

No. 108 MM 2024

In the Supreme Court of Pennsylvania

REPUBLICAN NATIONAL COMMITTEE AND
REPUBLICAN PARTY OF PENNSYLVANIA,

PETITIONERS,

v.

AL SCHMIDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE
COMMONWEALTH AND ALL 67 COUNTY BOARD OF ELECTIONS,

RESPONDENTS.

**ANSWER TO PETITIONERS' APPLICATION FOR EXERCISE OF
KING'S BENCH POWER OR EXTRAORDINARY JURISDICTION**

Daniel T. Brier (PA 53248)
Donna A. Walsh (PA 74833)
Timothy E. Gates (PA 202305)
Richard L. Armezzani (PA 322804)
MYERS, BRIER & KELLY, LLP
425 Biden Street, Suite 200
Scranton, PA 18503
(570) 342-6100

*Attorneys for Respondents,
Lackawanna County Board of
Elections and Luzerne County Board of
Elections and Registration*

TABLE OF AUTHORITIES

CASES

<i>In re Bruno</i> , 101 A.3d 635 (Pa. 2014)	2, 3
<i>In re Canvassing Observation</i> , 241 A.3d 339 (Pa. 2020)	4
<i>Center for Coalfield Justice v. Washington Cnty. Bd. of Elections</i> , No. 2024-3953 (Washington Cnty. Aug. 23, 2024), <i>appeal pending</i> , No. 1172 CD 2024 (Pa. Commw. Sept. 5, 2024)	3
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , 493 F. Supp. 3d 331 (W.D. Pa. 2020)	5
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , 502 F. Supp. 3d 899 (M.D. Pa. 2020), <i>aff'd</i> , 830 F. App'x 377 (3d Cir. 2020)	4
<i>Friends of Danny DeVito v. Wolf</i> , 227 A.3d 872 (Pa. 2020).....	2
<i>Koter v. Cosgrove</i> , 844 A.2d 29 (Pa. Commw. 2004)	3
<i>Pa. Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020).....	4
<i>Republican Nat'l Comm. v. Chapman</i> , 284 A.3d 207 (Pa. 2022).....	1
<i>Republican Nat'l Comm. v. Chapman</i> , No. 447 M.D. 2022, 2022 WL 16754061 (Pa. Commw. Sept. 29, 2022).....	1, 4
<i>Washington Cnty. Comm'rs. v. Pa. Labor Relations Bd.</i> , 417 A.2d 164 (Pa. 1980)	3

STATUTES

Pa. Const. art. I, § 5	5
25 Pa. C.S.A. § 2642(f)	4

Petitioners Republican National Committee and Republican Party of Pennsylvania (referred to collectively as “RNC”) urge the Court to preliminarily enjoin longstanding party-neutral practices concerning defective mail ballots and take up on an expedited basis its recycled challenge to those practices. While certain election issues have previously been deemed worthy of invocation of King’s Bench jurisdiction, the facts and circumstances here make use of this extraordinary power particularly inappropriate. For the reasons below, the RNC’s application should be denied.

First, the exigency claimed by the RNC is of its own strategic making. County practices concerning defective mail ballots were the subject of an original jurisdiction action filed by the RNC in Commonwealth Court in 2022. *See Republican Nat’l Comm., et al. v. Chapman, et al.*, No. 447 M.D. 2022 (filed Sept. 1, 2022). The Commonwealth Court denied the RNC’s request for a preliminary injunction seeking to enjoin county election boards from developing and implementing notice and cure procedures in advance of the 2022 general election. *Republican Nat’l Comm. v. Chapman*, No. 447 M.D. 2022, 2022 WL 16754061 (Pa. Commw. Sept. 29, 2022). This Court affirmed the decision to deny a preliminary injunction in October 2022, with three Justices voting to affirm and three Justices voting to reverse. *Republican Nat’l Comm. v. Chapman*, 284 A.3d 207 (Pa. 2022). In March 2023, the Commonwealth Court dismissed the action for lack of

jurisdiction, finding there is no original jurisdiction in Commonwealth Court over actions against county election boards. *Republican Nat'l Comm., et al. v. Schmidt, et al.*, No. 447 M.D. 2022, slip op. at 28 (Pa. Commw. Mar. 23, 2023). The RNC then retreated for 18 months before launching this eleventh hour challenge raising the same arguments and seeking the same relief from this Court. Its own slow pace proves the lack of exigency and counsels strongly against the exercise of King's Bench power. *See generally Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884 (Pa. 2020) (King's Bench jurisdiction properly invoked "to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law"); *In re Bruno*, 101 A.3d 635, 672 (Pa. 2014) (King's Bench power is appropriate when the Court needs to "innovate a swift process and remedy appropriate to the exigencies of the event").

Second, as the RNC acknowledges in its Petition, several cases involving these same issues were litigated in the lower courts and are the subject of a pending petition for appeal to this Court and a pending appeal in the Commonwealth Court. In *Genser v. Butler Cnty. Bd. of Elections*, No. 1074 C.D. 2024 (Pa. Commw. Sept. 5, 2024), *pet'n for appeal pending*, (Pa. Sept. 8, 2024), the Commonwealth Court reversed a trial court decision denying two electors the opportunity to cast provisional ballots upon notice that their mail ballots were defective. A petition for

allowance of appeal from the Commonwealth Court’s decision in *Genser* is presently pending before this Court. There is also pending before the Commonwealth Court an appeal from a decision by another trial court allowing electors to cast provisional ballots where their mail ballots were found defective. *Center for Coalfield Justice v. Washington Cnty. Bd. of Elections*, No. 2024-3953 (Washington Cnty. Aug. 23, 2024), *appeal pending*, No. 1172 CD 2024 (Pa. Commw. Sept. 5, 2024). Both of those actions involve fully developed records and follow the time-tested adversarial process for deciding legal issues. There is no need to bypass existing process here. *See, e.g., In re Bruno*, 101 A.3d at 670 (“purpose” of King’s Bench jurisdiction “is not to permit or encourage parties to bypass an existing constitutional or statutory adjudicative process . . .”); *Washington Cnty. Comm’rs. v. Pa. Labor Relations Bd.*, 417 A.2d 164, 167 (Pa. 1980) (“Our extraordinary jurisdiction should be invoked sparingly . . .”) (internal citations omitted).

Third, the RNC’s late challenge to notice and cure prejudices county election officials who have been preparing for the upcoming election, including by providing training to election workers on election procedures. *See, e.g., Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Commw. 2004) (late challenge to implementation of referendum “prejudice[d] th[e] Election] Board since it ha[d] already begun to act upon the referendum’s terms . . .”). There is much work to be done before Election Day. The RNC’s application—which was filed after election preparations have

begun and is not likely to be decided until after some mail ballots have been returned—threatens to upend and interfere with this important work. The public interest also weighs heavily against the preliminary injunctive relief RNC is seeking. *See Republican Nat’l Comm. v. Chapman*, 2022 WL 16754061, at *19 (denying RNC request to preliminarily enjoin cure procedures because, *inter alia*, “it would seriously harm the public interest and orderly administration of elections” to require counties “to modify their practices and procedures . . . **when absentee and mail-in voting is already underway**”) (emphasis in original).

Fourth, the RNC’s challenge misapprehends the role of county election boards and their statutory authority. The RNC relies heavily on *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), which holds that notice and cure procedures are not statutorily *required*, but there can be no doubt that that county election boards retain *discretion* to implement such procedures. *See, e.g., Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 920 (M.D. Pa. 2020) (“It is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots.”), *aff’d*, 830 F. App’x 377 (3d Cir. 2020). Indeed, the Election Code expressly empowers county election boards “[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 and electors.” 25 P.S. § 2642(f); *see also In re Canvassing Observation*, 241 A.3d 339, 350 (Pa.

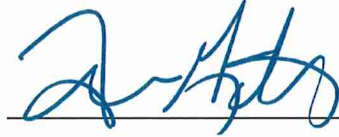
2020) (acknowledging “discretion of county boards of elections” to develop regulations concerning positioning of candidate representatives); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 395 (W.D. Pa. 2020) (acknowledging “legislature’s decision to leave the counties with ultimate discretion when it comes to how, and to what extent, to use drop boxes. . .”). Any legitimate challenge to county election boards’ exercise of statutory discretion may properly be addressed in the ordinary course without resorting to extraordinary jurisdiction.

Finally, the relief sought by the RNC—an order enjoining counties from offering voters the opportunity to cure defective ballots or vote provisionally—conflicts with the guarantee of “free and equal” elections. Article 1, Section 5 of the Pennsylvania Constitution provides that “[e]lections shall be free and equal” and “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. 1, § 5. The relief sought here would do just that and on an expedited basis, without a developed record, and based on a contrived emergency. This is inconsistent with the constitutional guarantee and is more reason to deny the application.

For these reasons, the RNC's application for invocation of King's Bench jurisdiction and request for other relief should be denied.

Dated: September 20, 2024

Respectfully submitted:



Daniel T. Brier (PA 53248)

Donna A. Walsh (PA 74833)

Timothy E. Gates (PA 202305)

Richard L. Armezzani (PA 322804)

MYERS, BRIER & KELLY, LLP

425 Biden Street, Suite 200

Scranton, PA 18503

(570) 342-6100

dbrier@mbklaw.com

dwalsh@mbklaw.com

tgates@mbklaw.com

rarmezzani@mbklaw.com

*Attorneys for Respondents, Lackawanna
County Board of Elections and Luzerne
County Board of Elections and Registration*

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I, Timothy E. Gates, 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.




Timothy E. Gates

Date: September 20, 2024

RETRIEVEDFROMDEMOCRACYDOCKET.COM

PROOF OF SERVICE

I, Timothy E. Gates, hereby certify that I served the forgoing Answer upon all counsel of record via the Court's PACFile eService system, which service satisfies the requirements of Pa. R.A.P. 121.



Timothy E. Gates

Date: September 20, 2024

RETRIEVEDFROMDEMOCRACYDOCKET.COM