

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

---

**No. 1172 CD 2024**

---

**REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PARTY  
OF PENNSYLVANIA, and WASHINGTON COUNTY BOARD OF  
ELECTIONS,**

**Appellants,**

**v.**

**CENTER FOR COALFIELD JUSTICE, et al.,**

**Appellees.**

---

**AMICUS BRIEF OF SECRETARY AL SCHMIDT AND  
DEPARTMENT OF STATE**

Kathleen M. Kotula (No. 86321)  
Kathleen A. Mullen (No. 84604)  
Pennsylvania Department of State  
306 North Office Bldg.  
401 North Street  
Harrisburg, PA 17120-0500

September 10, 2024

Michael J. Fischer (No. 322311)  
Aimee D. Thomson (No. 326328)  
Jacob B. Boyer (No. 324396)  
Office of General Counsel  
333 Market Street, 17<sup>th</sup> Floor  
Harrisburg, PA 17101  
aimeethomson@pa.gov  
(223) 234-4986

*Counsel for Amici Secretary of the Commonwealth Al Schmidt and  
Department of State*

## INTEREST OF AMICI CURIAE

The Secretary of the Commonwealth and the Department of State file this amicus brief to help aid the Court's resolution of this matter. The Secretary's and the Department's "obvious interest in election administration" are "highly salient" here. Memorandum Opinion, *In re: Contest of November 7, 2023*, No. 1482 CD 2023, Slip Op. at 5 n.5 (Pa. Cmwlth. Dec. 29, 2023). In particular, the Secretary has a strong interest in ensuring that counties are canvassing ballots and certifying election results consistent with the requirements of the Election Code.<sup>1</sup>

---

<sup>1</sup> This brief was not authored or paid for, in whole or in part, by any person or entity other than *amici* and their counsel.

## ARGUMENT

The Secretary of the Commonwealth and the Department of State (the “Secretary”) files this amicus brief to raise three points for the benefit of the Court as it undertakes its review of this appeal on an expedited basis.

1. Common Pleas Court directed the Washington County Board of Elections to use something referred to as SURE codes. As used here, SURE codes refer to the mechanism for county boards of elections to assign a status to a mail ballot in the Statewide Uniform Registry of Electors (or “SURE”). While county boards of elections use the SURE system, it is the Department of State that administers it. 25 Pa.C.S. § 1222.

Every mail-ballot package has a unique barcode linked to a unique SURE entry with a status code. When a mail-ballot package is returned by the voter to the county board of elections, the county scans the unique barcode into SURE and selects a code to update the status of that ballot. Assigning a status to a mail ballot sends an automatically generated email to the voter if the voter’s email was provided with the application for that ballot. The email is based on a template and varies slightly

depending on the code that has been assigned. The Department created the codes used for assigning a status to a mail ballot, and drafted the email templates received by voters, in close consultation with the counties.

There are three general categories of SURE codes for returned mail-ballot packages. The first (for which there is only one code) is “RECORD,” which allows a county to designate that a voter’s mail-ballot package has been returned in some form. The second is “PEND,” to be applied when a county notices the mail-ballot package might have an error that could lead to the ballot being rejected. The Department created the “PEND” codes as one option for counties that choose to notify mail voters of an observed error and offer them an opportunity to address the error. There are multiple “PEND” codes (e.g., “PEND – NO SIGNATURE”) that can be used depending on the nature of the observed issue. The third is “CANC,” to be applied if the ballot will not be counted due to an error. Here, too, there are multiple “CANC” codes (e.g., “CANC – NO SIGNATURE”) that can be used depending on the defect.

2. As the Court correctly held just last week, a “question whether an elector can cure a defect in a mail-in ballot” is legally and procedurally

distinct from a “question about provisional voting and counting provisional ballots.” *Genser, et al. v. Butler County Board of Elections, et al.*, No. 1074 C.D. 2024, 2024 WL 4051375, at \*2 (Pa. Cmwlth. Sept. 5, 2024) (petitions for allowance of appeal filed, 240 WAL 2024, 241 WAL 2024, 242 WAL 2024, 243 WAL 2024).

A mail voter does not need to live in a county that provides notice of an obvious but fatal defect on a mail-ballot package to exercise their right to cast a provisional ballot at their polling place. The right to complete a provisional ballot is guaranteed by federal and state law, not by the details of any county’s notice practices.

The Help America Vote Act (HAVA) and the Election Code permit any voter to fill out and submit a provisional ballot at their polling place if they believe they are registered and eligible to vote but their eligibility is questioned. 52 U.S.C. § 21082(a); 25 P.S. § 3050(a.2), (a.4); *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569-70 (6th Cir. 2004); *Genser*, 2024 WL 4051375, at \*16. And, as this Court ably explained, the Election Code requires county boards of elections to count a provisional ballot cast by an eligible, registered voter if the voter complies with the

procedural requirements and if the voter has not successfully cast another ballot in that election. *Genser*, 2024 WL 4051375, at \*16.

Therefore, regardless of how the Court resolves the constitutional question of notice at issue in this case, registered and eligible voters in Pennsylvania will remain entitled to complete a provisional ballot at their polling place and to have that provisional ballot counted if the voter cast no other ballot in that election. *Id.*

3. Common Pleas Court ordered the Washington County Board of Elections to “indicate in each district poll register a person whose mail-in packet is being segregated as a person who has not voted, allowing the individual to submit a provisional ballot at the polls.” Mem Op. at 3. This relief is unnecessary for two reasons.

First, district poll registers (i.e., poll books) are used by poll workers at polling places on Election Day. Amending the poll book would not provide notice to a mail voter, who would have no reason to visit the polling place unless they already intended to cast a provisional ballot.

Second, this relief does not change the voter’s right to cast a provisional ballot nor any other decision that is made at a polling place on Election Day. As stated above, every voter in Pennsylvania is entitled

to cast a provisional ballot on Election Day if they believe they are registered and eligible to vote but their eligibility is questioned. Nothing appearing in a poll book modifies that right. A provisional ballot will not be *counted*, however, unless and until the county board of elections confirms both that “the individual was registered and entitled to vote” and that “the individual did not cast any other ballot, including an absentee ballot, in the election.” 25 P.S. § 3050(a.4)(5)(i), (7)(i)(A); *see Sandusky Cnty.*, 387 F.3d at 570.

September 10, 2024

Respectfully submitted,

Kathleen M. Kotula (No. 86321)  
Kathleen A. Mullen (No. 84604)  
Pennsylvania Department of State  
306 North Office Bldg.  
401 North Street  
Harrisburg, PA 17120-0500

/s/ Aimee D. Thomson  
Michael J. Fischer (No. 322311)  
Aimee D. Thomson (No. 326328)  
Jacob B. Boyer (No. 324396)  
Governor’s Office of General  
Counsel  
333 Market Street, 17<sup>th</sup> Floor  
Harrisburg, PA 17101  
aimeethomson@pa.gov  
(223) 234-4096

*Counsel for Amici Secretary of the Commonwealth Al Schmidt and  
Department of State*

## CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Date: September 10, 2024

/s/ Aimee D. Thomson

Aimee D. Thomson

RETRIEVEDFROMDEMOCRACYDOCKET.COM



## CERTIFICATE OF LENGTH

I certify that this brief complies with the word count requirement set forth in Pennsylvania Rule of Appellate Procedure 531(b)(3). Excluding matters identified in Pennsylvania Rule of Appellate Procedure 2135(b), this brief is 1,046 words. I have relied on Word's word count function to determine the length of this brief.

Date: September 10, 2024

/s/ Aimee D. Thomson

Aimee D. Thomson

RETRIEVEDFROMDEMOCRACYDOCKET.COM