



October 26, 2022

VIA EMAIL

Dear Pennsylvania County Boards of Election:

Campaign Legal Center (“CLC”) writes to provide you with information regarding how Boards and their staffs, including District Election Boards, can properly adjudicate frivolous challenges to voter eligibility under 25 Pa. C.S.A. §§ 1203(h)-(i) and 3053 to minimize the burden on election administration and protect the rights of voters, including important guidance on limitations imposed by federal law.¹

CLC is a nonpartisan, nonprofit organization working to protect and strengthen the U.S. democratic process across all levels of government through litigation, policy analysis, and public education. CLC seeks a future in which the American political process is accessible to all citizens, resulting in representative, responsive, and accountable government. Consistent with that mission, we have worked with election officials across the nation to improve their administrative policies, protect the freedom to vote of citizens within their jurisdictions, and strengthen the democratic process.

To that end, CLC is concerned about the potential for mass eligibility challenges during the upcoming election, which have become increasingly common throughout the country.²

Mass eligibility challenges organized by partisan challengers and submitted with insufficient evidence risk disenfranchising eligible voters and causing

¹ This letter is not legal advice; it is intended to present a summary of relevant Pennsylvania and federal law.

² See, e.g., Nick Corasaniti & Alexandra Berzon, *Activists Flood Election Offices with Challenges*, N.Y. Times (Sept. 28, 2022) <https://www.nytimes.com/2022/09/28/us/politics/election-activists-voter-challenges.html?action=click&module=RelatedLinks&pgtype=Article> (noting the recent wave of voter eligibility challenges in states such as Michigan, Georgia, and Texas).

unnecessary disruption to the orderly administration of the 2022 elections—particularly in counties with fewer veteran election officials. Reminding your staff and volunteers of the rules for voter challenges and their responsibilities in dismissing challenges lodged without cause will ensure a fair and orderly election and will safeguard voters from intimidation.

To mitigate the potential harms to both voters and election administrators caused by baseless mass challenges, CLC provides the election law summary below to support your development of uniform processes for adjudicating voter eligibility challenges, in compliance with the following requirements of Pennsylvania and federal law.

I. Voter Challenges in Pennsylvania

As you are aware, Pennsylvania law permits challenges (1) to a voter’s registration, (2) to a voter’s mail ballot or application for a mail ballot, and (3) to a voter’s ballot or provisional ballot on Election Day. Such challenges are subject to various limitations, which we have detailed further below.

A. Challenges to Voter Registration

Registration commissioners, registration staff, or qualified voters from the same municipality may challenge an individual’s registration to vote by filing a challenge affidavit setting out information about the challenger and the challenged voter and the basis for the challenge.³ The challenged voter must respond to the challenge with a sworn written statement and “must produce such other evidence as may be required to satisfy the registrar or commissioner” that she is eligible to register.⁴

If the commission is satisfied that the voter is eligible to be registered, the voter is registered; otherwise, the individual’s registration is canceled.⁵ Individuals whose registrations are cancelled may appeal the decision to the applicable state trial court up to seven days before an election.⁶

Because Pennsylvania law requires a challenger to individually set out the basis for a challenge in an affidavit, challenges submitted *en masse* in the form of a spreadsheet or other data set without individualized affidavits are insufficient and should be rejected. Sustaining such mass challenges to voters’ registration would likely also violate the National Voter Registration Act’s

³ See 25 Pa. C.S.A. § 1329(a)-(b).

⁴ *Id.* § 1329(c).

⁵ *Id.*

⁶ *Id.* § 1602(a)(2), (b).

(“NVRA”) prohibition on the systematic removal of voters from the rolls on the basis of a change in residence within 90 days of a federal election.⁷

B. Challenges to Mail Ballot Eligibility

Individuals seeking to challenge a county election board decision approving an application for a mail ballot may do so only on the basis that the applicant is not an eligible voter.⁸ The county election board receives all challenges, which must be made by 5 p.m. on the Friday before Election Day.⁹ Any person challenging a mail ballot or an application for a mail ballot must make a \$10 cash deposit with the county board, and the deposit is refunded only if the challenge is sustained or otherwise withdrawn within five days after the election.¹⁰

The county board must maintain all mail ballots that have been challenged—whether due to challenges to the ballot applications or to the ballots themselves—unopened in a secure, sealed container in the board’s custody until it fixes a time and place for a formal hearing to consider all challenges.¹¹ The county board must give notice “where possible” to all mail voters whose ballots are challenged, as well as to every challenger.¹² The hearing must take place by the Friday after Election Day.¹³ The county board must review each challenge, considering any testimony and evidence in a hearing on the record.¹⁴ The Election Code does not specify the burden or standard of proof applicable to challenges, though at least one state court has held that the burden is on the challenger to prove her allegations by a preponderance of the evidence.¹⁵

Upon a petition filed by “any person aggrieved by the decision of the county board,” the county trial court may review any decision of the county board “upholding or dismissing any challenge.”¹⁶ The aggrieved party must file the appeal within two days after the board’s decision.¹⁷ “Pending the final determination of all appeals, the county board shall suspend any action in canvassing and computing all challenged ballots”—even those that have not

⁷ 52 U.S.C. § 20507(c)(2)(A).

⁸ 25 P.S. §§ 3146.2b(c), 3150.12b(a).

⁹ *Id.*

¹⁰ *Id.* § 3146.8(f).

¹¹ *Id.* § 3146.8(g)(5).

¹² *Id.*

¹³ *See id.*

¹⁴ *Id.*

¹⁵ *Appeal of Petrucci*, 38 Pa. D. & C. 2d 675, 677 (Pa Ct. Com. Pl. 1965).

¹⁶ 25 P.S. § 3146.8(g)(6).

¹⁷ *Id.*

been appealed.¹⁸ After all challenges have been resolved, any ballots “finally determined to be valid” are counted with the remainder of the county’s votes.¹⁹

C. Challenges to Election Day Ballots and Provisional Ballots

District election officials, election overseers, and poll watchers, as well as voters who are lawfully present in the polling place, may challenge a voter’s ballot based on identity or residence.²⁰ A voter’s identity may also be deemed challenged if district election officials determine that the voter’s signature does not match the signature in the district voting register.²¹ The Election Code provides that, when challenged, a voter “shall produce at least one qualified elector of the election district as a witness, who shall make affidavit of his identity or continued residence in the election district.”²²

However, guidance issued by the Secretary of the Commonwealth makes clear that before requiring the challenged voter to produce a witness, the election judge must “determine if a challenge rests on a good faith basis”; the election judge must not permit routine or frivolous challenges” and should allow a challenged voter to cast a normal ballot if she is “satisfied as to the identity and residency of the voter.”²³ The same guidance notes that routine challenges based on race, ethnicity, or other protected traits are unlawful.”²⁴ If the challenge proceeds and the voter produces this witness, he is entitled to vote a regular ballot.²⁵ If the voter does not produce such a witness, he may cast only a provisional ballot.²⁶

Whether a provisional ballot is ultimately counted is determined after Election Day. Within seven days of Election Day, the county election board holds an initial examination of the provisional ballot envelopes to determine whether

¹⁸ *Id.* § 3146.8(g)(7).

¹⁹ *Id.*

²⁰ *Id.* § 3050(d); Pa. Dep’t of State, *Guidance on Rules in Effect at the Polling Place on Election Day* 4 (Oct. 2016), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20GUIDANCE%20ON%20RULES%20IN%20EFFECT%20AT%20THE%20POLLING%20PLACE%20ON%20ELECTION%20DAY%2010-16.pdf>. Challenges can also be based on noncompliance with certain procedural rules for casting a ballot. 25 P.S. § 3050(d). In addition, the Election Code contains a provision for challenging a ballot based on the voter’s giving or a receiving a bribe in exchange for a vote. *Id.* § 3051. Such challenge may be made by any election official or eligible voter and is decided by district election officers. *Id.* A voter accused of violating this anti-bribery provision may rebut the accusation with a written affidavit. *Id.*

²¹ 25 P.S. § 3050(a.3).

²² *Id.* § 3050(d).

²³ Pa. Dep’t of State, *supra* note 20, at 5

²⁴ *Id.* at 5.

²⁵ *See id.*; Pa. Dep’t of State, *supra* note 20, at 5.

²⁶ *See* 25 P.S. § 3050(a.2)-(a.3), (d); Pa. Dep’t of State, *supra* note 20, at 5.

the individual who submitted each ballot was eligible to vote.²⁷ Representatives of the candidates and political parties participating in the election may monitor this process and lodge formal challenges to the county election board's determination as to a particular provisional ballot.²⁸ Within seven days of a provisional ballot challenge, the county election board holds a hearing to determine whether each challenged provisional ballot should be counted.²⁹ This hearing proceeds in an identical manner to hearings for adjudicating challenges to absentee ballots, and the same appellate procedure applies as well.³⁰

II. Other Legal Requirements

As you know, both federal and Pennsylvania law provide robust protection against voter intimidation and other forms of infringement on the fundamental right to vote. The process for responding to voter challenges—especially those conducted *en masse*—must therefore comply with all such federal and state laws, as well as the U.S. Constitution. As such, we want to reiterate that all Boards of Elections have the responsibility and discretion to protect Pennsylvania voters from baseless and discriminatory challenges and ensure that the adjudication of all voter challenges complies with both state and federal law.

A. Racially Discriminatory Challenges

Organized challengers frequently target voters from marginalized communities in an attempt to intimidate or deter members of those communities from voting.³¹ Sustaining such discriminatory challenges could violate the U.S. Constitution and federal law. Taken together, the Equal Protection Clause of the Fourteenth Amendment³² and Section 2 of the Voting Rights Act³³ prohibit the use of voting practices that result in citizens being denied equal access to the democratic process on account of “race, color, or membership in a language minority group.”³⁴ Since these are often the exact groups targeted by discriminatory challenges, clerks and other local elections officials should consider carefully whether granting mass challenges brought

²⁷ *Id.* § 3050(a.4)(4).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See, e.g., Nicolas Riley, Brennan Ctr. for Just., *Voter Challenges* 11-12 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf.

³² U.S. Const. amend XIV, § 1.

³³ 52 U.S.C. 10301

³⁴ See U.S. Dept. of Justice, *Guidance Under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, for Redistricting and Methods of Electing Government Bodies* (Sept. 1, 2021) <https://www.justice.gov/opa/press-release/file/1429486/download>.

before them would have the effect of unlawfully disadvantaging voters because of their race.

B. Voter Intimidation

Baseless mass challenges to voter eligibility could constitute voter intimidation, since such challenges are often made in bad faith to deter eligible citizens—including members of historically marginalized group—from voting. Such voter intimidation is illegal under both federal and Pennsylvania law.

Federal law provides that anyone who “intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote” in a federal election has committed a federal crime.³⁵ Additionally, several federal statutes impose civil liability for voter intimidation. Section 11(b) of the Voting Rights Act makes it unlawful to “intimidate, threaten, or coerce” another person, or attempt to do so, “for voting or attempting to vote” or “for urging or aiding any person to vote or attempt to vote.”³⁶ And Section 2 of the Ku Klux Klan Act of 1871 makes it unlawful for “two or more persons to conspire to prevent by force, intimidation, or threat,” any voter from casting a ballot for the candidate of his or her choice.³⁷

Similarly, Pennsylvania law criminalizes the use of force, violence or restraint, and threat or infliction of injury, damage, harm, or loss “in order to induce or compel [a] person to vote or refrain from voting at any election, or to vote or refrain from voting for or against any particular person.”³⁸ Individuals who intimidate voters in this manner can be fined up to \$5,000 and face up to two years in prison.³⁹

To that end, each county and district board should review their duties and responsibilities to ensure that organized mass challenges do not result in unlawful voter intimidation, and only challenges made using the proper procedure and supported by sufficient evidence are considered and sustained. County and district boards should also not hesitate to refer incidents of voter intimidation, including baseless mass challenges, to the Pennsylvania

³⁵ 18 U.S.C. § 594.

³⁶ 52 U.S.C. § 10307(b).

³⁷ 42 U.S.C. § 1985(3).

³⁸ 25 P.S. § 3547.

³⁹ *Id.*

Attorney General's Office,⁴⁰ Pennsylvania Department of State,⁴¹ and U.S. Department of Justice (DOJ).⁴²

C. Uniform and Nondiscriminatory Standards

The Constitution requires that each state and political subdivision use uniform, nondiscriminatory standards and processes for evaluating voter eligibility challenges.⁴³ For example, in the 2000 presidential election, the Supreme Court found unconstitutional a process by which Florida counties “used varying standards to determine what was a legal vote[.]”⁴⁴

Boards of Elections should work to eliminate any meaningful divergence among them in the standards and processes used to evaluate voter challenges in different municipalities and replace them with uniform standards and processes. By doing so, Pennsylvania's voter challenge processes can avoid the “arbitrary and disparate treatment” of challenged ballots that violates the Constitution.⁴⁵

By ensuring compliance with the processes, requirements, and limitations of Pennsylvania's voter challenge laws, you can mitigate the potential harm and disruption caused by frivolous voter eligibility challenges. This summary of the relevant law should help you to prepare proactively to develop written procedures and policies for adjudicating such challenges and train your staff, volunteers, and election inspectors on the requirements of Pennsylvania and federal law applicable to voter eligibility challenges.

Please do not hesitate to reach out with any questions. We stand ready to assist you in upholding federal and state law and protecting Pennsylvanians' freedom to vote.

⁴⁰ Voter intimidation can be reported to the Attorney General's Office at <https://www.attorneygeneral.gov/voting-complaint/>.

⁴¹ Written reports of voter intimidation can be submitted to the Department of State at <https://www.pavoterservices.pa.gov/Pages/ReportElectionComplaints.aspx>. The Department of State's voter hotline can be reached by phone at 1-877-868-3772.

⁴² The DOJ Civil Rights Division can be reached at 800-253-3931, and voter intimidation reports can be submitted online at <https://civilrights.justice.gov/report>. More information on DOJ's resources to protect voting access can be found at <https://www.justice.gov/opa/pr/justice-department-releases-information-efforts-protect-right-vote>.

⁴³ See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (finding that the lack of uniform standards across counties for when to count a ballot violates the Constitution's Equal Protection Clause).

⁴⁴ *Id.* at 107.

⁴⁵ *Bush*, 531 U.S. at 104-05.

Sincerely,

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