to substantiate the allegations of their petition; (3) surmising that Petitioners who acted as election officials “acted fraudulently,” were “lying,” and “could be subject to investigation by the District Attorney” for signing the General Return Sheet at the polling place, where those petitioners never observed the tabulation of mail-in ballots; (4) misrepresenting Petitioners’ recount petition and counsel’s argument asserting that Petitioners “wanted to audit the results” of the election and conduct a “forensic audit,” when the word “audit” does not appear anywhere in Petitioners’ brief and was never spoken by Petitioners’ counsel at

to open a ballot box. *See* Appellants’ Br. at 2, 12-16. Specifically, Appellants argue that the Trial Court erred by failing to schedule a proposed date and place to conduct the proposed opening of the ballot boxes and recount while ordering Appellants to give notice to interested candidates of these details. *See id.* Appellants further argue that the Trial Court erred by finding that the Election Code, in the absence of specific allegations of fraud or error supported by *prima facie* evidence, requires the filing of petitions to open ballot boxes, and the payment of attendant fees, in all election districts in which the election in question is contested. *See id.* at 2, 16-24.

### III. Discussion

Initially, as our Supreme Court has observed,

in considering statutory provisions of the Election Code, we must remember “the longstanding and overriding policy in our Commonwealth to protect the elective franchise.” *In re Nomination Petition of Driscoll*, 847 A.2d 44, 49, [] (Pa. []2004). To promote this policy, th[e Supreme] Court has consistently held that the provisions of the Election Code must “be liberally construed to protect a candidate’s right to run for office and the voters’ right to elect the candidate of their choice.” *Id.*[:] *see also In re Nomination Petition of Flaherty*, []770 A.2d 327, 331 ([Pa.] 2001); *Weiskerger Appeal*, []290 A.2d 108, 109 ([Pa.] 1972). At the same time, however, we have said that “the policy of the liberal reading of the Election Code cannot be distorted to emasculate those requirements necessary to assure the probity of the

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the argument; and (5) denying Petitioners’ request for a hand recount of the ballots?

Appellants’ Br. at 2.

process.” *Petition of Cianfrani*, 359 A.2d 383, 384 ([Pa.] 1976).

*In re 2003 Gen. Election for Off. of Prothonotary*, 849 A.2d 230, 237 (Pa. 2004).

Regarding petitions to open a ballot box, Section 1701(a) of the Election Code, 25 P.S. § 3261(a), provides that

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<sup>[11]</sup> 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.

25 P.S. § 3261(a). Section 1701(a) goes on to expressly state that “[i]t 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.” *Id.* As this Court and our Supreme Court have also observed,

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<sup>11</sup> The Election Code defines a “qualified elector” as “any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election.” 25 P.S. § 2602.

the General Assembly [has] made the procedure to open ballot boxes relatively easy, but ... [has] also included the verification requirement, no doubt because it felt it necessary to require some basis for the opening of boxes to prevent the filing of Petitions for the sole purpose of indulging in a “fishing expedition.”

*2003 Gen. Election for Off. of Prothonotary*, 849 A.2d at 239 (quoting *Giacobello v. Bd. of Elections of Borough of Mount Union, Cnty. of Huntingdon*, 322 A.2d 429, 431 (Pa. Cmwlth. 1974) (internal citation and some quotation marks omitted).

Section 1703(a)(1) of the Election Code, 25 P.S. § 3263(a)(1), operates in tandem with Section 1701(a) of the Election Code, 25 P.S. § 3261(a), and sets forth the additional requirement that petitions to open a ballot box must 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.” 25 P.S. § 3263(a)(1).<sup>12</sup> Thus, where, within five days of the completion of the computational canvassing of the election returns by the county board of elections, three qualified electors file a petition to open a ballot box that includes an unspecified allegation of fraud or error verified by the electors to be based upon information they consider reliable evidence of fraud or error, the court in which the petition is filed is obligated to open the ballot box and

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<sup>12</sup> Section 1703(a)(1) provides, in pertinent part, that

[a]ny petition to open a ballot box or to recanvass the votes on a voting machine or an electronic voting system pursuant to section[] 1701 . . . 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.

25 P.S. § 3263(a)(1).

cause the entire vote of that ballot box to be correctly counted by persons designated by such court or judge. *See* 25 P.S. § 3261(a).<sup>13</sup>

Once the statutory requisites are met, Section 1701(c) of the Election Code, 25 P.S. § 3261(c), requires the court to cause notice to be given to potentially affected candidates as follows:

Before any ballot box is opened under the provisions of this section, the court [wherein the Section 1701 petition is filed] shall direct that notice of time and place of proposed recount be given, either personally or by registered mail, to each candidate for the office or offices which are to be recounted by the order of the court, and each such candidate may be present at such recount, either in person or by his attorney or by his duly authorized representative, under such regulations as the court may prescribe.

25 P.S. § 3261(c). Notably, this section does not affect the Trial Court’s jurisdiction to hold a hearing to determine whether a petition to open has met the requirements of Section 1701(a), e.g., whether the petition has been filed by three qualified electors of the election district in which the affected ballot box is located. *Compare In re Bingham* 275 A.3d 1108 (Pa. Cmwlth. 2022) (failure to meet statutory requirement of service of nomination petitions removes jurisdiction of the court). However, the statutory requirement relates solely to notice to be given to affected candidates of the opening of the ballot box and proposed recount scheduled in reference to a petition that has satisfied the requirements outlined in Sections 1701(a) and 1703(a)(1). In other words, while the Trial Court may additionally order that

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<sup>13</sup> We note that “[b]allot boxes may be opened under the provisions of [S]ection [1701] at any time within four months after the date of the general, municipal, special or primary election at which the ballots therein shall have been cast.” 25 P.S. § 3261(f).

candidates be given notice of a hearing to determine to whether the petition meets all statutory requirements, Section 1701 requires only that the candidates be given notice of the scheduled opening of the ballot box and proposed recount. *See* 25 P.S. § 3261(c).

Here, each Petition tracked the language of Section 1701(a) and alleged that, upon the Petitioners' best information and belief, fraud or error not evident on the general return of votes had been committed in the computation of the votes, in the making of ballots, or otherwise in connection with the ballots for the elections involving the named candidates in certain election districts. *See* Petitions at 2, ¶ 5. The Petitions were notarized and filed within five days after the completion of the computational canvassing of all returns by the Board of Elections. *See* 2003 *Gen. Election for Off. of Prothonotary*, 849 A.2d at 238 (concluding that "the General Assembly intended the term 'duly verified' in section 1701 to mean that the three electors bringing the Petition to Open have confirmed the averments in the Petition by means of an oath or affirmation before a notary public or similar public official."). As such, provided Petitioners are "qualified electors of the election district," they have complied with the statutory requirements for filing petitions to open ballot boxes, and the Trial Court was accordingly obligated to schedule the opening of the ballot boxes involved in the Petitions and cause notice of the schedule opening to be given to potentially affected candidates. *See* 25 P.S. § 3261(a); 25 P.S. § 3261(c); 25 P.S. § 3263(a)(1).

However, the Trial Court did not schedule a date and time for the opening of the ballot boxes as required. *See* 25 P.S. § 3161(c). Instead, the Trial Court entered an order scheduling a "hearing," i.e., the December 5 Hearing, apparently for the purpose of determining whether the Petitions in fact met the

requirements of Section 1701 petitions and requiring Appellants to provide, either personally or by registered mail, notice of the order, and thus of the December 5 Hearing, to each candidate for the relevant offices and to file an affidavit as proof of the service of such notice. *See* November 18 Order. While the Trial Court did not err by scheduling such a hearing, the Trial Court needed to specify a time and place for the proposed opening of the ballot boxes referred to in the Petitions before it could require notice of such time and place. *See id.* The Trial Court’s failure to schedule a date and time for the opening of the ballot boxes while ordering Appellants to provide notice of the November 18 Order to the potentially affected candidates created confusion regarding the service required of Appellants. *See* N.T. at 3-12. Consequently, Appellants did not provide notice of the November 18 Order or the hearing to the affected candidates as instructed.<sup>14</sup> *See id.*

The Trial Court indicated that failure to serve its administrative scheduling order deprived the Trial Court of jurisdiction. *See* Trial Court Opinion Pursuant to Pa.R.A.P. 1925 at 19-21 (stating in reference to Petitioners’ failure to comply with the November 18 Order that, “due to Petitioners’ failure to adhere to the procedures laid out by the Election Code for challenging the results of the November 2022 General Election, the [Trial Court] may well be without jurisdiction to hear and decide the substantive issue of a recount in this matter.”). However, as explained above, there is no requirement that a pre-ballot box opening hearing be

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<sup>14</sup> At the December 5 Hearing, Appellants conceded that they did not serve the candidates with notice of the hearing but argued that service of the statutorily required notice – which required the inclusion of the time and place of the proposed recount – was not possible because the time and place of the proposed recount had yet to be determined due to lack of cooperation from the Board of Elections. *See* N.T. at 3-5.

held or that notice of such a hearing on the candidates is necessary for jurisdiction.<sup>15</sup> Rather, as discussed previously, the only notice requirement pertains to notice of the time and place of opening a ballot box. 25 P.S. § 3161(c). The Trial Court did not, however, impose the extreme penalty of dismissing the Petitions with prejudice as a sanction for non-compliance with its directive to give candidates notice of the November 18 Order. Instead, the Trial Court stated a mistaken belief that such failure to serve “may well” deprive it of jurisdiction. The Trial Court erred to the extent it relied upon lack of jurisdiction to dismiss the petitions with prejudice.

Additionally, the Trial Court incorrectly relied on requirements set forth in Section 1703(a)(1) of the Election Code, 25 P.S. § 3263(a)(1), to dismiss the Petitions for Petitioners’ failure to either allege fraud or error with specificity or file in every election district in the Commonwealth. *See* Trial Court Decision at 14-15. Section 1703(a)(1) provides:

Any petition to open a ballot box or to recanvass the votes on a voting machine or an electronic voting system pursuant to section[] 1701 [] 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):

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<sup>15</sup> Assuming that the Petitioners violated the scheduling order of the Trial Court by failing to serve the candidates with this scheduling order, the result would not be dismissal for lack of jurisdiction, but rather would be a sanction for failure to adhere to the Trial Court’s administrative order.

(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.

25 P.S. § 3263(a)(1) (internal footnote omitted). The Trial Court construed Section 1703(a)(1) as requiring that 1701 petitions either (1) be filed (and fees paid) in every election district in which the election is contested, which for statewide elections would include every election district in the Commonwealth; or (2) plead particular acts of fraud or error supported by *prima facie* evidence of the same. *See* Trial Court Decision at 14-15. This was error.

Section 1701(a) expressly states: “[i]t 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). The first sentence of Section 1703(a)(1) merely provides a five-day time limit for the filing of a Section 1701 petition. 25 P.S. § 3263(a)(1). The second sentence of Section 1703(a)(1) provides that, “[i]f 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.” 25 P.S. § 3263(a)(1). The subsequent procedures contained in subclauses 1703(a)(1)(i) and 1703(a)(1)(ii) apply only to subsequent petitions filed after the discovery of fraud or error as a

result of the opening of a ballot box scheduled in response to a valid Section 1701 petition. *See* 25 P.S. §§ 3263(a)(1)(i) & (a)(1)(ii). Therefore, a Section 1701 petition need not either be filed in every election district for a particular election or, in the alternative, allege specific fraud or error. The Trial Court erred by so finding. *See* 25 P.S. § 1703(a)(1).

The Trial Court also erred to the extent that it relied on the equitable doctrine of laches to invalidate the Petitions signed by electors who had acted as election officials in the challenged election districts and had previously signed an attestation to the legality of the results. *See* Trial Court Decision at 13-14. While we appreciate the Trial Court's concerns and skepticism regarding the four Petitioners who served as election officials in the election districts where they now assert challenges,<sup>16</sup> we do not agree that laches applies to the instant matter. As an

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<sup>16</sup> The Trial Court stated:

Important to note is that the pleadings reflect that at least four of the Petitioners served as election officials in the very precincts in which they now allege fraud in the counting of votes. As such, each of the identified Petitioners swore an oath and signed that the election would be conducted in accordance with law. At the return of the vote, each signed a "General Return Sheet," which ensures that the total number of voters and the total number of votes are reconciled. The Return Sheet contains the following statement,

We the Election Officials certify that We have followed all the procedures proscribed by Law.

The four Petitioners who conducted the election in their precinct and who swore that they would uphold the law, who counted and reconciled the votes, and who then swore that they followed all procedures proscribed by law, now claim that there was fraud in their precinct. In short, they now claim they themselves acted fraudulently or in error. Aside from the obvious question, "Were you lying then or are you lying now", it reinvigorates one of

equitable bar against the prosecution of stale claims,<sup>17</sup> the concept of laches is inapposite to the circumstances involved here and is not appropriately applied to the instant facts. Additionally, we do not agree that the application of other equitable principles (such as equitable estoppel) would necessarily and automatically function to estop the Petitioners in question from making apparently inconsistent statements about the propriety of the elections over which they presided.<sup>18</sup> As noted above, the Election Code defines a “qualified elector” as “any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election.” 25 P.S. § 2602. Regardless of conflicting statements made outside the bounds of the Petitions, the Petitioners herein allege that they have satisfied the requirements of

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the seminal inquiries, do you have specific claims of fraud? As counsel for Petitioners assured the [Trial C]ourt that they have evidence of fraud, but don’t want to tell us, the [Trial C]ourt wonders if perhaps it is because his own Petitioners may have acted fraudulently and could be subject to investigation by the District Attorney.

Trial Court Decision at 7.

<sup>17</sup> “[T]he doctrine of laches [is] an equitable bar to the prosecution of stale claims and is the practical application of the maxim that those who sleep on their rights must awaken to the consequence that they have disappeared.” *In re Wilksburg Taxpayers & Residents Interest in Green St. Park Sale to a Private Developer & Other Park-Sys. Conditions*, 200 A.3d 634, 642 (Pa. Cmwlth. 2018) (internal quotation marks omitted).

<sup>18</sup> Whether equitable principles would apply to preclude a petition notwithstanding the petitioner’s status as a qualified elector would depend on the circumstances of the individual case. We can imagine, for example, a scenario in which an election official could discover reliable information that the official believed evidenced fraud or error after having already certified that an election occurred occurring to law.

“qualified electors” for the purpose of the Petitions. *See* Petitions; 25 P.S. § 2602. Accordingly, while the Trial Court may properly hold a hearing to determine whether the Petitions have met those statutory requirements, including a finding as to whether the Petitioners are indeed “qualified electors,” the Trial Court erred in dismissing certain of the Petitions because a petitioner was also a certifying election official.

We observe, however, that the Trial Court did not err by denying Petitioners’ requests for hand recounts without the use of machines. *See* Trial Court Decision at 10-13; Petitions at 2, ¶ 7. As this Court has explained:

Section 1701(a) directs the relevant court to

order the ballot box to be opened and “cause the entire vote thereof to be correctly *counted by persons designated by such court or judge,*” but this statute is silent on the manner in which such designated persons must conduct the recount.” . . . . The statutory language in Section 1701(a) requires the court to designate the specific person or persons to conduct the recount without requiring the court to direct that the recount be done by hand instead of by machine.

Furthermore, Section 1118-A of the Election Code mandates that “[i]n an election district using an electronic voting system, should a recount of votes be ordered as provided by law, the ballots shall be recounted in accordance with Section 1404(e) of the Election Code, 25 P.S. § 3154(e).” 25 P.S. § 3031.18. In turn, Section 1404(e) states, in relevant part:

Whenever it shall appear that there is a discrepancy in the returns of any election district, or, upon petition of three voters of any district, verified by affidavit, that an error, although not

apparent on the face of the returns, has been committed therein, or of its own motion or under subsection (g), the county board shall at any time prior to the completion of the computation of all of the returns for the county, summon the election officers of the district, and said officers, in the presence of said board, shall conduct a recount or recanvass of all ballots cast. Before making such recount or recanvass, the said board shall give notice in writing to the proper custodian of voting machines, and to each candidate, and to the county chairman of each party or political body, affected by the recount or recanvass; and each such candidate may be present in person, or by attorney, and each of such parties, or bodies, may send two representatives to be present at such recount or recanvass.

....

(3) In a county in which an election district uses an electronic voting system utilizing paper ballots, all of the following apply:

(i) The county board shall recount all ballots using manual, mechanical or electronic devices of a different type used for the specific election.

(ii) All ballots containing overvotes shall be counted manually.

*Id.* § 3031.18. Therefore, reading Sections 1118-A, 1404(e), and 1701(a) together, recounts of this nature involving votes cast upon paper ballots that were electronically recorded and tabulated, can be done electronically, manually, or mechanically, with the sole exception being if any such ballots contain overvotes, they must be recounted manually.

*In Re: Petition to Open Ballot Box Pursuant to 25 P.S. § 3261(a) and for a Correct Count of the Republican Primary Election for the Pennsylvania House of Representatives, Representative for the 100<sup>th</sup> District* (Pa. Cmwlth., No. 553 C.D. 2022, filed June 13, 2022),<sup>19</sup> slip op. at 3-5 (holding petitioners not entitled to hand recount of all ballots cast in election district) (some internal citations and brackets omitted) (emphasis in original).

This Court received this appeal on January 11, 2023. Briefing was concluded and the case was submitted for decision on January 24, 2023. We note that, although the offices that were the subject of the Petitions have been filled and the victorious candidates sworn into office by the time of the filing of this opinion, the matter is not moot. In determining “[w]hether proceedings should be allowed to continue on [] petitions to open [] ballot boxes and recount votes, where the election results have already been certified, the declared winner has been sworn in, and there is no underlying election contest[,]” our Supreme Court has explained that boards of elections improperly certify election results while timely and properly petitions to open the ballot boxes are pending. *See 2003 Gen. Election for Off. of Prothonotary*, 849 A.2d at 235-36. The Supreme Court explained that

county board[s of elections] may only certify the results of an election “[a]t the expiration of five days after the completion of the computation of votes” and even then, *only if no Petition to Open has been filed*. [25 P.S.] § 3154(f) (emphasis added); *see also Appeal of Chase*, [] 133 A.2d 824, 827 ([Pa.] 1957) (noting that “certification cannot be made until five days after the computation is completed”) (italics in original) (underscore added); *Appeal of Cole*, [] 620 A.2d 565, 568–69 ([Pa. Cmwlth.]

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<sup>19</sup> Pursuant to Commonwealth Court Internal Operating Procedure Section 414(a), 210 Pa. Code § 69.414(a), unreported panel decisions of this Court issued after January 15, 2008, may be cited for their persuasive value.

1993) (“*Board may not make the final certification until after the court has ruled on the petition.*”).

*Id.* at 236 (emphasis supplied). Therefore, our Supreme Court held that, where a board of election improperly certified election results while a petition to open a ballot box remained outstanding, it could consider the petition notwithstanding the certification of the election results and the swearing in of the declared winner. *See id.* at 235-36. Here, the Board of Elections improperly certified the election results while the Petitions remained outstanding. Accordingly, the matter is not moot, and in the event that the Trial Court is satisfied, by hearing or otherwise, that the Petitions meet the requirements of Section 1701 petitions, it shall schedule the opening of the ballot boxes in question and recount thereof as discussed *supra*.

#### **IV. Conclusion**

For the above reasons, we vacate the Trial Court Decision and remand the matter for further proceedings consistent with this opinion.

Jurisdiction relinquished.

s/Christine Fizzano Cannon

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CHRISTINE FIZZANO CANNON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Petition to Open Ballot Box :  
Pursuant to 25 P.S. §3261(a) : CONSOLIDATED CASES  
and for a correct account of the :  
General Election for the Governor :  
and Lieutenant Governor of :  
Pennsylvania, United States :  
Senator for Pennsylvania, United :  
States Representative for the 6<sup>th</sup> :  
District of Pennsylvania State :  
Representative for the :  
157th Legislative District :

Appeal of: Sally Ann Mininger, :  
Martina M. Gain and Robert C. Frank, :  
all of the Election District of :  
Tredyffrin Township M-4, : No. 1489 C.D. 2022  
Polling Place #617 :

In re: Petition to Open Ballot Box :  
Pursuant to 25 P.S. §3261(a) :  
and for a correct account of the :  
General Election for the Governor :  
and Lieutenant Governor of :  
Pennsylvania :

Appeal of: James Juric, Sarah :  
Juric and Linda R. McGlinn, :  
all of the Election District of :  
East Bradford, N-2 Polling : No. 1490 C.D. 2022  
Place #021 :

In re: Petition to Open Ballot Box :  
Pursuant to 25 P.S. §3261(a) :  
and for a correct account of the :  
General Election for the Governor :  
and Lieutenant Governor of :  
Pennsylvania :

Appeal of: Miriam G. Matrangola, :  
Peter J. Matrangola and John DeVris, :  
all of the Election District of : No. 1491 C.D. 2022  
Birmingham 1, Polling Place #014 :

In re: Petition to Open Ballot Box :  
Pursuant to 25 P.S. §3261(a) :  
and for a correct account of the :  
General Election for the Governor :  
and Lieutenant Governor of :  
Pennsylvania :

Appeal of: Kathleen Perri Dobson, :  
Erin Kershaw and Marc Altman, all :  
of the Election District of : No. 1492 C.D. 2022  
Birmingham 2, Polling Place #015 :

In re: Petition to Open Ballot Box :  
Pursuant to 25 P.S. §3261(a) and :  
for a correct account of the General :  
Election for the Governor and :  
Lieutenant Governor of Pennsylvania :

Appeal of: Mary Maguire, Debra :  
Swavely and Barbara Ann Lawrie, :  
all of the Election District of Upper : No. 1493 C.D. 2022  
Uwchlan 2, Polling Place #666 :

In re: Petition to Open Ballot Box :  
Pursuant to 25 P.S. §3261(a) and :  
for a correct account of the General :  
Election for the Governor and :  
Lieutenant Governor of Pennsylvania :

Appeal of: Hobart L. Clark, Kathryn S. :  
Clark and Deirdre C. Miller, all of the :  
Election District of Willistown N-1, : No. 1494 C.D. 2022  
Polling Place #770 :

ORDER

AND NOW, this 10<sup>th</sup> day of February, 2023, Trial Court Decision and Order dated December 9, 2022, is VACATED and the matter is REMANDED for further proceedings.

Jurisdiction relinquished.

s/Christine Fizzano Cannon

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CHRISTINE FIZZANO CANNON, Judge