

No. 24A408

IN THE
Supreme Court of the United States

FAITH GENSER, ET AL.,

Plaintiffs-Respondents

v.

BUTLER COUNTY BOARD OF ELECTIONS, ET AL.,

Defendants-Respondents,

and

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Intervenor-Applicants.

Application from the Supreme Court of Pennsylvania
(No. 26 WAP 2024, No. 27 WAP 2024)

**Brief of the Public Interest Legal Foundation as *Amicus Curiae*
in Support of Neither Party**

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INTERESTS OF *AMICUS CURIAE*¹

The Public Interest Legal Foundation, Inc. (“Foundation”) is a non-partisan, public interest 501(c)(3) organization whose mission includes working to protect the fundamental right of citizens to vote and preserving the integrity of electoral processes across the country. Over the last decade, the Foundation devoted considerable time and resources to these goals in the Commonwealth of Pennsylvania.

SUMMARY OF THE ARGUMENT

Whether and to what extent voters have the right to learn about and cure deficient mail-in ballots has been the subject of litigation in the Commonwealth since 2020. *See, e.g., Pa. Democratic Party v. Boockvar*, 662 Pa. 39, 238 A.3d 345 (2020). Legal rulings and a lack of action by lawmakers has created a voting-rights “Wild West” in which a voter’s rights depends solely on the county in which the voter resides. Applicants ask this Court to inject yet another legal ruling into this heavily contested space. *Amicus* takes no position on the merits of the Applicants’ request. Instead, *amicus* files this brief to provide the Court with additional information about the state of ballot-curing rights in the Commonwealth, and to inform the Court that its decision may implicate the rights of Pennsylvanians under the Commonwealth’s

¹ No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

Free and Equal Elections Clause, a right that guarantees voters “equal participation in the electoral process for the selection of his or her representatives in government.”

League of Women Voters v. Commonwealth, 645 Pa. 1, 100 (2018).

ARGUMENT

I. A Voter’s Right to Learn About and Cure a Deficient Mail-In Ballot Depends on Where the Voter Lives.

Applicants acknowledge that Pennsylvania’s computerized registration system (the “SURE System”) gives counties the “*option*” to notify a mail-in voter that her ballot contains a disqualifying error (hereafter “SURE Notice”). (App. at 19 n.3 (emphasis in original).) Only “some counties choose to do so.” (*Id.*)

Applicants’ observation is consistent with the Foundation’s understanding. Earlier this year, the Foundation contacted and visited local election offices in the Commonwealth to learn whether and to what extent a voter can learn about and cure disqualifying errors on a mail-in ballot (hereafter, “Notice and Opportunity to Cure”). The Foundation learned that practices—and thus voter’s rights—differ in minor and significant ways. Examples include the following:²

² The information contained herein concerning county curing practices was gathered via public records requests and in-person conversations with county election office officials and employees. This information is considered accurate as of July and August 2024, when the Foundation gathered it. If any of this information has changed since it was gathered, it is more evidence of the diverse and perhaps volatile nature of curing rights in the Commonwealth.

In **Westmoreland County**, mail-in voters have no Notice and Opportunity to Cure.

In **Schuylkill County**, mail-in voters have no Notice and Opportunity to Cure.

In **Lancaster County**, mail-in voters have no Notice and Opportunity to Cure.

In **Philadelphia County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice and/or telephone. Philadelphia County also posts on its website a list of voters whose ballot materials contain disqualifying errors. Voters may also correct disqualifying errors in the elections office and, on information and belief, voters may correct disqualifying errors by casting a provisional ballot on Election Day.

In **Beaver County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice, but only beginning on the Friday before Election Day. According to the county, the SURE Notice is delayed to avoid disparate treatment of voters who do not have an email address on file and who will therefore not receive a SURE Notice. Beaver County also posts on its website a list of voters whose ballot materials contain disqualifying errors. Beaver County distributes the same information to political parties. Voters may also correct disqualifying errors in the elections office and, on information and belief, voters may correct disqualifying errors by casting a provisional ballot on Election Day.

In **Greene County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice and/or telephone. Greene County also provides to political party committees a list of voters whose ballot materials contain disqualifying errors. Voters may also correct disqualifying errors in the elections office and, on information and belief, voters may correct disqualifying errors by casting a provisional ballot on Election Day.

In **Allegheny County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice and/or through the mail. Allegheny County mails disqualified ballots back to voters with instructions to cure the disqualifying error. Voters may also correct disqualifying errors in the elections office and, on information and belief, voters may correct disqualifying errors by casting a provisional ballot on Election Day.

In **Fayette County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice and/or telephone and/or through the mail. Voters may correct disqualifying errors in the elections office and, on information and belief, voters may correct disqualifying errors by casting a provisional ballot on Election Day.

In **Somerset County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice. Voters may correct disqualifying errors in the elections office.

In **Delaware County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice and/or telephone and/or through the mail. Delaware County mails disqualified ballots back to voters with instructions to cure the disqualifying error. Voters may also correct disqualifying errors in the elections office and, on information and belief, voters may correct disqualifying errors by casting a provisional ballot on Election Day.

In **Montgomery County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice and/or telephone. Voters may correct disqualifying errors in the elections office and, on information and belief, voters may correct disqualifying errors by casting a provisional ballot on Election Day.

In **Bucks County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice and/or telephone and/or through the mail. Voters may correct disqualifying errors in the elections office and, on information and belief, voters may correct disqualifying errors by casting a provisional ballot on Election Day.

In **Northampton County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice and/or telephone and/or through the mail. Voters may correct disqualifying errors in the elections office and, on information and belief, voters may correct disqualifying errors by casting a provisional ballot on Election Day.

In **Lehigh County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice and/or telephone. Voters may correct disqualifying errors in the elections office and, on information and belief, voters may correct disqualifying errors by casting a provisional ballot on Election Day.

In **Lebanon County**, mail-in voters are given Notice and Opportunity to Cure. Further details about Lebanon County's policy are presently unknown.

In **Berks County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice. Voters may correct disqualifying errors in the elections office and, on information and belief, voters may correct disqualifying errors by casting a provisional ballot on Election Day. Voters may also call the elections office and request that a replacement ballot be sent through the mail.

In **Chester County**, mail-in voters are given Notice and Opportunity to Cure. Voters are notified of disqualifying errors by SURE Notice and/or telephone and/or through the mail. Voters may correct disqualifying errors in the elections office and, on information and belief, voters may correct disqualifying errors by casting a provisional ballot on Election Day.

The rights of mail-in voters thus depend on where the voter resides.

II. The Free and Equal Elections Clause Requires Equal Treatment of Voters Regardless of Where They Reside.

The Pennsylvania Constitution provides, “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.” Pa. Const. Art. I, § 5 (hereafter, “Free and Equal Elections Clause”).

“The broad text of the first clause of this provisional mandates clearly and unambiguously, and in the broadest possible terms, that all elections conducted in this Commonwealth must be ‘free and equal.’” *League of Women Voters*, 645 Pa. at 100. The Free and Equal Elections Clause requires that “all aspects of the electoral process” must be “conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.” *Id.*

A delegate to the 1873 Constitutional Convention opined that that the words “free and equal” as used in the Free and Equal Elections Clause “exclude not only all invidious discriminations between individual electors, or classes of electors, but also *between different sections or places in the State.*” *Id.* at 108 (quoting Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania. Exhibiting The Derivation and History of Its Several Provisionals*, Article I at 10 (1883) (emphasis added). Consistent with this sentiment, the Pennsylvania Supreme Court explains “that it may be said that elections are free and equal within the meaning of the

Constitution ... *when every voter has the same right as any other voter*” *Winston v. Moore*, 244 Pa. 447, 457 (1914) (emphasis added).

III. The Right to Learn About and Cure a Mail-in Ballot Is Presently Not Equal.

Mail-in voters in most Pennsylvania counties are given Notice and Opportunity to Cure while mail-in voters in other counties are not. In other words, rights differ “between different sections or places in the State.” *League of Women Voters*, 645 Pa. at 108 (citations and quotations omitted). These varying policies mean voters do not have “the same right as any other voter.” *Moore*, 244 Pa. at 457. Some mail-in voters are thus denied an “equal” election in apparent violation of the Free and Equal Elections Clause.

CONCLUSION

The disposition of the Applicants’ Petition, and this matter, more generally, may implicate rights under the Commonwealth’s Free and Equal Elections Clause. The Foundation brings these matters to the Court’s attention with the hope that it will aid the Court’s consideration of the matters before it now, and in the future.

Respectfully submitted,

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