

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH D. HAMM, individually and as a candidate for the Pennsylvania State House of Representatives in the 84th Legislative District; MIKE KELLY, individually and as a candidate for the United States House of Representatives 16th District; BILLY ALLRED; CHAD HORNER; CAROLYN CONNOR; and JOAN HAUSER,

Petitioners,

v.

KATHY BOOCKVAR, in her official capacity as the Secretary of the Commonwealth of Pennsylvania,

Respondent.

ORIGINAL JURISDICTION

No. 600 MD 2020

**APPLICATION FOR LEAVE TO FILE BRIEF OF
THE NAACP-PENNSYLVANIA STATE CONFERENCE,
BLACK POLITICAL EMPOWERMENT PROJECT,
COMMON CAUSE PENNSYLVANIA, AND LEAGUE OF
WOMEN VOTERS OF PENNSYLVANIA AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

Pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure, the NAACP-Pennsylvania State Conference, Black Political Empowerment Project, Common Cause Pennsylvania, and League of Women Voters of Pennsylvania

(together, “*Amici*”) respectfully request leave to file the accompanying *amicus curiae* brief in support of Respondent Kathy Boockvar, in her official capacity as the Secretary of the Commonwealth of Pennsylvania.

1. On November 3, 2020, Joseph D. Hamm and five other individuals (“Petitioners”) invoked this Honorable Court’s original jurisdiction seeking, *inter alia*, a preliminary injunction barring Respondent from permitting allegedly invalidly submitted absentee and mail-in ballots to be cured by the submission of provisional ballots and prohibiting Respondent from disclosing identifying information about voters who submitted ballots that Petitioners allege must be rejected for non-compliance with the Pennsylvania Election Code.

2. In support of Respondent, *Amici* seek to file the accompanying brief to provide additional context regarding provisions of the Election Code relevant to the determination of both the merits and the remedy (if any) in this case.

3. *Amici* have extensive experience and expertise regarding the Election Code and other laws governing voting in this Commonwealth, and a strong interest in ensuring that the right to vote of their members and all Pennsylvanians is protected.

WHEREFORE, *Amici* respectfully request that this Honorable Court grant the requested leave and accept the accompanying *amicus curiae* brief.

Dated: November 5, 2020

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

I hereby certify, pursuant to Pa. R.A.P. 127, that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 5, 2020

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STATE CONFERENCE, BLACK POLITICAL
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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are four non-partisan organizations – representing the interests of their nearly 50,000 Pennsylvania members – dedicated to eliminating barriers to voting and increasing civic engagement among their members and in traditionally disenfranchised communities. *Amici* have an interest in ensuring that their members, and all Pennsylvanians, are not disenfranchised by Petitioners’ attempt to prevent qualified voters from curing defective mail-in or absentee ballots by casting a provisional ballot.

The **NAACP-Pennsylvania State Conference** is a non-partisan organization that has approximately 10,000 members in 44 branches across Pennsylvania. Its Political Action Committee is dedicated to ensuring that all eligible Pennsylvania citizens are given a full and equal opportunity to exercise their fundamental right to vote, and it has sought to prevent efforts to suppress or disenfranchise African-American voters. NAACP-PSC engages in voter registration, education, and turnout efforts. In the 2020 election cycle, NAACP-PSC launched a vote campaign called “Wake Up Black Vote.” A key component of that campaign included providing accurate information regarding the voting process to NAACP-PSC’s membership and to the public.

The **Black Political Empowerment Project (B-PEP)** is a non-profit, non-partisan organization that has worked since 1986 to ensure that the Black

community in Pittsburgh votes in every election. During every election cycle, B-PEP's work includes voter registration drives, get-out-the-vote activities, education and outreach regarding the voting process, and election-protection work. B-PEP focuses these activities in predominantly Black American neighborhoods in Allegheny County, with some efforts in Westmoreland and Washington Counties. In preparation for the November 3 election, B-PEP's work has included educating voters about recent changes to Pennsylvania election procedures and informing its members about the voting process, including with respect to absentee and mail-in ballots.

Common Cause Pennsylvania is a non-profit, non-partisan political advocacy organization and a chapter of the national Common Cause organization. With approximately 36,000 members and supporters in Pennsylvania, Common Cause Pennsylvania works to encourage civic engagement and public participation in democracy, to ensure that public officials and public institutions are accountable to and reflective of all people, and to implement structural changes through the American democratic process. Common Cause Pennsylvania uses grassroots mobilization, community education, coalition building, legislative advocacy, and litigation to ensure that voters in communities that vote at the lowest rates can have their vote counted.

The League of Women Voters of Pennsylvania is a non-partisan statewide

non-profit formed in August 1920, shortly after the Nineteenth Amendment granted women suffrage in November 1918. The League and its 2,273 members are dedicated to helping the people of Pennsylvania exercise their right to vote, as protected by the law. Through its education and advocacy efforts, the League works in the areas of voter registration, election protection, voter education, get-out-the vote efforts, and grassroots mobilization around voting rights. It works to ensure that voters are not disenfranchised by removing unnecessary barriers to full participation in the electoral process. The League has pursued legal action to achieve these goals.

Amici urge the Court to reject Petitioner’s request for declaratory and injunctive relief. As explained in this brief submitted in support of this request, the relief sought by Petitioners would impose unique burdens on voting rights that *Amici*, non-partisan organizations representing the interests of impacted voters at risk of disenfranchisement, are uniquely positioned to address.¹

¹ No one other than amici, their members, or their counsel paid in whole or in part for the preparation of this brief or authored in whole or in part this brief. *See* Pa. R.A.P. 531(b)(2).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioners seek to prevent provisional ballots cast by qualified electors from being counted. This attempt to disenfranchise Pennsylvania voters must be rejected. *First*, the premise of Petitioners' remarkable request is mistaken. Nothing in the Election Code prohibits a county board of elections from providing notice that a voter's mail-in ballot has been rejected so that the voter can be contacted and afforded an opportunity to cast a valid ballot. *Second*, even if Petitioners were correct that a county board violated a purported non-disclosure requirement in the Election Code, the remedy for the *county board's* error cannot possibly be to nullify the right of a *qualified elector* to cast a provisional ballot legitimately cast in compliance with a good-faith interpretation of state law.

Petitioners are wrong on the law. But they are also just wrong. Pennsylvanians have just voted in the midst of a once-in-a-century pandemic, under recently amended laws expanding mail-in voting. The technical requirement of the secrecy envelope for mail-in ballots was just recently decided by the Supreme Court of Pennsylvania. It is both unsurprising and understandable that some voters, many voting by mail for the first time, would make honest mistakes in returning their ballot. It is simply unconscionable that Petitioners would complain that these voters should not have received notice of those mistakes "because it allows voters an opportunity to cure perceived defects," Application at

18 – as if that were a bad thing. The right to cast a vote is sacred. This Court should not enter an injunction barring qualified voters from fixing an honest mistake in order to cast a valid vote at the eleventh hour.

ARGUMENT

I. The Election Code Does Not Prohibit County Boards From Providing Notice That An Elector’s Mail-In Ballot Is Defective.

Petitioners make the strained argument that a secrecy requirement governing pre-canvassing meetings must be read as a prohibition on providing notice that a ballot has been rejected so that the voter has an opportunity to cast a valid ballot. That is not what the Election Code says.

The provision relied on by Petitioners states: “No 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.” 25 P.S. § 3146.8 (emphasis added). Petitioners’ apparent view is that because the identity of electors whose ballots are rejected are mentioned *during* the pre-canvass meeting, that information is somehow “the result” of the pre-canvass meeting. But that is not what “result” means. A “result” is the “outcome of some action.” *See Oxford English Dictionary Online* (3d ed. 2010). The Code itself defines the word “pre-canvass” as a process that culminates in “the counting, computing and tallying of the votes reflected on the ballots.” 25 P.S. § 2602(q.1). The “results”

of the pre-canvass meeting are the outcome of that process – the tallying of votes that the pre-canvass produces.

And it makes perfect sense that the General Assembly would prohibit this tally – “the results” of the pre-canvass meeting – from being disclosed “prior to the close of the polls.” *Id.* § 3146.8. The General Assembly has a clear interest in ensuring that partial election results are not disclosed prior to the closing of the polls, since doing so might discourage participation or otherwise affect the conduct of the election. *See* 1 Pa. C.S. § 1921(c) (in cases of ambiguity the intention of the General Assembly may be ascertained by considering, *inter alia*, “[t]he object to be obtained”).

By contrast, Petitioners have not even attempted to explain what interest the General Assembly would have in preventing a qualified elector from learning that his or her ballot was rejected, so that the elector can have an opportunity to cast a valid provisional ballot. To the contrary, in interpreting “ambiguous statutes generally and election matters specifically,” this Court is “mindful of the ‘longstanding and overriding policy of this Commonwealth to protect the elective franchise.’” *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *9 (Pa. Sept. 17, 2020) (quoting *Shambach v. Bickhart*, 577 Pa. 384, 845 A.2d 793, 798 (2004)). The suggestion that the General Assembly intended to *prohibit* a qualified elector from being informed that his or her mail-in ballot was

rejected, so that the qualified elector would have an opportunity to cast a valid one, is simply too farfetched to be credited. A non-disclosure requirement protecting “the results” of the pre-canvass from being prematurely publicized cannot reasonably be construed as having that result.

To argue otherwise, Petitioners pluck from its context a statement from *In re November 3, 2020 General Election*, No. 149 MM 2020, 2020 WL 6252803 (Pa. Oct. 23, 2020). In interpreting the Election Code to decide whether it requires or permits signature matching on the mail-in ballot declaration, the Court noted that reading such a requirement into the Code “would create a risk that voters would be disenfranchised.” *Id.* at *6. That is because, the Court explained, “the Election Code contains no requirement that voters whose ballots are deemed inadequately verified be apprised of this fact.” *Id.* In the context of discussing this concern, the Court observed that “unlike in-person voters, mail-in or absentee voters are not provided any opportunity to cure perceived defects in a timely manner.” *Id.* Petitioners seize on this last statement, but ignore everything that led up to it. The point the Court was making is that the Code does not “*require[]*” notification of the voter. *Id.* And it is certainly not guaranteed any notification during a pre-canvass meeting would afford a “timely” opportunity to cure, since the pre-canvass meeting can take place only starting on Election Day itself. *Id.* This one sentence from the Court’s opinion, expressed as a reason to interpret the Code to *avoid*

disenfranchisement, cannot be read as establishing a *prohibition* on a voter being provided with notice and an opportunity to cure.

Constitutional avoidance principles likewise cut firmly against adopting Petitioners' interpretation of § 3146.8. Under the canon of constitutional avoidance that the General Assembly has directed this Court to apply, "if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, [the Court will] adopt the latter construction." *Commonwealth v. Herman*, 161 A.3d 194, 212 (2017); *cf.* 1 Pa. C.S. § 1922(3) ("[T]he General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth."). Petitioners' interpretation of § 3146.8 not only raises "constitutional difficulties" – if adopted, it would deprive Pennsylvanians of their constitutional right to vote. This Court has a duty to avoid such a result where, as here, another construction of a statutory provision is available. *See Mt. Lebanon v. Cnty. Bd. of Elections*, 368 A.2d 648, 650 (1977) ("[W]e should not decide a constitutional question unless absolutely required to so do.").

II. Even If County Boards Erred In Providing Notice Of Defects, Invalidation Of Ballots Would Not Be An Appropriate Remedy.

Section 3146.8 imposes a duty of non-disclosure that does not apply to this context. Even if, however, the Court thought that a county board or other

participant in a pre-canvass meeting had violated that duty by providing notice of mail-in ballot deficiencies to a voter, it would not follow that the voter – who did not commit any violation of the non-disclosure requirement – should be punished with disenfranchisement.

To the contrary, the Election Code specifically allows any voter who requested an absentee or mail-in ballot, but whose ballot has not been voted, to cast a provisional ballot. The Code states that “[a]n elector who requests an absentee ballot and who is not shown on the district register as having voted the ballot *may vote by provisional ballot*” 25 P.S. § 3146.6(b)(2) (emphasis added); *id.* § 3150.16(b)(2) (same for mail-in ballots). In fact, the Code specifically requires voters to be given notice that if their “voted mail-in ballot is not timely received [the elector] may only vote on election day by provisional ballot” (unless the voter brings their ballot to the polling place and spoils it according to specified procedures). *Id.* § 3150.13(e); *see also id.* § 3146.3(e) (same for absentee ballots). Thus, Petitioners’ requested remedy would invalidate provisional ballots cast in a situation for which provisional ballots are authorized. It would also undermine Pennsylvania law permitting the casting of provisional ballots, which the Legislature enacted to prevent disputes about voter eligibility from disenfranchising eligible voters.

Moreover, the Code expressly enumerates the circumstances under which

“[a] provisional ballot shall not be counted.” 25 P.S. § 3050(a)(5)(ii). That list does not include a county board’s alleged violation of its pre-canvassing non-disclosure obligations. This Court should not read into the Code an additional ground for not counting a provisional ballot not provided by the General Assembly. *See Sivick v. State Ethics Comm’n*, 2020 WL 5823822, at *10 (Pa. Oct. 1, 2020) (“Under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters.”).

Petitioners’ proposed remedy is also plainly overbroad. Petitioners seek an order preventing the counting of any ballots that are meant to cure a defect in an earlier ballot – even if a voter realized on her own that she made a mistake in casting her ballot, without being notified of the defect in putative violation of § 3146.8. This would disenfranchise voters who were not even prompted by the allegedly illegal “notice.” And Petitioners do not stop there. They also seek to throw out any ballots that “have been altered, or that have been attempted to be altered, to correct or cure” a deficiency – without regard to whether such alterations resulted from the notice process that Petitioners challenge.

Ultimately, the rule urged by Petitioners, which would deprive a qualified elector of the franchise as a result of someone else’s purported violation of a non-disclosure requirement, cannot be reconciled with fundamental principles of Pennsylvania law. It should be rejected.

CONCLUSION

For the aforementioned reasons, *Amici Curiae* respectfully urge this Court to reject Petitioners' attempt to disenfranchise Pennsylvania voters.

Dated: November 5, 2020

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CERTIFICATION OF WORD COUNT

I hereby certify that this brief contains 2,229 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this petition.

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