IN THE SUPREME COURT OF PENNSYLVANIA

No. ____ ____ 2024

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

APPELLANTS

v.

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

APPELLEES

PETITION FOR ALLOWANCE OF APPEAL

Appeal from the September 24, 2024 Memorandum Opinion and Order of the Pennsylvania Commonwealth Court at No. 1172 C.D. 2024 affirming the August 23, 2024 Opinion and of the Court of Common Pleas of Washington County at No. 2024-3953

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Republican National Committee and Republican Party of Pennsylvania hereby petition this Honorable Court, pursuant to Pa.R.A.P. § 1111 *et seq.*, to allow an appeal from the September 24, 2024 Order of the Commonwealth Court affirming the Order of the Court of Common Pleas of Washington County granting partial summary judgment and a permanent injunction in favor of Appellees. As discussed herein, special and important reasons exist to allow the appeal under Pa.R.A.P. § 1114.

INTRODUCTION

With the 2024 General Election fast approaching, this case requires the Court's review and intervention. While the Commonwealth Court majority's Order facially applies to only mail-in voters in Washington County, its reasoning would apply much more broadly. The majority's Opinion is incorrect as a matter of law, and the sweeping application of its rationale would effectuate an unconstitutional judicial revision of the Election Code ("Code").

Under the guise of procedural due process, the Opinion **requires** mail-in voters who have submitted a potentially defective mail-in ballot to the Washington County Board of Elections ("Board") to be provided notice of the defect through the SURE System so that the defect can fixed by submitting a "failsafe" second ballot –

a provisional ballot – a remedy that is not authorized by the Code.[1] This is an improper effort to circumvent this Court's binding decision in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372-74 (Pa. 2020) (hereinafter "*Pa. Dems.*") holding that courts **cannot** mandate notice and cure of defective mail-in ballots. It also directly contradicts the plain text of the Election Code, which states that a provisional ballot "shall not be counted" if a mail ballot cast by that voter "is timely **received** by a county board of elections." 25 P.S. § 3050(a.5)(5)(ii)(F).

The underlying action attacked a policy adopted by the Board at a public meeting for handling mail-in ballots that was in place for the 2024 Primary Election (the "Policy"). The Commonwealth Court panel majority, over a dissent by Judge Dumas, reached its holding here even though the Board has not yet adopted a policy for handling mail-in ballots for the upcoming 2024 General Election. The absence of such a current policy renders this case non-justiciable. But the majority nonetheless forged ahead so it could improperly dictate from the bench what the Washington County policy will be for the upcoming election. The Court's intervention is required to remedy this.[2]

[1] This Petition uses "mail-in ballot" or "mail ballot" to refer to both absentee ballots and mail-in ballots. *See* 25 P.S. §§ 3146.6, 3150.16.

[2] As indicated in note 14 of the Commonwealth Court's Opinion, the majority went outside the record on appeal and elected *sua sponte* to visit the Washington County Board's website to review the agenda from the Board's September 12, 2024 meeting to see if a new policy had been adopted. No new policy vote was taken at that meeting. Another meeting is scheduled for October 2, 2024.

Moreover, contrary to the majority's Opinion, *Pa. Dems.* is dispositive here: there is no "constitutional or statutory" right to "notice and cure" of defective mail-in ballots, and the Commonwealth Court lacks authority to order the Board to provide such notice or to permit the ballots to be cured, regardless of method. *Id.* at 374, 380. The Commonwealth Court's disregard of *Pa. Dems.* and its mandating the Board to provide notice of defective mail-in ballots so that voters can cure by voting provisionally, improperly usurps the powers of the General Assembly. *See id.* Further, it requires Washington County to inspect mail-in ballots before the official pre-canvass and to notify voters of the results of those inspections via the SURE System. That contravenes the Code. *See* 25 P.S. §§ 2602(q.1), 3146.8(g)(1.1). For each of these reasons, this Court should hear this case.

To achieve its flawed result, the Commonwealth Court incorrectly read ambiguity into the relevant provisions of the Code where none exists. It needed to do so in order to find an underlying "right" to submit a provisional ballot to support Appellees' procedural due process claim. In doing so, the Commonwealth Court ignored both the statutory structure of 25 P.S. §§ 3050.11 through 3050.17 and the clear language of Section 3050.16(a), setting forth how to vote a mail-in ballot. That statutory structure and the clear language of Section 3050.16(a) wholly undermine the claimed statutory ambiguity on which the Commonwealth Court's decision is

founded. The Court should accept this Petition to correctly evaluate and apply the relevant sections of the Code before the 2024 General Election.

Finally, in the face of this Court's binding precedent holding that the protections of procedural due process do not extend to legislative actions, *e.g., Sutton v. Bickell*, 220 A.3d 1027, 1032 (Pa. 2019), the majority improperly determined that a legislative policy passed by the Board for handling and treating mail-in ballots gives rise to a procedural due process claim. The majority's decision improperly impedes on the jurisdiction of the Board over the manner and conduct of elections—substituting the majority's view of what is good election policy for that of the Board. So as not to trample on the legislative discretion of the Board, this Court should grant this appeal to reverse the majority's erroneous procedural due process holding.

As discussed below, grounds for granting this Petition exist under, *inter alia*, Rule 1114(b) (2), (3), (4) and/or (6).

OPINION BELOW

The unreported Opinion of the Commonwealth Court was authored by Judge Wojcik and joined by President Judge Jubelirer. Judge Dumas dissented without opinion. A copy of the Opinion and related Order is attached as Appendix Exhibit A.

The Opinion and Order of Judge Neuman of the Court of Common Pleas of Butler County, which was affirmed by the Commonwealth Court, is attached as Appendix Exhibit B.

ORDERS IN QUESTION

The relevant text of the Commonwealth Court's Order states: "AND NOW this 24th day of September 2024, the August 23, 2024 Order of the Court of Common Pleas of Washington County is **AFFIRMED**."

QUESTIONS FOR REVIEW AND PRESERVATION BELOW

1. Whether the Commonwealth Court erred in finding that Appellees' claims are justiciable where the uncontradicted evidence before the Trial Court established that the complained-of Policy was adopted for only the 2024 Primary Election, and such Policy will not be in place for the 2024 General Election without a new meeting of the Board to consider and vote on it.

Substantively addressed and preserved in Republican Petitioners' trial court brief at pp. 4, 11-22, at the Trial Court hearing at 42:18-24[3] and in their Commonwealth Court brief at pp. 6, 16-20. Ruled on in the Trial Court's August 23, 2024 Opinion at p. 12 (finding that although the Board may change its policy, the policy used at the April 2024 primary election is still in effect); affirmed by the Commonwealth Court Opinion at pp. 13, n.14 ("On the issue of justiciability, we rely on the trial court's opinion.").

[3] A copy of the August 5, 2024 hearing transcript before the Trial Court is attached as Appendix Exhibit C.

2. Whether, contrary to this Court's binding precedent in *Pa. Dems.*, the Commonwealth Court improperly usurped the authority of the General Assembly by effectively rewriting the Code to require court-mandated notice and curing when it held that a voter must be notified of a potentially defective mail-in ballot and is entitled to submit a provisional ballot as a "failsafe," as well as erred by finding a protected liberty interest supporting a procedural due process claim despite *Pa. Dems.* holding that there is no constitutional, statutory, or legal right to be provided notice of and an opportunity to cure a defective mail-in ballot.[4]

Substantively addressed and preserved in Republican Petitioners' trial court brief at pp.7-8, 10-12, 29-31, 33-34, 46-49 and their Commonwealth Court brief at pp. 38-43. Ruled on in the Trial Court's Opinion at p. 3, 16-17 (finding that *Pa. Dems.* "does not bar plaintiffs' claim before this Court"); affirmed by the Commonwealth Court Opinion at pp. 8-13 (finding "*Boockvar* is distinguishable from this matter").

3. Whether the Commonwealth Court erred in holding that, due to purported ambiguities in the Code, the Code authorizes a voter who submits a mail-

[4] Similar questions to this question and Question 3 below are presently before the Court in *Genser v. Butler County Board of Elections*, No. 243 WAL 2024, although *Genser* does not involve the Court-ordered notice of a ballot defect via the SURE system present here. The Commonwealth Court majority relied extensively on the decision in *Genser*. *See* Appx. Ex. A at 8-13. For convenience, the Commonwealth Court's Opinion in *Genser,* which is presently on appeal before this Court, is attached as Appendix Exhibit D.

in ballot that is timely received by the Board, but suspected of being defective, to submit a provisional ballot as a "failsafe" if the mail-in ballot is indeed defective.

Substantively addressed and preserved in Republican Petitioners' trial court brief at pp. 33-34, 46-49 and their Commonwealth Court brief at pp. 28-30. Ruled on by the trial court at p. 25 ("Here, the statutory scheme under 25 P.S § 3150.11, 25 P.S. § 3150.16, and 25 P.S § 3050 is ambiguous[.]"); affirmed by the Commonwealth Court at pp. 8-13 ("the Casting and Timely Received Clauses are ambiguous when considered alongside the Having Voted Clause.").

4. Whether the Commonwealth Court erred in finding that this Court's Legislative Acts Doctrine did not bar Appellees' procedural due process challenge to the Policy passed by the Board for handling and treating mail-in ballots.

Substantively addressed and preserved in Republican Petitioners' trial court brief at pp. 2, 3, 23-26 and their Commonwealth Court brief at pp. 38-43. Ruled on by the trial court at pp. 13-16 ("As this Court finds that the Board's policy is an adjudicative action . . . this Court finds that the Plaintiffs' claims are not barred by the Legislative Acts Doctrine"); affirmed by the Commonwealth Court at pp. 14-15 ("Here, as the trial court aptly reasoned, the County Board's canvassing determinations amount to an adjudication because the canvassing determinations apply the existing provisions of the Election Code and prevent a small number of otherwise qualified electors from having their vote counted . . . Hence, unlike a

legislative act, the Policy effectively only binds a small class of citizens, who are prevented from exercising their constitutional and statutory rights[.]").

5. Whether the Commonwealth Court's mandate that the Board inspect mail-in ballots upon receipt and input certain information into the SURE system to alert voters to potentially defective mail-in ballots improperly constitutionalizes notice and curing of mail-in ballots and contradicts express provisions of the Code.

Substantively addressed and preserved in Republican Petitioners' trial court brief at pp. 40-45 and their Commonwealth Court brief at pp. 42-46. Ruled on by the trial court at pp. 2, 4, 27 (directing that the elections office must "choose the most appropriate selection in the SURE system to reflect as such."); affirmed by the Commonwealth Court at p. 17 n. 17 (discussing distinction between "segregation and canvassing").

STATEMENT OF THE CASE

A. The Complaint.

Appellees initiated this case on July 1, 2024, seeking declaratory and injunctive relief against the Board regarding its handling of mail-in ballots during the 2024 Primary Election.

Appellees include two interest groups, the Center for Coalfield Justice ("CCJ") and the Washington Branch NAACP ("NAACP"); and a group of individual

voters—Bruce Jacobs, Jeffrey Marks, June DeVaughn Hython, Erika Worobec, Sandra Macioce, Kenneth Elliott, and David Dean (together, "Voter Appellees").

Voter Appellees each applied for, received, and submitted mail-in ballots that the Board rejected because they did not comply with the requirements for mail-in ballots under the Code. July 1, 2024 Complaint, ¶¶ 83-132.[5] Appellees contend that the Board's actions deprived them of a "right" to receive notice that their mail-in ballots were defective, as well as the "right" "to cure a defective mail-in ballot by voting a provisional ballot and have that provisional ballot count." *See id.* ¶¶ 37-51, 55-62, 159. Thus, contrary to the verbiage used by the Commonwealth Court and the Trial Court, Appellees' Complaint directly asks for a form of curing a defective mail-in ballot. Appellees allege that the Board violated Pennsylvania Constitution's Procedural Due Process Guarantee by not providing Voter Appellees with notice and an opportunity to cure the defects in their mail-in ballots. *Id.* at ¶¶ 148-160.

B. The Board's Policy For The 2024 Primary Election.

On March 12, 2024, the Board met to consider what notice-and-cure policy it would adopt for the Primary Election.[6] Deposition of Melanie Ostrander, Washington County Director of Elections ("Ostrander Dep.") pp. 51-53 (attached as Appendix. Exhibit H); Joint Stipulation of Facts ("JSOF"), ¶ 29 (attached as

[5] The Complaint is found at Appendix Exhibit E.
[6] The Board previously permitted limited notice and cure procedures in Washington County for the 2023 Primary and General Elections. *See* Appx. Ex. B at 5.

Appendix Exhibit F). No resolution was reached during this initial meeting, however, and the Board met a second time on April 11, 2024. *See* JSOF, ¶ 33 and JSOF Exs. L-N (Minutes of March 12, 2024 and April 11, 2024 Board Meetings). The Minutes reflect that the Board ultimately voted 2-1 to adopt the Policy. Under the Policy, the Board chose ***not*** to provide notice of, or an opportunity to cure, defective mail ballots. *Id*.; *see also* Ostrander Dep., 67:24-71:4. The Policy "mandated that all mail-in ballot packets received by the County Board were to be marked in the [SURE] system as 'record-ballot returned.'" Appx. Ex. A at 2.

The uncontroverted record demonstrates that the Board adopted the Policy ***only*** for the Primary Election, and the Board has not yet adopted a policy regarding notice or curing for the 2024 General Election. Ostrander Dep, pp. 126:13-127:18. Ostrander testified that a new vote will be taken to establish a policy for the 2024 General Election. Appx., Ex. C at 42:18-24.

While in 2023 the Board carried over its policy from the primary election to the general election, that is not guaranteed to occur in 2024. Nonetheless, the Trial Court – without citing any support in the record and there is none – opined that "there has been no indication that the policy will be changed and therefore the policy used in the April primary is still in effect." Appx. Ex. B at 9, n. 32. The Commonwealth Court did not substantively address the issue other than to note "we rely on the trial court's opinion." Appx. Ex. A at 13, n. 14.

C. The SURE System.

The Code expressly states that Pennsylvania Department of State ("DOS") is required to implement a Statewide Uniform Registry of Electors ("SURE") system, which is to be used as the single, uniform integrated computer system governing the database of registered electors in the Commonwealth. 25 Pa. C.S.A. § 1222

Deputy Secretary of the Commonwealth, Jonathan Marks, testified that a county is required to enter into SURE the following information: (a) whether a voter was sent a mail ballot, and (b) whether that voter's ballot was received by the county board of elections. Marks Dep., p. 35:10-23 (cited excerpts attached as Appendix Exhibit G). This is all that a Board is required to do. The Board complied with these requirements in the 2024 Primary Election by noting in the SURE system whether a mail ballot was sent to a voter, and whether such ballot was subsequently received by the Board. Ostrander Dep., pp. 23:1-24; 27:14-28:5. This was recorded by the Board by selecting the "Record-Ballot Returned" code for each returned mail ballot from the dropdown menu in SURE. *See id.,* 67:9-23; JSOF, ¶ 42.

D. DOS Created SURE Instructions Improperly Requires Notice and Cure Procedures.

On March 11, 2024, DOS issued a document to county boards entitled "Changes to SURE VR and PA Voter Services as of March 11, 2024" (hereinafter, "SURE Instruction"). JSOF Ex. D. The SURE Instruction informs county boards of new codes which the boards ***may*** use when receiving and logging the return of

mail-in ballots. Ostrander Dep., pp. 56:24-57:14. While the Secretary has authority to promulgate regulations governing SURE, the SURE Instruction **does not constitute such a regulation**. Marks Dep., p. 30:24-31:23. The SURE Instruction is **not binding** on county boards of elections. *See id.*, pp. 14:19-15:3.

SURE provides boards the option to use one of multiple codes from the dropdown menu other than "Record-Ballot Returned." JSOF Ex. D. Such other codes permit, *but do not require*, boards to record any further determination the board made regarding the ballot. *Id*., *see also* Marks Dep., pp. 38:23-40:13.

The SURE Instruction further explains that selecting the codes triggers an automatically generated e-mail from DOS to the voter. *See id.* The recording board is neither the author nor the sender of the auto-generated e-mail which is transmitted via the SURE system. *Id.* Boards do not have the ability to change the content of such emails or otherwise control their transmission. Ostrander Dep., pp. 78:23-79:11; 161:13-162:16.

DOS's auto-generated e-mails provide Washington County voters with inaccurate and contradictory information when compared to the Policy. Ostrander Dep., pp. 162:17-167.2. The Policy does not provide voters with notice of and/or an opportunity to cure defective mail ballots, but the SURE System emails provide such notice and tell them the opposite. Ostrander Dep., pp. 214:9-216:5.

Further, Ms. Ostrander testified that while Washington County poll workers will typically allow anyone to submit a provisional ballot on request, it is the Board's practice to not count provisional ballots after a mail-in ballot was returned by a provisional ballot voter. *Id.*, pp. 89:11-90:8. This practice conforms with the Code, which states that a provisional ballot "shall not be counted" if a mail ballot cast by that voter "is timely **received** by a county board of elections." 25 P.S. § 3050(a.5)(5)(ii)(F).

Consistent with its Policy not to provide notice-and-cure procedures, the Board chose to use the "Record Ballot-Return" option to record all mail-in ballots received. *See* Exhibit M to the JSOF, attached at Exhibit F hereto. Pursuant to the Policy, during the 2024 Primary Election, upon receipt, Board employees stamped the outer envelope of each received mail-in ballot as "received." Board employees further examined the declaration for any defects (*i.e.*, lack of signature or date), segregated the envelopes by defect during the pre-canvass, and then entered the ballot into the SURE system as "Record-Ballot Returned." *See* Ostrander Dep., pp. 73:7-76:20. If Washington County voters called to inquire about the status of their mail-in ballot, the county's election personnel were instructed to explain that every received mail ballot was locked as required by the Code and would be reviewed during the canvass. Ostrander Dep., pp. 90:20-92:5.

E. Procedural History.

Appellees filed the Complaint on July 1, 2024 and a motion for preliminary injunction on July 3, 2024. Appx. Ex. B. at 6. On July 9, 2024, the parties appeared before the Trial Court and engaged in a scheduling conference. *Id*. Upon motion, which was not opposed, the Trial Court granted Intervenor-Appellants leave to intervene in this matter. *Id*. Thereafter, on July 26, 2024, the parties filed the JSOF, along with their respective Motions for Summary Judgment and briefs. *Id*. On August 5, 2024, the Trial Court conducted a hearing. *Id.* at 6-7. On August 23, 2024 the Trial Court issued its Opinion, which is discussed in Subsection F below, concluding that Appellees were entitled to notice that their submitted mail-in ballots were defective and an opportunity to submit a provisional ballot on Election Day and ordering that the Board make selections in the SURE system to guarantee that an email is sent providing such notice.

The Trial Court Order was appealed to the Commonwealth Court on September 5, 2024. Following briefing, the Commonwealth Court issued its Opinion on September 24, 2024, which is discussed below in Subsection G.

F. The Trial Court's Opinion.

In a matter of what it calls "first impression," the Trial Court found that the Policy "seemingly violates" an elector's right to challenge the determination that there is a defect in that voter's mail-in ballot and that the Policy, therefore, violates that elector's procedural due process rights. Appx. Ex. B, pp. 1-2. In so holding, the Trial Court found purported ambiguities in the Code and concluded that because a deficient mail-in ballot may not ultimately be counted, the voter, in effect, never voted at all. *Id*., at 3. Based on this logic and the purported ambiguities it found in the Code, the Trial Court instructed the Board to mark a voter whose mail-in ballot has been segregated as having not voted, to provide notice of any defect via the SURE system, and mandated that such a voter be permitted to vote provisionally. *Id*.

In doing so, the Trial Court cited to section 3157 of the Code providing, *inter alia*, that "[a]ny person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election . . . may appeal therefrom within two days after such order or decision shall have been made[.]" *Id*., at 17. Based on this provision, the Trial Court concluded that the act of segregating a mail-in ballot that is suspected of containing a defect constitutes a challengeable "decision" for the purposes of Section 3157, and that Section 3157 gave rise to a protectible liberty interest for procedural due process purposes. *Id*.

According to the Trial Court, because electors were not provided with an opportunity to "challenge" the "decision" to segregate the ballots, the Policy deprived electors of a "right to be heard by a fair and impartial tribunal," thereby violating procedural due process rights. *Id*., at 2. Moreover, the Trial Court held that voters whose mail-in ballots are segregated for potential defects must be permitted to submit provisional ballots, pursuant to section 3150.16(b)(2) of the Code. *Id.*, at 3. The Court concluded that the Policy adopted by the Board clearly violated the statutory right to allow a person checks and balances against the government. *Id*., at 2. The Court ordered the Board to enter codes into the SURE System so that voters are provided notice of a potential defective mail-in ballot. *Id.*

G. The Majority's Opinion.

The Commonwealth Court majority affirmed the Trial Court in all respects. It relied extensively on the prior panel majority's Opinion in ***Genser***, where it found purported ambiguity in Sections 25 P.S. § 3150.16(b)(2), § 3050(a.4)(1), and (2) § 3050(a.4)(5)(ii)(F) of the Code and, thus, interpreted the Code as permitting the submission of a provisional ballot by a voter who has submitted a defective mail-in ballot. Appx. Ex. A at 9-13; *see also* Exhibit D.

On the issue of justiciability of Petitioners' claim for prospective relief, the majority "rel[ied] on the trial court's opinion." *Id.* n. 14. It did so without any analysis of the *actual* record evidence, which indisputably shows that the Board

would vote on and adopt a new policy for mail-in ballots before the 2024 General Election – a fact the Trial Court likewise ignored. The majority also improperly went outside the record on appeal to visit the Board's website and view the agenda for the Board's September 12, 2024 meeting in assessing the issue of justiciability. The website confirmed that the Board had yet to adopt a policy for the 2024 General Election. *Id.* Nonetheless, the majority found the claim was justiciable without any substantive analysis.

The majority also agreed with the Trial Court that the Legislative Acts Doctrine did not preclude Appellees' procedural due process challenge. *Id.* at 14-15. Despite citing this Court's binding precedent in *Sutton*, 220 A.3d at 1032, defining "agency action as those that affect one individual or a few individuals" and agreeing that the Policy applied to ***all*** mail-in voters in Washington County, the majority determined that the Policy's impact on "a small class of citizens," *i.e.,* a total of 259 mail-in voters who submitted defective ballots in the 2024 Primary Election, made it an adjudicative action. Appx. Ex. A at 14-15.

Central to its procedural due process violation finding, the majority held that a requisite protected liberty interest supporting a procedural due process claim existed. *Id.* at 15-16. Here, however, the majority diverged somewhat from the Trial Court. While the Trial Court based its Opinion that a protected liberty interest existed on the statutory right in Section 3157 of the Code—the majority founded its

liberty interest determination on "Article I, Section 5 of the Pennsylvania Constitution, Pa. Const. art I, §5, also known as the free and equal elections clause, [which] protects the right to vote as a fundamental right." *Id.* at 16. That holding is at odds with this Court's holding in *Pa. Dems.*, where this Court rejected a challenge based on the Free and Equal Elections Clause finding no "constitutional or statutory" right to be provided notice of and an opportunity to cure a defective mail-in ballot. *Pa. Dems.* 238 A.3d at 372-74.

While the ability under 25 P.S. § 3157 to contest the refusal to count a defective mail-in ballot was the requisite liberty interest relied on by the Trial Court, and even though that interest could be protected by a post-canvass publication of a list of such ballots, the majority (like the Trial Court) determined that notice via the SURE system before Election Day is required. Appx. Ex. A at 17.

REASONS FOR ALLOWANCE OF APPEAL

A. The Majority's Justiciability Decision is Contrary to the Unrebutted Factual Record, Conflicts With The Legal Standards for Evaluating This Threshold Issue Established by This Court, and the Majority's Extra-Record Efforts to Find Justiciability Were An Abuse of Its Powers (Rule 1114(b)(2), (4) and (6)).

The majority erred in adopting the Trial Court's finding that this matter was justiciable—that decision is clearly erroneous because the uncontroverted evidence before the Trial Court established that the Board would vote on a new policy for the 2024 General Election and that has yet to happen.

The majority *sua sponte* searched the Board's website in an effort to find evidence that the Board has adopted the Policy for the upcoming election. When the majority's efforts came up empty, because the Board has yet to do so, the majority nonetheless ignored its own research which confirmed that undisputed fact and affirmed the trial Court's unfounded justiciability determination.

The doctrine of ripeness "mandates the presence of an actual controversy." *Bayada Nurses, Inc. v. Dep't of Labor & Industry*, 8 A.3d 866, 874 (Pa. 2010). Under the ripeness doctrine, "[w]here no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained." *Cherry v. City of Philadelphia*, 692 A.2d 1082, 1085 (Pa. 1997). "A declaratory judgment must not be employed to determine rights in anticipation of events [that] may never occur". *Gulnac by Gulnac v. S. Butler Cty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991).

Here, Appellees' Complaint (and the Opinions of both the majority and the Trial Court) is predicated on alleged harm that might be suffered in the yet to occur November General Election. All assume that the Policy adopted by the Board in conjunction with the 2024 Primary Election will likewise be adopted for the 2024 General Election. In deciding that this matter was justiciable, the Trial Court erroneously found that, "although the Board may change its policy, the policy used at the April 2024 primary election is still in effect[.]" Appx. Ex. B at 12. There was

absolutely zero record support for this finding, which was adopted by the majority, rendering it clearly erroneous.

Until the Board schedules a public meeting (the next one is October 2) and adopts a policy through a formal vote, no policy exists, and the relief requested by Appellees and granted by the Trial Court and the majority is entirely speculative. The underlying claims for prospective relief are, consequently, not justiciable. This Court should accept this appeal to remedy the improper and unsupported determination of justiciability, a threshold issue that both the Trial Court and the Commonwealth Court steam rolled through so that they could, from the bench, mandate their version of proper election policy.

B. The Commonwealth Court's Opinion is in Conflict with this Court's Ruling in *Pa. Dems.* (Rule 1114(b)(2) and (4)).

This Court has expressly held that 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. Dems.* 238 A.3d at 372-74. "To the extent that a voter is at risk of having his or her ballot rejected" due to their failure to comply with the Code's requirements for mail-in ballots, "the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk is one best suited for the Legislature." *Id.*; *accord Pa. State Conf. of NAACP Branches v. Sec'y Pa.,* 97 F.4th 120, 133-35 (3d. Cir. 2024) ("*NAACP*") (refusing to count noncompliant ballots is not denying "the right to vote'" or disenfranchisement). In reaching its decision in *Pa. Dems.*, this Court

recognized that, "[t]he power to regulate elections is a legislative one" and resides in the General Assembly. *Id.* at 366.

The majority claims that it does not offend *Pa. Dems.* citing to its prior decision in *Genser*, which is presently on appeal before this Court. Appx. Ex. A. at 13. In *Genser,* a Commonwealth Court panel majority "reject[ed] [the] view" that allowing a voter to submit a provisional ballot after they have voted a defective mail-in ballot "amount[s] to ballot curing." Appendix Ex. D at 2. Such a finding creates distinction without difference. Moreover, it ignores that the majority's directive in this case to provide notice of a defective mail-in ballot to a voter via the SURE system itself offends *Pa. Dems.*

Indisputably, the voters here filled out and returned mail-in ballots with fatal defects; despite this, the majority requires the Board to provide them notice of the defects and permits them to remedy those defects by submitting a second (provisional) ballot—a provisional ballot that, as explained below, is not authorized by the Code. Regardless of the majority's semantic gymnastics, that is both notice and curing, which this Court held cannot be mandated under *Pa. Dems. See Pa. Dems.* 238 A.3d at 372-74.

But, that is not the only way the majority runs afoul of *Pa. Dems*. The majority agrees that, to bring a procedural due process claim, a litigant "must establish that the government has deprived them of a protected [] liberty interest." Appx. Ex. A at

15-16. Obviously, in light of this Court's holding in *Pa. Dems* that there is no right to notice of a defect in a mail-in ballot or an opportunity to cure, *see* 238 A.3d at 372-74, a procedural due process claim cannot be founded on an assertion of a right to such notice of a defective mail-in ballot—but that is substantively what the majority did by requiring notice of a defective mail-in ballot via the SURE system. Appx. Ex. A. at 16-17.

More still, this Court's decision in *Pa. Dems* rejected a claim that "notice and cure" was required by the Pennsylvania Constitution's Free and Equal Elections Clause. 238 A.3d at 372-74. This Court reasoned that the Clause does not mandate a cure procedure "for [mail] ballots that voters have filled out incompletely or incorrectly." *Id.* at 374. In direct contravention of this holding, the majority here founded its finding of a protected liberty interest on the Free and Equal Elections Clause. Appx. Ex. A. at 16. That cannot be reconciled with *Pa. Dems*.

To address the clear conflicts between the majority's Opinion and *Pa. Dems.*, the Court should grant this Petition.

C. The Majority Rewrote or Added Provisions to the Code by Finding Purported Ambiguities in the Code Where None Exist (Rule 1114(b)(3) and (4)).

Relying on another panel majority's decision in *Genser*, the majority here concludes that "the Election Code created a statutory right to cast a provisional ballot as a 'failsafe' to ensure otherwise qualified electors may cast their vote and have it

counted." Appx. Ex. A at 13. But this is wrong. The Election Code unambiguously states that a voter's provisional ballot "shall not be counted" if he submitted a mail ballot that was "timely received." 25 P.S. § 3050(a.4)(5)(i) and (ii)(F). This language is unambiguous, and the majority below erred in holding otherwise. Indeed, Appellants have already explained why that is the case in their brief in *Genser*. Principal Br. of Appellants 24-37, *Genser v. Butler Cnty. Bd. of Elecs.*, 26 WAP 2024 & 27 WAP 2024 (Pa. filed Sept. 24, 2024). The majority therefore erred in following the decision of the other panel majority in *Genser*. Thus, for all the same reasons the Court granted review of this question in *Genser*, it also should grant review of this question here and decide the issue consistently in both cases.

D. The majority erroneously found that Washington County's policy is adjudicatory, rather than a legislative act.

It need go without stating that the Board's adoption of the Policy was a legislative act of a public body. The Board's Policy affected the interests of and applied to all Washington County voters in conjunction with the 2024 Primary Election. As a matter of law, this Court's binding precedent establishes that legislative acts cannot be challenged on procedural due process grounds. *E.g., Sutton,* 220 A.3d at 1032. The rationale behind this rule is clear and well-founded: courts do not have authority to make legislative policy and allowing every policy decision of a political body to be subjected to a procedural due process challenge

would bring our system of government to a halt and contravene the separation of powers. *See Mazur v. Trinity Area Sch. Dist*., 961 A.2d 96, 104 (Pa. 2008).

To avoid this clear restriction, Appellees, the Trial Court and the majority all endeavored to find an adjudicative act on which to build a procedural due process claim. They decided to attack "the series of individual determinations the election staff have made and will make going forward" concerning to set aside or segregate a suspected defective mail-in ballot when it is received. *See* Appx. Ex. B at 14-15; *accord* Appx. Ex. A. at 14. However, as the majority's Opinion is forced to acknowledge, the Policy "mandated that all mail-in ballot packets received by the County Board were to be marked in the [SURE system] as 'record-ballot returned.'" Appx. Ex. A at 2. All the ministerial election staff workers are doing is following the Policy. Thus, it remains the Policy—a clear legislative act—that is being challenged.

And, in any event, the employees in the Elections Office do not determine whether a given ballot is defective and will not be counted—that is done by the Computation Board. Ostrander Dep., at p. pp. 183-184; 197-198. The **ministerial actions** of the Elections Office staffers are not adjudicatory in nature and, thus, cannot form the basis of Appellees' procedural due process claim. Contrary to the majority's conclusion, the fact that a legislative policy ultimately "binds a small class of citizens" (Appx. Ex. A at 15) is immaterial to the analysis of whether the

challenged action is legislative or adjudicative. The point is that the Policy *affects the rights of the public in general*. *See Ondek v. Allegheny County Council*, 860 A.2d 644, 649 (Pa. Commw. 2004).

The precedent set by the majority is a dangerous one. If every local legislative policy can be turned into a series of individual adjudicative actions simply because government employees are ministerially tasked with acting under and in accordance with the policy as part of their day-to-day job functions, then nearly every legislative policy or decision eventually becomes subject to a procedural due process challenge. That is not nor should it be the law. The Court should accept this appeal to clarify the proper scope of the Legislative Acts Doctrine and its clear applicability here.

E. The Majority's Opinion Forces Washington County to Violate the Code and Improperly Constitutionalizes the Secretary's Efforts to Foster Notice and Curing Through the SURE System (Rule 1114(b)(3) (4) and (6)).

The ultimate result of the majority's Opinion is a judicial directive mandating, *inter alia*, that (i) the Board inspect mail-in ballots upon receipt and (ii) input certain information into the SURE system to trigger an email from the Secretary that will provide a voter notice of a potentially defective mail-in ballot. *See* Appx. Ex. A at 17; Appx. Ex. B. at 4. What the majority has done is turn the Secretary's unauthorized SURE System emails advising voters of a defective mail-in ballot and suggest curing into a Constitutional requirement.

The Constitution requires no such thing. Even assuming that Petitioners have challenged an adjudicative act, there is no procedural due process right to pre-election notice of mail ballot defects. The majority failed to identify any protected interest that could support such a right, and regardless, voters are already provided all the process that they are due—namely, copious instructions on how to properly fill out their mail ballots.

The majority's judicial directive of additional process does not merely supplement the Code. Rather, it *overrides* the Code in at least two respects: (i) it requires the Board to conduct an "inspection" of a mail ballot prior to the pre-canvass and (ii) it requires the Board to disclose the findings of that "inspection" prior to the close of the polls on election day. *Contra* 25 P.S. §§ 2602(q.1), 3146.8(g)(1.1). Rather than respect the presumption of constitutionality, the majority ignored it. If that decision is left to stand, the entire Act 77—which is nonseverable—is in jeopardy. The Court should accept this appeal, and reverse.

1. <u>The majority erred when it discovered a procedural due process right to pre-election notice of mail ballot defects</u>.

This Court has explained that the Pennsylvania Constitution's procedural due process guarantee "entails a balancing of three considerations: (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." *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018). In condensed form, this inquiry takes place in "two steps: the first asks whether there is a life, liberty, or property interest that the state has interfered with; and the second examines whether the procedures attendant to that deprivation were constitutionally sufficient." *Commonwealth v. Turner*, 80 A.3d 754, 764 (Pa. 2013). The majority's analysis falters at both steps.[7]

a. <u>The majority failed to identify a relevant private interest</u>.

The first step requires the Court to "consider the private interest that … will be affected" if the plaintiffs are "denied the right to" pre-election notice of mail ballot defects. *Commonwealth v. Wallace*, 97 A.3d 310, 320 (Pa. 2014). The majority identified three private interests: the right to cast a provisional ballot to cure a prior defective ballot, the right to vote under Article I, section 5 of the Pennsylvania Constitution, and the right to appeal "any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election" under 25 P.S. § 3157. Appx. Ex. A at 16-17.

None of these interests supports the majority's holding. *First*, as already mentioned, there is no right to cast a provisional ballot when the Board has already

[7] The Court of Common Pleas also relied upon its supposed right to cast a provisional ballot as a cure-all for earlier-submitted invalid mail ballots. As mentioned earlier, that right is nonexistent, and thus cannot support a procedural due process claim either.

timely received a mail ballot from the voter. The majority cannot ground a private interest in its misreading of the Code.

Second, the majority's right-to-vote suggestion falters as well. To begin, the majority gave no support for its assertion that the right to vote is a "life, liberty, or property interest." *Turner*, 80 A.3d at 764. To Appellants' knowledge, no court has ever described the right to vote as a life or property interest. *See Richardson v. Hughs*, 978 F.3d 220, 230 (5th Cir. 2020) ("We have found no court that has held that the right to vote … is a property interest."). And the majority's assertion that the right to vote is "fundamental" does nothing for its holding. "For procedural due process, the question is not whether the plaintiffs assert a *fundamental right*, but instead whether the right they assert is a *liberty interest*." *Id.* at 231. It is no wonder that numerous courts have thus rejected procedural due process claims predicated on the right to vote. *See id.* at 232; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008); *Memphis A. Phillip Randolph Inst. v. Hargett*, 482 F. Supp. 3d 673, 691 (M.D. Tenn. 2020), aff'd on other grounds sub nom. *Memphis A. Phillip Randolph Inst. v. Hargett*, 978 F.3d 378 (6th Cir. 2020); *Lecky v. Virginia State Bd. of Elections*, 285 F. Supp. 3d 908, 918 (E.D. Va. 2018).

Even assuming that it is a liberty or property interest, the right to vote is simply not implicated in this case. That right does not give every voter carte blanche to cast ballots in any way he or she chooses. There is "no authority" for the proposition that

"the 'right to vote' encompasses the right to have a ballot counted that is defective under state law." *Pa. State Conf. of NAACP Branches v. Sec'y Pa.*, 97 F.4th 120, 133 (3d Cir. 2024). "Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right." *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting from denial of application for stay); *see also Ball v. Chapman*, 289 A.3d 1, 24-25 (Pa. 2022) (Opinion of Wecht, J.) (recognizing that this analysis is "persuasive" outside of a specific statutory context).

Properly understood, the right to vote is not affected by the Board's lack of pre-election notice of mail ballot defects. On its face, Appellees' complaint does not dispute that they failed to comply with the Election Code's mandatory requirements for casting a valid ballot. Compl. ¶¶ 83-132. And this Court has already held that, pursuant to its authority to regulate elections, the General Assembly has forbidden do-overs: once a voter submits an invalid ballot, there is no cure procedure. *See Pa. Dems.*, 238 A.3d at 372-74. The Pennsylvania Constitution does not entitle noncompliant voters to notice of defects that they, by definition, cannot correct.

Third, the right to appeal in 25 P.S. § 3157 does not justify the majority's holding either. That provision gives a right to appeal to "[a]ny person aggrieved by any order or decision of any county board regarding the computation or canvassing of the *returns* of any primary or election." (emphasis added). But decisions

regarding election returns can only be made *after* voting has concluded. *See id.* § 3146.8(g)(1.1). It is simply impossible for a right to appeal election *returns* to give birth to a right to *pre-election* notice.

b. <u>The Board has already provided all the process that is due</u>.

The Court can stop at the first step and conclude that the majority's procedural due process analysis was in error. But proceeding to the second step—asking "whether the procedures attendant to th[e] deprivation were constitutionally sufficient," *Turner*, 80 A.3d at 764—only reinforces that conclusion. Even assuming that Appellees can locate some (narrowly defined) liberty or property interest, the procedure the majority chose is grossly out-of-step. The Board has already provided the process that is due, and Appellees are entitled to nothing more.

The interests that the majority identified are plainly insufficient to justify the imposed permanent injunction. The majority gave pride of place to the right to vote in its analysis, but it made next to no effort to show that there is any meaningful "risk of an erroneous deprivation" of that right absent pre-election notice. *See Wallace*, 97 A.3d at 321 (rejecting procedural due process claim because the risk of erroneous deprivation was "slim"). Again, the complaint itself does not even argue that the Board made a mistake in rejecting Appellees' ballots. *See* Compl. ¶¶ 83-132. As for § 3157, the right to appeal canvassing decisions can only provide—at most—the

right to notice *after* the election. That statute cannot ground the majority's mandate of *pre*-election notice.

In fact, voters in Washington County already receive the only process they are due. As this Court has recognized, "whether pre-deprivation notice is required largely depends upon […] the risk of an erroneous deprivation" and "the value of additional or substitute safeguards." *Friends of DeVito v. Wolf*, 227 A.2d 872, 897 (Pa. 2020). For that reason, "[s]o long as the Secretary and the county boards of elections provide electors with adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere—pre-deprivation notice is unnecessary." *Pa. Dems.*, 238 A.3d at 389 (Wecht, J., concurring).

The Board provides such instructions. Voters who receive mail ballots are given detailed instructions on how to cast them properly, printed directly on the envelopes. As relevant for Appellees in this case, the spaces on the envelope for the signature and date are accompanied by these directions, respectively: "Sign or mark here (REQUIRED)," and "Today's date here (REQUIRED)." Pa. Dep't of State, Directive Concerning The Form Of Absentee And Mail-In Ballot Materials (July 1, 2024), https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-Directive-Absentee-Mail-in-Ballot-Materials-v2.0.pdf. And, for good measure, voters also receive a document titled

"Instructions—Make your ballot count!" telling them to "[s]ign and date the return envelope." *Id.* In these circumstances, it is implausible that additional procedures would reduce an already "slim" risk of erroneous deprivation, s*ee Wallace*, 97 A.3d at 321, and for that reason, the majority's pre-deprivation notice requirement is neither necessary nor constitutionally mandated.

2. <u>The consequences of the majority's rejection of the Code are breathtakingly broad</u>.

In its haste to discover new constitutional rights, the majority glosses over the fact that its holding is in direct contradiction of the Code. Under the majority's ruling, the Board must "notify any elector whose mail-in ballot is segregated for a disqualifying error" so that he or she "has an opportunity to challenge" that determination, and it must do so prior to the end of the voting period. Appx. Ex. B at 27. To state the obvious, the majority thus requires the county (a) to determine whether a voter's mail-in ballot is valid and (b) to report that determination to the voter, all *before* the election is concluded.

The Code does not allow what the majority demands. "[U]pon receipt," county boards are not permitted to inspect or open a mail-ballot package. 25 P.S. § 3146.8(a). Instead, county boards must "safely keep the ballots in sealed or locked containers until they are to be canvassed." *Id.* The very earliest time the county board is permitted to open and inspect mail ballots is at the "pre-canvass," which takes place at 7:00 A.M. *on election day*. *See id.* §§ 2602(q.1), 3146.8(g)(ii)(1.1).

And even then, "[n]o person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls." *Id.* § 3146.8(g)(ii)(1.1).

But inspection, opening, and disclosure is exactly what the majority commands of the Board. The Board cannot determine whether the voter made a disqualifying error without inspecting (and, in the case of the secrecy envelope requirement, opening) the ballot-return envelope. It cannot inspect or open the ballot-return envelope before Election Day itself. And even once it does, the Code prohibits telling the voters the results until *after* polls close.

In other words, the Code forecloses the majority's directive to the Board. It is one thing to use procedural due process to supplement a statutory interest. It is quite another to use that doctrine to hold a duly-enacted statute unconstitutional. That difference appears to have escaped the attention of the courts below, as neither paid even lip service to the principle that "acts passed by the General Assembly are strongly presumed to be constitutional." *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1103 (Pa. 2014). That presumption can only be overcome if the challenger demonstrates that the statute "clearly, palpably, and plainly violates the Constitution." *Id.* But neither the Court of Common Pleas nor the majority made any determination whatsoever that the Code "clearly, palpably, and plainly" falls short of the three-factor balancing test for procedural due process. Even if the Court

thinks that the procedural due process question is close (it is not), the presumption of constitutionality does not permit rejection of broad swathes of the Code so easily.

If ever that presumption had purchase, it has it here. The presumption stems from the premise that "the power of judicial review must not be used as a means by which the courts might substitute [their] judgment as to the public policy for that of the legislature." *Commonwealth v. Torsilieri*, 316 A.3d 77, 91 (Pa. 2024). Especially so in the context of elections. "The power to regulate elections is legislative, and has always been exercised by the law-making branch of the government." *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914). "Errors of judgment in the execution of the legislative power, or mistaken views as to the policy of the law, or the wisdom of the regulations, do not furnish grounds for declaring an election law invalid unless there is a plain violation of some constitutional requirement." *Id.*

Perhaps the majority thinks that it would be better to count votes and publish the results on a rolling basis. And if it were to run the election, the majority certainly would opt for pre-election notice and an extensive administrative appeals process that permits voters to submit as many ballots as they want as long as they eventually comply with the initial ballot requirements. But those calls are for the General Assembly, not the courts. And unless the majority can identify a "gross abuse" (it cannot), it is unjustified in "striking down an election law demanded by the people,

and passed by the law-making branch of government in the exercise of a power always recognized and frequently asserted." *Id.* at 523.

There is one more problem with the majority's analysis. Act 77—the landmark bill in which the General Assembly expanded the ability to vote by mail ballot—is "nonseverable," and "[i]f any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." 2019 Pa. SB 421, § 11. That Act directs the county boards of election to keep mail ballots "in sealed or locked containers until they are to be canvassed by the county board of elections." *Id.* § 7. It also provides that "[t]he county board of elections shall meet no earlier than the close of polls … to begin canvassing." *Id.* Those provisions and their application are invalid under the majority's analysis; accordingly, if the majority's opinion stands, Act 77—and its expansion of mail ballot availability—is void.

"It is not for the judiciary to usurp the General Assembly's policy-making authority and exceed the parameters of legislation by engrafting statutory requirements that the General Assembly chose to omit." *Keystone Rx LLC v. Bureau of Workers' Comp. Fee Rev. Hearing Off.*, 265 A.3d 322, 334 (Pa. 2021) (Wecht, J., concurring). Here, not only did the General Assembly omit the majority's chosen requirements—it actively *prohibited* them. The consequences of the majority's decision are a reminder of the care courts must exercise when deciding whether to

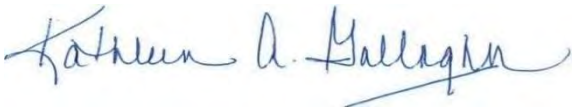
hold duly-enacted legislation unconstitutional. The majority failed to exercise that care here, and the Court should reverse.

CONCLUSION

For all of the above reasons, the Court should grant allowance of appeal. The rules and procedures governing Pennsylvania elections need to be appropriately determined by this Court before the 2024 General Election.

September 27, 2024

Respectfully submitted,



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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Petition for Allowance of Appeal contains 8,642 words, exclusive of the supplementary matter as defined by Pa. R.A.P. 2135(b).

THE GALLAGHER FIRM, LLC

Dated: September 27, 2024

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

I 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.

THE GALLAGHER FIRM, LLC

Dated: September 27, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

THE GALLAGHER FIRM, LLC

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