

November 12, 2024

VIA EMAIL

Donald J. Frederickson, Jr.
County Solicitor
Lackawanna County Government Center
123 Wyoming Avenue, 6th Floor
Scranton, PA, 18503

Re: Provisional Ballot Challenges

Dear Mr. Frederickson:

We write on behalf of Bob Casey for Senate, Inc. (“*CFS*”), to memorialize its verbal challenges to the Lackawanna County Board of Elections’ (the “*Board*”) rejection of certain provisional ballots and VBM set aside ballots.¹ This letter may be supplemented if any additional provisional ballots are rejected by the County or otherwise challenged after November 12, 2024.

Specifically, CFS challenges the Board’s rejection of provisional ballots cast by voters who:

- Submitted a provisional ballot that (1) was not signed by the judge of elections and/or minority inspector, (2) did not include an election official’s statement of the state the reason for voting provisionally, (3) had a missing signature in Box 2 or 4, and/or (4) was not placed in a secrecy envelope.
- Were not on the poll list on election day and were subsequently determined by the Board not to be registered. We are asking the Board to undertake several additional steps to confirm the voter’s eligibility.

As described below, recent reports of widespread voter registration errors may also impact the Board’s adjudication of these provisional votes. Specifically, we have learned that qualified voters in Lackawanna timely submitted voter registration applications but remain in pending

¹ The Board’s rejection of certain provisional ballots encompasses any adoption by the Board of challenges to provisional ballots including—but not limited to—challenges made by representatives on behalf of Dave McCormick for U.S. Senate.

status, and others may have had their registrations canceled entirely. *See* Ex. A. Records from the Department of State indicate that some of these voters may have been disenfranchised unlawfully, and we are concerned that the Board’s failure to process these registrations may violate voters’ rights. We address each of these issues below and ask the Board to confirm its adherence to state and federal law during the canvassing process.

A. Challenges to provisional ballots rejected for defects caused by poll worker and/or election official error.

At the Board’s November 8 and November 12, 2024 meetings, a CFS representative lodged verbal challenges to the Board staff’s recommendation to reject multiple categories of provisional ballots. All such ballots were set aside. Although Pennsylvania law does not require that these challenges be submitted in writing, CFS memorializes those challenges again here to facilitate the Board’s review and ultimate determination.

CFS challenges the rejection of provisional ballots for errors that were likely attributable to election officials. These include missing signatures from the judge of elections and/or minority inspector or an election official’s failure to denote the reason for provisional voting on the ballot envelope. These issues are plainly the error of the election officials. In an email to county officials on November 7, 2024, Deputy Secretary of State official Jonathan Marks wrote:

The Department has received inquiries from counties as to whether a provisional ballot should be counted if the voter affidavit is not signed by the Judge of Elections and/or the Minority Inspector. It is the Department’s position that a missing signature of the Judge of Elections and/or the Minority Inspector should not invalidate a provisional ballot if there are no other disqualifying errors. The lack of a signature from the Judge of Elections or the Minority Inspector is not specified in the Election Code as a basis for refusing to count a provisional ballot. *See* 25 P.S. § 3050(a.4)(5)(ii). While the affidavit to be signed by the voter contains a space for both officials to sign, and the Department’s guidance accordingly includes both officials’ signing the affidavit as part of the provisional ballot process, nothing in the Election Code authorizes counties to reject provisional ballots because either or both failed to sign the affidavit.²

But so too are purportedly missing affidavit or envelope signatures and missing inner secrecy envelopes in circumstances where the poll worker fails to properly instruct the voter or supply the voter with the requisite materials. Unlike mail ballots, which are largely completed and submitted privately, the provisional voting process is guided by election officials who are required to instruct voters on how to properly complete the ballot—indeed the election code sets forth carefully choreographed procedures that election officials must follow once an elector seeks to vote provisionally. *See* 25 Pa. Stat. § 3050(a). Moreover, Department of State guidance plainly imposes requirements on *poll workers* to ensure that these procedures are followed. *See* Pa. Dep’t of State, Pennsylvania Provisional Voting Guidance (Oct. 24, 2024) at 4 (“For everyone receiving a provisional ballot, ***poll workers must ensure*** that, before the provisional ballot is issued, the Voter

² Email from Deputy Secretary of State Jonathan Marks to County Election Officials, “DOS Email: Provisional Ballot Questions” (Nov. 7, 2024).

Information, Voter Affidavit for Provisional Ballot, and Current Address sections on the provisional ballot envelope are completed by the voter. Again, the voter must sign both the Voter Affidavit for Provisional Ballot and the front of the provisional ballot envelope. ***Poll workers must ensure*** that the voter signs their name in the presence of both the Judge of Elections and the Minority Inspector. ***Poll workers must also ensure*** that both the Judge of Elections and Minority Inspector sign the affidavit.”) (emphasis added).³ Under these circumstances, critical defects like missing secrecy envelopes more likely reveal errors or omission caused by the election official, rather than the voter. Tellingly, in Lackawanna, almost half of all ballots rejected for lacking secrecy envelopes or a voter’s signature were cast in a single precinct—Scranton—suggesting that the problem potentially lies with the precinct, not the voter. Where poll-worker error causes ballots to be marked deficient, those ballots must be counted. *See NEOCH v. Husted*, 696 F.3d 580, 591-97 (6th Cir. 2022).⁴

Accordingly, and pursuant to Lackawanna’s order of proceedings, CFS anticipates addressing these challenges at the hearing scheduled for November 15, 2024.⁵

B. Challenges to provisional ballots based on voter’s registration status.

CFS challenges the rejection of provisional ballots based solely on the Board’s staff’s failure to find voters’ names on registered-voter lists. SURE operators regularly face challenges in searching for registered voters’ names in the SURE system, especially when those voters have multiple middle or last names. *See In re Doyle*, 304 A.3d 1091, 1119 (Pa. 2023) (noting that “SURE system operators were ultimately able to confirm the registration information . . . only after they performed multiple searches using different criteria as directed by the court or local counsel”). The Department of State recently warned that “[s]hould a voter not be registered or not be properly registered, counties should be thorough in their investigation, ensuring that any timely submitted updates or registrations were processed properly.”⁶ In fact, officials in York County recently discovered that 13% of ballots rejected as “not registered” were done so in error. After CFS challenged those rejections, the York County Board remedied those errors by cross-checking voters’ names again using different formats. Here, the Board has not provided CFS with any information regarding its efforts to “perform[] multiple searches using different criteria” to

³ <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-provisionalballots-guidance-v2.2.pdf>

⁴ Although Pennsylvania courts have held that the requirements to sign provisional ballots or to place those ballots in a secrecy envelope are mandatory, *see In re Canvass of Provisional Ballots in the 2024 Primary Election*, 322 A.3d 900 (Pa. 2024) (addressing unsigned provisional ballots); *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 993 (Pa. Commw. Ct. 2022) (addressing secrecy envelopes), these courts did not consider the due process implications of disenfranchisement due to a poll worker’s failure to properly instruct the voter.

⁵ CFS further requests that the Board conduct a ballot-by-ballot review to confirm whether a signature or a secrecy envelope is, in fact, missing. Any mark (even a pen dot) within the signature box is sufficient.

⁶ Email from Deputy Secretary of State Jonathan Marks to County Election Officials, “Provisional Ballot Reconciliation” (Nov. 7, 2024).

confirm these voters' registration statuses. *See id.*

In addition, CFS challenges all determinations to reject provisional ballots solely on the basis that voters were purportedly not registered in Lackawanna. Instead, the Board must assess whether these ballots were rejected because the voters (1) live in a new county but are registered in their old counties, or rather, (2) live in new counties, are registered in new counties, but attempted to vote in their old county. Pennsylvania law requires that voters be allowed to vote in “the election district from which he or she removed his or her residence within thirty days preceding the election.” 25 Pa. Stat. Ann § 2811; *see also In re Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900, 912–13 (Pa. 2024). Further, DOS guidance instructs that voters who move within the Commonwealth more than 30 days before an election, but failed to update their registration, may vote in their old precinct for one election.⁷ Because the Board has not provided CFS with information to determine whether these rejected provisional ballots would be permissible under the guidelines described above, CFS must challenge any determination to reject these ballots wholesale.

Apart from the specific objections above, CFS has concerns about the significant number of pending (and potentially rejected) voter registration applications in Lackawanna. A voter with a pending registration status may be forced to vote provisionally—and that provisional ballot may not be counted unless the purported defect in their registration application is resolved in a timely manner. As such, CFS writes to ensure that Lackawanna is complying with state and federal law in processing registration application in a manner that prevents unlawful disenfranchisement of Pennsylvania voters.

1. The Board may not reject applications with non-matching identification numbers or information.

To the extent that any voter in Lackawanna County has a registration application which remains pending because of non-matching identification numbers, which may be that the voter allegedly failed to enter ID numbers—either a driver's license or the last four digits of their SSN—that match state records. To be sure, Pennsylvania law directs voters to provide ID numbers on their voter registration application, 25 Pa. Stat. §§ 1327(a)(2), 52 U.S.C. § 21083(a)(5)(A)(i), but the failure to disclose such information (or providing ID numbers that do not match state records) is not a disqualifying error. *See* 25 Pa. C.S. §§1328(b)(2)(i)-(iv). DOS guidance confirms that a voter registration application “may not be rejected based solely on a non-match between the applicant's identifying numbers on their application and the comparison database numbers.”⁸ DOS recently reiterated that “any registrations that are in pending status due to HAVA verification are

⁷ Pennsylvania Dep't of State, *How to Update Your Registration*, 2024, available at <https://www.pa.gov/en/agencies/vote/voter-registration/update-my-registration.html>.

⁸ Pennsylvania Dep't of State, *Directive Concerning HAVA-Matching Drivers' Licenses or Social Security Numbers for Voter Registration Applications*, 2018, available at <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2018-HAVA-Matching-Directive.pdf>

considered valid registrations, as registrations may not be rejected based solely on a non-match.”⁹ Absent other independent grounds for rejection, applications with non-matching ID “must be processed like all other applications,” and “any application placed in [pending] status” for non-matching ID “MUST be accepted.”¹⁰ In other words, missing ID or transposed digits in a driver’s license or social security number, for example, are not sufficient grounds to deny a voter’s registration application or to leave the application in pending status.¹¹

These records also suggest that the Board has invoked the Help America Vote Act (HAVA) to justify placing hundreds of registration applications on hold; but that interpretation misreads the statute. While HAVA requires voter registration applicants to provide identification numbers on their application forms, the statute, like Pennsylvania law, falls short of requiring those numbers to match the state’s comparison databases as a precondition for registration. 52 U.S.C. § 21083(a)(5)(A); *see also Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1172 (11th Cir. 2008) (recognizing HAVA does not require exact match of ID numbers before registering to vote). At most, the state may require some voters—but not overseas voters covered under UOCAVA, or any other individual entitled under federal law to vote by mail¹²—to provide identification when voting for the first time in an election for federal office. 52 U.S.C. § 21083(b)(1)-(2).

Not only does HAVA provide no authority to reject such applications, another federal law prohibits it outright: under the materiality provision of the Civil Rights Act, states may not “deny the right of any individual to vote in any election because of an error or omission” on a registration application “if such error or omission is not material in determining whether such individual is qualified” to vote. 52 U.S.C. § 10101(a)(2)(B). And the presence of an identification number on an application, whether entered correctly or with a transposed digit, “cannot offer any information about a voter’s substantive eligibility to vote.” *La Union del Pueblo Entero v. Abbott*, 705 F. Supp. 3d 725, 752 (W.D. Tex. 2023) (holding ID number requirement violates the materiality provision), *stayed pending appeal sub nom. United States v. Paxton*, No. 23-50885 (5th Cir. Dec. 15, 2023).

We expect that the Board will comply with state and federal law in its review of mail-in, absentee, and provisional ballots, including ballots from voters whose registrations are currently in pending status. Please see Exhibit A for a list of these voters. Any voter on this list who casts a provisional ballot should not have their ballot rejected on the grounds that the voter is not registered.

2. Missing or incomplete information, or relocation within Pennsylvania, may not provide sufficient grounds to disqualify voter registration applicants.

⁹ Email from Deputy Secretary of State Jonathan Marks to County Election Officials, “Provisional Ballot Reconciliation” (Nov. 7, 2024).

¹⁰ Pennsylvania Dep’t of State, *Directive Concerning HAVA-Matching Drivers’ Licenses or Social Security Numbers for Voter Registration Applications* (emphasis in original).

¹¹ *Id.*

¹² 52 U.S.C. § 21083(b)(3)(C).

Upon review of records from the Department of State, CFS identified at least 10 voters in Lackawanna County so far whose registration applications remain pending because of “missing information” generally or “missing signature.” These additional categories of voters in pending status merit further review to ensure compliance with state and federal law. This includes any voter with “missing” or “incomplete” information on their registration application. Such applicant may also be entitled to vote.

As explained above, the Board may not disqualify a registration application simply because information is “missing”—rather, the content and function of that information is determinative. If the omitted information is not material in determining whether an individual is a qualified elector, its absence is not a permissible basis to deny anyone the ability to register, or the right to vote. 52 U.S.C. § 10101(a)(2)(B). We ask that the Board confirm that none of these registrations have been set aside for immaterial omissions in violation of the Civil Rights Act. Please see Exhibit A for a list of these voters. Any voter on this list who casts a provisional ballot should not have their ballot rejected on the grounds that the voter is not registered.

Moreover, the Pennsylvania Supreme Court has recently confirmed that a registered voter who relocates to a different county in the Commonwealth within 30 days of an election remains eligible to vote in their current or previous county. *In re Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900, 912-13 (Pa. 2024); *see also* 25 P.S. § 2811(3); Pa. Const. art. VIII, § 1. Further, DOS guidance instructs that voters who move within the Commonwealth more than 30 days before an election, but failed to update their registration, may vote in their old precinct for one election.¹³ We ask that the Board ensure its process for reviewing registrations and ballots of voters who have relocated—either to or from Lackawanna—complies with the above guidelines.

3. Federal law imposes restrictions on canceling registrations.

To the extent that any individuals were unable to vote in Lackawanna due to cancellation of their registration, we remind the Board of its list maintenance obligations under the National Voter Registration Act (NVRA). Three key provisions of this federal law bear emphasis: *First*, the Board may not remove any registered voter from the rolls solely because of that individual’s inactivity or their failure to vote in any election, or for any period of time. 52 U.S.C. § 20507(b). *Second*, the Board may not “remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant changed residence *unless*”: (1) the Board receives written confirmation from the voter acknowledging the change of address, or (2) the voter fails to respond to a postcard notice *and also fails* to vote in at least two subsequent federal general election cycles. *Id.* § 20507(d) (emphasis added). Lastly, the NVRA prohibits the Board from conducting any program aimed at systematically removing ineligible voters from the voter rolls within 90 days of a federal election. For the November 2024 election, the statutory quiet period began on August 7—efforts to systematically removed alleged ineligible voters from the voter rolls from this date through election day would have been unlawful. *Id.* § 20507(c)(2)(A).

¹³ Pennsylvania Dep’t of State, *How to Update Your Registration*, 2024, available at <https://www.pa.gov/en/agencies/vote/voter-registration/update-my-registration.html>.

Given the reports of Pennsylvanians attempting to vote, only to discover that their registrations had been canceled, we ask that you confirm Lackawanna's compliance with the NVRA's mandates.

C. Absentee and Vote-By-Mail Ballots.

The Board informed CFS that it had not reviewed any rejected mail-in or absentee (collectively, "VBM") ballots after election day. In response to CFS's request for information, the Board responded that it could not provide a total number of VBMs and that the Board will not be providing these rejected ballots to observers for inspection in advance of a hearing on Thursday, November 14. As a result, CFS cannot know for what exact reasons VBM ballots were excluded from the count on or before election day. To the extent any of the VBMs set aside in CFS challenges these determinations.

Disqualifying undated or misdated ballots violates the Free and Equal Elections Clause as well as the First and Fourteenth Amendments. The County does not use the date on a VBM return envelope for any legitimate purpose, as has already been established several times over in both state and federal court. *See Pa. State Conf. of NAACP Branches v. Secretary*, 97 F.4th 120 (3d Cir. 2024); *McCormick for U.S. Senate v. Chapman*, 286 M.D. 2022, 2022 WL 2900112 (Pa. Commw. Ct. June 2, 2022); *Chapman v. Berks Cnty. Bd. of Elections*, 355 M.D. 2022, 2022 WL 4100998 (Pa. Commw. Ct. Aug. 19, 2022). The Free and Equal Elections Clause of the Pennsylvania Constitution, Pa. Const. art. I, § 5, prohibits counties from disqualifying VBM ballots for violating a meaningless requirement. *See, e.g., Baxter v. Philadelphia Bd. of Elections*, No. 1305 C.D. 2024. The BOE, therefore, cannot set aside ballots that had no date or were out of the date range.

Signature comparison is not a valid basis for setting aside a VBM ballot. *See In re Gen. Election of Nov. 3, 2020*, 662 Pa. 718, 749 (2020). Additionally, CFS requests that BOE staff provide for inspection all 255 ballots rejected for purportedly lacking a signature on an envelope to confirm that there are no identifying marks that cannot be construed as a signature; any mark (even a pen dot) within the signature box is sufficient for the ballot to be counted.

Finally, if a voter verifies their identification by November 12, any ballots set aside for that reason must be counted. 25 P.S. § 3146.8(h).

* * *

We appreciate the Board's attention to ensuring that every eligible vote is counted. Accordingly, please see the attached Right to Know request for records related to the Board's adjudication of provisional ballots. Accordingly, we understand that Lackawanna County is currently completing its count of ballots, as some provisional ballots were recently discovered on November 12, 2024. We ask that you provide all applicable records in electronic form to pacountyinfo@gmail.com as soon as possible, and in any event no later than Wednesday, November 13, 2024. We also ask that you notify us immediately of any scheduled hearings in which the Board will adjudicate any provisional, mail-in, or absentee ballots cast by the voters

identified above.

Very truly yours,

A handwritten signature in black ink, appearing to read "Judy Price". The signature is written in a cursive style with a prominent initial "J".

JUDY PRICE, ESQ.

Enclosure(s): Exhibit A