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IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 26 & 27 WAP 2024

FAITH GENSER AND FRANK MATIS,
Respondents,

v.

BUTLER COUNTY BOARD OF ELECTIONS, REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PARTY OF PENNSYLVANIA, AND THE PENNSYLVANIA DEMOCRATIC PARTY,
Appellants.

BRIEF OF *AMICUS CURIAE* RESTORING INTEGRITY AND TRUST IN ELECTIONS FILED IN SUPPORT OF APPELLANTS

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I. STATEMENT OF INTEREST

Restoring Integrity and Trust in Elections ("RITE") is a 501(c)(4) non-profit organization with the mission of protecting the rule of law in the qualifications for, process and administration of, and tabulation of voting in the United States. RITE is a non-partisan, public-interest organization dedicated to protecting elections as the democratic voice of the people. RITE submits this brief to highlight the pervasive constitutional infirmites attendant in the countinued *ad hoc* approach to curing and to underscore the untenable nature of the Commonwealth Court's statutory construct.

II. INTRODUCTION

Less than two weeks ago, Justice Wecht, in a concurring opinion, lamented that "[t]et again, [this Court is] called upon to decide whether the Election Code really means what it says."[1] And much like the circumstances of that dispute, this case is nothing more than an effort to abuse the mechanism of provisional balloting by converting it into a means of curing mail-in ballots that do not conform to the law. Although presented under the auspices of statutory construction,

[1] *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *10 (Pa. Sept. 13, 2024)

the Commonwealth Court's decision entrenches—and enlarges—curing procedures that certain county boards of elections have created without any statutory authority. As this Court held in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (*PDP*), it is for the Legislature to develop and implement a curing procedure via the Election Code. The legislature has not done so. That should be the end of this case. Because there is no authority to cure defective ballots, there is no authority to use provisional ballots for that purpose. The Commonwealth Court thus defied *PDP*'s mandate when it ordered the expansion of a curing process that was unauthorized from its inception. Its decision must be reversed.

In fact, this case demonstrates the wisdom inherent in PDP's conclusion that the parameters of any curing regime must be set by the legislature, rather than courts. Rather than promote fairness, the Commonwealth Courts' decision renders Pennsylvannia's elections far less fair than if it had adhered to PDP, as requried.

Separate and apart from its fundamental disregard of binding authority, the Commonwealth Court's decision should also be reversed because it utterly misconstrues the statutory scheme in question. As

this Court recently made clear, Section 1210(a.4)(5)(ii), which lists the conditions under which "[a] provisional ballot shall not be counted" is unambiguous. 25 P.S. § 3050(a.4)(5)(ii). The interpretation is, therefore, also foreclosed by binding precedent.

III. ARGUMENT

A. Curing of defective ballots is a matter for legislative resolution under the Election Code and its creation by any other governmental branch or unit entrenches disparate treatment of Pennsylvania voters and is barred by this Court's decision in *Boockvar*.

Although the Commonwealth Court' decision is largely couched as a discrete exercise in statutory construction, at bottom, this case presents an in issue far more fundamental than the proper interpretation of Section 1210(a.4) of the Election Code: whether boards of elections (in concert with the Secretary) have the power to implement extra-statutory procedures for "curing" defective mail-in ballots—whether by provisional ballot or otherwise. To be sure, the intermediate court's reading of Section 1210(a.4) of the Election Code, which sets forth the process for voting by provisional ballot, is utterly untenable under settled precepts of statutory construction. But the catalyst for this action was the decision of a county board of elections to

implement a notice and cure process that is found nowhere in statute, leading Appellees to cast provisional ballots under a misguided view that this was a permissible extension of a "curing" process offered by the county. And faced with this attempt to "cure" a defective ballot, the Commonwealth Court, under the guise of statutory interpretation, ordered an even more expansive curing process. The threshold issue in this case, therefore, is whether county boards of elections, in the absence of a legislative enactment, may adopt "notice and opportunity to cure" procedures for voters who have submitted defective mail-in or absentee ballots.

In this regard, a careful reading of *PDP*, makes plain that the power to establish a procedure for curing defective mail-in ballots is reposed exclusively in the legislative branch. And while *PDP* held only that counties may not be compelled to implement curing procedures, its rationale is—if not dispositive—highly instructive.

To illuminate, in refusing to require counties to follow a judicially-created procedure for "curing" defective ballots, the Court explained that "the decision to provide a 'notice and opportunity to cure' procedure to alleviate th[e] risk [of invalid ballots] is one best suited for the

Legislature." *PDP*, 238 A.3d at 374. Fashioning such relief would be particularly inappropriate, the *PDP* panel explained, "in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania's government." *Id.*

Notwithstanding *PDP*'s unmistakable directive that a ballot curing procedure may be prescribed only through legislative enactment, over the last few years, boards of elections throughout the Commonwealth have—including the Butler County Board of Elections—have taken it upon themselves to implement their own ballot-curing measures. This encroachment on legislative power, which was augmented by the Commonwealth Court here, should not be countenanced. To the contrary, in keeping with *PDP*'s central guiding principle, this Court should reaffirm that, absent statutory authority, county boards of elections may not establish their own curing guidelines. Indeed, without such a definitive pronouncement, this Court (as well as the Federal courts) will likely see an exponential

increase in the number of election-related cases that *ad hoc* "notice and opportunity to cure" procedures adopted by various counties—even if well-intentioned—have resulted in an electoral landscape riddled with disparities that are likely to reach (if they have not already) constitutionally untenable levels.

Specifically, even a perfunctory review of the minutes of proceedings from the various boards of elections around the Commonwealth reveals that sixty-seven counties have taken wildly divergent views on the issue of curing. Indeed, nothing remotely approaching a consensus exists on whether to even allow curing. And even among those counties that do offer some opportunity to cure, there is widespread difference of view on how and when voters must be informed of defects in their ballots, what types of defects are curable, and how and when those curable defects may be corrected. The upshot of this is that voters who live in one county may have their ballots invalidated for a defect that in a neighboring county would be curable.

The constitutional perils of allowing elections to be conducted in such a manner cannot be overstated. Indeed, that such disparate treatment of voters is in palpable tension with the State Constitution's

equality and uniformity in elections should be self-evident. But the current landscape also violates core tenets of the Equal Protections Clause of the Federal Constitution. As the United States Supreme Court explained in *Bush v. Gore*, 531 U.S. 98 (2000), a state may not, through "arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. 104-05. Thus, "*Bush*'s core proposition" is that "a state may not take the votes of two voters, similarly situated in all respects, and, for no good reason, count the vote of one but not the other[.]" *Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331, 387 (W.D. Pa. 2020). Moreover, as the United States District Court for the Western District of Pennsylvania recognized, "[i]t also seems reasonable (or at least defensible) that this proposition should be extended to situations where a state takes two equivalent votes and, for no good reason, adopts procedures that greatly increase the risk that one of them will not be counted—or perhaps gives more weight to one over the other." *Id.*

That a lack of uniformity in how defects are treated across the Commonwealth raises the specter of a violation of the Federal Constitution is in no way a novel proposition. *See Pierce v. Allegheny*

Cty. Bd. of Elections, 324 F. Supp. 2d 684, 697 (W.D. Pa. 2003) ("A state must impose uniform statewide standards in each county in order to protect the legality of a citizen's vote. Anything less implicates constitutional problems under the equal protection clause of the Fourteenth Amendment."). As the Court explained in *Pierce*, "the United States Supreme Court has found a constitutional violation where a canvassing procedure "was not conducted 'in compliance with the requirements of equal protection and due process." *Id.* (quoting *Bush*, 531 U.S. at 110).

Of course, because some degree of discrepancy in how each county conducts its canvassing process is inevitable, nothing in the relevant authorities suggests that absolute uniformity is required. *See, e.g.*, *Shannon v. Jacobowitz*, 394 F.3d 90, 96 (2d Cir. 2005) (collecting examples of irregularities courts have found are not actionable). Thus, "garden variety" issues, such as isolated incidents of machine malfunction, human error, mistakes by officials, etc., do not rise to the level of a constitutional violation. *See id.*; *see also Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 643 (E.D. Pa. 2018). But when counties adopt differing systems and procedures for canvassing votes

and deciding whether a ballot should be counted—which is precisely what occurs when counties have wildly differing policies for curing—the disparities become constitutionally intolerable. In short, therefore, the current curing scheme is a constitutional disaster waiting to happen. And absent intervention from this Court, this runaway train will run headlong into a mountain of constitutional infirmity.

Setting aside the very real constitutional perils ahead, the current "ballot curing" practices are profoundly unfair and misguided on multiple levels. To begin, as this case illustrates, allowing counties to implement extra-statutory curing procedures gives a decided advantage to voters who reside in more affluent counties, while depriving voters from less well-heeled counties of the same advantages. As the Commonwealth Court noted, the Butler County Board of Elections operates ballot processing machines that allow it to identify ballots that are not enclosed inside a secrecy envelope. Undoubtedly other counties have also purchased such sophisticated technology. But lacking the necessary funds, other counties invariably do not have such machines. The practical reality, then, is that two voters who otherwise similarly situated and submit a mail-in ballot with the very same defect on the

very same day will be treated differently solely based on whether they are fortunate enough to reside in a more affluent area of the Commonwealth.

The problems with the current paradigm in which "curing" occurs run even deeper. For instance, even sophisticated ballot processing machines can only detect certain errors. Other errors, including under-voted ballots, over-voted ballots, and identifying marks on secrecy envelopes or ballots cannot be so detected. Yet, under current curing practices, counties are free to make arbitrary decisions on what errors are "minor" enough to allow a voter to cure and what errors are sufficiently severe to warrant invalidation.

This *ad hoc* approach to curing also treats voters differently based on time of error because individuals who vote early may receive notice that affords an opportunity to cure, while voters who vote later may not receive sufficient notice. There may well be sound policy reason for drawing such a distinction based on the time when a ballot was

submitted, but that judgment is best made by the General Assembly and should be enforced statewide.[2]

Moreover, even among the counties that have adopted curing procedures and purchased sophisticated equipment, there is no consensus. Butler County, as the Commonwealth Court notes, allows voters who submit an undated or unsigned voter declaration to cure, but it does not allow "naked ballots" to be cured. Some counties, however, allow curing regardless of the defect. Still, others, may permit curing for a missing date, but not a missing signature.

Again, there may well be perfectly justifiable reasons for drawing such distinctions between types of defects, but just as the judiciary is ill-suited to make those policy judgments, so too are county boards of elections. In the short, therefore, this Court should reaffirm *PDP*'s core principle relative to curing: unless and until the political branches address the issue through legislation, a procedure for curing simply

[2] Indeed, the Commonwealth Court's decision illustrates this point. Specifically, although the panel appears to believe that it is a foregone conclusion that the rights of voters who submit their ballots early are superior because of their diligence, an equally strong case can be made that voters who submit their ballot closer to the deadline are more conscientious and deliberative in their decision-making. The fact that reasonable minds can differ on this point is precisely why such policy decisions should be made by the democratically elected representatives of the citizens.

cannot be established. Because the Commonwealth Court defied this Court's mandate in *PDP* and not only approved such a procedure here, but also ordered its expansion, the intermediate court's decision should be reversed.

B. The plain language of the Election Code prohibits canvassing a provisional ballot submitted by an elector whose mail-in or absentee ballot was timely received.

Although Appellees and their *amici* have done their best to muddy the waters, the statutory analysis implicated by this case is not altogether complicated. Indeed, in light of this Court's recent decision in *In re Canvass of Provisional Ballots in 2024 Primary Election*, __ A.3d __, 2024 WL 4181584 (Pa. Sept. 13, 2024) (*In re Canvass of Provisional Ballots*), the Commonwealth Court's interpretation of the statutory scheme simply cannot stand.

The mechanism for voting by provisional ballot, as *In re Canvass of Provisional Ballots* recognized, is set forth in Section 1210(a.4) of the Election Code. *See* 25 P.S. § 3050(a.4). Specifically, escribing the procedure for provisional voting, the Court explained that, "paragraph (a.4)(1) allows a voter to 'cast a provisional ballot' but it includes no method for doing so. The remaining paragraphs are integrally

intertwined with paragraph (1) as they spell out the mechanics by which the ballot referred to in paragraph (1) is to be cast and handled thereafter by the poll workers and the county election board." *In re Canvass of Provisional Ballots*, __A.3d at __, 2024 WL 4181584, at *6. Accordingly, "[a] natural reading—and one that avoids a result that is 'absurd, impossible of execution or unreasonable,'—is that the General Assembly intended that any provisional ballot cast under (a.4)(1) necessarily implicates the procedures given in the succeeding paragraphs for how that ballot is to be cast and treated thereafter." *Id.* (quoting 1 Pa.C.S. § 1922(1)).

Among those paragraphs that are "essential to the operation of the scheme by which any provisional ballot may be cast[,]" *id.*, is paragraph (a.4)(5)(ii), which outlines the specific circumstances under which a provisional ballot may not be counted. More specifically, as relevant here, under that provision, "[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." 25 P.S. § 3050(a.4)(5)(ii)(F).

This language could not be clearer. In plain and unambiguous terms, the legislature cogently indicated that it intended for counties to

reject provisional ballots where the county has already received a mail-in or absentee ballot from the voter in question. And as this Court recently reiterated, where the General Assembly has "spelled out the consequences" of a particular action or inaction in the electoral process, that provision must be strictly construed and applied. *In re Canvass of Provisional Ballots*, 2024 WL 4181584, at *6 (citing *Oncken v. Ewing*, 8 A.2d 402, 404 (Pa. 1939) ("If the law itself declares a specified [election] irregularity to be fatal the courts will follow that command, irrespective of their views of the importance of the requirement.")); *see also id.* at * 14-15 (reiterating that, where the General Assembly has attached a particular consequence for failing to adhere to a mandatory statutory provision, it must be strictly enforced). In fact, four years ago, the Commonwealth Court also interpreted this provision and concluded that boards of elections are prohibited from counting such provisional ballots.[3] Despite this clear statutory language, the Commonwealth

[3] *See In re Allegheny County Provisional Ballots in the 2020 General Election*, slip op. at 4 (Pa. Cmwlth., No. 1161 C.D. 2020, filed Nov. 20, 2020) ("[U]nlike matters which involve ambiguous statutory language where courts apply principles of statutory construction to interpret same, this matter requires no application of statutory construction principles, for the language is plain and unambiguous—the provisional ballots at issue 'shall not be counted.'") (referencing 25 P.S. § 3050(a.4)(5)(ii)(A), (F)).

Court here sought to circumvent clear statutory language in order to count provisional ballots that the Election Code excludes. To do so, the Commonwealth Court manufactured ambiguity where none existed.

Specifically, the Commonwealth Court referenced the provisional ballot "Eligibility" provision, which provides that a voter who is not shown as "**having voted**" may vote by provisional ballot, 25 P.S. § 3150.16(b)(2) (emphasis supplied), as well as Section 1210(a.4)(5)(i), which provides that a county board of elections shall count a ballot if the board determines that the voter did not "**cast**" any other ballot. 25 P.S. § 3050(a.4)(5)(i) (emphasis supplied). Although candidly difficult to follow at times, the Commonwealth Court essentially appears to find ambiguity and tension in the terms "vote" and "cast" relative to the prohibition on counting a provisional ballot where another ballot was "timely received" under Section 1210(a.4)(5)(ii).

The Commonwealth Court's interpretation, however, is flawed on multiple levels. For starters, in concluding that the statute is ambiguous, the Commonwealth Court simply accepted Secretary Al Schmidt's suggestion—one that lacked any statutory support—that these terms *might* have a different meaning. But it is well-settled that

courts "must not overlabor to detect or manufacture ambiguity where the language reveals none." *Sivick v. State Ethics Comm'n*, 238 A.3d 1250, 1264 (Pa. 2020); *see also Commonwealth v. Fant*, 146 A.3d 1254, 1260–61 (Pa. 2016) ("[A] statute cannot be dissected into individual words, each one being thrown onto the anvil of dialectics to be hammered into a meaning which has no association with the words from which it has violently been separated." (internal citations and quotations omitted)). And as explained below, a closer review of the statute, and this Court's decision in *In re Canvass of Provisional Ballots* confirms that the Commonwealth Court's reading of Section 1210(a.4)(5) is both strained and unnatural.

Specifically, insofar as the Commonwealth Court concluded that the ambiguity is a result of the interplay between Section 1306-D(b)(2) and Section 1210(a.4), the five-justice majority in *In re Canvass of Provisional Ballots* expressly held that these two provisions, taken together, do not create an ambiguity. *Compare In re Canvass of Provisional Ballots*, 2024 WL 4181584, at *5 (rejecting the dissent's view that the two provision operate to engender an ambiguity, *with id.* at *20 (Donohue, J., dissenting) ("[T]he sanction provision of

(a.4)(5)(ii)—simply do not apply to electors who were issued mail-in ballots but who nonetheless present on election day for in-person voting without their mail-in ballot."). Indeed, the Commonwealth Court's basis for finding an ambiguity largely tracks the dissent's statutory interpretation, which was addressed—and rejected—by the majority. *See id.* at *5.

Nor is there any tension within Sections 1210(a.4)(5), such that a finding of an ambiguity would be warranted. Specifically, although Subsection (a.4)(5)(i) requires boards of elections to count a provisional ballot if the voter "did not cast any other ballot[,]" 25 P.S. § 3050(a.4)(5)(i), this provision is made expressly subject to the ensuing subsection,[4] which, again, provides that a provisional ballot may not be counted if the voter's mail-in or absentee ballot was timely received. As this Court has recognized, "[t]he purpose of a *proviso* is to 'qualify, restrain or otherwise modify the general language of the enabling

[4] *See* 25 P.S. § 3050(a.4)(5)(i) ("***Except as provided in subclause (ii)***, if it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector's registration form and, if the signatures are determined to be genuine, shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election." (emphasis added)).

provision.'" *Commonwealth v. Bigelow*, 399 A.2d 392, 395 (Pa. 1979) (quoting *Commonwealth ex rel. Margiotti v. Lawrence*, 193 A. 46, 48 (Pa. 1937)); *see also* 1 Pa.C.S § 1924 ("Provisos shall be construed to limit rather than to extend the operation of the clauses to which they refer."). By including a proviso in Subsection (a.4)(5)(i), the General Assembly qualified and restrained the general scope of that language, such that if one of the circumstances in Subsection (a.4)(5)(ii) are present, a provisional ballot may not be counted. Thus, it is utterly unnecessary to ascertain the meaning of "cast" in Subsection (a.4)(5)(i) and determine how it relates to "received" in Subsection (a.4)(5)(ii).

And finally, even if it were appropriate to engage in the cast-versus-received interpretive exercise, the Commonwealth Court's interpretation is untenable. It is axiomatic that where words and phrases lack technical definitions they must "be construed according to rules of grammar and according to their common and approved usage," 1 Pa. C.S. § 1903(a). While the Commonwealth Court suggests that Appellees' ballots were not "timely received," this interpretation is inconsistent with the ordinary and approved usage of the term received.

Once a ballot arrives at a county elections board, it has been received.[5] By holding that a ballot is timely received only if that ballot is "valid" and "will be counted," the Commonwealth Court is not engaging in statutory interpretation, it is adding language that the General Assembly did not see fit to include. Indeed, the Legislature, in drafting the statute, could have easily provided that a provisional ballot may not be counted when the voter has submitted a valid mail-in ballot that was timely received and approved for canvassing. It did not do so.

Simply put, the statutory scheme allows for the counting only of those provisional ballots cast by voters who never submitted their mail-in ballot, or whose mail-in ballot did not arrive at the county boards of elections by the statutory deadline. Importantly, "having voted" or "cast" a ballot does not indicate that the vote necessarily will count. Indeed, a voter can arrive at their polling station, fill out and submit

[5] The Commonwealth Court's attempt to distinguish between the receipt of the ballot and receipt of the ballot enclosed within the declaration envelope has no basis in law, fact, or common experience. The statutory provisions referring to receipt of documents are too numerous to list and, in nearly each one of those situations, the items in question are presumably arriving enclosed within some packaging. The rationale articulated by the intermediate court makes sense in only one set of circumstances, which, although rare, does occur a handful of times at every election: where an elector submits a declaration envelope without the mail in ballot inside it. In that situation, it can reasonably be argued that only the outer declaration envelope was received and the mail-in ballot was not.

their ballot, receive their voting sticker, but still have that vote not count based on a technicality later determined by the county board of election. Likewise, a voter can submit a ballot by mail and the county board of election can "receive" the ballot but later determine that the ballot is defective because it lacks a signature. Under both circumstances, the voter, nonetheless, "voted" or "cast" their ballot and the county board of election "received" that ballot.

This interpretation is supported by the principles of statutory construction. Further, as indicated above, the object of statutory construction is "to ascertain and effectuate the intent of the General Assembly" and the "statute's plain language generally provides the best indication of legislative intent." *A.S. v. Pa. State Police*, 143 A.3d 896, 903 (Pa. 2016). "Having voted" and "cast" are not defined in the Election Code and the Commonwealth Court did not necessarily conclude that the terms have technical meanings. In fact, the Commonwealth Court considered dictionary definitions that demonstrate that the terms are not ambiguous. *See Genser v. Butler Cnty. Bd. of Elections* (Pa. Cmwlth., No. 1074 C.D. 2024, filed Sept. 5, 2024) slip op. at 13.

Simply put, however, all the smoke and mirrors in the world cannot detract from the straightforward conclusion that the language of Section 1210 is unambiguous—a provisional ballot cannot be counted if the county already received a mail-in or absentee ballot from the voter. It's that simple.

IV. CONCLUSION

The Commonwealth Court erred in its interpretation of the Election Code because there is no ambiguity in the provisions at issue that direct that a voter cannot submit a provisional ballot after submitting a mail-in or absentee ballot. In so doing, the Commonwealth Court created an impermissible cure procedure for mail-in and absentee voters that contravenes this Court's precedent and has wide-ranging negative implications. Thus, for the reasons expressed above, this Court should reverse the Commonwealth Court's decision.

Respectfully submitted,

Dated: September 26, 2024

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WORD COUNT CERTIFICATION

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Dated: September 26, 2024 /s/ Matthew H. Haverstick