

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 7 MM 2022

**CAROL ANN CARTER, et al.
Petitioners,**

v.

**LEIGH M. CHAPMAN, in her official capacity as the Acting Secretary
of the Commonwealth of Pennsylvania, et al.,
Respondents.**

**BRIEF FOR *AMICUS CURIAE*
PHILADELPHIA COUNTY BOARD OF ELECTIONS
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF AMICUS CURIAE

The Philadelphia County Board of Elections (“Philadelphia” or the “Board”) or is responsible for the operation of elections in Philadelphia County and ensuring that they are free and accessible. It requires a staff of over 100 people to prepare for elections, including processing voter registration, 25 Pa. C.S. §§ 1322, 1328, providing and evaluating nominating petitions, 25 P.S. § 2642(j), arranging polling places, *id.* §§ 2642(b), 2726(c), obtaining and distributing election materials, notices, *id.* §§ 2642(c), (h), 3041, mailing absentee and mail-in ballots, *id.* §§ 3146.5, 3150.15, staffing district election boards and training district poll workers, *id.* § 2642(d), (f), (g), setting up electronic ballot marking devices (BMDs), *id.* § 2642(c), creating and testing the ballot in multiple languages,¹ 52 U.S.C. § 10503, preparing poll books, 25 Pa. C.S. § 1402(d), and shipping BMDs to polling places, 25 P.S. §§ 2642(b), 3044. The same staff are tasked with post-election responsibilities such as the canvass and tabulation of in-person votes, absentee and mail-in ballots, and provisional ballots, the examination of poll books, and the certification of election results. *See* 25 P.S. §§ 2642(k), 3146.8, 3154; 25 Pa. C.S. § 1402(f). Because of these responsibilities and the associated

¹ *See, e.g.,* Phila Board of Elections, *Fiscal 20 Operating Budget* at 1 (last visited Feb. 14, 2022), *available at* https://files7.philadelphiavotes.com/departments-reports/FY20_Budget.pdf.

costs, the Board is necessarily interested in the matters at issue in this case which potentially impact these obligations and the timelines on which the Board conducts its pre- and post-election activities.

ARGUMENT

Amicus Curiae the Philadelphia County Board of Elections takes no position on the merits of the Petition. However, the Board wishes to apprise the Court of the deadlines under which the Board operates as those timelines impact the Board's ability to conduct free and accessible elections, including the ability to take any action necessary to comply with this Court's decision in this matter.

As an initial matter, the Board must mail absentee and mail-in ballots to voters months in advance of the election. While most can be sent within fifty days of the election, the Board must mail ballots to international and military voters seventy days before the election. *See* 25 P.S. § 3146.5(a). Delays in mailing can exacerbate these timelines.²

With regard to in-person voting, the technology and administrative requirements in Philadelphia necessitate significant lead time for the Board to prepare the voting equipment. Philadelphia's elections take place on ExpressVote

² *See, e.g.,* Wallace McKelvey, *Mail delays even worse across Pa., with 42% of Philly mail taking longer than 5 days*, PennLive (Oct. 29, 2020 11:29 p.m.), <https://www.pennlive.com/news/2020/10/mail-delays-even-worse-across-pa-with-42-of-philly-mail-taking-longer-than-5-days.html>.

XL electronic ballot marking devices (BMDs). *See Stein v. Boockvar*, No. 16-6287, 2020 WL 2063470, at *2 (E.D. Pa. 2020). Although the BMDs are electronic, they rely on a database of information to display the ballot.³ The Board must “lock” that database more than a month before an election in order to have the BMDs available for election day.⁴ Once the database is locked, the Board cannot add or remove candidates’ names from the ballot for the coming election. *Id.* After locking, the Board must conduct logic and accuracy testing on the BMDs in each required language⁵ and then ship them over multiple weeks to their respective polling places for election day. Given the number of races involved in this primary and the recent inclusion of Chinese in addition to Spanish as a

³ Robert Torres, Dep’t of State, Commonwealth of Pa., *Report Concerning the Examination Results of Elections Systems and Software EVS 6021 with DS200 Precinct Scanner, DS540 and DS850 Central Scanners, Expressvote HW 2.1 Market and Tabulator, ExpressVote XL Tabulator and Electionware EMS* at 24 (Nov. 30, 2018) [hereinafter *DOS Examination Report*], available at <https://www.dos.pa.gov/VotingElections/Documents/Voting%20Systems/ESS%20EVS%206021/EVS%206021%20Secretary%27s%20Report%20Signed%20-%20Including%20Attachments.pdf>

⁴ *See* Decl. of Joseph Lynch at 4, *Stein*, 2020 WL 2063470 (E.D. Pa. Dec. 12, 2019) (ECF 123-2) (explaining need for 50 days before the 2020 General Election, a federal election); Non-Party Philadelphia County Board of Elections’s Application To Expedite Consideration of Petition ¶ 8, *In Re: Nomination Petition of Rania Major as a Democratic Candidate for Municipal Judge in Philadelphia County*, No. 15 EAP 2021 (Pa. Mar. 31, 2021) (explaining need for 35 days before 2021 Primary Election, a municipal primary).

⁵ *See*, Torres, *DOS Examination Report*, *supra* note 3, at 38.

required Section 203 language in Philadelphia,⁶ the Board must lock the database at least 42 days in advance of the election. This timeline, therefore, requires that all candidates be finalized six weeks in advance of election day, including final determinations on challenges to nominating petitions. The Board would need additional time to prepare for a subsequent election if it were held less than three months later.

In addition, after each election, the same personnel who are involved in preparing for the election are tasked with post-election activities. It takes several weeks to finish canvassing ballots and processing provisional ballots, and even longer due to the social distancing of workers during the pandemic. *See, e.g.*, 25 P.S. §§ 3050(a.4), 3146.8(g), 3154. Additional time is required for a recount, if necessary. *See* 25 P.S. § 3154(e)-(g). Certification does not take place until 20 days after the election, during which time BMDs records must be preserved for recanvassing. *See* 25 P.S. §§ 2642(k), 3262(c). Afterwards, the ensuing months allow the Board staff to repair and perform preventative maintenance on the BMDs in preparation for the next election, as well as obtain parts, supplies for new ballots, and personal protective equipment (PPE). For instance, each separate election requires the Board to print and send a new ballot to each voter on the

⁶ *See* Voting Rights Act Amendments of 2006, Determinations Under Section 203, 86 Fed. Reg. 69611, 69616 (Dec. 8, 2021).

Permanent Mail-in Voter List. These processes can take even longer if there are supply chain complications.

Thus, for the orderly administration of the 2022 Primary Election, the Board respectfully requests that if this Court adjusts the timeline for the Primary Election, it ensure that the adjusted timeline provides that the ballot will be final at least 42 days before the date of the 2022 primary election and that if there is an additional election day before the November 2022 General Election, that any such schedule provide at least 62 days between elections as well as accounting for the possibility that impoundment of election equipment could create further delays.

CONCLUSION

For all of the reasons set forth above, the Board respectfully requests that this Court issue its decision such that the timeline for the 2022 Primary Election and final ballot is set at least 42 days before the date of the election, and that if there is an additional election before the November 2022 General Election that any schedule provides at least 62 days between elections.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

I hereby certify that this brief contains 1120 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further 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.

/s/ Michael Pfautz

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