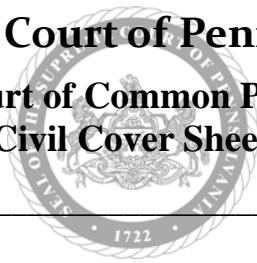


# Supreme Court of Pennsylvania

## Court of Common Pleas Civil Cover Sheet



County \_\_\_\_\_

*For Prothonotary Use Only:*

Docket No: \_\_\_\_\_

TIME STAMP

*The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.*

SECTION A

**Commencement of Action:**

- Complaint       Writ of Summons       Petition  
 Transfer from Another Jurisdiction       Declaration of Taking

Lead Plaintiff's Name:  
IN RE: Allegheny County Provisional Ballots in the 2020 C

Lead Defendant's Name:

Are money damages requested?  Yes  No      Dollar Amount Requested:  within arbitration limits  
(check one)       outside arbitration limits

Is this a *Class Action Suit*?  Yes  No      Is this an *MDJ Appeal*?  Yes  No

Name of Plaintiff/Appellant's Attorney: Matthew H. Haverstick

**Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)**

SECTION B

**Nature of the Case:** Place an "X" to the left of the ONE case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

**TORT** (do not include Mass Tort)

- Intentional  
 Malicious Prosecution  
 Motor Vehicle  
 Nuisance  
 Premises Liability  
 Product Liability (does not include mass tort)  
 Slander/Libel/ Defamation  
 Other: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**MASS TORT**

- Asbestos  
 Tobacco  
 Toxic Tort - DES  
 Toxic Tort - Implant  
 Toxic Waste  
 Other: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**PROFESSIONAL LIABILITY**

- Dental  
 Legal  
 Medical  
 Other Professional: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**CONTRACT** (do not include Judgments)

- Buyer Plaintiff  
 Debt Collection: Credit Card  
 Debt Collection: Other \_\_\_\_\_  
 \_\_\_\_\_  
 Employment Dispute: Discrimination  
 Employment Dispute: Other \_\_\_\_\_  
 \_\_\_\_\_  
 Other: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**REAL PROPERTY**

- Ejectment  
 Eminent Domain/Condemnation  
 Ground Rent  
 Landlord/Tenant Dispute  
 Mortgage Foreclosure: Residential  
 Mortgage Foreclosure: Commercial  
 Partition  
 Quiet Title  
 Other: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**CIVIL APPEALS**

- Administrative Agencies
- Board of Assessment  
 Board of Elections  
 Dept. of Transportation  
 Statutory Appeal: Other \_\_\_\_\_  
 \_\_\_\_\_  
 Zoning Board  
 Other: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**MISCELLANEOUS**

- Common Law/Statutory Arbitration  
 Declaratory Judgment  
 Mandamus  
 Non-Domestic Relations Restraining Order  
 Quo Warranto  
 Replevin  
 Other: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CIVIL DIVISION

COVER SHEET

Plaintiff(s) In re: Allegheny County Provisional Ballots in the 2020 General Election	Case Number : <input type="text"/> - <input type="text"/> - <input type="text"/>
	Type of pleading : Civil Appeal - Board of Elections
Defendant(s) Vs	Code and Classification : _____
	Filed on behalf of Nicole Zicarelli
	(Name of the filing party)
	<input checked="" type="checkbox"/> Counsel of Record <input type="checkbox"/> Individual, If Pro Se
	Name, Address and Telephone Number : Matthew H. Haverstick 1717 Arch Street, 5th Floor Philadelphia, PA 19103 (215) 568-2000
Attorney's State ID : 85072	
Attorney's Firm ID : _____	

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY**

*IN RE: Allegheny County Provisional Ballots  
in the 2020 General Election.*

No. \_\_\_\_\_

**ORDER FOR HEARING**

AND NOW, this \_\_ day of November, 2020, upon consideration of the Petition For Review In The Nature Of A Statutory Appeal filed by Nicole Ziccarelli, it is hereby ORDERED that a hearing is scheduled for the \_\_\_\_\_ day of November, 2020, at \_\_\_\_\_ o'clock \_\_.m., in Courtroom \_\_\_ of the Allegheny County Court of Common Pleas.

\_\_\_\_\_, J.

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY**

*IN RE: Allegheny County Provisional Ballots  
in the 2020 General Election.*

No. \_\_\_\_\_

**ORDER**

AND NOW, this 16<sup>th</sup> day of November, 2020, upon consideration of the Petition For Review In The Nature Of A Statutory Appeal filed by Nicole Ziccarelli, and any responses thereto, the Allegheny County Board of Elections is hereby ORDERED to set aside any provisional ballots that: (a) do not contain the necessary affidavit under Section 3050(a.4)(2); (b) were not signed as required by Section 3050(a.4)(3); or (c) were submitted by voters whose mail-in or absentee ballots were timely received. To the extent any such provisional ballots have been canvassed, or tabulated, the Allegheny County Board of Elections is FURTHER ORDERED to subtract any votes recorded on said provisional ballots from the total.

\_\_\_\_\_, J.

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY**

*IN RE: Allegheny County Provisional Ballots  
in the 2020 General Election.*

No. \_\_\_\_\_

**PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL**

Nicole Zicarelli, candidate for the Senate of Pennsylvania from the 45<sup>th</sup> Senatorial District, hereby appeals from the decision of the Allegheny County Board of Elections (the “Board”) directing the acceptance, canvassing, and computation of certain provisional ballots that it was required to set aside under Section 3050(a.4)(5)(ii), and in support thereof, avers as follows:

**INTRODUCTION**

1. This appeal concerns the authority of the Board of Electors to count provisional ballots cast in the November 3, 2020 General Election that do not comply with the requirements set forth in the Election Code.

**JURISDICTION AND VENUE**

2. The Court has jurisdiction over this statutory appeal and venue is proper in this Court pursuant to Section 3157 of the Election Code. *See* 25 P.S. § 3157(a).

**PARTIES**

3. Petitioner Nicole Zicarelli is the Republican candidate for Senate from the 45<sup>th</sup> Senatorial District, which encompasses parts of Allegheny and Westmoreland Counties.

4. The Board is a local governmental agency generally responsible for overseeing the conduct of all elections in Allegheny County, including, *inter alia*, canvassing provisional ballots by electors on election day and adjudicating any challenges to the qualifications of such voters. *See id.* at § 2642 (detailing the powers and duties of the county boards of elections); *see also* City of Pittsburgh Charter, Art. X, § 1.10-1006.

#### **DETERMINATION SOUGHT TO BE REVIEWED**

5. Zicarelli appeals from the Board’s decision to accept and count provisional ballots in violation of Section 3050(a.4)(5)(ii)(A), Section 3050(a.4)(5)(ii)(B), or Section 3050(a.4)(5)(ii)(F).

#### **FACTS AND PROCEDURAL BACKGROUND**

6. The 2020 General Election was conducted on November 3, 2020.

7. In Allegheny County, approximately 17,000 provisional ballots were cast in the General Election.<sup>1</sup>

8. Section 3050 of the Election Code provides that a voter whose qualification to vote cannot be established at the polls is permitted to cast a provisional ballot. *See* 25 P.S. § 3050(a.4)(1) (“At all elections an individual who claims to be properly registered and eligible to vote at the election district but whose name does not appear on the district register and whose registration cannot be determined by the inspectors of election or the county election board shall be permitted to cast a provisional ballot.”)

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<sup>1</sup> <https://www.post-gazette.com/news/politics-local/2020/11/14/Allegheny-County-board-of-elections-provisional-ballots-naked-ballots-election-2020/stories/202011140071>

9. Specifically—and of particular relevance to this matter—Section 3050(a.4) imposes the following requirements with regard individuals who voting by provisional ballot on Election Day:

- i. “Prior to voting the provisional ballot,” the voter must sign an affidavit affirming, *inter alia*, that the provisional ballot is the only one the cast by the elector in that election. 25 P.S. § 3050(a.4)(2)
- ii. “After the provisional ballot has been cast,” the voter must place the provisional ballot in a secrecy envelope and “shall place his signature on the front of the provisional ballot envelope.” 25 P.S. P.S. § 3050(a.4)(3).

10. Importantly, pursuant to Section 3050(a.4)(5), a provisional ballot shall not be counted where either the affidavit *or* the provisional ballot envelope is unsigned. 25 P.S. § 3050(a.4)(5)(ii)(A)-(B).

11. Additionally, Section 3050 mandates that a provisional ballot shall not be counted where the voter’s absentee or mail-in ballot is timely received by the Board. 25 P.S. § 3050(a.4)(5)(ii)(F).

12. On or after November 10, 2020 the provisional ballots were presented for review to the candidates’ representatives, during which time, various challenges were made to the Board’s initial decision relative to the provisional ballots. *See* 25 P.S. § 3050(A.4)(4).

13. Of the approximate 17,000 provisional ballots cast in Allegheny County in the 2020 General Election, approximately 270 ballots (the “Disputed Ballots”) were challenged on one of the following three grounds:

- i. Containing an affidavit signed by the voter under 25 P.S. § 3050(a.4)(2), but not containing the signature required by 25 P.S. § 3050(a.4)(3);

- ii. Containing the requisite signature under 25 P.S. § 3050(a.4)(3), but lacking the affidavit signed under 25 P.S. § 3050(a.4)(2);
- iii. The provisional ballot was cast by an elector whose mail-in or absentee ballots were timely received by the Board, but were somehow defective (*i.e.*, missing, or incomplete secrecy envelope, identifying mark, etc.).

14. On Saturday, November 14, 2020, the Board conducted a hearing, during which it considered it considered the whether the three classes of ballots described above (the “Disputed Ballots”) should be set aside as invalid.

15. Considering each of the three challenges separate, the Board decided—by a vote of 2-1 relative to each category—to canvass the Disputed Ballots and directed the Manger of the Elections Division to proceed.

### **GROUND FOR APPEAL**

***I. Section 3050 is clear that both affidavit signatures are required for a provisional ballot.***

16. As discussed above, Section 3050(a.4)(2), and (3) require:

(2) Prior to voting the provisional ballot, the elector shall be required to sign an affidavit stating the following . . . .

(3) After the provisional ballot has been cast, the individual shall place it in a secrecy envelope. The individual shall place the secrecy envelope in the provisional ballot envelope and shall place his signature on the front of the provisional ballot envelope. All provisional ballots shall remain sealed in their provisional ballot envelopes for return to the county board of elections.

25 P.S. § 3050(a.4)(2), (3).

17. Because “the word ‘shall’ carries an imperative or mandatory meaning,” Section 3050’s requirement that a provisional ballot contain both the signature on the affidavit and the ballot envelope is presumptively mandatory. *In re Canvass of Absentee Ballots of Nov. 4, 2003*



*Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004); *see also Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997) (“By definition, ‘shall’ is mandatory.”).

18. Accordingly, based upon the plain language of the Election Code, a voter must sign **both** the affidavit ballot envelope when casting a provisional ballot.

19. Further, this requirement for both signatures is evidenced by Section 3050(a.4)(5)(ii), which states that:

(ii) A provisional ballot **shall not be counted if:**

(A) either the provisional ballot envelope under [Section 3050 (a.4)](3) or the affidavit under [Section 3050(a.4)]2 is not signed by the individual;

(B) the signature required under clause [Section 3050 (a.4)](3) and the signature required under clause [Section 3050 (a.4)](2) are either not genuine or are not executed by the same individual;

25 P.S. § 3050(a.4)(5)(ii)(A)-(B) (emphasis added).

20. Because the statute is clear that both signatures are required in order for a provisional ballot to be counted, the Board erred when it determined otherwise and proceeded to count the Disputed Ballots that contained one signature but not the other.

21. Although the clear statutory language leaves no room for interpretation or exercise of discretionary, it is also notable that the two signatures relate to different matters and must be affixed at different times. As such, while reasonable minds may differ on whether the strictures are necessary, they are plainly the result of a deliberate policy judgment made by the legislature.

***II. Section 3050 is clear that a provisional ballot shall not be counted where a mail-in ballot is timely received.***

22. As previously noted, Section 3050 (a.4)(5)(ii)(F) provides that a provisional ballot “shall not be counted if . . . the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.” 25 P.S. § 3050(a.4)(5)(ii)(F).

23. Because “the word ‘shall’ carries an imperative or mandatory meaning,” Section 3050’s requirement that a provisional ballot not be counted where the absentee or mail-in ballot is timely received is presumptively mandatory. *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004); *see also Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997) (“By definition, ‘shall’ is mandatory.”).

24. Nowhere does Section 3050 provide that an elector’s provisional ballot may be counted where the elector’s timely received absentee or mail-in ballot was defective. Accordingly, such a consideration is immaterial for purposes of determining the validity of a provisional ballot under Section 3050.

25. Rather, pursuant to the plain language of Section 3050, so long as the absentee or mail-in ballot is timely received by the Board, the provisional ballot shall not be counted, regardless of any consideration of whether the absentee or mail-in ballot is considered defective.

26. Accordingly, the Board erred when it determined otherwise and proceeded to count the Disputed Ballots of electors that cast provisional ballots when their absentee or mail-in ballots were timely received by the Board under the Election Code.

WHEREFORE, Petitioner Nicole Ziccarelli respectfully requests that this Court issue an Order reversing the decision of the Allegheny County Board of Electors and directing it to set aside any provisional ballots that: (a) do not contain the necessary affidavit under Section 3050(a.4)(2); (b) were not signed as required under Section 3050(a.4)(3); or (c) were submitted by voters whose mail-in or absentee ballots were timely received.

Respectfully submitted,

Dated: November 16, 2020

  
\_\_\_\_\_  
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*Attorneys for Petitioner*

**VERIFICATION**

I, Shohin H. Vance hereby swear or affirm that I am counsel of record for Petitioner Nicole Zicarelli in the within action, that the verification of said Petitioner could not be obtained within the time allowed for filing this Petition, and that the facts contained in the attached Petitioner are true and correct to the best of my knowledge.

This statement is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsifications to authorities.

Dated: November 16, 2020

  
\_\_\_\_\_  
Shohin H. Vance

**CERTIFICATE OF COMPLIANCE**

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

Dated: November 16, 2020



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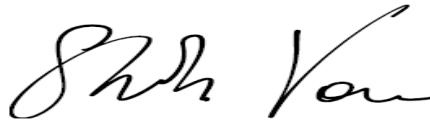
*Attorneys for Petitioner*

**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing Petition to be served on the following persons  
via e-mail on the date set forth below:

Andrew F. Szefi, Esq.  
County Solicitor – Allegheny County  
Fort Pitt Commons  
445 Fort Pitt Boulevard, Suite 300  
Pittsburgh, PA 15219  
Andrew.Szefi@AlleghenyCounty.US

Dated: November 16, 2020



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