

**IN THE SUPREME COURT OF PENNSYLVANIA  
WESTERN DISTRICT**

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28 WAP 2024

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**REPUBLICAN NATIONAL COMMITTEE, 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.

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

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Appeal from the Sept. 24, 2024 Opinion and Order of the Commonwealth Court at  
Docket No. 1172 C.D. 2024 affirming the Aug. 23, 2024 Opinion and Order of the  
Court of Common Pleas of Washington County at Docket No. 2024-3953

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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 or absentee ballots (collectively referred to hereafter as mail 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 the recently adopted Washington County policy challenged here. The DNC and PDP each have a concrete interest in protecting their voters from such disenfranchisement.<sup>1</sup>

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<sup>1</sup> This brief was not authored or paid for, in whole or in part, by any person or entity other than amici and their counsel. *See* Pa. R.A.P. 531.

## INTRODUCTION

At issue in this case is whether Washington County (or any other county) can purposefully report election-related information in a way that misleads voters and deprives them of their right to cast a ballot that will be counted. Under both the Election Code and the Pennsylvania Constitution, the answer is no.

In enacting Act 77 in 2019, the General Assembly—seeking to facilitate greater participation in Pennsylvania elections—granted all qualified voters the right to cast a ballot by mail. *McLinko v. Department of State*, 279 A.3d 539, 543 (Pa. 2022). The Washington County Board of Elections (“Board”), however, has chosen to disregard the General Assembly’s purpose “to lift the voice of every voter in the Commonwealth,” *id.* The Board interprets Act 77 to mean that if a voter attempts to vote by mail but fails to complete all requisite steps, she is thereby disqualified entirely from voting in the election. That view flouts not only the General Assembly’s purpose in enacting Act 77, but also the text of the Election Code: As the Commonwealth Court correctly held in another case currently pending before this Court, the code entitles such voters to vote provisionally. *See Genser v. Butler County Board of Elections*, 2024 Pa. Commw. Unpub. LEXIS 479, at \*34 (Pa. Commw. Ct. Sept. 5, 2024).

Violating its duty to conduct elections “honestly, efficiently, and uniformly” 25 Pa.C.S. §2642(g), the Board deprives voters of this right to vote provisionally

through a policy of obfuscation. Even when it knows a voter's mail ballot will not be counted, the Board withholds that information from both the Secretary of the Commonwealth and the voter, so that nothing can be done to avoid disenfranchising the voter until it is too late. Specifically, rather than accurately reporting the status of a voter's uncountable mail ballot in the Statewide Uniform Registry of Electors ("SURE") system, which would trigger a notification from the Department of State that the voter may vote provisionally on election day, the Board misrepresents to the voter that her defective ballot will be counted. Pennsylvania law does not permit such misdirection.

To the contrary, as this Court has repeatedly explained, the Election Code's fundamental purpose is "[t]o obtain freedom of choice, a fair election and an honest election return[.]" *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) (alterations in original) (quoting *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965)). And as the Commonwealth Court observed here and in *Genser*, that purpose "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 freedom of choice, and not twice, which would prevent an honest return." Op.12 (quoting *Genser*, 2024 Pa. Commw. Unpub. LEXIS 479, at \*38-39).

Various parts of the Election Code 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. Of particular relevance here, such a voter may cast a provisional ballot: The code provides that an individual who requested a mail ballot but “is not shown on the district register as having voted *may vote by provisional ballot*” upon affirming that the provisional ballot is the only one the voter will cast. 25 P.S. §3150.16(b)(2) (mail); *id.* §3146.6(b)(2) (same for absentee ballots) (emphasis added for each); *see also id.* §3050(a.4)(2) (voter affirmation).

To effectuate this statutory right to vote provisionally—a right that must be exercised on election day, 25 P.S. §3050(a.2), (a.4)(5)(i)—such an individual must typically be made aware on or before election day that she 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 that her county board has identified one or more defects in her mail ballot and decided that it will not be counted, the voter has no reason to go to her election place and cast a provisional ballot. The voter will also be denied her right under 25 P.S. §3157(a) to appeal the rejection of her ballot.

Because ensuring that eligible voters have the information they need to cast a counted ballot is central to Pennsylvania’s election system, and because the Board’s practice of actively withholding such information deprives individuals of the fundamental right to vote without the due process the Pennsylvania Constitution guarantees, the Commonwealth Court was correct to affirm the trial court’s order requiring the Board to “input the accurate status of [voters’ mail ballots] in the SURE



system and provide the status to the elector if requested.” Trial Court Op.2. This Court should affirm.<sup>2</sup>

## ARGUMENT

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

#### **A. The Board’s Practice Deprives Voters Of Their Statutory Right To Vote Provisionally**

The Election Code provides that a person who requested a mail ballot but “is not shown on the district register as having voted *may vote by provisional ballot.*” 25 P.S. §§3150.16(b)(2), 3146.6(b)(2) (emphasis added in each). And as the Commonwealth Court recognized in *Genser*, a person has not “voted”—and therefore has a “statutory right to vote by provisional ballot”—if she submits a mail ballot that will not be counted because of some defect. 2024 Pa. Commw. Unpub. LEXIS 479, at \*34.

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 accurately affirm that their provisional ballot is the only one they

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<sup>2</sup> In the Commonwealth Court, the Board did not even explain, let alone defend, its practice. The Board simply “agree[d] with, adopt[ed] and ... join[ed]” the brief submitted by the Republican National Committee and the Republican Party of Pennsylvania. Wash. Co. Commw. Ct. Br.8. That speaks volumes.

have or will cast in the election, 25 P.S. §3050(a.4)(2). When a county board does not accurately code a voter’s mail ballot as deficient in the SURE system, *see infra* part I.B, it thus deprives the voter of her right to vote provisionally on election day.

*Genser*’s recognition of the “statutory right to vote by provisional ballot,” 2024 Pa. Commw. Unpub. LEXIS 479, at \*34—in combination with the statutory duty of county boards to conduct elections “honestly, efficiently, and uniformly,” 25 P.S. §2642(g)—is enough to resolve this case. If this Court affirms *Genser*’s statutory holding and applies it here, election officials will understand that provisional voting remains available to those whose mail ballots will not be counted, that voters must receive accurate information about that option, and that accurate SURE coding is the way to provide such accurate information. As in *Genser*, a holding to that effect would harmonize all relevant statutory provisions, uphold the franchise, deliver welcome clarity for county boards, and allow this Court to avoid the contested constitutional issues raised on appeal.

**B. The Board’s Practice Flouts The Commonwealth’s Statutory Regime For Sound Election Administration**

1. To help county boards comply with their obligation to conduct elections “honestly, efficiently, and uniformly,” 25 P.S. §2642(g), 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,” 25 Pa.C.S. §1222(a), (c).

Specifically, each county board “shall maintain ... records” in the SURE system, 25 Pa.C.S. §1222(c), in a manner that “[p]ermit[s] the timely printing and transmission” of poll books containing whatever information “may be necessary for the operation of the polling places on election days.” *Id.* §1222(c)(13). This 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 information enables election officials to ensure that individuals who have submitted a mail ballot that will be counted do not “vote at a polling place on election day,” 25 P.S. §3150.16(b)(1) (mail); *id.* §3146.6(b)(1) (same for absentee ballots). It likewise enables election officials to ensure that individuals who requested a mail 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), provided they affirm that their provisional ballot is the only ballot they will cast in the election, *id.* §3050(a.4)(2).

2. The Election Code also requires the Department of State to promulgate instructions for “administer[ing] the SURE system,” including “[u]niform procedures for ... entering information into the ... system.” 25 Pa.C.S. §1222(f). The Department has complied with this statutory mandate. *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 ballots in the SURE system. *See id.* at 6-11.

To record a ballot as timely returned, the Department instructs county boards to 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 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 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 for ballots that have disqualifying errors but might still be counted if properly cured. *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. And 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.

3. 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).

The Board, however, misinforms voters about the status of their mail ballots, by refusing to apply the correct SURE code. Instead of coding ballots with disqualifying errors 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 an *inaccurate* notice that the voter may *not* cast a ballot at his or her polling place on election day. As explained, *see supra* part I.A, this practice both deprives voters of their “statutory right to vote by

provisional ballot,” *Genser*, 2024 Pa. Commw. Unpub. LEXIS 479, at \*34, and violates the Board’s responsibility to conduct elections “honestly, efficiently, and uniformly,” 25 P.S. §2642(g).

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

This Court explained in *Pennsylvania Democratic Party v. Boockvar* that “the purpose and objective of the Election Code ... is ‘[t]o 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 (alteration in original) (quoting *Perles*, 213 A.2d at 783-784). 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.*

Disputing this, appellants argue (Br.23-25) that *Pennsylvania Democratic Party* actually *forecloses* the relief ordered here. But that argument rests on the premise that provisional voting is a form of “curing” ballot defects, which *Pennsylvania Democratic Party* held could not be judicially mandated, 238 A.3d at 375. That premise is flawed because the right to vote provisionally is conferred by *statute*, 25 P.S. §3150.16(b)(2), not by the grace of individual counties. As the Commonwealth Court put it here (and in *Genser*), the Election Code “independently

authorizes electors to vote by provisional ballot,” such that a “provisional ballot is a separate ballot, not a cured initial ballot.” Op.13 (quoting *Genser*, 2024 Pa. Commw. Unpub. LEXIS 479, at \*43).

*Pennsylvania Democratic Party*, 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, this Court 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. *See* 238 A.3d at 375. The relevant question there was simply 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. *Id.* at 372 (emphasis added). This 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, this Court concluded ruled, 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. That is simply not what is involved in this case.

In addition, there are no open policy questions here. 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 here is 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. But in any event, that, again is not a question this Court has addressed before. The trial court (Op.23) and the Commonwealth Court (Op.13) were thus right to reject appellants’ reliance on *Pennsylvania Democratic Party*.

## **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 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). And Pennsylvania’s due-process guarantee is more robust than its federal counterpart (which is not raised in this case), giving greater protection to a broader range of rights. *Marchionni v. Southeastern Pennsylvania Transportation Authority*, 715 A.2d 559, 562 n.2 (Pa. Commw. Ct. 1998); *see also, e.g., R. v. Department of Public Welfare*, 636 A.2d 142, 152-153 (Pa. 1994).

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 this Court has made clear time and again that the right to vote is “fundamental.” *Pennsylvania Democratic Party*, 238 A.3d at 382; *see also Applewhite v.*

*Commonwealth*, 54 A.3d 1, 3 (Pa. 2012). Indeed, Justice Wecht has expressly identified “the right to vote” as a “fundamental” right entitled to due-process protections. *Bert Co. v. Turk*, 298 A.3d 44, 86 n.11 (Pa. 2023) (concurring opinion). Because the right to vote (and have that vote counted) is fundamental, it 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**

When evaluating the scope of the Pennsylvania Constitution’s guarantee of procedural due process, this Court looks 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 probably 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; *accord Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976). 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.

1. The “protected interest” being deprived, *R.*, 636 A.2d at 153, is the right to vote. That right, as just discussed, is of paramount importance. *See Bert*, 298 A.3d at 86 n.11 (Wecht, J., concurring). Indeed, this Court has explained that “[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 the Pennsylvania Constitution is “sacred.” *Page v. Allen*, 58 Pa. 338, 347 (1868).

That sacred right is infringed when a county board segregates a voter’s mail ballot for a deficiency, yet codes the ballot in the SURE system in a way that obfuscates the ballot’s disqualification. The voter in that circumstance 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.

2. The policy also creates a high risk of erroneous deprivation of the right to vote, a risk that additional safeguards would meaningfully diminish. There is a high risk of erroneous deprivation because when voters are not notified that their mail ballots have been segregated as deficient, they have no reason to take further action to cast valid votes. This type of risk, this Court has explained, is precisely why “[n]otice is the most basic requirement of due process”: “Without notice,” individuals “cannot take advantage of any of the other procedural safeguards made available to” them. *Pennsylvania Coal Mining Association v. Insurance Department*, 370 A.2d 685, 692 (Pa. 1977). The risk is particularly acute here because the Board not only deprives voters of notice but also affirmatively *misinforms* them by causing them to receive an automated email saying they “are no longer permitted to vote at [their] polling place location,” *SURE Guidance* at 10.

Even if a Washington County mail 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 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 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. If a voter’s mail 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—and intolerable under this Court’s holding that “[f]airness, in the context of procedural due process, means having the right to notice and the opportunity to be heard *before*” a deprivation takes place, *Washington*, 306 A.3d at 301 (emphasis added).

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 do in fact routinely show up to vote provisionally. *See generally Genser*, 2024 Pa. Commw. Unpub. LEXIS 479, at \*12-13.

3. 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 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. In such circumstances—i.e., where providing notice to affected parties would “not ... be unduly burdensome”—this Court has held that due process requires notice whether or not there is an “explicit statutory entitlement” to such notice. *Pennsylvania Coal Mining Association*, 370 A.2d at 690, 693 (quotation marks omitted).

Any reliance on *Pennsylvania Democratic Party* to argue otherwise would be misplaced. As explained, this 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. It 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 voters to exercise their right to vote provisionally in the event their mail ballots are deemed defective.

In short, the right at stake is fundamental; 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.

### **III. *PURCELL* DOES NOT SUPPORT REVERSAL**

Under *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), and its progeny, “lower federal courts should ordinarily not alter the election rules on the eve of an election,” *Republican National Committee v. Democratic National Committee*, 589 U.S. 423, 424 (2020) (per curiam) (citing cases). Contrary to appellants’ argument (Br.43-47), those cases do not support reversal here.

To start, *Purcell* by its terms is a limit on “lower federal courts.” *Republican National Committee*, 589 U.S. at 424. It imposes no constraints on state courts—consistent with its grounding, at least partly, in considerations of federalism, *see, e.g., Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28, 28 (2020) (Roberts, C.J., concurring) (a case about “the authority of state courts to apply their own constitutions to election regulations” raises “different issues than” a

case where “a [federal] District Court intervened in the thick of election season to enjoin enforcement of a State’s laws,” which “involves federal intrusion on state lawmaking processes”). The U.S. Supreme Court has never suggested that *Purcell* is a creature of federal constitutional, statutory, or even common law, such that it would bind state courts.

State courts are of course free to adopt a *Purcell*-like principle as a matter of state law. In fact, appellants suggest (Br.44) that this Court recently did so, in declining to exercise King’s Bench jurisdiction. See Order at 3, *New PA Project Education Fund v. Schmidt*, No. 112 MM 2024 (Pa. Oct. 5, 2024). But in that case this Court specifically stated that it would “continue to exercise [its] appellate role with respect to lower court decisions that have already come before this Court in the ordinary course,” specifically citing this case. *Id.* at 3-4 n.2. Appellants offer no reason for this Court to disregard its own clear statement on this point.

In any event, *Purcell* does not apply here because the lower courts did not “alter the election rules,” *Republican National Committee*, 589 U.S. at 424. They instead *enforced* the Election Code—both its provisional-voting regime, *see supra* part I.A, and its mandate for “[u]niform procedures for ... entering information into the SURE system,” 25 Pa.C.S. §1222(f); *see supra* part I.B. Nor does the trial court’s order require the Board “to make substantial procedural changes,” Br.46; as



explained, *see supra* part II.B.3, selecting the correct option from the SURE system's drop-down menu imposes *no* administrative burden.

If anything, the concerns behind *Purcell* counsel in favor of affirmance here. The driving consideration under *Purcell* is to avoid “voter confusion and consequent incentive to remain away from the polls,” *Purcell*, 549 U.S. at 4-5. That is precisely what the trial court's order prevents, by curtailing a practice that misleads voters into believing they cannot cast a ballot at their polling place on election day. As appellants note (Br.43), the *Purcell* line of cases reflects the reality that “local officials must communicate to voters how, when, and where they may cast their ballots,” *Democratic National Committee*, 141 S.Ct. at 31 (Kavanaugh, J., concurring). Again, that is precisely what the trial court's order requires local officials to do.

## CONCLUSION

The decision of the Commonwealth Court should be affirmed.

October 11, 2024

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## **CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY**

This filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/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 4,982 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 October 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