

No. 7 WM 2022
IN THE SUPREME COURT OF PENNSYLVANIA

TODD ELLIOTT KOGER, REPUBLICAN CANDIDATE
APRIL 5, 2022, SPECIAL ELECTION PA HOUSE DISTRICT #24,
Petitioner

v.

2021 PENNSYLVANIA LEGISLATIVE
REAPPORTIONMENT COMMISSION,
Respondent

APPEAL FROM THE FINAL PLAN OF THE
2021 LEGISLATIVE REAPPORTIONMENT COMMISSION

**AMICUS CURIAE BRIEF OF
THE COUNTY COMMISSIONERS ASSOCIATION OF PENNSYLVANIA**

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, the County Commissioners Association of Pennsylvania (CCAP) is a statewide, nonprofit, bipartisan organization. In 1955, by passage of The County Code,¹ CCAP was recognized statutorily as the “state association” through which county commissioners “discuss and resolve the various questions arising in the discharge of the duties and functions of” their offices, “and to provide uniform, efficient and economical methods of administering the affairs of the counties pertaining to their offices.” *See* Sections 440-441 of The County Code, 16 P.S. §§ 440-441.

Pursuant to Sections 440-441 of The County Code, it is CCAP’s mission to represent “the commissioners, chief clerks, administrators, their equivalents in home rule counties, and solicitors of Pennsylvania’s 67 counties” by “advocat[ing] for and provid[ing] leadership on those issues that will enhance and strengthen the ability of county commissioners and their home rule counterparts to better serve their citizens and govern more effectively and efficiently.^[2]” In advancing this mission, CCAP acts through its staff members, Board of Directors, and Committees, the latter two being comprised of representatives of CCAP member counties, who direct CCAP’s advocacy and efforts on behalf of those members.

CCAP and its members are interested in the instant litigation because it could impact the scheduled course of the 2022 primary election process to be administered

¹ Act of August 9, 1955, P.L. 323, *as amended*, 16 P.S. §§ 101-3000.3903.

² CCAP, Corporate Mission Statement, <https://www.pacounties.org/getmedia/1436b364-86c8-4e3e-ab3c-d4c5a3777ac6/CCAPCorporateMission2013Update.pdf> (last visited Mar. 4, 2022).

by Pennsylvania’s counties. Section 301(a) of the Pennsylvania Election Code³ (Code) mandates that each county must have a board of elections, “which shall have jurisdiction over the conduct of primaries and elections in such county.” 25 P.S. § 2641(a). The membership of county boards of elections is set forth in Section 301(b) of the Code as follows: “the county board of elections shall consist of the county commissioners of such county ex officio, or any officials or board who are performing or may perform the duties of the county commissioners.” 25 P.S. § 2641(b). As county commissioners are ex officio members of the county boards of elections, CCAP is necessarily interested in this appeal, the result of which may impact the ability of the county boards of elections to fulfill the duties dictated by the Code.

II. BACKGROUND

Pursuant to Article II, Section 17(a) of the Pennsylvania Constitution, a legislative reapportionment commission shall be formed “[i]n each year following the year of the Federal decennial census . . . for the purpose of reapportioning the Commonwealth.” PA. CONST. art. II, § 17(a). Following the 2020 census, such a commission was formed. The federal government was delayed in releasing the 2020 census to the states,⁴ which, in turn, delayed the work of the 2021 Legislative

³ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

⁴ U.S. Census Bureau, *Redistricting Data: What to Expect and When*, <https://www.census.gov/newsroom/blogs/director/2021/07/redistrictingdata.html#:~:text=The%20COVID%2D19%20pandemic%20significantly,redistricting%20dat a%20to%20the%20states> (last visited Mar. 4, 2022) (“The COVID-19 pandemic significantly delayed our schedule for collecting and processing the data for the 2020 Census. . . . These delays pushed back our delivery of the redistricting data to the states.”).

Reapportionment Commission. The 2021 Legislative Reapportionment Commission did not approve a final legislative reapportionment plan until February 4, 2022.⁵

Article II, Section 17(d) of the Pennsylvania Constitution allows any aggrieved person to file an appeal from the final plan of a legislative reapportionment commission directly to this Court within 30 days of the filing of the final plan. PA. CONST. art. II, § 17(d). Due to the delay in the issuance of the Final 2021 Legislative Reapportionment Plan, the appeal period to challenge the plan overlaps with the time for candidates for seats in the Pennsylvania General Assembly to circulate nomination petitions. *See* Section 908 of the Code, 25 P.S. § 2868. As such, this Court, by Order dated February 23, 2022, temporarily suspended “the General Primary Election calendar relative to elections for seats in the General Assembly” during the pendency of the appeal period. *In re: Petitions for Review Challenging the Final 2021 Legislative Reapportionment Plan* (Pa., 569 Judicial Administration Docket, per curiam order dated Feb. 23, 2022).

III. ARGUMENT

Petitioner in the instant appeal, Todd Elliott Koger, Republican Candidate for Pennsylvania House District 24, exercised his rights under Article II, Section 17(d)

⁵ The Final 2021 Legislative Reapportionment Plan is publicly available on the website of the 2021 Legislative Reapportionment Commission. *See* Legislative Reapportionment Commission, Final 2021 Senate Reapportionment Plan, <https://www.redistricting.state.pa.us/Resources/GISData/Districts/Legislative/Senate/2021-Final/PDF/LRC%20Senate%20Final.pdf> (last visited Mar. 4, 2022); Legislative Redistricting Commission, Final 2021 House of Representatives Reapportionment Plan, <https://www.redistricting.state.pa.us/Resources/GISData/Districts/Legislative/House/2021-Final/PDF/LRC%20House%20Final.pdf> (last visited Mar. 4, 2022).

of the Pennsylvania Constitution and filed a Petition for Review with this Court on March 2, 2022, which challenges the Final 2021 Legislative Reapportionment Plan on various bases.

CCAP takes no position on the merits of Petitioner’s challenge to the Final 2021 Legislative Reapportionment Plan. Rather, CCAP files this brief to bring to the Court’s attention the deadlines under which the county boards of elections must operate when conducting a primary election.

The 2022 primary election is set to be held on May 17, 2022. *See* Sections 603-604 of the Code, 25 P.S. §§ 2753-2754. This date triggers a host of pre-election activities that county boards of electors statutorily are required to perform under the Code in order to ensure a free, fair, accessible, orderly, and accurate primary election. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) (setting forth “that the purpose and objective of the Election Code . . . is ‘[t]o obtain freedom of choice, a fair election and an honest election return.’”) (quoting *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965)). Many of these activities occur after the filing of nomination petitions. The date for circulating nomination petitions for candidates for seats in the Pennsylvania General Assembly is currently suspended pursuant to this Court’s February 23, 2022 Order. As such, the temporary suspension is compressing the period of time that county boards of election will have to prepare for the upcoming primary election.

Once the Court lifts the temporary stay and candidates are permitted to circulate and file nomination petitions, and after objections have been adjudicated, Section 915 of the Code requires the Secretary of the Commonwealth to transmit to the county boards of elections a “list of candidates of each party for the various offices, in the order in which they are to appear upon the official ballots or ballot

labels.” 25 P.S. § 2876. Following this transmission, the county boards of elections then prepare paper ballots and program electronic voting machines for use in the primary election. Section 1001 and 1111 of the Code, 25 P.S. §§ 2961, 3011(a).

The county boards of elections require a reasonable time to prepare paper ballots for in-person as well as absentee and mail-in voting,⁶ and to program voting machines for use in the primary election. The timeframe for such preparations is affected by the other requirements imposed upon the county boards of elections by the Code.

Pursuant to Section 1302(a) of the Code,⁷ the county boards of elections must begin processing applications for absentee ballots 50 days prior to the primary. 25 P.S. §§ 3146.2(a). With respect to applications for mail-in ballots, Section 1302-D(a) of the Code provides that county boards of elections may process these applications at any time before a primary election. 25 P.S. § 3150.12(a). The county boards of elections should deliver or mail ballots to approved applicants for absentee

⁶ In 2019, the General Assembly amended the Code through the enactment of what is commonly referred to Act 77. Under Act 77, any qualified elector may vote by mail. *See* Section 1301-D(a) of the Code, added by the Act of Oct. 31, 2019, P.L. 552, No. 77, § 8, 25 P.S. § 3150.11(a). Thus, Act 77 allows no-excuse voting. On January 28, 2022, the Commonwealth Court declared Act 77 unconstitutional. *McLinko v. Dep’t of State*, No. 244 M.D. 2021, __ A.3d __, 2022 WL 257659 (Pa. Cmwlth. 2022). An appeal of the Commonwealth Court’s decision is pending before this Court. During the pendency of the appeal, the Commonwealth Court’s decision is subject to an automatic supersedeas. *See McLinko v. Dep’t of State* (Pa., 14-19 MAP 2022, per curiam order dated Mar. 1, 2022); *see also* Pennsylvania Rule of Appellate Procedure 1736(b), Pa.R.A.P. 1736(b). Until a decision is issued by this Court indicating otherwise, the county boards of elections must continue to treat Act 77 as effective.

⁷ Added by the Act of March 6, 1951, P.L. 3, No. 1, § 11.

and mail-in ballots as soon as the ballots are available. *See* Sections 1305(b)(1) and 3105-D of the Code,⁸ 25 P.S. §§ 3146.5(b)(1), 3150.15.

Additionally, the Code imposes specific deadlines for the delivery or mailing of ballots to members of the military. Section 1305(a) of the Code requires that county boards of elections deliver or mail ballots to those applicants who are members of the military and live or serve “in an extremely remote or isolated area of the world” no later than 50 days prior to the primary election. 25 P.S. § 3146.5(a). That section of the Code further provides that county boards of elections must direct or mail absentee ballots to all other applicants who are members of the military no later than 45 days prior to the election. *Id.*

Moreover, Section 1008(a) of the Code requires county boards of elections begin allowing public inspection – in the board’s office and on the board’s website – of ballots and ballot labels by the Thursday before the primary election. 25 P.S. §2968(a). It also mandates that on the Thursday before the primary election, county boards of elections, upon request, deliver sample ballots to each candidate whose name appears on the ballot, to the chairman of each political party in the county, or to their respective representatives. *Id.* at (b)-(c).

With respect to the preparation of electronic voting machines, Sections 1110-A(d)⁹ and 1111 of the Code requires that the county boards of elections, at least 40 days prior to the election, mail a written notice to the county committee chair of each

⁸ Section 1305 of the Code was added by the Act of March 6, 1951, P.L. 3, No. 1, § 11. Section 3150.15 of the Code was added by the Act of October 2019, P.L. 552, No. 77, § 8.

⁹ Added by the Act of July 22, 1980, P.L. 600, No. 128, § 4.

political party¹⁰ stating the times when and the places where voting machines and systems will be prepared for use in the primary election. 25 P.S. §§ 3011(d), 3031.10(d). County boards of elections also must begin publicly exhibiting at least one voting machine with ballot labels for instruction of the voters at least 30 days before the primary election. Section 1115(a) of the Code, 25 P.S. § 3015(a).

These 50-, 45-, 40-, and 30-day statutory deadlines are rapidly approaching. The first of those deadlines, 50 days before the May 17, 2022 primary election, falls on March 28, 2022. County boards of elections, however, cannot begin preparing paper ballots, or programming election machines, until: nomination petitions have been circulated and filed; objections have been adjudicated; and, the Secretary of the Commonwealth has provided a list to each county of the candidates to appear on the ballots.

In light of these looming deadlines and the substantial work required to be completed by counties in advance of those deadlines, CCAP respectfully requests the Court expedite its decision in this appeal. Additionally, should the Court consider adjusting the primary election calendar with respect to seats in the General Assembly, as it did in the congressional redistricting case, *see Carter v. Chapman* (Pa., 7 MM 2022, per curiam order dated Feb. 18, 2022), CCAP urges the Court to set a calendar that will allow the county boards of elections a reasonable amount of time to complete their statutorily-mandated tasks of preparing and mailing ballots, programming electronic voting machines, and making those ballots and machines available for inspection.

¹⁰ Such notice also must be mailed to “the chairman or presiding officer of any organization of citizens within the county which has as its purpose or among its purposes the investigation or prosecution of election frauds and which has registered its name and address and the names of its principal officers with the county board of elections at least fifty days before the election.” 25 P.S. 3031.10(d).

CCAP further urges the Court against setting two primary dates – one for federal and one for state candidates. Operating two primaries would add considerable additional costs counties’ election expenses, including additional costs for: the rental of polling places; printing of ballots; obtaining envelopes for absentee and mail-in ballots; postage; voting equipment; truck rentals for deliveries and fuel for these truck rentals; and staff overtime. Additionally, conducting two primaries would add the extra burden of securing additional volunteers and polling places for a second primary. Absent relief from the General Assembly, these additional costs would be borne by the counties and, in turn, the county property taxpayers. *See* Section 305 of the Code, 25 P.S. § 2645. Further, conducting two primary elections would strain election staff, who must conduct various post-election activities such as: computation and canvassing of election returns; examination of provisional ballots; conducting recounts or recanvasses as required; and, certifying the results of the election to the Secretary of the Commonwealth, while also preparing for the general election. *See* Sections 302(k), 1210(a.4), 1308,¹¹ 1404, and 1702 of the Code, 25 P.S. §§ 2642(k), 3146.8, 3050(a.4), 3154, 3262.

IV. CONCLUSION

Pennsylvania’s county boards of election are committed to ensuring a free, fair, accessible, orderly, and accurate primary election in 2022. To permit such a result, the County Commissioners Association of Pennsylvania, by and through its members, respectfully requests the Court expedite its decision in this case and the making of any adjustments to the 2022 primary election calendar. Should the Court make any such adjustments, CCAP urges the Court to set a calendar that allows the

¹¹ Added by Act of March 6, 1951, P.L. 3, § 11.

county boards of elections a reasonable time to prepare ballots and program electronic voting machines and otherwise comply with the various requirements and deadlines imposed upon those boards by the Code.

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CERTIFICATION PURSUANT TO PA.R.A.P. 531

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2)(i) and (ii), *Amici Curiae*, County Commissioners Association of Pennsylvania, certify that no person other than *Amici Curiae*, their counsel, and their members contributed money intended to fund the brief's preparation or submission.

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CERTIFICATE OF CONFIDENTIALITY

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.

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CERTIFICATION PURSUANT TO PA.R.A.P. 2135(d)

Undersigned counsel hereby certifies pursuant to Pennsylvania Rule of Appellate Procedure 2135(d) that the foregoing document contains 2,821 words (exclusive of the caption, the table of contents, the table of authorities, signature block, and the certifications herein) according to the word count feature of undersigned counsel's computer.

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