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108 MM 2024

IN THE SUPREME COURT OF PENNSYLVANIA

No. 108 MM 2024

Republican National Committee and Republican Party of Pennsylvania, Petitioners,

v.

Al Schmidt, in his official capacity as Secretary of the Commonwealth, and All 67 County Boards of Elections
(See back of cover for list of County Respondents), Respondents.

APPLICATION TO INTERVENE OF PROPOSED INTERVENORS-RESPONDENTS DEMOCRATIC NATIONAL COMMITTEE AND PENNSYLVANIA DEMOCRATIC PARTY

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Respondents.

I. INTRODUCTION

Proposed Intervenors-Respondents, the Democratic National Committee ("DNC") and the Pennsylvania Democratic Party ("PDP" and collectively "Applicants") respectfully submit this application to intervene and to participate fully in this matter as intervenors-respondents. If permitted to intervene, the Applicants request to file the attached Response to Petitioners' Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction. (Attachment 1.)

Petitioners challenge the actions of the Secretary of State and county boards of elections across the Commonwealth to provide any notice to voters as to the status of their mail-in ballots, and the opportunity of the voters to cure any defect, or, alternatively, vote a provisional ballot on Election Day. The Election Code grants boards of election the authority "[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." 26 P.S. § 2642(f). Petitioners have asserted that, in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), this Court prohibited county boards of election from engaging in any notice and cure activity. Petitioners mischaracterize the decision in *Boockvar*, where this Court found only that "the Boards 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." *Id*. at 374

(emphasis added). Petitioners also launch a backdoor challenge to the Commonwealth Court's decision in *Genser v. Butler County Board of Elections*, No. 1074 C.D. 2024, No. 1085 C.D. 2024, 2024 WL 4051375, *15-16 (Pa. Commw. Ct. Sept. 5, 2024), *pet'n for appeal pending* (Pa. filed Sept. 8, 2024), in which the court held that the Election Code permits voters who submit defective mail ballots to vote provisionally and that provisional voting does not constitute a "cure" of a defective mail ballot.

The relief Petitioners request would significantly impede the ability of Democratic members and supporters to exercise their fundamental right to vote by isolating certain words from the Election Code to contort this Court's precedent and would prevent any election official at the state or county level from taking any action to facilitate those voters' participation in the election.

No party to this proceeding adequately represents Applicants' interests. Respondents have the duty to enforce Pennsylvania law, which is distinct from the Applicants' particularized interest in having their candidates assume office and its voters' ballots counted. Applicants' unique interests make intervention not just permissible, but mandatory. *See Larock v. Sugarloaf Twp. Zoning Hr'g Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

II. LEGAL STANDARD

Applications to intervene in original jurisdiction matters in the appellate courts are governed by Pennsylvania Rule of Appellate Procedure 1531(b), which mirrors the standards set forth in Pennsylvania Rules of Civil Procedure 2326-2350. Rule 2327 denotes four categories of persons or entities that may intervene "[a]t any time during the pendency of an action," including any person or entity that has "any legally enforceable interest" that may be affected by a judgment in the action. Pa. R.C.P. 2327(4). Rule 2329 provides certain grounds for refusal to permit the intervention of a person who fits within the parameters of Rule 2327, including that the person's interests are "already adequately represented." Pa. R.C.P. 2329(2). "Considering Rules 2327 and 2329 together, the effect of Rule 2329 is that if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present." *Larock*, 740 A.2d at 313. Even if a ground for refusal under Rule 2329 is present, this Court still possesses discretion to permit intervention. *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, 225 A.3d 902, 908 (Pa. Commw. Ct. 1999) (citing *Larock*, 740 A.2d at 313).

III. ARGUMENT

The DNC is a national committee (as that term is defined under 52 U.S.C. § 30101) dedicated to electing local, state, and national candidates of the Democratic Party to public office throughout the United States, including in Pennsylvania. The PDP is the DNC's coordinate party within the Commonwealth and is the largest political party by registration in Pennsylvania. As of September 16, 2024, 3,925,766 registered voters in Pennsylvania are members of the PDP. *See Voting & Election Statistics*, PA DEP'T OF STATE, *available at* https://www.pa.gov/en/agencies/dos/resources/voting-and-elections-resources/voting-and-election-statistics.html (last visited September 19, 2024). The PDP is a "major political party" as defined in the Pennsylvania Election Code. 25 P.S. § 2601. In each general, midterm, and municipal election, the PDP regularly nominates individuals for Pennsylvania's federal, state, and local offices. The DNC's membership and constituents in the Commonwealth include past and future individuals qualified to vote in the Commonwealth, and past and future candidates for offices across the Commonwealth. The DNC and PDP have dedicated significant resources to encourage its supporters and constituents to vote, including by mail. These voters require notification of any inadvertent and unknowing deficiencies within their mail and absentee ballots. Without notification and opportunity to cure or vote provisionally, these voters would be

disenfranchised under the policy Petitioners advance. Applicants thus each have a concrete interest in protecting their voters from disenfranchisement.

A. Applicants Have A Legally Enforceable, Particularized Interest In This Matter

Applicants have an interest in intervening in lawsuits regarding general election procedure. Both Pennsylvania state and federal courts have permitted political parties to intervene in cases addressing such procedure. *See e.g., Genser*, 2024 WL 4051375. At *2; *Pierce v. Allegheny Cnty. Bd. of Elections*, 324 F. Supp. 2d 684 (W.D. Pa. 2003). Applicants also have an interest in ensuring that its members are educated on notice-and-cure procedures across the Commonwealth and encouraging voters to cure deficient ballots, whether through curing the deficient ballot or submitting a provisional vote. Similarly, Applicants have an interest in ensuring that the votes of all of its members are counted. Finally, Applicants were a party in the Commonwealth Court's recent decision in *Genser v. Butler Cty. Bd. of Elections,* 2024 Pa. Commw. Unpub. LEXIS 479 (Pa. Commw. Ct. Sept. 5, 2024) and filed an amicus brief in support of appellees in *Center for Coalfield Justice v. Washington Cty. Bd. of Elections,* Docket No. 1172 C.D. 2024, currently before the Commonwealth Court. Petitioners raise and question both of these decisions.

B. Respondents Do Not Adequately Represent Applicants' Interests

Respondents do not share Applicants' interest in seeking to ensure that their candidates prevail and that their millions of members have the full opportunity to vote afforded by law. Respondents' duties are solely defined by Pennsylvania law, and they are bound to represent all Pennsylvanians. Respondents do not have any interest in which candidates win an election, nor do they have millions of members who will vote in this election by mail-in voting. This distinction between Applicants' interest ensuring the broadest access for their voters and election of their candidates and Respondents' interest in representing all Pennsylvanians and discharging their statutory duties is critical. *See City of Philadelphia. v. Commonwealth*, 838 A.2d 566, 578 (Pa. 2003) ("Petitioners' complaints stem from aspects of the bill under review that have particular application to Philadelphia. Therefore, Petitioners' interest in the outcome of the litigation . . . surpasses that of Pennsylvania citizens generally in procuring obedience to the law."); *see also Kleissler v. U.S. Forest Serv.*,157 F.3d 964, 972 (3d Cir. 1998) ("[W]hen the proposed intervenors' concern is not a matter of 'sovereign interest,' there is no reason to think the government will represent it[.]" (quotation marks omitted)).

Pennsylvania courts have consistently granted intervention (and reversed denials of intervention) where, as is the case here, intervenors were aligned with the government's litigation position but possessed unique and personal interests not

adequately addressed by government respondents. *See D.G.A. v. Dep't of Human Servs.*, 2020 WL 283885, at *7 (Pa. Commw. Ct. Jan. 21, 2020) (citing *Benjamin ex rel. Yock v. Dep't of Pub. Welfare*, 701 F.3d 938 (3d Cir. 2012)); *Larock*, 740 A.2d at 314.

C. Applicants' Interests In This Consolidated Matter Are Broader Than Petitioners' Asserted Interests

Applicants' interests here exceed in scope those Petitioners assert. Petitioners are the Republican National Committee and the Republican Party of Pennsylvania who have associational interests with Republican candidates and registered Republican voters. Applicants' interest in seeking to elect their own Democratic candidates and ensure the right to vote of millions of their own members is not shared by Petitioners. To the extent Petitioners have standing to adjudicate the Secretary and county board of elections' use of notice-and-cure methods, so too do Applicants.

D. Intervention Is Uniquely Appropriate In These Circumstances

Even if the Court were to find that one of the bases in Rule 2329 for refusing intervention is met, "the court is given the discretion to allow or to refuse intervention [] where the petitioner falls within one of the classes enumerated in Rule 2327." *Allegheny Reprod. Health Ctr.,* 225 A.3d at 908. This dispute presents a compelling case for allowing intervention. The widespread use of mail ballots in Pennsylvania during 2020's election cycle demonstrated that millions of residents of

the Commonwealth, many of whom are registered Democrats, preferred to vote by mail. In fact, as of September 19, 2024, 63% of the approved applications for a mail-in ballot for the 2024 General Election have come from registered Democrats. *See Daily Mail Ballot Report,* PENNSYLVANIA DEPT. OF STATE, *available at* https://www.pa.gov/en/agencies/vote/elections/elections-data.html (last visited September 19, 2024). Imposing a significant burden on the most fundamental of all rights should not be undertaken lightly. Permitting Applicants to intervene would help ensure that this Court's decision is made with the benefit of a full airing of views.

E. Applicants' Intervention Will Not Affect The Schedule Set Forth In This Consolidated Matter

Applicants are prepared to present their Brief in Opposition to Petitioners' Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction, concurrently with the brief due from Respondents, and in that filing present all of Applicants' arguments relevant to this consolidated litigation. Accordingly, no alterations would need to be made to accommodate Applicants' intervention.

IV. CONCLUSION

The application of the DNC and the PDP to intervene should be granted.

Respectfully submitted,

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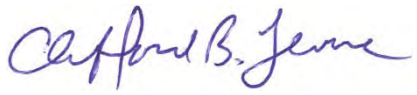
September 20, 2024

CERTIFICATE OF COMPLIANCE

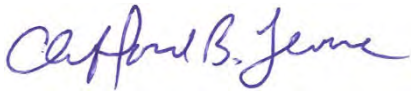
This filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.



CLIFFORD B. LEVINE

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served upon all counsel of record on September 20, 2024, by this Court's electronic filing system.



CLIFFORD B. LEVINE

IN THE SUPREME COURT OF PENNSYLVANIA

No. 108 MM 2024

Republican National Committee and Republican Party of Pennsylvania,

Petitioners,

v.

Al Schmidt, in his official capacity as Secretary of the Commonwealth, and All 67 County Boards of Elections
(See back of cover for list of County Respondents),

Respondents.

PROPOSED INTERVENORS-RESPONDENTS DEMOCRATIC NATIONAL COMMITTEE AND PENNSYLVANIA DEMOCRATIC PARTY'S APPLICATION TO INTERVENE

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Respondents.

[PROPOSED] ORDER GRANTING THE APPLICATION TO INTERVENE OF THE DEMOCRATIC NATIONAL COMMITTEE AND THE PENNSYLVANIA DEMOCRATIC PARTY

AND NOW, this ___ day of _____, 2024, and upon consideration of the application to intervene filed by the Democratic National Committee ("DNC") and the Pennsylvania Democratic Party ("PDP"), it is hereby ORDERED that the application is GRANTED. The Court DIRECTS the Prothonotary to enter the DNC and the PDP on the docket in this matter as an intervenors-respondents.

BY THE COURT:

_____, J.

s

ATTACHMENT 1

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 108 MM 2024

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, in his official capacity as Secretary of the Commonwealth, and ALL 67 COUNTY BOARDS OF ELECTION (See inside cover for list of County Respondents),

Respondents.

RESPONSE OF PROPOSED INTERVENORS-RESPONDENTS THE DEMOCRATIC NATIONAL COMMITTEE AND THE PENNSYLVANIA DEMOCRATIC PARTY TO PETITIONERS' APPLICATION FOR THE EXERCISE OF KING'S BENCH POWER OR EXTRAORDINARY JURISDICTION

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Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

DOCKETED CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

Since 2019, the Pennsylvania Election Code has given all voters in the Commonwealth the right to vote by mail. The code also gives every Pennsylvania voter the right to submit a provisional ballot in person on election day if the voter's mail-ballot package is deemed defective. Provisional ballots, as permitted under the code since 2002, provide a fail-safe mechanism to ensure that every qualified registered voter who wishes to exercise the franchise has the ability to submit one (and only one) ballot that will be counted. These twin statutory mechanisms—the right to vote by mail and the fail-safe protection of voting by provisional ballot—serve the fundamental "purpose and objective of the Election Code, which … is '[t]o obtain freedom of choice, a fair election and an honest election return.'" *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) ("*Boockvar*") (quoting *Perles v. Hoffman*, 213 A.2d 781, 783 (1965)).

Petitioners, the Republican National Committee and the Republican Party of Pennsylvania, ask this Court to upend that statutory regime on the eve of the 2024 election. Their request is based on a blinkered reading of the Election Code, a contorted reading of this Court's precedent, and a misguided effort to equate the Commonwealth-wide statutory *right* to vote provisionally, *see, e.g.*, 25 P.S. §3150.16(b)(2), with the option to "cure" defects evident on the face of a mail-

ballot package, which some counties choose to *permit* under their legislatively conferred authority to administer elections within their borders, *see id.* §2642(f).[1]

Make no mistake, the outcome petitioners seek is clear: A ruling that registered and qualified voters in Pennsylvania who try to exercise their fundamental right to vote but who err in submitting their mail ballot irretrievably forfeit that right, with no official in the Commonwealth having any power to prevent the resulting disenfranchisement. Under that regime, if a registered and eligible Pennsylvania voter who submitted a mail ballot today inadvertently omitted the secrecy envelope, a signature, or the date, she could not be told of the error and between now and Election Day (a period of more than six weeks) would be forbidden from taking any step to cast a vote that will count. That is not—and never has been—the law of Pennsylvania, and such a ruling would be wholly inconsistent with the paramount purpose of obtaining "freedom of choice, a fair election and an honest election return." *Boockvar*, 238 A.3d at 356. This effort to impede citizens of the Commonwealth from participating in our democracy should be rejected.

This Court should also recognize the effort for what it is. Until 2020, voting by mail in the many states that allowed it was a bipartisan exercise to increase electoral participation, equally preferred by Republican and Democratic

[1] Like the application, this opposition uses "mail ballot" to mean mail or absentee ballot, save where the text or context indicates otherwise.

voters. Stewart, *How We Voted in 2020*, MIT Election Data & Science Lab (Mar. 2021), https://tinyurl.com/5ba6zdrb. But, in 2020, Donald Trump began falsely stating again and again and again (as he does to this day) that such voting is somehow problematic and convinced many Republican voters not to do it. *See, e.g.*, @realDonaldTrump, Truth Social (Sept. 8, 2024 3:15 PM), https://truthsocial.com/@realDonaldTrump/posts/113103530713220883 ("20% of the Mail-In Ballots in Pennsylvania are fraudulent. Here we go again! … We will WIN Pennsylvania by a lot, unless the Dems are allowed to CHEAT. THE RNC MUST ACTIVATE, NOW!!!). As a result, the act of voting by mail is now a partisan signal—more Democratic-supporting voters do so than Republican-supporting. Petitioners know this dynamic well, and rather than earning the votes of a majority of Pennsylvanians, they would prefer to contort the Election Code to disqualify tens of thousands of qualified mail voters, believing that the overwhelming majority of them will be Democrats. This Court—and the Pennsylvania court system as a whole—should not be used for such a baseless and nakedly partisan exercise.

There is also no need for an exercise of this Court's King's Bench power or extraordinary jurisdiction. As petitioners acknowledge, a case in which this Court granted review today addresses closely related issues: *Genser v. Butler County Board of Elections*, No. 240 WAL 2024 (Pa. S. Ct.). There, the Commonwealth Court considered how the portions of the Election Code that address mail voting and provisional voting fit together, and held after doing so

that a Pennsylvania voter who casts a defective mail ballot has a statutory right to vote provisionally on Election Day. *Genser v. Butler County Board of Elections*, 2024 WL 4051375, *15-16 (Pa. Commw. Ct. Sept. 5, 2024), *petition for appeal granted* (Pa. Sept. 20, 2024). That decision is correct and rests on a developed record. This application is an end run around it. When it is affirmed that these voters have a statutory right to cast a provisional ballot on Election Day, county boards of election will provide the information voters need in order to decide whether they should exercise that right. They will do so because not doing so—or, worse, actively misleading voters by suggesting that their mail ballot will be counted when it will not be (as petitioners here urge)—would be inconsistent with the Election Code and long settled principles of due process, as another decision on appeal (to the Commonwealth Court) has held. *Center for Coalfield Justice v. Washington County Board of Elections*, No. 1172 C.D. 2024 (Pa. Commw. Ct.) ("*CCJ*") (appeal of the Republican National Committee and Republican Party of Pennsylvania pending).

The uniformity concerns that petitioners purport to raise can thus be readily resolved by an affirmance of *Genser*, including a clear holding that county boards may not impede voters' right to vote provisionally. There is no need for petitioners to circumvent those cases or to short-circuit the ordinary litigation process with a hasty King's Bench petition, filed just as mail ballots are being sent to voters throughout the Commonwealth.

Should the Court deem King's Bench jurisdiction appropriate, however, it should resolve petitioners' claims together with *Genser* and (via an exercise of extraordinary jurisdiction) *CCJ* as well. Doing so would ensure that the Court is presented with actual issues, on an actual record, which call into stark relief petitioners' efforts to contort the Election Code to deny the franchise to tens of thousands of Pennsylvania voters. In other words, any exercise of the Court's King's Bench jurisdiction should be undertaken so as to permit the Court to resolve all the relevant issues together.

STATEMENT OF THE CASE

A. Provisional Voting Under HAVA And The Election Code

1. The Help America Vote Act

In 2002, Congress enacted the Help America Vote Act ("HAVA"), 52 U.S.C. §§20901 *et seq*., to ensure that all states "afford each registered and eligible voter an equal opportunity to vote and to have that vote counted," *id.* §20981(a)(3). HAVA was enacted in response to the significant number of eligible voters who were denied their right to vote in the 2000 presidential election due to various procedural errors. *See Banfield v. Cortes*, 110 A.3d 155, 160 (Pa. 2015).

HAVA mandates that states give voters the opportunity to vote provisionally. *See* 52 U.S.C. §21082. A voter who signs an affirmation that he or she is registered to vote in the jurisdiction and eligible to vote "shall be" permitted to cast a provisional ballot." *Id.* §21082(a). Provisional ballots are

intended to provide "a fail-safe mechanism for voting on election day," even when voters themselves make an error. 148 Cong. Rec. S10488, S10496 (daily ed. Oct. 16, 2002) (Sen. Durbin). A House report accompanying HAVA explained that "provisional voting is necessary to the administration of a fair, democratic, and effective election system, and represents the ultimate safeguard to ensuring a person's right to vote." H.R. Rep. No. 107-329(I), at 37 (2001).

2. Provisional Voting Under The Election Code

Following HAVA's enactment, the General Assembly amended the Election Code to provide for provisional ballots in Pennsylvania. 25 P.S. §3050. Voters who believe that they are properly registered and eligible, but whose eligibility is in doubt, may vote provisionally in person on election day. *Id.* §3050(a.4)(1). Within seven days of election day, the county board of elections must determine whether the voter was entitled to vote. *Id.* §3050(a.4)(4).

As relevant here, the code provides that an individual who requested a mail ballot and "is not shown on the district register as having voted may vote by provisional ballot." 25 P.S. §3150.16(b)(2). A county board of elections to which a provisional ballot is submitted "shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election." *Id.* §3050(a.4)(5)(i).

B. The SURE System

Also in 2002, the General Assembly directed the Department of State to implement "a single, uniform integrated computer system," known as the

Statewide Uniform Registry of Electors ("SURE") system. 25 Pa. C.S. §1222(a), (c) (effective May 16, 2002). The General Assembly also directed that "[t]he secretary shall promulgate regulations necessary to establish, implement and administer the SURE system," which "shall include … [u]niform procedures for … the process and manner of entering information into the SURE system[and] the type and form of information to be entered." *Id.* §1222(f)(1). All counties are required to be "connected electronically to the SURE system" and to "maintain their registration records in the system." *Id.* §1222(c). The statutory provisions that established the SURE system require each county to use the SURE system as its general register. *Id*. §1222(e). The data that counties must enter into the SURE system includes data identifying "registered electors who have been issued absentee ballots," *id.* §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).

C. Voting By Mail in Pennsylvania

1. Adoption Of Act 77

In 2019, with Act 77, the Pennsylvania General Assembly adopted "no excuse" mail voting, amending the Election Code to give all Pennsylvanians who are registered to vote the right to vote by mail. *See McLinko v. Department of State*, 279 A.3d 539, 544 (Pa. 2022), *cert. denied sub nom. Bonner v. Chapman*, 143 S. Ct. 573 (2023). To exercise that right, voters must complete several steps. *See generally* 25 P.S. §§3150.1 *et seq*. After receiving and filling out a mail

ballot, the voter must place it into a secrecy envelope, seal that envelope and then place the sealed secrecy envelope into the pre-addressed return envelope. *Id.* §3150.16(a). The outer, "declaration" envelope contains the voter declaration and spaces for the voter to sign and handwrite the date. *Id.* Voters must return their completed ballots to their county board of elections, either by taking their ballots to a board-prescribed location or by mailing them. *Id*. Mail ballots are not counted if the voter does not sign or correctly date the ballot's return envelope or if the inner secrecy envelope is missing. *See Ball v. Chapman*, 289 A.3d 1, 20-23 (Pa. 2023); *Boockvar*, 238 A.3d at 380.

Whether the mistake involves the outer envelope or the absence of a secrecy envelope, mail ballot defects are apparent to election officials upon receipt.[2] In every election since the implementation of no-excuse mail voting, thousands of voters across the Commonwealth have made disqualifying errors when submitting their mail ballots.

[2] The absence of a secrecy envelope can be detected through a hole punched in the declaration envelope allowing election personnel to determine whether the mail ballot includes the yellow secrecy envelope without opening the declaration envelope. *See* Pennsylvania Department of State, *Directive Concerning the Form of Absentee and Mail-In Ballot Materials, Version 2.0*, at 2, 4 (July 1, 2024). For counties that elect not to use the hole punch, the absence of a secrecy envelope is determined prior to election day through the use of a machine that sorts the ballot envelopes and evaluates the dimensions and weight of the returned envelopes. *See Genser v. Butler County Board of Elections*, No. 1074 C.D. 2024, No. 1085 C.D. 2024, 2024 WL 4051375, *3 (Pa. Commw. Ct. Sept. 5, 2024)*, pet'n for appeal granted* (Pa. granted Sept. 20, 2024).

2. Use Of The SURE System In Receiving Mail Ballots

Following the adoption of Act 77 and the expansion of mail voting, the SURE system was adapted to address the receipt of mail ballots in addition to absentee ballots. Upon receipt of an envelope containing a mail ballot, a county election worker scans the envelope into the SURE system and records certain information regarding the envelope. *See* 25 P.S. §3150.17. The SURE system provides each voter a unique identification bar code, which is used to track the date when the board of elections receives the voter's mail ballot packet. This information is essential to the mail voting process because it identifies specifically whether the voter has been sent a mail ballot, whether the voter returned a mail ballot packet, and the date when the board of election received the packet. *Id.* §§3150.17 (b) (4) & (5)

The Secretary provides codes that the county boards of elections are able to use to identify how each ballot was treated, with 23 coding options that an election worker may use when scanning a ballot into the SURE system. Department of State, Statewide Uniform Registry of Electors (SURE) Project, B 23.9.0_County Release Notes, March 11, 2024 (A73-A77). These include codes for "accepted," "cancelled," "cancelled for declaration-envelope error" and "cancelled for lack of a secrecy envelope." *Id.* Use of these codes allow voters to follow the status of their ballot on the Department of State's "Track My Ballot" website, the maintenance of which is the norm in the United States. *See Track Your Ballot or Ballot Application*, Vote.Org, https://www.vote.org/ballot-

tracker-tools. Ballot status can also be made publicly available to requestors, allowing political parties and voting rights organizations to notify voters of their ballots' status.

Use of a specific ballot status code also triggers the transmission of a corresponding automatic email notification through the SURE system to the voter (if the voter file contains the voter's email address). *Id.* For example, the SURE system code for "cancelled for no signature on the declaration envelope" triggers an automatic email to the voter that explains that the mail ballot may not count because of the error and that the voter may "go to your polling place on election day and cast a provisional ballot." *Id.* (A76). A more fulsome discussion of SURE coding is provided below. *See infra* §II.

D. Notice-And-Cure Procedures, As Permitted In *Boockvar*

In *Boockvar*, this Court considered various issues associated with the new, no-excuse mail voting provisions added to the Election Code by Act 77, including whether the Court could direct each county board to adopt notice and post-election cure procedures for defective mail ballots. Petitioners in that case asked this Court to *direct* county boards to adopt a system to notify voters of mail-ballot defects; and likewise to *direct* county boards to allow voters to address those defects during a seven-day period after election day. *See Boockvar*, 238 A.3d at 372. Petitioners there argued that the constitution and Election Code placed these affirmative obligations on county boards. *See id*. at 373. The Court disagreed, holding that it could not place an affirmative notice mandate on county boards;

nor could the Court mandate any particular cure process, especially not one that extended after the election. The Court did not address, however, whether county boards could voluntarily notify voters that they had submitted deficient ballots and allow them to take pre-election steps to address the deficiency; the Court certainly did not prohibit counties from taking such steps. *See id*. at 374. *Boockvar* also did not consider the use of the SURE system with respect to mail ballots and did not address the code's provisional balloting requirements.

The Election Code grants boards of election the authority "[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." 25 P.S. §2642(f). Thus, the code empowers the county boards to provide guidance to electors.

E. "Pre-Canvassing" Under The Election Code

The Election Code defines "pre-canvassing" as "the 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 reflected on the ballots." 25 P.S. §2602(q.1) (emphasis supplied). The code does not permit boards to commence the described pre-canvassing activities prior to 7 a.m. on election day. *Id.* §3146(g)(1.1). Boards cannot disclose the result of any pre-canvass meeting prior to the close of the polls. *Id.*

No provision of the Election Code prevents election officials from reviewing mail ballots upon receipt. To the contrary, the code explicitly requires them to do so. County boards are obligated to keep track of the mail ballot and applications for several reasons. First, as noted, counties must record the date the ballot is received. 25 P.S. §3150.17(b)(5). Second, counties must update poll books—prior to election day—to "identify electors who have received and voted mail-in ballots." *Id.* §3150.16(b)(1). Third, challenges that a voter is not a qualified elector must be made to the county board prior to 5:00 p.m. on the Friday before the election. 25 P.S. §3146.2b(a). Fourth, if proof of an elector's death prior to the opening of the polls is available, the canvassers must reject the mail ballot of the deceased elector, which requires that the board find and remove the ballot in a room of tens of thousands of them. *Id.* §3146.8(d). In addition, the board should segregate ballots that may be deficient and place those ballots with similar ballots in anticipation of a post-election day review. *See, e.g.*, Pennsylvania Department of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes, Version 4.0*, at 3 (Apr. 3, 2023), https://tinyurl.com/5n8hsk2j.

F. *Genser v. Butler County*

The Commonwealth Court recently considered whether a voter who has submitted a defective mail ballot may vote provisionally and have that vote counted. *Genser*, 2024 WL 4051375, at *15-16. The Commonwealth Court considered and rejected the argument—now repeated by the very same petitioners

here—that provisional ballots are a form of notice and cure and that *Boockvar* somehow precluded the counting of provisional ballots where a voter had submitted a defective mail ballot. *Id.* at *16. The court correctly determined that "[t]he provisional ballot is a separate ballot, not a cured initial ballot" and noted that *Boockvar* addressed provisional voting only tangentially and not in the context of notice and cure. *Id.*

EXERCISING KING'S BENCH POWER OR EXTRAORDINARY JURISDICTION IS UNNECESSARY

As a threshold matter, petitioners' application should be denied because the problem that petitioners say warrants an exercise of King's Bench jurisdiction simply does not exist.

Petitioners ask this Court to override the "ordinary process of law" (App.19) because it is unclear (they claim) whether the Election Code permits voters to cast a provisional ballot that will be counted in lieu of a mail ballot that has been deemed defective—and they argue that this supposed lack of clarity will make the upcoming elections disuniform and constitutionally suspect. Specifically, petitioners argue that voters whose mail ballots are disqualified cannot lawfully cast a provisional ballot and that the Election Code forbids counties from counting any such ballots; they relatedly contend that county boards of elections may *not* inform voters that their mail ballots have been disqualified because of a defect with a ballot's envelope. Petitioners seem to assert that the General Assembly specifically intended to place an eligible voter

who makes a correctable mistake in submitting a mail ballot into a purgatory, where the voter cannot exercise the most fundamental right in the Commonwealth—the right to vote. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 802-814 (Pa. 2018).

But petitioners are wrong, both on the merits of these points and in claiming there is uncertainty about them. To the contrary, courts have (rightly) rejected petitioners' position. *See Genser*, 2024 WL 4051375; *CCJ*, No. 1172 C.D. 2024. The law is thus clear: Voters whose mail ballots are facially defective are permitted to vote provisionally on election day; and the SURE system may be used to gather and transmit to voters and election officials the information they need to ensure that such provisional ballot may be cast.

To the extent there *is* any ambiguity about the law, moreover, granting petitioners' application is unnecessary. As explained, cases now pending before this Court (*Genser*) and the Commonwealth Court (*CCJ*) present the same statutory construction issues the application implicates. Those cases, which have developed factual records and decisions from lower courts, offer more appropriate vehicles for this Court to consider petitioners' claims, if it deems doing so appropriate.

If, however, the Court grants petitioners' application, it should at the same time grant review in *Genser* and exercise its extraordinary jurisdiction over *CCJ* too, so that the closely related issues presented in the three cases can be resolved

simultaneously and this Court can benefit from the fully developed records in those cases.

ARGUMENT

I. COUNTING PROVISIONAL BALLOTS THAT ARE TIMELY SUBMITTED BY VOTERS WHOSE MAIL BALLOTS WERE DISQUALIFIED IS LAWFUL

The lynchpin of the Republican effort to disenfranchise eligible Pennsylvanians is their claim that Pennsylvania law prohibits counting a provisional ballot that is timely submitted by an eligible voter whose mail ballot is not counted because of some mistake the voter made in submitting it. App.42-51. As the Commonwealth Court held in *Genser*, that claim is baseless. The Election Code serves to ensure that qualified and registered voters who seek to exercise the franchise can have one ballot counted in an election, not more and not fewer. Consistent with that purpose, if a voter's mail ballot has been disqualified, the person is entitled to cast a provisional ballot that will be counted. And contrary to petitioners' claim, that approach does not constitute the "curing" of the defective mail ballot.

A. The Election Code Requires County Boards To Count Provisional Ballots Submitted By Voters Whose Mail Ballots Will Not Be Counted

1. Petitioners' argument that the Election Code "prohibits a county board from counting a provisional ballot submitted by a voter whose defective mail ballot the board timely received" (App.42) is wrong. As *Genser* recognized, there are three relevant statutory clauses—two of which petitioners ignore

entirely—that together make clear the legislature's intent that such provisional ballots must be counted.

First, the provisional-ballot statute's "Casting Clause" mandates that "[e]xcept as provided in subclause (ii)," a county board "shall count" a voter's provisional ballot if "the individual did not cast any other ballot, including an absentee ballot, in the election." 25 P.S. §3050(a.4)(5)(i). In turn, subclause (ii)—the "Timely Received Clause"—provides that a voter's provisional ballot shall *not* be counted where, as relevant here, "the elector's absentee ballot or mail-in ballot is timely received by a county board of elections." *Id.* §3050(a.4)(5)(ii)(F). Finally, the "Having Voted Clause" states that "[a]n 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" the provisional-ballot statute. *Id.* §3150.16(b)(2) (emphasis added).

According to petitioners, matters begin and end with the Timely Received Clause, which they say shows that a provisional ballot submitted by a voter whose mail ballot has been disqualified cannot be counted—thereby disenfranchising the qualified and registered voter entirely. But *Genser* correctly rejected petitioners' myopic focus on the Timely Received Clause, *see* 2024 WL 4051375, at *16, consistent with this Court's instruction that courts "must always read the words of a statute in context, not in isolation," *Gavin v. Loeffelbein*, 205 A.3d 1209, 1221 (Pa. 2019); *see also Bold v. Department of Transportation, Bureau of Driver Licensing*, 2024 WL 3869082, at *5 n.43 (Pa. Aug. 20, 2024). Indeed,

"the principle of construing statutory parts harmoniously is … fundamental to [this Court's] methodology of statutory construction." *Commonwealth v. Office of Open Records*, 103 A.3d 1276, 1284 (Pa. 2014). It is also embodied in the Statutory Construction Act, which directs that "[e]very statute shall be construed, if possible, to give effect to all its provisions." 1 Pa. C.S. §1921(a); *see also Bold*, 2024 WL 3869082, at *4.

Applying these principles to the three clauses discussed above leaves no doubt that county boards must count provisional ballots timely submitted by voters whose mail ballots have been disqualified.

Start with the Having Voted Clause, which as noted provides that an individual who requested a mail ballot and "is not shown on the district register as having *voted* may vote by provisional ballot." 25 P.S. §3150.16(b)(2) (emphasis added). That clause was added to the Election Code in 2019 by Act 77, *see* Act of Oct. 31, 2019, P.L. 552, No. 77, §§6, 8, as part of legislative revisions designed "to tether the statutory right to vote by provisional ballot to not just the *receipt* of a mail-in or absentee ballot, but also to whether that ballot was *voted*," *Genser*, 2024 WL 4051375, at *13 (first emphasis added). Similar uses of "voted" or a variant were likewise added by Act 77 to nearby provisions of the code. These include a provision adjacent to the Having Votes Clause that provides that an individual "who receives and *votes* a mail-in ballot … shall not be eligible to vote at a polling place on election day." *Id.* §3150.16(b)(1) (emphasis added). Another such tethering revision was made in 2020, when the

legislature added the word "voted" to provisions regarding mail ballots, so that they now require ballots to say that a person "who receives [a mail] ballot … and whose *voted* ballot is not timely received" by the county "may only vote on election day by provisional ballot." 25 P.S. §§3146.3(e), 3150.13(e) (emphasis added). Prior to 2020, the statute referred only to a "timely received" ballot. *See* Act of Mar. 27, 2020, P.L. 40, No. 12, §§9, 12.1.

The General Assembly's choice to affirmatively add these various uses of "votes" and "voted" reflects a legislative judgment that a county board may *not* refuse to count a provisional ballot just because the board timely received either an empty envelope or an invalid mail ballot. Voters are ineligible to cast a provisional ballot only if they sent mail ballots that were timely received and actually counted by the board.

That construction is consistent with the Election Code's purpose of making sure that qualified and registered voters who want to vote can have one (but only one) ballot counted in an election. And any other reading of the statutory term "vote" ignores the legislature's 2019 and 2020 amendments providing that a voter's mail ballot must be *voted*, not merely timely received, for a board to reject the voter's otherwise-valid provisional ballot. So construed, the Having Voted Clause requires a board to count a voter's provisional ballot unless the voter's mail ballot was in fact counted.

The Casting and Timely Received Clauses, meanwhile, can—and therefore "must," *Gavin*, 205 A.3d at 1221—be read harmoniously with this reading of the Having Voted Clause.

Take the Casting Clause first. As *Genser* noted, "[f]or a ballot to be *cast* may mean merely that it was 'deposited,' but it may also entail 'giv[ing] a *vote*,' which implies that the vote itself—not just the paper that records it—is validly cast." 2024 WL 4051375, at *13. The latter meaning best harmonizes the Casting Clause with the Having Voted Clause: Consistent with the Election Code purposes just recited (one and only one ballot), the Casting Clause should be read to require a board to count a voter's provisional ballot if the voter did not submit any other ballot that was *counted*. And that fits with the Having Voted Clause, which as discussed likewise requires a board to count a provisional ballot if the voter has not "voted"—meaning has not submitted another ballot that was counted.

Contrary to petitioners' contention (App.49), interpreting "cast" to denote that a ballot was counted is consistent with the term's ordinary meaning as well as its use throughout the Election Code. Indeed, other subdivisions of §3050(a.4) that prescribe which ballots count clearly use "cast" to refer to ballots that are counted. For example, §3050(a.4)(4)(vii) states: "Upon completion of the computation of the returns of the county, the votes cast upon the challenged official provisional ballots shall be added to the other votes cast within the county." This subsection concerns the tallying of votes, so ballots that are "cast"

means ballots that were counted, not ballots that arrived but were discarded. Likewise, the code requires officials to, "in each case of a return from a district in which ballots were used, read therefrom the number of ballots … issued, spoiled and cancelled, and cast, respectively." 25 P.S. §3154(c). This provision distinguishes between ballots that are "spoiled and canceled" (which do not count towards the vote) and ballots that are "cast" (which do count). The code also requires an automatic recount when a "candidate … was defeated by one-half of a percent or less of the votes cast for the office," *id.* §3154(g)(1)(i); again, votes that were "cast" are votes that were counted. Finally, the code directs the Secretary of the Commonwealth, after tabulating results, to "prepare a statement from the said returns, showing the total number of votes cast in the State and in each congressional district of the State for each political party for nomination as President of the United States." *Id.* §3162. The code is obviously not directing the Secretary to prepare a statement including votes conveyed in canceled ballots.

The Timely Received Clause likewise can (and hence must) be read in harmony with this construction. That clause directs a board not to count a voter's provisional ballot where "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). To be sure, unlike "voted" and "cast," the isolated term "timely received" cannot be read as referring to counted ballots. As *Genser* noted, "*received* obviously means 'to take into … possession (something offered or given by another)" or "to take delivery of (something) from another." 2024 WL 4051375, at *13. But the

relevant interpretive question centers on "the meaning of the thing that is to be received—the *ballot*." *Id*. And reading the "absentee ballot or mail-in ballot" mentioned in the Timely Received Clause as a *voted* or *cast* ballot, i.e., a ballot that will be counted, harmonizes this provision with the Having Voted and Casting Clauses. *See id.* Under this construction, all three provisions consistently direct boards *to count* a voter's provisional ballot when the voter has not already had another ballot counted and *to not count* a voter's provisional ballot when the voter has already had another ballot counted. Again, that is consistent with the Election Code's one-counted-ballot-per-voter purpose.

2. To the extent there is ambiguity in the meaning of the Having Voted, Casting, and/or Timely Received Clauses, *Genser* correctly held that such ambiguity must be resolved in favor of counting provisional ballots submitted by voters whose mail ballots will not be counted. Every relevant principle of statutory interpretation supports that conclusion.

First, resolving any ambiguity in favor of counting provisional ballots advances "[t]he object to be attained" by the provisional-voting statute, 1 Pa. C.S. §1921(c)(4)); *see also Bold*, 2024 WL 3869082, at *5. That statute is designed to (1) provide "a fail-safe mechanism for voting on election day," so that voters are not disenfranchised for either bureaucratic or voter error, 148 Cong. Rec. S10496 (2002) (Sen. Durbin), while (2) preventing provisional ballots from being a means of double-voting, *see* 25 P.S. §3050(a.4)(5). As explained, that purpose is served by interpreting the statute's various provisions as described above. i.e.,

as instructing boards that they *must* count a voter's provisional ballot when the voter has not had any other ballot counted in the election, and must *not* count a voter's provisional ballot if doing so would mean the voter would have two ballots counted in the election. Under petitioners' interpretation, by contrast, voters are unnecessarily denied the fail-safe mechanism of provisional voting.

Second, if the code is ambiguous, then the "venerable and well established" canon that "technicalities should not be used to make the right of the voter insecure," *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *5 (Pa. Sept. 13, 2024), forecloses petitioners' interpretation. As this Court has explained, there is a "longstanding and overriding policy in this Commonwealth to protect the elective franchise." *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004). For that reason, "[t]he Election Code must be liberally construed so as not to deprive … the voters of their right to elect a candidate of their choice." *Petition of Ross*, 190 A.2d 719, 720 (Pa. 1963). Thus, "*[e]very rationalization* within the realm of common sense should aim at saving the ballot rather than voiding it." *Appeal of Norwood*, 116 A.2d 552, 554-555 (Pa. 1955) (emphasis added). The interpretation adopted by *Genser* is consistent with these cases because it "sav[es]" votes, whereas the Board's position "void[s]" them, *id.* Because *Genser*'s reading is (at a minimum) a permissible interpretation of the statute, the canon in favor of liberally construing the Election Code dictates that reading.

Third, "[t]he consequences of [petitioners'] interpretation," 1 Pa. C.S. §1921(c)(6), cut against their reading. In particular, courts "must in all instances assume that the General Assembly does not intend a statute to be interpreted in a way that leads to an absurd or unreasonable result." *Boockvar*, 238 A.3d at 380 (citing 1 Pa. C.S. §1922(1)); *see also Bold*, 2024 WL 3869082, at *5. Here, petitioners' interpretation leads to just such results. For example, as even the court of common pleas in *Genser* recognized (in adopting these petitioners' position), that position requires county boards to "'treat a received Declaration Envelope as th[e] voter's return of their ballot, even if that Declaration Envelope is empty.'" *Genser*, 2024 WL 4051375, at *8 (cleaned up) (quoting the court of common pleas). In other words, petitioners' position is that a board has timely received a ballot even when it has received no ballot at all. That is a quintessentially absurd result that the General Assembly could not have intended.

Finally, the principle of constitutional avoidance supports the construction of the statute adopted by the Commonwealth Court in *Genser*. "When the validity of [a statute] is drawn in question, and if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Commonwealth v. Veon*, 150 A.3d 435, 443 (Pa. 2016). The

Statutory Construction Act codifies this rule, providing that "[i]n ascertaining the intention of the General Assembly in the enactment of a statute," it is presumed "[t]hat the General Assembly does not intend to violate the

Constitution … of this Commonwealth." 1 Pa. C.S. §1922(3). Even if the provisional-voting statute could be construed to disenfranchise voters whose mistakes cause their mail ballots to be canceled, that construction would (at a minimum) raise "a serious doubt" about its constitutionality under the state constitution's Free and Equal Elections Clause, Pa. Const. art. I, §5. That is because there is no compelling reason to disqualify a voter's provisional ballot when the voter's mail ballot is rejected as defective. Given that the statute can be construed in a way that avoids the need to resolve that constitutional question, this Court should do so.

B. A Provisional Ballot Is A Separate, Replacement Ballot Cast As A Failsafe—Not A "Cured" Mail Ballot

Aside from their flawed reading of the Timely Received Clause (and unjustified ignoring of the other relevant statutory provisions), petitioners incorrectly describe casting a provisional ballot as a means of "curing" a canceled mail ballot. App.42; *see generally* App.46-48. And the Election Code cannot require counting such provisional ballots, petitioners say, because *Boockvar* held that the code does not *require* boards to establish procedures for providing mail voters notice and an opportunity to cure defective ballots. This argument fundamentally misunderstands provisional voting.

As *Genser* explained, a "provisional ballot is a separate ballot, not a cured initial ballot." 2024 WL 4051375, at *16. Petitioners call this "a distinction without a difference," asserting that "[c]uring" as contemplated in *Boockvar*

applies not to a specific "ballot," but rather to a voter's opportunity to participate in an election at all, including "through provisional voting." App.48. That assertion finds no support in *Boockvar*. This Court did not address provisional voting in *Boockvar* when it declined to mandate that counties adopt notice-and-cure procedures; the question before this Court was whether counties must allow voters to "cure … facial defect[s]," 238 A.3d at 372—i.e., defects on the face of their initial *mail ballot envelopes*—not to whether they would be able to cast (entirely separate) provisional ballots in their place. Indeed, as *Genser* observed, *Boockvar* "only tangentially discussed provisional voting—the phrase appears only in a single sentence of that opinion," 2024 WL 4051375, at *16.

Put simply, by declining to require election boards to implement notice-and-cure procedures for *mail* ballots, this Court said nothing about whether boards must count (separate) *provisional* ballots cast to replace (not to cure) canceled mail ballots.

That interpretation not only harmonizes all relevant provisions. It also makes practical sense, giving counties clear guidance with no material disruption of existing election administration practices. Under this framework, counties will scan ballots to record the date received, §3150.17(b)(5), using accurate SURE codes to identify any signature, date, or secrecy envelope issues. The SURE system, in turn, will update poll book data to correctly identify who *voted* by mail prior to election day. §3150.16(b)(1). For those electors who tried but failed to vote by mail--due to signature, date, or secrecy envelope defects—the Secretary

will send an email informing them of their right to vote provisionally. That framework gives effect to all relevant statutory provisions, protects the franchise, and provides a clear, uniform, easily-administered framework for all 67 counties statewide.

II. THE ELECTION CODE REQUIRES COUNTIES TO CODE BALLOTS SO THAT THE SURE SYSTEM CAN CORRECTLY INFORM VOTERS OF THEIR STATUTORY RIGHT TO VOTE PROVISIONALLY IF THEY HAVE NOT CAST ANOTHER BALLOT IN THE ELECTION

Part of the relief petitioners request in their application is that this Court issue an order requiring election officials to *incorrectly* log in the SURE system (the Commonwealth's electronic-tracking system for ballots, *see supra* pp.6-7) many of the mail ballots that they receive. In particular, petitioners ask the Court (App.6, 57) to order that election officials give *all* mail ballots that are received the code that is intended for ballots that have no apparent disqualifying errors, i.e., intended for ballots that facially indicate they will be counted. These codes prompt an automatic email that tells voters that they are not permitted to vote a provisional ballot because they have already successfully vote in that election.

Petitioners make this request because when a ballot with an apparent error is given the correct code (the code denoting such an error), the voter can discern that she will need to cast a provisional ballot on election day to ensure that her vote will count—either through the "Track My Ballot" website or by an email informing her of the statutory right to submit a provisional ballot in person on election day.

Petitioners' request should be described plainly, because it is brazen. They ask this Court to order that county officials use the Commonwealth's tracking system to mislead voters so that they will be more likely to be disqualified from having their voice heard in the election and deprived of their statutory right to vote provisionally. No statute, no case, and no principle supports such a result.

A. SURE System Requirements Under The Election Code

The Election Code requires the Department of State to promulgate instructions for "administer[ing] the SURE system" including "[u]niform procedures for … entering information into the … system." 25 Pa.C.S. §1222(f). The Department has done so—including by providing codes for county boards to record in the system the status of mail ballots they receive. *See* Pennsylvania Department of State, *Changes to SURE VR and PA Voter Services as of March 11, 2024* ("*SURE Guidance*") at 6-11.

To record a ballot that is timely returned and has no apparent disqualifying errors, the Department instructs county boards to use the code "RECORD–BALLOT RETURNED." *SURE Guidance* at 10. When a voter's ballot is so coded in the system, the voter automatically receives an email from the Department of State informing him or her that, absent further notification stating otherwise, "you are no longer permitted to vote at your polling place location." *Id*. That message reflects the Election Code's provision—designed to prevent double voting—that "[a]ny elector who … votes a mail-in ballot … shall not be

eligible to vote at a polling place on election day." 25 P.S. §3150.16(b)(1); *see also* 25 P.S. §3146.6(b)(1) (same for absentee voters).

Other SURE codes are used for mail ballots with disqualifying errors, including "NO DATE," "INCORRECT DATE," "NO SECRECY ENVELOPE," and "NO SIGNATURE." *SURE Guidance* at 8-9. These codes are generally referred to as "CANC" codes, with "CANC" a shorthand for "canceled." A voter whose ballot is given a "CANC" code receives an email from the Department of State informing stating that her ballot "may not be counted" or "will not be counted," depending on the deficiency. *Id.* at 6-9. Consistent with the Election Code's provision that "[a]n elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot," 25 P.S. §3150.16(b)(2); *see also* 25 P.S. §3146.6(b)(2) (same for absentee voters), the email triggered by a "CANC" code further notifies the voter that "you can go to your polling place on election day and cast a provisional ballot," *SURE Guidance* at 6-9. As for voters in counties that offer the opportunity to cure, their ballots are coded as "PEND" (for pending), and they receive a similar email, but are also advised by the email that "[y]our county offers you the opportunity to fix your ballot envelope[s]" and are directed to a URL for more information. *SURE Guidance* at 6-7.

B. Accurate Use Of SURE System Codes Is Essential

To preserve the statutory right to vote provisionally, it is important that county boards use *accurate* SURE codes, because the board's coding determines

(as just explained) whether a voter is notified that she may cast a provisional ballot or instead notified that she may not do so. But as explained, the relief petitioners seek would convert the SURE system from a tool that provides accurate information to voters about the status of their ballots—so as to maximize the chance that they will actually have a ballot counted in the election—into one that provides *misleading* information instead. Voters whose mail ballots were not going to be counted, and who thus have a right conferred by the state legislature to cast a provisional ballot, would have that fact deliberately concealed from them by government officials. Such relief should be soundly rejected, as government officials should not be in the business of deceiving the public, much less doing so in order to deprive them of fundamental rights. It should also be rejected because it would frustrate the fundamental purpose of the Election Code, which is to "'obtain freedom of choice, a fair election and an honest election return,'" *Boockvar*, 238 A.3d at 356.

III. COUNTIES HAVE THE AUTHORITY UNDER THE ELECTION CODE TO FACILITATE VOTING THROUGH NOTICE AND PRE-ELECTION CURE OF MAIL BALLOTS

A. The Legislature Has Given County Boards Broad Authority To Make Election-Related Rules And Regulations, Which Includes Regulations Permitting Voters To Cure Deficiencies With Their Mail Ballots

The General Assembly has commanded the county boards to "make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections

officers and electors." 25 P.S. §2642(f). Pursuant to that authority, some counties have for years notified their voters about an error with mail ballots and allowed those voters to cure the error so that they would not lose their fundamental right to vote. *See Republican National Committee v. Chapman*, 2022 WL 16754061, at *19 (Pa. Commw. Ct. Sept. 29, 2022), *aff'd by an equally divided court*, 284 A.3d 207 (Pa. 2022).[3] Indeed, the Democratic National Committee's and Pennsylvania Democratic Party's understanding is that some type of cure has regularly been available with absentee ballots for decades—although there is no factual record here on that (or anything else) because of petitioners' effort to circumvent cases like *Genser* and *CCJ* with their application.

Petitioners argue (App.38) that §2642(f) does not authorize these (or, apparently, any, in petitioners' view) practices, because such practices (petitioners say) are "inconsistent with law," *id.* That is so, petitioners assert (*id.*), because "the General Assembly has declined" to mandate them by law. That meritless argument rests on two assertions, each incorrect.

First, petitioners (App.46-51) reprise their misplaced reliance on *Boockvar*. As explained, *see supra* pp.10-11, that case addressed whether the Election Code or state constitution *mandated* that all counties provide notice-and-cure

[3] "An opinion of affirmance by an equally divided court has no precedential value." *Lower Bucks County Joint Municipal Authority v. Koszarek*, 244 A.3d 54, 65 n.15 (Pa. Commw. Ct. 2020) (citing *Commonwealth v. Covil*, 378 A.2d 841 (Pa. 1977)).

procedures, and it held only that the answer is no, i.e., that "the Boards are not *required to* implement a 'notice and opportunity to cure' procedure." 328 A.3d at 374 (emphasis added). This Court did not address whether counties are *permitted* by the Election Code (specifically, by §2642(f)) to provide voters an opportunity to cure facial defects before election day. Repeating the same mischaracterization of this Court's precedent does not change that precedent, or otherwise help petitioners.

Second, petitioners emphasize a legislative proposal that would have required all counties to adopt a form of notice and cure. *See* House Bill 1300, Regular Session 2021-2022. But that bill, which was vetoed because it was "ultimately … about restricting the freedom to vote,"[4] says nothing about counties continuing to inform their voters of the need to take an additional step to have their votes counted before election day. Moreover, "without the Governor's signature or a two-thirds vote of the House and Senate to override his veto, it is axiomatic that House Bill [1300] is 'just a bill,'" that is, "[no]thing more than a proposal." *Carter v. Chapman*, 270 A.3d 444, 483-484 (Pa. 2022) (Wecht, J., concurring). Other courts have likewise recognized that a "'single unenacted bill … is meaningless as an expression of legislative intent.'" *Native Village of Eklutna v. Alaska Railroad Corporation*, 87 P.3d 41, 48 n.36 (Alaska 2004)

[4] Memorandum from Tom Wolfe, Commonwealth of Pennsylvania Governor, to the Honorable House of Representatives, https://tinyurl.com/yzr5w82p (June 30, 2021).

(quoting *Troy Gold Industries, Ltd. v. Occupational Safety & Health Appeals Board*, 231 Cal. Rptr. 861, 868 n.6 (Cal. Ct. App. 1986)); *accord, e.g.*, *City of Flagstaff v. Mangum*, 793 P.2d 548, 554 (Ariz. 1990) (citing *Allen v. State ex rel. Board of Trustees of Oklahoma Uniform Retirement System for Justices & Judges*, 769 P.2d 1302, 1306 (Okla. 1988)). Petitioners cite no relevant contrary authority.

Next, petitioners argue (App.39) that §2642(f) merely authorizes county boards to issue clarifying "guidance." That argument is inconsistent with the plain statutory text, which directs counties to adopt not simply "guidance," but rather "rules, regulations and instructions … *for* the guidance" of voters, election officials, and others. *Id.* (emphasis added). Not surprisingly given the atextual nature of this argument, the argument also runs afoul of this Court's precedent. In *In re Canvassing Observation*, the Court recognized county boards' authority to "fashion[] … *regulations* governing" the minimum distance at which observers were required to observe the canvass even though "the Election Code d[id] not specify minimum" distance requirements, 241 A.3d at 351 (emphasis added). The Court explained that the General Assembly, "had it so desired, could have easily established … parameters" by which county boards must exercise their authority but that it "did not." *Id.* at 350. And courts, this Court continued, are not free to impose their own requirements "where the legislature has, in the exercise of its policy judgment, seen fit not to do so." *Id.* Instead, "the absence of" of a legislative rule setting the distance at which observers could sit

"reflect[ed] the legislature's deliberate choice to leave such matters to the informed discretion of county boards of elections, who are empowered by Section 2642(f)" to issue such rules as necessary to effect their responsibilities to administer county elections. *Id.* The same reasoning applies fully here.

In *Boockvar*, too, this Court recognized that the Election Code gives county boards discretion on how to administer elections (including facilitating voting) in light of local conditions. There, petitioners advanced the same argument as here: that where no "provision of the Election Code explicitly empowers a county board of election to establish" ballot drop boxes, county boards lacked the authority to collect ballots this way. 238 A.3d at 360. The Court rejected that argument, recognizing boards' authority to establish methods of voting not otherwise foreclosed by statute. *See id.*

Petitioners cite (App.40) a single case in which they claim this Court prohibited county boards from exercising their inherent authority in the face of legislative silence on an issue: *In re November 3, 2020 General Election*, 240 A.3d 591 (Pa. 2020). But the Court there identified "plain and unambiguous language" in the Election Code detailing procedures for authenticating ballots, along with a long history of "explicit" guidance from the General Assembly "whenever it has desired to require election officials to undertake an inquiry into the authenticity of a voter's signature. *Id.* at 608-609. It was because of that clear statutory language and lengthy history that the Court prohibited county boards from discarding ballots based on mismatched signatures (as discarding such

ballots risked disenfranchising voters). *Id.* at 750. Here, by contrast, the legislature has been silent on the issue of whether county boards may offer voters an opportunity to cure their ballots, *see supra* pp.27-28, and offering voters that option does not disenfranchise or discriminate against anyone, *see infra* pp.39-41.

Finally, petitioners claim (App.40-41) that construing §2642(f) to authorize notice-and-cure procedures both violates non-delegation principles and creates disuniformity that violates the Free and Equal Elections Clause and the federal Equal Protection Clause. That too is wrong. As explained in Part IV, there is no constitutional disuniformity problem here. And as to non-delegation, petitioners again engage in mischaracterization, claiming (App.42) that rejecting their position would mean that "county boards have unlimited discretion to adopt any rule … not expressly foreclosed by the Election Code, … with no instruction on how to use it." In fact, county boards' discretion under §2642(f) is not "unlimited," nor do they have "no instruction on how to use it." Rather, rules, regulations, and instructions issued under §2642(f) must be "not inconsistent with law," and they must be deemed "necessary for the guidance of voting machine custodians, elections officers and electors." The Court has upheld delegations far more sweeping, including to authorize decision-making for "public convenience or necessity," *Chartiers Valley Joint Schools v. County Board of School Directors of Allegheny County*, 211 A.2d 487, 497 (Pa. 1965), as "deem[ed] wise in the best interests of the educational system," or just as "reasonable," *William Penn*

Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269, 292-293 (Pa. 1975). Finally, petitioners are wrong that giving effect to the plain text of §2642(f) means the legislature is not making the required "basic policy choices" (App.42). Although petitioners notably fail to identify what basic policy choice they think is not being made by the legislature, presumably it is whether to allow notice-and-cure procedures. But by enacting a statute that by its clear terms authorizes such procedures, the legislature *has* made that choice.

B. The Review Of Mail-Ballot Envelopes Upon Receipt Is Not "Pre-Canvassing"

Petitioners argue (App.2-3) that notice-and-cure is beside the point, because for county election officials to even look at the face of a returned mail ballot constitutes impermissible "pre-canvassing." The plain language of the statute, other obligations imposed on county officials by the Election Code, and common sense all refute that argument.

Pennsylvania law defines pre-canvassing as a "meeting," 25 P.S. §3146.8(g)(1.1), at which election officials conduct "the 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 reflected on the ballots," *id.* §2602(q.1) (emphasis added), producing results that those "observing, attending or participating" cannot disclose, *id.* §3146.8(g)(1.1). None of that describes an initial review of mail-ballot envelopes to mark their receipt, identify any facial defect, and organize

them for processing on election day. That review involves no "meeting," *id.* §3146.8(g)(1.1); nor any "opening" of envelopes, and hence no "counting, computing and tallying of the votes reflected on the ballots," *id.* §2602(q.1). Petitioners attempt to rewrite "inspection and opening" to mean just "inspection." App.2-3. But they are not free to change what the law says just because what it says forecloses their argument.

The Election Code, in fact, *requires* county election officials to review and track mail ballots upon receipt. *See supra* pp.11-12. County boards must record the date a mail ballot is received, 25 P.S. §3150.17(b)(5); update poll books before election day to "identify electors who have received and voted mail-in ballots," *id.* §3150.16(b)(1); receive any challenges to a voter's mail ballot application by 5 pm the Friday before election day, *id*. §3146.2b(a); and reject mail ballots submitted by deceased voters, *id.* §3146.8(d). The Department of State, moreover, instructs that county boards "should have processes in place to record the return date, return method, *and ballot status*" for all mail ballots received. Pennsylvania Department of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes, Version 4.0*, at 2 (Apr. 3, 2023), https://tinyurl.com/5n8hsk2j (emphasis added). The boards are instructed that "ballots that have been administratively determined to be undated or incorrectly dated," should be "set aside and segregate[] from" valid ballots, which "should be approved for the pre-canvass or canvass unless the application was challenged" by the Friday before election day. *Id.* at 3-4.

Finally, it is antithetical to efficient and accurate election administration to prohibit county boards from doing nothing before 7 am on election day to sort received ballots. In the 2022 election, more than 1.4 million Pennsylvanians requested to vote by mail, and that number "significantly declined compared to 2020" when even more Pennsylvanians requested mail ballots due to the pandemic. *See* Huangpu, *1.4 million Pennsylvanians asked to vote by mail. Here's what that means for Election Week 2022 counting.*, Spotlight PA, https://tinyurl.com/2ve82wt9. Segregating facially deficient mail ballots upon receipt by the county board helps the pre-canvassing and canvassing process proceed smoothly and without delay.

IV. THERE IS NO CONSTITUTIONALLY PROBLEMATIC DISUNIFORMITY HERE

As discussed, the heart of petitioners' request for King's Bench jurisdiction is their claim that counties' use of notice-and-cure procedures (so that more registered and eligible Pennsylvanians can exercise their fundamental right to vote rather than being disenfranchised) creates unconstitutional disuniformity in the Commonwealth. That argument is doubly flawed: First, most of the disuniformity is caused by some counties' failure to comply with the Election Code. The proper remedy for that is not to declare a constitutional violation but to direct compliance by those counties, as laid out in Arguments I and II. Second, any disuniformity does not rise to the level of a constitutional violation.

A. Any Disuniformity Results From Counties' Unlawful Refusal To Follow The Election Code

Pennsylvania's Election Code permits every voter, statewide, both to cast a mail ballot and, should any ballot contain a disqualifying mistake, to vote via provisional ballot submitted in person on election day. *See supra* pp.14-25. The Commonwealth's mail-voting system thus complies with the federal Equal Protection Clause because it does not, "by … arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-105 (2000) (per curiam). Specifically, the code ensures that county boards of elections across the Commonwealth do not "use[] varying standards to determine what [i]s a legal vote." *Id.* at 107, *quoted in* App.41. Indeed, petitioners do not even *assert* that "the standards for accepting or rejecting … ballots might vary … from county to county." *Bush*, 531 U.S. at 106. Nor could they. Under current law, no county board counts *any* mail ballot that is submitted either (1) in an unsigned, undated, or misdated outer envelope, or (2) without being enclosed a secrecy envelope. *See Ball*, 289 A.3d at 22.

Instead, petitioners posit "a real prospect that *provisional* ballots will be tallied using different standards in different counties." App.5 (emphasis added). There is no basis for that speculation because, again, Pennsylvania law is clear: "[M]ail-in and absentee voters can vote by provisional ballot if they have not already voted an earlier ballot, as 25 P.S. §§3146.6(b)(2) and 3150.16(b)(2) provide," including because an "elector … made an earlier but unsuccessful

attempt to cast or vote a ballot." *Genser*, 2024 WL 4051375, at *16. The Commonwealth Court's "unreported panel decision" *In re Allegheny County Provisional Ballots in the 2020 General Election*, 2020 WL 6867946 (Pa. Commw. Ct. Nov. 20, 2020), does not undermine this clarity; *Genser* correctly explained why *Allegheny County*'s reasoning and hence its holding are infirm. 2024 WL 4051375, at *16. And were there any lingering doubt, an affirmance by this Court of *Genser* would eliminate it. Finally, if any county declines to count properly submitted provisional ballots in the upcoming election, it will be acting unlawfully, and the Election Code's statutory appeals process will suffice to ensure uniform treatment.[5]

For these same reasons, the Election Code (which applies uniformly in all 67 counties) and counties' election-administration practices satisfy the requirements for uniformity under Pennsylvania law (*see* App.29 (citing Pa. Const. art. VII §6)).

B. The Use Of Notice-And-Cure Procedures In Certain Counties Does Not Create Intrastate Variation Of Constitutional Significance

Petitioners are wrong to assert (App.31) that it violates the federal Equal Protection Clause for some county boards of elections to notify voters about disqualifying ballot-casting errors and/or permit those voters to cure such errors

[5] Similarly, if any county board systematically coded mail ballots in SURE to prevent voters from learning that their mail ballots have been disqualified, that board would be acting unlawfully. *See supra* pp.26-29.

before election day. Again, the Election Code ensures that any voter, in any county, who submits a mail ballot with a disqualifying error can nonetheless submit a provisional ballot that will be counted. *See supra* pp.14-25. Petitioners cite no precedent holding that the Equal Protection Clause prohibits local officials from running voter assistance programs or tailoring voting procedures to local conditions, nor any sound basis for this Court to embrace such a holding for the first time here.

Petitioners' equal-protection argument relies entirely on a fundamental misreading of *Bush v. Gore* (e.g., App.29-32). In *Bush*, "[t]he question before the court [wa]s *not* whether local entities, in the exercise of their expertise, may develop different systems for implementing elections"—as here. 531 U.S. at 109 (emphasis added). Instead, *Bush* considered "a situation where a state court with the power to assure uniformity ha[d] ordered a statewide recount with minimal procedural safeguards" that did not provide in its order "at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness [we]re satisfied." *Id.* Here, the Election Code already "assure[s] uniformity," "equal treatment[,] and fundamental fairness," *id.*, by requiring every county board to count a provisional ballot submitted by a voter whose mail ballot was disqualified.

Multiple federal courts have rejected petitioners' argument that the availability of notice-and-opportunity-to-cure procedures in some counties offends the Equal Protection Clause. "To be sure, counties vary in implementing

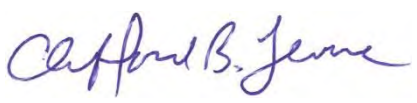
[the Election code's] guidance, but that is normal. Reasonable county-to-county variation is not discrimination." *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 F. App'x 377, 388 (3d Cir. 2020). "[L]ocal variety in voting [processes] can be justified by concerns about cost, the potential value of innovation, and so on." *Wexler v. Anderson*, 452 F.3d 1226, 1233 (11th Cir. 2006) (cleaned up). Accordingly, "many courts … have recognized that counties may, consistent with equal protection, employ … different election procedures and voting systems within a single state." *Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331, 389 (W.D. Pa. 2020) (collecting cases). The Equal Protection Clause simply does not prohibit a county board from deciding that local conditions justify it providing voters an additional form of notice or another way of addressing their ballots' defects before election day.

CONCLUSION

The application for exercise of King's Bench power or extraordinary jurisdiction should therefore be denied. If the application is granted, it should be resolved together with *Genser* and *CCJ*.

September 20, 2024

Respectfully submitted,

By: 

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CERTIFICATION OF COUNSEL

I hereby certify that this brief contains 10,180 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Clifford B. Levine

CERTIFICATE OF SERVICE

On September 20, 2024, I caused the foregoing to be electronically filed and to be served via the Court's electronic filing system on counsel of record for each party listed on the docket.

/s/ Clifford B. Levine