

ELECTION MATTER

Filed 10/6/2022 2:10:00 PM Supreme Court Middle District
100 MAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA

No. 100 MAP 2022

**REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN
SENATORIAL COMMITTEE, NATIONAL REPUBLICAN
CONGRESSIONAL COMMITTEE, REPUBLICAN PARTY OF
PENNSYLVANIA, DAVID BALL, JAMES D. BEE, DEBRA A. BIRO,
JESSE D. DANIEL, GWENDOLYN MAE DELUCA, ROSS M. FARBER,
CONNOR R. GALLAGHER, LYNN MARIE KALCEVIC, LINDA S.
KOZLOVICH, WILLIAM P. KOZLOVICH, VALLERIE SICILIANO-
BIANCANIELLO, S. MICHAEL STREIB,**

Petitioners,

v.

**LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the
Commonwealth of Pennsylvania, JESSICA MATHIS, in her official capacity
as Director of the Pennsylvania Bureau of Election Services and Notaries,
et al.,**

Respondents.

**BRIEF FOR APPELLEE THE BERKS COUNTY BOARD OF ELECTIONS
TO PETITIONERS' APPEAL FROM THE COMMONWEALTH COURT'S
MEMORANDUM OPINION AND ORDER ENTERED ON SEPTEMBER
29, 2022**

Cody L. Kauffman, Esq.
Supreme Court I.D. No. 320506
First Assistant County Solicitor
Berks County Services Center
633 Court Street, 13th Floor
Reading, PA 19601
(610) 478-6105 Ext. 6111
CKauffman@countyofberks.com
For The Berks County Board of Elections

TABLE OF AUTHORITIES

Cases

<u>Appeal of James</u> , 105 A.2d 64 (Pa. 1954)	2
<u>County of Allegheny v. Commonwealth</u> , 544 A.2d 1305 (Pa 1988)	7
<u>In re General Election of 1985</u> , 531 A.2d 836 (Pa. Commw. 1985)	2, 6
<u>In re Luzerne County Return Bd.</u> , 290 A.2d 108 (Pa. 1972)	5-6
<u>In Re Mayor of Altoona, Blair County</u> , 196 A.2d 371 (Pa. 1964)	2-3
<u>Pennsylvania Democratic Party v. Boockvar</u> , 238 A.3d 345 (Pa. 2020).	3, 4
<u>Petition of Cioppa</u> , 626 A.2d 146 (Pa. 1993)	2
<u>Republican National Committee, et al. v. Chapman, et al.</u> , (Pa. Cmwlt., No. 447 M.D. 2022, filed Sept. 29, 2022)	1, 2
<u>Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.</u> , 828 A.2d 995 (Pa. 2003)	4, 7

Statutes

25 P.S. § 2642	3, 6
25 P.S. § 3007	6
25 P.S. § 3146.8	3
52 U.S.C. § 21081	6

BRIEF OF THE BERKS COUNTY BOARD OF ELECTIONS¹

Background

On September 1, 2022, and September 7, 2022, Petitioners filed a Petition for Review seeking Declaratory and Injunctive Relief and an Application for Special Relief in the Form of a Preliminary Injunction, respectively. On September 29th, 2022, the Honorable Ellen Ceisler of the Commonwealth Court of Pennsylvania denied Petitioners' Application for a Preliminary Injunction stating, among other things, that "Petitioners have not proven that there is a clear violation of the Election Code or the law interpreting the Election Code." See Republican National Committee, et al. v. Chapman, et al., (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022), at *47 (Ceisler, J.) (single-Judge op.). Petitioners filed a timely notice of Appeal to this Honorable Court and continue to seek an injunction that prohibits County Boards of Elections from implementing cure procedures for absentee and mail-in ballots that are initially submitted by voters with errors that may preclude them from being counted. Petitioners allege that such curing procedures are unlawful.

Like other areas of Pennsylvania Election Law, the law surrounding mail-in/absentee ballot curing is not clear. This was reiterated by Judge Ceisler, who opined "[b]ecause it is not clear based on either the text of the Election Code, or the

¹ Pursuant to the Cover Letter for this Honorable Court's October 4, 2022, Order which states that "[c]ounsel may utilize briefs previously submitted to the Commonwealth Court if the cover page is updated," this Brief is largely consistent with Berks County's position statement submitted to the Commonwealth Court, with some procedural and substantive additions.

subsequent cases interpreting it, whether notice and cure procedures are permitted and/or prohibited by the Election Code, the Court concludes that Petitioners have failed to show a strong likelihood of success at this early stage of the litigation.” See id., at 41. The lack of clarity is evidenced by the varied approaches to curing taken by Counties throughout the Commonwealth. These inconsistencies are the inevitable byproduct of 67 Counties having to use their best judgment to create or consider procedures that are not clear in the law. Moreover, the lack of clarity exposes Counties to increasing litigation during a time of heightened election scrutiny. In accordance with this Honorable Court’s Order dated October 4, 2022, the Berks County Board of Elections files this brief in support of Berks County’s approach to ballot curing and in support of further clarity on the issue.

Relevant Law

Pennsylvania recognizes the “longstanding and overriding policy . . . to protect the elective franchise.” Petition of Cioppa, 626 A.2d 146, 148 (Pa. 1993). Election laws must be strictly construed to prevent fraud, but “ordinarily will be construed liberally in favor of the right to vote.” Appeal of James, 105 A.2d 64, 65 (Pa. 1954). It is axiomatic that the “purpose of the election laws is to ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process.” In re General Election of 1985, 531 A.2d 836, 839 (Pa. Commw. 1985); See also In Re Mayor of Altoona, Blair County, 196 A.2d 371, 374 (Pa. 1964) (“The very

purpose of election laws is to secure freedom of choice . . . to insure fair elections, or an equal chance and opportunity for everyone to express his choice at the polls; and to secure the rights of duly qualified electors and not to defeat them.”). To effectuate these considerations, County Boards of Elections have broad discretion “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . elections officers and electors.” 25 P.S. § 2642(f).

Regarding absentee/mail-in ballot curing, Petitioners correctly state that the Election Code allows for ballot curing “[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified.” See 25 P.S. § 3146.8(h). The Election Code does not otherwise expressly prohibit ballot curing in situations other than § 3146.8(h). This Honorable Court has previously concluded that County Boards “are not required to implement a ‘notice and opportunity to cure’ procedure.” Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 374 (Pa. 2020). However, this holding pertained the seeking of an injunction *requiring* County Boards to implement a Notice and Cure procedure. See id., at 353. The opinion does not specifically address whether County Boards are prohibited from implementing ballot curing procedures. Rather, the Court opined that further guidance on the issue was best left to the Legislature. Id., at 374.

In order for Petitioners to obtain the special injunction they are seeking, they need to prove that the injunction: (1) is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages, (2) that greater injury would result from refusing than from granting the injunction and the issuance of an injunction will not substantively harm other interested parties in the proceedings, (3) that the injunction would restore their status quo ante, (4) that the movant is likely to succeed on the merits, (5) that the requested injunction is reasonably suited to abate the offending activity, and (6) that the injunction will not adversely affect the public interest. See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003).

Argument

To date, aside from Judge Ceisler's 9/29/22 Opinion, the County Boards of Elections throughout Pennsylvania have not received further clarity since Pennsylvania Democratic Party v. Boockvar was decided. Instead, as outlined within Petitioners' filings, the Boards have developed varying curing procedures and prohibitions, based upon their respective interpretations of the law. Berks County does not proactively contact voters regarding irregularities within their mail-in/absentee ballots for the purpose of providing voters the opportunity to cure. As such, Berks County does not have a "notice and opportunity to cure" procedure. However, if a voter contacts the County about a potential deficiency within their mail-in/absentee

ballot, that voter will generally be allowed the opportunity to cure a minor irregularity prior to 8:00 pm on Election Day. Berks County believes this approach best balances enfranchisement, fairness, and consistency under the current state of the law.

A pertinent factor for Berks County not having a “Notice and Cure” procedure, aside from Elections’ staff bandwidth concerns, was the potential for disparate treatment between those voters who timely returned their mail-in/absentee ballots closer to, or on, election day and those voters who timely returned their ballots earlier. In other words, voters who returned their ballots closer to, or on, election day would likely not be provided the same opportunity to cure as similarly-situated voters who returned their ballots earlier, because a curing notice would not be able to be sent to the former group of voters in time. This potential for disparate treatment risks an equal opportunity for all voters to cure and is the main reason why Berks County has not implemented a notice and cure procedure.

Nonetheless, Berks County values the principles of enfranchisement and equal opportunity, which is why Berks County will generally allow voters an opportunity to cure a minor irregularity if they contact the County regarding an issue with their absentee/mail-in ballot. This approach is consistent with Pennsylvania election law’s goal of enfranchisement, as it gives voters who become aware of an issue within their mail-in/absentee ballot the opportunity to cure the defect. See In re Luzerne County

Return Bd., 290 A.2d 108, 109 (Pa. 1972) (“Our goal must be to enfranchise and not to disenfranchise”).

The approach also ensures an equal chance and opportunity for voters to exercise their right to vote throughout Berks County regardless of whether they vote by absentee/mail or in person at the precincts. See In re General Election of 1985, 531 A.2d 836, 839 (Pa. Commw. 1985) (an equal opportunity for all eligible electors to participate in the election process is a key purpose of election law). Specifically, allowing voters who contact the County the opportunity to cure a minor irregularity with their absentee/mail-in ballot prior to it being counted is consistent with a voter’s right at a precinct to correct their ballot prior to it being counted. See, e.g., 52 U.S.C. § 21081(a)(1)(A)(ii) (each voting system shall “provide the voter with the opportunity . . . to change the ballot or correct any error before the ballot is cast and counted); 25 P.S. § 3007(h).

Petitioners’ request for an injunction as it pertains to Berks County’s practice is not warranted. The requested injunction is not necessary to “prevent immediate and irreparable harm” because enfranchising voters pursuant to the County’s innate powers under § 2642(f) to issue regulations and instructions to our voters is neither an immediate or irreparable harm. This is especially true for Berks County since the disparate treatment concerns outlined above are not present in Berks County since we do not have a Notice and Cure procedure. Berks County believes our approach to

ballot curing balances the principles of enfranchisement, fairness, and consistency for voters. As such, it cannot be said there is an immediate or irreparable harm needing to be prevented as it pertains to Berks County's curing practices.

Since the "immediate and irreparable harm" prong of the factors outlined in Summit Towne Ctr is not present as it relates to Berks County's practices, there is no need to address the remaining factors. See County of Allegheny v. Commonwealth, 544 A.2d 1305, 1307 (Pa 1988) ("every one of these prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others"). For the foregoing reasons, Berks County believes our approach to curing is consistent with the law and within the parameters of the powers granted to County Boards under the Election Code.

Conclusion

Berks County's approach to ballot curing falls between those jurisdictions who have implemented notice and cure procedures and those jurisdictions who do not provide curing opportunities to voters. To that end, injunctive relief is not warranted as it pertains to Berks County and the Commonwealth Court's decision should be affirmed in that regard. Since Berks County does not have a "Notice and Cure" procedure, the County does not take a position on the Preliminary Injunction as it pertains to Notice and Cure procedures. However, Berks County welcomes further clarity from this Honorable Court on the issue.

Respectfully Submitted,

Dated: October 6, 2022

/s/ Cody L. Kauffman, Esq.
Cody L. Kauffman, Esq.
Supreme Court I.D. No. 320506
633 Court Street, 13th Floor
Reading, PA 19601
(610) 478-6105 Ext. 6111
Fax: (610) 478-6139
CKauffman@countyofberks.com

CERTIFICATE OF COMPLIANCE

I certify, in accordance with Pa.R.A.P. 2112 and Pa.R.A.P. 2135(a)(1), (d), that the foregoing Brief of Appellants does not exceed 14,000 words based upon the word count of the word processing system used to prepare this brief, which states that the total word count is 2,310 words.

Dated: October 6, 2022

/s/ Cody L. Kauffman, Esq.

Cody L. Kauffman, Esq.

Supreme Court I.D. No. 320506

633 Court Street, 13th Floor

Reading, PA 19601

(610) 478-6105 Ext. 6111

Fax: (610) 478-6139

CKauffman@countyofberks.com

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified 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: October 6, 2022

/s/ Cody L. Kauffman, Esq.

Cody L. Kauffman, Esq.

Supreme Court I.D. No. 320506

633 Court Street, 13th Floor

Reading, PA 19601

(610) 478-6105 Ext. 6111

Fax: (610) 478-6139

CKauffman@countyofberks.com