

# IN THE SUPREME COURT OF PENNSYLVANIA

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No. 28 WAP 2024

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Center for Coalfield Justice, Washington Branch NAACP, Bruce Jacobs,  
Jeffrey Marks, June Devaughn Hython, Erika Worobec, Sandra Macioce,  
Kenneth Elliott, and David Dean,

*Appellees,*

v.

Washington County Board of Elections, Republican National Committee,  
and Republican Party of Pennsylvania,

*Appellants.*

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## AMICUS BRIEF OF AFT PENNSYLVANIA AND THE PENNSYLVANIA ALLIANCE FOR RETIRED AMERICANS IN SUPPORT OF APPELLEES

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## INTERESTS OF AMICI CURIAE

AFT Pennsylvania (“AFTPA”)—the state affiliate of the American Federation of Teachers—is a union of professionals with a mission to champion fairness, democracy, and economic opportunity, as well as high-quality public education, healthcare, and public services, for its members and their communities. Among its more than 25,000 members across 55 local affiliates in Pennsylvania are public school educators and support staff, higher-education faculty, and other public employees such as social workers. AFTPA is committed to advancing its principles through community engagement, organizing, collective bargaining, and political activism. Ensuring that its members can cast an effective ballot is critical to AFTPA’s ability to advance the welfare of its members and achieve sound, commonsense public education policy through the political process. To that end, AFTPA has fought for its members’ right to vote in recent litigation in federal and state courts. See, e.g., *Eakin v. Adams Cnty. Bd. of Elections*, No. 1:22-cv-340 (W.D. Pa.); *Genser v. Butler Cnty. Bd. of Elections*, Nos. 26 WAP 2024, 27 WAP 2024 (Pa.). Because AFTPA members typically work on election day, many rely on mail ballots to exercise their right to vote.<sup>1</sup> At

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<sup>1</sup> Amici use the terms “mail ballots” and “mail voting” to encompass both absentee ballots, see 25 P.S. § 3146.6; and mail-in ballots, see 25 P.S. § 3150.16.

least 1,500 of AFTPA's members across more than 35 counties in Pennsylvania cast mail ballots in the 2022 general elections. Any policy that does not provide accurate notice of disqualifying errors on the mail ballots of AFTPA members, depriving them of an opportunity to contest those errors or take corrective action, threatens to disenfranchise those lawful voters.

The Pennsylvania Alliance for Retired Americans ("PARA") is a 501(c)(4) nonprofit social welfare organization serving and representing over 335,000 members in Pennsylvania, including in Washington County. Its membership is composed of retirees (most of whom are over the age of 65, from public and private sector unions), community organizations, and individual activists. PARA is a chartered state affiliate of the Alliance for Retired Americans, one of the country's leading grassroots senior organizations, whose mission is to ensure social and economic justice and to protect the civil rights of retirees after a lifetime of work. To advance that mission, PARA engages in important political efforts to protect and preserve programs vital to the health and economic security of retirees. As such, PARA has a distinct interest in procedures affecting the ability of its members to cast an effective vote in Pennsylvania's elections. Due to age or health difficulties, PARA's members disproportionately rely on mail voting to participate in the political process. Like AFTPA's members, PARA's



members who vote by mail will be at risk of disenfranchisement if they do not have accurate notice of disqualifying errors on their mail ballots.

Both AFTPA and PARA are nonpartisan organizations whose missions naturally support enfranchising eligible Pennsylvanians to the greatest extent possible. But mail ballot rejections have haunted Pennsylvania voters—including AFTPA and PARA members—in every election since Act 77’s enactment of universal no-excuse mail voting in 2019. In the November 2022 elections, for example, over 16,000 mail ballots were not counted because the voter forgot to place their ballot inside a secrecy envelope or did not sign or adequately date the mail ballot’s outer envelope.<sup>2</sup> In the 2023 primary elections, approximately 9,044 mail ballots were not counted for these same set of deficiencies.<sup>3</sup> And, in the 2024 primaries, about 8,600 voters submitted mail ballots that were not counted for the same reasons.<sup>4</sup> Taken together,

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<sup>2</sup> Mark Scolforo, *Majority of 16k canceled Pa. mail-in ballots were from Dems*, Assoc. Press (Jan. 6, 2023), <https://apnews.com/article/2022-midterm-elections-pennsylvania-united-states-government-a1c75c9cfc2f1bfca21ac4a4cbfe60f0>.

<sup>3</sup> *Shapiro Administration Introduces Redesigned Mail Ballot Materials to Give Voters Clearer Instructions, Decrease Number of Rejected Ballots, and Ensure Every Legal Vote is Counted*, Pa. Pressroom (Nov. 29, 2023), <https://www.media.pa.gov/pages/state-details.aspx?newsid=584>.

<sup>4</sup> See Decl. of Ariel Shapell in Supp. of Pls.’ Action for Declaratory J. ¶ 14, *Ctr. for Coalfield Just. v. Washington Cnty. Bd. of Elections*, No. 2024-3953 (C.P. Washington filed July 1, 2024), available at [https://www.aclupa.org/sites/default/files/field\\_documents/ccj\\_v.\\_washington\\_boe\\_complaint\\_filed.pdf](https://www.aclupa.org/sites/default/files/field_documents/ccj_v._washington_boe_complaint_filed.pdf) (PDF p. 103).

tens of thousands of ballots have been rejected because of technical errors in just the last two years alone.

Consequently, both AFTPA and PARA support opportunities for Pennsylvania voters to exercise their right to vote by mail and oppose the outcome sought here by the Appellants: depriving voters of the opportunity to ensure that their votes will count because they lack accurate notice of a disqualifying error on their mail ballot. See *Ctr. for Coalfield Just. v. Washington Cnty. Bd. of Elections*, No. 1172 C.D. 2024, 2024 WL 4272040, at \*8 (Pa. Commw. Ct. Sept. 24, 2024).

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## SUMMARY OF ARGUMENT

In each election since at least 2020, *thousands* of Pennsylvania voters have had their mail ballots set aside by county boards because of minor (but apparent) technical errors, such as a missing date or a missing signature. The Pennsylvania Election Code provides two critical protections to electors whose mail ballots are set aside due to such errors. First, 25 P.S. § 3157(a) gives “[a]ny person aggrieved” by a board’s decision to reject their ballot a right to challenge that in the Court of Common Pleas so long as that challenge is brought within two days of the board’s decision. Second, the Election Code allows an elector to appear at the polling place on election day and cast a provisional ballot. See 25 P.S. § 3050(a.4).

To ensure an elector can timely utilize these protective measures, they must first be aware that their mail ballot has been flagged for rejection. And the Pennsylvania Constitution’s guarantee of procedural due process *requires* that voters are not denied their right to vote without fair and accurate notice, so that they can either challenge the board’s decision not to count their mail ballot or cast a provisional ballot instead. The decision to reject a mail ballot based on a technical defect is plainly an adjudicative act, not a legislative one, therefore triggering the application of procedural due process. And while the consequences of the failure to provide adequate

process are dire—a near certainty of complete disenfranchisement—there is no state interest in refusing to provide the required notice. In fact, it is nearly burden-free for the county board to provide such notice; doing so is a simply matter of entering the correct designation into the SURE system, which will send notice to the affected voter and the district register.

This Court’s decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), is not to the contrary. The plaintiffs in *Boockvar* sought a statewide “notice and opportunity to cure” procedure and rested their arguments on the Free and Equal Elections Clause, not due process. *Id.* at 373–74. The question here is whether procedural due process requires, at a minimum, that voters be notified when their ballots are set aside for technical errors so that they can avail themselves of their statutory rights to challenge that determination or take corrective action. As amici previously explained in a related appeal, such procedures are entirely distinct from ballot “curing.” See *generally* Amicus Br. of AFTPA and PARA in Supp. of Appellees, *Genser*, No. 26 WAP 2024 (Pa. filed Sept. 26, 2024) (“Amici’s *Genser* Br.”).

The trial court correctly ordered the Washington County Board of Elections to give effect to the statutory and constitutional protections available to Pennsylvania voters by requiring accurate notice. It follows as a

corollary to that conclusion that the county board must input the correct ballot status into the SURE system and the district register when it reviews a mail ballot. This is necessary to ensure that voters are given accurate information; to avoid the possibility that voters will receive conflicting reports from county officials and the SURE system; and to ensure, consistent with due process, that electors with alleged mail ballot defects have a meaningful opportunity to be heard or to cast a separate provisional ballot.

### **ARGUMENT**

The procedural due process guarantee of the Pennsylvania Constitution, Pa. Const. art. I, § 1, requires that electors be provided accurate notice when their county board identifies a disqualifying error on their mail ballot. Under the U.S. Supreme Court’s *Mathews* test—adopted by this Court to determine what process is required by the Pennsylvania Constitution—inaccurate, conflicting, or untimely notice risks depriving voters of their liberty interest in exercising the right to vote by mail.<sup>5</sup>

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<sup>5</sup> Although Appellants initially argued that the federal *Anderson-Burdick* framework should apply here, see *Ctr. for Coalfield Justice*, 2024 WL 4272040, at \*2, they have since abandoned that argument and concede that the three-part *Mathews* test governs. See Principal Br. of Appellants Republican National Comm. & Republican Party of Pa. at 19 (“Appellants’ Br.”).

**I. Failure to provide accurate notice of disqualifying errors violates procedural due process.**

Procedural due process protections are “implicated . . . by adjudications,” *Small v. Horn*, 722 A.2d 664, 671 (Pa. 1998), where “there is a life, liberty, or property interest that the state has interfered with,” *Commonwealth v. Turner*, 80 A.3d 754, 764 (Pa. 2013). An adjudicative act is one “that affect[s] one individual . . . and appl[ies] existing laws or regulations to facts that occurred prior to the adjudication.” *Sutton v. Bickell*, 220 A.3d 1027, 1032 (Pa. 2019) (quoting *Small*, 722 A.2d at 671 n.12).

When adjudicative acts result in the rejection of a mail ballot, this Court must “examine[] whether the procedures attendant to that deprivation were constitutionally sufficient.” *Turner*, 80 A.3d at 764. “Ascertaining what process is due entails a balancing of three considerations: (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state.” *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Here, inaccurate, conflicting, confusing, or otherwise deficient notice deprives electors of statutory rights that the General Assembly has granted to effectuate the right to vote—whereas the

accurate, timely notice ordered by the trial court remedies that constitutional violation.

**A. The decision to set aside a mail ballot for a disqualifying defect is an adjudicative act.**

Setting aside individual ballots for disqualifying defects is an adjudicative decision. Doing so without adequate notice deprives electors who have cast allegedly defective mail ballots the opportunity “to contest their disqualification . . . [or] cast a provisional ballot on election day.” *Ctr. for Coalfield Just.*, 2024 WL 4272040, \*7. When a county board segregates and does not canvass a mail ballot for perceived noncompliance with statutory requirements, it is applying the Election Code to facts that occurred prior to its receipt of the ballot (i.e., the elector’s actions completing and submitting the mail ballot). *Cf. Kowenhoven v. County of Allegheny*, 901 A.2d 1003, 1009 (Pa. 2006) (“Due process principles apply to quasi-judicial or administrative proceedings.”). Because decisions to segregate and not canvass mail ballots for disqualifying defects bind electors on an individual basis, they are quintessential adjudications for the purposes of procedural due process. *Cf. Washington v. PA Dep’t of Corr.*, 306 A.3d 263, 297–99 (Pa. 2023) (recognizing that acts that “do[] not simply apply . . . across the board” are not “legislative acts” immune from requirements of procedural due process).

**B. Electors have liberty interests in exercising the fundamental right to vote using mail ballots.**

A county board's decision to set aside a voter's mail ballot threatens to deny that individual's right to vote and implicates at least two "state-created statutory entitlements" that must be given full effect in order to satisfy due process. *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) (citing *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970), and *Paul v. Davis*, 424 U.S. 693, 710–12 (1976)). The first is the statutory right under the Pennsylvania Election Code to appeal "any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election." 25 P.S. § 3157(a). This statutory right is held by "[a]ny person aggrieved," *id.*, and, because Pennsylvania offers universal mail-in voting, by any qualified elector whose ballot is segregated, see 25 P.S. § 3150.11. The appeal, however, must be filed within two days of the county board's decision. 25 P.S. § 3157(a). The second statutory entitlement is the right to cast a provisional ballot. See 25 P.S. § 3050(a.4); see also Amici's *Genser Br.* at 11–16, 19–22.

Appellants dispute whether the right to vote is a liberty interest, see Appellants' Br. at 20–21, 26–29, but their argument is at odds with "the vast majority of [federal] courts" that have extended due process protections to forms of mail-in or absentee voting authorized by state law. *Frederick v.*



*Lawson*, 481 F. Supp. 3d 774, 792–93 (S.D. Ind. 2020); *see also, e.g., Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 227 (M.D.N.C. 2020) (finding “protected liberty interest in the counting of [plaintiffs’] votes when submitted through absentee voting”); *Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1052 (D.N.D. 2020) (holding that absentee voting regime must be administered in compliance with procedural due process requirements); *Martin*, 341 F. Supp. 3d at 1337–38 (concluding that statutory “absentee voting regime” implicates liberty interest in right to vote and must be administered “with constitutionally adequate due process protection”); *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1030–31 (N.D. Fla. 2018) (recognizing that signature matching for mail and provisional ballots “presents procedural due process concerns”); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) (finding liberty interest in right to vote by absentee ballot); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at \*6 (N.D. Ill. Mar. 13, 2006) (“Under the Illinois Election Code, [absentee] voters risk the deprivation of their vote, a liberty interest, based on factual issues relating to their ballot.”).

Moreover, as the Commonwealth Court reiterated, “the protections of due process afforded under the Pennsylvania Constitution are broader than the protections afforded under the United States Constitution.” *Ctr. for*

*Coalfield Just.*, 2024 WL 4272040, at \*7 (alteration adopted) (quoting *Marchionni v. Se. Pa. Transp. Auth.*, 715 A.2d 559, 562 n.2 (Pa. Commw. Ct. 1998)). “The Federal Constitution has no counterpart to Article I, Section 1.” *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Hum. Servs.*, 309 A.3d 808, 897 (Pa. 2024). “Article I, Section 1 secures rights that are inherent and inalienable,” and it is “an enumeration of the fundamental human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of Commonwealth government to diminish.” *Id.* at 897–98 (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 803 (Pa. 2018)). Of course, these fundamental rights include the procedural due process guarantee and the “right of suffrage.” Pa. Const. art. I, § 5. The critical question here is not whether inaccurate or confusing notice of disqualifying mail-ballot defects violates the “*free and equal . . . exercise of the right of suffrage*,” *id.* (emphasis added), but whether such deficient notice may deprive electors of statutory rights that effectuate the fundamental right to vote. *Cf. Boockvar*, 238 A.3d at 372–74 (concluding that the Free and Equal Elections Clause does not mandate the provision of cure procedures by all county boards).

“Whether an interest in benefits or protections provided by the government is entitled to due process protections depends on the nature of

the government activity and the citizen's dependency and reliance on that activity." *Pa. Coal Mining Ass'n v. Ins. Dep't of Commonwealth*, 370 A.2d 685, 690 (Pa. 1977). Because the General Assembly has created statutory rights to effectuate the fundamental right to vote, the inability to exercise those rights implicates liberty interests subject to procedural due process protections of the Pennsylvania Constitution. See *Turner*, 80 A.3d at 766 (once the legislature "extend[s] a statutory right," it is "constitutionally obligated to ensure that those rights [a]re impacted only in accord with due process.").

**C. Due process requires that electors be provided adequate notice before being denied the right to vote by mail.**

"[T]he central demands of due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *PA Dep't of Corr.*, 306 A.3d at 289 (cleaned up). The "particulars" of what process is due are "determined by consideration of the *Mathews* Test." *Id.* That test requires consideration of: "(1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state." *Bundy*, 184 A.3d at 557 (citing *Mathews*, 424 U.S. at 335). Here, each of those factors weighs in favor of

providing the accurate notice mandated by the Commonwealth Court's decision.

First, the private interest affected by the official action is weighty. If a Pennsylvania elector's mail ballot is set aside because it suffers a defect that could render it uncountable, but that elector does not have knowledge of that fact, the elector is deprived of crucial protections of their right to vote, including their statutory right to seek judicial relief as well as their right to cast a provisional ballot, and will be disenfranchised. See *supra* Section I.B.

Second, the risk of erroneous deprivation is high, as demonstrated by rulings from Pennsylvania courts finding that county boards erred in refusing to canvass ballots. See, e.g., *In re Canvass of Provisional Ballots in 2024 Primary Election*, --- A.3d ---, 2024 WL 4181584, at \*9–10 (Pa. 2024) (finding error in county board's refusal to canvass provisional ballot). And the value of additional procedural safeguards is high. As this Court has recognized, “[t]here is . . . a general preference that procedural safeguards apply in the pre-deprivation timeframe.” *Bundy*, 184 A.3d at 557. In the election context, however, these safeguards *must* apply pre-deprivation, because there is often no recourse post-deprivation—or, in other words, post-election. See *Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020) (recognizing that where the opportunity to participate in an election has been lost, “[n]o

compensation a court can offer could undo that loss”); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“[O]nce the election occurs, there can be no do-over and no redress.”).

Pennsylvanians have only *two days* to appeal a decision of their county board to reject their mail ballot. 25 P.S. § 3157(a). And provisional ballots cannot be cast after election day. See *id.* § 3050(a.4). Absent timely, accurate notice that a previously cast ballot has been determined to have a disqualifying error and will not be counted, the deprivation is *nearly certain*—in fact, deprivation is avoided only if the individual somehow learns of their ballot’s status by other means. Compare *Ctr. for Coalfield Just.*, 2024 WL 4272040, at \*1 (voters learned from Right-to-Know Law request), with *Genser v. Butler Cnty. Bd. of Elections*, No. 1074 C.D. 2024, 2024 WL 4051375, at \*1 (Pa. Commw. Ct. Sept. 5, 2024) (voters “received an automatic email notice” through the SURE system, allowing them to cast provisional ballots and challenge the decisions of Butler County Board of Elections to not count those ballots). Consequently, absent accurate, timely notice, the risk of erroneous deprivation is extremely high.

Meanwhile, providing accurate and timely notice of a ballot defect will ensure that voters have an opportunity to protect their right to vote and cast a countable ballot. In the *Genser* litigation, for instance, both plaintiffs

“received an automatic email notice” through the SURE system, which allowed them to exercise their right to cast a provisional ballot and subsequently challenge the decision of the Butler County Board of Elections to not count those ballots. See 2024 WL 4051375, at \*1. But here, the Washington County Board “prevented inquiring electors from receiving notice as to whether their ballot had been segregated, and on election day, the district poll register only indicated whether an elector had requested a mail-in packet and whether it was received; the register similarly did not indicate whether the ballot had been segregated.” *Ctr. for Coalfield Just.*, 2024 WL 4272040, at \*1. As a result, Washington County voters were deprived of their right to challenge the decision to set their ballots aside and their right to cast a provisional ballot.

Finally, there is no “governmental interest” whatsoever served by refusing to enter accurate information already in the county boards’ possession into the SURE system. *PA Dep’t of Corrections*, 306 A.3d at 287 (citation omitted). Providing such notice will not impose any additional “fiscal and administrative burdens.” *Id.* (citation omitted). In fact, the Washington County Board provided such notice as recently as the 2023 elections before changing course. *Ctr. for Coalfield Just.*, 2024 WL 4272040, at \*8. Furthermore, county boards already enter *some* information about each

received mail ballot into the SURE system in any event. See *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1077 (Pa. 2020); *Bonner v. Chapman*, 298 A.3d 153, 157 n.5 (Pa. Commw. Ct. 2023); Joint Stipulation of Facts ¶ 21 (Ex. F to Appellants' Br.); see also Amicus Br. of Sec'y Al Schmidt and Dep't of State 3–4, *Ctr. for Coalfield Just.*, No. 1172 C.D. 2024, (Pa. Commw. Ct. Sept. 10, 2024) (“DOS Commw. Br.”). Providing accurate notice to voters by inputting correct codes into the SURE system will not require county boards to institute new procedures or conduct additional inspections. See *Martin*, 341 F. Supp. 3d at 1339–40 (“Because many of the procedures Plaintiffs request are already in place, the Court finds that additional procedures would involve minimal administrative burdens while still furthering the State’s asserted interest in maintaining the integrity of its elections.”). Instead, all that is required is that county boards provide accurate notice to voters that their ballot has been set aside. See *supra* Section I.B.

**II. The trial court’s injunction and order provides the requisite process that is due by requiring both accurate notice to electors and accurate poll book status.**

The Commonwealth Court affirmed the trial court’s order requiring the Washington County Board of Elections to: (1) “notify any elector whose mail-in packet is segregated for a disqualifying error, so the voter has an

opportunity to challenge (not cure) the alleged defects”; (2) “input the accurate status of the mail-in packet in the SURE system and provide the status to the elector if requested”; and (3) “properly document in the poll books that the elector has not ‘voted’ when an elector’s mail-in packet is segregated for a disqualifying defect in accordance with 25 P.S. § 3150.16 (which will allow the elector the opportunity to cast a provisional ballot) and choose the most appropriate selection in the SURE system to reflect as such.” Op. & Order 4, *Ctr. for Coalfield Just.*, No. 2024-3953 (C.P. Washington Cnty. Aug. 23, 2024) (“C.P. Op.”)

The first component of the trial court’s ordered relief is an appropriate remedy to prevent the denial of procedural due process under the Pennsylvania Constitution. See *supra* Part I. The second and third components are necessary corollaries to the required procedural safeguards: They ensure unambiguous and non-conflicting notice to voters so that they may exercise their right to be heard and to challenge the board’s determination. The third component additionally ensures that electors are able to secure their right to vote by casting a provisional ballot. Thus, this Court should affirm the trial court’s order, which correctly provides the process that is due.



**A. The trial court’s order requiring accurate “notice [to] any elector whose mail-in packet is segregated for a disqualifying error” was appropriate.**

As explained above, accurate notice of a county board’s decision to set aside a mail ballot when it has been identified as potentially defective allows voters to protect their right to vote by exercising their statutory rights to appeal “any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election,” 25 P.S. § 3157(a), and to cast a provisional ballot, *id.* § 3050(a.4). The Commonwealth Court therefore properly affirmed the trial court’s order that the Board must provide such accurate notice.

Whether a county board correspondingly offers an opportunity to cure that defect, or whether the notified voter chooses to cast a provisional ballot, is a separate question; procedural due process nonetheless requires “the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties” of the deprivation of their interests. *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (cleaned up); *cf. PA Dep’t of Corrections*, 306 A.3d at 295 (concluding that even if inmate lacked opportunity for “substantive relief[,] . . . he was still entitled to pre-deprivation notice”); *see also supra* Section I.C. Where the Board believes the elector’s mail ballot has fatal defects, due process requires providing accurate notice

to the elector with sufficient time to contest the disqualification of their mail ballot or cast a provisional ballot.

Appellants argue that requiring notice to allow a voter to cast a provisional ballot is foreclosed by the Court's ruling in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). See Appellants' Br. at 3–5, 16–17, 24–25. That is incorrect. This case presents an entirely different question from that decided in *Boockvar*, 238 A.3d at 372–74. The petitioners in that case sought a declaration that county boards were required to both “contact qualified electors whose mail-in or absentee ballots contain minor facial defects” and “provide them with an opportunity to *cure* those defects.” *Id.* at 372 (emphasis added). Crucially, the *Boockvar* petitioners “relie[d] upon the Free and Equal Elections Clause” of the Pennsylvania Constitution, which this Court held did not dictate “the ‘notice and opportunity to cure’ procedure sought . . . to alleviate th[e] risk” that a mail voter will have their ballot rejected. *Id.* at 372–74.

The notice required here is mandated by the procedural due process guarantee of the Pennsylvania Constitution, Pa. Const. art. I, § 1, to ensure voters have adequate opportunity to contest the county board's decision to set aside their mail ballot. And when a voter casts a provisional ballot pursuant to Section 3050(a.4)(5)(i), the voter does not “cure” any defects in

their mail ballot; instead, the voter casts a new ballot altogether. See *also* Amici's *Genser Br.* at 5–8. *Boockvar's* conclusion that the Free and Equal Elections Clause does not require a notice-and-cure procedure in no way displaces the procedures required to satisfy due process.

**B. The trial court's order requiring "input[ing] the accurate status of the mail-in packet in the SURE system" was a necessary corollary to its order requiring accurate notice.**

Procedural due process requires notice sufficient to give the affected individual an opportunity to contest the deprivation of their liberty interests. See *Harrington v. Commonwealth Dep't of Transp., Bureau of Driver Licensing*, 763 A.2d 386, 392 (Pa. 2000) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). In other words, what notice sufficiently complies with the demands of due process depends on the circumstances of each case. See *Curtis v. Redevelopment Auth. of City of Phila.*, 393 A.2d 377, 379–80 (Pa. 1978) (collecting cases on sufficiency of notice); see *also Pagni v. Commonwealth*, 116 A.2d 294, 295 (Pa. Super. 1955); *cf. Jones*, 547 U.S. at 226 ("notice [is] constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent"). Where notice is incomplete or misleading, however, it cannot accurately "apprise interested parties of the pendency of the [deprivation] and afford

them an opportunity to present their objections.” *Mullane*, 339 U.S. at 314; see also *In re R.M.*, 790 A.2d 300, 305–06 (Pa. 2002).

Here, the Washington County Board’s policy “mandated that all mail-in ballot packets received by the County Board were to be marked in the . . . [SURE] system as ‘record-ballot returned.’” *Ctr. for Coalfield Just.*, 2024 WL 4272040, at \*1. When a status for a mail ballot is entered into SURE, the system automatically generates an email to the voter. Joint Stipulation of Facts, ¶¶ 22–25; see also DOS Commw. Br. at 3–4. Thus, even if the County provided “an alternative procedure to afford notice . . . e.g., publishing a list of voters whose mail-in or absentee ballots were not counted,” *Ctr. for Coalfield Just.*, 2024 WL 4272040, at \*8, inputting an accurate status into SURE is still necessary to effectuate constitutionally-sufficient notice; otherwise voters would receive conflicting and confusing information: One form of notice would warn them of a potentially disqualifying defect, for instance, while the other (through the SURE system) would suggest there is no defect. Such “notice which is confusing, misleading, or inaccurate is insufficient to meet procedural due process requirements.” *In re R.M.*, 790 A.2d at 305–06 (citing *Walters v. Reno*, 145 F.3d 1032, 1043 (9th Cir. 1998)).

Consequently, the Commonwealth Court did not err in affirming the trial court's order requiring the Washington County Board enter the accurate status of mail ballots into the SURE system.

**C. The trial court's order requiring "document[ation] in the poll books that the elector has not 'voted'" is necessary to preserve electors' due process rights.**

The trial court's order that the Washington County Board "properly document in the poll books that the elector has not 'voted' when an elector's mail-in packet is segregated for a disqualifying defect," C.P. Op. at 4, was necessary to effectuate the accurate notice required by procedural due process and to ensure electors are able to cast a provisional ballot.

For one, a poll book—technically, a "district register," 25 P.S. § 2602(e)—is an administrative tool used by elections officials to determine whether an elector already has voted. *See, e.g., id.* §§ 3031.13(a), 3048(c), 3050(a.3)–(a.4), 3061, 3066, 3067(b), 3068(b); *see also* 25 Pa. C.S. § 1222(c)(13) (requiring SURE system "[p]ermit the timely printing and transmission by commissions of district registers and all other information contained in the system as may be necessary for the operation of the polling places on election days"); 25 Pa. C.S. § 1402. Much like the SURE status discussed above, *supra* Section II.B, the information in the district register must be accurate in order to avoid providing confusing or misleading notice

to voters who seek to cast a provisional ballot. See *In re R.M.*, 790 A.2d at 305–06.

Second, an electors' right to cast a provisional ballot in order to preserve their right to vote may be impeded if their status in poll books reflects *incorrectly* that they have already voted. See 25 P.S. §§ 3050(a.4), 3146.6(b), 3150.16(b). Pennsylvania law specifies that a mail voter “who is not shown on the district register as having voted . . . may vote by provisional ballot,” 25 P.S. §§ 3146.6(b)(2), 3150.16(b)(2), and there is a reasonable possibility that electors improperly designated in the district register as having “voted” may face difficulty casting their provisional ballot.<sup>6</sup> The trial court's order is necessary to prevent confusion and to ensure that electors whose mail ballots will not count have the opportunity to cast a provisional ballot.

## CONCLUSION

For the forgoing reasons, this Court should affirm the decision of the Commonwealth Court.

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<sup>6</sup> This Court is already considering the circumstances under which a properly cast provisional ballot must be counted in *Genser v. Butler County Board of Elections*, No. 26 WAP 2024 (Pa. 2024).

Dated: October 11, 2024

Respectfully submitted,

/s/ Adam C. Bonin

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## **CERTIFICATE OF COMPLIANCE WITH WORD LIMIT**

I hereby certify that this filing contains no more than 7,000 words, in accordance with Rules 531(b) and 2135(b) of the Pennsylvania Rules of Appellate Procedure.

/s/ Adam C. Bonin  
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## **CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127**

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Adam C. Bonin  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on October 11, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

/s/ Adam C. Bonin  
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