

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 28 WAP 2024

**CENTER FOR COALFIELD JUSTICE, WASHINGTON BRANCH
NAACP, BRUCE JACOBS, JEFFREY MARKS, JUNE DEVAUGHN
HYTHON, ERIKA WOROBEK, SANDRA MACIOCE, KENNETH
ELLIOTT, AND DAVID DEAN,
Appellees,**

v.

**WASHINGTON COUNTY BOARD OF ELECTIONS,
Appellant,**

and

**REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN
PARTY OF PENNSYLVANIA,
Intervenors/Appellants.**

**BRIEF FOR *AMICUS CURIAE*
PHILADELPHIA COUNTY BOARD OF ELECTIONS
IN SUPPORT OF NO PARTY**

CITY OF PHILADELPHIA
LAW DEPARTMENT
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INTEREST OF AMICUS CURIAE

This matter concerns the potential constitutional obligations on county boards of elections to provide certain notice to mail voters for purposes of procedural due process. The Philadelphia County Board of Elections (the “Board” or “Philadelphia”) has a crucial interest in this matter because it is responsible for ensuring each election is run smoothly with the resources available while allowing as many eligible voters to participate as possible and complying with its constitutional obligations. The Board processes hundreds of thousands of mail ballots submitted by Philadelphia voters and strongly believes boards should provide notice to those voters who submit ballots with potential facial deficiencies. Since 2020, as its resources have allowed, the Board has provided notice to voters by public posting, and currently does so via automatically generated SURE system email notifications and the regularly posted lists of potentially deficient mail ballots.¹ At the same time, the Board would need to devote significant additional resources to affirmatively provide every affected voter with additional individualized notice, separate from the above. Given the competing demands on

¹ See Phila. City Commissioners, *2024 General Election: Unverifiable Identification, Undeliverable, and/or Potentially Flawed Ballots* (Oct. 8, 2024), <https://vote.phila.gov/news/2024/10/08/2024-general-election-unverifiable-identification-undeliverable-and-or-potentially-flawed-ballots/>.

the Board, it submits this amicus brief to help aid the Court’s resolution of this matter.

ARGUMENT

The Board takes no position on the merits of the claim before this Court, but instead writes to address an issue that the lower courts have not fully addressed—the risk of *erroneous* deprivation—and how that may inform this Court’s analysis.

Courts balance three considerations in determining whether the due process provided is sufficient: “(1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state.” *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 897 (Pa. 2020). While the lower courts evaluated Petitioners’ interests, the Washington County Board of Elections’ current process, and the benefits and burdens of additional process, they did not properly consider how the process impacted the risk of *erroneous* deprivation. *See, e.g., S.F. v. Pa. Dep’t of Human Servs.*, 298 A.3d 495, 517 (Pa. Cmwlth. 2023) (“As we evaluate this factor, we ask ‘considering the current process, what is the chance *the state* will make a mistake?’” (citation omitted) (emphasis added)).

Washington County rejected Petitioners' mail ballots because it found they lacked a signature, were missing a date, or had an "incorrect" date. Assuming for the sake of argument that Petitioners have a protectable interest in the right to have their ballots counted, they could be considered deprived of that interest when their ballots were rejected. But that deprivation would only be erroneous if a sufficient ballot was mistakenly (or erroneously) rejected as insufficient.

To determine whether there was a risk of *erroneous* deprivation, the lower courts needed to consider whether Washington County could have made those sufficiency determinations incorrectly. For instance, was it possible that the board considered a declaration envelope incorrectly dated when the voter used the European dating convention for an acceptable date? Could a declaration envelope have appeared unsigned because the ink signature had been smeared to the point of appearing invisible by contact with water? *Cf. Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 389 (Pa. 2020) (Wecht, J., concurring) (noting risk of erroneous deprivation may be higher for where subjective assessments are possible).

It is these types of erroneous deprivation that the lower courts should have considered when evaluating the value of additional process. Instead, the courts considered the risk that Petitioners would be deprived (erroneously or not) of their vote, or of the ability to challenge the board's decision or cast a provisional ballot.

Because the lower courts did not consider this narrower risk of erroneous

deprivation, it is not clear how they would have resolved this analysis or whether there are sufficient facts in the record for this Court to do so in the first instance.

To the extent this Court does proceed to the remainder of the analysis at this juncture, it should be clear, when it balances the value of additional notice against the cost of doing so, that its decision is limited to the specific and narrow circumstances here. This case presents the rare and disappointing issue of the adequacy of notice in the face of active misfeasance, as Washington County is alleged to have intentionally given incomplete and even potentially misleading information to voters, despite having easy access to accurate information based on its segregation procedures. Any decision should thus only address the adequacy of notice when a county board intentionally withholds or provides misleading information to voters.

Respectfully submitted,

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October 11, 2024

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CERTIFICATION OF COUNSEL

I hereby certify that this brief contains 792 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.

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