

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| REPUBLICAN NATIONAL | : | |
| COMMITTEE, et al., | : | |
| | : | |
| Petitioners | : | |
| | : | |
| v. | : | No. 447 MD 2022 |
| | : | |
| LEIGH M. CHAPMAN, in her capacity as | : | |
| Acting Secretary of the Commonwealth of | : | |
| Pennsylvania, <i>et al.</i> , | : | |
| | : | |
| Respondents | : | |

ANSWER OF RESPONDENT LEHIGH COUNTY BOARD OF ELECTIONS IN OPPOSITION TO PETITIONERS' APPLICATION FOR PRELIMINARY INJUNCTION

In accordance with this Court's Order of September 9, 2022, the Lehigh County Board of Elections (Lehigh) hereby files this Answer in Opposition to the Application for Special Relief in the form of a Preliminary Injunction filed by Petitioners. Petitioners have requested that the sixty-seven (67) County Boards of Election 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."

Lehigh joins in the Answer filed by Respondents Chapman, Mathis and Chester County, and by way of additional Answer includes the following:

1. Lehigh has been assisting voters who personally drop off their absentee ballots for many years, and provides the same assistance to voters who choose to use mail-in ballots.
2. Many voters now utilize the same day process to apply for and cast their mail-in or absentee ballots, bringing those ballots in person to the counter of the Voter Registration Office in Lehigh. If the clerk who receives these ballots notices that the outer envelope is incomplete and the voter is still present, the clerk informs the voter of the issue and permits the voter to cure the issue. Under the proposed injunction, the clerk would be required to stay silent, not provide what would be considered reasonable customer service, and disenfranchise the voter.
3. The request for injunction is overly broad and the injunction as presented could act to restrict the ability of Lehigh to answer questions addressed to it by voters wishing to know their options if they are notified that their ballot has been cancelled.
4. As an example of the foregoing, if a ballot is returned with no secrecy envelope, also known as a “naked ballot”, Boards of Election must cancel the ballot. This currently happens only on primary or election day, when pre-canvassing begins. When the outer envelope of the ballot is opened, and the ballot is determined to be naked, the ballot is cancelled and the

cancellation is entered into the state system, at which point the Department of State sends a notice of the cancellation to the voter who submitted the naked ballot.¹ This generally results in the voter calling the Voter Registration office in Lehigh. Lehigh's practice historically and anticipated for the 2022 general election is to inform the voter that they may go to their polling place and cast a provisional ballot.² It is unclear whether the requested injunction would permit Lehigh to inform voters of their option to cast a provisional ballot when their original ballot has been cancelled.

5. Should Lehigh gain the capability to ascertain that a ballot does not include the secrecy envelope prior to the start of pre-canvassing, giving either the voter or interested political parties advance notice of the potential cancellation would allow the voter to learn that they would need to make arrangements to go to their polling place to cast a provisional ballot.³ Lehigh has agreed to look at the legality of doing so as part of its Stipulated Agreement cited in the Petition. This is a commonsense solution which has

¹ For those voters who have provided an email address as part of their application for the absentee or mail-in ballot.

² To call this a "cure" for the issue seems a misnomer, because a proper cure would involve permitting the voter to replace the noncompliant ballot.

³ As cited in the Petition for Review, Lehigh has entered into a Stipulated Agreement to resolve a federal lawsuit filed at 22-CV-02111, in which Lehigh has agreed to certain actions which include informing voters of the importance of providing contact information, see <https://www.lehighcounty.org/Departments/Voter-Registration/Absentee-Mail-In-Ballot>, notifying all voters whose naked ballots are discovered prior to 8:00 P.M. on Election Day and providing those names to the party or candidate representatives who are on-site. Lehigh has also agreed to pursue in good faith other actions which would allow Lehigh to identify naked ballots prior to pre-canvass, by virtue of the weight and/or thickness of the envelope and possibly utilizing a secrecy envelope of a strong color which would be more discernable from other materials provided to the voter with the absentee and mail-in ballot materials.

as its goal the preservation of the voter's ability to participate in the electoral process.

6. Lehigh has had many incidents of a husband and wife signing the other's outside ballot envelope. Rather than disenfranchise both voters, they are notified and given the opportunity to sign the correct envelope.
7. In all of these scenarios Lehigh has determined to provide the voter with the opportunity to preserve their right to cast a ballot for their chosen candidates. This has led to a side benefit of increasing voter understanding of the processes followed by Lehigh and increasing voter appreciation for the integrity of the system.
8. Under Pennsylvania election law, it is a well settled principle that every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it. In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1071 (Pa. 2020), cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid, 209 L. Ed. 2d 172, 141 S. Ct. 1451 (2021), citing Appeal of Norwood, 382 Pa. 547, 116 A.2d 552, 554– 55 (1955).
9. "The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order is made; it is not to subvert, but to maintain the existing status until the merits of the controversy

can be fully heard and determined.” Appeal of Little Britain Township, 651 A.2d 606, 610 (Pa. Cmwlth. 1994). “A preliminary injunction [does not] serve as a judgment on the merits since by definition it is a temporary remedy granted until that time when the [parties’] dispute can be completely resolved.” Id.

10. The grant of the requested preliminary injunction would alter the status quo, and put mail-in and absentee voters at risk of having their ballots voided for reasons which are easily cured.
11. A party seeking a preliminary injunction bears a heavy burden of proof. The applicant for a preliminary injunction must show that (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by money damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interests. SEIU Healthcare Pennsylvania v.

Commonwealth, 104 A.3d 495, 502 (Pa. 2014); see also Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003). “Because the grant of a preliminary injunction is a harsh and extraordinary remedy, it is granted only when each [factor] has been fully and completely established.” Pennsylvania AFL-CIO by George v. Commonwealth, 683 A.2d 691, 694 (Pa. Cmwlth. 1996).

12. Petitioners have not met the burden of proof for a preliminary injunction, for the reasons set forth below.
13. Petitioners have not identified any real immediate and irreparable harm from permitting county Boards of Election to notify mail-in and absentee voters of deficiencies in their ballots. The fact that counties may handle these situations in different ways does not create an impermissible lack of uniformity. Counties have been using different styles of voting machines for many years and may have different options as part of their vote casting in the polling place. For example, some machines notify voters if they under or over vote. Some do not. We see no handwringing over this difference.
14. Granting the preliminary injunction will cause great harm in the form of disenfranchising many Commonwealth voters, who could otherwise have their votes counted if they are able to cure their ballot envelope deficiencies or are informed that they may cast a provisional ballot if their ballot is

cancelled for lack of a secrecy envelope. There is no remedy for the loss of a vote.

15. The preliminary injunction would not restore the parties to the status quo, which one could argue is the status immediately prior to the effective date of Act 77, which introduced mail-in ballots. Lehigh has always assisted absentee voters with their ballot issues, and to treat mail-in ballots differently makes no sense.
16. Petitioners have not established a clear right to relief and are not likely to prevail on the merits of their claim. There is no prohibition in the Election Code which prevents Boards of Elections from assisting voters with their ballots. If Lehigh can assist a voter in person at the counter with ballot issues, it should be able to do so for ballots which are not delivered in person.⁴
17. The proposed injunction would be overbroad and could act to chill the speech of election workers in Lehigh who work diligently to assist all voters.
18. The preliminary injunction would definitely harm the public interest, which is to facilitate voting by all those who wish to participate in the electoral system.

⁴ Especially for disabled voters who cannot deliver their ballots in person.

For all the foregoing reasons, Lehigh respectfully requests that this Honorable Court deny Petitioners' request for a preliminary injunction.

Respectfully submitted,

/s/Catharine M. Roseberry, Esq.

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Respondents :

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: September 16, 2022

/s/Catharine M. Roseberry, Esq.

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