

IN THE SUPREME COURT OF PENNSYLVANIA

No. 26 WAP 2024 and 27 WAP 2024

FAITH A. GENSER, FRANK MATTIS, AND THE PENNSYLVANIA
DEMOCRATIC PARTY,

Petitioners/ Appellees,

v.

BUTLER COUNTY BOARD OF ELECTIONS

Respondents/ Appellants,

THE REPUBLICAN NATIONAL COMMITTEE AND THE REPUBLICAN
PARTY OF PENNSYLVANIA,

Intervenors/ Appellants.

***AMICI CURIAE* BRIEF OF COUNTY OFFICIALS IN SUPPORT OF
APPELLEES**

Joseph J. Khan
CURTIN & HEEFNER LLP
Pa. ID No. 86620
2005 S. Easton Road, Suite 100
Doylestown, PA 18901
Phone: (267) 898-0570
jjk@curtinheefner.com

Jonathan B. Miller*
Shannon Eddy*
PUBLIC RIGHTS PROJECT
490 43rd Street, Unit #115
Oakland, CA 94609
Phone: (510) 738-6788
jon@publicrightsproject.org
shannon@publicrightsproject.org
** On the brief*

Counsel for Amici Curiae

TABLE OF CONTENTS

I. STATEMENT OF INTEREST1

II. SUMMARY OF ARGUMENT3

III. ARGUMENT4

 A. Legislative *Amici's* Predictions Are At Odds With The Experiences Of Counties That Already Count Provisional Ballots When An Elector's Mail-in Ballot Contains A Fatal Flaw4

 B. The Commonwealth Court's Decision Is Correct Given The Strong Presumption In Favor Of Effectuating the Franchise8

 1. Adopting Appellants' interpretation of the Election Code would present serious constitutional questions and yield absurd outcomes for County *Amici's* constituents9

 2. The Commonwealth Court was correct to resolve ambiguous language in the Election Code in favor of electors' rights12

 3. Any outcome other than affirming the Commonwealth Court would create unnecessary confusion.....15

IV. CONCLUSION17

APPENDIX A - List of Amici Curiae19

EXHIBIT 1.....21

TABLE OF AUTHORITIES

CASES

<i>A.S. v. Pennsylvania State Police,</i> 143 A.3d 896 (2016)	12
<i>Appeal of James,</i> 105 A.2d 64 (Pa. 1954)	10
<i>Banfield v. Cortes,</i> 110 A.3d 155 (Pa. 2015)	9, 10
<i>Center for Coalfield Justice v. Washington County Board of Elections,</i> No. 1172 C.D. 2024 (Pa. Commw. Ct. Sept. 24, 2024)	14
<i>Center for Coalfield Justice v. Washington County Board of Elections,</i> No. 2024-003953 (Wash. Cnty. Ct. Common Pleas, Aug. 23, 2024)	14
<i>Genser v. Butler Cnty. Bd. of Elections,</i> No. 1074 C.D. 2024, 2024 WL 4051375 (Pa. Commw. Ct. Sept. 5, 2024).....	11, 12, 14
<i>In re Canvass of Provisional Ballots in the 2024 Primary Election,</i> No. 55 MAP 2024, 2024 WL 4181584 (Pa. Sept. 13, 2024)	9, 12
<i>Keohane v. Delaware County Board of Elections,</i> No. 2023-004458 (Del. Cnty. Ct. Common Pleas, Sept. 21, 2023)	14

<i>MCI WorldCom, Inc. v. Pennsylvania Pub. Util. Comm'n</i> , 844 A.2d 1239 (Pa. 2004)	10
<i>Pennsylvania Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020)	9, 11, 12, 17
<i>Sandusky Cnty. Democratic Party v. Blackwell</i> , 387 F.3d 565 (6th Cir. 2004).....	13
<i>Shambach v. Bickhart</i> , 845 A.2d 793 (Pa. 2004)	9
STATUTES	
25 P.S. § 2602	13
25 P.S. § 3050	13
25 P.S. § 3050(a.4).....	5, 6, 13
25 P.S. §§ 3146.1-3146.9	1
25 P.S. § 3146.6(b)(2).....	13
25 P.S. §§ 3150.11-3150.17	1
25 P.S. § 3150.16(b)(2).....	13
25 Pa. Stat. Ann. § 3150.16.....	13
52 U.S.C. § 21082	13
CONSTITUTIONAL PROVISIONS	
Pa. Const. art. I, § 5	8, 9
Pa. Const. art. VI, § 3	8

OTHER AUTHORITIES

Carter Walker, *Judge tells Delaware County to accept in-person votes from residents whose mail ballots were rejected*, SPOTLIGHT PA (Sept. 21, 2023) 16

Chester County, *Chester County – Voting by Provisional Ballot*, YOUTUBE..... 15

Chester County, *Voter Services Director’s Report*, (May 13, 2024)..... 5

Commonwealth of Pennsylvania, *Voting by Provisional Ballot* 15

Delaware County, *Frequently Asked Questions* 6

Pennsylvania Department of State, *Pennsylvania Provisional Voting Guidance (Version 2.1)* (Mar. 11, 2024) 6

Philadelphia City Commissioners, *2024 Primary - Ballots Returned as Undeliverable or Administratively Determined to Have No Secrecy Envelope, No Signature, No Date, or a Potentially Incorrect Date on Return Envelope* (Apr. 29, 2024) 16

I. STATEMENT OF INTEREST

The undersigned *amici* (“County *Amici*”) are elected Pennsylvania county commissioners, councilmembers, and election officials from both the Democratic and Republican parties.¹ Collectively, County *Amici* represent more than half of all Pennsylvanians. Boards of Elections in their counties are tasked with overseeing federal, state, and local elections, including in-person and mail-in voting procedures.² As officials deeply invested in the democratic process, County *Amici* have an interest in ensuring that all eligible electors in their counties can exercise the right to vote. As the officials responsible for the day-to-day administration of free and fair elections, county officials are experts in the practicalities of election administration. County *Amici* expend considerable time and resources to craft policies to ensure that polling places and mail-in and provisional ballot options are accessible to all constituents, and as necessary adjust those policies in response to

¹ A list of all County *Amici* joining this brief is included at Appendix A. Most County *Amici* represent counties where the county commissioners constitute the Board of Elections. Those County *Amici* who represent home rule counties also support and oversee the administration of elections, albeit in more of a legislative capacity for some of them. No party or counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

² Pennsylvania law provides for two forms of mail voting: (1) certain voters who are in military service, overseas, or unable to vote in person can vote by absentee ballot, 25 P.S. §§ 3146.1-3146.9; and (2) for all elections after March 2020, any person eligible to vote in Pennsylvania can vote by mail-in ballot. 25 P.S. §§ 3150.11-3150.17. Because absentee and mail-in ballots are largely treated identically under the Election Code, they will be referred to together as “mail-in voting” or “mail-in ballots.”

updated guidance and results of election litigation. County *Amici* also respond to elector questions, educate the media and voters about election security, train poll workers extensively on procedures, and accurately canvas ballots, among the countless duties required to administer an election.

County *Amici* not only agree with the rationale behind the Commonwealth Court’s decision, they are concerned that overturning it – and replacing the status quo with Appellants’ proposed draconian statewide ban on counting certain provisional ballots – would make it more difficult for their constituents to vote. Numerous County *Amici* administer elections in counties that have routinely allowed voters to cast provisional ballots in exactly the scenarios at issue in this litigation. Using provisional ballots in this manner is not only safe, straightforward and reliable, it is a critical failsafe that helps county election officials protect the constitutional rights of voters. Overturning the Commonwealth Court’s ruling would – in the middle of an election cycle – strip millions of County *Amici*’s constituents of a trusted safeguard while risking confusion if not chaos across the Commonwealth. Below, County *Amici* explain their trust and reliance on provisional ballots in order to correct the mischaracterizations in the brief in support of Appellants submitted by *amici curiae* legislative leaders (hereinafter, the “Legislative *Amici*”).

II. SUMMARY OF ARGUMENT

The Commonwealth Court correctly concluded that Butler County had erred in refusing to count provisional ballots from eligible electors who had ascertained fatal defects in their mail-in ballots. The decision below relies on the correct interpretation of various components of Pennsylvania law, ensures that the will of voters is protected, comports with the purpose of provisional ballots under federal law, and avoids any potential constitutional infirmity.

County *Amici* write separately here to offer their perspective and deep expertise as elected county officials and to counter the Legislative *Amici's* mischaracterization of voting in the counties. Counting provisional ballots in such circumstances already takes place in many locations, is not administratively burdensome, and reflects the best understanding of Pennsylvania law. Interpreting the Election Code to require the opposite result would, just weeks before mail-in voting begins, curtail the voting rights of millions of Pennsylvanians who have come to accept provisional ballots as a failsafe for errors with mail-in voting. Legislative *Amici* warn that “confusion” would arise from counting such provisional ballots but the opposite is true – widespread confusion would be caused by declaring this practice invalid, especially now that Election Day is little more than one month away. Accordingly, County *Amici* urge this Court to make clear that all counties

should and must allow electors to cast provisional ballots when they realize that their mail-in ballots cannot be a part of the count.

III. ARGUMENT

A. **Legislative *Amici*'s Predictions Are At Odds With The Experiences Of Counties That Already Count Provisional Ballots When An Elector's Mail-in Ballot Contains A Fatal Flaw**

The underlying facts of this case are familiar to County *Amici* because, contrary to the Legislative *Amici*'s apocalyptic predictions, they are fairly commonplace. Eligible electors submit mail-in ballots to county election administrators, and then a defect is detected. Many County *Amici* and their Boards of Elections have allowed electors to do exactly what Faith Genser and Frank Mattis attempted to do in Butler County – cast a provisional ballot that could be counted on Election Day.³ This practice ensures a reasonable opportunity for voters to have their votes counted while falling in line with administrative processes established by the Commonwealth. Indeed, there is nothing unique about these circumstances that warrants, let alone requires, disqualification of the provisional ballots. Pennsylvanians vote by provisional ballot every year.⁴ The process is neither

³ Some County *Amici* serve in counties that have not yet employed these practices and some County *Amici* serve in counties which have done so consistently since 2020. It is the view of all County *Amici* that all counties can and should allow voters to cast provisional ballots in cases such as this.

⁴ For example, a report from Chester County's Voter Services Director notes that dozens of Chester electors were able to use the failsafe mechanism of casting a provisional ballot to be able to vote in the 2024 primary. See Chester County, *Voter Services Director's Report* (May 13, 2024),

onerous nor unusual. To the contrary, for many electors, election workers, and election boards, provisional ballots have been an essential tool in administering smooth and efficient elections under increasingly difficult circumstances.

Legislative *Amici's* fearmongering about counting such provisional ballots is squarely at odds with County *Amici's* experience. To begin, reviewing and counting provisional ballots is not a complicated or new burden for the Boards of Elections – it is a familiar process that already exists and already is mandatory. 25 P.S. § 3050(a.4)(4). Thus, Legislative *Amici's* claim that the Commonwealth Court's decision “mandate[d] a complicated process not enacted by the political branches of our government,” Legislative Leaders *Amicus* at 2 (“Leg. *Amicus*”), is misplaced.

Legislative *Amici* claim that the Commonwealth Court's decision “complicates the canvassing process.” *Id.* It does not. It is not difficult for election boards to determine whether a provisional ballot was cast by an elector whose mail-in ballot was previously counted because the outer markings of mail-in ballots enable the county to determine the identity of the elector without revealing the substance of the elector's vote. There are numerous safeguards to ascertain the appropriateness of the provisional ballot, including opportunities for representatives of each

https://www.chesco.org/DocumentCenter/View/75903/2024_05_13-BoE-Directors-Report?bidId= (last visited Sept. 25, 2024).

candidate and political party to be present and to challenge the provisional ballots during the Boards of Elections' review process. 25 P.S. § 3050(a.4)(4).

The Legislative *Amici* warn that affirming the Commonwealth Court's decision will "delay the final vote tally." Leg. *Amicus* at 25. There is no basis for this forecast. There is already a seven-day period for counties to determine if the voter "was entitled to vote at the election district in the election." 25 P.S. § 3050(a.4)(4)(i)-(vii). This is the case not just for provisional ballots in these particular circumstances (*i.e.*, missing secrecy envelopes), but all provisional ballots cast for any reason at all. County *Amici* know that the Boards of Elections are capable of counting provisional ballots correctly and on time.

Legislative *Amici* claim that counting these provisional ballots "will lead to more double voting." Leg. *Amicus* at 24. It has not. Critically, a provisional ballot is only counted after the Board of Elections determines that the elector has not already successfully cast a valid vote.⁵ Without any supporting evidence, Legislative *Amici*

⁵ The Department of State's guidance to counties on canvassing provisional ballots states: "When determining whether to count a provisional ballot, the county board of elections must reconcile provisional ballots with ballots cast in person on Election Day and with returned absentee and mail-in ballots. If a voter cast an Election Day ballot or successfully voted an absentee or mail-in ballot, the provisional ballot shall not be counted." Pennsylvania Department of State, *Pennsylvania Provisional Voting Guidance (Version 2.1)* (Mar. 11, 2024), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-ProvisionalBallots-Guidance-2.1.pdf> at 4. Counties do perform this reconciliation. See also, e.g., Delaware County, *Frequently Asked Questions*, <https://delcopa.gov/vote/faq.html> (last visited Sept. 25, 2024) ("Provisional ballots are not counted on election day. Instead, they are returned to the Bureau of Elections and, as part of the Return Board process, each provisional ballot is reviewed to ensure that the individual had not voted by

predict that the Commonwealth Court’s decision will “create an incentive for voters to submit multiple ballots.” *Leg. Amicus* at 22. Yet County *Amici* know from experience that there is no incentive for voters, who choose the mail-in option out of convenience if not necessity, to needlessly wait in line at the polls after submitting a mail-in ballot. Nor is there any support, in either the law or in the experience of County *Amici*, for Legislative *Amici*’s claim that counting provisional ballots “creates an unfair advantage for voters who are given a second chance to vote.” *Id.* Simply put, it does not. Every qualified voter has the chance to have exactly one vote counted – no more, and hopefully, no less.

Finally, while Legislative *Amici* claim that election integrity and public confidence in elections would be endangered by affirming the Commonwealth Court’s decision, the opposite is true. Voter participation is a vital part of the democratic process, and allowing minor errors to foreclose any possibility of casting a ballot on Election Day – as the Legislative *Amici* and Appellants ask the Court to do – is what would undermine confidence in elections. Granting relief to Appellants would weaken the integrity of elections by using a strained interpretation of the Election Code to strip away a safeguard away from millions of voters as they prepare to vote in the 2024 general election. There is simply no reason to do so.

mail-in ballot, absentee ballot, or in-person at the polling place. If it is determined that no other ballot had been cast by the voter, the provisional ballot will be opened and counted.”)

B. The Commonwealth Court’s Decision Is Correct Given The Strong Presumption In Favor Of Effectuating the Franchise

Pennsylvania law requires county Boards of Elections to count provisional ballots cast by eligible, registered electors if the elector complies with the provisional ballot requirements and if the elector has not successfully cast another ballot in that election. The issue before this Court is how qualified electors may cast a ballot – not how Legislative *Amici's* standards for “finality” or “election integrity” may be met. As the Legislative *Amici* and Appellants assert the General Assembly’s preeminence in the constitutional order of Pennsylvania elections, they diminish if not overlook the voting rights of County *Amici’s* constituents, which must be protected above competing interests in election administration. County *Amici* each took an oath to “support, obey and defend” these rights. Pa. Const. art. VI, § 3 (Public Officers; oath of office). Accordingly, they understand that voting is not only a constitutional right, but also a foundational one. They also understand that, in interpreting an ambiguous statute, the Commonwealth Court was correctly guided by the directive to protect the electoral franchise rather than reading the Election Code in a way that would implicate grave constitutional concerns.

1. Adopting Appellants’ interpretation of the Election Code would present serious constitutional questions and yield absurd outcomes for County *Amici*’s constituents.

Protecting the right to vote is foundational, because that right “is fundamental and pervasive of other basic civil and political rights.” *Banfield v. Cortes*, 110 A.3d 155, 176 (Pa. 2015) (citation omitted); *see also* Pa. Const. art. I, § 5 (“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.”). It has been the “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) (quoting *Petition of Cioppa*, 626 A.2d 146, 148 (Pa. 1993)). In fact, this policy has stood the test of time, spanning at least 75 years, across different partisan leadership, economic circumstances, and social movements. As this Court recently made clear, where the statute leaves room for ambiguity, the “concept that ‘technicalities should not be used to make the right of the voter insecure,’ [and] the interpretive principle that the Election Code is subject to a liberal construction in favor of the right to vote... are venerable and well established.” *In re Canvass of Provisional Ballots in the 2024 Primary Election*, No. 55 MAP 2024, 2024 WL 4181584 at *5 (Pa. Sept. 13, 2024) (quoting *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954)); *see also Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) (the Election Code “should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate

of their choice.”); *Appeal of James*, 105 A.2d 64, 65 (Pa. 1954) (“All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor.”).

Adopting Appellants’ position – that the Election Code forbids an elector from casting a valid provisional ballot on Election Day because he or she previously submitted a faulty envelope – may run afoul of Pennsylvania’s Free and Equal Elections Clause, Pa. Const. art. I, § 5.⁶ However, the Commonwealth Court was wise to avoid resolving the constitutional questions presented by such an interpretation, because, as explained below, the Election Code does not need to be read to require this result.⁷ *Genser, et al. v. Butler Cnty. Bd. of Elections, et al.*, No. 1074 C.D. 2024, 2024 WL 4051375, at *16, n.29 (Pa. Commw. Ct. Sept. 5, 2024).

The Commonwealth Court’s opinion included practical examples which illustrate the wisdom of this choice. Notably, the Commonwealth Court explained that under Butler County’s interpretation of the Election Code, an elector who mailed back a secrecy envelope without an actual ballot would have been treated as

⁶ This provision of Article I of the Pennsylvania Constitution requires that regulations burdening the right to vote must be “reasonable, non-discriminatory regulations to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield*, 110 A.3d at 176-77.

⁷ Under the canon of constitutional avoidance, “when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided,” it is presumed that courts will adopt the view to avoid the question. *MCI WorldCom, Inc. v. Pennsylvania Pub. Util. Comm’n*, 844 A.2d 1239, 1249 (Pa. 2004).

having “voted” (and thus ineligible to cast a provisional ballot). *Genser* 2024 WL 4051375, at *15. While Appellants ridicule this example as a mere “hypothetical,” Appellant Br. at 36, County *Amici* known that voters mistakenly return empty secrecy envelopes *in every election cycle*. For example, County *Amici* include county commissioners in Chester County, where, in each election since the implementation of Act 77, the Board of Elections has received multiple secrecy envelopes that were empty. The Board has also received secrecy envelopes containing misplaced items instead of ballots in each election. In the 2024 primary election, for example, one of these envelopes contained a personal check that was made out to the voter’s church. Attempting to tithe is not the same thing as having voted, and a statute that said otherwise would be absurd.

While Appellants dismiss such outcomes as a “distraction” from their argument, Appellant Br. at 36, County *Amici* know and represent the very real Pennsylvanians who would be disenfranchised under Appellants’ theory of voting rights. As explained by the Commonwealth Court, reading the Election Code to disqualify otherwise valid provisional ballots would be absurd and unreasonable,⁸

⁸ Courts “must in all instances assume the General Assembly does not intend a statute to be interpreted in a way that leads to an absurd or unreasonable result.” *Pa. Democratic Party*, 238 A.3d at 380 (citing 1 P.S. § 1922(1)). Illustrating another absurd outcome that would result from Butler County’s reading of the Election Code, the Commonwealth Court cited the example of electors who may have made the same mistakes as *Genser* and *Mattis*, but were tardy to the point that their declaration envelopes arrived after Election Day. Under Butler County’s policy, if both sets of electors submitted provisional ballots, “[t]he lackadaisical mail-in elector winds up with one vote; the diligent elector winds up with none.” *Genser*, 2024 WL 4051375 at *15, n.28.

running afoul of this Court’s clear admonition that the “goal must be to enfranchise and not to disenfranchise [the electorate].” *Pa. Democratic Party*, 238 A.3d at 361 (quoting *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972)). The Commonwealth Court’s interpretation of the Election Code is not only in line with the understanding of County *Amici*, it is correct under Pennsylvania law.

2. The Commonwealth Court was correct to resolve ambiguous language in the Election Code in favor of electors’ rights.

While federal and state law make it clear that electors must be given the opportunity to cast provisional ballots, the Election Code has left it to the courts to resolve how Boards of Elections should count provisional ballots. Thus, the Commonwealth Court did not “usurp[]the power of the General Assembly” as alleged by the Legislative *Amici*, Leg. *Amicus* at 2, but rather resolved a statute that has generated disagreement since its enactment.⁹

Starting with the purpose of provisional ballots is crucial. The 2002 Help America Vote Act (HAVA) required states to implement provisional-voting regimes

⁹ While many parties, *amici*, and courts agree on this reasonable interpretation of the statute, the Appellees in this case (and some individual judges) do not, and “[a] statute is ambiguous when there are at least two reasonable interpretations of the text.” *A.S. v. Pennsylvania State Police*, 143 A.3d 896, 905-06 (2016) (collecting cases) To *amici*, who rely on the judiciary to interpret the Election Code, the variance is an indicator that there is an ambiguity to resolve. Even if the Court concludes that Appellees’ interpretation is also reasonable, then the statute is ambiguous, and the “venerable and well established” principle of applying “liberal construction in favor of the right to vote” certainly applies. *In re Canvass of Provisional Ballots*, 2024 WL 4181584 at *5. The Commonwealth Court was therefore correct in resolving that ambiguity in favor of counting the votes. *Genser*, 2024 WL 4051375 at *15 (citations omitted).

for federal elections (at a minimum). 52 U.S.C. § 21082 (*formerly* 42 U.S.C. § 15482).¹⁰ The purpose of provisional voting is to “prevent on-the-spot denials of provisional ballots to voters,” ensuring that eligible voters can vote exactly once. *See, e.g., Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004).

As the Commonwealth Court correctly observed, however, Pennsylvania statutes regarding the counting of provisional ballots are ambiguous. The county board “shall” count the provisional ballot if the voter “did not cast any other ballot,” 25 P.S. § 3050(a.4)(5)(i), and “shall not” count the provisional ballot if a mail-in ballot was “timely received.” *Id.* § 3050(a.4)(5)(ii)(F). Additionally, the Election Code authorizes provisional voting by electors who request mail-in ballots but do not “vote” those ballots. *Id.* §§ 3150.16(b)(2)¹¹, 3146.6(b)(2). However, crucially, the terms “cast” and “vote” are not defined, 25 P.S. § 2602, and many authorities have interpreted those terms to only apply to ballots that are being counted.

County *Amici* agree with the Secretary of the Commonwealth’s reading as well as the ruling of the Commonwealth Court that a voter whose mail-in ballot is

¹⁰ Shortly after HAVA became law, the General Assembly amended the Election Code to incorporate HAVA’s provisional ballot protections. *See* 25 P.S. § 3050.

¹¹ “An elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot under section 1210(a.4)(1) [25 P.S. § 3050].” 25 Pa. Stat. Ann. § 3150.16.

cancelled or invalid has not “cast any other ballot” or “voted.” *Genser*, 2024 WL 4051375 at *13. The provision concerning whether a ballot is “timely received” arises “only if that ballot is and remains valid and will be counted, such that that elector has already voted.” *Id.* Several other courts agree. *Amici* include county officials in Delaware County and Washington County; this year, the Butler County court’s counterparts in these counties resolved this ambiguity by concluding that, under the Election Code, electors who have returned invalid ballots have not yet voted. *Keohane v. Delaware County Board of Elections*, No. 2023-004458 at *3 (Del. Cnty. Ct. Common Pleas, Sept. 21, 2023) (such voters “cannot be said to have ‘cast’ a ballot.”); *Center for Coalfield Justice v. Washington County Board of Elections*, No. 2024-003953 at *26 (Wash. Cnty. Ct. Common Pleas, Aug. 23, 2024) (“It is clear that an elector whose mail-in packet is deemed to have a disqualifying error did not vote.”). Days before the filing of this brief, a separate panel of the Commonwealth Court relied on the statutory analysis in the Commonwealth Court’s decision in this case in order to uphold the Washington County trial court’s decision. *Center for Coalfield Justice v. Washington County Board of Elections*, No. 1172 C.D. 2024 at *13 (Pa. Commw. Ct. Sept. 24, 2024).

This reading of the Election Code, independently reached by trial and appellate judges across the Commonwealth, is not only common sense, it also allows County *Amici* to continue to effectuate the purpose of a provisional ballot as a

failsafe mechanism to enable qualified voters to secure their fundamental right to vote. A contrary interpretation would not.

3. Any outcome other than affirming the Commonwealth Court would create unnecessary confusion.

Indeed, while Legislative *Amici* argue that affirming the Commonwealth Court would lead to confusion, the opposite is true; overturning this decision would cause widespread confusion among millions of County *Amici*'s constituents. The Commonwealth Court's decision aligns with County *Amici*'s understanding (and, for many, practice) of effectuating the electoral franchise under Pennsylvania law. The Commonwealth, like many County *Amici*, advises voters to cast provisional ballots under similar circumstances. Over the last four years, millions of voters in County *Amici*'s counties have become familiar with this system, having been educated by election officials,¹² exposed to news articles reporting counties'

¹² The Commonwealth's "Voter Support" website informs voters that they "may be issued a provisional ballot" if "[y]ou were issued an absentee or mail-in ballot but believe you did not successfully vote that ballot, and you do not surrender your ballot and outer return envelope at the polling place to be spoiled," or if "[y]ou returned a completed absentee or mail-in ballot that was rejected, or you believe will be rejected, by the county board of elections and you believe you are eligible to vote." Commonwealth of Pennsylvania, *Voting by Provisional Ballot*, <https://www.pa.gov/en/agencies/vote/voter-support/provisional-ballot.html> (last visited Sept. 25, 2024). Some counties' materials echo that guidance. For example, an educational video from Chester County instructs voters that they may cast a provisional ballot if "you were issued but did not successfully cast an absentee or mail-in ballot, and you did not surrender your ballot at the polling place to be voided." Chester County, *Chester County – Voting by Provisional Ballot*, YOUTUBE, <https://youtu.be/5hWGbyKseqY> at 0:41 (last visited Sept. 25, 2024) (cleaned up).

practices,¹³ and repeatedly instructed in several consecutive election cycles to submit provisional ballots if their mail-in ballots are likely to be disqualified.¹⁴ At least some counties have already begun training poll workers. For millions of Pennsylvanians, an affirmance of the Commonwealth Court’s decision would only validate the status quo.

On the other hand, granting the relief sought by Appellants would create sudden confusion and would disenfranchise Pennsylvania electors. Stripping millions of electors of the right to cast a provisional ballot at this late stage in the election cycle, especially in those counties with a history of relying on this failsafe, would lead to voters making futile attempts to vote provisionally on Election Day. Such a change in the law would, operationally, cause several counties represented by *County Amici* to overhaul the substance and methods of their guidance to voters and poll workers,

¹³ Carter Walker, *Judge tells Delaware County to accept in-person votes from residents whose mail ballots were rejected*, SPOTLIGHT PA (Sept. 21, 2023), <https://www.spotlightpa.org/news/2023/09/pennsylvania-mail-provisional-ballot-delaware-county-lawsuit/>.

¹⁴ For example, in Montgomery County, mail-in voters who forget to include a secrecy envelope are contacted via email and instructed that they may vote a provisional ballot at their polling place on Election Day. Some counties post a list of voters whose returned mail-in ballots have been determined to have a defect, including lack of a secrecy envelope; the list provides instructions on voting with a provisional ballot on Election Day. *See, e.g., Philadelphia City Commissioners, 2024 Primary - Ballots Returned as Undeliverable or Administratively Determined to Have No Secrecy Envelope, No Signature, No Date, or a Potentially Incorrect Date on Return Envelope* (Apr. 29, 2024), <https://vote.phila.gov/news/2024/04/18/2024-primary-ballots-administratively-determined-to-have-no-secrecy-envelope-no-signature-no-date-or-a-potentially-incorrect-date-on-return-envelope/> (last visited Sept. 25, 2024). Other counties send individual notices to voters whose mail-in ballots have not been counted due to deficiencies, including a lack of secrecy envelope. *See, e.g., Exhibit 1* (providing an example of the letter that Chester County sent voters after the April 2024 primary, including instructions to cast a provisional ballot on Election Day).

a particularly onerous challenge given the timing as we approach the election. Even if County *Amici* are able to retrain poll workers and invest in last-minute education efforts, many of their constituents would face needless confusion, frustration, and disenfranchisement on Election Day.

By contrast, voters are already permitted to cast provisional ballots in all 67 counties. Affirmance with precedential effect would not require counties to alter the nature of their election administration operations but instead would require them, during the final tally, to count provisional ballots like those cast by Ms. Genser and Mr. Mattis as part of the provisional ballot process. Given the strong presumption in favor of counting ballots, *Pa. Democratic Party*, 238 A.3d at 360-61 (quoting *Shambach*, 845 A.2d at 798), the Commonwealth Court was correct in reading the Election Code to require such a result.

IV. CONCLUSION

For all of the foregoing reasons and for the reasons provided by Respondents as well as the Department of State, the judgment of the Commonwealth Court should be affirmed. Such a result not only vindicates the rights of Ms. Genser and Mr. Mattis, but of millions of County *Amici's* constituents. The Election Code exists to enfranchise, not disenfranchise, their constituents, and providing consistency on these points will benefit all Pennsylvania electors, not only in this year's election but in elections for years to come.

Dated: September 26, 2024

Respectfully submitted,

CURTIN & HEEFNER LLP

By:



Joseph J. Khan, Esquire

Pa. ID No. 86620

2005 S. Easton Road, Suite 100

Doylestown, PA 18901

Phone: (267) 898-0570

jjk@curtinheefner.com

Jonathan B. Miller, Esquire*

Shannon Eddy, Esquire*

PUBLIC RIGHTS PROJECT

490 43rd Street, Unit #115

Oakland, CA 94609

Phone: (510) 738-6788

jon@publicrightsproject.org

shannon@publicrightsproject.org

* *On the brief*

Counsel for Amici Curiae

APPENDIX A - List of Amici Curiae

Pat Fabian
Commissioner, Armstrong County

Justin Douglas
Commissioner, Dauphin County

Dante Santoni, Jr.
Commissioner, Berks County

Dr. Monica Taylor
Council Chair, Delaware County

Diane Ellis-Marseglia
Commissioner and Chair, Bucks County Board of Commissioners

Rock Copeland
Council Member, Erie County

Bob Harvie
Commissioner, Bucks County Chair, Bucks County Board of Elections

Chris Drexel
Council Member, Erie County

Amber Concepcion
Commissioner, Centre County

Vince Vicites
Commissioner, Fayette County

Mark Higgins
Commissioner, Centre County

Sherene Hess
Commissioner, Indiana County

Josh Maxwell
Commissioner-Chair, Chester County

Jo Ellen Litz
Commissioner, Lebanon County

Marian Moskowitz
Commissioner, Chester County

Geoff Brace
Commissioner-Chair, Lehigh County

Angela Harding
Commissioner, Clinton County

Patty Krushnowski
Council Member, Luzerne County

Christopher Seeley
Commissioner, Crawford County

Jimmy Sabatino
Council Member, Luzerne County

Brittany Stephenson
Council Member, Luzerne County

Timothy McGonigle
Commissioner, Mercer County

Neil K. Makhija
Commissioner, Montgomery County
Chair, Montgomery County Board of Elections

Jamila H. Winder
Commissioner and Chair, Montgomery County Board of Commissioners

Lamont G. McClure
County Executive,
Northampton County

Seth Bluestein
City Commissioner,
City and County of Philadelphia

Lisa Deeley
Commissioner and Vice Chair,
City and County of Philadelphia

Omar Sabir
City Commissioner and Chairman, City and County of Philadelphia

Larry Maggi
Commissioner, Washington County

EXHIBIT 1



THE COUNTY OF CHESTER

**BOARD OF ELECTIONS:**

Josh Maxwell, Chair
Marian D. Moskowitz, Vice Chair
Eric M. Roe, Commissioner

CHESTER COUNTY VOTER SERVICES

Government Services Center
601 Westtown Road, Suite 150
P.O. Box 2747
West Chester, PA 19380-0990
(610) 344-6410 FAX: (610) 344-5682

Karen Barsoum
Director

Dear Voter,

During intake of your mail-in/absentee ballot envelope, we identified a deficiency which may prevent your ballot from being counted.

If you would like to cure this deficiency, please come to the Chester County Voter Services Office at **601 Westtown Road, Suite 171, West Chester between 8:30AM and 4:30PM, Monday-Friday**. You will need to verify your identity by showing either a state-issued ID, an employee ID, a utility bill with your name and address, or a government check, or you can verbally verify your driver's license number or last four digits of your social security number in person.

The last day to cure a deficiency is **Monday, April 22, 2024**.

If you are unable to come to the Voter Services office, you can go to your Polling Place and vote by casting a Provisional Ballot on Election Day (Tuesday, April 23, 2024). The elections staff at your Polling Place will assist you. As a reminder, the polls are open from 7AM to 8PM. To find your polling place, visit www.chesco.org/elections.

If you have any questions, you may contact the office at 610-344-6410 or via e-mail ballotinfo@chesco.org.

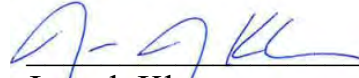
Sincerely,

Chester County, Voter Services

CERTIFICATE OF WORD COUNT

I hereby certify that this brief contains 4,274 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this petition.


Dated: September 26, 2024


Joseph Khan

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify, pursuant to Pa.R.A.P. 127, 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.

Dated: September 26, 2024



Joseph Khan