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Attorneys for Board of Elections

**SONJA KEOHANE, RICHARD KEOHANE,
and BARBARA WELSH**

vs.

**DELAWARE COUNTY BOARD OF
ELECTIONS**

: **COURT OF COMMON PLEAS,**
: **DELAWARE COUNTY**
:
: **ELECTION LAW**
:
: **CV-2023-4458**
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BOARD OF ELECTIONS’ ANSWER TO PETITION FOR REVIEW

Defendant Board of Elections (the “Board”), by and through its undersigned counsel, respectfully submits its Answer to the Petition for Review in the Nature of a Statutory Appeal (“Petition”) filed by Petitioners Sonja Keohane, Richard Keohane, and Barbara Welsh (collectively, “Petitioners”) and avers as follows:

PRELIMINARY STATEMENT

Petitioners assert that “Voting is the cornerstone of our democracy and the fundamental right upon which all our civil liberties rest.” The Board agrees wholeheartedly. That is one of the reasons that, although not required by law to do so,¹ the Board gives voters the opportunity to

¹ Under Pennsylvania law, a county Board of Elections may—but is not required to—adopt a “notice and cure” program to alert mail ballot voters when they have returned a facially defective ballot and give such voters the opportunity to obtain and vote a replacement ballot. *See Pennsylvania Democratic Party v. Boockvar*, 662 Pa. 39, 86, 238 A.3d 345, 374 (Pa. 2020); *see also Republican National Committee, et al. v. Chapman, et al.*, No. 447 M.D. 2022 (Pa. Cmwlth. March 23, 2023) (dismissing petition which sought order declaring notice and cure procedures to be prohibited under Election Code).

amend facially defective mail-in and absentee ballots through a fully-developed and implemented notice-and-cure program. Under the Board's notice-and-cure program, when the Board receives a facially defective ballot, it notifies the affected voter by e-mail and letter and invites the voter to come to the Delaware County Voter Services Center at the Courthouse in the county seat of Media, Pennsylvania to obtain and vote a replacement ballot that will unquestionably be able to be counted under current law. If a voter is unable to come to the Voter Service Center, the voter is offered the opportunity, upon providing proper identification to Board staff over the phone, to obtain a replacement ballot via mail.

This case deals with the question of what happens when a voter who has voted a mail ballot that is timely received by the Board but is facially defective, does not (or cannot) take advantage of the Board's notice and cure process but instead travels to their local polling place on Election Day and votes a provisional ballot. At least two Board members (a majority) have made very clear in public comments, including in comments made during the provisional ballot hearing for the 2023 Primary Election, that they believe that a provisional ballot voted by a voter in the foregoing circumstances should, in all fairness, be counted. However, those same Board members also explained that they felt bound to vote to reject provisional ballots from six such voters, including the three Petitioners in this case, based on a 2020 decision by the Pennsylvania Commonwealth Court addressing, among other things and with limited analysis, the issue of whether provisional ballots cast in these circumstances may be counted. Those same Board members share the Petitioners' view that the decision of the Commonwealth Court was not robustly or correctly reasoned and should be reconsidered, rejected, and replaced with a determination that provisional ballots from voters in these circumstances should be counted.

ANSWER

INTRODUCTION

1. This Paragraph contains conclusions of law to which no response is required. By way of further response, the Board agrees with the sentiments expressed.

2. Admitted in part, denied in part. To the extent that this Paragraph purports to describe the nature of the action, no response is required to that aspect of the Paragraph. The Board admits that each of the Petitioners voted a provisional ballot at their polling place on Primary Election Day, May 16, 2023, after the Board had cancelled facially and fatal defective mail ballots that had been returned by the voters and were timely received by the Board. Any remaining factual allegations are denied as stated. By way of further response, it is specifically denied that the Board is seeking to disenfranchise any voters, including the Petitioners.

3. Admitted in part, denied in part. It is admitted that the Board adopted a notice and cure procedure, after such procedures were determined to be legal in the Pennsylvania courts, pursuant to which the Board, through its staff, notifies voters who submit facially defective mail ballots and invites those voters to cure such ballots by either obtaining a replacement ballot in person at the County Voter Services Center or by having a replacement ballot mailed directly to the voter's address. It is also admitted that, as of the date of the 2023 Primary Election (and the date of the filing of this action by Petitioners, the Pennsylvania Department of State website included guidance indicating that a voter who had returned a defective mail ballot could vote a provisional ballot on Election Day. All other allegations are denied as stated and any characterization of the writing referred to in this Paragraph is denied because the writing speaks for itself. It is specifically denied that the aforementioned Department of State guidance mandates the *counting* of provisional ballots cast by voters whose timely returned defective mail ballots have been canceled by a board of elections. That guidance

merely states that such voters may *receive and submit* a provisional ballot. Each of the Petitioners was indeed permitted to *receive and submit* a provisional ballot in accordance with the Department of State guidance. The Pennsylvania Department of State also requires that all mail-in and absentee ballot instructions, as well as ballots themselves, contain the following language warning voters that their provisional ballots may not be counted: “**WARNING:** If you return a mail-in or absentee ballot by the deadline, you may not vote at your polling place on Election Day. If you are unable to properly return your voted mail-in or absentee ballot by the deadline, you may vote a provisional ballot at your polling place on Election Day. However, if you remit (surrender) your mail-in or absentee ballot and your Ballot Return Envelope, the Judge of Election then should void the remitted ballot and envelope and let you vote a regular Election Day ballot at the polling place.” At the direction of the Pennsylvania Department of State, the Board included these instructions in all mail-in ballot materials sent to voters, including in the materials sent to each of the Petitioners. Further, due to the lack of sustained challenge to the adjudication of these ballots, the Board lacked record evidence to distinguish this situation from prior Pennsylvania law and guidance. By way of further response, it is specifically denied that the notice and cure procedure adopted by the Board “is found nowhere in state law”: notice and cure procedures have been found by the Pennsylvania courts to be within the power of county boards of election to adopt.

4. Admitted in part, denied in part. It is admitted that the Petitioners did not complete the cure process made available to them by the Board after being provided with notice thereof. It is further admitted that the Petitioners, after learning that their mail ballots were canceled due to facial and fatal defects, went to their respective polling places on Election Day and completed provisional ballots. After reasonable investigation, the Board is without sufficient

information as to the motive of the Petitioners for their actions to enable the Board to admit or deny the allegations related thereto and they are therefore denied, as are all other factual allegations in this Paragraph. By way of further response, the Board expressly denies any veiled suggestion that the notice and cure procedure it has adopted is unlawful or improper.

5. Admitted in part, denied in part. Further, this Paragraph contains conclusions of law to which no response is required. It is admitted that a majority of the Board has expressed the view that provisional ballots cast by voters who submitted mail ballots that were timely received by the Board but were cancelled due to facial defects should, in fairness, be counted. All other factual allegations in this Paragraph are denied.

6. To the extent that this Paragraph purports to describe the nature of the action, no response is required. Further, this Paragraph contains conclusions of law to which no response is required.

JURISDICTION

7. This Paragraph contains conclusions of law to which no response is required.

PARTIES

8. Admitted in part, denied in part. It is admitted that Sonja Keohane is a registered voter in Delaware County, Pennsylvania, is 80 years of age, and attempted to vote in the 2023 Municipal Primary. It is also admitted that the Board, through its staff, notified Mrs. Keohane on or about May 10, 2023, that her ballot had been received by the Board but was canceled due to facial defects on the outer return envelope, and that Mrs. Keohane completed and submitted a provisional ballot at her polling place on Election Day, May 16, 2023. After reasonable investigation, the Board is without sufficient information to admit or deny the remaining factual allegations of this paragraph and they are therefore denied.

9. Admitted in part, denied in part. It is admitted that Richard Keohane is a registered voter in Delaware County, Pennsylvania, is 81 years of age, and attempted to vote in the 2023 Municipal Primary. It is also admitted that the Board, through its staff, notified Mr. Keohane in advance of Election Day that his ballot had been received by the Board but was canceled due to facial defects on the outer return envelope, and that Mr. Keohane completed and submitted a provisional ballot at his polling place on Election Day, May 16, 2023. After reasonable investigation, the Board is without sufficient information to admit or deny the remaining factual allegations of this paragraph and they are therefore denied.

10. Admitted in part, denied in part. It is admitted that Barbara Welsh is a registered voter in Delaware County, Pennsylvania, is 79 years of age, and attempted to vote in the 2023 Municipal Primary. It is also admitted that the Board, through its staff, notified Ms. Welsh on or about May 11, 2023, that her ballot had been received by the Board but was canceled due to facial defects on the outer return envelope, and that Ms. Welsh completed and submitted a provisional ballot at her polling place on Election Day, May 16, 2023. After reasonable investigation, the Board is without sufficient information to admit or deny the remaining factual allegations of this paragraph and they are therefore denied.

11. Admitted.

DECISION OF THE BOARD AT ISSUE

12. This Paragraph purports to describe the nature of the action and, as such, no response is required.

13. Admitted.

FACTUAL BACKGROUND

Voting by Mail in Pennsylvania

14. This Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied. Further, this Paragraph contains conclusions of law to which no response is required.

15. This Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied. Further, this Paragraph contains conclusions of law to which no response is required.

16. This Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied. Further, this Paragraph contains conclusions of law to which no response is required.

17. Admitted in part; denied in part. This Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied. Further, this Paragraph contains conclusions of law to which no response is required. It is admitted that clerical mistakes by mail voters are not uncommon and that in the 2022 General Election, thousands of mail ballots returned by Pennsylvania registered voters were set aside due to various defects, including because they lacked legally mandated secrecy envelopes, proper signatures, and/or valid dates. After reasonable investigation, the Board is without sufficient information to admit or deny the remaining factual allegations of this paragraph and they are therefore denied.

The Board Canceled Petitioners' Mail Ballots

18. Admitted in part, denied in part. It is admitted that Petitioners and three other qualified voters returned mail ballots that were received by the Board prior to Election Day, May 16, 2023, and that the Board, through its staff, determined that their ballots suffered from facial defects that rendered the ballots unable to be counted, namely that they did not have a valid date. The remaining factual allegations of this paragraph are denied.

19. Admitted in part, denied in part. It is admitted that the Petitioners are, and were at the time of the 2023 Primary Election, qualified electors, that they were registered to vote in Delaware County, that they requested, received, and returned mail ballots prior to Election Day, May 16, 2023, and that they completed and submitted provisional ballots at their respective polling places on Election Day, May 16, 2023. After reasonable investigation, the Board is without sufficient information to admit or deny the remaining factual allegations in this Paragraph and they are therefore denied.

20. Admitted. By way of further response, the review and determination was performed by Board staff at the direction and with the authorization of the Board.

21. It is admitted that the Board, through its staff, sent such notices to each of the Petitioners and it is not denied that Petitioners received such notices.

Conflicting Guidance for Curing Cancelled Mail Ballots

22. Admitted in part, denied in part. It is admitted that the Board has posted guidance regarding facially defective mail ballots on its website. This Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied.

23. Admitted in part, denied in part. It is admitted that the guidance posted by the Board on its website provides direction to voters who have returned a mail ballot with facial defects. This Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied.

24. Admitted in part, denied in part. It is admitted that the Board sent emails and postal mail to the Petitioners with instructions on how to cure their defective mail ballots. It is further admitted that it is the Board's understanding that an automated email is routinely sent to such voters from the Department of State. After reasonable investigation, the Board is without

sufficient information to admit or deny the remaining factual allegations of this paragraph and they are therefore denied.

25. Admitted in part; denied in part. It is admitted that the guidance supplied to the Petitioners by the Board regarding curing defective mail ballots does not mention provisional ballot voting at all. This Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied.

26. Admitted in part, denied in part. It is admitted that the guidance supplied to the Petitioners by the Board regarding curing defective mail ballots does not state that a voter may request a replacement ballot by mail, not return it, and then vote a provisional ballot that would be counted. This Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied.

27. This Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied. By way of further response, it is noted that the Department of State guidance does not state that a provisional ballot voted by a voter who has returned a mail ballot that was timely received by a board of elections but was cancelled due to having facial fatal defects, will ultimately be *counted*; it merely states that such a voter is entitled to *request, receive, and vote* a provisional ballot. Petitioners here indeed did request, receive, and vote provisional ballots.

28. Admitted in part, denied in part. It is admitted that the Board sent emails and postal mail to the Petitioners with instructions on how to cure their defective mail ballots and that the guidance supplied to the Petitioners by the Board regarding curing defective mail ballots does not mention provisional ballot voting. This Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied.

29. After reasonable investigation, the Board is without sufficient information to admit or deny the allegations and they are therefore denied.

30. After reasonable investigation, the Board is without sufficient information to admit or deny the allegations and they are therefore denied.

31. Admitted. By way of further response, the Board has instructed its poll workers to allow mail voters who received notice-and-cure emails or letters to vote provisionally, just as Petitioners were permitted to do here. The Board has not suggested to voters, nor has it advised poll workers to suggest to voters, that such provisional ballots can or will be counted because the Board is aware of legal precedent that indicates that they cannot be counted, and the Board did not want to encourage voters to cast ballots the validity of which was in significant legal question, particularly when such voters could cast a different types of ballot that did not present a risk of not being counted.

Petitioners' Efforts to Vote

32. After reasonable investigation, the Board is without sufficient information to admit or deny the allegations and they are therefore denied.

33. Admitted, upon information and belief.

34. This Paragraph contains conclusions of law to which no response is required.

35. After reasonable investigation, the Board is without sufficient information to admit or deny the allegations and they are therefore denied.

36. Denied as stated. This Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied. By way of further response, it is admitted that the Board's policy is to permit voters whose mail ballots were timely received by the Board but cancelled due to facial defects to *complete and submit* provisional ballots at their polling place on Election Day, but that is something entirely distinct from the question of whether such ballots will

ultimately be *counted*. Indeed, many voters are permitted to *receive and submit* provisional ballots without any promise or suggestion that such ballots will ultimately be *counted*. This is because the legal standard for allowing someone to *receive and submit* a provisional ballot is not the same as the legal standard for determining whether that ballot should be *counted*.

Petitioners Sonja and Richard Keohane

37. Admitted.

38. Admitted.

39. Denied. After reasonable investigation, the Board is without sufficient information to admit or deny the allegations and they are therefore denied. By way of further response, the Board has explicitly instructed staff to not instruct voters to vote provisionally if they have sent in their mail-in or absentee ballot. The Pennsylvania Department of State also requires that all mail-in and absentee ballot instructions, as well as ballots themselves, contain the following language warning voters that their provisional ballots may not be counted:

“**WARNING:** If you return a mail-in or absentee ballot by the deadline, you may not vote at your polling place on Election Day. If you are unable to properly return your voted mail-in or absentee ballot by the deadline, you may vote a provisional ballot at your polling place on Election Day. However, if you remit (surrender) your mail-in or absentee ballot and your Ballot Return Envelope, the Judge of Election then should void the remitted ballot and envelope and let you vote a regular Election Day ballot at the polling place.” At the direction of the Pennsylvania Department of State, the Board included these instructions in all mail-in ballot materials sent to voters, including in the materials sent to each of the Petitioners.

40. After reasonable investigation, the Board is without sufficient information to admit or deny the allegations and they are therefore denied.

41. After reasonable investigation, the Board is without sufficient information to admit or deny the allegations and they are therefore denied.

42. After reasonable investigation, the Board is without sufficient information to admit or deny the allegations and they are therefore denied. By way of further response, the Board specifically denies that the Board or its staff “simply threw out” Mr. Keohane’s vote. On the contrary, the Board and its staff followed the law of the Commonwealth of Pennsylvania as they understood it. Despite the disagreement of at least a majority of the members of the Board as to the interpretation of that law by the Commonwealth Court, the Board determined that Mr. Keohane’s provisional ballot was not legally eligible to be counted unless and until a court rules that his ballot should be counted notwithstanding the Commonwealth Court’s decision.

Petitioner Barbara Welsh

43. Admitted.

44. Admitted in part. It is admitted that the Board notified Ms. Welsh that it had canceled her mail-in ballot due to facial defects. As to the remaining allegations, after reasonable investigation, the Board is without sufficient information to admit or deny the allegations and they are therefore denied.

45. Admitted in part, denied in part. It is admitted that Ms. Welsh served as a clerk in the November 2022 general election and May 2023 primary election, and that she underwent poll worker training. As to the remaining allegations, after reasonable investigation, the Board is without sufficient information to admit or deny the allegations and they are therefore denied.

46. Admitted in part, denied in part. It is admitted that Ms. Welsh has regularly voted in general and primary elections. As to the remaining allegations, after reasonable investigation, the Board is without sufficient information to admit or deny the allegations and they are therefore denied. By way of further response, the Board denies that Ms. Welsh was denied the

right to vote. On the contrary, she exercised her right to vote. Unfortunately, she did so improperly by returning a mail ballot with an invalid date, which rendered it ineligible to be counted under the law. At least a majority of the members of the Board agree that Ms. Welsh, and other voters in the same situation she found herself in after learning that her mail ballot was facially and fatally defective, should be permitted to vote a provisional ballot that is actually eligible to be counted.

The Board's Decision to Disenfranchise Petitioners²

47. Admitted.

48. Admitted.

49. Admitted in part, denied in part. It is admitted that the Board did not personally and individually notify Petitioners of the provisional ballot hearing. By way of further response, the Board had no legal obligation to notify any of the Petitioners personally and individually of the provisional ballot hearing. The Board publicly published notice of the provisional ballot hearing in newspapers of general circulation as required by law and, furthermore, posted notice of the provisional ballot hearing on its public website on or about May 15, 2023. After reasonable investigation, the Board is without sufficient information to admit or deny the other factual allegations in this Paragraph and they are therefore denied.

50. Admitted. By way of further response, the Election Code is specific that “[o]ne authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room” while provisional ballot determinations are being made. 25 P.S. § 3050(a.4)(4).

² The Board denies this, and every other, characterization contained in Petitioners’ headings.

51. Admitted. By way of further response, the Election Code is specific that “[o]ne authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room” while provisional ballot determinations are being made and is clear that only “[r]epresentatives...shall be entitled to challenge any determination of the county board of elections with respect to the counting or partial counting of the ballot under this section.” 25 P.S. § 3050(a.4)(4).

52. Admitted. By way of further response, the Election Code at 25 P.S. § 3050(a.4)(4)(i-vii) provides the procedure for validly challenging the disposition of a provisional ballot and sets forth the provisional ballot challenge hearing process.

53. Admitted.

54. Denied. By way of further response, The Board is, and at all relevant times was, aware that the Pennsylvania Commonwealth Court has interpreted 25 P.S. § 3050(a.4)(5)(ii)(F), which states that a provisional ballot “shall not be counted if...the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections,” to be “unambiguous” and a “clear statutory mandate that the provisional ballots to which this language applies must not be counted.” *In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 (Table), 2020 WL 6867946, at *4 (Pa. Cmwlth. Nov. 20, 2020). The Pennsylvania Supreme Court declined to reconsider the Commonwealth Court’s interpretation. *In re Allegheny Cnty. Provisional Ballots in 2020 Gen. Election*, 663 Pa. 352, 242 A.3d 307 (Table) (Pa. 2020) (denying petition for allowance of appeal). This decision of the Commonwealth Court—and not any perception about vulnerability to legal challenge—was the reason for the Board’s decision that the Petitioners’ provisional ballots were not able to be counted, and a majority of members

of the Board explicitly said as much at the provisional ballot hearing immediately prior to voting that the Petitioners' ballots could not be counted.

55. Admitted.

56. Admitted.

GROUND FOR APPEAL

The Board Misapplied the Election Code

57. This Paragraph contains conclusions of law to which no response is required.

58. Admitted.

59. Admitted.

60. Admitted.

61. This Paragraph contains conclusions of law to which no response is required.

62. This Paragraph contains conclusions of law to which no response is required.

63. This Paragraph contains conclusions of law to which no response is required.

64. This Paragraph contains conclusions of law to which no response is required.

65. Admitted.

66. Admitted.

67. This Paragraph contains conclusions of law to which no response is required. By way of further response, the proposition that the Secretary of the Commonwealth may authoritatively interpret the Election Code has been specifically and explicitly rejected by the Pennsylvania Supreme Court. *See In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1078 n.6 (Pa. 2020) ("More importantly, the Secretary has no authority to definitively interpret the provision of the Election Code, as that is the function, ultimately, of this Court. It is the Election Code's express terms that control, not the written guidance provided by the Department and as this Court repeatedly has cautioned, even

erroneous guidance from the Department or county boards of elections cannot nullify the express provisions of the Election Code.”) (citations and internal quotations omitted).

68. Denied. By way of further response, the notice and cure program adopted by the Board does not *cause* disenfranchisement, but rather has the effect of helping to *prevent and avoid* many instances of potential disenfranchisement, particularly as compared to those boards of election in counties throughout the Commonwealth that have refused to adopt any notice and cure program despite having the legal right and ability to do so. Moreover, the Board’s notice and cure program is not incompatible with an interpretation of the Election Code under which provisional ballots cast by voters who timely returned mail ballots that were facially and fatally defective are eligible to be counted.

69. This Paragraph contains conclusions of law to which no response is required.

70. This Paragraph contains conclusions of law to which no response is required.

71. This Paragraph contains conclusions of law to which no response is required.

The Board’s Decision to Not Count Petitioners’ Provisional Ballots Violated Their Fundamental Right to Vote

72. This Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied. Further, this Paragraph contains conclusions of law to which no response is required.

73. This Paragraph contains conclusions of law to which no response is required.

74. This Paragraph contains conclusions of law to which no response is required.

75. This Paragraph contains conclusions of law to which no response is required.

76. This Paragraph contains conclusions of law to which no response is required.

WHEREFORE, the Delaware County Board of Elections respectfully requests that the Court enter an order declaring the Petitioners' provisional ballots eligible to be counted and directing the Board to count them.

Dated: June 12, 2023

Respectfully submitted,

/s/ J. Manly Parks, Esq.

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VERIFICATION

I, the undersigned, am authorized to sign this Verification on behalf of Defendant Delaware County Board of Elections. I hereby certify that the statements in the foregoing Answer are true and correct to the best of my knowledge, information, and belief. I understand that this verification is made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

A handwritten signature in black ink, appearing to read "James A. Allen", written over a horizontal line.

Date: June 8, 2023

For Defendant Delaware County Board of Elections

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served the foregoing Answer on all counsel of record via this Court's e-filing system and via e-mail.

Dated: June 12, 2023

/s/ Nicholas Centrella Jr.

Nicholas Centrella Jr.