

ELECTION MATTER

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100 MAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA

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No. 100 MAP 2022

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REPUBLICAN NATIONAL COMMITTEE, *et al.*,  
Appellants

vs.

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

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BRIEF FOR APPELLEE  
NORTHAMPTON COUNTY BOARD OF ELECTIONS

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APPEAL FROM THE COMMONWEALTH COURT'S MEMORANDUM  
OPINION AND ORDER ENTERED ON SEPTEMBER 29, 2022

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## **I. COUNTER-STATEMENT OF QUESTION INVOLVED**

1. Whether the Commonwealth Court correctly denied Petitioners' Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.A.P. 1532 in its September 29, 2022 Memorandum Order and Memorandum Opinion because the Petitioners' failed to meet their burden of proof on all elements necessary for a preliminary injunction?

**Suggested Answer: Yes.**

## **II. COUNTER-STATEMENT OF THE CASE**

Appellee Northampton County Board of Elections incorporates by reference as if the same were set forth herein the procedural history and statement of facts set forth in the Commonwealth Court's September 29, 2022 Memorandum Opinion.

## **III. ARGUMENT**

Appellee Northampton County Board of Elections incorporates by reference as if the same were set forth herein the well-reasoned analysis and discussion of the Commonwealth Court in its September 29, 2022 Memorandum Opinion to deny Petitioners' request for a preliminary injunction.

Appellee Northampton County Board of Elections writes separately to clarify that there are two processes at issue in Northampton County. First, voters who have an issue with the signature on their absentee or mail-in ballot are contacted as time permits and permitted to come into the Election Office to remedy

the issue on or before 8 p.m. on Election Day. Second, during the pre-canvass authorized by law to begin at 7:00 a.m. on Election Day, Appellee from time-to-time will create a list of voters whose ballots are set aside during the pre-canvass for lack of a secrecy envelope and provide that list to candidate and party representatives on site. Those representatives may contact voters about the potential to vote by provisional ballot.

With respect to the right of voters to correct an issue with a signature, the Commonwealth Court's well-reasoned opinion addresses why Petitioners are not entitled to a preliminary injunction.

With respect to voters who vote provisionally because their ballot is set aside, there is an additional reason why Petitioners are not entitled to preliminary injunction relief. There is no immediate or irreparable harm with respect to voters who vote by provisional ballot if their vote is set aside and not counted. The Election Code provides a process for voters to vote provisionally and, importantly, a process to challenge provisional ballots. See 25 P.S. §3050(a.4). To the extent voters vote by provisional ballot in response to the cancellation or set aside of a mail-in or absentee ballot, Petitioners have a remedy at law and are unable to demonstrate the immediate and irreparable harm entitling them to a preliminary injunction. See also In re: Motion for Injunctive Relief of Northampton County Republican Committee, North. Cnty. No. C-48-CV-2020-6915 (Northampton

Cnty. November 5, 2020) (Appeal discontinued) (attached hereto as Appendix “A”).

Petitioners also are unable to establish the elements necessary for a preliminary injunction to stop providing lists of voters whose ballots are set aside during the pre-canvass on Election Day. The Pennsylvania General Assembly authorized county boards of election to conduct a "pre-canvass" of mail-in and absentee ballots. The "pre-canvass" is defined as:

[T]he 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.

25 P.S. § 2602.

The pre-canvass is permitted to start at seven o'clock A.M. on Election Day.

25 P.S. § 3146.8(g)(1.1). "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. Id.

Pursuant to the guidance issued by the Department of State issued on November 2, 2020, a voter whose ballot is set aside or cancelled because of a defect - such as a "naked ballot" or missing declaration - is permitted to cast a provisional ballot if notified of the cancellation of the mail-in or absentee ballot. Provisional ballots are not reviewed until the canvass pursuant to 25 P.S.

§3050(a.4). Representatives of political parties and candidates are permitted to challenge provisional ballots. Id. Since there is an adequate remedy under the Election Code, injunctive relief is improper. See Starkey v. Smith, 283 A.2d 700, 701 (Pa. 1971) (holding that there is no cause of action cognizable in equity when the Pennsylvania Election Code provides an adequate remedy).

The disclosure of the information concerning voters whose ballots were set aside during the pre-canvass is not a "result" as contemplated by 25 P.S.

§3146.8(g)(1.1). The word "result" is not defined in the Election Code. However, the definition of pre-canvass set forth in 25 P.S. §2602(q.1) is instructive for what the legislature intended by the word "result." The definition of pre-canvass specifically excludes "the recording or publishing of the votes reflected on the ballots." Id. There is no reference to the disposition of individual ballots in the definition of pre-canvass.

Reading the prohibition of "recording or publishing the votes reflected on the ballots" as set forth in the definition of pre-canvass along with the prohibition of disclosure of any "portion of the results" set forth in 25 P.S. §3146.8(g)(1.1), it appears the legislature wanted to ensure that no vote totals were released prior to the close of the polling places. The legislature did not intend to prohibit the disclosure of information pertaining to the disposition of individual ballots during the pre-canvass; it would have said so if it did.

The Court must interpret the Election Code in a constitutional manner. The Court should also construe the Election Code in a manner which favors the right of voters to vote. Permitting the disclosure of information at issue during the pre-canvass to permit voters an opportunity to cure a defective ballot lawfully supports the right of voters to cast a vote in an election. The guidance issued by the Secretary of the Commonwealth on November 2, 2020 gives voters a due process right to cure their ballot subject to challenge under the Section 3050 of the Election Code. Petitioners cannot establish that they are likely to proceed on the merits should this matter proceed.

#### **IV. CONCLUSION**

Appellee Northampton County Board of Elections respectfully requests that this Court affirm the Commonwealth Court's September 29, 2022 Order and Memorandum Opinion which denied Petitioners' Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.A.P. 1532.

Respectfully Submitted,

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## **APPENDIX “A”**

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY  
COMMONWEALTH OF PENNSYLVANIA  
CIVIL DIVISION – LAW**

**IN RE: MOTION FOR INJUNCTIVE  
RELIEF OF NORTHAMPTON COUNTY  
REPUBLICAN COMMITTEE**

**No.: C-48-CV-2020-6915**

**PENNSYLVANIA RULE OF APPELLATE PROCEDURE  
1925(a) STATEMENT**

**AND NOW**, this 5<sup>th</sup> day of November, 2020, the court issues the following statement:

**BACKGROUND**

On November 3, 2020, the Northampton County Republican Committee presented on oral motion seeking an injunction against the Northampton County Board of Elections to prohibit the Board from disclosing the names and identifying information of voters whose mail-in ballots were cancelled during pre-canvassing on November 3, 2020. These ballots were deemed to be invalid for reasons ranging from missing a signature, to lacking the necessary privacy envelope. The Northampton County Board of Elections set aside certain ballots and provided the names of addresses associated with the affected ballots to both the Democratic and Republican Parties so that both parties would have the ability to contact these voters and direct them to the polls and vote by provisional ballot. The Northampton County Republican Committee argues that such disclosure is

prohibited by statute because it constitutes “results” pursuant to 25 Pa.C.S.

§ 3146.8(g)(1)(ii)(1.1):

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.

*Id.* However, the County Board of Elections were told by Jonathan M. Marks, the Pennsylvania Deputy Secretary for Elections and Commissions, that such disclosure is valid:

The Department of State has been asked whether county board of elections can provide information to authorized representatives and representatives of political parties during the pre-canvass about voters whose absentee and main-in ballots have been rejected. The Department issued provisional ballot guidance on October 21, 2020, that explains that voters whose completed absentee or main-in ballots are rejected by the county board for reasons unrelated to voter qualifications may be issued a provisional ballot. To facilitate communication with these voters, the county boards of elections should provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected and should promptly update the SURE system.

E-mail from Jonathan M. Marks, Deputy Secretary for Elections and Commissions (Nov. 2, 2020, 8:38 EST). The Northampton County Republican Committee argues that that the Department of State’s

guidance violated 25 Pa.C.S. § 3146.8(g)(1)(ii)(1.1) and that this information cannot be disclosed. In contrast, the Northampton County Board of Elections and the Northampton Democratic Party stated that these names and addresses did not constitute "results" under the statute, and that the information was public information. For the reasons set forth below, we deny the Northampton County Republican Committee's motion for injunctive relief.

### **DISCUSSION**

A petitioner seeking a preliminary injunction must establish every one of the following prerequisites; if the petitioner fails to establish any one of them, there is no need to address the others. First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

*Duquesne Light Co. v. Longue Vue Club*, 2013 PA Super 8, 63 A.3d 270, 275 (2013) (quoting *Kessler v. Broder*, 851 A.2d 944, 947 (Pa.Super.2004)). To qualify for injunctive relief, the Northampton County Republican Committee

must show both irreparable harm to itself and that there would be no substantial harm to other interested parties. Because the Northampton County Republican Committee has failed to show “that an injunction is necessary to prevent immediate and irreparable harm,” this Court will not address the other requirements. *Id.*

When an affected voter is notified that his/her mail-in ballot is deficient, the voter is able to cast a provisional ballot. Additionally, the Pennsylvania Department of State’s “Pennsylvania Provisional Voting Guidance” states that a voter may be issued a provisional ballot if a “[v]oter returned a completed absentee or mail-in ballot that was rejected by the county board of elections and the voter believes they are eligible to vote.” Pennsylvania Department of State, *Pennsylvania Provisional Voting Guidance*, Oct. 21, 2020 (discussing guidelines regarding provisional ballots under Act 77 of 2019). This guidance further supports the fact that provisional ballots may be used as method of curing deficient mail-in ballots. A provisional ballot records an individual’s vote while the county board of elections determines whether it can be counted. A provisional ballot may be challenged within seven days after the election, pursuant to 25 Pa.C.S. §3050(a.4)(4)(i)-(iv):

Within seven calendar days of the election, the county board of elections shall examine each provisional ballot envelope that is received to determine if the individual voting that ballot was entitled to vote at the election district in the election. 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 determination is being made. Representatives shall be permitted to keep a list of those persons who cast a provisional ballot and shall be entitled to challenge any determination of the county board of elections with respect to the counting or partial counting of the ballot under this section. Upon challenge of any provisional ballot under this clause, the ballot envelope shall be marked "challenged" together with the reason for the challenge, and the provisional ballot shall be set aside pending final determination of the challenge according to the following procedure:

- (i) Provisional ballots marked "challenged" shall be placed unopened in a secure, safe and sealed container in the custody of the county board of elections until it shall fix a time and place for a formal hearing of all such challenges, and notice shall be given where possible to all provisional electors thus challenged and to every attorney, watcher or candidate who made the challenge.
- (ii) The time for the hearing shall not be later than seven days after the date of the challenge.
- (iii) On the day fixed for the hearing, the county board shall proceed without delay to hear the challenges and, in hearing the testimony, the county board shall not be bound by the Pennsylvania Rules of Evidence.
- (iv) The testimony presented shall be stenographically recorded and made part of the record of the hearing.

25 Pa.C.S. § 3050(a.4)(4)(i)-(iv).

Even assuming, *arguendo*, that the Northampton County Republican Committee is correct in its position that the Deputy Secretary for Elections and Commissions' position is wrong and that the statute prohibits the disclosure of this information, the Northampton County Republican Committee would not be harmed in any way by allowing these votes to be cast by provisional ballot because they can be challenged after the election on the ground that disclosure was prohibited under the statute. In contrast,

preventing these affected individuals from casting provisional ballots would constitute substantial and irreparable harm because those individuals who took a number of affirmative steps in an effort to vote in this election would have their votes invalidated without any real opportunity to cure its deficiency. Although these affected votes may ultimately be invalidated, they have no chance of ever being valid if affected individuals are not given the opportunity to vote by provisional ballot. These voters would thereby be disenfranchised without any type of judicial review regarding the Northampton County Republican Committee's argument.

Notably, the record is devoid of any testimony regarding how this disclosure of information would cause the Northampton County Republican Committee immediate and irreparable harm. The petitioner failed to call a single witness or to produce any evidence supporting its oral motion for injunctive relief. *See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1002-03 (2003) (finding sufficient grounds to deny preliminary injunction where there was "no concrete evidence of harm" where arguments "rested almost entirely on speculation and hypothesis"); *see also Allied Env'tl. Serv., Inc. v. Roth*, 222 A.3d 422, 429 (2019) (holding that "there must still be some evidence of an immediate and irreparable harm to justify the entry of a preliminary injunction."). As a result, its request for an injunction must fail.

The Northampton County Republican Committee has failed to show both that the denial of its injunction will cause it immediate and irreparable harm and that the injunction it seeks will not substantially harm other parties. Because the Northampton County Republican Committee fails to fulfill these two requirements, this Court need not address the merits of whether the disclosure of the information violates the statute and need not address the remaining four prerequisites for a preliminary injunction. See *Duquesne Light Co.*, 63 A.3d at 275 (2013) (“A petitioner seeking a preliminary injunction must establish every one of the following [six] prerequisites[.]”)

**CONCLUSION**

For the reasons set forth above, we respectfully suggest that the Northampton County Republican Committee’s appeal lacks merit and should be dismissed.

**BY THE COURT:**

  
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**MICHAEL J. KOURY, JR.,  
PRESIDENT JUDGE**