

IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 26 WAP 2024 and 27 WAP 2024

**FAITH A. GENSER; FRANK P. MATIS; AND THE PENNSYLVANIA
DEMOCRATIC PARTY,**

Respondents/Appellees,

v.

BUTLER COUNTY BOARD OF ELECTIONS,

Respondent/Appellant,

**REPUBLICAN NATIONAL COMMITTEE; AND REPUBLICAN
PARTY OF PENNSYLVANIA,**

Intervenors/Appellants.

*Appeal from the September 5, 2024 Memorandum Opinion and Order of
the Pennsylvania Commonwealth Court at Consolidated Case Nos. 1074
C.D. 2024 and 1085 C.D. 2024 reversing the August 16, 2024
Memorandum Opinion of the Court of Common Pleas of Butler County
at No. MSD-2024-40116*

**BRIEF OF AMICI CURIAE CENTER FOR ELECTION
CONFIDENCE, INC. AND AMERICA FIRST LEGAL FOUNDATION
IN SUPPORT OF APPELLANTS**

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INTEREST OF AMICI CURIAE

Center for Election Confidence

Center for Election Confidence, Inc. (“CEC”) is a non-profit organization that promotes ethics, integrity, and professionalism in the electoral process. CEC works to ensure that all citizens can vote freely within an election system of reasonable procedures that promote election integrity, prevent vote dilution and disenfranchisement, and instill public confidence in election procedures and outcomes. To accomplish this, CEC conducts, funds, and publishes research and analysis regarding the effectiveness of current and proposed election methods. CEC is a resource for lawyers, journalists, policymakers, courts, and others interested in the electoral process. CEC also periodically engages in public-interest litigation to uphold the rule of law, voting rights and election integrity and files *amicus* briefs in cases where its expertise and national perspective may illuminate the issues under consideration.

For example, CEC (previously known as Lawyers Democracy Fund) participated as amicus curiae in the U.S. Supreme Court in *Ritter v. Migliori*, 143 S. Ct. 297 (2022). In *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), CEC advocated that the Supreme Court of Pennsylvania respect the

General Assembly’s policy judgments and enforce the signature and date requirement for absentee ballots. Both courts ruled in favor of the positions advocated by CEC.

America First Legal Foundation

America First Legal Foundation (“AFL”) is a nonprofit organization dedicated to promoting the rule of law in the United States, with a particular focus on election integrity and the protection of voting rights as guaranteed by the Constitution and laws of the United States. The Foundation is committed to ensuring that electoral processes are fair, transparent, and in accordance with established legal frameworks. Because this case has significant implications for voter integrity and election procedures in Pennsylvania, America First Legal has a substantial interest in its outcome. The Foundation’s expertise in election law and its commitment to upholding democratic principles make it well-positioned to provide valuable insights to the Court on the legal and constitutional issues at stake in this matter.

ARGUMENT

Amici curiae respectfully submit that the Commonwealth Court erred in its decision by failing to adhere to the binding precedent established by the Pennsylvania Supreme Court in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). This deviation from established case law not only undermines the specific holding in *Pa. Democratic Party* but also challenges the fundamental principle of stare decisis, a cornerstone of our legal system. The focus of this brief is to underscore the critical importance of stare decisis in maintaining judicial consistency and predictability, particularly in cases where a higher court has provided clear guidance on the matter at hand. By examining the lower court's departure from *Pa. Democratic Party* through the lens of stare decisis, we aim to demonstrate why this Court should reaffirm the precedent set by this Court and correct the Commonwealth Court's misapplication of the law.

I. THE DOCTRINE OF STARE DECISIS

A. STARE DECISIS AND ITS FOUNDATIONAL ROLE IN THE LEGAL SYSTEM.

Stare decisis is a fundamental doctrine in our legal system that obligates courts to follow historical cases when ruling on similar matters.

This principle ensures consistency, predictability, and integrity in the judicial process, fostering reliance on judicial decisions and contributing to the perceived fairness of the legal system. The doctrine of stare decisis operates both horizontally and vertically. Horizontal stare decisis refers to a court adhering to its own precedent, while vertical stare decisis binds lower courts to follow the decisions of higher courts within the same jurisdiction. The doctrine permeates the jurisprudence of federal and Commonwealth Courts.

The U.S. Supreme Court has consistently emphasized the importance of stare decisis in maintaining the stability and credibility of the legal system. In *Kimble v. Marvel Enterprises, LLC*, 576 U.S. 446 (2015), the Court underscored the principle of stare decisis. It described the rationale behind stare decisis as “promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process.” *Id.* at 455. In *Kimble*, the Supreme Court reaffirmed its commitment to the doctrine of precedent, choosing to uphold the rule established in *Brulotte v. Thys Co.*, 379 U.S.

29 (1964), which prohibited patent licensors from receiving royalties for sales made after the patent's expiration.

The Supreme Court in *Kimble* had the opportunity to overrule *Brulotte* but chose not to, emphasizing the importance of stare decisis. The Court acknowledged that stare decisis is not an “inexorable command,” but it also highlighted that adhering to precedent promotes stability and predictability in the law. *Kimble*, 576 U.S. at 455. The Court reasoned that any change to the established rule should come from Congress, not the judiciary, underscoring the separation of powers and the respective roles of the legislative and judicial branches in shaping patent law. *Id.* at 456.

The *Kimble* decision illustrates the Supreme Court's cautious approach to overturning its precedents, especially when those precedents interpret statutory law. The Court noted that statutory stare decisis carries “usual strong force” because it involves the interpretation of laws passed by Congress. The Court also pointed out that Congress had multiple opportunities to amend the patent laws to address the issues raised by the *Brulotte* rule but chose not to, which the Court interpreted as an indication of congressional acquiescence to the *Brulotte* rule.

This Court has similarly recognized the crucial role of stare decisis in maintaining legal stability. *See Commonwealth v. Thompson*, 351 A.2d 280 (Pa. 1976) (without the doctrine of stare decisis, the Court stated “we may fairly be said to have no law”). This Court has demonstrated a strong commitment to stare decisis, particularly in cases involving long-standing precedents. For example, in *Smith v. City of Philadelphia*, 516 A.2d 306 (Pa. 1986), the Court upheld the constitutionality of statutory caps on governmental tort liability, a precedent that has stood for over four decades. The principle of stare decisis played a significant role in the Court’s decision. The Court relied on its previous interpretations of the Pennsylvania Constitution and statutory law to uphold the legislature’s authority to impose limitations on tort liability against political subdivisions. This adherence to precedent ensures stability and predictability in the law by respecting established legal principles unless there is a compelling reason to deviate from them. In that case, the Court did not find a compelling reason to overturn its previous understanding of the legislature’s powers under the Pennsylvania Constitution.

Similarly, in *Fonner v. Shandon, Inc.*, 724 A.2d 903 (Pa. 1999), the court reaffirmed the validity of the statutory employer doctrine in workers' compensation cases, noting the legislature's choice not to alter this long-standing principle despite multiple opportunities to do so. The role of stare decisis in this decision is evident in the court's reliance on the precedent established by *McDonald v. Levinson Steel Co.*, 153 A. 424 (Pa. 1930) and subsequent interpretations of the Workers' Compensation Act. The *Fonner* court's analysis and application of precedent underscore the importance of consistency and predictability in the law.

While both the U.S. Supreme Court and the Pennsylvania Supreme Court strongly adhere to the principle of stare decisis, they also recognize the need for flexibility in certain circumstances. *Commonwealth v. Weinstein*, 274 A.2d 182 (Pa. 1971). This balance allows the courts to maintain legal stability while also ensuring that the law can evolve to address new challenges and correct past errors. *See e.g., Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)) and *Atkins v. Virginia*, 536 U.S. 304 (2002) (overturning *Penry v. Lynaugh*, 492 U.S. 302 (1989)). These decisions demonstrate the

Court's fealty to the principles behind *stare decisis*, vindicating existing standards from decisions contrary to reason.¹

In sum, *stare decisis* plays a crucial role in maintaining the stability, predictability, and integrity of our legal system. Both the U.S. Supreme Court and the Pennsylvania Supreme Court have consistently emphasized its importance while also recognizing the need for flexibility in certain circumstances. This balanced approach ensures that our legal system can provide consistent and reliable outcomes while also adapting to address new challenges and correct past errors. As courts continue to navigate complex legal issues, the principle of *stare decisis* will undoubtedly remain a cornerstone of judicial decision-making, guiding courts in their pursuit of justice, correct interpretation and application of the law, and legal consistency.

¹The concept of *stare decisis* derives from the English Common Law. In describing the purposes both behind *stare decisis* and those grounds upon which judges may depart from it, William Blackstone stated that it is necessary "to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law ... is not become permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments." 1 William Blackstone Commentaries on the Laws of England 69.

A court may only dispense with *stare decisis* when "the former determination is most evidently contrary to reason." *Id.* When courts dispense with *stare decisis*, Blackstone posits that "subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." *Id.* at 70.

B. BINDING NATURE OF SUPREME COURT DECISIONS.

Decisions rendered by the Pennsylvania Supreme Court are binding on all lower Commonwealth courts. This principle is unequivocally established and has been consistently reaffirmed. By comparison, this Court is not bound by decisions of the Third Circuit or inferior federal courts. *Hall v. Pennsylvania Bd. of Prob. & Parole*, 851 A.2d 859, 865 (Pa. 2004) (“this Court has clearly indicated that we are not obligated to follow the decisions of the Third Circuit on issues of federal law.”) The Commonwealth Court, as intermediate appellate court, is bound by Pennsylvania Supreme Court precedents. This hierarchical structure of precedential authority was clearly articulated in *Crocker v. Workers' Comp. Appeal Bd.*, 225 A.3d 1201, 1210 (Pa. Commw. Ct. 2020): “[u]nder stare decisis, we are bound to follow the decisions of our Court unless overruled by the Supreme Court or where other compelling reasons can be demonstrated.”

C. EXCEPTIONS AND LIMITATIONS TO STARE DECISIS

While the doctrine of stare decisis is generally strictly applied in Pennsylvania, certain nuances and limited exceptions exist:

1. Distinguishing Cases

Lower courts may distinguish the facts of a case before them from the precedent if significant differences warrant a different outcome. This practice was demonstrated in *Commonwealth v. Hawkins*, 953 A.2d 1248 (Pa. 2007), where the Superior Court distinguished the case from a Supreme Court precedent based on factual differences.

2. Anticipatory Overruling

The practice of anticipatory overruling, where a lower court might predict that a higher court would overrule its own precedent, is strongly discouraged in Pennsylvania. In *Boyle v. Municipal Authority of Westmoreland County*, 216 A.3d 524, 533 (Pa. Commw. Ct. 2019), the Commonwealth Court explicitly stated that it “lacks the authority to disregard Supreme Court precedent, even if it appears that the precedent in question is in tension with more recent Supreme Court decisions.”

3. Changes in Higher Court Composition

Lower courts are expected to follow higher court precedents regardless of potential changes in the higher court’s composition. This principle was affirmed in *Commonwealth v. Randolph*, 933 A.2d 1016, 1021 (Pa. Super. 2007), where the Superior Court adhered to a Supreme Court precedent

despite speculation about potential changes in the Supreme Court's stance.

4. Dicta vs. Holding

Pennsylvania courts distinguish between binding holdings and non-binding dicta from higher courts. The Pennsylvania Supreme Court clarified in *Hunsberger v. Bender*, 437 A.2d 438 (Pa. 1981), that while the court's holdings are binding precedent, its dicta are not.

In conclusion, while there are limited mechanisms for lower courts to navigate around precedents in exceptional circumstances, the general rule persists that decisions of higher courts within the same jurisdiction are binding on lower courts. This adherence to precedent promotes stability in the law and fosters public confidence in the judicial system.

II. ANALYSIS OF *PA. DEMOCRATIC PARTY V. BOOCKVAR*

A. KEY FINDINGS AND HOLDINGS OF THE PENNSYLVANIA SUPREME COURT IN *PA. DEMOCRATIC PARTY V. BOOCKVAR*.

This Court's decision in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) provides a clear illustration of the Court's interpretation of statutory mandates within the Election Code. There, this Court concluded that the Legislature intended for the secrecy envelope

provision to be mandatory, emphasizing the importance of adhering to the statutory language to ensure the integrity of the voting process.

The Court's analysis began with the statutory text of Section 3150.16(a), which explicitly states that a mail-in elector "shall ... enclose and securely seal the [ballot] in the envelope on which is printed, stamped or endorsed 'Official Election Ballot.'" This language was deemed to constitute a mandatory requisite for casting a mail-in ballot and having that ballot counted. The Court supported its interpretation by referencing *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223 (Pa. 2004), where it previously held that the use of the term "shall" carries a mandatory meaning, thereby setting a precedent for interpreting similar statutory language as obligatory.

Further, the Court addressed the argument that the absence of a narrowly defined remedy for failing to use a secrecy envelope rendered the provision directory rather than mandatory. The Court rejected this argument, affirming that the legislative intent was clear in mandating the use of secrecy envelopes for mail-in ballots. In fact, the Court recognized that the legislature's authority extends to prescribing the consequences for noncompliance with these rules, even when such

noncompliance stems from “minor errors.” *Pa. Democratic Party*, 238 A.3d 345, 374 (Pa. 2020) (“To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature.”)

Pursuant to this authority, the General Assembly has mandated that mail ballots failing to comply with signature, dating, and secrecy-envelope requirements are invalid and must not be counted. See *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); See *id.*

Crucially, this Court in *Pa. Democratic Party* explicitly held that the judiciary lacks the authority to mandate curing procedures for defective mail ballots absent legislative action. *Pa. Democratic Party*, 238 A.3d. at 374. This holding underscores the fundamental principle that courts must defer to the General Assembly’s judgment in crafting election procedures, including the determination of which defects render a ballot invalid and whether opportunities for cure should be provided.

In summary, *Pa. Democratic Party* establishes the mandatory nature of the secrecy envelope requirement for mail-in ballots, based on

a careful interpretation of the statutory language, precedent, and constitutional principles. The Court’s ruling reflects a broader judicial approach to election law, emphasizing the importance of adhering to legislative mandates to preserve the integrity and secrecy of the voting process.

B. THE COMMONWEALTH COURT’S DECISION CONTRAVENES BINDING PRECEDENT.

As set forth above, this Court has unambiguously held that a voter has no constitutional, statutory, or legal right to be provided notice of and an opportunity to cure a defective mail-in ballot. *Pa. Democratic Party*, 238 A.3d at 372-74. In *Pa. Democratic Party*, this Court explicitly stated:

To the extent that a voter is at risk of having his or her ballot rejected due to minor errors made in contravention of those requirements, ... the decision to provide a “notice and opportunity to cure” procedure to alleviate that risk is one best suited for the Legislature.

Id. at 374.

This principle has been reinforced by federal courts. The Third Circuit Court of Appeals, in *Pa. State Conf. of NAACP Branches v. Sec’y Pa.*, 97 F.4th 120, 133-35 (3d Cir. 2024), affirmed that “a voter who fails to abide by state rules prescribing how to make a vote effective is not

‘denied the right to vote’ or disenfranchised ‘when his ballot is not counted.’” (quoting *Ritter v. Migliori*, 142 S.Ct. 1824, 1825 (2022) (Alito, J., dissenting)).

In reaching its decision in *Pa. Democratic Party*, this Court recognized longstanding precedent that “[t]he power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government.” *Pa. Democratic Party*, 238 A.3d at 366 (internal citations omitted). This principle underscores the separation of powers and the judiciary’s role in interpreting, rather than creating, election law.

The Commonwealth Court’s attempt to distinguish its ruling from *Pa. Democratic Party* is fundamentally flawed. The Court claims that allowing a voter to submit a provisional ballot after voting a defective mail-in ballot does not “amount to ballot curing.” Maj. Op., App. Ex. A to Appellants Brief at A.33. This assertion creates a distinction without a difference and contravenes the spirit and letter of this Court’s precedent.

The process mandated by the Commonwealth Court is, in fact, ballot curing. Voters who submitted mail-in ballots with fatal defects (*i.e.*,

no secrecy envelope) are permitted to remedy those defects by casting a second (provisional) ballot. This process:

- a) Provides notice to the voter of their defective ballot;
- b) Offers an opportunity to correct the error; and
- c) Allows for the counting of a vote that would otherwise be invalid.

These elements precisely constitute the “notice and opportunity to cure,” Maj. Op., App. Ex. A at A.33; a procedure that this Court in explicitly left to the legislature to implement.

The Commonwealth Court’s ruling also effectively expands the use of provisional ballots beyond their statutorily defined purpose. The Election Code does not authorize the use of provisional ballots as a mechanism to cure defective mail-in ballots. By mandating this procedure, the Commonwealth Court has impermissibly legislated from the bench, contravening both the letter of the Election Code and this Court’s clear directive in *Pa. Democratic Party*.

The Commonwealth Court’s decision represents a clear departure from this Court’s binding precedent in *Pa. Democratic Party*. By mandating a *de facto* curing procedure under the guise of provisional balloting, the lower court has improperly usurped the legislative function and contradicted this Court’s explicit ruling. Such judicial overreach

undermines the integrity of the electoral process and the clear directives of both this Court and the General Assembly. The Commonwealth Court's decision should be reversed to respect stare decisis, maintain consistency with established precedent, and to respect the constitutional separation of powers in election regulation.

III. ARGUMENT FOR ADHERENCE TO PRECEDENT

The Commonwealth Court's failure to adhere to the precedent set in *Pa. Democratic Party* has far-reaching implications that extend beyond the immediate case at hand. This departure from stare decisis threatens to introduce legal uncertainty into Pennsylvania's election processes and erode judicial authority.

The lower court's ruling creates significant ambiguity regarding the proper handling of defective mail-in ballots. County boards of elections, tasked with implementing election procedures, now face conflicting directives: this Court's clear statement in *Pa. Democratic Party* that curing procedures are a legislative prerogative, and the Commonwealth Court's mandate for a de facto curing process. This uncertainty could lead to inconsistent application of election procedures across counties,

potentially violating the equal protection principles articulated in *Bush v. Gore*, 531 U.S. 98, 148 L. Ed. 2d 388 (2000).

By disregarding this Court's clear precedent, the Commonwealth Court's decision undermines the hierarchical structure of the judiciary. As this Court stated in *Tilghman*, "[a]s an intermediate appellate court, the Superior Court is obligated to follow the precedent set down by this Court." *Com. v. Tilghman*, 673 A.2d 898, 903 (Pa. 1996). The same principle applies to the Commonwealth Court. Allowing lower courts to deviate from Supreme Court precedent threatens the stability and predictability of the law, creating uncertainty for the citizens of Pennsylvania and potentially encouraging further departures in other areas of jurisprudence.

The lower court's ruling effectively creates a new procedure for handling defective mail-in ballots, a task explicitly reserved for the Legislature by this Court in *Pa. Democratic Party*. This judicial overreach not only contravenes the principle of separation of powers but also risks undermining public confidence in the electoral process by introducing procedures not sanctioned by the General Assembly.

Had the Commonwealth Court properly adhered to the precedent established in *Pa. Democratic Party*, it would have been compelled to reach a different conclusion. The correct application of *Pa. Democratic Party* would have proceeded as follows:

1. The court should have acknowledged, as this Court did in *Pa. Democratic Party*, that the power to regulate elections, including the establishment of curing procedures, lies with the Legislature. 238 A.3d at 374.
2. Following this Court's lead in *Pa. Democratic Party*, the lower court should have strictly interpreted the statutory requirements for mail-in ballots, including the mandatory nature of the secrecy envelope. *Id.* at 380.
3. The Commonwealth Court should have refrained from creating a judicial remedy for defective mail-in ballots, recognizing that such action is beyond the court's authority and encroaches on the legislative function.
4. The court should have limited the use of provisional ballots to their statutorily defined purposes, rather than expanding their use as a mechanism to cure defective mail-in ballots.

By adhering to these principles, derived directly from *Pa. Democratic Party*, the Commonwealth Court would have reached a conclusion consistent with this Court's precedent and the statutory framework established by the General Assembly. Such a ruling would have upheld the integrity of the electoral process while respecting the separation of powers fundamental to our system of government.

CONCLUSION

In conclusion, the Commonwealth Court's failure to adhere to the clear precedent set in *Pa. Democratic Party* undermines the doctrine of stare decisis, introduces legal uncertainty, and encroaches upon legislative authority. This Court should reaffirm its commitment to stare decisis and the principles articulated in *Pa. Democratic Party* by reversing the lower court's decision and providing clear guidance on the proper application of election law in Pennsylvania.

Respectfully submitted.

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I certify that this brief contains 3,309 words and complies with the word-count limit under Pa. R. App. P. 531(b)(3) and Pa. R. App. P. 2135(a)(1).

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CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 127

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

Dated: September 26, 2024

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