

IN THE SUPREME COURT OF PENNSYLVANIA

No. 55 MAP 2024

**IN RE: CANVASS OF PROVISIONAL BALLOTS IN THE
2024 PRIMARY ELECTION**

**BRIEF FOR AMICUS CURIAE SECRETARY OF THE
COMMONWEALTH AL SCHMIDT AND THE PENNSYLVANIA
DEPARTMENT OF STATE IN SUPPORT OF PETITIONER**

Appeal from the Order of the Commonwealth Court of Pennsylvania at
No. 629 CD 2024 dated July 3, 2024

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INTEREST OF AMICUS CURIAE

The Secretary of the Commonwealth and the Department of State file this amicus brief under Pennsylvania Rule of Appellate Procedure 531 in support of reversing the Commonwealth Court's order. The Secretary and the Department have an interest in this matter based on their responsibilities related to the administration and final certification of Pennsylvania's elections as well as their interest in the proper interpretation of laws governing Pennsylvania's elections.¹

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

SUMMARY OF THE ARGUMENT

This case involves two decisions of the Luzerne County Board of Elections to count, or not, provisional ballots cast in the 2024 primary election.

Luzerne's Board decided to count one ballot returned by an individual indisputably eligible to vote in Luzerne who had neglected to sign the provisional ballot's outer return envelope. Commonwealth Court concluded that the Election Code's direction to reject a provisional ballot returned without that signature needed to be followed here. That decision, however, was incorrect because the voter had completed his provisional ballot under the guidance of his polling location's judge of elections. Rejecting a ballot for poll-worker induced errors violates constitutional principles of fairness and protections of the right to vote. Moreover, an order to reject this ballot introduces difficult questions about what is permissible under the Help America Vote Act, questions that can otherwise be avoided.

The Board also decided not to count a provisional ballot from an individual registered in Schuylkill County. Commonwealth Court's ruling that this ballot must instead be counted failed to properly consider

the importance of where a voter is registered and overlooked the relevant provisions of Pennsylvania's Election Code and Voter Registration Law.

ARGUMENT

I. Mr. Wagner's Ballot Should Be Counted

A. Rules Governing Provisional Voting

In Pennsylvania, in-person voting on Election Day is organized through local election districts. *See* 25 P.S. §§ 2701-2706 (creating election districts). There are 9,159 districts across the Commonwealth. Elections at these districts are conducted "by a district election board consisting of a judge of election, a majority inspector of election and a minority inspector of election," *id.* § 2671, which are constitutionally created roles, Pa. Const. art. VII, § 11. The judge of election and the inspectors are themselves elected, 25 P.S. § 2671, and they have unique legal protections on Election Day, *id.* § 2683.

One of these election officials' critical responsibilities is receiving the district register (or the poll book) used on Election Day. 25 Pa.C.S. § 1402(d). The district register contains the list of individuals registered to vote. *Id.* § 1402(a)-(b). When individuals arrive at their polling place on Election Day to vote, it is the job of these election officials to ensure that the voter appears in the district register. 25 P.S. § 3050(a.3).

On Election Day, however, election officials do not always have perfect information. And over 20 years ago, Congress identified a problem with eligible voters arriving at a polling place but not being able to submit a ballot because there were questions about their eligibility. H.R. Rep. 107-329 at 38 (2001). In response, Congress passed the Help America Vote Act (HAVA) to, among other things, ensure that eligible individuals do not lose the opportunity to participate in an election due to on-the-spot doubts about their eligibility. *See Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004).

HAVA accomplishes this objective by instructing poll workers to notify voters whose eligibility is questioned that they may cast a provisional ballot and by guaranteeing that those voters may always do so. 52 U.S.C. § 21082(a)(1). If it is later determined “that the individual is eligible under State law to vote,” their provisional ballot “shall be counted as a vote in that election in accordance with State law.” *Id.* § 21082(a)(4).

Before casting a provisional ballot, the voter must execute an affirmation in front of an election official that they are registered in that jurisdiction and eligible to vote in that election. *Id.* § 21082(a)(2). HAVA also requires that election officials establish a system—“such as a toll-

free number or an Internet website”—that allows anyone who casts a provisional ballot to learn if their vote was counted and, if not, the reason. *Id.* § 21082(a)(5)(B).

Pennsylvania’s General Assembly amended the Election Code to comply with HAVA. The Election Code reiterates that individuals who arrive at a polling place claiming to be eligible to vote at that location, but whose eligibility is in doubt, can cast a provisional ballot. 25 P.S. § 3050(a.4)(1). The Election Code prescribes the form of the affidavit that, under HAVA, a voter must sign before receiving a provisional ballot and requires that the judge of election and minority inspector also sign the affidavit. *Id.* § 3050(a.4)(2). Completed ballots are to be placed in a secrecy envelope and the secrecy envelope in a larger envelope, which the voter must sign. *Id.* § 3050(a.4)(3).

The Election Code also directs how provisional ballots are counted. Within seven days of Election Day, the relevant county board of elections must determine if the voter “was entitled to vote at the election district in the election.” *Id.* § 3050(a.4)(4). There are opportunities to challenge the boards’ determination, and procedures to adjudicate such a challenge. *Id.* § 3050(a.4)(4)(i)-(vii). If the voter was “registered and entitled to vote

at the election district where the ballot was cast,” the county shall conduct a signature verification and “shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election.” *Id.* § 3050(a.4)(5)(i).

Separately, the Election Code directs that, notwithstanding a determination that a provisional voter was eligible to vote, a “provisional ballot shall not be counted” if certain of Pennsylvania’s rules for submitting a provisional ballot are not followed. *Id.* § 3050(a.4)(5)(ii). Among them are the rule that voters must sign the provisional ballot’s outer envelope. *Id.* § 3050(a.4)(5)(ii)(A).

B. Provisional Ballots Cannot Be Rejected for Poll-Worker Induced Errors

Here, Mr. Wagner’s provisional ballot was challenged because he neglected to sign the outer provisional ballot envelope. *Cmwlth. Ct. Op.* at 2. The Election Code’s relevant provision is explicit—in a way that many parts of the Election Code are not—that a ballot returned by a voter who failed sign the provisional ballot envelope should not be counted. 25 P.S. § 3050(a.4)(5)(ii)(A). Commonwealth Court held that this statutory language clearly indicates the General Assembly intended that provisional ballots be rejected if the voter failed to sign the outer envelope and

ruled on that basis that Mr. Wagner's ballot should have been rejected. Cmwlth. Ct. Op. at 6-10 & n.8. Yet, rejecting Mr. Wagner's ballot would violate constitutional principles that protect the right to vote.

As this Court has recognized, "the right of suffrage is the most treasured prerogative of citizenship in this nation and this Commonwealth." *In re Recount of Ballots Cast in Gen. Election on Nov. 6, 1973*, 325 A.2d 303, 308 (Pa. 1974). "Unreasonable impairment or unnecessary restrictions upon this right cannot be tolerated whether the contest be for the selection of the President of the United States or the district committeeman." *Id.*

In *In re Recount*, these constitutional considerations animated this Court's evaluation of ballots returned without the voter having removed the ballot's numbered corner. *Id.* The relevant statutory language explicitly provided that "the election officer shall direct the elector . . . to remove the perforated corner containing the number . . . Any ballot deposited in a ballot box . . . without having the said number torn off shall be void and shall not be counted." *Id.* (quoting 25 P.S. § 3055). This Court, however, concluded it would be an "unreasonable encroachment upon the fran-

chise” to invalidate a ballot “where the voter has complied with all instructions communicated to him and in the absence of any evidence of improper influence having been exerted.” *Id.* at 309. Any other ruling would “unnecessarily condition the right to vote upon the proper discharge of the responsibility of an election official over whom the voter has no control.” *Id.*

Another Justice of this Court has likewise identified the adequacy of instructions voters receive about applicable voting rules as relevant to whether rejecting ballots is permissible. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 389 (Pa. 2020) (Wecht, J., concurring); *see also In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1089 (Pa. 2020) (Wecht, J., concurring) (“I cannot say with any confidence that even diligent electors were adequately informed as to what was required to avoid the consequence of disqualification in this case.”); *Kelly v. Commonwealth*, 240 A.3d 1255, 1257-58 (Pa. 2020) (Wecht, J., concurring) (“[D]ue consideration must also be accorded to the rights of those voters who cast ballots in good faith reliance upon the laws passed by their elected representatives.”).

Outside Pennsylvania, courts have likewise been unwilling to order that ballots be rejected despite evident errors if the voter's error was made in reliance on the advice or conduct of election officials. Rejecting ballots because of state acts that "induce voters to miscast their votes," the Sixth Circuit has held, is fundamentally and unconstitutionally unfair. *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012); *see also Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 243 (6th Cir. 2011) ("To disenfranchise citizens whose only error was relying on poll-worker instructions appears to us to be fundamentally unfair."). Therefore, the Sixth Circuit held, an Ohio law that penalized voters who relied on a poll worker's incorrect direction about where to vote was likely unconstitutional. *Ne. Ohio Coal. For Homeless*, 696 F.3d at 597-98.

Similarly, the First Circuit held that excluding from an election's results unauthorized absentee ballots that election officials provided to voters would make an election fundamentally and unconstitutionally unfair. *Griffin v. Burns*, 570 F.2d 1065, 1074-79 (1st Cir. 1978). The Northern District of New York likewise held that it is fundamentally and unconstitutionally unfair to reject unauthorized absentee ballots where the

voter “reasonably relied upon the actions of the [Board of Election’s] experts in sending them absentee ballots.” *Hoblock v. Albany Cnty. Bd. of Elections*, 487 F. Supp. 2d 90, 97 (N.D.N.Y. 2006).

The risks of poll-worker induced errors are particularly pronounced with provisional balloting.

By law, poll workers have an affirmative role in provisional voting. At the outset, HAVA directs that “election official[s] at the polling place shall notify” individuals of the opportunity to cast a provisional ballot. 52 U.S.C. § 21082(a)(1). Before anyone may cast a provisional ballot, the voter must execute a “written affirmation ... before an election official at the polling place” stating that they are registered to vote and eligible to vote. *Id.* § 21082(a)(2). Even more, in Pennsylvania that affirmation must be signed by the Judge of Elections and minority inspector. 25 P.S. § 3050(a.4)(2). HAVA even entitles everyone who has cast a provisional ballot to information from appropriate election officials about whether their provisional ballot was counted. 52 U.S.C. § 21082(a)(5).

In practice, poll workers are often even more involved as voters navigate provisional voting. As a general matter, county boards of elections

strive to ensure that poll workers provide voters with complete and correct instructions about voting provisionally. County boards do so by working hard to train the 9,159 judges of elections and other poll workers about how the provisional ballot process operates (as well as all other aspects of administering an election). *See, e.g.,* Allegheny County Election Officer Handbook at 29²; Dauphin County Training Manual at 26-27³; Montgomery County Training Manual 76-82⁴.

Still, judge of elections is an independently elected office that is outside the direct oversight of county boards of election (or the Department of State), *see* 25 P.S. § 2671, and the over 9,000 judges of election across the Commonwealth do not always provide voters with complete instructions. And that can lead to voters who have reasonably assumed that they are being properly instructed by an election official failing to comply with all the Election Code's provisional voting requirements.

² Available at: <https://pollworkertraining.alleghenycounty.us/wp-content/uploads/2021/10/Election-Officers-Handbook-January-22-2024.pdf>.

³ Available at: <https://dauphinelectiontraining.com/wp-content/uploads/2023/05/Dauphin-County-PA-Pollworker-Handbook-2023.pdf>.

⁴ Available at: <https://www.montgomerycountypa.gov/DocumentCenter/View/43044/PE24-In-Person-Slideshow>.

This case provides a paradigmatic example. Mr. Wagner explained that after arriving at the polling place and being told he could vote only provisionally, he was taken to a table and “was more or less being led on how to [vote provisionally].” N.T. 22:15-16. An election official—the Judge of Elections, Mr. Wagner believed—“basically was leading [him] through everything. She was telling [him] what to do, what not to do.” N.T. 22:18-20, 23:7-9. When completing the provisional ballot materials, Mr. Wagner followed the Judge of Elections’ instructions, describing her as “the boss.” N.T. 24:12-23.

To reject his ballot under these circumstances would be an unreasonable and undue burden on the constitutional right to vote.

C. This Court Must Consider If HAVA Allows Rejecting Mr. Wagner’s Ballot

Rejecting Mr. Wagner’s ballot would raise difficult questions about whether doing so is permitted under HAVA.

When Congress passed HAVA, it set a floor for whose provisional ballots must be counted, mandating that if an “individual is eligible under State law to vote, the individual’s provisional ballot shall be counted as a vote in that election in accordance with State law.” 52 U.S.C. § 21082(a)(4).

This appeal does not appear to raise any issue regarding whether Mr. Wagner is “eligible under State law to vote.” Instead, the challenge to Mr. Wagner’s ballot arose because he failed to sign the provisional ballot envelope. But it is not the case that the failure to sign the provisional ballot envelope made Mr. Wagner ineligible “under State law to vote.” Eligibility under state law to vote depends on facts that are true about the voter *before* they cast a provisional ballot (even if those facts are not known to election officials at that time). Indeed, under HAVA, an individual’s ability to receive a provisional ballot is conditioned on their swearing that they are “eligible to vote in that election.” 52 U.S.C. § 21082(a)(2)(B); *see also id.* § 21082(a) (making a provisional ballot available to those who declare at a polling place that they are “eligible to vote in an election for Federal office”). Congress could not have insisted that individuals swear to their eligibility if it depended on future events.

This understanding of what makes someone “eligible under State law to vote” for purposes of HAVA comports with Pennsylvania law. People are eligible to vote in Pennsylvania if they are old enough, have been a citizen long enough, have lived in Pennsylvania long enough, have followed the rules governing voter registration, and are not imprisoned for

a felony conviction. Pa. Const. art. VII, § 1; 25 P.S. § 2811; 25 Pa.C.S. § 1301(a)-(b). They are not eligible based on their compliance with rules that govern how to submit a provisional ballot. In fact, when the General Assembly amended the Election Code to implement HAVA, it distinguished between determining a voter's eligibility (and rejecting a provisional ballot on that basis), 25 P.S. § 3050(a.4)(4), and rejecting a provisional ballot for procedural reasons (such as neglecting to sign the outer envelope) **notwithstanding** that a voter is eligible, *id.* § 3050(a.4)(5)(i)-(ii).

HAVA and the Election Code therefore are in accord: Someone's eligibility exists (or does not) before they cast a provisional ballot. That eligibility to vote is not affected by whether someone signs an envelope after filling out their ballot.⁵

⁵ Courts have split about whether rules requiring that voters cast a ballot only at their precinct impose a condition of voter eligibility. *Compare Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 427-34 (E.D. Mich. 2004) and *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 671 F. Supp. 2d 575, 617 (D.N.J. 2009) with *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 576-79 (6th Cir. 2004) and *Florida Democratic Party*, 342 F.Supp.2d at 1079-81. Even if rules that limit where voters may cast a ballot are properly understood to impose a condition of voter eligibility, there is no similarity for purposes of judging eligibility between rules that are antecedent to, and independent of, the

Section 21082(a)(4)'s directive that provisional ballots from eligible voters "shall be counted as a vote in that election in accordance with State law" does not suggest a different result. The "in accordance with state law" language does not relate to *whether* a provisional ballot "shall be counted," but instead permits states to determine *how* provisional ballots that "shall be counted" are in fact counted. *Bay Cnty. Dem. Party v. Land*, 347 F. Supp. 2d 404, 432 (E.D. Mich. 2004). Indeed, Pennsylvania law carefully describes how provisional ballots are counted. 25 P.S. § 3050(a.4)(4)(i)-(vii). If Congress meant to permit rejecting provisional ballots for reasons such as the missing signature at issue here, it would written something like "the individual's provisional ballot shall be counted as a vote in that election *if* in accordance with State law."

II. Mr. O'Donnell's Ballot Should Not Be Counted

Commonwealth Court's decision also should be reversed as to Mr. O'Donnell's provisional ballot, which the Luzerne County Board of Elections properly rejected.

act of casting a provisional ballot and a rule requiring someone who already has cast a provisional ballot to then sign an envelope.

The circumstances regarding Mr. O'Donnell's ballot are unusual. Mr. O'Donnell testified that in June 2023 he purchased a home in Schuylkill County. N.T. 31:8-14. Before that, he lived and voted in Luzerne County. N.T. 30:19-25. In December 2023, he changed the address of his vehicle registration with the Pennsylvania Department of Transportation to his Schuylkill County home. N.T. 33:12-17.

Mr. O'Donnell claims that "without his knowledge" the Department of Transportation then changed his voter registration to the new Schuylkill County address used for his vehicle registration. N.T. 33:17-20. Although there is nothing in the record about what form Mr. O'Donnell used to change his registration and little detail about his interaction with the Department of Transportation, Mr. O'Donnell testified that when he updated his vehicle registration he was not asked about his voter registration. N.T. 37:11-19. Nor did Mr. O'Donnell recall ever receiving any confirmation that his voter registration changed. N.T. 34:23-35:4.⁶

⁶ Emily Cook, Luzerne County's Acting Election Director, correctly testified that confirmation of changes to a voter's registration record come from the county to which the voter moved. N.T. 41:9-19; *see also* 25 Pa.C.S. § 1328(c)(2). Mr. O'Donnell testified that he was not actually living in Schuylkill County until several months after registering there, so it is quite plausible he simply never saw a confirmation sent to his Schuylkill County address.

Luzerne County, however, did receive a notice in December 2023 that Mr. O'Donnell had registered in Schuylkill County. N.T. 39:7-18.⁷

Despite moving his vehicle registration to Schuylkill County in December 2023, Mr. O'Donnell testified that he did not move there himself until March 29, 2024. N.T. 32:5-7. Then, for the 2024 primary election, he tried to vote in Luzerne County, where his cousin was on the ballot. N.T. 34:7-17, 35:14-18.

Based on this testimony (and accepting the Court of Common Pleas' fact finding), Commonwealth Court concluded that because Mr. O'Donnell had not moved from Luzerne County until March 29, 2024, he had "removed his residence within 30 days preceding the election," and therefore was eligible to vote in Luzerne County. Cmwlth. Ct. at 11 (quoting 25 P.S. § 2811(3)) (cleaned up).

But Commonwealth Court failed to recognize the importance of Mr. O'Donnell having already moved his registration to Schuylkill County

⁷ Ms. Cook incorrectly testified that Mr. O'Donnell's voter registration was updated only because of changes made in September 2023 to the form of the application to register to vote that can be completed while applying for a driver's license. N.T. 40:1-14. Based on Mr. O'Donnell's testimony, however, those changes are completely irrelevant here as he was not applying for a driver's license during his December 2023 interaction with the Department of Transportation.

and thus that court's analysis did not consider the relevant statutory provisions.

Eligibility to vote in Pennsylvania requires complying with rules for registering to vote. 25 P.S. § 2811 (entitling people to vote if they meet certain criteria and have “complied with the provisions of the acts requiring and regulating the registration of electors”); 25 Pa.C.S. § 1301(b) (“No individual shall be permitted to vote at any election unless the individual is registered under this subsection...”). HAVA created provisional ballots for people whose eligibility is uncertain but did not do away with state laws requiring voters to register to be eligible. *See Florida State Conference of NAACP v. Browning*, 522 F.3d 1153, 1170 (11th Cir. 2008) (explaining Congress did not intend for provisional balloting to be a “sweeping federal invalidation of state voter registration requirements”).

And Pennsylvania's Voter Registration Law specifically identifies the three provisions that authorize an individual who has moved to a new residence to nonetheless vote at their former polling location. 25 Pa.C.S. § 1301(c). None of them permits counting Mr. O'Donnell's ballot. Instead, the first allows individuals who move within a county to vote at their former polling place under some circumstances and voters who move to a

new county to do so if they have “*not registered* to vote in the new county of residence.” 25 Pa.C.S. § 1501(b)(1)-(3) (emphasis added).⁸ The second applies when a voter has made timely notice of removal, something that did not happen here. *Id.* § 1502. And the third applies when someone has moved but failed to notify the registration commission of that move. 25 Pa.C.S. § 1902(b). This, too, does not cover Mr. O’Donnell’s circumstance as he did notify the commission by registering in a new county.

Additionally, Commonwealth Court was needlessly worried that a contrary decision would mean people who move pre-election will be unable to vote. Cmwltth. Ct. Op. at 11. Mr. O’Donnell’s issue arose not because his residence changed, but because he sought to vote in his old county after he changed his registration. As just described, Pennsylvania law allows people who move before an election to vote at their old polling place under some circumstances if they have not registered elsewhere.

Finally, in Commonwealth Court, Mr. Cabell argued that if Mr. O’Donnell’s Schuylkill County registration was an impediment to counting his vote in Luzerne County, then the registration change should be

⁸ This provision is consistent with what is allowed under 25 P.S. § 2811(3), the section that Commonwealth Court exclusively relied upon.

considered “void *ab initio*” because it was unlawful. Cabell Br. at 36-37; Cabell Reply at 16. But Mr. Cabell’s statutory appeal under 25 P.S. §§ 3050(a.4)(4)(v) and 3157 of Luzerne County’s decision not to count a provisional ballot is not the proper vehicle for raising issues with Mr. O’Donnell’s voter registration.

In any event, Mr. Cabell’s arguments fall woefully short of establishing any issue with the registration change. His underlying premise is that Mr. O’Donnell’s voter registration changed without Mr. O’Donnell having done anything to precipitate the change. Cabell Br. at 39. But as would be expected in an appeal about Luzerne’s decision not to count Mr. O’Donnell’s provisional ballot, the facts regarding Mr. O’Donnell registering to vote in Schuylkill County are severely underdeveloped. While Mr. O’Donnell testified during his brief examination that the Department of Transportation changed his registration without his knowledge, *see supra* at 16-17, it is far more likely that Mr. O’Donnell completed a request to change his voter registration (and then did not see the confirmation

that he had done so because he was not regularly present as his Schuylk-ill County address until several months after registering there).⁹

CONCLUSION

For the above reasons, the Commonwealth Court's decision should be reversed.

July 31, 2024

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⁹ Indeed, the version of the Department of Transportation form (the MV-63) for changing a driver's license address and vehicle registration address that was in use in December 2023 included a field for the driver to decide if they wanted to update their voter registration with the new address. The current version contains a similar prompt. Ms. Cook's testimony suggested that Luzerne County had received confirmation that Mr. O'Donnell had communicated through the Department of Transportation that he had changed his address and was updating his voter registration. N.T. 41:15-48:17.

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.

Dated: July 31, 2024

/s/ Jacob B. Boyer

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CERTIFICATE OF LENGTH

I certify that this brief is 4,057 words and therefore complies with the word count requirement set forth in Pennsylvania Rule of Appellate Procedure 531(b)(3). I have relied on Word's word count function to determine the length of this brief.

Dated: July 31, 2024

/s/ Jacob B. Boyer

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