

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1172 C.D. 2024

**REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF
PENNSYLVANIA; and WASHINGTON COUNTY BOARD OF ELECTIONS,**

Appellants,

v.

**CENTER FOR COALFIELD JUSTICE, WASHINGTON BRANCH NAACP,
BRUCE JACOBS, JEFFREY MARKS, JUNE DEVAUGHN HYTHON,
ERIKA WOROBEK, SANDRA MACIOCE, KENNETH ELLIOTT and
DAVID DEAN,**

Appellees.

**BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AND THE
PENNSYLVANIA DEMOCRATIC PARTY AS *AMICI CURIAE*
IN SUPPORT OF APPELLEES**

Appeal from the August 23, 2024 Opinion and Order of the Court of Common
Pleas of Washington County, Pennsylvania at Docket No. 2024-3953

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September 11, 2024

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INTEREST OF AMICI CURIAE

The Democratic National Committee (“DNC”) is the Democratic Party’s national committee, as that term is defined in 52 U.S.C. §30101(14). The Pennsylvania Democratic Party (“PDP”) is the DNC’s official state affiliate within Pennsylvania, overseeing 67 subsidiary county committees; it is a major political “party” as defined in 25 P.S. §2602. The DNC and PDP regularly support the election of candidates to Pennsylvania’s federal, state, and local offices, and defend the right of eligible voters to vote for those candidates.

The DNC and PDP file this brief because they each have members and constituents across the Commonwealth, including eligible voters in Washington County, who may inadvertently and unknowingly submit deficient mail and absentee ballots. Such voters require notification of any such deficiencies in order to exercise their statutory right under the Election Code to vote provisionally on election day. Without notification and the opportunity to vote provisionally, these voters would be disenfranchised—as they are under Washington County’s recently adopted policy. The DNC and PDP each have a concrete interest in protecting their voters from such disenfranchisement.

Additionally, as the lead plaintiff in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (“*Boockvar*”), the PDP offers its unique

perspective on that case to explain its consistency with the relief the trial court ordered here.

INTRODUCTION

As this Court explained just last week in *Genser v. Butler County Board of Elections*, 2024 Pa. Commw. Unpub. LEXIS 479 (Pa. Commw. Ct. Sept. 5, 2024), the fundamental purpose of the Election Code is “to obtain freedom of choice, a fair election, and an honest election return,” *id.* at *38 (quoting *Boockvar*, 213 A.2d at 783). That purpose, this Court concluded, “is advanced by ensuring that each qualified elector has the opportunity to vote **exactly once** in each ... election. Not zero times, which would deprive an elector of the freedom of choice, and not twice, which would prevent an honest return.” *id.* at *38-39.

Various parts of the Election Code seek to effectuate this purpose, providing that if a voter’s ballot is at risk of disqualification, the voter may take steps to ensure that she casts a ballot that will count. The voter may vote provisionally or appeal the disqualification of her ballot to the Court of Common Pleas. These statutory rights plainly contemplate the sharing of accurate information about the status of voters’ ballots. And the Secretary of the Commonwealth, under his statutory authority to standardize the recording and sharing of election information, has provided for the recording and sharing of the pertinent information in the statewide elections database. At issue in this case is whether Washington County (or any other

county) can purposefully thwart the flow of information in a way that misleads voters, deprives them of their statutory right to cast a ballot that will be counted, and needlessly confuses election officials. Under both the Election Code and the Pennsylvania Constitution, the answer is no.

The Election Code's ultimate fail-safe is the provisional ballot. As *Genser* held, mail- and absentee-ballot voters may “vote provisionally” and have their provisional votes counted “under some circumstances.” 2024 Pa. Commw. Unpub. LEXIS 479, at *1-2. The code provides that an individual who requested a mail or absentee ballot and “is not shown on the district register as having voted *may vote by provisional ballot*” upon affirming that the provisional ballot is the only ballot they will cast. 25 P.S. §3150.16(b)(2) (mail); *id.* §3146.6(b)(2) (absentee) (emphasis added for each); *id.* §3050(a.4)(2) (voter affirmation). To effectuate this statutory right to vote provisionally—a right that must be exercised on election day, *id.* §3050(a.2), (a.4)(5)(i)—such an individual must be made aware *on or before* election day that they will “not [be] shown on the district register as having voted,” *id.* §§3146.6(b)(2), 3150.16(b)(2). If a voter does not know whether their county board has identified any defects in their mail or absentee ballot that would preclude their vote from being counted, they have no reason to go to their election place and cast a provisional ballot.

In addition, the Election Code permits challenges to board determinations that a ballot should not be counted before the Court of Common Pleas. 25 P.S. §3157(a). As the trial court recognized here, that advocacy is thwarted if the board withholds accurate information about the status of a ballot. Op.20-22.

But the Washington County Board of Elections (“Board”) has chosen to actively withhold information from voters. Even worse, the Board encodes the status of defective ballots into the Statewide Uniform Registry of Electors (“SURE”) system in a manner that *misinforms* voters about their ballot status. This conduct deprives voters of their statutory right to cast a provisional ballot. It also deprives voters of their fundamental right to vote, without the due process the Pennsylvania Constitution guarantees. Because ensuring eligible voters have the information they need to cast a counted ballot is central to Pennsylvania’s election system, the trial court was correct to order the Board to “input the accurate status of [voters’ mail ballots] in the SURE system and provide the status to the elector if requested.” Op.2. This Court should affirm.*

* The Board does not offer this Court a single word in defense of its practice, but simply “agrees with, adopts and ... joins” the brief submitted by the Republican National Committee and the Republican Party of Pennsylvania (Wash. Co. Br.8). That speaks volumes. While the Board may have adopted the practice out of opposition to the use of provisional ballots to “cure” defective mail ballots, *Genser* has clarified that provisional voting is not “cure” at all; and the decision leaves counties with no discretion to interfere with Pennsylvanians’ statutory right to vote by provisional ballot.

ARGUMENT

I. THE BOARD'S PRACTICE THWARTS, AND CANNOT BE RECONCILED WITH, THE PROTECTIONS THE ELECTION CODE PROVIDES TO VOTERS

A. The Election Code Requires County Boards Of Elections To Maintain Timely And Accurate Records Regarding The Status Of Voters' Mail And Absentee Ballots

County boards of elections are responsible for ensuring that elections in their respective counties are “honestly, efficiently, and uniformly conducted.” 25 Pa.C.S. §2642(g). To help boards do so, the legislature directed the Department of State to “develop and establish ... a single, uniform integrated computer system”—known as the “SURE system”—to which all county boards “shall be connected” and in which all county boards “shall maintain ... records.” *Id.* §1222(a), (c).

Specifically, each county board “shall maintain ... records,” 25 Pa.C.S. §1222(c), in the SURE system in a manner that “[p]ermit[s] the timely printing and transmission ... of district registers”—commonly known as poll books—complete with whatever information “may be necessary for the operation of the polling places on election days.” *Id.* §1222(c)(13). That includes records that accurately identify which voters have “vote[d] in an election and the method by which their ballots were cast.” *Id.* §1222(c)(20). Such records also are independently “necessary for the operation of the polling places on election days,” *id.* §1222(c)(13), because the Election Code provides that individuals who have already voted by mail or absentee

ballot “shall not be eligible to vote at a polling place on election day,” 25 P.S. §3150.16(b)(1) (mail); *id.* §3146.6(b)(1) (absentee). By contrast, individuals who requested a mail or absentee ballot but who are “*not* shown on the district register as having voted *may vote by provisional ballot*” at their polling place on election day, *id.* §3150.16(b)(2) (mail); *id.* §3146.6(b)(2) (absentee) (emphases added), provided they affirm that their provisional ballot is the only ballot they will cast in the election, *id.* §3050(a.4)(2).

The Election Code also requires the Department of State to promulgate (which it has) instructions for “administer[ing] the SURE system,” including “[u]niform procedures for ... entering information into the ... system.” 25 Pa.C.S. §1222(f); *see also* Pennsylvania Department of State, *Changes to SURE VR and PA Voter Services as of March 11, 2024* (“*SURE Guidance*”). As relevant here, the Department has provided various codes for county boards to record the status of mail and absentee ballots in the SURE system. *See SURE Guidance* at 6-11.

To record a ballot as timely returned, the Department instructs that county boards should use the SURE system’s “RECORD – BALLOT RETURNED” code. *SURE Guidance* at 10. When a voter’s ballot is so coded in the system, the voter automatically receives an email from the Department of State informing the voter that, absent any further notification stating otherwise, “you are no longer permitted to vote at your polling place location.” *Id.* That message reflects the Election Code’s

provision—designed to prevent double voting—that “[a]ny elector who ... votes a mail-in ballot ... shall not be eligible to vote at a polling place on election day.” 25 P.S. §3150.16(b)(1); *see also* 25 P.S. §3146.6(b)(1) (same for absentee voters).

Other SURE codes are used for mail or absentee ballots with disqualifying errors, including “NO DATE,” “INCORRECT DATE,” “NO SECRECY ENVELOPE,” and “NO SIGNATURE.” *SURE Guidance* at 8-9. These codes are generally referred to as “CANC” codes, where “CANC” is shorthand for “canceled.” (In counties offering notice and cure, “PEND” codes, i.e. “pending” codes, serve a similar purpose. *Id.* at 2.) A voter whose ballot is given a CANC code receives an email from the Department of State informing the voter that her ballot “may not be counted.” *Id.* at 6-8. Consistent with the Election Code’s provision that “[a]n elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot,” 25 P.S. §3150.16(b)(2); *see also* 25 P.S. §3146.6(b)(2) (same for absentee voters), the email triggered by a “CANC” code notifies the voter that “you can go to your polling place on election day and cast a provisional ballot,” *SURE Guidance* at 8-9.

To preserve the statutory right to vote provisionally, it is essential that county boards use accurate SURE codes, because (as just explained) the board’s coding determines whether the Department of State notifies voters whether they may cast a provisional ballot. Such information is also essential to enable challenges to board

determinations to disqualify ballots—a right the Election Code also confers to protect the fundamental right to vote. *See* 25 P.S. §3157(a).

B. The Board’s Practice Illegally Deprives Voters Of Timely And Accurate Notice Regarding The Status Of Their Mail Or Absentee Ballots, Thereby Depriving Voters Of Their Statutory Right To Vote Provisionally

The Washington County Board of Elections misinforms voters about the status of their mail and absentee ballots by refusing to apply the correct SURE code. Instead of coding ballots that have disqualifying errors (errors which the Board does not allow to be cured) as “canceled,” which triggers a notice to the voter that he or she may cast a provisional ballot at his or her polling place on election day, the Board codes such ballots as timely received, triggering notice that the voter may *not* cast a ballot at his or her polling place on election day. *SURE Guidance* at 10.

The Board’s practice deprives voters of their statutory right to cast a provisional ballot where their mail or absentee ballot contains a disqualifying error. That is because, to effectuate their statutory right to vote provisionally, voters must have accurate information about their status on or before election day—both to know *that* they must travel to their polling place to vote in person by provisional ballot, and also to be able to faithfully affirm that their provisional ballot is the only one they cast in the election, 25 P.S. §3050(a.4)(2). When a county board does not

accurately code a voter's mail or absentee ballot as deficient in SURE, it thus deprives the voter of her right to vote provisionally on election day.

C. *Boockvar* Does Not Permit The Board To Mislead Voters And Thereby Deny Their Statutory Right To Vote Provisionally

The Pennsylvania Supreme Court explained in *Boockvar* that “the purpose and objective of the Election Code ... is ‘to obtain freedom of choice, a fair election and an honest election return,’” and that the code therefore “should be liberally construed so as not to deprive ... electors of their right to elect a candidate of their choice.” 238 A.3d at 356 (quoting *Perles v. Hoffman*, 213 A.2d 781, 783 (1965)). Here, that principle confirms the unlawfulness of the Board's conduct, which *does* “deprive ... electors of their right to elect a candidate of their choice,” *id.*

Appellants incorrectly argue (Br.32-38) that *Boockvar* actually *forecloses* the relief ordered here. That argument rests on the premise that provisional voting is a form of “curing” ballot defects, which *Boockvar* held could not be judicially mandated, 238 A.3d at 375. That premise is doubly flawed. First, the right to vote provisionally is conferred by *statute*, 25 P.S. §3150.16(b)(2), not by the grace of individual counties. Second, this Court's decision in *Genser* forecloses the premise. As this Court explained, “the Code independently authorizes electors to vote by provisional ballot,” such that a “provisional ballot is a separate ballot, not a cured initial ballot.” 2024 Pa. Commw. Unpub. LEXIS 479, at *43.

Boockvar, moreover, did not involve the right to cast provisional ballots, nor did it involve counties' obligations to code the status of mail ballots into the SURE system accurately. Indeed, *Boockvar* did not mention the SURE system at all, and it discussed provisional ballots only in the context of observing that they must be placed in secrecy envelopes. The relevant question there was whether county boards would be ordered to "contact qualified electors whose mail-in or absentee ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail, *and provide them with the opportunity to cure those defects*" during a seven-day, post-election period. 238 A.3d at 372 (emphasis added). The Court held that such a detailed notice-and-cure framework, permitting post-election day acts by voters affecting which ballots would be counted, could not be imposed judicially. *See id.* at 372-375. Rather, *Boockvar* ruled that how and whether to mandate county boards to provide voters the post-election opportunity to correct deficient ballots involved a judgment "best suited to the Legislature," given "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." *Id.* at 374.

Here, by contrast, there are no open policy questions. The trial court did not create a new process; it applied the Election Code, which mandates that "[a]n elector

who requests a mail-in ballot and who is not shown on the district register as having voted *may vote by provisional ballot.*” 25 P.S. §3150.16(b)(2) (emphasis added). The legislature has also provided a right to challenge board determinations to disqualify mail ballots to the Court of Common Pleas. *Id.* §3157(a). The question is simply whether county boards must accurately enter the voters’ status into the SURE system so that voters have access to the information necessary to exercise those rights. For all the reasons given, the answer under a proper interpretation of the Election Code is yes.

In short, the trial court was thus correct to reject appellants’ reliance on *Boockvar*. Op.23.

II. THE PENNSYLVANIA CONSTITUTION’S DUE-PROCESS PROTECTIONS INDEPENDENTLY REQUIRE THAT VOTERS RECEIVE ACCURATE INFORMATION IN ORDER TO ALLOW THEM TO EXERCISE THEIR RIGHT TO VOTE

A. The Pennsylvania Constitution Prohibits Denying The Right To Vote Without Due Process

The first article of the Pennsylvania Constitution—the “Declaration of Rights”—“is an enumeration of the fundamental individual human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of the Commonwealth government to diminish.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 803-804 (Pa. 2018). “The guarantee of due process of law, in Pennsylvania jurisprudence, emanates from a number of provisions of the

Declaration of Rights,” including article I, section 1. *Khan v. State Board of Auctioneer Examiners*, 842 A.2d 936, 945 (Pa. 2004). This due-process guarantee is more robust—giving greater protection to a broader range of rights—than its federal counterpart. *See Marchionni v. Southeastern Pennsylvania Transportation Authority*, 715 A.2d 559, 562 n.2 (Pa. Commw. Ct. 1998). For example, the Pennsylvania Constitution establishes a due-process “interest in preserving [one’s] reputation,” Pa. Const. art. I, §1, an interest not protected by the U.S. Constitution, *R. v. Department of Public Welfare*, 636 A.2d 142, 152-153 (Pa. 1994).

More generally, the Pennsylvania Supreme Court has recognized that “[p]rocedural due process” is an “axiom of American jurisprudence,” one that “imposes constraints on governmental decisions which deprive individuals of ... fundamental rights.” *Washington v. Pennsylvania Department of Corrections*, 306 A.3d 263, 284 (Pa. 2023). The right to vote is among the fundamental rights that the Pennsylvania Constitution affords due-process protection: That right is enshrined in the Declaration of Rights, *see* Pa. Const. art. I, §5, from which the Pennsylvania Constitution’s due-process guarantee “emanates,” *Khan*, 842 A.2d at 945. And the Pennsylvania Supreme Court has made clear time and again that the right to vote is “fundamental.” *Boockvar*, 238 A.3d at 382; *see also Applewhite v. Commonwealth*, 54 A.3d 1, 3 (Pa. 2012). Indeed, “the right to vote” has been expressly identified as a “fundamental” right entitled to due process protections. *Bert Co. v. Turk*, 298 A.3d

44, 86 n.11 (2023) (Wecht, J., concurring). The Declaration further provides that the fundamental rights it enumerates must be read together, because “everything in [Article I] is excepted out of the general powers of the government and shall forever remain inviolate.” Pa. Const. art. I, §25. Thus, the right for an eligible voter to cast a ballot that will be counted cannot be deprived without due process—namely without “notice and an opportunity to be heard at a meaningful time and in a meaningful matter,” *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018) (citation and quotation marks omitted).

B. The Board Violates Procedural Due Process When It Withholds From Voters Information That Their Mail Ballots Have Been Segregated As Invalid

To evaluate the scope of the Pennsylvania Constitution’s broad guarantee of procedural due process, the Pennsylvania Supreme Court is guided by the three-part test from *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See R.*, 636 A.2d at 153. Under that test, courts look to (1) “the private interest that will be affected by the official action,” (2) “the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements will entail.” *R.*, 636 A.2d at 146. Applying these factors here makes

clear that due process requires that voters receive accurate information in order to allow them to exercise their right to vote.

i. The “protected interest” that is being deprived, *R.*, 636 A.2d at 153, is the fundamental right to vote. As the Pennsylvania Supreme Court has explained, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *In re Nomination Papers of Nader*, 858 A.2d 1167, 1180 (Pa. 2004) (quotation marks and subsequent history omitted). Simply put, the right to vote as guaranteed by Pennsylvania Constitution is “sacred.” *Page v. Allen*, 58 Pa. 338, 347 (1868).

When a county board segregates a voter’s mail or absentee ballot for a deficiency, yet codes the ballot in the SURE system in a way that obfuscates the ballot’s disqualification, the voter is disenfranchised. The voter has no way to know she must go to her polling place on election day and vote by provisional ballot, and no way to know she may challenge the purported bases for disqualification in court. This deprivation is real: In the 2024 primary alone, Washington County disenfranchised 259 mail voters who timely returned defective mail ballots, comprising 2% of the electorate that voted by mail. Stip. Facts ¶¶51-52. There is thus no doubt that the Board’s policy deprives Pennsylvanians of their fundamental right to vote.

ii. The policy also creates a high risk of erroneous deprivation of the fundamental right to vote, while the value of additional safeguards is considerable. There is a high risk of erroneous deprivation because when voters are not informed that their mail ballots have been segregated due to deficiency (or, worse, are *misinformed* by automated email that “you are no longer permitted to vote at your polling place location,” *SURE Guidance* at 10), they have no reason to take further action to cast valid votes. Indeed, in Washington County, they are instructed they may not take any further action at all.

Even if a Washington County mail or absentee voter knew about the Board’s policy and tried to vote provisionally on election day out of an abundance of caution, she could not do so, for two reasons. First, because of the Board’s withholding of information about whether the voter’s mail or absentee ballot was disqualified, the voter could not faithfully execute the required provisional-ballot attestation that “this is the only ballot that I cast in this election,” 25 P.S. §3050(a.4)(2). Second, if, as here, the Board coded disqualified mail ballots as “received,” the voter would be “shown on the district register as having voted” and could face complications in voting provisionally. *Id.* §3150.16(b)(2); *see* Stip. Facts ¶46.

The Board’s policy also risks erroneously depriving Washington County residents of their right to vote by making it exceedingly difficult for them to avail themselves of the Election Code’s post-election procedure to challenge the Board’s

decision to not count their mail or absentee ballots. The code provides that “[a]ny person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election” may appeal within two days to the appropriate county Court of Common Pleas. 25 P.S. §3157(a). If a voter’s mail or absentee ballot is not counted, that voter cannot challenge the decision until *after election day*. See *id.* §3146.8(g). And if the voter loses such a challenge, it is too late to cast a provisional ballot, so he or she is disenfranchised. The risk of error in such a system is self-evident.

The value of additional safeguards, meanwhile, is considerable because they allow eligible voters to take additional steps to ensure their votes will be counted. County boards that (unlike Washington County) properly code ballots segregated due to deficiencies provide voters with the information they need to vote provisionally on election day. Indeed, the record in *Genser* demonstrates that voters who receive the automated email notice through the SURE system that their ballots were disqualified routinely show up to vote provisionally. See generally *Genser*, 2024 Pa. Commw. Unpub. LEXIS 479, at *12-13.

iii. Finally, there is no cognizable burden on the Board from having to *correctly* enter into the SURE system the status of ballots that were segregated on receipt due to one or more errors. The Board is already scanning these ballots into SURE, as the Election Code requires, and the record here confirms that even in the

2024 primary, the Board continued to segregate deficient mail and absentee ballots before scanning them into the SURE system. Stip. Facts ¶¶2, 42. Requiring the Board's staff to select the correct option from the SURE system's drop-down menu imposes no additional administrative burden.

Any reliance on *Boockvar* to argue otherwise would be misplaced. The court there considered the burden associated with imposing non-statutory notice-and-cure procedures on counties not equipped to administer them. See 238 A.3d at 372-375. The court did not consider whether counties that already code ballot status into the SURE system (as they are required to do) must do so accurately so as to enable their voters to exercise their right to vote provisionally in the event their mail or absentee ballots are deemed defective.

In short, the right at stake is enormously important; the challenged policy creates a high risk of that right being erroneously deprived; additional safeguards would meaningfully diminish if not eliminate that risk; and there is little or no burden on the government from imposing those safeguards. All factors here thus point in the same direction: The Board's policy violates due process.

CONCLUSION

The decision of the trial court should be affirmed.

September 11, 2024

Respectfully submitted,



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/s/ Clifford B. Levine

CERTIFICATE OF LENGTH

According to the word-count function of the word-processing system used to prepare the brief, this brief contains 4,075 words that are countable under Pennsylvania Rule of Appellate Procedure 2135(a)(1), excluding the cover page, table of contents, and table of authorities.

/s/ Clifford B. Levine

CERTIFICATE OF SERVICE

On September 11, 2024, I caused the foregoing to be electronically filed and to be served via the Court's electronic filing system on counsel of record for each party listed on the docket.

/s/ Clifford B. Levine