

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

No. 55 MAP 2024

**IN RE: CANVASS OF PROVISIONAL BALLOTS
IN THE 2024 PRIMARY ELECTION**

On Appeal from the July 1, 2024 Memorandum Opinion of
the Honorable Anne E. Covey of the Commonwealth Court, No. 628 C.D. 2024

**BRIEF OF *AMICI CURIAE* THE DEMOCRATIC NATIONAL
COMMITTEE AND THE PENNSYLVANIA DEMOCRATIC PARTY
IN SUPPORT OF APPELLANT ON ISSUE NO. 1**

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INTEREST OF AMICI CURIAE

The Democratic National Committee (“DNC”) is the Democratic Party’s “national committee,” as 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. §2601. As of April 23, 2024, almost 3.9 million voters in Pennsylvania are registered as Democrats.* 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.

They are filing this brief because they have a particular interest in ensuring that eligible voters who follow election officials’ voting instructions in good faith are not denied their fundamental right to vote by having their ballots discarded. In addition, this Court’s ruling here may bear on the resolution of *Black Political Empowerment Project v. Schmidt*, No. 283 MD 2024 (Pa. Commw. Ct.) (“*BPEP*”), which concerns whether the Pennsylvania Constitution’s Free and Equal Elections Clause (Pa. Const. art. I, §5) forecloses disqualifying mail and absentee ballots solely because a voter failed to write the correct date on the ballot-return envelope. *BPEP*—in which the DNC and PDP have intervened—is set for argument before the Commonwealth Court on August 1 and will likely come before this Court on appeal not long thereafter.

* See Pennsylvania Department of State, *April 23, 2024 Primary Voter Registration Statistics*, <https://tinyurl.com/2024PAprimaryregistration>.

INTRODUCTION

The Free and Equal Elections Clause of the Pennsylvania Constitution guarantees the fundamental right to vote, which includes the right to have one's vote counted. Consistent with that constitutional mandate, this Court has long held that voters may not be disenfranchised through the discarding of their ballots except for compelling reasons, and it has repeatedly moderated enforcement of the election code where rigid application of its technical requirements would disqualify otherwise-valid ballots without serving any purpose. That line of authority, under which this Court has deemed a variety of inadvertent technical errors by eligible voters insufficient to justify discarding their timely cast ballots, applies with special force to the unusual facts here. The undisputed evidence establishes that the voter in question (Timothy James Wagner) followed the instructions of the senior election worker administering the provisional-balloting process at his polling place when completing his ballot and its accompanying envelope. In doing so, he signed the affidavit establishing his eligibility to cast a provisional ballot but did not *also* "place his signature on the front of the provisional ballot envelope," 25 P.S. §3050(a.4)(3). After turning in his provisional-ballot package to the election worker, Wagner called the phone number the election worker provided to confirm that his ballot had been accepted—and was told that it had been. Strict enforcement of the technical requirement that Wagner sign the front of the provisional-ballot envelope would

serve no purpose under these circumstances. Accordingly, there is no reason, let alone the requisite compelling reason, to discard Wagner's ballot.

BACKGROUND

Timothy Wagner appeared at his Lake Township (Luzerne County) polling place on April 23, 2024, to vote for the Republican nominee for General Assembly representative in the 117th legislative district. *In re Canvass of Provisional Ballots in the 2024 Primary Election*, No. 628 C.D. 2024 (Pa. Commw. Ct. July 1, 2024), slip op. 3 ("Op."). An election worker informed Wagner that he would have to cast a provisional ballot because he had been issued a mail ballot but had not returned it. *Id.* Wagner testified that "he followed the instructions of a senior election worker in completing the ballot and its accompanying envelope." *Id.* Specifically, he testified that the senior election worker "basically was leading me through everything. She was telling me what to do, what not to do." *Id.* Following those instructions, Wagner executed and signed the affidavit establishing his eligibility to vote provisionally, in conformance with 25 P.S. §3050(a.4)(2), and placed his ballot in the provisional-ballot secrecy envelope, which he in turn placed in the exterior provisional-ballot envelope. Op.2. He did not, however, sign the front of the exterior provisional-ballot envelope. *Id.* The senior election official accepted the provisional-ballot package and told Wagner he should call a number to confirm that his ballot had been formally accepted (i.e., that it would be counted). *Id.* at 2-3; *see also id.* at MSW-3 (Wolf, J., dissenting in part). Upon calling that number, an election

worker told Wagner: “Yep, we have your ballot. It’s good. It’s accepted. You’re verified.” Op.3.

At an April 29, 2024, meeting of the Luzerne County Board of Elections, candidate Mike Cabell challenged Wagner’s provisional ballot on the ground that Wagner had not signed the exterior provisional-ballot envelope. Op.2. On May 3, the board upheld its initial decision to count Wagner’s ballot. *Id.* at 3. Cabell then appealed, and the Court of Common Pleas held a hearing, at which Wagner gave un rebutted testimony that he followed the instructions of the lead poll worker in completing and returning his provisional ballot. *Id.* Having heard this live testimony and received other evidence, the court found that Wagner had made his electoral intent “exceedingly clear,” and it affirmed the board’s decision to count his ballot. *Id.* at 3-4 (quoting Trial Court Op.4-5 (May 15, 2024)). A divided panel of the Commonwealth Court reversed, however, holding that—despite a properly executed affidavit establishing Wagner’s eligibility to cast a provisional ballot—the absence of a separate signature on the exterior provisional-ballot envelope disqualified his ballot under 25 P.S. §3050(a.4)(5)(ii)(A). *Id.* at 9.

ARGUMENT

I. THIS COURT’S PRECEDENT PROHIBITS DISQUALIFICATION OF WAGNER’S BALLOT

The Pennsylvania Constitution’s Free and Equal Elections Clause guarantees all citizens the fundamental right to vote. The Clause provides that:

“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, §5. By including the Clause in the Declaration of Rights (in order to expressly to protect the fundamental right to vote), “Pennsylvania’s Constitution, when adopted in 1776, was ... the most radically democratic of all the early state constitutions.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) (quotation marks omitted).

In describing “the minimum requirements” of free and equal elections, this Court has stated:

“[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.”

League of Women Voters, 178 A.3d at 810 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)). Accordingly, this Court has long admonished that “[t]he power to throw out a ballot for minor irregularities ... must be exercised very sparingly,” and that a voter is “not to be disenfranchised at an election except for compelling reasons.” *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945); accord *Appeal of Norwood*, 116 A.2d 552, 555 (Pa. 1955).

Consistent with these principles, this Court has declined to disqualify ballots for failure to comply with technical requirements in the election code if

the voter's intention is clear and strict enforcement of the requirement serves no compelling interest. For instance, the Court has held that inadvertent stray marks on a ballot are not disqualifying, notwithstanding a statutory prohibition against extraneous markings. *See Appeal of Gallagher*, 41 A.2d at 631-633; *Appeal of Norwood*, 116 A.2d at 554. In so holding, the Court has emphasized that—as is also true here—these “*are not willful errors*” by the voter. *In re Petitions to Open Ballot Boxes*, 188 A.2d 254, 256 (Pa. 1963). Likewise, this Court has declined to disqualify a ballot on which the voter wrote in a candidate's name rather than check the box next to that candidate's printed name on the ballot, despite a statutory provision (25 P.S. §2963) reserving the write-in space for persons “whose name is not printed on the ballot.” *Appeal of James*, 105 A.2d 64, 64 (Pa. 1964). And this Court has declined to disqualify ballots marked in red or green ink, notwithstanding a statutory mandate to count ballots marked in blue or black ink. *In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972).

More recently, Justice Wecht has explained that, while “the Election Code should be *interpreted* with unstinting fidelity to its terms,” *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1089 (Pa. 2020) (Wecht, J., concurring in part) (emphasis added), other considerations may moderate its *enforcement* in particular cases. Such considerations include whether enforcement would transgress “constitutional protections” on the right to vote, *id.* at 1082; *see also Ball v. Chapman*, 289 A.3d 1, 27 n.156 (Pa. 2023) (Wecht, J., joined by Todd, C.J., and Donahue, J.). Indeed,

this Court has recognized unanimously that statutes must be construed and applied consistent with the protection of fundamental rights conferred by the Pennsylvania Constitution. *Pennsylvania State Education Association v. Commonwealth*, 148 A.3d 142, 158 (Pa. 2016).

Thus, while disqualification of a ballot may be appropriate where the voter is provided “‘with adequate instructions ... including conspicuous warnings regarding the consequences for failing strictly to adhere’ to [the relevant statutory] requirements,” it “would be unfair to punish voters” for incidents of election administration that lead to unnecessary risk of voter error. *In re Canvass*, 241 A.3d at 1089 (Wecht, J., concurring in part) (quoting *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 389 (Pa. 2020) (Wecht, J., concurring)). In sum, “[a]lthough the conditions that might infringe the franchise are too manifold to enumerate, when we are satisfied that a violation of the right [to vote] has occurred or is likely to occur, ‘our Court possesses broad authority to craft meaningful remedies when required.’” *Pennsylvania Democratic Party*, 238 A.3d at 387 (Wecht, J. concurring) (quoting *League of Women Voters*, 178 A.3d at 822).

The Commonwealth Court departed here from the foregoing decisions of this Court, instead relying on its own decision in *In re Allegheny County Provisional Ballots in the 2020 General Election*, 241 A.3d 695 (Table) (Pa. Commw. Ct. 2020), *appeal denied*, 242 A.3d 307 (Pa. 2020). That unpublished decision relied upon *In re Nomination Petition of Guzzardi*, 99 A.3d 381 (Pa.

2014). But *Guzzardi* concerned a *candidate's* ballot access; it thus did not implicate voters' constitutional right to cast a ballot. And the Commonwealth Court's reliance on *Guzzardi* in *In re Allegheny* resulted in the disqualification of voters' ballots on technical statutory grounds without consideration of the fundamental right to vote that is expressly conferred by the Pennsylvania Constitution. None of that warrants denying the right to vote here.

This Court's precedents protecting the fundamental right to vote apply with special force to the unusual facts here, where Wagner was personally instructed by the senior election worker at his polling place on the process for completing his provisional ballot and expressly informed that his ballot had been accepted as submitted. It is undisputed that Wagner properly executed the affidavit affirming his eligibility to vote provisionally, completed his ballot in the presence of the official administering the process, and made his electoral intent "exceedingly clear." Op.3-4. And there has there been no suggestion of fraud as to Wagner's ballot. On these facts, enforcing the technical requirement that each voter separately "place his signature on the front of the provisional ballot envelope," 25 P.S. §3050(a.4)(3), would serve no purpose. There is certainly no "compelling reason[]," *Appeal of Gallagher*, 41 A.2d at 632, to disqualify the ballot.

II. THE COURT SHOULD DECIDE THIS CASE NARROWLY, ON GROUNDS SPECIFIC TO ITS UNUSUAL FACTS

This case presents a narrow question arising on unusual facts and may be decided in Wagner's favor by applying the precedent cited above, which


reflects—sometimes expressly and sometimes impliedly—the importance of protecting a qualified voter’s fundamental right to vote. The Court need go no further. The *BPEP* litigation, which as noted is pending in the Commonwealth Court and likely to come before this Court soon, provides a better vehicle for any broader consideration of the Free and Equal Elections Clause.

CONCLUSION

The judgment of the Commonwealth Court should be reversed, and the case remanded with instructions that Wagner’s ballot be counted.

July 31, 2024

Respectfully submitted,

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CERTIFICATION OF COUNSEL

I hereby certify that this brief contains 2,090 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that 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 SERVICE

On July 31, 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