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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| Faith Genser and Frank Matis,<br>Appellants,<br>v.<br><br>Butler County Board of Elections,<br>Republican National Committee,<br>Republican Party of Pennsylvania,<br>and The Pennsylvania Democratic Party | : | **CASES CONSOLIDATED**<br><br><br><br><br><br>Trial Ct. No. MSD-2024-40116<br><br>NO. 1074 C.D. 2024 |
| Faith Genser and Frank Matis,<br><br>v.<br><br>Butler County Board of Elections,<br>Republican National Committee,<br>Republican Party of Pennsylvania, and<br>The Pennsylvania Democratic Party. | : | |
| Appeal of: The Pennsylvania<br>Democratic Party | : | NO. 1085 C.D. 2024 |

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# BRIEF OF VOTER-APPELLANTS FAITH GENSER and FRANK MATIS

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On Appeal from the Memorandum Opinion and Order of the Court of Common Pleas of Butler County, Entered on August 16, 2024

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## I. INTRODUCTION

Appellants Faith Genser and Frank Matis ("Voter-Appellants") attempted to vote by mail in the April 2024 primary election in Butler County. Before Election Day, they both learned that they had mistakenly omitted the inner secrecy envelope when they returned their mail-in ballot packets, and that as a result their mail-in ballots would not count. Voting is important to Ms. Genser and Mr. Matis, and they each sought to preserve their right to vote by casting a provisional ballot at their polling place on Election Day. But Appellee Butler County Board of Elections ("Board") refused to count their provisional ballots because Voter-Appellants had already returned their uncountable mail ballot packets.

The purpose of provisional voting is to give an elector a chance to mark a ballot and have it counted if, during the after-the-fact review, the board of elections determines that the voter is a qualified registered elector and did not successfully vote any other ballot in the election. This comports with the broader goal of the Pennsylvania Election Code, which is to ensure that the process of voting runs smoothly and that every eligible citizen is able to vote exactly once. Neither the Election Code's text nor its spirit creates the legal equivalent of a minefield, where one misstep is fatal to an elector's chance to cast a vote.

Yet the court below read the Pennsylvania Election Code to mean that if a voter mails in a naked ballot, and the voter's county does not offer a process for

curing mail-in ballots, then the voter has irrevocably blown her chance to participate in that election. This is indefensible as a matter of statutory interpretation. As demonstrated by a split between courts of common pleas on the meaning of the statute's text, the relevant provisions are not "clear and free from all ambiguity," 1 Pa.C.S. § 1921(b), and it is thus incumbent on a reviewing court to ascertain "the intention of the General Assembly," *id*. § 1921(c). The Board's and the lower court's attempts to rest this case entirely on one isolated phrase from the Election Code have led them to bizarre conclusions. In one instance, the court below even admitted the "absurdity of the outcome." Opinion at 21.

It need not and should not be this way. Read in context, and with faithful regard for the General Assembly's intent, the Election Code provisions at issue in this case lead straight to the conclusion that the Board must count Voter-Appellants' provisional ballots. And no binding case law holds otherwise.

This case can and should be resolved solely as a matter of statutory interpretation. But in the alternative, the Board's decision not to count Voter-Appellants' provisional ballots is irreconcilable with the Pennsylvania Constitution's guarantee of "free and equal" elections. That constitutional provision forbids county boards not only from denying the franchise outright, but also from "mak[ing] it so difficult as to amount to a denial." *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). The fact that Voter-Appellants made a technical slipup that

prevented their mail-in ballots from being counted is not the end of the constitutional inquiry, as the court below seemed to believe, but the beginning. Counting their provisional ballots would introduce no risk of double voting and no conceivable harm to the voting process. The only harm here is to Voter-Appellants' right to vote. The constitutional imperative is to count their provisional ballots.

## II. STATEMENT OF JURISDICTION

This is a direct appeal from the final Order entered by the Honorable S. Michael Yeager of the Court of Common Pleas of Butler County on August 16, 2024. Memorandum Opinion and Order (Dkt. No. 29). Voter-Appellants initiated this case in the trial court under 25 P.S. § 3157. This Court has jurisdiction over this appeal under 42 Pa.C.S. § 762(a)(4)(i)(C). *Dayhoff v. Weaver*, 808 A.2d 1002, 1005-06 (Pa. Cmwlth. 2002).

## III. ORDER IN QUESTION

Voter-Appellants Faith Genser and Frank Matis seek review of the Order of August 16, 2024, which states:

> Upon consideration of Petitioners', Faith A. Genser and Frank P. Matis, *Petition for Review in the Nature of a Statutory Appeal* and *Petitioners' Memorandum of Law in Support of Election Appeal*; Respondent's, the Butler County Board of Elections, *Board of Elections Answer to Petition for Review in the Nature of a Statutory Appeal* and *Memorandum in Opposition to Petition for Review in the Nature of a Statutory Appeal*; Intervenor's, the Pennsylvania Democratic Party, *The Pennsylvania Democratic Party's Brief in*

*Support of Petitioners' Petition for Review in the Nature of a Statutory Appeal*; and the Intervenor-Respondents', Republican National Committee and Republican Party of Pennsylvania joint *Brief in Opposition to Petition for Review in the Nature of a Statutory Appeal*, and following hearing thereon, in accordance with the above *Memorandum Opinion*, the Petitioners', Petition for Review in the Nature of a Statutory Appeal is DISMISSED.

## IV. SCOPE AND STANDARD OF REVIEW

The Court's "scope of review in election contest cases is limited to examination of the record to determine whether the trial court committed errors of law and whether the court's findings were supported by adequate evidence." *Dayhoff*, 808 A.2d at 1005 n.4. The standard of review for questions of law is *de novo*. *E.g.*, *In re Benkoski*, 943 A.2d 212, 215 n.2 (Pa. 2007).

## V. STATEMENT OF QUESTIONS INVOLVED

1. Does 25 P.S. § 3050 permit a board of elections to refuse to count a provisional ballot because the voter previously submitted a defective mail-in ballot?

   Answer of the court below: Yes.

   Suggested answer: No.

2. Does Article I, § 5 of the Pennsylvania Constitution permit a board of elections to refuse to count a provisional ballot because the voter previously submitted a defective mail-in ballot?

   Answer of the court below: Yes.

   Suggested answer: No.

## VI. STATEMENT OF THE CASE

### A. Form of Action and Procedural History

This is an appeal from the Memorandum Opinion and Order of the Butler County Court of Common Pleas that dismissed the Petition for Review in the Nature of a Statutory Appeal. Voter-Appellants Faith Genser and Frank Matis are two qualified Butler County voters who cast provisional ballots in the April 23, 2024, Primary Election at their respective polling places after learning that their mail-in votes would not be counted because of a disqualifying mistake. On April 26, 2024, Appellee, the Butler County Board of Elections (the "Board"), refused to count their provisional ballots.

On April 29, 2024, Voter-Appellants commenced this action by filing a Petition for Review in the Nature of a Statutory Appeal (Dkt. No. 2) in the Butler County Court of Common Pleas (the "trial court" or the "court below"). This Petition was an election appeal pursuant to 25 P.S. § 3157, challenging the April 26, 2024, decision of the Board not to count Voter-Appellants' provisional ballots.

On May 7, 2024, the trial court held an evidentiary hearing on the Petition for Review. Before the hearing began, also on May 7, 2024, the trial court granted intervenor status to the Republican National Committee, the Republican Party of Pennsylvania, and the Pennsylvania Democratic Party. *See* Dkt. Nos. 10, 11. At the hearing, the trial court heard testimony from Ms. Genser and Mr. Matis. The Court

also heard testimony from Chantell McCurdy, the Director of Elections for the Board. On June 28, 2024, all parties—the Petitioners, the Respondent Board of Elections, and the political party Intervenors—submitted briefs to the trial court on the legal issues presented in the Petition for Review. *See* Dkt. Nos. 23-27.

On August 16, 2024, the trial court issued a Memorandum Opinion and Order (Dkt. No. 29) dismissing the Petition for Review. Voter-Appellants timely filed a Notice of Appeal on August 20, 2024 (Dkt. No. 31). On August 21, 2024, this Court entered an Order expediting briefing in this appeal.

### B. Prior Determinations in This Case

The prior determination in this case is the Memorandum Opinion and Order dismissing the Petition for Review ("Opinion"), which was issued on August 16, 2024.

### C. Name of Judge or Official Whose Determination Is To Be Reviewed

The Honorable President Judge S. Michael Yeager of the Butler County Court of Common Pleas issued the determination to be reviewed by this Court.

### D. Factual Chronology

The relevant facts in this case are not in dispute. Opinion at 2 n.1 (Dkt. No. 29). Voter-Appellants Faith Genser and Frank Matis are qualified Butler County electors who each attempted to vote by mail in the April 23, 2024 primary election. Both Voter-Appellants forgot to include the required secrecy envelope in their

mail-in ballot packets. Shortly after receiving their flawed mail-in ballot packets, the Board entered data into the Pennsylvania Department of State's statewide voter registration database (the "SURE system"), which generated an automated email notice to both Voter-Appellants that their mail-in ballots would not be counted because of this error. On Election Day, Ms. Genser and Mr. Matis cast provisional ballots at their local polling places, following the instructions in the SURE system email and information provided to them via telephone by Board employees. The Board rejected (i.e., did not count) their mail-in votes because Ms. Genser and Mr. Matis had failed to enclose their ballots inside the required secrecy envelope. On April 26, the Board also voted to not count Voter-Appellants' provisional ballots.

### 1. Voting by Mail in Pennsylvania

Under Pennsylvania law, a voter seeking to vote by mail must complete and submit to her county board of elections an application that includes her name, address of registration, and proof of identification. 25 P.S. §§ 3146.2 (absentee ballots), 3150.12 (mail-in ballots).[1] The proof of identification must be a Pennsylvania driver's license number if the voter has a PennDOT-issued driver's license or PennDOT non-driver ID card. If the voter does not have a Pennsylvania-

[1] Identical procedures govern how voters apply for, complete, and return absentee and mail-in ballots. For brevity, this brief uses the terms "mail-in" and "mail" ballots to encompass both absentee and mail-in ballots.

issued driver's license or non-driver ID, she must provide the last four digits of her Social Security number. 25 P.S. § 2602(z.5)(3). Upon receipt of an application, the county board verifies the voter's identity and eligibility and then sends her a mail-ballot packet that contains: (1) a ballot; (2) a "secrecy envelope" marked with the words "Official Election Ballot"; and (3) a pre-addressed outer return envelope that contains a voter declaration with spaces to sign and handwrite the date (the "declaration envelope"). 25 P.S. §§ 3146.6(a), 3150.16(a).

The voter must complete several steps to successfully return a mail-in ballot. The mail-in voter must mark the ballot, place it in the secrecy envelope, and then place the secrecy envelope in the outer declaration envelope. *Id*. §§ 3146.6(a), 3150.16(a). Next, the voter must "fill out, date and sign" the printed declaration on the outer return envelope. *Id*. Finally, the voter must return the entire ballot packet by mail or in person to her county board of elections at its main office or at a designated drop-off location. To be considered timely, the completed mail ballot packet must arrive at the county board of elections by 8:00 p.m. on Election Day. *Id*. §§ 3146.6(c), 3150.16(c).

It is not uncommon for voters to make mistakes when completing their mail ballot packets. Under current Pennsylvania law, a board of elections must reject a mail-in ballot packet if it has any of three common defects: (a) no voter signature on the declaration envelope; (b) no date or an "incorrect" date on the declaration

envelope; or (c) no secrecy envelope. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) ("*PDP*").

### 2. The Board Rejected the Mail-in Ballots Submitted by Ms. Genser and Mr. Matis Because They Neglected to Include the Secrecy Envelope.

The Board is the local government agency responsible for overseeing the conduct of all elections in Butler County, including adjudicating and deciding whether to count provisional ballots in accordance with the Pennsylvania Election Code. *See* 25 P.S. § 2642 (powers and duties of county boards of elections); *id*. § 3050(a.4) (adjudication of provisional ballots); Hr'g Tr., McCurdy, 18:23-19:7 (Dkt. No. 17) (explaining that the Board of Elections designates the Computation Board to adjudicate provisional ballots); 25 P.S. §§ 3153-3154 (computation of returns).

Ms. Genser and Mr. Matis both attempted to vote by mail for the April 2024 Primary Election. Ms. Genser and Mr. Matis requested, received, and marked their mail-in ballots prior to Election Day. Opinion at 2 (Dkt. No. 29); Hr'g Tr., Genser, 139:12-14; Hr'g Tr., Matis, 86:18-25 (Dkt. No. 17). However, Ms. Genser and Mr. Matis each made a mistake when assembling their mail-in ballot packets for return to the Board: they failed to place the ballot inside the required secrecy envelope before inserting it into the outer declaration envelope. Hr'g Tr., McCurdy, 60:2-7; *see also* Hr'g Tr., Matis, 94:15-17 (Dkt. No. 17) ("I made a mistake . . . I

wholeheartedly admit that I didn't put it in the secrecy envelope."). Ms. Genser and Mr. Matis each submitted their incomplete mail ballot packets to the Board prior to the deadline for receipt of mail-in ballots. Opinion at 2 (Dkt. No. 29).

Upon receipt of Ms. Genser's and Mr. Matis's mail ballot packets, the Board screened the ballot packets with a machine and determined that the secrecy envelopes were missing, which would prevent the Board from counting Voter-Appellants' mail ballots under current Pennsylvania law.[2] Hr'g Tr., McCurdy, 33:19-25, 34:4-8 (describing the Agilis Falcon machine); *id. at* 60:2-10 (Dkt. No. 17) (confirming that both Appellants' mail-in ballots were not counted). When the

[2] When the Board receives mail-in ballots, it runs them through a sorting machine that evaluates the dimensions of the envelope "to make sure that this is in fact an official election envelope with the required materials inside." Hr'g Tr., McCurdy, 33:19-25 (Dkt. No. 17). This machine evaluates the dimensions of the declaration envelope, including its length, height, thickness, and weight. *Id.* 33:19-25, 34:4-8. When the machine detects a mail-in ballot packet that appears to be missing a secrecy envelope, the Board enters the "Canceled – No Secrecy Envelope" code for that ballot into the SURE system. *Id*. 68:1-14. While Ms. McCurdy testified that the Board does not know with certainty that the secrecy envelope is missing until the Computation Board meets and opens the outer envelope, the machine's determinations were correct that Ms. Genser's and Mr. Matis's mail-in ballot packets lacked secrecy envelopes. Further, the Board can easily verify that a mail-in ballot is lacking a secrecy envelope without opening the ballot itself to see the individual's selection of candidate(s). Ms. McCurdy confirmed that the Computation Board checked Voter-Appellants' mail-in ballots to confirm they were missing a secrecy envelope, but that "nobody looked at them to see who they voted for." Hr'g Tr., McCurdy, 65:9-16 (Dkt. No. 17); *see also id*. (those naked ballots "have always remained and remain secret" and are currently "locked in a cabinet in the room that we open all the ballots").

machine detects that a mail-in ballot packet is missing the required secrecy envelope, the Board records the ballot status for that voter as "CANCELED – No Secrecy Envelope." Opinion at 6-7 (Dkt. No. 29); Hr'g Tr., McCurdy, 68:10-14 (Dkt. No. 17). The Board marked both Voter-Appellants' mail-in ballots into the SURE system as "CANCELED – No Secrecy Envelope." Hr'g Tr., McCurdy, 48:3-4 (Dkt. No. 17).

On April 11, 2024, Ms. Genser received an automated email via the Department of State's SURE System that said the following:

> After your ballot was received by BUTLER County, it received a new status.
>
> Your ballot will not be counted because it was not returned in a secrecy envelope. If you do not have time to request a new ballot before April 16, 2024, or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.

*See* Petitioners' Hr'g Exhibit D, Attachment 2 to Petitioners' Memorandum of Law in Support of Election Appeal (Dkt. No. 23). Mr. Matis received the same email from the SURE System. Hr'g Tr., Matis, 87:5-9 (Dkt. No. 17).

Ms. Genser and Mr. Matis each called the Butler County Bureau of Elections after receiving this email notification. An election office employee told Mr. Matis that he could not fix his mail ballot at the office, but that he could cast a provisional ballot at his polling place. Hr'g Tr., Matis, 87:25-88:4; 98:4-10 (Dkt. No. 17). An election official informed Ms. Genser that she could cast a provisional

ballot on Election Day, but that if she cast a provisional ballot it would likely not be counted. Hr'g Tr., Genser, 150:12-19 (Dkt. No 17); *see also id.* at 169:4-5 ("I guess I had a vague hope that it would be [counted], but I wasn't counting on it.").

### 3. The Butler County Board of Elections Curing Policy

The Board has adopted a curing policy for mail-in voters who make mistakes when completing their mail-in ballot packet. If the declaration envelope has been properly completed by the voter, the Board records that voter's ballot into the SURE system as "RECORD—Ballot Returned." Opinion at 6 (Dkt. No. 29); Hr'g Tr., McCurdy, 33:2-6, 34:4-9, 45:15-18 (Dkt. No. 17). If the voter has neglected to sign or date the declaration envelope, the Board records the voter's ballot into the SURE system as "PENDING—No Signature" or "PENDING—No Date." Opinion at 7 (Dkt. No. 29); Hr'g Tr., McCurdy, 51:11-17 (Dkt. No. 17). Under the Board's "curing" policy, such individuals are permitted to "cure" the mistake by signing an attestation at the election office, or by submitting a provisional ballot on Election Day, in which case the Board will treat the submission of the provisional ballot as the attestation. Hr'g Tr., McCurdy, 50:15-21 (Dkt. No. 17); *see also* "Butler County Curing Policy, Respondent Intervenor Republican Party Hr'g Exhibit 1, Attachment 3 to Petitioners' Memorandum of Law (Dkt. No. 23). In both instances, the Board will count the voter's mail ballot. Hr'g Tr., McCurdy 50:13-21, 60:17-61:4 (Dkt. No. 27). The Board has steps in

place to guarantee that it will not count both a mail ballot and a provisional ballot from a single voter at a single election. Hr'g Tr., McCurdy, 61:5-10 (Dkt. No. 17). The Butler County "curing" policy does not address whether voters who mistakenly submit a "naked ballot" (i.e., a mail ballot not placed within a secrecy envelope) may have their vote counted by casting a provisional ballot on Election Day. Opinion at 7 (Dkt. No. 29); Hr'g Tr., McCurdy, 65:17-21 (Dkt. No. 17).

#### 4. Voter-Appellants Each Cast a Provisional Ballot on Election Day, but the Board Did Not Count Them.

On April 23, 2024, Election Day, Ms. Genser and Mr. Matis appeared in person at their respective local polling places, where they each submitted a provisional ballot. Opinion at 2 (Dkt. No. 29).

On April 26, 2024, the Board, through its designated Computation Board, reviewed all provisional ballots submitted on Election Day and voted not to count Ms. Genser's and Mr. Matis's provisional ballots. Hr'g Tr. McCurdy, 60:2-16 (Dkt. No. 17) (confirming that the provisional ballots submitted by Petitioners were not counted). The Computation Board rejected three ballots in total from voters who had "cast a provisional ballot when they had already turned in an absentee or mail-in ballot that lacked a secrecy envelope." Hr'g Tr., McCurdy, 25:19-21 (Dkt. No. 17); *see also* "F. Matis Provisional Ballot Search" (showing provisional ballot status "rejected" because Mr. Matis "voted by . . . absentee/mail-in"); Petitioners' Hr'g Exhibit B, Attachment 4 to Petitioners' Memorandum of

Law; "F. Genser Provisional Ballot Search," Petitioners' Hr'g Exhibit E, Attachment 5 to Petitioners' Memorandum of Law (Dkt. No. 23).

Voter-Appellants' election appeal in the Butler County Court of Common Pleas timely followed the Board's decision not to count their provisional ballots.

### E. Statement of the Order or Determination Under Review

The determination under review is the August 16, 2024, Memorandum Opinion and Order of the Butler County Court of Common Pleas dismissing the Petition for Review in the Nature of a Statutory Appeal. The Court dismissed the Petition for Review and upheld the Board's decision not to count the provisional ballots cast by Voter-Appellants.

## VII. SUMMARY OF ARGUMENT

The Board and the trial court's refusals to count Voter-Appellants' provisional ballots are grounded in a misconception that holding otherwise would amount to forcing the Board to adopt a "cure" process that should be within its discretion. But the provisional ballot process is fundamentally different from the notice and cure processes that county boards of elections can choose whether they implement.

For more than two decades, provisional voting has played a critical role in protecting the franchise in Pennsylvania. Among other things, provisional voting preserves the right to vote by providing 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.

Contrary to the decision of the court below, a commonsense interpretation of Pennsylvania's Election Code leads to only one conclusion: a voter whose mail ballot cannot be counted because the voter made a mistake "did not cast any other ballot in the election" under 25 P.S. § 3050(a.4)(5)(i), and did not have a "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(a). Thus, a provisional ballot cast in this circumstance must be counted under 25 P.S. § 3050. This reading of the relevant Election Code provisions 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 § 3050: to ensure that each voter gets to vote once and only once. By rejecting both their mail-in ballot submissions and their provisional ballots, the Board and the court below ensured that Voter-Appellants did not get to vote at all.

Although the question of whether a provisional ballot must be counted is a matter of clear statutory interpretation, the Pennsylvania Constitution's Free and Equal Elections Clause, Pa. Const. art. I, § 5, also demands that Voter-Appellants'

provisional ballot count in these circumstances. The Free and Equal Elections Clause requires the government to act in a reasonable and non-discriminatory fashion and to identify a valid governmental interest before disenfranchising a voter. The Board offered no such reason in refusing to count the disputed provisional ballots, which were unquestionably genuine.

In sum, this Court should reverse the decision below and order the Board to count Voter-Appellants' provisional ballots.

## VIII. ARGUMENT

### A. The General Assembly Created the Provisional Voting System to Preserve the Right to Vote and to Prevent Double-Voting.

This is not a case about whether a voter in Butler County can cure a mail-in ballot that has a disqualifying mistake. Rather, it is a case about a legal question: whether a voter who fails to successfully vote by mail can preserve his fundamental right to vote by casting a provisional ballot on Election Day. And consistent with the federal Help America Vote Act of 2002 ("HAVA") and Pennsylvania law, the answer is most certainly yes. Provisional voting is a statutory right that exists regardless of what curing policy, if any, a county board of elections chooses to offer.

#### 1. The Trial Court Misunderstood the History and Role of Provisional Voting.

The trial court erred by conflating "notice and cure" programs with Pennsylvania's longstanding statutory provisional ballot process. The term "notice

and cure" is a term of art in election administration that refers to programs carried out to notify voters of a deficiency in their mail-in ballot and offer them an opportunity to correct the deficiency, such that their mail-in ballot will be counted. *See, e.g.*, Bipartisan Policy Center, *Logical Election Policy* (Jan. 2020) at 43-44, https://bipartisanpolicy.org/wp-content/uploads/2020/01/Bipartison_Elections-Task-Force_R01-2.pdf. "Cure" programs most often allow voters to appear in person at their county election office and correct the deficiencies on site.

Regardless of whether the Board has opted to notify voters of disqualifying defects with their mail ballot packets and offer them an opportunity to correct the defects, Pennsylvania's longstanding provisional voting regime is separate and distinct from such a program. Provisional voting predates the adoption of "no excuse" mail voting in Pennsylvania by nearly two decades, and the General Assembly deliberately enacted provisional voting to fortify the right to vote.

**2. Provisional Voting is Intended to Preserve the Right to Vote.**

Twenty-two years ago, the Pennsylvania General Assembly amended the Pennsylvania Election Code and added sections establishing a provisional-voting procedure in Pennsylvania. *See* P.L. 1246, Act No. 150 of 2002, § 12, codified at 25 P.S. § 3050(a.4), *et seq.* The initial enactment of provisional voting in Pennsylvania occurred after the passage of HAVA, now codified at 52 U.S.C. §§ 20901, *et seq.* HAVA established a provisional-voting regime for federal

elections and required that "[e]ach state and jurisdiction shall . . . comply with the requirements of [the provisional voting] section on and after January 1, 2004." 52 U.S.C. § 21082(d). Act 150 of 2002 was Pennsylvania's implementation of the mandatory requirements of HAVA, and it went beyond the requirements of HAVA by applying the new procedures to both federal and state elections. *See* 33 Pa.B. 6119 (Dec. 13, 2003) (summarizing the requirements of HAVA on provisional voting and noting that "Act 150 of 2002, establishes procedures for the implementation of provisional voting in Pennsylvania").

The policy rationale underlying provisional voting was clear and simple: to prevent the disenfranchisement of voters. *E.g.*, *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1076-77 (N.D. Fla. 2004) ("Congress enacted HAVA at least partly in response to [Florida's failure to, inter alia] allow the casting of a ballot by a person who presented at a polling place on election day but who was determined by election officials at that time not to be eligible to vote. If the determination that the voter was not eligible later turned out to be erroneous, the problem could not be cured. Those turned away from the polls during the November 2000 election, even erroneously, thus had no opportunity to vote.").

Congress wanted not only to rectify the mass disenfranchisement that occurred in Florida in 2000 because of voter registration purges, but also to prevent voters from being turned away at the polls for any reason and having no recourse

after Election Day if the poll workers were mistaken. The floor debates over HAVA are replete with statements emphasizing the need for this kind of protection of voters' rights. For example, Senator Dick Durbin stated that HAVA "*provides a fail-safe mechanism for voting on election day*. It requires that all states allow voters to cast a provisional ballot at their chosen polling place if the voter's name isn't on the list of eligible voters, or an election official, for whatever reason, declares a voter ineligible." 148 Cong. Rec. S10496 (Oct. 16, 2002) (Statement of Sen. Durbin) (emphasis added).

In Pennsylvania, the General Assembly added 25 P.S. § 3050(a.4) to the Election Code to implement Congress's command that each state comply with, and establish, HAVA's fail-safe for voters. For the past forty-one elections, Pennsylvania law has ensured that provisional ballots are available to voters to preserve the right to vote for a variety of reasons, such as when the voter's name is not in the poll book and the voter believes she is registered to vote, or the voter is unable to present an acceptable form of proof of identification as required when voting in a polling location for the first time. Most recently, when the General Assembly made mail-in voting available to all Pennsylvania electors with P.L. 552, Act No. 77 of 2019, the legislature reaffirmed that provisional voting serves as a fail-safe to preserve the right to vote by providing that a mail voter who has not voted her mail ballot may cast a provisional ballot. 25 P.S. § 3150.16(b)(2) ("An

elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot . . . .").

Ensuring that voters vote once, and only once, in any election is baked into the provisional-ballot process. During the floor debate on HAVA, Sen. Mitch McConnell stated: "a voter's eligibility will be verified, however, prior to the counting of the ballot to *ensure that those who are legally entitled to vote are able to do so and do so only once*; again, making it easier to vote and harder to cheat." 148 Cong. Rec. S10412 (Oct. 15, 2002) (emphasis added). The ballot is "provisional" because the poll workers at the precinct are unable to determine the voter's eligibility, and so that assessment must be conducted after the fact by the board of elections. *See* U.S. Election Assistance Commission, *Election Management Guidelines* 106 (2d ed. 2023), https://www.eac.gov/sites/default/files/electionofficials/EMG/EAC_Election_Management_Guidelines_508.pdf.

Pennsylvania's statutory regime explicitly codifies the after-the-fact evaluation of a provisional ballot to determine whether the voter was eligible to cast a provisional ballot. 25 P.S. §3050(a.4)(4). The board of elections must evaluate two things: (1) whether the voter is a qualified, registered elector in the election district; and (2) whether the voter already successfully voted in the election. *Id.* As discussed more fully below, construction of the relevant statutory

provisions to require counting the provisional ballot when the previously submitted mail ballot is disqualified for errors in the packet is consistent with the overall statutory regime of provisional voting.

The Delaware County Court of Common Pleas ordered provisional ballots that voters had submitted in just these circumstances to be counted in *Keohane v. Delaware County Board of Elections*, CV-2023-4458 (Del. Cnty. Ct. Com. Pl. Sept. 21, 2023) (attached as Exhibit A). Judge Whelan wrote "[a]ll parties and this Court are concerned with the risk of double voting; however, the Board has safeguards in place to prevent double voting in this situation." *Keohane* at ¶ 10. Judge Whelan noted approvingly the Delaware County Board's procedures, including: (1) the defective mail-in ballot is "segregated" from other mail-in ballots and is not counted, and (2) before the provisional ballot hearing, the Board "checks all provisional ballots against Election Day poll books and by-mail ballots to determine if each voter who voted provisionally also voted a different way." *Id.* at ¶ 13(b). With these "procedural safeguards" in place, Judge Whelan ordered the Delaware County Board of Elections to count the provisional ballots submitted by electors whose attempt to vote by mail-in ballot had been rejected. *Id.* at ¶ 14.

Here, the Board employed similar "procedural safeguards" to ensure that neither Ms. Genser nor Mr. Matis had more than one vote counted in the April 2024 primary election, including protocols to (1) examine the mail-in ballots for

defects and notify the affected individuals, (Opinion at 6) (Dkt. No. 29); (Hr'g Tr., McCurdy, 33:19-34:18) (Dkt. No. 17), (2) segregate defective mail-in ballots and not count them, (Hr'g Tr., McCurdy, 21:6-23, 22:10-16), and (3) adjudicate provisional ballots by confirming whether the individual had successfully submitted another vote in the election and had that ballot counted. Opinion at 9 (Dkt. No. 29); Hr'g Tr., McCurdy, 60:17-61:10; *id*. at 50:13-21. Indeed, Butler County's election director confirmed that the office has procedures in place to guarantee that no voter "accidentally has two different votes counted" in the same election. Hr'g Tr., McCurdy, 61:5-10.

Regardless of whether a county adopts a program of notifying voters with disqualifying errors in their mail ballot packets, Pennsylvania's provisional-voting system exists to ensure voters can make their voices heard on Election Day. The provisional-ballot procedure is available to voters who learn, from whatever source, that their previously submitted mail ballot was not successfully voted because of technical errors on the declaration envelope or the lack of a secrecy envelope. The provisional voting process ensures that, for each voter, one ballot will be counted: not two ballots, and not zero ballots.

### B. Voter-Appellants Did Not "Cast," and the Board of Elections Did Not "Timely Receive," a "Mail-In Ballot" for Purposes of 25 P.S. § 3050.

This case can be resolved purely on statutory construction grounds. The statutory issue boils down to the proper interpretation of "did not cast any other ballot," and "absentee ballot or mail-in ballot is timely received" in the following two provisions of the Pennsylvania Election Code:

> 25 P.S. § 3050(a.4)(5)(i): "Except as provided in subclause (ii), if it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector's registration form and, if the signatures are determined to be genuine, *shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election*." (emphasis added).

> 25 P.S. § 3050(a.4)(5)(ii)(F): "*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." (emphasis added)

The Delaware County Court of Common Pleas in *Keohane* considered the same statutory construction issue presented here but reached a different conclusion from that reached by the trial court. The fact that two courts of common pleas have understood § 3050(a.4)(5)(i) and § 3050(a.4)(5)(ii)(F) quite differently illustrates that these provisions are ambiguous. *Warrantech Consumer Prods. Servs., Inc. v. Reliance Ins. Co. in Liquidation*, 96 A.3d 346, 354-55 (Pa. 2014) ("A statute is ambiguous when there are at least two reasonable interpretations of the text under

review."); *see also Bold v. Dep't of Transp., Bureau of Driver Licensing*, __ A.3d __, No. 36 MAP 2023, 2024 WL 3869082, at *5 (Pa. Aug. 20, 2024) ("Granting due respect to the capable Pennsylvania jurists who have examined this terminology in the past and reached divergent conclusions, we think it clear that both accounts of the statute are reasonable.").

In light of this ambiguity, the Court should interpret the statutory provisions by considering, among other things, "[t]he occasion and necessity for the statute," "[t]he mischief to be remedied," "[t]he object to be obtained," and "[t]he consequences of a particular interpretation." 1 Pa.C.S. § 1921(c). With respect to the Election Code in particular, when a provision lends itself to two possible interpretations, courts must choose the one that enfranchises voters rather than disenfranchises them. "In construing election laws . . . [o]ur goal must be to enfranchise and not to disenfranchise." *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972); *see also Shambach v. Bickhart*, 845 A.2d 793, 798-802 (Pa. 2004); *Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954) ("Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage."); 1 Pa.C.S. § 1928(c) ("All other provisions of a statute shall be liberally construed to effect their objects and to promote justice.").

With these principles in mind, Voter-Appellants' commonsense interpretation must prevail because it is consistent with the purpose of § 3050(a.4)(5) and preserves the right to vote, while the Board and trial court's interpretation prevents electors from voting and leads to absurd results.

### 1. Voter-Appellants' Commonsense Statutory Interpretation Is Consistent with the Statute's Purpose and Preserves the Right to Vote.

*Keohane* held that a qualified voter who attempted to submit a mail-in ballot to the board of elections, only to have that attempt rejected because of a disqualifying mistake, cannot sensibly be said to have "cast" a ballot within the ordinary meaning of that word. *Keohane* ¶ 9 ("[V]oters who attempted to submit mail-in ballots to the Board and were later notified by the Board that their respective mail-in ballots were defective, cannot be said to have 'cast' a ballot."). Likewise, a contemporaneous edition of Black's Law Dictionary defines "cast" as "[t]o formally deposit (a ballot) or signal one's choice (in a vote)." *Black's Law Dictionary* 230 (8th ed. 2004). A voter cannot be said to have "formally deposit[ed]" a mail-in ballot when she has made a procedural mistake that results in the Board rejecting her ballot such that her choices of candidates will never be processed or counted.

Here, Voter-Appellants' mail-in ballot submissions were nullified because they were missing the required secrecy envelope. *See PDP*, 238 A.3d at 380

(holding that a voter's failure to "enclos[e] the ballot in the secrecy envelope renders the ballot invalid"). Although Voter-Appellants *tried to* "cast" mail-in ballots, they failed to do so, and their attempts were rejected by the Board. Voter-Appellants had in no sense "cast" mail-in ballots where they had submitted a mail-in packet that was not legally permitted to be canvassed or counted.

The affidavit the voter signs at the polling place for a provisional ballot supports this interpretation. The individual affirms that "this is the only ballot that I cast in this election." 25 P.S. § 3050(a.4)(2). A voter who realizes she mailed in a naked ballot that will not be counted has a good-faith belief that she has not "cast" a ballot in the election. That is because the commonsense and plain reading of this section of the Election Code obligates the Board to count a properly submitted provisional ballot after the Board has determined, during the canvass, that the voter failed to submit a mail-in ballot eligible to be counted.

The absurd result proposed by the Board—that a voter who makes a minor error in the mail-ballot submission process *ipso facto* surrenders the right to vote provisionally—is avoided when the phrase "mail-in ballot is timely received" in 25 P.S. § 3050(a.4)(5)(ii)(F) is interpreted to mean a timely received ballot conforming to the rules for submitting such ballots under the Election Code. The timeliness requirement referenced in § 3050 is derived from § 3150.16, which is entitled "Voting by mail-in electors" and defines when and how a mail-in ballot

must be returned to the county board of elections. The two provisions must be read together.

25 P.S. § 3150.16(a) states the general rule as to what the voter must do on or before the timeliness deadline at "eight o'clock P.M. on the day of the primary or election" to effect a vote—the voter must mark the ballot, put it in a secrecy envelope, and sign and date the envelope. Each step required to meet the deadline is outlined in explicit detail:

> At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3150.16(a); *accord id.* § 3146.6 (same rules for absentee voters). Thus, while § 3050(a.4)(5)(ii)(F) has a brief reference to a "timely" submission, what must be done to satisfy that timeliness requirement is fleshed out in § 3150.16. The two Election Code sections work hand in glove.

Under this commonsense reading, which synthesizes the statutory text, the Board did not "timely receive" the "mail-in ballots" of the Voter-Appellants under

25 P.S. § 3050(a.4)(5)(ii)(F) before 8:00 PM on Election Day. The Voter-Appellants had failed to completely follow the vote-submission process set out in § 3150.16, which mandates use of a secrecy envelope. They did not therefore supply a "timely" vote to the Board, nor did they supply a countable "mail-in ballot," and they should not have been disqualified from voting provisionally.

Voter-Appellants' statutory interpretation is consistent with the purpose of § 3050(a.4)(5)—to ensure that each voter gets to vote once and only once. If a voter's legally sufficient mail-in ballot arrives at the Board by the deadline, and the voter also submits a provisional ballot at the polling place, then the provisional ballot must not be counted, because that would constitute double-voting. Counting provisional ballots from voters whose mail-in ballots are rejected, like Voter-Appellants, is standard practice in most Pennsylvania counties and introduces no risk of double voting. *See Keohane* ¶ 10 ("[T]he Board has safeguards in place to prevent double voting in this situation.").

The Board and trial court's interpretation of the statute goes beyond preventing double-voting and prevents citizens from voting. By rejecting *both* mail-in ballot submissions *and* provisional ballots from Voter-Appellants, the Board and the trial court ensured that Ms. Genser and Mr. Matis did not get to vote at all. This interpretation violates the principle of interpreting election laws "to

enfranchise and not to disenfranchise" and should be rejected. *In re Luzerne Cnty. Return Bd.*, 290 A.2d at 109.

### 2. The Board's Statutory Interpretation Leads to Absurd Results.

The Board's statutory interpretation should be rejected because it not only prevents voters from voting, but also leads to absurd results. *See* 1 Pa.C.S. § 1922(1) (declaring the statutory construction presumption "[t]hat the General Assembly does not intend a result that is absurd"); *In re Nomination Papers of Lahr*, 842 A.2d 327, 333 (Pa. 2004) (noting that courts should be "mindful of the requirements of liberal construction of the [Election] Code, and the duty to avoid unreasonable or absurd constructions").

For example, the Board's error in failing to count Voter-Appellants' provisional ballots because the Board timely received naked and thus uncountable ballots is underscored by Ms. McCurdy's testimony about the Board's peculiar treatment of another type of voter mistake. Ms. McCurdy testified that if a voter mails in an outer envelope containing a properly sealed but empty secrecy envelope, the Board would consider the voter to have submitted a "mail-in ballot" for purposes of § 3050(a.4)(5)(ii)(F), even though the Board had received *no ballot at all*. *See* Hr'g Tr., McCurdy, 63:4-64:8 (Dkt. No. 17). The trial court acknowledged the "abstract absurdity" of this approach, but then compounded the absurdity by holding that "the Board *must* treat a received Declaration Envelopes

[sic] as the voter's return of their ballot, even if that Declaration Envelope is empty." Opinion at 21 (Dkt. No. 29); *see also id.* at 20 (holding that when a "Declaration Envelope is received by the Board, that elector's 'mail-in ballot' has been 'received,' regardless of any errors or omissions made by the elector"). In other words, the trial court, while professing to hew closely to the statutory text, held that the term "mail-in ballot" in § 3050(a.4)(5)(ii)(F) can mean "empty declaration envelope."

This absurd result is avoided when § 3050(a.4)(5)(ii)(F)'s terminology of "timely received" "mail-in ballot" is interpreted to exclude incomplete mail-in ballot packets. This interpretation does not add new content to the statute; rather, it faithfully implements the statute by applying it in a coherent manner that is consistent with the General Assembly's intent to offer provisional balloting as a fallback option to protect the right to vote while also preventing double-voting.

Voter-Appellants' construction is also consistent with the provisions of the Election Code that allow for provisional voting by a citizen who has requested a mail-in ballot but has not returned it by 8:00 PM on Election Day. For example, if a voter obtains a mail-in ballot, fills it out, and drops it in a mailbox on the Monday before Election Day, he may reasonably fear that the Postal Service might not deliver his mail-in ballot to the Board until Wednesday. In this circumstance, if she goes to his polling place on Election Day, the district register (i.e., poll book) will

show that she is ineligible to vote using an ordinary in-person ballot because she has been sent a mail-in ballot that might be timely received by the Board. She would be allowed to fill out a provisional ballot instead. 25 P.S. § 3150.16(b)(2) ("An elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot under [§ 3050(a.4)(1)]."); *id.* § 3146.6(b)(2) (similar language for absentee ballots).

Under Voter-Appellants' (and *Keohane*'s) interpretation of the Election Code, this voter's mail-in ballot would count if it arrived at the Board by 8:00 PM on Election Day and complied with all the rules; if not, his provisional ballot would count. Under the Board's odd interpretation of the Election Code, which the court below approvingly described as a "'first come, first counted' approach," (Opinion at 21) (Dkt. No. 29), if the voter sent in a naked mail-in ballot that arrived by the 8:00 PM Tuesday deadline, neither the mail-in nor the provisional ballot would count; but if the naked ballot arrived on Wednesday, the provisional ballot *would* count. Hr'g Tr., McCurdy, 64:9-65:8 (Dkt. No. 17). A table illustrates the absurdity of this theory about counting a mail-in ballot ("MIB"):

Voter-Appellants: Which Ballot Counts?

| | *MIB arrives Tuesday* | *MIB arrives Wednesday* |
|---|---|---|
| *MIB has secrecy envelope* | MIB | Provisional |
| *MIB is naked* | Provisional | Provisional |

Board: Which Ballot Counts?

| | *MIB arrives Tuesday* | *MIB arrives Wednesday* |
|---|---|---|
| *MIB has secrecy envelope* | MIB | Provisional |
| *MIB is naked* | **Neither** | Provisional |

In other words: under the theory of the Board and the trial court, if a voter submits a mail-in ballot that is naked but on time, he may not cast a provisional ballot; but if a voter makes *two* mistakes by mailing in a naked ballot *and* doing so tardily, he *may* cast a provisional ballot. *See generally* 1 Pa.C.S. § 1922(1) (declaring the statutory construction presumption "[t]hat the General Assembly does not intend a result that is absurd"); *In re Nomination Papers of Lahr*, 842 A.2d at 333 (noting that courts should be "mindful of the requirements of liberal construction of the [Election] Code, and the duty to avoid unreasonable or absurd constructions").

There is no practical reason, from an election-administration perspective, for adopting the trial court's reading of the relevant Election Code provisions. As explained above, the Board has procedural safeguards in place to prevent any risk of double voting if a voter submits a defective mail-in ballot and then casts a provisional ballot on Election Day.

Nor does anything turn on how or when a voter or the Board learns that a secrecy envelope is missing. The trial court misunderstood Voter-Appellants' position when it stated that Voter-Appellants are "attempting to . . . impos[e] upon [the Board] a duty to review all mail-ballots for compliance with vote-casting procedures prior to designating these ballots as having been received by the Board." Opinion at 22 (Dkt. No. 29). The trial court also erred in stating that "[u]nder Petitioners' proposed interpretation of the statute, a mail-in ballot would not be 'received' until it is opened, the secrecy envelope confirmed to be present, and the document therein confirmed to be a valid, filled-in ballot." *Id.* at 17. Voter-Appellants do not argue that the Board must check for naked ballots before Election Day, nor that "receipt" occurs during the canvass. Voter-Appellants' argument is simply that if a voter attempts to vote by mail and later realizes she omitted the secrecy envelope or made some other disqualifying mistake, the Election Code permits her to cast a provisional ballot to preserve her right to vote; and if the Board ultimately discovers during the canvass that the voter indeed made a disqualifying mistake, the Election Code requires the Board to count her provisional ballot. It makes no difference whether the voter learned of her mistake from a phone conversation with the Board; or from an email notification via the SURE system, however phrased; or by "return[ing] home to find the secrecy envelope on a table." Opinion at 29 (Dkt. No. 29). Nor does it matter whether the

Board discovers a likely disqualifying mistake before Election Day or afterwards during the canvass. All that matters is whether the voter successfully submitted a countable mail-in ballot.

### C. No Case Law Stands in the Way of Counting Petitioners' Provisional Ballots.

In the court below, the Board and Republican Party Intervenor-Appellees pointed to two cases that they mischaracterized as controlling in the instant matter. One of these cases, *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) ("*PDP*"), addressed a completely different issue and is not relevant to the disposition of this case. The other, *In re Allegheny County Provisional Ballots in the 2020 General Election*, No. 1161 CD 2020, 2020 WL 6867946 (Pa. Cmwlth. Nov. 20, 2020), is an unreported opinion from this Court that provided only a cursory analysis of the present statutory interpretation issue and was incorrectly decided on this point.

#### 1. *Pennsylvania Democratic Party v. Boockvar* is Inapposite.

In *PDP*, the Pennsylvania Supreme Court held that county boards of elections are "not required to implement a 'notice and opportunity to cure' procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly" because the Election Code is silent on such procedures. 238 A.3d at 374. The repeated references to *PDP* in the trial court briefing are based on two underlying assumptions, both of which are incorrect: (1) that counting provisional

ballots from voters who submitted naked mail ballots is a "cure" of the type considered by the Supreme Court in that case; and (2) that Appellants are asking the courts to "redraft" the duly enacted Butler County Curing Policy. (Board's Memorandum in Opposition to Petition for Review, at 14) (Dkt. No. 26); *see also* Republican Party Intervenor-Appellees' Brief in Opposition to Petition for Review, at 9) (Dkt. No. 25) ("*Pa. Dems.* makes clear that voters have no *right* to cure and, thus, that Pennsylvania courts cannot *order* county boards to permit them to cure.") (emphases in original). Likewise, the trial court cited *PDP* briefly, noting that the Supreme Court "has determined the current Election Code does not mandate a cure procedure for defective mail-in ballots," (Opinion at 22-23) (Dkt. No. 29), and conflated non-mandatory cure procedures with mandatory statutory requirements for counting provisional ballots, *see id.* at 27.

A provisional ballot is not a "cure" of a voter's defective mail-in ballot as discussed in *PDP*, but is a statutory fail-safe guaranteed by the Election Code to prevent voter disenfranchisement in a diverse array of circumstances. The Supreme Court in *PDP* did not consider the statutory provisions regarding when a voter's provisional ballot must be counted. Instead, the petitioners in *PDP* brought a sweeping claim under the Pennsylvania Constitution and the "spirit of the Election Code," asking the Court to create a statewide procedure that would require boards to provide mail-in voters with an opportunity to "cure" their defective mail-in

ballots under its "broad authority to craft meaningful remedies." 238 A.3d at 372-73 (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2019)). The Supreme Court declined, in light of the "open policy questions attendant to that decision, including what the precise contours of the procedure would be." *Id.* at 374.

Because the Board does not provide any way for a voter to "cure" a naked ballot such that their original mail-in ballot would be counted, Voter-Appellants' only option to vote was to cast provisional ballots. The *PDP* petitioners did not raise, and the Supreme Court did not consider, whether the statutory provisions for provisional ballots require counties to count provisional ballots cast by voters who submitted mail-in ballots with disqualifying mistakes, such as a missing secrecy envelope. That is the issue now before this Court. In contrast to the legislative silence about "curing" the original mail-in ballots themselves, the General Assembly has unambiguously spoken about casting provisional ballots.

### 2. *In re Allegheny County* Was Wrongly Decided.

*In re Allegheny County* need not be considered by this Court because it is not precedential and was decided on only a limited record with a cursory analysis. *See* 2020 WL 6867946, at *1; *see also* 210 Pa. Code § 69.414(a) (providing that

unreported panel decisions of the Commonwealth Court may be cited for "persuasive value, but not as binding precedent").[3]

Nor does *In re Allegheny County*'s cursory review of the provisional ballot issue hold significant persuasive value. The panel engaged chiefly with two other questions concerning provisional ballots and mentioned the question at issue in this case in only one short paragraph, in which it noted that a "small number of provisional ballots" in the election under review implicated this question. 2020 WL 6867946 at *4. The panel's reasoning is reproduced here in full:

> [Section 3050] plainly 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). Like the language relating to the requisite signatures, this provision is unambiguous. We are not at liberty to disregard the clear statutory mandate that the provisional ballots to which this language applies must not be counted.

*Id*. The panel overlooked that § 3050(a.4)(5)(i) requires that a provisional ballot be counted if "the individual did not cast any other ballot, including an absentee ballot, in the election." The panel did not explain how receipt of a defective ballot

[3] No inference can be drawn from the Pennsylvania Supreme Court's denial of the petition for allowance of appeal with respect to In re Allegheny County, see 242 A.3d 307 (Pa. 2020) (Table), since there are any number of reasons why the Supreme Court may decide not to take up a discretionary appeal. *See*, *e.g.*, *Salazar v. Allstate Ins. Co.*, 702 A.2d 1038, 1043 n.10 (Pa. 1997) ("We note that the fact that this court denied allowance of appeal in [lower court cases] is no indication of our endorsement of the reasoning used by the [lower] Court in those matters.").

packet could constitute "timely" receipt of a valid "mail-in ballot." Nor did the panel explain how the defective mail-in ballot packet could not constitute a "ballot" for purposes of being counted while simultaneously constituting a timely received "ballot" for purposes of depriving the voters of their right to cast a provisional ballot.

There is no conflict between the relevant portions of § 3050, and as Appellants have explained *supra*, there is no difficulty in interpreting these two provisions to protect the franchise, particularly when they are read in concert with § 3150.16. *In re Allegheny County* made no attempt to reconcile these provisions. The purpose of § 3050(a.4)(4) is to allow boards of elections to count provisional ballots as long as they do not result in double voting. The provisional ballot is a fail-safe option for voters who might otherwise have no vote counted at all. *See, e.g.*, 25 P.S. § 3050(a.2) (permitting provisional ballots where the voter cannot produce proof of identification or where that proof is challenged). This Court should construe the Election Code in accordance with the General Assembly's obvious intent to ensure that each eligible voter gets to vote one time—not two times, not zero times—and allow Appellants' provisional ballots to be counted.

Finally, *In re Allegheny County* is flawed for the additional reason that it failed to give due weight to the constitutional imperative to uphold the right to vote. As Appellants have discussed, courts must construe any ambiguity in the

Election Code to enfranchise, not disenfranchise. *See, e.g.*, *Appeal of James*, 105 at 65-66 ("Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning." (quotation marks and citation omitted)).

### D. In the Alternative, the State Constitution Requires Counting Petitioners' Provisional Ballots.

In addition to wrongly deciding the statutory interpretation issue, the court below erroneously rejected Voter-Appellants' alternative argument that the Board's decision not to count their provisional ballots violated their right to vote under the Pennsylvania Constitution's Free and Equal Elections Clause. Pa. Const. art. I, § 5.

This Court need not reach the constitutional question because, as discussed above, 25 P.S. § 3050 should be interpreted to require the Board to count the disputed provisional ballots. Indeed, if there is any ambiguity, this Court can and should construe the statute to require counting of the votes. It is well established that the Court should adopt a construction that renders a statute constitutional if at all possible. *E.g.*, *Working Families Party v. Commonwealth*, 209 A.3d 270, 278

(Pa. 2019). Nevertheless, if the Court reaches the constitutional question, it should find the Board's policy unconstitutional.

### 1. The Free and Equal Elections Clause Guarantees the Right of Voter Participation to the Greatest Degree Possible.

Article I, Section 5 of the Pennsylvania Constitution guarantees that "[e]lections 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." Under this guarantee,

> all aspects of the electoral process, to the greatest degree possible, [must] be kept open and unrestricted to the voters of our Commonwealth, and, also, 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.

*League of Women Voters*, 178 A.3d at 804.

To effectuate the constitutional right to vote, courts require governmental entities to demonstrate a compelling reason when impinging on the right to vote. *See Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964) ("[E]ither an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons."); *see also Shambach*, 845 A.2d at 801-02 (the Pennsylvania Election Code "must be liberally construed to protect voters' right to vote"). Pennsylvania constitutional law forbids boards of elections from taking action that denies the franchise or "make[s] it so difficult as to amount

to a denial." *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914); *see also De Walt v. Bartley*, 24 A. 185, 186 (Pa. 1892) ("The test is whether such legislation denies the franchise, or renders its exercise so difficult and inconvenient as to amount to a denial"); *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).

The court below gave a nod to the core principles of *League of Women Voters* but misconstrued the Supreme Court's detailed explication of the Free and Equal Elections Clause as being limited to redistricting and similar cases. Opinion at 27 (Dkt. No. 29). Describing this as a "curing" case, the trial court failed to apply the constitutionally required analysis of *PDP*, in which the Court considered various provisions of the Election Code one by one, recognizing that "the state may enact substantial regulation containing *reasonable, non-discriminatory restrictions* to ensure honest and fair elections that proceed in an orderly and efficient manner." Opinion at 26 (Dkt. No. 29) (citing *PDP*, 238 A.3d at 369-70) (emphasis added). Here, the Board had to show that its refusal to count the disputed provisional ballots was both reasonable and non-discriminatory, a burden it failed to discharge.[4]

[4] *PDP* also refused to issue a mandatory injunction that would have created from whole cloth a notice-and-cure regime for fixing defects with mail-ballot packets,

### 2. The Refusal to Count Provisional Ballots of Failed Mail-in Voters is Unreasonable.

There is no dispute that Voter-Appellants filled out properly formatted provisional ballots that could otherwise be counted. Indeed, under the Board's policy, if a mail-in ballot arrives after the deadline, whether naked or not, the Board will count the voter's provisional ballot, demonstrating that provisional ballots are a safe and effective method of voting.

The Board does not contest these facts or explicitly identify a state interest in support of its position. The Board's position is essentially punitive in nature—the voter who fails to dot his i's and cross his t's should have his right to vote extinguished. This approach is inconsistent with the mandate of the Free and Equal Elections Clause to promote voting rights to "the greatest degree possible." *League of Women Voters*, 178 A.3d at 804.

The Board and the trial court try to justify their harsh position by arguing that the Board has no obligation to allow curing or help the voter in any way, but they are observing the problem through the wrong end of the telescope. The Free and Equal Elections Clause does not ask whether a state has an inherent right to

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on the grounds that doing so would be a complex undertaking and a legislative function. 238 A.3d at 372-75. The question presented here, by contrast, is only whether a vote that had been cast via provisional ballot should be counted. And on this question, unlike in the question of notice and cure, the legislature has already spoken, by enacting 25 P.S. § 3050(a.4).

punish voters for not following the rules, but rather *whether a regulation denying the right to vote is reasonable*. It is the government's burden to establish that a restriction on voting is reasonable, and here the relevant issue is whether the Board should count a vote in hand at the time of the canvass or simply reject it as a penalty for noncompliance with mail-voting technicalities. Such behavior is unreasonable, is directly in conflict with the mandate of the Free and Equal Elections Clause to promote voting and serves no valid governmental interest.

The trial court failed to apply the relevant constitutional analysis and instead applied erroneous reasoning to flawed premises:

> This court determined above that a voter's mail-in ballot is received by the Bureau when the Declaration Envelope is delivered thereto, regardless of whether the votes on the ballot inside can or will be included in the official tabulation. Consequently, any chance to correct a deficient ballot received by the Bureau, including by casting a provisional vote, constitutes a "cure." Petitioners do not allege, and indeed, there is no evidence, they were not provided with an equal opportunity to submit a valid ballot. Thus the Petitioners' current displeasure does not implicate the equal opportunity to vote, but rather, the equal opportunity to correct a mistake. The evils the Free and Equal Clause is designed to protect against, i.e., the denial of the equal right and opportunity to vote, and the dilution of votes through crafty redistricting, do not extend to opportunities to "cure" deficiencies with certain mail-in ballots but not others.

Opinion at 26-27 (Dkt. No. 29). There are at least three flaws with the above analysis.

First, rather than focusing on whether counting provisional ballots imposes any burden on the Board, the court miscast the question as turning on "the equal

opportunity to correct a mistake" and then concluded there is no constitutional right to be treated equally with respect to "correct[ions]." Opinion at 27 (Dkt. No. 29). But the question here is whether the Board can refuse to count an otherwise valid provisional ballot as a penalty for making an error on a mail-in ballot.

Second, the trial court's attempt to create a point of distinction between flaws on the face of the declarations envelope and those discovered when the ballot is opened support Voter-Appellants' position, not the Board's. The burden on the Board is the same in both situations. By the time of the canvass, the Board knows which mail-in ballot packets are countable and which are not. In either case, the Board can and should count one of each voter's ballots (mail-in or provisional). Its refusal to do so is unreasonable and discriminatory. Whether the flaw that makes a mail-in ballot uncountable is on the inside or outside of the ballot packet cannot possibly make a constitutional difference.

Third, the court's blanket holding that only "vote-casting regulations" implicate the Free and Equal Clause, and not provisions like the Board's provisional ballot counting policy here (Opinion at 27-28) (Dkt. No. 29), is simply wrong. No court has held that board of elections policies regarding the counting of provisional ballots are immune from the reach of the Free and Equal Elections Clause. To the contrary, boards violate the Clause when, as here, their restrictions deny the franchise or "make it so difficult as to amount to a denial" of the vote.

*Winston v. Moore*, 91 A. at 523. Here, the Board fully denied Voter-Appellants' right to vote when it refused to count their provisional ballots, knowing that their earlier mail ballots were uncountable.

In short, the proper way to look at the issue presented is to evaluate whether there is any justification in the record for refusing to count an otherwise timely and properly completed provisional ballot, when the alternative is to disenfranchise the voter. Because the Board offered no such reason, the decision below must be reversed.

## IX. CONCLUSION

Faith Genser and Frank Matis are well-meaning citizens who tried but failed to exercise their right to vote by mail. After realizing they had failed, they cast provisional ballots to ensure their voices would be heard in the primary election. There is no basis in the Election Code or the Pennsylvania Constitution to reject their provisional ballots, and this Court should reverse the decision below and order the Board to count them.

Dated: August 23, 2024

Respectfully submitted,

/s/ Benjamin D. Geffen

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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 10,946 words, not including the supplementary matter as described in Pa.R.A.P. 2135(b).

Dated: August 23, 2024

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## 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: August 23, 2024

/s/ Benjamin D. Geffen
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# EXHIBIT
# A

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA**

**CIVIL ACTION AT LAW**

| | | |
|---|---|---|
| **SONJA KEOHANE, RICHARD KEOHANE and BARBARA WELSH** | : | **No.: 2023-004458** |
| **v.** | : | |
| **DELAWARE COUNTY BOARD OF ELECTIONS** | : | |

**ORDER**

AND NOW, this 21st day of September, 2023, upon consideration of the Motion for Judgment on the Pleadings of Petitioners Sonja Keohane, Richard Keohane, and Barbara Welsh, a Memorandum of Law in support thereof, Respondent Delaware County Board of Elections' response to the Motion in which Respondent does not oppose the relief requested by Petitioners, and Petitioners' reply in support of the Motion, it is ORDERED that the Motion for Judgment on the Pleadings is GRANTED. It is further ORDERED that Respondent is directed to count Petitioners' provisional ballots submitted at their respective polling places on Primary Election Day, May 16, 2023, and amend the official vote count from the May 2023 Primary Election to include the votes indicated on Petitioners' provisional ballots. In support of the foregoing, the Court hereby sets forth the following:

1. The facts of this case are not in dispute as this matter concerns the decision of Respondent Delaware County Board of Elections ("the Board") not to count three provisional ballots submitted by Petitioners, who each voted by mail but whose mail-in ballots were canceled due to disqualifying defects on the outer envelopes;

2. In each instance, the Board contacted Petitioners and provided a "notice and cure letter" explaining the opportunity to cure the defective ballots in person at the Board's

office in Media, Delaware County, Pennsylvania or to request a replacement ballot be issued by mail in advance of primary Election Day, May 16, 2023;

3. The Petitioners did not request replacement ballots nor appear in person in Media, Delaware County, Pennsylvania to avail themselves of the "notice and cure" procedure offered by the Board but rather each Petitioner voted provisionally at their polling place on primary Election Day, May 16, 2023;

4. Subsequently, at the provisional ballot challenge hearing, the Board voted to not count these ballots based on *In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 (Pa.Cmwlth. 2020) which stands for the proposition that voters who have cast another ballot and/or whose ballots have been timely received by the Board may not have subsequent provisional ballots counted;

5. This Court recognizes the Election Code contains two provisions which are at issue and relate to casting a provisional ballot following an unsuccessful attempt to cast a mail-in or absentee ballot. The first subsection states that "[e]xcept as provided in clause (ii), if it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector's registration form and, if the signatures are determined to be genuine, shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election." 25 P.S. § 3050(a.4)(5)(i);

6. The second subsection states that a provisional ballot "shall not be counted" if "the elector's absentee ballot or mail-in ballot are timely received by a county board of elections." 25 P.S. § 3050(a.4)(5)(ii)(F);

7. To the extent there is any ambiguity between § 3050(a.4)(5)(i) and § 3050(a.4)(5)(ii)(F), Pennsylvania law demands that statutory provisions be read harmoniously to give effect to both provisions and should be construed in a way that does not nullify or exclude another provision. *See, e.g., In re Borough of Downingtown,* 161 A.3d 844, 871 (Pa. 2017) (noting that when two statutory provisions can be read as harmonious or in conflict, courts should construe them as in harmony with each other).

8. "It is the longstanding and overriding policy in this Commonwealth to protect the elective franchise. The Election Code must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice. It is therefore a well-settled principle of Pennsylvania election law that every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 General Election,* 241 A.3d 1058, 1071 (Pa. 2020).

9. In this instance, these three qualified voters who attempted to submit mail-in ballots to the Board and were later notified by the Board that their respective mail-in ballots were defective, cannot be said to have "cast" a ballot.

10. All parties and this Court are concerned with the risk of double voting; however, the Board has safeguards in place to prevent double voting in this situation.

11. "When the Board receives a mail-in or absentee ballot, Board staff examines the outer envelope for obvious defects such as a missing signature or date. If such a defect is found, the Board provides a notice via e-mail or regular mail to the affected voter and offers them the opportunity to cure their ballot at Government Center in person, or mails a replacement ballot." (Board's 7/28/23 Memorandum of Law, p. 6).

12. The defective mail-in ballot is segregated from other mail-in ballots and is not counted or included in the pre-canvass and canvass. (Board's 7/28/23 Memorandum of Law, p. 6). It is treated by the Board's staff as if the ballot was not received at all. *Id.* Then, the voter may vote their replacement ballot;

13. The Board also provided this Court with additional protections afforded by the provisional ballot challenge hearing process. These include:

a. "The Board schedules and holds a provisional ballot challenge hearing within seven days of each primary or election. *See* 25 P.S. § 3050(a.4)(4);

b. Prior to the hearing, the Board checks all provisional ballots against Election Day poll books and by-mail ballots to determine if each voter who voted provisionally also voted a different way;

c. The Board also collects the names and addresses of each voter who cast a provisional ballot in Delaware County and makes those available to party leaders and candidates;

d. The Board further publishes all mail-in and absentee voters on its website. Therefore, ahead of the hearing, representatives and the Board, and any other interested party, can confirm that voters have not cast a provisional ballot and also voted in some other way."

(Board's 7/28/23 Memorandum of Law, p. 7).

14. With these safeguards in place, Respondent shall count Petitioners' provisional ballots submitted at their respective polling places on Primary Election Day, May 16, 2023, and amend the official vote count from the May 2023 Primary Election to include the votes indicated on Petitioners' provisional ballots.

BY THE COURT:

JOHN J. WHELAN, J.