

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 108 MM 2024

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF
PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, in his official capacity as Secretary of the Commonwealth, *et al.*,
Respondents.

**RESPONDENTS CARBON, CENTRE, CLINTON, COLUMBIA, INDIANA,
LAWRENCE, MONROE, MONTOUR, NORTHUMBERLAND, SNYDER,
AND VENANGO COUNTY BOARDS OF ELECTIONS IN OPPOSITION
TO PETITIONERS' APPLICATION FOR THE EXERCISE OF KING'S
BENCH POWER OR EXTRAORDINARY JURISDICTION**

Petitioners' Application for the Exercise of King's Bench Power or Extraordinary
Jurisdiction, filed September 18, 2024

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Respondents Carbon County Board of Elections, Centre County Board of Elections, Clinton County Board of Elections, Columbia County Board of Elections, Indiana County Board of Elections, Lawrence County Board of Elections, Monroe County Board of Elections, Montour County Board of Elections, Northumberland County Board of Elections, Snyder County Board of Elections, and Venango County Board of Elections (collectively, “Respondent Counties”), by and through their undersigned counsel, Babst, Calland, Clements, and Zomnir, P.C., file this Response to Petitioners’ Application for the Exercise of King’s Bench Jurisdiction or Extraordinary Jurisdiction.

RESPONSE

Forty-eight days before the General Election, after all challenges to participants on the ballot were completed, and just as ballot-printing can begin, Petitioners filed this King’s Bench application challenging county boards of elections’ long-standing ballot-curing procedures and use of provisional ballots.

The purpose of ballot-curing procedures is to prevent the disenfranchisement of voters who make mistakes when attempting to comply with mail-in and absentee-voting procedural requirements. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 360–61 (Pa. 2020) (“*Boockvar*”) (noting the “longstanding and overriding policy in this Commonwealth to protect the elective franchise”). The procedures work to ensure that one class of voters (mail-in and absentee voters) is on the same footing as another (those who vote in person and can cure defects at the polling

places). (*Id.* at 6.) Thwarting ballot-curing procedures would disproportionately affect voters of certain demographics whose mail-in ballots are more likely to be rejected due to procedural irregularities.¹

Further, as Petitioners know,² ballot-curing procedures have existed in the Commonwealth’s county boards of elections for years. Thus, a determination that the procedures are statutorily and constitutionally prohibited would make it likely that some “officials were illegally elected and that everything they have done has no constitutional sanction[.]” *Cf. In re Canvass of Absentee Ballots of 1967 Gen. Election*, 245 A.2d 258, 261 (Pa. 1968) (noting, in different circumstances, that such an outcome “would [] to shake the very structure of our State government”).

To avoid these consequences, and for the reasons set forth below, among those raised by the other Respondents, the Respondent Counties respectfully request that the Court decline to exercise its King’s Bench power and deny the request for extraordinary jurisdiction as misplaced.

A. Applicable Legal Standards

“King’s Bench power” and “extraordinary jurisdiction” refer to distinct methods by which this Court can assume jurisdiction over certain matters. *In re*

¹ *Eakin v. Adams County Board of Elections*, No. 22-CV-00340 (M.D. Pa. filed May 5, 2023), ECF No. 314-11 (Declaration of Professor Daniel Hopkins) ¶¶ 9–10.

² *See, e.g.*, Brief for Appellant, *Republican Nat’l Comm. v. Chapman*, 284 A.3d 207 (Pa. 2022) (No. 100 MAP 2022), 2022 WL 17298488, at *7 (noting boards’ implementation of ballot-curing procedures).

Avellino, 690 A.2d 1138, 1140 (Pa. 1997). Codified in 42 Pa.C.S.A. § 502, the Court’s King’s Bench power entails a “general superintendency over inferior tribunals[] [that] may be exercised where no matter is pending in the lower court.” *In re Avellino*, 690 A.2d at 1140 (internal quotation marks omitted). Such power, however, must be employed “with extreme caution.” *Commonwealth v. Balph*, 3 A. 220, 230 (Pa. 1886). In exercising this power, the Court’s “principal obligations are to conscientiously guard the fairness and probity of the judicial process” and the “dignity, integrity, and authority of the judicial system,” all for the protection of the citizens of the Commonwealth of Pennsylvania. *Commonwealth v. Williams*, 129 A.3d 1199 (Pa. 2015) (internal quotation marks omitted) (quoting *In re Bruno*, 101 A.3d 635, 675 (Pa. 2014)).

“Extraordinary jurisdiction” is more limited. While the Court can invoke its King’s Bench power even in the absence of any case pending before a lower court, the same is not true of extraordinary jurisdiction. Extraordinary jurisdiction can be invoked when—and only when—a matter is already pending before a lower court. *In re Avellino*, 690 A.2d at 1140. More specifically, extraordinary jurisdiction allows the Court to “assume plenary jurisdiction of [a matter pending before any court] at any stage thereof and enter a final order or otherwise cause right and justice to be done.” 42 Pa.C.S.A. § 726.

Like the King’s Bench power, extraordinary jurisdiction is exercised “sparingly and only in circumstances where the record clearly demonstrates the

petitioners’ rights.” *Board of Revision of Taxes v. City of Philadelphia*, 4 A.3d 610 (Pa. 2010) (first citing *Commonwealth v. Morris*, 771 A.2d 721, 731 (Pa. 2001); and then citing *Phila. Newspapers, Inc. v. Jerome*, 387 A.2d 425, 430 n.11 (Pa. 1978)). Even the “presence of an issue of immediate public importance is not alone sufficient to justify extraordinary relief.” *Phila. Newspapers, Inc.*, 387 A.2d at 430 n.11.

B. Petitioners’ Attempt to Invoke the Court’s Extraordinary Jurisdiction Is Misplaced

Petitioners do not separately analyze extraordinary jurisdiction as distinct from the Court’s King’s Bench power. (Pet’rs’ App. *passim*.) Rather, they appear to treat the two interchangeably. (*Id.*) A review of their application, however, reveals no basis for invoking the Court’s extraordinary jurisdiction. Petitioners do not request that the Court exercise plenary jurisdiction over an underlying case involving the same parties and the same issues. They instead cite multiple cases, primarily appeals in which they are involved—*Genser v. Butler County Board of Elections*, No. 1074 CD 2024, 2024 WL 4051375 (Pa. Commw. Ct. Sept. 5, 2024), and *Center for Coalfield Justice v. Washington County Board of Elections*, No. 2024-3953 (Wash. Cnty C.C.P. Aug. 23, 2024) (“*Coalfield Justice*”)³—neither of which implicate all Respondents named in this matter. (Pet’rs’ App. *passim*.)

³ The Commonwealth Court in *Genser*—from which Petitioners and others have filed petitions for allowance of appeal, *Genser v. Butler Cnty. Board of Elections*, No. 240 WAL 2024 (Pa. filed Sept. 8, 2024)—addressed the “question . . . whether the Election Code prohibits counting Electors’ provisional ballots because their fatally flawed mail-in ballots were timely received by Election Day,” *see Genser*, 2024 WL 4051375, at *1. The Court rejected the contention (raised

Contrast the circumstances in *Genser* and *Coalfield Justice* with *Boockvar*, where the Court exercised extraordinary jurisdiction over an already pending case involving a petition against the Secretary of the Commonwealth and all 67 county boards of elections. *See Pa. Democratic Party v. Boockvar*, No. 407 MD 2020 (Pa. Commw. Ct filed July 10, 2020). There, unlike here, this Court exercised plenary jurisdiction over a “matter pending before any court[.]” *See* 42 Pa.C.S.A. § 726. Petitioners do not seek the same relief here, and the Court should therefore deny the application for extraordinary jurisdiction.

C. The Ill-Timed, Late-in-the-Day Relief Petitioners Seek Would Serve Only to Engender Unnecessary Confusion and Threaten to Unfairly Disenfranchise Certain Demographics

Preliminary, regarding Petitioners’ request that the Court exercise its King’s Bench power, the timing of their application is questionable, if not suspect. Petitioners have known for years that some county boards of elections have notice-and-cure procedures. Nevertheless, Petitioners—despite having litigated numerous challenges to counties’ administration of elections—inexcusably waited until this week to file their application. The dangers of last-minute changes to (or complete evisceration of) notice-and-cure procedures are real. “Court orders affecting

by, *e.g.*, Petitioners as intervenors in that case) that the Election Code prohibited Butler County from counting the provisional ballots. *Id.* at *16. The issues in the *Coalfield Justice* case include whether the trial court correctly directed the Washington County Board of Elections to inform mail-in voters of disqualifying errors relating to their mail-in ballot packets and to “input the accurate status of the mail-in packet in the SURE system and provide the status of the elector if requested.” *See Coalfield Justice* at 2.

elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). And “[a]s an election draws closer, that risk will increase.” *Id.*

Ever concerned with the risk of confusing electors (Pet’rs’ App. at 1), Petitioners’ appeal to the Court’s King’s Bench power just before the election is puzzling and, more troublingly, incongruent with their concerns about injecting unnecessary confusion into the election process.⁴ The better course at this juncture is for Petitioners to await (1) this Court’s decision regarding their petition for permission to appeal in *Genser* and (2) the Commonwealth Court’s decision in the *Coalfield Justice* appeal. This would ensure that Petitioners are prevented from “bypass[ing] an existing . . . statutory adjudicative process,” *e.g.*, the right to petition for allowance of appeal, *In re Bruno*, 101 A.3d at 670, and enable fact-specific determinations regarding the procedures adopted by each county board of elections.

Indeed, Petitioners’ eleventh-hour end-run around the appeals process presents a quintessential laches problem because (1) they delayed bringing this application and (2) the delay, if the Court were to invalidate all notice-and-cure procedures, would result in gross prejudice not only to the county boards of elections but also to the electorate at large. *Williams v. Pa. Dep’t of State*, No. 394 M.D. 2024,

⁴ Petitioners ask the Court to prohibit county boards of elections from employing notice-and-cure procedures *while this application is pending* and before the Court decides whether to issue a briefing schedule. (Pet’rs’ App. 6.) This approach may lead to further confusion if the Court decides to grant that preliminary relief only to reject Petitioners’ claims on the merits later.

2024 WL 3912684, at *5 (Pa. Commw. Ct. Aug. 23, 2024) (“The two elements of laches are (1) a delay arising from a party’s failure to exercise due diligence and (2) prejudice to the opposing side resulting from the delay.” (cleaned up) (quoting *Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998)), *aff’d*, No. 25 WAP 2024, 2024 WL 4195131 (Pa. Sept. 16, 2024).

Petitioners have known for years that some county boards of election adopted notice-and-cure procedures, and they have known about the Secretary’s instructions and guidance since March 2024. (Pet’rs’ App. at 4.) To be sure, Petitioners raised similar challenges to the Secretary’s guidance and Butler County’s notice-and-cure procedures in *Genser*. See 2024 WL 4051375, at *1. Still, those other challenges did not stop Petitioners from filing a King’s Bench application challenging the county’s notice-and-cure procedures long ago. This Court should not countenance Petitioners’ ill-timed application, which invites far more confusion and last-minute adjustments than maintaining the status quo.

D. The Application Implicates Factual Issues That Counsel in Favor of Denying It

Another reason for which the Court should deny the application is that it involves issues of fact without a developed record. In their application, Petitioners state, “it is unclear precisely which county boards offer curing, and on what terms, because some boards do not have written curing policies or do not disclose their policies.” (Pet’rs’ App. at 10.) They go on to state that some counties permit curing

of “signature, dating, or secrecy envelopes,” whereas some “permit[] curing only for signature and dating defects[.]” (*Id.*) And then they raise nuanced arguments targeted, for example, at any procedure that allows curing in the context of secrecy envelopes. (*Id.* at 36 (asserting “more” reasons for which “providing notice and an opportunity to cure secrecy-envelope defects is inconsistent with Pennsylvania law” (internal quotation marks omitted).))

Petitioners’ invitation to parse and evaluate their arguments wholesale, without a developed record, would seem particularly inapt for a King’s Bench application.⁵ As noted above, Petitioners raise fact-specific arguments targeted at specific notice-and-cure procedures. Yet, as the record stands, it is woefully underdeveloped regarding the policies and protocols of the 67 county boards of elections regarding notice and curing and provisional ballots. Petitioners could have long ago marshaled the facts needed to present a clear picture of how some counties have handled curing and/or provisional ballots for purposes of filing a King’s Bench application well before the General Election.

Importantly, because the Commonwealth Court often sits as a trial court as part of its original jurisdiction, it, unlike this Court, is “organized to support orderly fact-finding.” *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 904 (Pa. 2002)

⁵ If this Court agrees that the record is bereft of necessary facts but chooses to engage in fact-finding itself, permitting discovery may run counter to the “speedy and summary disposition” that exercise of the King’s Bench power is meant to provide. *Commonwealth v. Beaumont*, 4 Rawle 366, 367 (Pa.1834) (quoting Blackstone Book 3, ch. 4, § 42).

(Saylor, C.J., joined by Dougherty, J. and Mundy, J.). Of course, the Commonwealth Court has already issued a ruling in *Genser*. But if this Court grants allocatur, it can decide to remand the case for factual determinations. Or Petitioners can simply bring a lawsuit against the same Respondents named in this action, in which case the Commonwealth Court “can more appropriately administer the necessary judicial consideration in the first instance, subject to appellate review by this Court if necessary.” *Id.* And regarding *Coalfield Justice*, that case is on appeal to the Commonwealth Court from a trial court decision that discusses Washington County’s procedures in detail.

E. Petitioners’ Substantive Arguments Lack Merit

Meanwhile, the substantive arguments advanced in the application lack merit. Petitioners raise several, sometimes overlapping arguments. The Respondent Counties will not belabor this point, as the other Respondents will undoubtedly address why Petitioners’ claims lack merit—and if the Court grants Petitioners’ application, the Respondent Counties would respectfully request an opportunity to brief the merits before the Court rules on them. Further, many of the reasons underlying the Respondent Counties’ arguments are discussed in *Republican National Committee v. Chapman*, No. 447 MD 2022, 2022 WL 16754061 (Pa. Commw. Ct. Sept. 29, 2022) (“*Chapman*”), and other relevant lower court cases.

The Respondent Counties nonetheless address a few critical flaws in Petitioners’ reasoning.

1. Petitioners Force a Strained Reading of *Boockvar*

Petitioners rely heavily on *Boockvar* to support their claims (Pet’rs’ App. *passim*), but that reliance is misplaced. Disregarding dicta, the holding of that case is simply that absentee or mail-in voters are not constitutionally or statutorily entitled to cure defective ballots. *See Boockvar*, 238 A.3d at 372–74. *That* is the narrow holding of the decision, and the question of whether boards of elections can decide to implement ballot-curing procedures on their own was not before the Court. *See, e.g., Chapman*, 2022 WL 16754061, at *10 (“[T]he Supreme Court’s holding in [*Boockvar*] . . . was not that County Boards are prohibited from implementing notice and cure procedures, but only that County Boards are not **required** to implement notice and cure procedures.”).

In fact, the RNC in *Chapman* contended that county boards of elections’ notice-and-cure procedures are “in irreconcilable tension with the Court’s holding in [*Boockvar*].” *See* Brief for Appellant, *Republican Nat’l Comm. v. Chapman*, 284 A.3d 207 (Pa. 2022) (No. 100 MAP 2022), 2022 WL 17298488, at *24. And if this Court agreed with that premise, it would have reversed the Commonwealth Court’s decision in *Chapman*. Instead, six Justices were evenly split over whether to affirm, resulting in an affirmance by operation of law. *See Republican Nat’l Comm. v. Chapman*, 284 A.3d 207, 208 (Pa. 2022) (“[T]he Court being evenly divided, the order of the Commonwealth Court is AFFIRMED.”).

2. Petitioners' Uniformity Concerns Are Overstated and Myopic

Petitioners also rely heavily on notions of statewide uniformity in the election process, citing Article VII, § 6 and Article I, § 5 of the Pennsylvania Constitution, 25 P.S. § 2642(g),⁶ and the Equal Protection Clause. (Pet'rs' App. at 2.) Even setting aside the fact that Article VII, § 6 applies to "laws" (not boards of elections' procedures) and that Article I, § 5 pertains to "free and equal elections" and not "uniformity" as Petitioners posit, Petitioners' claim that eliminating notice-and-cure procedures would promote uniformity ignores that a prohibition on such procedures would disproportionately affect certain demographics in a way that violates the spirit of equal protection. When pitting Petitioners' uniformity concern (that county boards of elections have different notice-and-cure procedures) against this other concern (that certain classes of individuals who are more likely to use mail-in or absentee voting will not have the same opportunity to cure as in-person voters), the Respondent Counties submit that the latter is paramount because it threatens disenfranchisement of certain classes.

3. The Election Code's Pre-Canvassing Rules Do Not Prohibit Notice-and-Cure Provisions

Another flaw in Petitioners' reasoning concerns their claim that "the Election Code unambiguously *forecloses* curing by prohibiting": (1) "'inspection' and

⁶ Section 2642(g) requires county boards of elections to undertake certain duties "to the end that primaries and elections may be honestly, efficiently, and *uniformly conducted*." 25 P.S. § 2642(g) (emphasis added).

‘opening’ of mail-ballot materials until Election Day or thereafter”; and (2) “any person from disclosing the ‘results’ of such an inspection or opening before the close of the polls.” (Pet’rs’ App. at 3 (citing and quoting 25 P.S. §§ 3146.8(g)(ii)(1.1), 2602(q.1).)⁷

Petitioners do not point to any evidence that any county board of elections opens envelopes and inspects ballots before pre-canvassing.⁸ (*See id. passim.*) The Respondent Counties certainly do not. Further, while pre-canvassing takes place no earlier than 7 a.m. on election day and involves the inspection and opening of ballot envelopes, *see* 25 P.S. §§ 3146.8(g)(ii)(1.1), 2602(q.1), the prohibition under which “[n]o person observing, attending or participating in a pre-canvass meeting may

⁷ Section 3146.8(g)(ii)(1.1) provides:

The county board of elections shall meet no earlier than seven o’clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours’ notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

25 P.S. § 3146.8(g)(ii)(1.1).

Section 2602(q.1), in turn, provides that “[t]he word “**pre-canvass**” shall mean the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.” *Id.* § 2602(q.1).

⁸ This is another reason for which the development of a factual record would be useful, not only to the Respondents, but also to Petitioners.

disclose the results of any portion of any pre-canvass meeting prior to the close of the polls,” *id.* § 2602(q.1), does not, by its terms, forbid a county board of elections from using a machine to sort and flag irregular ballot envelopes, from observing obvious errors on an outer envelope without opening it, or from uploading computer-generated data to the SURE system.

In this regard, Petitioners appear to overlook the ways in which certain counties’ boards of elections operate in practice. For example, in some counties (perhaps most), if a voter hand-delivers a ballot, the counties’ election staff will ask the voter to show the back of the envelope and note any facial irregularity—the voter could then remedy the defect right at that point before the staff accepts the ballot. In such circumstances, Petitioners cannot seriously argue that the staff are deemed to have engaged in an impermissible (superficial) “inspection” of the mail-in packet.

Relatedly, it bears emphasizing that county boards of elections “enjoy broad authority under Section 2642(f) of the Election Code to implement such procedures at their discretion.” *Chapman*, 2022 WL 16754061, at *10. And the absence of a legislative prohibition on notice-and-cure procedures, in the Respondent Counties’ view, reflects a “deliberate choice to leave such matters to the informed discretion of county boards of elections,” which are “empowered by Section 2642(f) . . . [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.” *In re Canvassing Observation*, 241 A.3d 339, 350 (Pa. 2020) (alteration in original)

(quoting 25 P.S. § 2642(f)).⁹ Significantly, the very SURE codes that Petitioners argue against constitute a relatively simple and non-intrusive manner for an elections office to flag and notify a voter of an irregularity.

In short, as the Commonwealth Court aptly articulated in 2022, “notice and opportunity to cure procedures implemented by County Boards have generally been accepted in order to fulfill the longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Chapman*, 2022 WL 16754061, at *4. Petitioners’ arguments to the contrary should be rejected, and their request for King’s Bench relief denied for lack of merit, among other reasons.

F. Exercising the King’s Bench Power or Extraordinary Jurisdiction Would Signal a Trend of Granting Such Relief More Readily in Election Cases

In 2022, some of the Respondent Counties highlighted the potential for setting a dangerous precedent if the Court exercised its King’s Bench power, to wit:

[G]ranted the Application could set a dangerous precedent. If an issue that the RNC claims has been settled law since October of 2020 is a sufficient basis to invoke King’s Bench power two years later, then virtually any issue—election or otherwise—will satisfy the criteria to exercise such jurisdiction. Therefore, instead of confining King’s Bench authority to reviewing “an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law,” [*Williams*, 129 A.3d at 1206], the exercise of King’s Bench jurisdiction will become the norm. Were that to occur, the

⁹ To the extent the Court should find any ambiguity arising from the provisions upon which Petitioners rely, that ambiguity should be resolved through the lens of the principle that election laws are to be “liberally construed” to protect a voter’s right to vote for the candidate of their choosing. *See, e.g., Petition of Cioppa*, 626 A.2d 146, 148 (Pa. 1993). In this case, that means allowing election staff to observe and flag obvious facial defects on a ballot’s outer envelope.

consequences for the Pennsylvania judicial system would be dire.

Answer to App. for Exercise of King’s Bench or Extraordinary Jurisdiction on Behalf of Bedford County Board of Elections et al., *Ball v. Chapman*, 289 A.3d 1 (Pa. filed Oct. 19, 2022) (No. 102 MM 2022) (citation to record omitted).

Two years later, and this Court is again faced with an election-related challenge asserted in a King’s Bench and extraordinary jurisdiction application. The Respondent Counties respectfully submit that granting Petitioners’ application here would signal to litigants that election cases are special—that the Court will more readily if not routinely entertain King’s Bench applications in election cases. This signaling may embolden parties to leapfrog the ordinary course of the judicial process, circumvent necessary factfinding, and unnecessarily burden this Court’s docket. And nothing in the statutes or case law indicates that election-related claims are treated any differently from all other claims for purposes of the Court’s King’s Bench power or extraordinary jurisdiction.

G. Conclusion

This Court should deny the application for the foregoing reasons and any additional reasons offered by the other Respondents in this matter. *See, e.g., In re Domitrovich*, 257 A.3d 702, 715 (Pa. 2021) (“Keeping in mind that we should exercise our King’s Bench authority with extreme caution, we decline to exercise it here[.]” (citation omitted)).

WHEREFORE, the Respondent Counties respectfully request that this Honorable Court deny Petitioners' Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction.

Respectfully submitted,

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Dated: September 20, 2024

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.

Date: September 20, 2024

/s/ Elizabeth A. Dupuis

Elizabeth A. Dupuis, Esquire