

**IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

No. 28 WAP 2024

CENTER FOR COALFIELD JUSTICE, et al.
Petitioners-Appellees

v.

**REPUBLICAN NATIONAL COMMITTEE AND
REPUBLICAN PARTY OF PENNSYLVANIA,**
Intervenors-Appellants

WASHINGTON COUNTY BOARD OF ELECTIONS
Respondents

BRIEF OF PETITIONERS-APPELLEES

On Appeal of the Republican National Committee and Republican Party of
Pennsylvania from the Order of Commonwealth Court, 1172 CD 2024,
entered on September 24, 2024

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INTRODUCTION

In the weeks leading up to the April 2024 primary, the Washington County Board of Elections (the “Board” or “Washington County”) segregated mail-in ballots that voters returned without a signature or a date, or with an incorrect date, knowing these votes would never be counted. The Board then hid that information from the voters and the public, preventing voters from taking any recourse, either by voting provisionally or challenging disqualification. As a result, the Board’s actions disenfranchised 259 qualified, eligible Washington County voters in the April 2024 primary, none of whom were notified that their mail-in ballots would not be counted.

Washington County’s top election official candidly admitted that during the 2023 elections, the Board had provided notice to voters who sent in flawed mail-in ballot packets. Doing so was easy: when logging the mail-in ballot as required, election workers simply selected the proper code from a drop-down menu in the state’s electronic voting system, the Statewide Uniform Registry of Electors (“SURE”), thereby triggering an automated email to the voter alerting them that there was a problem with their ballot. The reason Washington County did not do the same thing during the 2024 primary is that the composition of the Board changed, following which, by a 2-1 vote, the Board revoked its 2023 policy and ordered the elections staff not to enter the correct codes into SURE or even to

answer telephone inquiries about the status of mail-in ballots. In light of these uncontested facts, the lower court concluded that “the burden on the government is low” in properly utilizing the SURE system and that the “great staff in the elections office have proven to be more than capable of contacting electors based on the Board’s 2023 policy.” Trial Court Memorandum Opinion and Order of August 23, 2024 (“Trial Court Op.”) 21 (RNC Appx. Ex. B).¹

Based on those facts—which are uncontested on appeal—the trial court held that the Board had violated the procedural due process rights of mail-in voters and enjoined the Board from employing its practice for the 2024 general election. The Commonwealth Court affirmed. *Ctr. for Coalfield Just. v. Washington Cnty. Bd. of Elections*, No. 1172 C.D. 2024, 2024 WL 4272040 (Pa. Commw. Ct. Sept. 24, 2024).

There was no error in the Commonwealth Court’s analysis. Under Article I, Section 1 of the Pennsylvania Constitution, if a protected liberty interest is implicated—and voting certainly qualifies—procedural due process attaches, and courts must balance three factors: 1) the private interest affected; 2) the risk of an erroneous deprivation and the value of additional or substitute safeguards; and 3) the state’s interest, including the burdens the additional or substitute procedural

¹ “RNC Br.” and “RNC Appx.” refer to the principal brief and appendix submitted by the Intervenor-Appellants on October 9, 2024.

requirements would impose on the state.² Weighing those interests here, the right to relief is clear. Washington County’s practice implicates fundamental rights, the risk of deprivation is certain if a county enters inaccurate codes into SURE, and the burden on a county in entering the right codes is nil.

The Board did not file for allocatur from the Commonwealth Court’s decision, but the Republican National Committee and the Republican Party of Pennsylvania (“Republican Intervenors”) did, incongruously arguing that compliance with the lower court’s injunction is too burdensome, when there is no record support, and the party on whom the alleged burden falls makes no such complaint here.

The Republican Intervenors attack the Commonwealth Court’s procedural due process analysis on multiple grounds, none of which have merit. First, they deny that voting is a liberty interest, despite clear language in the Pennsylvania Constitution and precedent contradicting that assertion. Then they argue that all the notice that is due is in the instructions mailed with the ballot package. With multiple elections behind us, we know that is not enough, and there will be thousands of voters in the upcoming election whose ballots will be rejected for minor mistakes. Republican Intervenors counter that even if that is so, this Court

² *Washington v. Pa. Dep’t of Corr.*, 306 A.3d 263, 300 (Pa. 2023); *R v. Pa. Dep’t of Pub. Welfare*, 636 A.2d 142, 152-53 (Pa. 1994).

settled the question at issue in *Pa. Democratic Party v. Boockvar*³ (“*Pa. Democratic Party*”), which they interpret as creating an unqualified right of county boards of elections to deny information to their constituents. But that is a twisted reading of *Pa. Democratic Party*, which held only that the Court had no legislative guideposts from which to create a notice and cure regime. This Court did not consider a constitutional due process challenge there, much less sanction county boards of elections’ misuse of the existing SURE system, which has evolved significantly since 2020.

Finally, the Republican Intervenors include a grab bag of other theories that go beyond the three-factor due process analysis and raise questions that this Court did not agree to take up on allocatur. They claim that merely looking at the ballots violates the pre-canvassing prohibition in the Election Code, which is a patently absurd reading of the Code. They claim that the non-severability provision of Act 77 is implicated here, when Voter-Appellees are not seeking to strike down any provision of the Act. And most perniciously, Republican Intervenors attempt to sweep the Board’s conduct under the rug by invoking misplaced timeliness arguments, which if accepted would set a dangerous precedent. This appeal arose out of actions taken in the April 2024 primary and was decided below on an expedited basis in August. Pennsylvania is never much more than six months or so

³ 238 A.3d 345 (Pa. 2020).

from an election and reversal based on the timing of the lower court's decision would render numerous election matters immune from review.

The Commonwealth Court “ha[d] no difficulty concluding that Republican Intervenors’ arguments [were] unavailing,” and upheld the trial court’s injunction. *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *4. This Court should do the same and affirm the judgment of the Commonwealth Court.

COUNTER-STATEMENT OF THE CASE

Stripping the argument and rhetoric from Republican Intervenors’ Statement of the Case, RNC Br. 3-16, and as the Commonwealth Court correctly observed, *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *2, the material facts are not in dispute:

- in every election, voters make mistakes on their mail ballot declaration envelopes;
- county election workers scanning the returned mail-in ballot into the SURE system can readily see if the declaration envelope has a disqualifying error that will prevent that mail-in ballot from ever being counted;
- county election workers routinely segregate these mail-in ballots with disqualifying errors; and

- county election workers can easily select the correct code in SURE to alert the voter that their mail-in ballot envelope contains a disqualifying error.

I. Voting by Mail in Pennsylvania

In 2019, Pennsylvania adopted “no excuse” absentee or mail-in voting, allowing registered voters to submit mail-in ballots without having to justify why they cannot go to the polls on Election Day. Accordingly, since the 2020 primary election, all registered, eligible Pennsylvania voters have had the right to vote by mail-in ballot.⁴ Act of Oct. 31, 2019, P.L. 552 No. 77 (“Act 77”).

Upon receipt of the mail-in ballot packet, a voter must mark the ballot, place it in a “secrecy” envelope, and then place the secrecy envelope in a pre-addressed outer return envelope, which contains a voter declaration and spaces to sign the declaration and handwrite the date (the “declaration envelope”). 25 P.S.

§§ 3146.6(a), 3150.16(a). Mail-in ballots are not counted if the voter fails to sign or correctly write the date on the declaration envelope or forgets to include the secrecy envelope. *See Ball v. Chapman*, 289 A.3d 1, 28 (Pa. 2023); *Pa.*

Democratic Party, 238 A.3d at 380. In every election since the implementation of Act 77, thousands of voters across the Commonwealth have made disqualifying

⁴ Identical procedures govern how voters apply for, complete, and return both absentee and mail-in ballots. For ease of reference, the term “mail-in ballots” is used to encompass both absentee and mail-in ballots.

mistakes when submitting their mail-in ballots that have resulted in their votes not being counted. *See* July 1, 2024 Verified Complaint (“Compl.”) ¶ 32 (RNC Appx. Ex. E).

II. The SURE System

In general, in Pennsylvania, the authority for carrying out the nuts and bolts of election administration falls to county boards of elections. Notable exceptions to the general rule include the specific and exclusive authority conferred upon the Secretary of the Commonwealth to develop, maintain and instruct counties on the use of “a single, uniform integrated computer system,” the SURE system. 25 Pa.C.S. § 1222. *See also* Deposition of Deputy Secretary for Elections and Commissions Jonathan Marks (“Marks Tr.”) 24:3-12 (RNC Appx. Ex. G).

Counties are required to work in and through the SURE system. *See* 25 Pa.C.S. § 1222(c) (“All [county election] commissions shall be connected electronically to the SURE system and shall maintain their registration records in the system.”); *see also id.* § 1222(e) (“[E]ach commission shall be required to use the SURE system as its general register.”); Deposition of Washington County Elections Director Melanie Ostrander (“Ostrander Tr.”) 203:24-204:1; 204:6-10 (RNC Appx. Ex. H). Counties must enter data into the SURE system, including data identifying “registered electors who have been issued absentee ballots,” 25 Pa.C.S. § 1222(c)(19), and data identifying “registered electors who vote in an

election and the method by which their ballots were cast,” *id.* § 1222(c)(20). *See also* 4 Pa. Code §183.4(b)(2) (“A commission shall enter . . . voting history for registrants.”). The General Assembly delegated to the Secretary the task of developing the procedures for entering data into the SURE system and *did not* retain that authority for itself. *See* 25 Pa.C.S. 1222(f). Specifically, the Secretary has the exclusive authority to determine “the process and manner of entering information into the SURE system, the type and form of information to be entered, . . . [and], the manner and time frame for updating information in the system[.]” *Id.* As a practical matter and to comply with other Election Code provisions, counties must also promptly and accurately enter this data into SURE in order to generate accurate poll books for Election Day.⁵

According to Department of State (“DOS”) protocols for processing mail-in ballots, upon receiving a mail-in ballot, counties are required to stamp the receipt date on the outer envelope and record the receipt in the SURE system. Parties’ Joint Stipulation of Facts (“Stip. Facts”), Ex. I, Pa. Dep’t of State, Guidance

⁵ Specifically, county boards of election must promptly and accurately enter this data into SURE to “[p]ermit the timely printing and transmission” of “district registers,” more commonly known as poll books, “and all other information contained in the system as may be necessary for the operation of the polling places on election days.” 25 Pa.C.S. § 1222(c)(13). Without that up-to-date information, counties could not generate accurate poll books for Election Day that identify voters who requested a mail-in ballot and returned it and those who did not. For example, if the poll book shows that the voter was sent a mail-in ballot but has not returned it, the voter may vote by provisional ballot. 25 P.S. § 3150.16(b)(2) (mail-in ballots); *id.* § 3146.6(b)(2) (absentee ballots). As a practical matter, however, no voter may be denied the opportunity to submit a provisional ballot.

Concerning Examination of Absentee and Mail-in Ballot Return Envelopes at 2 (RNC Appx. Ex. F); Marks Tr. 12:20-25; 18:20-19:1; 86:16-18 (RNC Appx. Ex. G). When a mail-in ballot is scanned into the SURE system, the election worker is presented with a drop-down menu with 23 options for coding the status of the ballot. The county board of elections decides which code to use to indicate the ballot status, thus triggering a corresponding automatic email notification to the voter. Stip. Facts ¶ 24 (RNC Appx. Ex. F); Marks Tr. 57:7-12; 69:25-70:6 (RNC Appx. Ex. G); Ostrander Tr. 34:25-35:12; 38:24-39:8 (RNC Appx. Ex. H).

For example, DOS provides a “RECORD – BALLOT RETURNED” code to record the voter’s ballot as timely returned. Stip. Facts, Ex. D at 10 (RNC Appx. Ex. F). When a county board of elections selects this code, it automatically generates an email indicating that the voter’s ballot has been received. *Id.* DOS also provides a set of “CANC” codes—short for “CANCELLED”—for ballots with disqualifying errors on the declaration envelope. Stip. Facts, Ex. D at 3 (RNC Appx. Ex. F). The SURE County Release Notes explain that the “cancelled” codes are intended to be used when a voter returns the ballot packet with an error and the county “has made a final decision as to the ballot, *or it does not offer the opportunity to cure.*” *Id.* at 8-9 (emphasis added). Selecting a particular “CANC”

code generates a corresponding email notification to the voter indicating that their ballot may not be counted because of an error. *See, e.g., id.* at 8.⁶

The return codes entered into SURE automatically generate two important actions that notify voters of their ballot status. In addition to triggering the email that notifies voters that their ballot has a disqualifying error, coding a mail-in ballot with a disqualifying error allows each voter to “track” the status of their mail-in ballot on a DOS website. *Id.* at 15. This data is also made publicly available to requestors by statute, enabling political parties and voting rights organizations to reach out to affected voters and notify them of their ballot status. *Stip. Facts* ¶ 24 (RNC Appx. Ex. F); *Marks Tr.* 28:19-22 (RNC Appx. Ex. G). *See* 25 P.S. §§ 3146.9, 3150.17. The codes also impact the way voters’ ballot status is listed in the poll books on election day: for example, a voter whose defective mail-in ballot is marked “cancelled” in the SURE system will be listed in the poll books as having been issued a mail-in ballot, but not having returned it. *See Ostrander Tr.* 44:7-25 (RNC Appx. Ex. H). DOS guidance specifies that “[i]t is important that the ballot return status is promptly and accurately recorded in SURE using the specific

⁶ For the 2024 general election, DOS has modified slightly the email text that voters will receive. But the structure of the codes and the general information provided in the email is the same: A “received” email only indicates that the ballot has been returned, and provides no information about the disqualifying error, whereas a “cancelled” email alerts the voter to the error and their option to submit a provisional ballot.

response type as to the disposition for each ballot received.” Stip. Facts, Ex. I at 3 (RNC Appx. Ex. F).

III. Washington County’s Use of the SURE System for Mail-In Ballots

During each election cycle, when Washington County receives an application for a mail-in ballot, it verifies the voter’s identity and eligibility using the SURE system. Ostrander Tr. 24:24-26:1 (RNC Appx. Ex. H). The Board then prints a unique bar code label from the SURE system that is linked with the voter and affixed to the ballot packet. *Id.* 26:2-27:5. The Board then sends the ballot packet to the voter, using the SURE system to track the date when the ballot packet was mailed. *Id.* 27:14-28:9.

Once the voter returns the mail-in ballot packet, the election office date-stamps the ballot and scans the bar code on the outer declaration envelope into the SURE system to record that the ballot has been received. Stip. Facts ¶ 41 (RNC Appx. Ex. F); Ostrander Tr. 29:5-30:10 (RNC Appx. Ex. H). The office also visually examines the ballot to determine whether the outer declaration envelope is correctly and completely dated and signed. Ostrander Tr. 41:4-9 (RNC Appx. Ex. H). It is immediately apparent to the election staff whether the declaration, which is on the same side of the outer envelope as the bar code, is missing a signature, is dated improperly, or is missing a date. *Id.* 38:1-14; 41:10-13; *see also* Marks Tr. 85:24-86:7 (RNC Appx. Ex. G).

In the lead-up to both the 2023 primary and general elections, the Washington County elections office scanned mail-in ballots with disqualifying errors on the declaration envelopes into the SURE system and on the same day, coded them using one of the “CANC” codes in SURE. Stip. Facts ¶¶ 26-27 (RNC Appx. Ex. F); Ostrander Tr. 32:25-33:7; 34:15-35:12; 40:2-19 (RNC Appx. Ex. H). Based upon the type of “CANC” code that was selected by County staff, voters received an automatic email through the SURE system informing them that their ballots had been cancelled and would ultimately not be counted. Ostrander Tr. 38:24-39:17 (RNC Appx. Ex. H). And if there was not an email address on record, County staff placed a phone call to the voter informing them that their declaration envelope had a disqualifying error. *Id.* 43:7-13. Washington County then segregated any ballots with defective declaration envelopes into bins, filed alphabetically by precinct name, and placed the disqualified ballots in a separate area of the office’s secure mail-ballot room. *Id.* 41:14-24; 47:4-48:19. In 2023, Washington County also permitted voters to “cure” mail-in ballots that lacked a signature on the declaration envelope by going to the election office to add the signature. Voters who forgot the date or wrote an “incorrect date” could request a replacement mail-in ballot. If voters were unable to cure, they could vote a provisional ballot at their local polling place on Election Day. Stip. Facts ¶ 28

(RNC Appx. Ex. F); *id.* Ex. K; *see also* Ostrander Tr. 40:2-19; 42:22-43:13; 49:1-11; 169:15-20 (RNC Appx. Ex. H).

In advance of the April 2024 primary, however, the Board reversed course and instead directed staff to conceal from voters any information about disqualifying errors on their declaration envelopes. Stip. Facts ¶¶ 29-35 (RNC Appx. Ex. F). After a series of meetings, in which the Board was informed that dozens and ultimately hundreds of mail-in ballots with mistakes had already been segregated, the Board voted 2-1 not to provide voters with notice of and the opportunity to cure mail-in ballots with disqualifying errors on the declaration envelope. *Id.* ¶¶ 33-35. A week before the April 2024 primary election, the election office informed the Board that it had already identified and segregated 170 ballots that would not be counted. *Id.* ¶ 39; Ostrander Tr. 86:14-87:4 (RNC Appx. Ex. H).

Throughout the April 2024 election cycle, election office staff scanned and coded mail-in ballots in the SURE system on the day they were returned, and segregated ballots with disqualifying errors on the declaration envelope in separate bins, alphabetized by precinct, just as they had in 2023. Stip. Facts ¶¶ 41, 43 (RNC Appx. Ex. F); Ostrander Tr. 74:16-75:8 (RNC Appx. Ex. H); *see also id.* 48:2-19. But instead of coding the segregated ballots as “CANC” as they did in 2023, the office marked every ballot in the SURE system as “Record – Ballot Returned,” whether or not the mail-in ballot declaration envelopes had disqualifying errors.

Stip. Facts ¶ 42 (RNC Appx. Ex. F); Ostrander Tr. 67:9-23; 71:5-18 (RNC Appx. Ex. H). As a result, voters whose mail-in ballot declaration envelopes had disqualifying errors, such as Voter-Appellees Mr. Marks, Ms. Macioce, and Mr. Elliott, were not notified that they had made a mistake on their declaration envelopes and instead received an email informing them that their ballots had been received. *See* Stip. Facts, Exs. A, B, C (RNC Appx. Ex. F); Ostrander Tr. 66:14-23; 123:18-124:24; 162:23-163:7; 218:5-219:4 (RNC Appx. Ex. H). Voters checking the DOS online tracker to determine the status of their mail-in ballot saw a similar message indicating only that their ballot had been received, but not that their ballot would not be counted because of a disqualifying error. Stip. Facts, Ex. D at 15 (RNC Appx. Ex. F). In addition, throughout the April 2024 election cycle, the Board directed the election office to tell voters who inquired about their mail-in ballot whether the ballot had been received, but did not provide any voters with information about whether their mail-in ballot had been segregated for a disqualifying error on the declaration envelope. Stip. Facts ¶ 44 (RNC Appx. Ex. F); Ostrander Tr. 91:20-92:5; 92:24-93:2; 93:5-12; 179:1-180:14 (RNC Appx. Ex. H).

In the end, Washington County disenfranchised 259 mail-in voters for sending in defective ballot packages, representing 2% of all otherwise eligible mail-in ballots. *See* Stip. Facts ¶¶ 51-52 (RNC Appx. Ex. F); Ostrander Tr. 118:21-

24 (RNC Appx. Ex. H). These voters are both Democrats and Republicans. *See* Stip. Facts ¶ 52 (RNC Appx. Ex. F). Not one of these voters knew to vote a provisional ballot on Election Day. *Id.* ¶ 49. Only on May 17, 2024—nearly a month after the election—did the Board respond to a Right-To-Know-Law request that finally revealed the names of the 259 voters whose mail-in ballots had been segregated and not counted due to disqualifying errors. *Id.* ¶ 51.

IV. The November Election

Washington County began sending out mail-in ballot packets for the November 5 general election on October 7, 2024, and will soon begin to scan returned ballot packages into the SURE system. On October 2, 2024, the Board voted to adhere to the trial court’s order, but only under duress.⁷ If the injunction is lifted and the Board is permitted to revert to its prior practice, hundreds and potentially thousands of qualified, eligible mail-in voters in Washington County will once again have their votes cancelled in this and future elections without their knowledge.

⁷ *See* Mike Jones, *Elections board approves new mail-in ballot policy for Washington Co.*, Observer-Reporter (Oct. 3, 2024), <https://www.observer-reporter.com/news/election/2024/oct/03/elections-board-approves-new-mail-in-ballot-policy-for-washington-co/> (“At present, we are operating under the order of Judge Brandon Neuman,” county solicitor Gary Sweat told the elections board.”).

SUMMARY OF ARGUMENT

The Commonwealth Court correctly held that the Board’s practice for handling mail-in ballots deprived Voter-Appellees and similarly situated mail-in voters of the right to vote “without notice and an opportunity to be heard,” and thus “contravenes due process.” *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *8. Republican Intervenors’ arguments to the contrary are unavailing.

I. The Commonwealth Court correctly found that the Pennsylvania Constitution and the Election Code grant Appellees a protected liberty interest in the right to vote. Voting is a fundamental right that is explicitly recognized and protected by the Pennsylvania Constitution. The right to vote by provisional ballot, a statutory failsafe that has played a critical role in protecting the franchise in the Commonwealth for decades, also gives rise to a liberty interest that may not be impaired without due process of law.

II. Having found a protectible liberty interest, the Commonwealth Court correctly applied the three-factor test for evaluating due process violations under Article I, Section 1 of the Pennsylvania Constitution. *Washington v. Pa. Dep’t of Corr.*, 306 A.3d 263, 284 (Pa. 2023) (citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)).

a. The private interest impaired by the Board’s actions is the fundamental right to vote, which this Court has called “the most treasured prerogative of citizenship.” *Appeal of Norwood*, 116 A.2d 552, 553 (Pa. 1955).

b. The risk of erroneous deprivation, coupled with the value of additional safeguards, weighs in Appellees’ favor. The Board’s decision to purposely conceal voters’ mail-in ballot status resulted in a “secret, one-sided determination of facts decisive of rights” that creates a high risk of erroneous deprivation by making disenfranchisement a foregone conclusion. *Washington*, 306 A.3d at 266. Entering accurate information into the SURE system—which the Board is well-positioned to do—would greatly reduce that risk.

c. Providing the safeguard of using the SURE system would place little, if any, added burden on the Board, which is already obligated to use the SURE system to track mail-in ballots. The trial court made a factual finding that the Board has “proven to be more than capable” of accurately coding ballots in the SURE system in years past. Neither the Board, which is not a party to this appeal, nor Republican-Intervenors, offer any argument to the contrary.

III. Republican-Intervenors’ remaining arguments for reversal were waived below and substantively without merit. The lower court’s order does not implicate, let alone violate, the pre-canvassing provisions of the Election Code. Because Appellees do not request a declaration of unconstitutionality with respect

to any provision of Act 77, there is no cause to consider the non-severability provision. And Republican Intervenors' invocations of *Purcell* are misplaced. The federal-law *Purcell* principle does not limit this Court's power, and indeed duty, to resolve issues of Pennsylvania election law, nor do any prudential concerns militate in favor of allowing Washington County to return to its unconstitutional behavior.

This Court should affirm.

ARGUMENT

I. The Commonwealth Court Correctly Held that the Board's Actions Interfered with Voters' Protected Liberty Interests.

Pennsylvania courts “examine procedural due process questions 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). As to the first step, the lower courts correctly held that the Board's actions interfered with protected liberty interests.

A. The Fundamental Right to Vote Is a Protected Liberty Interest.

Due process protections attach when a government action interferes with a protected life, liberty or property interest. *E.g., id* at 764. Rights expressly set forth in the Pennsylvania Constitution by their nature constitute protectable interests for such purposes: The fact that an interest “is recognized and protected by our highest

state law[,] our Constitution[,]” through “explicit reference . . . provid[es] the basis for this Court to regard it as a fundamental interest which cannot be abridged without compliance with constitutional standards of due process.” *R v. Pa. Dep’t of Pub. Welfare*, 636 A.2d 142, 149 (Pa. 1994).

Voting is a fundamental right under the Pennsylvania Constitution. *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *8; *see, e.g., In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) (noting that “the right to vote” is “fundamental”), *overruled on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016); *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (noting that “this Court has acknowledged that the right to vote is fundamental and pervasive of other basic civil and political rights”) (internal quotation marks and citation omitted). And unlike the U.S. Constitution, which has no provision expressly protecting the right to vote, the Pennsylvania Constitution expressly protects voting in two clauses: Article I, Section 5 (“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage”); and Article VII, Section 1 (“Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections . . .”). Such express protections strongly indicate that the right to vote is a protected liberty interest. *E.g., R v. Pa. Dep’t of Public Welfare*, 636 A.2d at 149.

This Court’s treatment of the right to vote, which this Court has called “the most treasured prerogative of citizenship,” *Appeal of Norwood*, 116 A.2d 552, 553 (Pa. 1955), is in accord. This Court has also linked the right to vote directly to citizens’ freedoms, noting its place in the Declaration of Rights and observing that “the plain and expansive sweep of the words ‘free and equal[]’ . . . [is] indicative of the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth.” *See League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). Indeed, the right to vote includes not just the right of “each voter under the law . . . to cast his ballot and have it honestly counted” but also a guarantee against any “regulation of the right to exercise the franchise” that could “deny the franchise itself, or make it so difficult as to amount to a denial.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). These well-settled and expansive constitutional protections for the exercise of a fundamental and expressly guaranteed constitutional right plainly create a liberty interest under Pennsylvania law.

Republican Intervenors’ argument to the contrary relies almost entirely on the faulty reasoning of a motions panel decision from the Fifth Circuit decision—an opinion that *one of the panel’s own members* agreed was “essentially written in sand with no precedential value.” *Richardson v. Tex. Sec’y of State*, 978 F.3d 220, 244 (5th Cir. 2020). *See* RNC Br. 26-27. Aside from being a non-precedential

interpretation of the *federal* constitution (not the Pennsylvania Constitution), the *Richardson* motions panel’s conclusion that a “liberty interest” is “generally limited to freedom from restraint,” *id.* at 230, was also just plain wrong.⁸ That is why other courts have repeatedly declined to follow it, calling it an “outlier” that takes “an extremely constricted view of liberty that does not include voting rights”⁹ and fails to “explain why voting deserves less protection than other state-created rights or constitutionally created liberty interests.”¹⁰

⁸ The purportedly “numerous” other courts that Republican Intervenors claim have “rejected procedural due process claims predicated on the voting right” are, in fact, a 6th Circuit case in which the court never engaged in an analysis of that question, *see League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478-79 (6th Cir. 2008) (dismissing claim based on insufficiency of the pleadings), and two district court cases that subsequently relied on the *Brunner* court’s ruling. *See Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908, 918 (E.D. Va. 2018) (relying on *Brunner*); *Memphis A. Phillip Randolph Inst. v. Hargett*, 482 F. Supp. 3d 673, 686 (M.D. Tenn. 2020), (relying on *Brunner* and *Lecky* but noting that “one might (justifiably) closely associate liberty with representative democracy and representative democracy with the right to vote; ergo, one might justifiably associate liberty with the right to vote and thus say that one has a liberty interest in the right to vote.”), *aff’d on other grounds sub nom. Memphis A. Phillip Randolph Inst. v. Hargett*, 978 F.3d 378 (6th Cir. 2020).

⁹ *League of Women Voters of S.C. v. Andino*, 497 F. Supp. 3d 59, 77 (D.S.C. 2020), *appeal dismissed (as likely moot) and remanded*, 849 F. App’x 39 (4th Cir. 2021).

¹⁰ *League of Women Voters of Kan. v. Schwab*, 525 P.3d 803, 826 (Kan. Ct. App. 2023), *aff’d in part, rev’d in part*, 549 P.3d 363 (Kan. 2024). The majority of federal courts that have considered the question have found that voting is a liberty interest entitled to the protections of due process. *See United States v. Texas*, 252 F. Supp. 234, 250 (W.D. Tex. 1966) (right to vote is “included within the concept of liberty”), *aff’d per curiam*, 384 U.S. 155 (1966) (mem.); *Raetzl v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1356–57 (D. Ariz. 1990); *Doe v. Rowe*, 156 F. Supp. 2d 35, 47–48 (D. Me. 2001); *Zessar v. Helander*, No. 05-C-1917, 2006 WL 642646, *6 (N.D. Ill. Mar. 13, 2006); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018), *stay pending appeal denied*, *Ga. Muslim Voter Project v. Kemp*, No. 18-14502-GG, 2018 WL 7822108 (11th Cir. Nov. 2, 2018); *Self Advocacy Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1052 (D.N.D. 2020); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 227 (M.D.N.C. 2020); *Frederick v. Lawson*, 481 F. Supp. 3d 774, 788 (S.D. Ind. 2020); *League of Women Voters of*

This Court should follow its own precedents and the express text of the Pennsylvania Constitution instead. Those clearly show that the right to vote is a protected liberty interest under the applicable procedural due process analysis.

B. Included Within the Right to Vote is the Statutory Right to Vote a Provisional Ballot.

The Commonwealth Court was correct to conclude that the Election Code, which “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,” also creates a liberty interest. *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *6; *see also* Trial Court Op. 17 (RNC Appx. Ex. B) (holding that voters’ statutory right to vote a provisional ballot under 25 P.S. § 3150.16(b)(2) constituted a liberty interest). State statutory law can also be a source of enforceable liberty interests. *E.g.*, *Young v. Pa. Dep’t of Corr.*, No. 365 M.D. 2015, 2016 WL 756943, at *2 (Pa. Cmwlth. Feb. 24, 2016) (“A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty,’ or it may arise from an expectation or interest created by state laws or policies.”), *aff’d*, 638 Pa. 52, 152 A.3d 982 (2016); *accord Wilder v. Dep’t of Corr.*, 673 A.2d 30, 32 (Pa. Cmwlth. 1996).

Appellants offer two attacks on the Commonwealth Court’s determination that the right to vote a provisional ballot is a protectible liberty interest. First,

S.C. v. Andino, 497 F. Supp. 3d 59, 77 (D.S.C. 2020), *appeal dismissed (as likely moot) and remanded*, 849 F. App’x 39 (4th Cir. 2021).

Appellants challenge whether the Election Code allows rejected mail-in voters to cast provisional ballots, an issue being addressed in the co-pending *Genser* appeal. And second, Appellants assert that the Court already decided the issue in *Pa Democratic Party*. Neither constitutes a ground to reverse.

1. The Election Code Authorizes the Right to Vote by Provisional Ballot for a Voter Who Fails to Successfully Vote by Mail.

For more than two decades, provisional voting has played a critical role in protecting the franchise in Pennsylvania. It is not a forbidden “do-over,” as Republican Intervenors claim, RNC. Br. 28, but a legislatively enacted process that preserves the right to vote by ensuring that a qualified voter who attempts to vote by mail, only to have that attempt rejected by the county board of elections because the voter made a mistake, has the right to cast a provisional ballot and to have that ballot counted. *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *6; *see also* Appellees Brief, *Genser*, Nos. 26 & 27 WAP 2024 (Pa. filed Sept. 26, 2024) (“Genser Appellee Br.”).

Seeking to litigate again in this case the issues fully briefed and currently pending before this Court in *Genser v. Butler Cnty. Bd of Elections*, No. 1074 C.D. 2024, 2024 WL 4051375 (Pa. Commw. Ct. Sept. 5, 2024), *alloc. granted*, 2024 WL 4248971 (Pa. Sept. 20, 2024) (“*Genser*”), Republican Intervenors claim that there is no protected liberty interest in voting a provisional ballot under the

Elections Code. RNC Br. 21. Specifically, Republican Intervenors argue that the “timely received clause” in the Election Code, which provides that “[a] provisional ballot shall not be counted if the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections,” 25 P.S. § 3050(a.4)(5)(ii)(F), unambiguously prohibits a voter who makes a disqualifying error on a mail ballot packet from voting a provisional ballot and having that vote count. RNC Br. 22-23. But in interpreting the Election Code, the inquiry does not begin and end with the “timely received clause.” Republican Intervenors’ argument misreads that clause by isolating it from the broader context of the Election Code and without considering its ambiguity.

As argued at length in the *Genser* briefing and as the Commonwealth Court in *Genser* correctly held, a commonsense interpretation of Pennsylvania’s Election Code leads to only one conclusion: a voter who makes a mistake that prevents the voter’s mail-in ballot from counting “did not cast any other ballot in the election” under 25 P.S. § 3050(a.4)(5)(i), and did not have their “mail-in ballot” “timely received” by the board under 25 P.S. § 3050(a.4)(5)(ii)(F) where the voter’s submission did not meet the requirements set forth in 25 P.S. § 3150.16. Thus, in this circumstance, the Election Code guarantees that a provisional ballot “shall count.” *See* 25 P.S. § 3050(a.4)(5)(i). That guarantee is a cognizable liberty

interest, consistent with the broader protections for the franchise in the Pennsylvania Constitution and the Election Code.

This reading of the relevant Election Code provisions, which are ambiguous, is consistent with “[t]he occasion and necessity for the statute,” 1 Pa.C.S. § 1921(c); avoids absurd results; and, most importantly, enfranchises, not disenfranchises, voters. This reading is also consistent with the obvious purpose of Section 3050: to ensure that each voter gets to vote once and only once. If boards of elections were allowed to reject both a voter’s mail-in ballot submission and their provisional ballot, as Republican Intervenors argue, voters would get no vote at all. *Genser Appellee Br.* 27-42. In sum, the right to vote a provisional ballot under the Election Code is available to voters who learn that their previously submitted mail-in ballot was not successfully voted because of a disqualifying error and therefore creates a cognizable liberty interest requiring due process protections.¹¹

¹¹ The lower courts also found that the right to contest ballot determinations under 25 P.S. § 3157 gave rise to a protectable interest. Trial Ct. Op. 17 (RNC Appx. Ex. B); *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *8. Republican Intervenors spill a great deal of ink protesting that conclusion, RNC Br. 26, 28-29, but this Court does not even need to reach the question because due process protections are clearly triggered by the constitutional right to vote and the statutory right to vote by provisional ballot. Notice that would only alert a voter to show up at the canvass to contest the determination provides no opportunity to vote with a provisional ballot to preserve their fundamental right to vote. *See infra* at II.B. Moreover, none of the impacted voters were provided *any* notice by the Board, either before or after Election Day, about their mail-ballot rejection. Stip. Facts ¶¶ 9-15 (RNC Appx. Ex. F). Instead, the 259 disenfranchised voters were only informed months after the primary election by voting rights organizations who had successfully received the list through a Right-to-Know-Law request. *Id.* ¶ 51; *id.* Ex. F.

2. *Pa. Democratic Party v. Boockvar* Is Inapposite.

Republican Intervenors repeatedly cite *Pa. Democratic Party* for the proposition that there is no liberty interest in voting by provisional ballot because “a voter has no constitutional, statutory, or legal right . . . to cure a mail ballot defect through provisional voting or otherwise.” RNC Br. 24. The Commonwealth Court correctly held that *Pa. Democratic Party* is not on point. *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *6. In *Pa. Democratic Party*, this Court held that county boards of elections are not required to implement a “cure” procedure for defective mail-in ballots, because “although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the ‘notice and opportunity to cure’ procedure sought by Petitioner.” 238 A.3d at 374. But in contrast to the legislative silence about “curing” mail-in ballots, the Election Code *does* specify procedures for casting and counting *provisional ballots*, as outlined above.

Until *Genser*, this Court had never been presented with or considered the statutory provisions regarding whether a voter’s provisional ballot must be counted following the rejection of a mail-in ballot. *See Genser*, 2024 WL 4051375, at *16 (observing that the *Pa. Democratic Party* Court “only tangentially discussed provisional voting—the phrase appears only in a single sentence of that opinion”). Here and in *Genser*, the Commonwealth Court correctly rejected Republican

Intervenors’ ongoing conflation of the separate concepts of mail-in ballot curing and the casting of a provisional ballot. *See* RNC Br. 23-25. “To conclude . . . that ‘any chance to . . . cast[] a provisional vote[] constitutes a ‘cure’ is to both overread [*Pa. Democratic Party*] and to read the provisional voting sections out of the Code.” *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *6 (quoting *Genser*, 2024 WL 4051375, at *16). Rather, the statutory right to cast a provisional ballot—and to have it counted—“does not depend on any ballot curing process, whether optional or mandatory. *The provisional ballot is a separate ballot, not a cured initial ballot.*” *Id.* (emphasis added); *see also Pa. Democratic Party*, 238 A.3d at 372 (discussing “curing” as correcting “mail-in or absentee ballots [that] contain minor facial defects,” not as submitting provisional ballots to be counted in lieu of defective mail-in ballots).¹² Because it simply involved a different issue, this Court need not reexamine or disturb *Pa. Democratic Party* to affirm the Commonwealth Court’s finding of a liberty interest in the right to vote by provisional ballot.

¹² In addition to arguing that *Pa. Democratic Party* precludes finding a liberty interest in provisional voting, Republican Intervenors also argue that *Pa. Democratic Party* precludes ordering the Board to provide notice. RNC BR. 16, 23-24. But *Pa. Democratic Party* was decided under the Pennsylvania Election Code and Article 1, Section 5 of the Pennsylvania Constitution. It was not a procedural due process case, and it did not involve a claim under Article I, Section 1 of the Pennsylvania Constitution. Trial Court Op. 20 (RNC Appx. Ex. B). The issues being addressed in the current case are “issues of first impression.” *Id.* at 2. In other words, the right to notice under the procedural due process exists separate and apart from any notice under the Election Code.

Finally, the courts below did not usurp the role of the General Assembly in ordering that the Board must provide notice under the due process guarantees in Article I, Section 1. RNC. Br. 24 (citing *Pa. Democratic Party*). Whether the Board’s denial of voters’ fundamental right to vote without pre-deprivation notice violates the procedural due process requirements of the Pennsylvania Constitution is not a question entrusted to the legislature; it is in the judiciary’s prerogative to adjudicate. *See, e.g., Washington*, 306 A.3d at 285.

II. Due Process Under Article I, Section 1 Requires Pre-Deprivation Notice to Voters Who Make Disqualifying Errors on Their Mail-In Ballot Envelopes.

Having concluded that the Voter-Appellees had a protectible liberty interest in voting, the Commonwealth Court properly ascertained what process is due using the three-part balancing test set out in *Washington*, 306 A.3d at 284-85; *R v. Pa. Dep’t of Pub. Welfare*, 636 A.2d 142, 152-53 (Pa. 1994) (adopting test from *Mathews v. Edridge*, 424 U.S. 319 (1976) as a matter of state law). This Court has held that the test under the Pennsylvania Constitution is an expansive one, explaining that “[t]hese rules are intended to ‘minimize substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests.’” *Washington*, 306 A.3d at 285. This view aligns with the importance that Pennsylvania courts place on the “sacred,” “fundamental” right to vote, which

Pennsylvania considers “the most treasured prerogative of citizenship.” *Page v. Allen*, 58 Pa. 338, 347 (1868); *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902 A.2d 476, 488 (Pa. 2006); *Appeal of Norwood*, 116 A.2d at 553.

Under the *Washington/Mathews* test, courts balance the following three factors: 1) the private interest affected; 2) the risk of an erroneous deprivation and the value of additional or substitute safeguards; and 3) the state’s interest, including the burdens the additional or substitute procedural requirements would impose on the state. *Washington*, 306 A.3d at 300 (citations omitted). Each of the three applicable factors supports the conclusion that the Board’s practices violated Appellees’ procedural due process rights.

A. Factor 1: The Private Interests Affected

Republican Intervenors gloss over the first factor, the private interest affected, because they have nothing to say on the subject. It is undeniable that the loss of the right to vote goes to the heart of what it means to be a citizen of the Commonwealth of Pennsylvania. The private interest at stake here is of the utmost importance.

B. Factor 2: The Unacceptably High Risk of Erroneous Deprivation

The second balancing factor, the risk of erroneous deprivation coupled with the probable value of additional safeguards, also weighs heavily in Appellees’ favor.

1. The Deprivation Is Certain.

As the trial court correctly concluded and the Commonwealth Court affirmed, the Board's actions, which deliberately altered how they process mail ballots to ensure that voters will not and cannot learn that their mail-in ballot has a disqualifying error before Election Day, "incurred a high risk of erroneous deprivation" because they "precluded the notice" necessary for voters to protect their rights. *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *3; *see also* Trial Ct. Op. 21 (RNC Appx. Ex. B) ("[t]he risk of erroneous deprivation of that interest is high as electors have no notice that their ballot has been segregated and presumptively will not be counted.").

The Board's handling of mail-in ballots and misuse of the SURE system results in the kind of "secret, one-sided determination of facts decisive of rights" that this Court has condemned as violative of due process. *Washington*, 306 A.3d at 266. Because voters are unable to learn that their right to vote will be taken away, disenfranchisement is a foregone conclusion—as evidenced by the fact that not a single voter who made a disqualifying error on their mail-in ballot packet in the April 2024 primary voted by provisional ballot or attended the official computation and canvass. Stip. Facts ¶ 49 (RNC Appx. Ex. F). This is an inexcusable result. *See Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202

A.2d 538, 540 (Pa. 1964) (“The disfranchisement of even one person validly exercising his right to vote is an extremely serious matter.”).

2. The Board Is Well-Positioned to Provide Additional Safeguards.

The Board’s practice is especially unreasonable because additional safeguards would greatly reduce the risk of disenfranchisement. The “controlling inquiry” under the second balancing factor is “solely whether the state is in a position to provide for pre-deprivation process.” *Washington*, 306 A.2d at 290 (internal citations omitted). There can be no question that the Board is well-positioned to provide that process. The injunction orders the Board to do no more than it is already doing: it must only “notify any elector whose mail-in packet is segregated for a disqualifying error” by “input[ting] the accurate status of the mail-in packet in the SURE system and provide the status to the elector if requested.” Trial Court Op. 27 (RNC Appx. Ex. B). The Board is currently selecting a code for each mail ballot from a drop-down menu; all Appellees ask is that the Board continue entering an accurate code. Doing so ensures that voters with an email address on file will receive an email alerting them that their mail-in packet has an error and that they have an option to “go to [their] polling place on election day and cast a provisional ballot.” *See* Stip. Facts, Ex. D at 8-9 (RNC Appx. Ex. F). It also enables political parties and nonprofit organizations, like Organizational Appellees, to access the accurate SURE system information and take whatever

steps they can to ensure the integrity of the voting process. *Id.* ¶ 24; Marks Tr. 28:19-22 (RNC Appx. Ex. G). *See* 25 P.S. §§ 3146.9, 3150.17.

3. Republican Intervenors' Proposed Alternatives Are Illusory.

Republican Intervenors argue that the instructions on the mail-in ballot, standing alone, suffice to provide adequate “notice” to the voter. RNC Br. 31-33. But those instructions merely suggest the theoretical possibility that some persons might experience a deprivation. They do not notify the voter that he or she *has in fact* made a disqualifying mistake and will be deprived of the right to vote, nor do they put the voter on notice that he or she should vote a provisional ballot or give the voter any opportunity to respond to the rejection and rescue their vote. *See generally Pa. Coal Mining Ass’n v. Ins. Dep’t*, 370 A.2d 685, 692 (Pa. 1977) (“A citizen is best protected against arbitrary action when he is given an opportunity to challenge that action before it is taken.”); *see also Washington*, 306 A.3d at 294 (procedural due process concern was not about “whether Washington was notified of the contents of the statute, but whether he was adequately notified” that it would be implemented against him “and whether he was afforded the opportunity to challenge it” before such implementation); *cf. Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1052 (D.N.D. 2020) (holding a signature-matching requirement was wholly deficient because “[v]oters are simply never notified or afforded any opportunity to respond if election officials reject their ballots for a signature

discrepancy. This all but ends the inquiry”). The ballot instruction provides no notice of any impending deprivation, and no process at all. The fact that hundreds of Washington County voters were denied the right to vote even in a lower-turnout primary—and that many tens of thousands of Pennsylvanians have had their mail ballots disqualified based on envelope-date issues in recent years, in election after election—makes plain that the instructions on the mail ballot envelope are woefully insufficient to prevent the deprivation of Pennsylvanians’ fundamental rights.

Similarly, Republican Intervenors focus on the canvass, cheekily arguing that mail-in voters can simply appear at the canvass to receive their measure of due process. RNC. Br. 35, 37. Of course, that ignores the obvious point that if the voter is not on notice that his or her mail-in ballot is in the “do not count bin,” they would have no reason to attend the canvass. And if all the mail-in voters did attend as a precautionary matter, the result would be chaos. The scenario proposed by Republican Intervenors is fanciful, impractical, and does not address the salient point, which is that without some notice from the SURE system, there is a high likelihood—indeed a near certainty—that the aggrieved voters will miss the canvass. And the scenario proposed by Republican Intervenors ignores the fact that the canvass comes too late for a voter to preserve their fundamental right to vote by voting a provisional ballot.

4. Notice Should Be Required Regardless of the Outcome of *Genser*.

Finally, the notice ordered by the trial court serves important functions, regardless of what position this Court takes in *Genser* on the right to have a provisional ballot counted. While Republican Intervenors try to link the two cases together, the lower court explicitly decided that injunctive relief was appropriate without first deciding the *Genser* issue. That is because the trial court correctly concluded that the procedural right to appear and contest the validity of a decision to refuse to count one's ballot is important whether or not the voter is ultimately successful. *See Washington County*, 306 A.3d at 296 (“[T]he absence of a concrete remedy at the end of the process that is due is [not] an excuse for denying the right to process itself . . . the controlling inquiry in procedural due process claims is not whether some form of concrete relief will manifest at the end of the process that the Constitution requires; rather, the controlling inquiry in this regard is whether the state is in a position to provide for pre-deprivation process.”) (internal quotations omitted). The trial court's decision was correct and independently supports the issuance of injunctive relief. Moreover, informing the voter of a disqualifying error serves a salutary purpose, even if the voter is unable to rescue their ballot, because alerting voters to their error decreases chances the voter makes it again.

C. Factor 3: The Minimal Burden on the Board

The third balancing factor considers the burden on the Board in providing notice. At this point, the Board is not challenging the lower courts' factual findings that the burden involved here is minimal. Indeed, the Board *is not even a party to this appeal*. While Republican Intervenors, as a stand-in, try to pick up the gauntlet, they fail to establish that any of the trial court's findings of fact on the question of burden were clearly erroneous. Absent such a showing, there is no basis to disturb those findings on appeal. *See 2401 Pa. Ave. Corp. v. Fed'n of Jewish Agencies of Greater Phila.*, 489 A.2d 733, 736 (Pa. 1985) (“[T]he Court is bound by the trial judge’s findings of fact unless those findings are not based on competent evidence.”).

As the Commonwealth Court noted, the record in the lower court is clear that compliance with the lower court’s order would lay little, if any, burden on the Board, “especially because . . . the County Board afforded notice to electors whose ballots were segregated for the 2023 elections.” *Ctr. for Coalfield Just.*, 2024 WL 4272040, at *8. Moreover, the Board is already obligated to use the SURE system for tracking mail-in ballots. *See* 25 Pa.C.S. § 1222; 25 P.S. § 3150.16(b)(1); 4 Pa. Code § 183.4(b)(2). And the Board has already resumed entering accurate SURE codes pursuant to the trial court’s injunction order pending resolution of this appeal.

The *only* process modification the order below requires is for the Board to select a different and accurate code from a drop-down menu. That simple step fulfills the procedural due process duty because it ensures pre-deprivation notice. It would in no “way inhibit the [BOE’s] operations[,]” because the “infrastructure is already in place to provide both notice and an opportunity to be heard” *Washington*, 306 A.3d at 299 n.53. As the court below correctly observed, “the great staff in the elections office have proven to be more than capable of contacting electors based on the Board’s 2023 policy.” Trial Court Op. 21 (RNC Appx. Ex. B). Indeed, the fact that the majority of counties across Pennsylvania do exactly what Washington County did in 2023 further demonstrates that the burden on the Board would be *de minimis*. See *Democracy N.C.*, 476 F. Supp. 3d at 229 (finding the burden to the state of providing pre-rejection notice to be “minimal” where “several counties have processes in place already”). Republican Intervenors barely discuss the actual facts of this case, arguing instead that the relief requested is “amorphous” and making up hypotheticals about publication and ballot review procedures.¹³ But there is nothing ambiguous or amorphous about what the Board

¹³ Republican Intervenors also suggest that notifying voters of problems with their mail ballots will lead to “differential treatment” because voters who submit later-arriving mail ballots will have less time to correct defects than those who submit earlier-arriving mail ballots. RNC Br. 36-37. But the lower courts’ orders treat all voters *the same*, by requiring that the Board of Elections to enter accurate codes for everyone. The date of notice will be correlated to the date when the voter returns the ballot, but that is hardly a constitutional infirmity. Republican Intervenors’ invocation of *Bush v. Gore*, 531 U.S. 98 (2000), is obviously beside the point. There are not

did in 2023, what most Pennsylvania counties already do, and what the trial court ordered by way of injunctive relief. Appellees are simply asking that the Board enter the proper codes from a drop-down menu in SURE. There is nothing unclear, amorphous, or objectionable about any of that. Republican Intervenors’ parade of horrors is a mirage.

* * *

In summary, the Commonwealth Court properly upheld the trial court’s determination that the Board violated Appellees’ procedural due process rights. Republican Intervenors have provided no basis to overturn the findings of fact underlying that determination, much less the trial court’s balancing of the equities.

III. The Scope of Relief the Lower Court Granted Is Within its Equitable Discretion.

Republican Intervenors assert that the lower court overstepped its authority in requiring the Board to enter proper codes in the SURE system. RNC Br. 38-41. However, having found a violation of the Appellees’ constitutional rights, the lower court had broad equitable powers to fashion relief. This Court reviews the scope of injunctive relief under the abuse of discretion standard. *O.D. Anderson, Inc. v. Cricks*, 815 A.2d 1063, 1071 (Pa. Super. Ct. 2003); *RESPA of Pa., Inc. v.*

“hanging chads” here and no difference in how ballots will be counted. Whatever valid ballots arrive in time for the canvass will be considered.

Skillman, 768 A.2d 335, 339 (Pa. Super. Ct. 2001). There was no abuse in the lower court’s injunction.

A. The Lower Court’s Order Does Not Violate the Pre-Canvassing Provisions of the Election Code.

Republican Intervenors make a bizarre argument that the court’s injunction “bulldoze[s]” the Election Code by requiring Washington County election staff to “open,” conduct an “inspection” of a mail-in ballot prior to the pre-canvass and requires the Board to “disclose the results” of that “inspection” prior to the close of the polls on Election Day. 25 P.S. §§ 2602(q.1), 3146.8(g)(1.1); RNC Br. 38-39. The argument is not only wrong on the merits, it is waived because Republican Intervenors failed to raise the argument below. *See* Pa.R.A.P. 302(a) (“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.”); *Commonwealth v. Agie*, 296 A.2d 741, 741 (Pa. 1972) (“We have consistently held that issues not raised in the court below are waived . . .”). The waiver problem is particularly acute here, as the matters under review are limited by the order granting allocatur. These new issues are simply not reviewable in this discretionary proceeding.

In any case, this new “pre-canvassing” argument is easily dispatched. Election staff across the Commonwealth routinely examine the outer declaration envelope to ensure completeness and then note the results of that examination in SURE without opening the envelope. Indeed, it is virtually impossible to handle a

declaration envelope without noticing that a signature is missing. Washington County's election staff routinely reviewed and segregated ballots into the "do not count" bin and made no argument below that the injunction issued against it was infirm due to this "pre-canvassing" argument. This is a common practice in the Commonwealth.

On the other hand, pre-canvassing is a completely different, multi-step process that begins at 7:00 a.m. on Election Day, *see* 25 P.S. § 3146.8(g)(1.1), during which the pre-canvass board opens mail-in ballot declaration envelopes, removes the secrecy envelopes, shuffles the secrecy envelopes, removes the ballots from them, unfolds the ballots, and otherwise prepares those ballots for counting and recording at the canvass meeting that begins at the close of polls.¹⁴ Attorneys and watchers appointed by candidates and campaigns are permitted to observe this process. The Election Code defines the term "pre-canvassing" as follows:

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

¹⁴ Ms. Ostrander testified to the multistep nature of the pre-canvass. *See* Ostrander Tr., 103:15-104:8 (RNC Appx. Ex. H). During the pre-canvass process, Board staff open the declaration envelopes and remove the inner secrecy envelope. *Id.*, 103:18-22 (noting that the pre-canvass is the stage at which "absentee and mail-in ballots are officially allowed by the election law to be opened"); *see also* Marks Tr. 19:12-21 (RNC Appx. Ex. G). Next, the ballot is removed from the inner secrecy envelope, "unfolded and prepared for counting." Ostrander Tr., 103:25-104:3 (RNC Appx. Ex. H). Finally, the ballots are "ultimately opened and then tabulated." Marks Tr. 19:20-21 (RNC Appx. Ex. G). The pre-canvass is the first step in a multi-week process that culminates in the certification of the election, and is not the same as election workers "looking at the outer envelope on a ballot to make a determination as to . . . whether it was dated or signed." Marks Tr., 41:15-18 (RNC Appx. Ex. G).

reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.

25 P.S. § 2602(q.1). By focusing on the word “inspection” while leaving out the remainder of the statutory requirements that constitute the “pre-canvassing” process, Republican Intervenors argue that the lower court has now ordered the Board to violate § 3146.8(g)(1.1) by “inspecting . . . the ballot” prior to 7:00 a.m. on Election Day when “pre-canvassing” begins. RNC Br. 39. But straightforward principles of statutory interpretation make clear that merely *looking* at the unopened outer declaration envelope is not pre-canvassing, which necessarily must include inspecting *and* opening *and* counting *and* computing of ballots. *See, e.g., Rivera v. Phila. Theological Seminary of St. Charles Borromeo, Inc.*, 507 A.2d 1, 8 (Pa. 1986) (“Grammatically, this construction is indicated by the dual presence of the conjunctive ‘and’ in the list”); *Bloomsburg Town Ctr., LLC v. Town of Bloomsburg*, No. 905 C.D. 2019, 2020 WL 6494701, at *6 (Pa. Cmwlth. 2020) (holding that use of “and” in a provision connotes “a conjunctive rather than a disjunctive list of requirements”).

Nor is entering the accurate status of the ballots into the SURE system “disclos[ing] the results of any portion of any pre-canvass meeting prior to the close of the polls.” 25 P.S. § 3146.8(g)(1.1), as Republican Intervenors argue. RNC Br. 39. Disclosure of “results” in this section refers to the outcome of the race after the votes are tabulated. There is absolutely no statutory prohibition against

informing voters that their sealed, mail-in ballot packet contains a disqualifying error on the outer envelope. The contention otherwise is both waived and without merit.

B. The Court’s Order Does Not Trigger Act 77’s Non-Severability Clause.

After repeatedly insisting that the “pre-canvassing” provisions of the Election Code are implicated by the court’s injunction (they are not), Republican Intervenors’ brief veers into the fantastical. Baldly claiming that the majority’s decision “would create a pre-canvass period coterminous with the 50-day statutory mail-voting period,” Republican Intervenors argue that the majority has invoked procedural due process to “hold a duly-enacted statute unconstitutional.” RNC Br. 39. This argument is confounding. Appellees did not bring a challenge to the constitutionality of the Election Code, nor does the injunction invalidate any provision of the statute. But the framing provides Republican Intervenors an opportunity to lecture this Court on the well-known presumption of constitutionality standard and argue that the lower courts did not determine that the Election Code “clearly, palpably, and plainly violates the Constitution.” RNC Br. 40 (citations omitted).

This standard only applies where a party seeks to invalidate an act of the General Assembly. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 801 (Pa. 2018) (“[A] *statute* is presumed to be valid, and will be declared

unconstitutional only if . . . the *enactment* clearly, palpably, and plainly violates the Constitution”) (emphasis added) (citations and quotations omitted); *see also Commonwealth v. Torsilieri*, 232 A.3d 567, 575 (Pa. 2020) (“[A] party *challenging a statute* must meet the high burden of demonstrating that the statute clearly, palpably, and plainly violates the Constitution”) (emphasis added) (citations omitted). Appellees did not seek to invalidate, and the lower courts did not declare unconstitutional, any part of the Election Code. Thus, the presumption of constitutionality standard is entirely inapplicable.

Finally, Republican Intervenors claim that the relief Appellees seek, and which the Commonwealth Court upheld, implicates Act 77’s non-severability provision. RNC Br. 41-42. Republican Intervenors conclude that “if the majority’s opinion stands, Act 77—and its expansion of mail-in ballot availability—is void, and Pennsylvania’s universal [sic] mail-voting regime has just been invalidated in the midst of the ongoing 2024 General Election.” RNC Br. 42. That is preposterous. Appellees did not challenge any provision of the Election Code, Republican Intervenors have not specified which Election Code provision is stricken by either the claims or relief, and, as discussed in the preceding section, the relief does not conflict with the Code’s pre-canvassing strictures, so there is nothing to implicate the severability provision.

C. *Purcell* Does Not Constrain This Court from Affirming the Lower Court’s Order.

Republican Intervenors next invoke the so-called “*Purcell* principle,” RNC Br. 43-47, but *Purcell* simply does not apply in this appeal, and it is certainly no barrier to affirming.

Purcell is an equitable doctrine grounded in federalism that limits the power of *federal courts* to grant relief. *See, e.g., Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurring in stay denial) (“[F]ederal courts ordinarily should not alter state election laws in the period close to an election.”) (emphasis added); *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in stay grant) (“It is one thing for a State on its own to toy with its election laws close to a State’s elections. But it is quite another thing for a federal court to swoop in and re-do a State’s election laws in the period close to an election.”); *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (explaining that the “*Purcell* principle” counsels that “*federal courts* ordinarily should not alter state election laws in the period close to an election.”) (emphasis added).

But the doctrine has no application in *state court*. Thus, while the U.S. Supreme Court “has often stayed lower federal court injunctions” that are issued close in time to an election, *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring), state court action has never been subject to the same limitation. *E.g., Moore*, 142 S.

Ct. at 1089 (Kavanaugh, J., concurring) (agreeing with denial of a *Purcell* stay of a North Carolina Supreme Court decision ordering the redrawing of congressional lines because “it [was] too late for the federal courts to order that the district lines be changed for the 2022 primary and general elections”). Indeed, nothing about *Purcell* has stopped the Pennsylvania courts in the past from resolving disputes about the conduct of elections while elections or canvassing are underway. *See, e.g., Ball v. Chapman*, 289 A.3d 1 (Pa. 2022) (resolving King’s Bench petition filed by the RNC on October 19, 2022); *In re Canvass of Absentee & Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (2020) (resolving issues arising during post-election canvass around the 2020 election); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012) (entering a preliminary injunction against enforcement of a voter ID law after remand from this Court, 54 A.3d 1, 5 (Pa. Sept. 18, 2012)).

Republican Intervenors repeatedly reference this Court’s recent denial of competing King’s Bench petitions. RNC Br. 43, 44, 45, 47. But the Court’s reference by analogy to *Purcell* in that context makes no difference here. While such equitable concepts may be relevant in considering whether to grant extraordinary jurisdiction (which is always a matter of discretion), this Court at the same time made clear that these theories are no barrier to merits resolution of appeals that raise important election issues “in the ordinary course,” and that this

Court would continue to play its “appellate role” in such cases. *New Pa. Project Educ. Fund v. Schmidt*, No. 112 MM 2024, 2024 WL 4410884, at *3-4 n.2 (Pa. Oct. 5, 2024). This is just such an appeal—indeed, in declining to exercise King’s Bench authority, this Court *expressly referenced this specific case* as an example of a justiciable appeal arising “in the ordinary course” that can and would be decided. *Id.*

In any event, even if *Purcell* were theoretically relevant here, Republican Intervenors are especially ill-suited to invoke it. They are partisan actors, not government officials. The *Purcell* principle is premised on the “*State’s* extraordinarily strong interest in avoiding . . . changes to its election laws and procedures.” *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (emphasis added). It is not a tool for private litigants to wield when “no state official has expressed opposition.” *Republican Nat’l Comm. v. Common Cause R.I.*, 141 S. Ct. 206, 206 (2022). Here, the Board never even sought allocatur. Only Republican Intervenors are pressing this appeal and seeking to reinstate a regime that unfairly cheats voters of a chance to make their ballots count.

Moreover, even if *Purcell* was conceptually applicable and properly raised, the principles that animate it would be satisfied. For example, “the underlying merits are entirely clearcut” in Appellees’ favor, *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring): voters are being subjected to a significant deprivation

of their protected interests, without notice or an opportunity to do anything about it, and with no policy rationale or burden on the government to justify it. *See supra* Part II. And the “feasib[ility]” of entering the right code instead of the wrong one “without significant cost, confusion, or hardship,” *Merrill*, 142 S. Ct. at 881, is obvious. The Board entered the proper codes in 2023, *and it is doing so right now* in compliance with the lower courts’ orders. Republican Intervenors’ surmise that compliance with the lower courts’ orders will create any additional difficulties is not supported in the trial record. The undisputed evidence showed that Washington County is already entering a code in the SURE system when it receives a mail-in ballot, that entering the correct code generates an automatic notification for voters, and that entering the correct code is no more burdensome than intentionally entering an incorrect one. *See supra* Parts II and III of Counter-Statement of the Case. Even if it applied here, *Purcell* cannot provide an excuse for depriving voters of notice and an opportunity to preserve their fundamental right to vote.¹⁵

CONCLUSION

Appellees respectfully request that the Court deny Republican Intervenors’ appeal and affirm the decision below and hold that a county board of elections

¹⁵ That is especially true where, as here, any supposed “delay” in pursuing these claims, RNC Br. 19, was due entirely to the Board refusing to ever tell Voter-Appellees that they had been disenfranchised. Indeed, it was not until the Board was served with a Right to Know request that it identified which voters had been deprived of their fundamental right to vote. *See* Stip. Facts ¶ 51 (RNC Appx. Ex. F).

violates voters' procedural due process rights when it fails to provide prompt notice to voters of disqualifying errors with their mail-ballot packets.

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CERTIFICATION OF WORD COUNT

I certify that the foregoing brief complies with the 14,000-word limit established by Pa.R.A.P. 2135. According to the word count of the word-processing system used to prepare this brief, the brief contains 11,656 words, not including the supplementary matter as described in Pa.R.A.P. 2135(b).

Dated: October 11, 2024

/s/ Claudia De Palma

 Claudia De Palma

CERTIFICATION 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: October 11, 2024

/s/ Claudia De Palma

Claudia De Palma