

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

NO. 149 MM 2020

IN RE NOVEMBER 3, 2020 General Election

**Petition of Kathy Boockvar, Secretary of the Commonwealth of
Pennsylvania**

**Answer of PENNSYLVANIA DEMOCRATIC PARTY, NILOFER NINA
AHMAD, ANTON ANDREW, DANILO BURGOS, AUSTIN DAVIS,
DWIGHT EVANS, ISABELLA FITZGERALD, EDWARD GAINEY,
MANUEL M. GUZMAN, JR., JORDAN A. HARRIS, ARTHUR
HAYWOOD, VINCENT HUGHES, MALCOLM KENYATTA, PATTY H.
KIM, STEPHEN KINSEY, PETER SCHWEYER, SHARIF STREET, and
ANTHONY J. WILLIAMS
to Secretary Boockvar's Application for Invocation of King's Bench Power
to Declare Proper Construction of Election Code**

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ANSWER

The Pennsylvania Democratic Party, Nilofer Nina Ahmad, Anton Andrew, Danilo Burgos, Austin Davis, Dwight Evans, Isabella Fitzgerald, Edward Gainey, Manuel M. Guzman, Jr., Jordan A. Harris, Arthur Haywood, Vincent Hughes, Malcom Kenyatta, Patty H. Kim, Stephen Kinsey, Peter Schweyer, Sharif Street, and Anthony J. Williams (collectively, the “Pennsylvania Democratic Party Respondents”) file the following Answer tot Secretary Boockvar (the “Secretary”) Application for Invocation of King’s Bench Power.:

Introduction

1. The Democratic Party Respondents seek a fair and free election, where eligible voters may vote and have the certainty that their votes will count. For that reason, the Democratic Party Respondents participated in recent litigation in this Court seeking that certainty. As the various County Boards of Election prepare to undertake the basic and essential task of counting each and every eligible vote, efforts to introduce delay and disruption in the process continue.

2. The Secretary’s work to achieve clarity and to apply the language of the Election Code so that these core objectives may be met, is laudable and critical to sound election administration, which undergirds democracy.

Description and Position of Supporting Respondents

3. The Pennsylvania Democratic Party Respondents were the Petitioners in *Pa. Democratic Party v. Boockvar*, ___ A.3d ___, (Pa. 2020), and in that capacity, have a vested interest in the Secretary's Application here.

4. The Pennsylvania Democratic Party Respondents include the Pennsylvania Democratic Party, which has associational standing on behalf of its members and candidates to ensure fair and free elections. *See Orloski v. Davis*, 564 F. Supp. 526 (M.D. Pa. 1983) (holding that the Pennsylvania Democratic Party has standing in matters affecting election procedure). The individual Respondents include voters and candidates who similarly have standing to ensure the election in which they intend to participate is fair and equal.

5. The Pennsylvania Democratic Party Respondents support Secretary Boockvar's Application for Invocation of King's Bench Power to Declare the Proper Construction of the Election Code and ask this Court to exercise its King's Bench powers and to grant the necessary relief, for the reasons cited in Secretary's Application and those set forth below.

6. The Pennsylvania Democratic Party Respondents agree that the Secretary's Application is ripe because the plaintiffs in the related federal court matter, captioned as *Donald J. Trump for President, Inc. et al. v. Kathy Boockvar, et al.*, No. 2:20-cv-966 (W.D. Pa.) ("DJTFP Plaintiffs") have asked the federal

court to enjoin the Secretary and the 67 county Boards of Elections from applying the plain meaning of the Pennsylvania Election Code, despite the fact that this Court is “the ultimate expositor[] of state law.” *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass’n*, 426 U.S. 482, 488 (1976).

7. The Pennsylvania Democratic Party Respondents welcome this Court’s clear explication of the Election Code, consonant with the Secretary’s position, so that election officials throughout the Commonwealth have clear guidance on the mail-in and absentee counting process that is a central component of this year’s election.

Act 12 Precludes Signature-by-Signature Review or Challenges

8. The Pennsylvania Democratic Party Respondents agree with and support the Secretary’s interpretation of the Election Code with respect to statutory procedures governing ballot applications and the canvassing of voted mail-in and absentee ballots. The Secretary’s interpretation of the Election Code is faithful to its plain text, which provides that once a county election board has “verified” an absentee or mail-in ballot, it “shall be counted and included with the returns of the applicable election district” unless the voter’s application for the ballot previously had been challenged. 25 Pa. P.S. § 3146.8(g)(4); Secretary’s App. at 16-18.

9. Both as a matter of law and as a matter of practicality, and as demonstrated through a review of Act 77 of 2019 and Act 12 of 2020, there is no

opportunity during the canvassing of absentee or mail-in ballots for an observer to interpose ballot-by-ballot challenges.

10. The pre-canvassing of absentee and mail-in ballots begins the morning of Election Day. As initially amended through Act 77, Section 1308(g)(3) of the Election Code (as amended) required a name-by-name announcement of each elector voting by means of absentee or mail-in ballot so that a candidate or party representatives could have the opportunity to challenge the voter's eligibility on certain limited grounds (i.e., that they were not a qualified voter or were ineligible for an absentee ballot).

11. Significantly, Act 77, which allowed for challenges during the pre-canvass, did not allow for challenges to any aspect of the voter's declaration, let alone whether the voter's signature matched the voter file. *See* Act 77 of 2019, 25 P.S. § 3146.8 (West 2019).

12. Act 12 of 2020 eliminated that challenge process. Act 12 removed Act 77's name-by-name announcement language and replaced it with a provision that requires a county board only to provide a *list* of the names of electors whose absentee or mail-in ballots are to be pre-canvassed or canvassed. *See* Act 12 of 2020 at 25 P.S. § 3146.8(g)(3) (West 2020) (striking remaining challenge options (i) and (iii)). Under the contemplated schedule set forth in the Election Code, the

list then may be compared to the list of voters whose absentee or mail-ballot applications had been challenged on or before the Friday before the election.

13. The law does not include any other mechanism for challenges. Once the county board has “verified” a ballot, unless the voter’s application has been challenged, that ballot “shall be counted.” 25 Pa. P.S. § 3146.8(g)(4).

The Election Code Appropriately Distinguishes Between In-Person And Mail-in Voting

14. The Election Code does not impose the same type of signature review for mail-in votes as it does for in-person votes. The General Assembly’s statutory choices to adopt parallel, but distinct, structures reflect the fundamental differences between in-person voting and mail-in voting.

15. To vote in person, voters present themselves to vote and sign a voter list, which can be compared to their signature as recorded in the SURE system. The Election Code expressly provides for a review of the signature for in-person voting. 25 P.S. § 3050(a.3)(2). If, for some reason, a question arises, the voter is notified and has the immediate opportunity to respond to the judge of elections.

16. If necessary, the voter has a second chance to demonstrate his or her identity, by returning to the polling place with an appropriate form of evidence. The evidence could include verification by mutual neighbors, because both the elector and the judge of elections are required to live in the voting division and the residents of the district have elected the judge of elections to weigh and decide

these questions of identity. 25 P.S. § 3050(d). It could also be necessary for voters to obtain a court order to confirm their right to vote.

17. In contrast, with mail-in voting, the elector's identity is confirmed much earlier in the voting process. Upon submitting an application for a mail-in ballot, the voter is required to provide some type of information to obtain a that ballot, including a driver's license, a Commonwealth issued non-driver's identification, or social security number. 25 P.S. §§ 3150.12(f), (g)(2). The Boards of Election are thus able to confirm the identity of the voter when issuing a ballot to that voter, which is then sent to the address that the voter provides and cannot be forwarded. When the Board of Elections subsequently receives the voter's envelope, which contains the ballot, the Board is able to confirm that the envelope received matches the identity of the applicant who was sent a particular ballot, and mark the application as "approved." 25 P.S. § 3150.12B(a)(1).

18. This process enables the Board of Elections to publish a list of voters who have returned envelopes containing a ballot. The Election Code provides for a limited challenge, allowing challenges only on the grounds that the applicant was not a qualified elector. 25 P.S. § 3150.12b(a)(2). All challenges to voter qualifications must be made by 5 p.m. on the Friday before the election. 25 P.S. § 3150.12b(a)(1). Thus, the Board's review of the name is simply for the purpose

of verifying that the ballot received was from the voter who applied for that particular mail in ballot.

19. The Election Code contains no provision that would allow for challenges based on the highly subjective process of comparing signatures. Yet, the DJTFP Plaintiffs and others suggest that they should be allowed to make challenges to mail-in ballots on Election Day, at the moment the Boards are to commence the counting of what could be hundreds of thousands of mail-in ballots. That atextual argument would have substantial legal and practical implications.

20. Contrary to the position that the DJTFP Plaintiffs now take, with Act 12, the Legislature amended Act 77 by removing those provisions that would have allowed challenges during pre-canvassing and canvassing. See 25 P.S. § 3146.8(g)(2) (2019); see also 12 Pa. Legislative Journal (2020) p. 277 (State Rep. Boyle, discussing Act 12, stating “When we have our election, whether it is the primary or the general election permanently, we do not want a delay of several weeks before there is actually a resultI think as Pennsylvanians and Americans we should be able to agree that we want the winner to be known in a timely manner.”).

21. Current Section 3146.8(g)(2) omits that language. Pursuant to the Act 12 amendments, the only challenges now available with respect to a mail-in voter are to the voter’s qualifications and those challenges must be made by the Friday

preceding Election Day, not as the Boards of Election are poised to begin counting ballots on Election Day itself. 25 P.S. § 3146.8(g)(4).

22. The DJTFP Plaintiffs suggest in the Federal Court litigation that Boards of Election or an individual – and partisan – pollwatcher could issue challenges to a mail-in ballot, without notice to the voter and without providing the voter with an opportunity to address those issues. This position has no basis in the Election Code and, if allowed, would violate fundamental due process, and more importantly, violate the Free and Fair Elections Clause of the Pennsylvania Constitution. Pa. Const. art. I, sec. 5; *Pa. Democratic Party v. Boockvar*, ___ A.3d ___ (Pa. 2020).

**The Anticipated Volumes of Mail-in Ballots,
Which Cannot Be Counted Until 7 a.m. on Election Day,
Render Election Day Signature Challenges Impracticable**

23. The legislative changes to Act 12 specifically preclude the signature-by-signature review that the DJTFP Plaintiffs now demand. That onerous demand is inconsistent with the statute and would be highly disruptive of the administration of the elections on Election Day.

24. The DJTFP Plaintiffs demands conflict with the Election Code and must be viewed in the context of their candidate, the President of the United States, asserting that all votes must be counted on Election Day. At the same time, the

DJTFP Plaintiffs demand an opportunity to grind the Election Day processes throughout the Commonwealth to a halt.¹

25. Pennsylvania partisan *and elected* officials have even speculated that delay or interference with the count could be used to disenfranchise *all* Pennsylvania voters so that the election could be decided through a mechanism other than the counting of ballots, through what are being euphemistically called “alternative selection processes.”²

26. County election officials are under considerable pressure to process ballots as rapidly as possible. The most populated counties, in particular, face the daunting tasks of counting hundreds of thousands of mail-in and absentee ballots during the statutorily limited pre-canvass and the canvass that begins at the close of the polls.

¹ See, e.g., @realdonaldtrump, Twitter (Jul. 30, 2020 4:22 pm), <https://twitter.com/realDonaldTrump/status/1288933078287745024> (Must know Election results on the night of the Election, not days, months, or even years later!), @atrupar, Twitter (Sept. 19, 2020 7:24 pm) <https://twitter.com/atrupar/status/1307460628500676610> (quoting Donald Trump at rally stating “Now we’re counting on the federal court system to make it so we can actually have an evening where we know who wins”), and Nina Golgowski, *Trump: “We’re Counting” On Federal Courts To Declare Election Night Winner*, HUFFPOST.COM (Sept. 20, 2020 2:45 pm), <https://www.huffpost.com/entry/trump-wants-courts-to-declare-election-day-winner>.

² Barton Gellman, *The Election That Could Break America*, THE ATLANTIC MONTHLY (Nov. 2020 issue) available at <https://www.theatlantic.com/magazine/archive/2020/11/what-if-trump-refuses-concede/616424/>.

27. The counties have purchased millions of dollars of additional equipment and are undertaking preparations for the pre-canvass and canvass, but, by statute, the actual tallying of ballots cannot begin until 7 a.m. on Election Day.

28. Allowing a signature-based challenge to a mail-in or absentee ballot – without notice to the voter and without providing the voter with an opportunity to address those issues – would violate fundamental due process, and more importantly, violate the Free and Fair Elections Clause of the Pennsylvania Constitution. Pa. Const. art. I, sec. 5; *Pa. Democratic Party v. Boockvar*, ___ A.3d ___, (Pa. 2020); *see also Democracy N.C. v. N.C. State Bd. of Elections*, --- F.Supp. 3d ---, 2020 WL 4484063,)*52-55 (M.D. N.C. Aug. 4, 2020) (collecting innumerable cases and holding that disqualifying ballots on the basis of signature matching without the opportunity to cure violates due process); *Richardson v. Texas Secretary of State*, --- F.Supp.3d ---, 2020 WL 5367216 (W.D. Tex. Sept. 8, 2020) (same). That process would unduly delay, without any statutory support or justification, the timely count of the mail-in votes of eligible voters throughout the Commonwealth.

29. County election officials cannot be expected to process an enormous volume of mail-in ballots on Election Day while also repeatedly and unnecessarily re-verifying the identity of each voter. This problem would be exacerbated if any

system participant undertakes tactics that cause delay, whether that delay is incidental or intentional.

30. The changes to the Election Code, which the Legislature adopted in Act 12, responded to the onset of the COVID-19 pandemic and anticipated a higher volume of mail-in voting. Unfortunately, the pandemic persists and the anticipated volume of mail-in ballots in the 2020 General Election is expected to greatly exceed the volume of mail-in ballots received in the 2020 Primary Election.

31. As the Secretary noted in her application, it is anticipated that 2.5 million Pennsylvanians will cast votes by mail in the 2020 General Election, creating an extremely high volume of mail in ballots that the Boards of Election must canvass, beginning at 7 a.m. on Election Day.

32. Despite the record expenditures on equipment and personnel that those counties have undertaken, the counties will have to work around-the-clock (which they plan to do) to complete the count of the ballots of each eligible voter in a timely manner, as close to Election Day as possible.

33. The County Boards of Elections must be afforded the opportunity to process and to count the ballots that they have determined to be valid, thus giving effect to the will of each county's voters. In that task, they must not face endless interference from observers who seek to lodge serial challenges that have no basis in state law. That is what the Election Code so clearly precludes and is another

reason, beyond the clear textual analysis that the Secretary has set forth, why the grant of the declaration is sought.

For the foregoing reasons, and for all the other reasons listed in the Secretary's Application, this Court should GRANT Secretary Boockvar's Application and issue a declaratory judgment that:

(i) County election officials may not reject absentee or mail-in applications or refuse to count voted absentee or mail-in ballots based on a subjective perception of signature variation; and

(ii) Absentee and mail-in ballots and the applications for those ballots may not be challenged by third-parties at any time based on signature comparison.

Respectfully submitted,

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MIDDLE DISTRICT**

NO. 149 MM 2020

IN RE NOVEMBER 3, 2020 General Election

**Petition of Kathy Boockvar, Secretary of the Commonwealth of
Pennsylvania**

PROPOSED ORDER

AND NOW this ____ day of October, 2020, upon consideration of the
Petition of Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania, and
the responses thereto, this Court hereby GRANTS the Petition and declares as
follows:

County election officials may not reject absentee or mail-in applications or
refuse to count voted absentee or mail-in ballots based on a subjective perception of
signature variation; and

Absentee and mail-in ballots and the applications for those ballots may not be
challenged by third-parties at any time based on signature comparison.

BY THE COURT:

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing ANSWER was filed with the PACFile system and through that system, served upon all counsel of record as demonstrated on the Proof of Service generated thereby.

/s/ Clifford B. Levine