

ELECTION MATTER

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100 MAP 2022

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

No. 100 MAP 2022

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Petitioners/Appellants

v.

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

**JOINDER AND SUBMISSION OF APPELLEE LEHIGH
COUNTY BOARD OF ELECTIONS**

Appeal from the September 29, 2022, Order of the Commonwealth
Court (per Ceisler, J.), denying Petitioners'/Appellants' Application for
Special Relief in the Form of a Preliminary Injunction

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In accordance with this Court's Order of October 4, 2022, the Lehigh County Board of Elections (Lehigh) hereby joins in the Briefs filed by the other Appellees in opposition to the grant of the preliminary injunction. Because there are serious potential practical implications for boards of elections from the proposed preliminary injunction, Lehigh additionally submits the following.

I. Preliminary Statement

Appellants have requested that the sixty-seven (67) County Boards of Elections be “enjoined from implementing procedures to notify voters that their mail-in or absentee ballots fail to comply with the Election Code's signature and secrecy ballot requirements and giving such voters an opportunity to "cure" noncompliant ballots ("cure procedures"), except where expressly authorized under the Election Code, until resolution of this litigation.” The potential breadth and impact of the requested preliminary injunction is tremendous. A grant of the proposed preliminary injunction could create uncertainty in county election workers across the state about their ability to assist voters with questions about their absentee or mail-in ballots. As presented, the proposed preliminary injunction could limit the ability of county election personnel to communicate options to voters who request information about their options if their ballot is cancelled.

II. Background

The Petition for Review was filed in the Commonwealth Court's original jurisdiction on September 1, 2022 and received by the Lehigh via certified mail on September 7, 2022. On September 7, 2022, Appellants filed their Application for Special Relief in the Nature of a Preliminary Injunction which Lehigh received on September 12th. The Commonwealth Court issued an order on September 9, 2022, which: 1. required all Parties who opposed the Preliminary Injunction to file a response by September 16, 2022; 2. established a deadline for stipulation of facts; and 3. scheduled a status conference on September 22, 2022.

The Parties submitted a Joint Stipulation of Facts to the Court below on September 20, 2022. *See* Reproduced Record, Vol. 2, pp. 0504a-0559a. On September 22nd, Judge Ceisler held a status conference which included argument on the issue of laches raised by several Appellees, as well as on the merits of Appellants' Application for a Preliminary Injunction. After the status conference, the Court issued an order requiring a joint stipulation of exhibits and setting a schedule for the parties to brief both the issue of laches and any remaining arguments pertaining to the preliminary injunction criteria. On September 29, 2022 Judge Ceisler issued an order and opinion denying Appellants' request for a Preliminary Injunction and this appeal immediately followed on September 30, 2022.

III. Argument

A. Outer envelope issues

Lehigh would like to be clear about the assistance it provides to its absentee and mail-in ballot voters, as described in the Joint Stipulation of Facts submitted below. For many years Lehigh has assisted voters who appear in person at the counter to deliver absentee ballots, as many other counties do, and Lehigh continues to provide that same assistance to voters delivering either their absentee or mail-in ballots in person. This assistance includes a visual inspection of the outer envelope to determine if there are omissions or mistakes in the voter declaration, which requires the voter to sign and date the envelope. If there are issues with the outer envelope, Lehigh informs the voter and permits them to remedy those omissions or mistakes.

Appellants, when specifically asked by the Court during argument, made their position clear that at-the-counter in-person assistance to voters dropping off their ballots was not permissible, and should be barred under the proposed preliminary injunction. Voters should not believe their ballots go into a bureaucratic black hole where they get no information or answers. A voter who drops their ballot off in person and then later learns that they had an omission or mistake in the outer envelope which election personnel could have informed them of will certainly lose faith in the personnel who are essential to administering elections. Even worse

would be the situation where the voter drops off the mail-in or absentee ballot at the counter, asks the election worker at the counter if it is okay, and is met with silence or a response that the worker is not permitted to assist them. These scenarios are certainly possible if the proposed preliminary injunction is granted. If this Court wants to encourage voter trust in the system, then at a minimum allowing election workers to assist voters at the counter should be encouraged, not prohibited.

In Lehigh, if the ballot's outer envelope is properly completed, then the ballot is placed with the group of ballots waiting for pre-canvassing on election day. At that point the ballot is secured, and no one other than election personnel has access to it, including the voter who submitted the ballot. If the outer envelope is not properly completed, then the ballot is segregated and not put in the group of ballots eligible for pre-canvassing.

This same process is also used for those mail-in ballots which are deposited in drop boxes or sent through the mail. If the outer envelope has omissions or mistakes, it will not be secured because it is not eligible to be canvassed. If possible, the voter is notified and permitted to come into the office in person and make the necessary corrections. Lehigh wants all eligible voters to have the same opportunity to remedy minor issues with their ballot's outer envelope, regardless of how the ballot is delivered. Doing so has had the unanticipated effect of bolstering

voter confidence in how elections are conducted, because those voters now recognize that each ballot is reviewed and will only be counted if properly completed.

B. Secrecy envelope issues

Because ballots with properly completed outer envelopes are secured, it is not until election day, during the pre-canvass process, that the outer envelope is removed and the presence or lack of the secrecy envelope is determined. For those ballots lacking the secrecy envelope (often referred to as naked ballots), Lehigh (and presumably all the other counties) enters the cancellation of the ballot in the state SURE system. At that point, the **state** notifies the voter that the ballot has been cancelled. In Lehigh, the only remedy available for voters whose ballots are cancelled for any reason is to cast a provisional ballot at their polling place. When a voter gets the cancellation notification from the state and calls Lehigh to ask what they can do, they are told to cast a provisional ballot. **There is no opportunity provided to replace the ballot already cast with a compliant ballot.** Lehigh wants to preserve its ability to inform voters of their remedy to cast a provisional ballot in the event their ballot is cancelled. If allowing voters to cast a provisional ballot when their ballot has been cancelled is considered a “cure”, then the proposed preliminary injunction could be interpreted as preventing election workers from telling voters this is an option.

In addition to the cancellation notice provided by the state, Lehigh has agreed in the *Bausch/Dondiego* Stipulated Agreement to notify any party representatives present during pre-canvassing of the ballot cancellation, and, if the voter has provided contact information, to attempt to notify the voter that their ballot has been cancelled. *See* Lehigh County Board of Elections' Stipulated Agreement, attached to Appellants' Petition for Review as Exhibit F.

Lehigh has also agreed to look at the possibility of identifying the ballots without secrecy envelopes prior to pre-canvassing, so that the voters could be notified earlier than election day of the need to cast a provisional ballot. Lehigh has not determined if it will do this for the November 8, 2022 election. *Id.*

Contrary to Appellants' assertion in their brief, this Stipulated Agreement is not inconsistent with or contrary to the guidance provided to voters by the Secretary of the Commonwealth. That guidance states "if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election."

Pennsylvania Department of State, Mail and Absentee Ballot, at

<https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absenteeballot.aspx>.

Voters in Lehigh are not and will not be permitted to correct their naked ballot; their remedy is to cast a provisional ballot on election day. The only result of the Stipulated Agreement is to provide notice *in addition to* the notice provided by the

state, and perhaps give the voter more time on election day to make arrangements to get to their polling place and cast a provisional ballot. This is completely consistent with the guidance provided by the state.

Because the state already notifies voters in the state whose ballots are cancelled, it is absurd for Appellants to suggest that the counties are prohibited from doing the same thing as part of administering elections.

IV. Conclusion

For the reasons stated herein as well as those presented by the other Respondents with whom the Lehigh County Board of Elections joins, Respondent Lehigh respectfully requests that this Honorable Court affirm the Commonwealth Court determination which denied Appellants' request for 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 Joinder and Submission 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).

Respectfully submitted,

Date: October 6, 2022

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CERTIFICATE OF COMPLIANCE

I, Catharine M. Roseberry, 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.

Respectfully submitted,

Date: October 6, 2022

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