

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 447 MD 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,
S. MICHAEL STREIB,**

Petitioners,

v.

**LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the
Commonwealth of Pennsylvania,
JESSICA MATHIS, in her official capacity as Director of the Pennsylvania
Bureau of Election Services and Notaries,
*et al.,***

Respondents.

**ANSWER ON BEHALF OF BERKS COUNTY BOARD OF ELECTIONS
TO PETITIONERS' PETITION FOR REVIEW AND PETITION FOR
PRELIMINARY INJUNCTION**

Dated: September 16, 2022

*/s/ Cody L. Kauffman, Esq.*_____

Cody L. Kauffman, Esq.

Supreme Court I.D. No. 320506

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*For The Berks County Board of
Elections*

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TABLE OF AUTHORITIES

Cases

<u>Appeal of James</u> , 105 A.2d 64 (Pa. 1954)	2
<u>In re General Election of 1985</u> , 531 A.2d 836 (Pa. Commw. 1985)	2, 4
<u>In re Luzerne County Return Bd.</u> , 290 A.2d 108 (Pa. 1972)	4
<u>In Re Mayor of Altoona, Blair County</u> , 196 A.2d 371 (Pa. 1964)	2
<u>Pennsylvania Democratic Party v. Boockvar</u> , 238 A.3d 345 (Pa. 2020).	2, 3
<u>Petition of Cioppa</u> , 626 A.2d 146 (Pa. 1993)	2

Statutes

25 P.S. § 3007	5
25 P.S. § 3146.8	2
52 U.S.C. § 21081	5

POSITION STATEMENT OF
THE BERKS COUNTY BOARD OF ELECTIONS

Background

On September 1, 2022, and September 7, 2022, Petitioners filed a Petition for Review seeking Declaratory and Injunctive Relief and an Application for Special Relief in the Form of a Preliminary Injunction, respectively. Ultimately, Petitioners are seeking an injunction that prohibits County Boards of Elections from developing and implementing cure procedures for absentee and mail-in ballots that are initially submitted by the voters with errors that may preclude them from being counted. Petitioners assert that the law is clear on this issue and that it is unlawful for Counties to develop and implement absentee/mail-in ballot curing procedures.

Like other areas of Pennsylvania Election Law, the law surrounding mail-in/absentee ballot curing is not clear, as evidenced by the varied approaches to curing taken by Counties throughout the Commonwealth. These inconsistencies are the inevitable byproduct of 67 Counties having to use their best judgment to create or consider procedures that are not clear in the law. Moreover, the lack of clarity exposes Counties to increasing litigation during a time of heightened election scrutiny. In accordance with this Honorable Court's Order dated September 9, 2022, the Berks County Board of Elections files this position statement in support of Berks County's approach to ballot curing and in support of further clarity on the issue.

Relevant Law

Pennsylvania recognizes the “longstanding and overriding policy . . . to protect the elective franchise.” Petition of Cioppa, 626 A.2d 146, 148 (Pa. 1993). Election laws must be strictly construed to prevent fraud, but “ordinarily will be construed liberally in favor of the right to vote.” Appeal of James, 105 A.2d 64, 65 (Pa. 1954). It is axiomatic that the “purpose of the election laws is to ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process.” In re General Election of 1985, 531 A.2d 836, 839 (Pa. Commw. 1985); See also In Re Mayor of Altoona, Blair County, 196 A.2d 371, 374 (Pa. 1964) (“The very purpose of election laws is to secure freedom of choice . . . to insure fair elections, or an equal chance and opportunity for everyone to express his choice at the polls; and to secure the rights of duly qualified electors and not to defeat them.”).

Regarding absentee/mail-in ballot curing, Petitioners correctly state that the Election Code allows for ballot curing “[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified.” See 25 P.S. § 3146.8(h). The Election Code does not otherwise expressly prohibit ballot curing in situations other than § 3146.8(h). The Pennsylvania Supreme Court concluded that County Boards “are not required to implement a ‘notice and opportunity to cure’ procedure.” Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 374 (Pa. 2020). However, this holding by the Pennsylvania Supreme Court

pertained the seeking of an injunction *requiring* County Boards to implement a Notice and Cure procedure. See id., at 353. The opinion does not specifically address whether County Boards are prohibited from implementing ballot curing procedures. Rather, the Court opined that further guidance on the issue was best left to the Legislature. Id., at 374.

Argument

To date, the County Boards of Elections throughout Pennsylvania have not received further clarity since Pennsylvania Democratic Party v. Boockvar was decided. Instead, as outlined within Petitioners' filings, the Boards have developed varying curing procedures and prohibitions, based upon their respective interpretations of the law. Berks County does not proactively contact voters regarding irregularities within their mail-in/absentee ballots for the purpose of providing voters the opportunity to cure. As such, Berks County does not have a "notice and opportunity to cure" procedure. However, if a voter contacts the County about a potential deficiency within their mail-in/absentee ballot, that voter will generally be allowed the opportunity to cure prior to 8:00 pm on Election Day. Berks County believes this approach best balances enfranchisement, fairness, and consistency under the current state of the law.

A pertinent factor for Berks County not having a "Notice and Cure" procedure was the potential for disparate treatment between those voters who timely returned

their mail-in/absentee ballots closer to, or on, election day and those voters who timely returned their ballots earlier. In other words, voters who returned their ballots closer to, or on, election day would likely not be provided the same opportunity to cure as similarly-situated voters who returned their ballots earlier, because a curing notice would not be able to be sent to the former group of voters in time. This potential for disparate treatment risks an equal opportunity for all voters to cure and is the main reason why Berks County has not implemented a notice and cure procedure.

Nonetheless, Berks County values the principles of enfranchisement and equal opportunity, which is why Berks County will generally allow voters an opportunity to cure if they contact the County regarding an issue with their absentee/mail-in ballot. This approach is consistent with election law's goal of enfranchisement, as it gives voters who become aware of an issue within their mail-in/absentee ballot the opportunity to cure the defect. See In re Luzerne County Return Bd., 290 A.2d 108, 109 (Pa. 1972) (“Our goal must be to enfranchise and not to disenfranchise”).

The approach also ensures an equal chance and opportunity for voters to exercise their right to vote throughout Berks County regardless of whether they vote by absentee/mail or in person at the precincts. See In re General Election of 1985, 531 A.2d 836, 839 (Pa. Commw. 1985) (an equal opportunity for all eligible electors to participate in the election process is a key purpose of election law). Specifically, allowing voters who contact the County the opportunity to cure a minor irregularity

with their absentee/mail-in ballot prior to it being counted is consistent with a voter's right at a precinct to correct their ballot prior to it being counted. See, e.g., 52 U.S.C. § 21081(a)(1)(A)(ii) (each voting system shall “provide the voter with the opportunity . . . to change the ballot or correct any error before the ballot is cast and counted); 25 P.S. § 3007(h). In short, Berks County believes that our approach to curing best balances the principles of enfranchisement, fairness, and consistency for voters.

Conclusion

Berks County's approach to ballot curing falls between those jurisdictions who have implemented notice and cure procedures and those jurisdictions who do not provide curing opportunities to voters. To that end, pursuant to Paragraph 3 of this Honorable Court's September 9, 2022, Order, Berks County would oppose the Application for Preliminary Injunction to the extent that the requested relief seeks to prohibit Berks County's current practice of providing an opportunity to cure to voters who contact us. Since Berks County does not have a “Notice and Cure” procedure, the County does not take a position on the Application for Preliminary Injunction as it pertains to Notice and Cure procedures. However, the County welcomes further clarity from the Court on this issue.

Respectfully Submitted,

Dated: September 16, 2022

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CERTIFICATE OF COMPLIANCE

I 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.

Dated: September 16, 2022

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing position statement have been served upon the parties/counsel of record via electronic mail or the Court's Electronic Filing System.

Dated: September 16, 2022

/s/ Cody L. Kauffman, Esq.

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