

ELECTION MATTER

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100 MAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA

No. 100 MAP 2022

Republican National Committee, National Republican Senatorial Committee,
National Republican Congressional Committee, Republican Party of Pennsylvania,
David Ball, James D. Bee, Debra A. Biro, Jesse D. Daniel,
Gwendolyn Mae DeLuca, Ross M. Farber, Connor R. Gallagher,
Lynn Marie Kalcevic, Linda S. Kozlovich, William P. Kozlovich,
Vallerie Siciliano-Biancaniello, and S. Michael Streib,
Petitioners/Appellants,

v.

Leigh M. Chapman, in her official capacity as Acting Secretary of the
Commonwealth; Jessica Mathis, in her official capacity as Director of the
Pennsylvania Bureau of Election Services and Notaries;
and All 67 County Boards of Elections
(See back of cover for list of County Respondents),
Respondents/Appellees.

BRIEF FOR APPELLEE
ALLEGHENY COUNTY BOARD OF ELECTIONS

Appeal from Commonwealth Court's Sept. 29, 2022 Order at No. 447 MD 2022

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Adams County Board of Elections; Allegheny County Board of Elections;
Armstrong County Board of Elections; Beaver County Board of Elections;
Bedford County Board of Elections; Berks County Board of Elections;
Blair County Board of Elections; Bradford County Board of Elections;
Bucks County Board of Elections; Butler County Board of Elections;
Cambria County Board of Elections; Cameron County Board of Elections;
Carbon County Board of Elections; Centre County Board of Elections;
Chester County Board of Elections; Clarion County Board of Elections;
Clearfield County Board of Elections; Clinton County Board of Elections;
Columbia County Board of Elections; Crawford County Board of Elections;
Cumberland County Board of Elections; Dauphin County Board of Elections;
Delaware County Board of Elections; Elk County Board of Elections;
Erie County Board of Elections; Fayette County Board of Elections;
Forest County Board of Elections; Franklin County Board of Elections;
Fulton County Board of Elections; Greene County Board of Elections;
Huntingdon County Board of Elections; Indiana County Board of Elections;
Jefferson County Board of Elections; Juniata County Board of Elections;
Lackawanna County Board of Elections; Lancaster County Board of Elections;
Lawrence County Board of Elections; Lebanon County Board of Elections;
Lehigh County Board of Elections; Luzerne County Board of Elections;
Lycoming County Board of Elections; McKean County Board of Elections;
Mercer County Board of Elections; Mifflin County Board of Elections;
Monroe County Board of Elections; Montgomery County Board of Elections;
Montour County Board of Elections; Northampton County Board of Elections;
Northumberland County Board of Elections; Perry County Board of Elections;
Philadelphia County Board of Elections; Pike County Board of Elections;
Potter County Board of Elections; Schuylkill County Board of Elections;
Snyder County Board of Elections; Somerset County Board of Elections;
Sullivan County Board of Elections; Susquehanna County Board of Elections;
Tioga County Board of Elections; Union County Board of Elections;
Venango County Board of Elections; Warren County Board of Elections;
Washington County Board of Elections; Wayne County Board of Elections;
Westmoreland County Board of Elections; Wyoming County Board of Elections;
and York County Board of Elections,
Respondents/Appellants.

Appellee Allegheny joins in the Briefs filed by the other Appellees in opposing the Application for Preliminary Injunction. Appellee Allegheny submits this Brief to address several points raised in its Answer to the Application below and at the Commonwealth Court proceeding held on September 22, 2022.

I. ARGUMENT

A. The Election Code Provides County Boards of Election with Requisite Authority

The Election Code grants the county boards of election broad jurisdiction for conducting elections in such county. *See* 25 P.S. § 2641. For example, the counties select and equip polling places. *Id.*, §2642 (b). Additionally, the county boards select and purchase “primary and election equipment of all kinds” consistent with the Act. *Id.*, §2642 (c). County boards also “appoint their own employes, voting machine custodians, and machine inspectors” *Id.*, §2642 (d). Finally, county boards have the explicit statutory authority “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors. *Id.*, §2642 (f).

Contrary to Appellants’ assertion that the Code requires uniformity across the Commonwealth’s election boards, this plain language dealing with the powers of county boards of elections cited above reveals that the Legislature fully contemplated heterogeneity across the Commonwealth and expressly permitted boards to implement practices that give effect to the voters’ right to cast their ballot.

This is both legal and logical because the logistics and procedures required to conduct an efficient election in large urban counties such as Allegheny and Philadelphia differ from those that are rural and sparsely populated.

The Pennsylvania Supreme Court has long recognized this legislative intent and deemed that the absence of specific provisions reflects, “the legislature’s deliberate choice to leave such matters to the informed discretion of county boards of elections, who are empowered by Section 2642(f) of the Election Code ‘[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.’ 25 P.S. § 2642(f).” *In re Canvassing Observation*, 241 A.3d 339, 350 (Pa. 2020), *cert. denied sub nom., Donald J. Trump for President, Inc. v. Degraffenreid*, 209 L. Ed. 2d 172, 141 S. Ct. 1451 (2021).

1. Allegheny County’s Board of Elections’ Practice Regarding Mail-In Ballots

Act 77, enacted in 2019 revised the Election Code and, in addition to the long existent absentee ballot mailing procedure, the Act for the first time provided for no-excuse mail-in voting. *See* 25 P.S. §§ 3150.11- 3150.17. Act 77 provides for an interior secrecy envelope and a larger mailing envelope which is printed with a declaration in the form prescribed by the Secretary of State that the voter is required to complete. *Id.*, §3150.14.

In 2020, when Act 77 became effective, Allegheny County thereafter implemented a procedure of returning by mail to the voters those ballots with apparent errors such as missing information, or information in the wrong response fields along with a letter reiterating the instructions and another exterior ballot envelope and secrecy envelope. *See*, Joint Stipulation of Exhibits, Allegheny-1. Voters then had the option to review and revise their exterior envelope and return it to the Allegheny Board of Elections by mail, at the Board's office or the then existing manned ballot return locations.

It is important to note that there is no statutory prohibition that prevents local boards from providing electors voting at their neighborhood polling place with guidance or to permit them an opportunity to comply with the law if that in person voter makes a mistake on his or her ballot. Correlatively, there is nothing that prohibits a county election board from providing voters who request and submit a ballot to be delivered via the mail with notice and an opportunity to comply with the declaration on the exterior postal envelope used to deliver their ballot.

“As the Supreme Court of the United States has explained, the right to vote comprises not just ‘the right of qualified voters within a state to cast their ballots,’ but also the right ‘to have their ballots counted.’” *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 387 (Pa. 2020), *cert. denied sub_nom.*, *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732 (2021)(Justice Wecht,

concurrency, citing *United States v. Classic*, 313 U.S. 299, 314, 315, 61 S.Ct. 1031 (1941).

As the President Judge of the Commonwealth Court, observed mere months ago:

“ For almost 70 years, the Pennsylvania Supreme Court has recognized that

[t]he power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election **except for compelling reasons** The purpose in holding elections is to register **the actual expression of the electorate's will** and that computing judges should endeavor to see **what was the true result**. There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.

Appeal of James, 105 A.3d 64, 67 (Pa. 1954).

McCormick for U.S. Senate v. Chapman, NO 286 M.D. 2022, 2022 WL 2900112

*9. (emphasis in original).

Allegheny County strives to ensure the voters in this jurisdiction have adequate procedures in place to safeguard their rights to have their ballots counted.

B. THE APPLICATION IS BARRED BY THE EQUITABLE DOCTRINE OF LACHES

Numerous other county board of election respondents and the several intervening parties have raised in their New Matter or by Preliminary Objections in the Court below, and it is anticipated they will reassert here the equitable doctrine of laches as a bar to the instant Petition. Allegheny joins these other Respondents’

well-stated and well-reasoned arguments asserting that this doctrine is a bar to the instant Application.

At the virtual status conference on September 22, 2022, the Appellants averred in opposition to the doctrine several reasons for waiting mere weeks before the county boards would be sending out mail-in ballots requested by voters. Among those reasons proffered by the Appellants, to which Allegheny specifically addresses, were that there was a legislative effort which was vetoed by Governor Wolf in July, 2021, under which the General Assembly addressed the curing of voter error in completing the mail-in ballot declaration and that it could not proceed with its claim until it received Bucks County's responses to an open records request in early August, 2022.

As addressed at length by other Respondents and Intervenors, the Appellants and others have, since 2020, filed numerous well-publicized actions in various courts challenging the provisions of Act 77. The instant Appellant Republican National Committee and its counsel herein also participated in the much discussed case of *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) where it was expressly known to the parties that some counties were implementing procedures for cure.

As to the first issue, Petitioners below, and Appellants here, cite no authority for the proposition that they were required to wait until the resolution of pending legislative action to seek legal relief for what the Appellants assert is necessary to

prevent “immediate and irreparable harm.” Allegheny and a number of the other Board Respondents, including those with larger populations and metro areas, continued their adopted practices for the 2021 Primary and General Election and this year’s Primary Election. The Appellants were seemingly unbothered by their asserted harm through these election cycles despite knowing that there were many elections boards within the Commonwealth which promulgated and implemented measures to assure voters an opportunity to have their mail-in ballots counted.

Next, Appellants’ assertion that they were compelled to wait until receipt of information from Bucks County to file the instant action is similarly without merit. First, the Appellants were aware of other populous counties having long standing mail-in ballot notice and cure procedures. Bucks County, in its Answer and New Matter to the Petition, explicitly pleads that their practices were a matter of public record and litigated in the matter of *Donald J. Trump for President, Inc. v Bucks County Board of Elections*, 2020-05627 (Bucks C.C.P. 2020). Answer and New Matter of Bucks County Board of Elections to Petition for Review Seeking Declaratory and Injunctive Relief, ¶128. Second, irrespective of whether it received information from Bucks County, Appellants’ claim is premised on its assertion that *no* county board of elections has the authority to implement procedures relating to mail-in ballot cures absent explicit legislative authority. The Appellants plead that as of June 2022, the Northampton and Lehigh County Boards of Elections agreed to

begin implementing procedures. Appellants' Application for Special Relief in the Form of a Preliminary Injunction Under Pa.R.A.P. 1532, ¶13. The Appellants argue that the Bucks County documentation was a necessary arrow in their quiver and were required to delay filing until receipt of that County's information. This is wholly inconsistent with Appellants' argument that even having one county implementing a procedure "*per se* constitutes immediate and irreparable harm." *Id.*

The Court should not credit these arguments as valid reasons for Appellants' delay in filing the instant action on the eve of mailing ballots to voters.

CONCLUSION

For the reasons stated herein and those filed by other Respondents with whom Allegheny County Board of Elections joins, the Respondent Allegheny County Board of Elections respectfully requests this Honorable Court to deny the Application for Special Relief in the Nature of a Preliminary Injunction.

Respectfully submitted,
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RULE 2135 CERTIFICATE OF COMPLIANCE

I certify pursuant to Pa. R.A.P. 2135(d) that the foregoing Brief of Appellee does not exceed 14,000 words (excluding the supplementary matter outlined in Pa. R.A.P. 2135(b)), as determined using Microsoft Word for Office 365 software, and therefore complies with the word count limit set forth in Pa.R.A.P. 2135(a)(1).

Dated: October 6, 2022

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**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

I certify that this filing complies with the provisions of the *Public Access Policy of the United 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.

Dated: October 6, 2022

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