

IN THE SUPREME COURT OF PENNSYLVANIA
No. 28 WAP 2024

WASHINGTON COUNTY BOARD OF ELECTIONS,
REPUBLICAN NATIONAL COMMITTEE, AND REPUBLICAN PARTY OF
PENNSYLVANIA,

Petitioners/ Appellants,

v.

CENTER FOR COALFIELD JUSTICE, *et al.*,

Respondents/ Appellees.

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

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I. STATEMENT OF INTEREST

Amici are commissioners of counties in western, central and eastern Pennsylvania who have served in their respective roles administering elections since before Act 77 made no-excuse mail-in voting universal in the Commonwealth.¹ Each of the *amici*, including one commissioner who has served on Washington County's board of elections since 2004, is the longest-serving member of their respective board of elections. Each of the *amici* is among the more than 30 county commissioners, councilmembers and executives who joined an *amicus curae* brief which urged this Honorable Court to affirm the Commonwealth Court's decision in *Genser v. Butler*, a decision on which the lower court relied and which Appellants now ask this Court to overturn. *Ctr. for Coalfield Just. v. Washington Cnty. Bd. of Elections*, No. 1172 C.D. 2024, 2024 WL 4272040, at *5 (Pa. Commw. Ct. Sept. 24, 2024) (citing *Genser v. Butler Cnty. Bd. of Elections*, No. 1074 C.D. 2024, 2024 WL 4051375 (Pa. Commw. Ct. Sept. 5, 2024) (*appeal granted in part*, No. 240 WAL 2024, 2024 WL 4248971 (Pa. Sept. 20, 2024))). At the time of this filing, the appeal of *Genser* is pending before this Court.

¹ *Amici* join this brief in their respective capacities as independently elected officials. 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.

The undersigned *amici* write separately to share their unique perspective as election officials who have served through recent changes in election law, particularly through the expansion of mail-in voting.² They agree with the lower court’s ruling on notice, understand the ability of election boards to implement it, and refute Appellants’ claim that it will “lead to disruption” of the upcoming election. Appellants’ Br. at 46. The notice directives ordered by the Court of Common Pleas and affirmed by the Commonwealth Court are logical, administratively simple, and commonplace processes that are in line with best practices, the Election Code and the Pennsylvania Constitution.

II. SUMMARY OF ARGUMENT

Amici agree with both the trial court and the Commonwealth Court in this case: *amici*’s constituents are entitled to notice if their mail-in ballot will be disqualified. When Washington County stopped providing notice to voters whose mail-in ballots contained disqualifying errors right before the 2024 primary, even when contacted by voters accustomed to the prior policy, more than 250 electors were denied their rights.

² This brief uses the terms “mail-in voting,” “mail-in ballot” or “mail ballot” to refer to voting that involves both absentee ballots and mail-in ballots. See 25 P.S. §§ 3146.6, 3150.16.

As commissioners who have administered elections through the passage and adoption of Act 77, *amici* agree with the Commonwealth Court’s rejection of the erroneous idea that following the trial court’s notice directives could be illegal or difficult—to the contrary, many counties already follow notice procedures that comply with the order. Following the court order in order to provide the rights guaranteed to *amici*’s constituents certainly does not conflict with the Election Code, which precludes neither the quick review of the outer envelope of mail-in ballots that identifies errors nor the accurate tracking of ballots that enables election offices to notify voters of those errors. Those steps, which are commonplace policies across Pennsylvania counties, do not constitute an undue challenge for election offices. Indeed, the widespread adoption of mail-in ballots over the past five years makes such review and segregation of ballots an important part of preparing for a timely canvass.

The trial court’s ruling on notice, affirmed by the Commonwealth Court, offers an administratively reasonable way to provide due process to Pennsylvania’s electors. Voting is “the most treasured prerogative of citizenship,” *Appeal of Norwood*, 116 A.2d 552, 553 (Pa. 1955), and *amici* ask that the Court uphold the Commonwealth Court’s decision to protect that prerogative.

III. ARGUMENT

Throughout numerous election cycles, including several presidential elections, *amici* have worked to protect the electoral franchise. Each year, *amici* have seen their respective county election boards adapt to changes in Pennsylvania voting law. Perhaps most significantly, after *amici* began their respective service as county commissioners, the General Assembly passed Act 77 “to make voting more convenient for qualified electors.” *Genser v. Butler Cnty. Bd. of Elections*, No. 1074 C.D. 2024, 2024 WL 4051375, at *15 (Pa. Commw. Ct. Sept. 5, 2024).

Amici quickly adapted to this new expansion of voting rights, as did their constituents. As soon as Act 77 was implemented, at the height of the COVID-19 pandemic, voters in *amici*’s counties began exercising their new no-excuse right to vote by mail en masse.³ In each election cycle, *amici* and county commissioners across the Commonwealth have endured a constant stream of litigation while waiting for the legislature to provide further clarity about Act 77 and its interplay with the rest of the Election Code.⁴

³ In the June 2, 2020 primary election, 51% of all votes cast were cast by mail, and in the November 3, 2020 general election, “2,648,149 mail-in ballots were cast, representing 38% of the total votes.” *McLinko v. Dep’t of State*, 279 A.3d 539, 544 (Pa. 2022).

⁴ For example, Centre County’s Board of Elections was sued seventeen times in 2020. Gary Sinderson, *Centre Co. officials address cost of mail-in ballot lawsuit*, WJAC (May 23, 2024), <https://wjactv.com/news/local/centre-county-officials-address-cost-mail-in-ballot-lawsuit-election-pennsylvania/>.

Through it all, *amici* have seen first-hand how the expansion of mail-in voting has made voting more accessible while at the same time creating technical pitfalls that risk disenfranchising qualified electors who make innocent mistakes. The peculiarities of mail-in envelopes create opportunities for human error that do not exist at the polls. Yet all electors, whether they vote by mail or in person, have the same liberty interest in having their votes counted. The case before this Honorable Court is about treating the mail-in voters fairly, giving them the notice they deserve, and affording them the process they are due.

A. The Commonwealth Court correctly found that the Electors are entitled to notice of their disqualification.

As county commissioners and members of their respective boards of elections, *amici* all have a duty to ensure that the Election Code is administered in accordance with the constitutional rights of their constituents. The right to vote in free and fair elections, Pa. Const. art. I, § 5, and the right to procedural due process, Pa. Const. art. I, §1, are both enshrined in the Constitution of Pennsylvania, which *amici* took an oath to “support, obey and defend.” Pa. Const. art. VI, § 3. The right to vote is “fundamental and ‘preservative of other basic civil and political rights.’” *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)). “If a liberty interest is identified, then procedural due process protections must attach.” *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *7 (Pa.

Commw. Ct. Sept. 24, 2024). Such protections include “adequate notice, opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction of the case.” *Id.* (quoting *Lawson v. Department of Public Welfare*, 744 A.2d 804, 806-07 (Pa. Cmwlth. 2000)). “Notice is the most basic requirement of due process.” *Pa. Coal Mining Ass’n v. Ins. Dep’t*, 370 A.2d 685, 692–93 (Pa. 1977).⁵ For these reasons, *amici* are committed to ensuring that all eligible voters—those who cast in-person ballots and those who, in recent years, increasingly rely on mail-in ballots—can cast ballots, have their votes counted, and receive fair notice before their votes are disqualified.

Unfortunately, scores of eligible electors failed to receive notice that their votes would not be counted in Washington County’s 2024 primary election after the County abruptly discontinued its prior practice of providing notice to voters whose mail-in ballots were segregated for disqualifying errors (and even declined to warn voters who specifically asked about their ballots). *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *1. Some voters did not find out for months after the primary. *Id.* at *8. For *amicus* from Washington County, each of these 259 disqualifications correlates to a constituent who lost the fundamental right to vote—not only without warning,

⁵ As the Commonwealth Court noted, Pennsylvanians’ due process rights are “broader than the protections afforded under the United States Constitution.” *Ctr. for Coalfield Just.*, 2024 WL 4272040 at *7 (quoting *Marchionni v. Southeastern Pennsylvania Transportation Authority*, 715 A.2d 559, 562 n.2 (Pa. Cmwlth. Ct. 1998)).

but after receiving admittedly “misleading” communications from the County. *See* Appellants’ Br., Ex. 3, Melanie Ostrander Tr., at 66:14-23; 123:18-124: 162:23-163:7; 218:5-219:4 (“Ostrander Tr.”) (agreeing that the language in the SURE⁶ emails generated by Washington County’s input of the “Record – Ballot Returned” code was “misleading”).

These constituents include a senior citizen who was shocked and upset to find out that, in spite of her efforts to ensure that her vote would be counted, the opposite happened. It was especially important to this woman that her vote be counted because her friend was a candidate in that election. After submitting her ballot, she followed up by contacting the County to ensure that her ballot was received. When the County told her that her ballot had been received, she understood that her vote would be counted. She did not realize that she had made a mistake in submitting her ballot or that her vote was discarded until after the media covered the instant litigation.

Appellants suggest that providing the general public the date, time and location of the County’s canvass was the only notice owed to voters such as her. Appellants’ Br. at 13. *Amici* disagree. This voter deserved better from her

⁶ “SURE” refers to the Statewide Uniform Registry of Electors (or “SURE”). 25 Pa.C.S. § 1222. It is a computer system that contains a database of all registered electors, assigning them each a unique SURE registration number and providing “instant access” to county elections officials to registration records maintained on the system. *Id.*

government. Under the Pennsylvania Constitution, she was entitled to due process before her vote was thrown away. The Commonwealth Court’s decision properly vindicated that right – for her, for the Electors, and for all Pennsylvanians.

B. The Commonwealth Court correctly rejected arguments that compliance with the trial court’s notice directives would have been unusual, burdensome or even illegal.

Amici include county commissioners, including from Washington County, whose boards of elections have implemented processes such as those directed by the trial court. Throughout this litigation, Appellants have cast suspicion on such processes, which election officials throughout the Commonwealth, including *amici*, have relied on to administer elections smoothly. The Commonwealth Court correctly rejected arguments that notifying voters in this way would be new, difficult or even illegal for county boards of elections.

1. It is not illegal to provide notice as required by the trial court.

To begin, *amici* dispute Appellants’ claim that providing notice as required by the trial court is somehow illegal.

Appellants argue that the order affirmed by the Commonwealth Court is “foreclose[d]” by the Election Code, Appellants’ Br. at 39, because it requires the Board to “inspect” mail-in ballots and “disclose” the result, thereby “creat[ing] a

pre-canvass period” ahead of the statutory pre-canvass. Appellants’ Br. at 38-39. But the act of visually observing the outside of mail-in ballot envelopes for “ten to thirty seconds or less,” Ostrander Tr. 41:4-13, in order to segregate the ones with defects does not constitute a pre-canvass. Taking this step in advance of the pre-canvass simply helps election offices process the large volumes of mail-in ballots efficiently as soon as the Code allows.⁷ By contrast, the pre-canvass is a publicly noticed meeting of the board of elections that begins no earlier than 7:00am on Election Day, 25 P.S. § 3146.8(g), in which the board carries out a defined process:

“[T]he inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots.”

25 P.S. § 2602(q.1). No one familiar with election administration in Pennsylvania counties would mistake these two distinct phenomena, but Appellants conflate them by artificially extracting the word “inspection” from the multi-step definition of “pre-canvass.” *Amici* are not only familiar with the distinct stages of an actual pre-canvass, they are aware that the review and segregation of mail-in ballots is a standard practice that this Court has ordered in the past.⁸ *Ball v. Chapman*, 284 A.3d 1189 (Order dated Nov. 1, 2022) (“We hereby DIRECT that the Pennsylvania

⁷ Indeed, for most counties, not taking this step would be impractical.

⁸ It is also one that Washington County, like other counties, continued to practice in the 2024 primary election, even after it stopped providing notice.

county boards of elections segregate and preserve any ballots contained in undated or incorrectly dated outer envelopes”).

Similarly, *amici* refute Appellants’ argument that warning a voter of a potential disqualification would violate the Election Code. Appellants’ Br. at 39. Appellants claim that providing electors with notice before discounting their ballots is “disclos[ing] the results of any portion of any pre-canvass meeting prior to the close of the polls.” *Id.* (citing 25 P.S. §3146.8(g)(1.1)). Not so. The administrative task of reviewing, scanning, coding, and segregating the mail-in ballot is not a “meeting,” let alone the pre-canvass meeting. Moreover, the “results” contemplated by the Code are the results of the computation and tally of votes that is part of the pre-canvass, not the determination of whether a mail-in ballot envelope contains a disqualifying error. For all of these reasons, the Commonwealth Court was correct to reject Appellants’ strained interpretation of the Election Code.

2. It is not difficult to provide notice as required by the trial court.

Amici also understand that it is not difficult to provide notice to electors through SURE that their votes are at risk for disqualification. The trial court’s order included two directives relating to notice: “input the accurate status of the mail-in packet in the SURE system and provide the status to the elector if

requested” and “notify any elector whose mail-in packet is segregated for a disqualifying error.”⁹ Opinion and Order, *Ctr. for Coalfield Just. v. Washington Cnty. Bd. of Elections*, No. 2024-3953, at 4 (C.P. Washington, Aug. 23, 2024) (“Order”). Appellants argue that these procedures would impose a “significant and unjustified” burden on the board of elections. Appellants’ Br. at 36. *Amici* know that Appellants are mistaken – not only with respect to Washington County, but also with respect to county election administration more generally.

The above steps are not burdensome or complex. For example, inputting the status of the mail-in packet merely requires scanning the ballot and selecting the code to update the status of the ballot, which is already the procedure in many counties. Identifying the correct code takes “seconds, ten to thirty seconds or less.”¹⁰ Selecting the correct code does not add significant time to the process that the elections office follows to scan, segregate, and securely store ballots. The larger adjustments that *amici* and elections offices have already made to accommodate Act 77’s new right to universal mail-in voting, like hiring temporary

⁹ The Order also includes a directive concerning the documentation of poll books, but *amici*’s brief only addresses the notice due to electors and the directives regarding the same.

¹⁰ Ostrander Tr. at 38:7-14. (“Q: ... When your office was looking at a declaration envelope in 2023, how long would it take on average to determine if the date was correct? A: I don’t know an exact time, but it did not – within seconds, 10 to 30 second [sic] or less. Q: And how long would it take to determine if a date was present at all? A: Again, I don’t know the exact time, but within 10 to 30 seconds.”)

staff to handle the larger volume mail-in ballot processing generally,¹¹ already includes time for such minor steps in that process. Once the office has inputted the correct status into the SURE system, responding to voter inquiries about the status of the ballot is not difficult, and is not an extraordinary step. County elections offices field voter questions about various parts of the process all the time—by phone, in person, and by email—and have done so since long before the passage of Act 77 and subsequent increase in mail-in ballot processing.

Over the last five years, *amici* have seen their boards of elections – and others across the Commonwealth – make many major adjustments under difficult conditions. The notice directives in the trial court’s order, by contrast, are straightforward measures that county boards are amply capable of implementing. Contrary to Appellant’s argument, the lower court’s decision did not require anyone to “invent” a new system, Appellant Br. at 18, because Washington County, like counties across Pennsylvania, had utilized such techniques in the past.

3. Many counties already follow the notice procedures set out in the order affirmed by the Commonwealth Court.

Indeed, *amici* are aware that counties across Pennsylvania already provide notice to electors in the manner set forth in the trial court’s order. The use of

¹¹ *Id.* at 17:15-22 (describing the hiring of eighteen to twenty temporary employees); 30:25 – 31:11 (describing election technicians, office managers, and temporary employees receiving and scanning returned mail-in ballots).

“cancelled” or “pending” codes that the Department of State offers is not unusual – it is commonplace. *See* Complaint, Ex. 8., Decl. of Ariel Shappell at ¶ 13, *Ctr. for Coalfield Just. v. Washington Cnty. Bd. of Elections*, No. 2024-3953 (C.P. Washington, Jul. 1, 2024) (40 counties were using the “cancelled” or “pending” codes in the SURE system by the day before Election Day in the April 2024 primary, with almost three thousand mail-in ballots coded as such for missing or incorrect dates on the outer envelope by that date). In fact, many of those counties¹² allow voters to come to election offices ahead of Election Day to cure their flawed mail-in ballots—a step that, to be clear despite Appellants’ arguments to the contrary, Appellants’ Br. at 24, was not required by the trial court’s order.¹³ *See Order* at 4.

In fact, as one of *amici* knows first-hand, Washington County implemented both a notice process *and* a curing process before the 2024 primary. *Ctr. for Coalfield Just.*, 2024 WL 4272040 at *8. In 2023, a Washington County voter whose ballot was to be cancelled for a dating issue would be allowed to visit the

¹² At least 32 counties offer voters an opportunity to cure their ballots after they notify them of the error in their ballots. Ian Karbal, *Daupin County will allow voters to correct mail-in ballot errors. Advocates hope more will follow.*, PENNSYLVANIA CAPITAL STAR, Sept. 12, 2024, <https://penncapital-star.com/voting/dauphin-county-pennsylvania-will-allow-voters-to-correct-mail-in-ballot-errors-advocates-hope-more-follow/>.

¹³ Notwithstanding Appellants’ suggestion to the contrary, casting a provisional ballot is not a curing process. *Ctr. for Coalfield Just.*, 2024, 2024 WL 4272040, at *6 (quoting *Genser*, 2024 WL 4051375, at *16).

Board of Elections office to receive a new ballot. Ostrander Tr. at 40:2-11. Such a voter could also vote provisionally on Election Day, *id.*, a right recently affirmed by the Commonwealth Court. *Genser*, 2024 WL 4051375, at *16. These practices were not illegal, unusual or difficult to administer. *Ctr. for Coalfield Just.*, WL 4272040 at *1.

Importantly, the trial court’s order in this case does not require the pre-Election Day curing step that Washington County once offered. The notice requirements affirmed by the Commonwealth Court offer a reasonable means of providing due process to the voters who continue to exercise their right to cast a mail-in ballot. *Amici* know from experience – as the record in this case supports – that county boards of elections are fully capable of providing such relief.

IV. CONCLUSION

As the law evolves and voting behavior changes, *amici* will adapt with the times in order to protect the voting rights of their constituents. One constant that must not falter is our judicial branch’s steadfast commitment to “enfranchise and not to disenfranchise” the electorate when resolving disputes. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 361 (Pa. 2020) (quoting *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972)). The trial court met that goal by providing an administratively reasonable way to assure the due process rights of

voters, using trusted and reliable systems and practices relied on by counties across the Commonwealth to provide notice. The Commonwealth Court met that goal by affirming the trial court's order. For the sake of their constituents, *amici* ask this Honorable Court to do the same.

Dated: October 11, 2024

Respectfully submitted,
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CERTIFICATE OF WORD COUNT

I hereby certify that this brief contains 3,503 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this petition.

Dated: October 11, 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: October 11, 2024



Joseph Khan