IN THE SUPREME COURT OF PENNSYLVANIA

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No. 26 WAP 2024 & No. 27 WAP 2024

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FAITH GENSER, FRANK MATIS, and THE PENNSYLVANIA DEMOCRATIC PARTY,

Plaintiffs-Appellees,

v.

BUTLER COUNTY BOARD OF ELECTION, REPUBLICAN NATIONAL COMMITTEE, and REPUBLICAN PARTY OF PENNSYLVANIA,

Defendants-Appellants.

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Appeal from the Order of the Commonwealth Court of Pennsylvania
(No. 1074 C.D. 2024 & No. 1085 C.D. 2024, Sept. 5, 2024)

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INTEREST OF AMICI CURIAE

The Secretary of the Commonwealth and the Department of State file this amicus brief in support of affirming the decision of Commonwealth Court in this matter. The Secretary's and the Department's "obvious interest in election administration" are "highly salient" here. Memorandum Opinion, *In re: Contest of November 7, 2023*, No. 1482 CD 2023, Slip Op. at 5 n.5 (Pa. Cmwlth. Dec. 29, 2023). In particular, the Secretary has a strong interest in ensuring that counties are canvassing ballots and certifying election results consistent with the requirements of the Election Code so that he too may properly fulfill his statutory responsibilities.[1]

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[1] This brief was not authored or paid for, in whole or in part, by any person or entity other than *amici* and their counsel.

INTRODUCTION

This case is not about "court-mandated curing." Nor is it about any one county's "notice and cure" policies. Provisional voting is not a "cure," but instead a discrete method of voting created and governed by federal and state law.

Instead, the only question raised in this appeal is whether the Election Code unambiguously prohibits a county board of elections from counting a voter's provisional ballot solely because the voter timely returned an invalid and uncounted mail ballot. The answer is no.

Commonwealth Court correctly recognized that the relevant statutory provisions use inconsistent and undefined language that renders their meaning "not explicit." In the face of ambiguity, Commonwealth Court followed this Court's precedent and construed the Election Code in line with legislative intent: facilitating opportunities for registered, eligible voters to vote a single, valid ballot. Its conclusion— that the Election Code does not allow a county to reject a provisional ballot cast by a registered and eligible voter solely because the voter timely returned an invalid and uncounted mail ballot—is consistent with

the Election Code's text, structure, and history. It also protects the elective franchise while preventing double voting.

The RNC ignores the need to read relevant provisions in the Election Code in *pari materia* and relies on a single phrase to claim that the text is "clear and free from all ambiguity." Its argument fails.

No one disputes that Faith Genser and Frank Matis are registered, eligible voters whose timely returned but flawed mail ballots were not counted in the 2024 primary election. Nor does anyone dispute that the only ballot each of them cast in that election that could be counted is their provisional ballot. In asking this Court to order those provisional ballots rejected as a "consequence" for having timely returned flawed mail ballots, the RNC injects into the Election Code a punitive, anti-enfranchisement intent that has no basis in its text, structure, or history, and that would run afoul of the Constitution's guarantee of "Free and Equal" elections. The General Assembly has never punished a voter's *unsuccessful attempt* to vote one way by categorically barring the voter from pursing another available option.

Commonwealth Court correctly interpreted the Election Code to reject that notion. This Court should affirm.

SUMMARY OF THE ARGUMENT

1.   A voters' right to fill out a provisional ballot at the polling place is guaranteed by federal and state law, not by any county's discretionary procedures. Casting a provisional ballot is completely distinct from the "notice-and-cure" procedures considered in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

2.   The Election Code addresses provisional voting by mail voters in multiple sections, using inconsistent and undefined language. Read together, the relevant provisions are not "clear and free from all ambiguity" as to whether a provisional ballot must be rejected solely because the voter timely returned a mail ballot that will not be counted. Reading the Election Code's ambiguous text "in favor of the right to vote," *In re Canvass of Provisional Ballots in 2024 Primary Election*, No. 55 MAP 2024, 2024 WL 4181584, at *3 (Pa. Sept. 13, 2024) ("*In re Canvass of 2024 Provisional Ballots*"), the only reasonable interpretation is the one reached by Commonwealth Court: the Election Code does not prohibit a county from counting a provisional ballot cast by a registered and eligible voter solely because they timely returned an invalid and uncounted mail ballot.

3. If the Election Code unambiguously requires county boards to reject a provisional ballot solely because the voter timely returned an invalid and uncounted mail ballot, then it would violate the Pennsylvania Constitution's Free and Equal Elections Clause. Arbitrarily denying provisional voting only to mail voters who timely return invalid mail ballots serves no election purpose and therefore unconstitutionally burdens the right to vote.

4. Affirming Commonwealth Court would ensure uniformity because this Court's decision will provide the definitive interpretation of Pennsylvania's Election Code, which all election officials must follow.

ARGUMENT

I.   Provisional voting is not "curing."

Every voter in this country is entitled to fill out a provisional ballot on Election Day if they believe they are registered and eligible to vote but their eligibility to vote at their polling place is in doubt.[2] Using this statutorily created process is not a "cure." *Contra* RNC Br. at 13, 23-24, 28-29.

1.   Under federal and state law, any individual who believes they are properly registered and eligible to vote in Pennsylvania, but whose eligibility is in doubt, "*shall* be permitted to cast a provisional ballot" at their polling place on Election Day. 52 U.S.C. § 21082(a) (emphasis added); 25 P.S. § 3050(a.2), (a.4)(1) (emphases added). A provisional ballot will not be *counted*, however, unless and until the county board of elections confirms both that "the individual was registered and entitled to vote" and that "the individual did not cast any other ballot, including an absentee ballot, in the election." 25 P.S. § 3050(a.4)(5)(i), (7)(i)(A).

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[2] During the trial court hearing, Butler County Director of Elections Chantell McCurdy testified: "Any voter is always welcome to fill out a provisional ballot at a polling place. We never want to deny them that opportunity." RNC Br. A112.

Provisional ballots are a creation of the federal Help America Vote Act ("HAVA"), which Congress passed in response to the problem of eligible voters arriving at a polling place but not being able to submit a ballot because there were questions about their eligibility. *See* 52 U.S.C. § 21082; *see also* H.R. Rep. 107-329 at 38 (2001). HAVA created "a system for provisional balloting, that is, a system under which a ballot would be submitted on election day but counted if and only if the person was later determined to have been entitled to vote." *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004). If "the individual is eligible under State law to vote," their provisional ballot "shall be counted as a vote in that election in accordance with State law." 52 U.S.C. § 21082(a)(4).

Two months after HAVA became law, Pennsylvania's General Assembly amended the Election Code to incorporate HAVA's provisional ballot protections for all Pennsylvania voters. Act of Dec. 9, 2002, P.L. 1246, No. 150 (codified in relevant part at 25 P.S. § 3050, as amended).

Today, "[w]hen an elector arrives at the polling place, if there is any doubt about his eligibility to vote, he may cast a provisional ballot." *In re Canvass of 2024 Provisional Ballots*, 2024 WL 4181584, at *3; *see* 25 P.S.

§ 3050(a.2), (a.4)(1). The voter must sign an affidavit (also signed by two election officials) affirming that they are registered and eligible to vote in the election and that the provisional ballot is the only ballot they cast in the election; fill out and place the ballot in a secrecy envelope; and place the secrecy envelope in a larger envelope that the voter must sign. 25 P.S. § 3050(a.4)(2)-(3); *see also* 52 U.S.C. § 21082(a)(2).

2.   A Pennsylvania mail voter does not need to live in a county that has chosen to offer "notice and cure" to access their statutory right to cast a provisional ballot at the voter's polling place.[3] Processes that counties have in place to allow voters to remedy errors that will lead to rejection of their mail ballot during canvassing are separate from provisional voting.

Indeed, when this Court previously addressed "notice and cure" procedures, it did not mention provisional voting at all. *See Pa.*

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[3] Substantial parts of the RNC's brief, *e.g.*, RNC Br. 5-9, 37-42, appear to be lifted from its still-pending King's Bench application. *See* Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction, at 28-34, 36-38, *RNC v. Schmidt*, No. 108 MM 2024 (Pa. filed Sept. 18, 2024). Those passages appear to be an attempt to shoehorn issues into this appeal that have nothing to do with the actual questions before this Court. Commonwealth Court's mandate said nothing about notice and ordered *only* that the Election Code does not prohibit Butler County from counting Ms. Genser and Mr. Matis's provisional ballots.

Democratic Party, 238 A.3d at 372-74. Rather, it determined that counties did not have to adopt the specific procedure requested by petitioners: "having the Boards contact those individuals whose ballots the Boards have reviewed and identified as including 'minor' or 'facial' defects—and for whom the Boards have contact information—and then afford those individuals the opportunity to cure defects until the UOCAVA deadline" of one week after election day. *Id.* at 372. The RNC's contention that curing means "avoiding the *consequences* of the voter's error on the mail ballot," RNC Br. at 24 (emphasis added), would expand "notice and cure" well beyond *Pennsylvania Democratic Party* and impose a punitive element that simply does not exist in this Court's decision or anywhere in election law.[4]

More importantly, provisional voting is not "curing" because the right to cast a provisional ballot is provided by federal law. Under HAVA,

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[4] Nor, in any event, does curing as described in *Pennsylvania Democratic Party* (or counting a provisional ballot when required under the Election Code) affect the consequences of a voter's error. If, when ballots are canvassed, a ballot has some disqualifying error, it will not be counted. If there is no error, it will be counted. What the voter did to ensure that they returned the ballot correctly does not pertain to the consequences that will be imposed for any error. And questions about whether to count a provisional ballot like those at issue in this appeal arise only because the consequence of certain errors have been imposed.

every voter "*shall* be permitted to cast a provisional ballot" at their polling place if they believe they are registered and eligible to vote but "the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote." 52 U.S.C. § 21082(a) (emphasis added); *accord Sandusky Cnty. Democratic Party*, 387 F.3d at 569-70. Likewise, under the Election Code a voter "*shall* be permitted to cast a provisional ballot," 25 P.S. § 3050(a.2), (a.4)(1) (emphases added), if "there is any doubt about his eligibility to vote," *In re Canvass of 2024 Provisional Ballots*, 2024 WL 4181584, at *3.

The RNC claims that the Election Code cabins the use of provisional ballots to "only limited circumstances," RNC Br. 4-5, 26-27, but state rules for who can fill out a provisional ballot cannot be narrower than what federal law mandates, *see Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 490 (Pa. 2006) (holding that under Pennsylvania's "unitary system of voting," there are "no provisions in our Election Code for separating the elections for federal offices from the elections for state and local offices"). And federal law permits anyone to cast a provisional ballot if their name does not "appear on the official list

of eligible voters for the polling place" or if "an election official asserts that the individual is not eligible to vote" at the polling place. 52 U.S.C. § 21082(a); *accord Sandusky Cnty. Democratic Party*, 387 F.3d at 570.[5]

Finally, a voter who seeks to cast a provisional ballot because they believe their mail ballot will not be counted due to a fatal flaw can accurately sign an affidavit stating the provisional ballot "is the only ballot that I cast in this election." 25 P.S. § 3050(a.4)(2); *contra* RNC Br. at 27-28. Under the facts known to that voter at the time, the provisional ballot *is* the only one they will cast in that election. *See also infra* at 16-17 (explaining that the Election Code sometimes uses "cast" to mean a counted vote). Indeed, Ms. Genser and Mr. Matis knew at the time they filled out their provisional ballots that their mail ballots would not count, rendering their affidavit statements accurate. Mem. Op. at 3.

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[5] Nor does the Election Code's rules for how to *count* a provisional ballot affect whether a voter can *cast* one. *Contra* RNC Br. at 36-37 n.6. Timely receipt of a mail ballot by a county board has nothing to do with whether a voter "is eligible to vote *in an election.*" 52 U.S.C. § 21082(a) (emphasis added). Instead, a Pennsylvania resident is eligible to vote in an election if they are old enough, have been a citizen long enough, have lived in Pennsylvania long enough, have followed the rules governing voter registration, and are not imprisoned for a felony conviction. Pa. Const. art. VII, § 1; 25 P.S. § 2811; 25 Pa.C.S. § 1301(a)-(b).

II. **Under the Election Code, county boards cannot reject a provisional ballot solely because the voter timely returned an invalid and uncounted mail ballot.**

Multiple Election Code sections address counting provisional ballots by individuals who requested a mail ballot. Mem. Op. 23-28; *see* 1 Pa.C.S. § 1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions."). These sections use inconsistent and undefined terms, rendering their application to the circumstances here not "clear and free from all ambiguity." 1 Pa.C.S. § 1921(b); Mem. Op. 23-28.

When that statutory ambiguity is viewed through the lens of legislative intent, and mindful of not depriving voters "of their right to elect a candidate of their choice," *Pa. Democratic Party*, 238 A.3d at 356, the proper interpretation is the one reached by Commonwealth Court: the Election Code does not allow a county board of elections to reject a provisional ballot cast by a registered and eligible voter solely because they previously returned a timely but invalid and uncounted mail ballot. Mem. Op. at 32-33.

A. **The Election Code's language is ambiguous.**

1.   Multiple Election Code sections address counting provisional ballots cast by individuals who also requested a mail ballot. As

Commonwealth Court recognized, these sections use "nonuniform and undefined terminology, the meaning of which is not plain in context." Mem. Op. at 28. Together, they can reasonably be read to direct that county boards cannot reject a provisional ballot solely because the voter timely returned an invalid and uncounted mail ballot.

Mail Ballots. Official mail ballots must include a statement that a voter "who receives a [mail] ballot . . . and whose *voted [mail] 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) (emphases added). The word "voted" was specifically added by Act 12 of 2020; previously, this requirement read "whose [mail] ballot is not timely received." *See* Act of Mar. 27, 2020, P.L. 41, No. 12, §§ 9, 12.1.

Polling places. Any voter who "*receives and votes* a [mail] ballot" is not "eligible to vote at a polling place on election day." 25 P.S. §§ 3146.6(b)(1), 3150.16(b)(1) (emphases added). The "district register at each polling place shall clearly identify electors who have *received and voted* [mail] ballots as ineligible to vote at the polling place." *Ibid* (emphases added). But "[a]n elector who requests [a mail] ballot and who is not shown on the district register as *having voted*" "may vote by

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provisional ballot under section 1210(a.4)(1)." *Id.* §§ 3146.6(b)(2), 3150.16(b)(3) (emphases added). This language was added by Act 77 of 2019, which enacted no-excuse mail voting. Act of Oct. 31, 2019, P.L. 552, No. 77, §§ 6, 8.

County review. County boards of elections must meet within seven days of the election to canvass provisional ballots. The board is directed first "to determine if the individual voting that ballot *was entitled to vote* at the election district in the election." 25 P.S. § 3050(a.4)(4) (emphasis added).

Then, if the provisional voter was "registered and entitled to vote," the county shall count the ballot only 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), (7)(i) (emphasis added). This language, which refers only to absentee (but not mail-in) ballots, predates the passage of Act 77 of 2019.

Correct and incorrect polling places. The Election Code differentiates between a voter who casts a provisional ballot at their correct polling place and a voter who casts a provisional ballot at the wrong polling place. If the provisional ballot was cast at the correct

polling place, it "shall not be counted" if certain of the rules for submitting a provisional ballot are not followed, *id.* § 3050(a.4)(5)(ii), including if the voter's "absentee ballot or mail-in ballot is *timely received* by a county board of elections," *id.* § 3050(a.4)(5)(ii)(F) (emphasis added). This language was added by Act 77, which otherwise left this clause unchanged. But if the provisional ballot is cast at the wrong polling place, there is no prohibition on counting it if the voter's mail ballot was "timely received." *See id.* § 3050(a.4)(7).

2.   As Commonwealth Court observed when reviewing these sections, the Election Code does not define key terms, such as "voted," "vote," "cast," and "timely received." Mem. Op. at 23-28. And the plain language of these sections does not clearly, and free from all ambiguity, explain when someone who unsuccessfully tried to vote by mail can have their provisional ballot counted. *Cf.* 1 Pa.C.S. § 1921(b).

Significantly, the word "voted" can refer to both the effort to submit a ballot and the act of successfully submitting a ballot and having it counted. *Compare* §§ 3146.6(c), 3150.16(c) ("Except as provided under 25 Pa.C.S. § 3511 (relating to receipt of *voted* ballot) …"), *with id.* § 3166 ("The Secretary of the Commonwealth, on receiving and computing the

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returns of the election of presidential electors, shall lay them before the Governor, who shall enumerate and ascertain the number of votes given for each person so *voted* for[.]"); *contra* RNC Br. at 32-33. But the most common understanding of what it means to vote is that a ballot was actually counted. *United States v. Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections."); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *23 (Pa. Cmwlth. Jan. 17, 2014) (explaining that the "right to vote embodied in our Constitution entitles every vote to be counted").

Likewise, the verb "cast" has at least three different usages. *Id.* at 25. Indeed, in § 3050 alone, it refers to the act of a voter filling out a ballot ("shall be permitted to *cast* a provisional ballot," § 3050(a.4)(1)), and the act of successfully returning a ballot to be included in the election returns ("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," § 3050(a.4)(4)(vii)); *see also, e.g., id.* § 3159 ("Upon receiving the certified returns … the Secretary of

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the Commonwealth shall forthwith proceed to tabulate, compute and canvass the votes *cast* for all candidates[.]"). *Contra* RNC Br. at 32.

The meaning of what must be "timely received" for purposes of § 3050(a.4)(5)(ii)(F) is also not clear, because other subsections of the Election Code use different terminology. The official ballot instructs the voter that if their "*voted* [mail] ballot is not timely received," then the voter "may only *vote* on election day by provisional ballot." *Id.* §§ 3146.3(e), 3150.13(e) (emphases added). Elsewhere, "a *completed* [mail] ballot must be received in the office of the county board of elections no later than eight o'clock P.M." on Election Day. *Id.* §§ 3146.6(c), 3150.16(c) (emphases added). Poll books must show everyone "*having voted*" a mail ballot. *Id.* §§ 3146.6(b)(2), 3150.16(b)(3) (emphases added). And a county board must not count any provisional ballot until it confirms "that the individual did not *cast* any other ballot, including an absentee ballot, in the election." *Id.* § 3050(a.4)(5)(i), (7)(i) (emphases added).

Across the various subsections, the results are inconsistent. A mail voter who mail ballot is "timely received" before 8 p.m. on Election Day but after the poll books are prepared—and therefore cannot be "shown on

the district register as having *voted*"—"may *vote* by provisional ballot."

Id. §§ 3146.6(b)(2), 3150.16(b)(2) (emphases added). A provisional ballot

accidently cast at the wrong polling place will be counted even if the voter

timely returned a fatally flawed mail ballot because the Election Code

includes no prohibition. *See id.* § 3050(a.4)(7).

The result is that for purposes of determining whether a county

board must count a provisional ballot filled out by a mail voter whose

timely received mail ballot is fatally flawed, the "words of the Code are

not explicit." Mem. Op. at 28 (quoting 1 Pa.C.S. § 1921(c)) (cleaned up).

3.   The RNC's various rebuttals—which require pages of tangled

and contradictory statutory interpretation, RNC Br. at 32-36—only

confirm that the Election Code's discussion of provisional voting by mail

voters is not "clear and free from all ambiguity."

The RNC initially asks the Court to look at one subsection of the

Election Code in insolation, on the grounds that it unambiguously

resolves the issue. RNC Br. at 25-26 (citing 25 P.S. § 3050(a.4)(5)(ii)(F)).

But the RNC struggles to explain how § 3050(a.4)(5)(ii)(F) accords with

the plain language of other subsections of the Code. *See In re Canvass of

2024 Provisional Ballots*, 2024 WL 4181584, at *5 (explaining how

different subsections "buttress[]" each other to render the meaning unambiguous).

For example, the RNC claims that the Election Code "makes clear that a mail ballot voter as completed voting mail-ballot package is timely received at the office of the county board." RNC Br. at 36 (cleaned up). But this does not accord with the language used for mail ballot instructions, which concerns a "voted [mail] ballot" that is not "timely received." 25 P.S. §§ 3146.3(e), 3150.13(e). It also does not accord with the common understanding of what it means to vote. *See supra* at 16. The RNC's attempt, two pages earlier, to construe the mail ballot instructions does not acknowledge the inconsistency. *See* RNC Br. at 34.

Elsewhere, the RNC concedes that "cast" has multiple meanings but insists without any explanation that the correct meaning is whichever supports rejecting provisional ballots. RNC Br. at 32.

Most damningly, the RNC claims that the only way to properly interpret § 3050(a.4)(5(ii)(F) is "to construe 'having voted' and 'voted ballot' as satisfied when the voter's mail ballot is timely received." RNC Br. at 35. But if the Court must construe the word "vote" to mean only

timely receipt, then the language is certainly "not explicit." 1 Pa.C.S. § 1921(c).

B. Ambiguous provisions of the Election Code must be interpreted to protect the elective franchise.

When, as here, the words of a statute "are not explicit," their meaning should be ascertained by considering, among other things, "occasion and necessity for the statute," the "mischief to be remedied," "the object to be attained," the "former law, if any, including other statutes upon the same or similar subjects," and the "consequences of a particular interpretation." 1 Pa.C.S. § 1921(c)(1), (3)-(6).

When interpreting ambiguous provisions of the Election Code in particular, the Court should apply a "liberal construction in favor of the right to vote," *In re Canvass of 2024 Provisional Ballots*, 2024 WL 4181584, at *5, and choose the interpretation of the Code that "enfranchises, rather than disenfranchises, the electorate," *Pa. Democratic Party*, 238 A.3d at 356; *accord Appeal of James*, 105 A.2d 64, 65 (Pa. 1954) ("All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor.").

This interpretive principle shares its roots with the canon of constitutional avoidance, which directs that "when a statute is

susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," the Court should adopt the latter. *MCI WorldCom, Inc. v. Pennsylvania Pub. Util. Comm'n*, 844 A.2d 1239, 1249 (Pa. 2004) (citing 1 Pa.C.S. § 1922). Relevant here, the Pennsylvania Constitution requires that all regulations that burden the right to vote must be "reasonable, non-discriminatory regulations to ensure honest and fair elections that proceed in an orderly and efficient manner." *Banfield v. Cortes*, 110 A.3d 155, 176-77 (Pa. 2015); *accord Pa. Democratic Party*, 238 A.3d at 369.

In this context, the most coherent reading of § 3050(a.4)(5)(ii)(F) is that a voter's mail ballot is not "timely received" for purposes of counting a provisional ballot if a valid mail ballot has not been received at all. As a result, a county board of elections must count a provisional ballot cast by a registered, eligible voter who has not returned a mail ballot that will counted and who otherwise complies with the procedural requirements. This interpretation best reconciles the various provisions while guarding

against both the General Assembly's concern about double voting and the needless, punitive disenfranchisement of registered and eligible voters.[6]

1.   The history and evolution of the Election Code demonstrate a legislative intent to expand the methods of voting while preventing double voting. *See* 1 Pa.C.S. § 1921(c)(1), (3)-(6). Throughout the various iterations of the Election Code, the General Assembly has never signaled an intent to *punish an unsuccessful attempt* to vote by categorically barring the voter from successfully voting via another available method. *Contra* RNC Br. at 28-29.

For example, in the mid-20th century, Pennsylvania extended absentee voting to civilians who would be away from their county on Election Day. *See generally, e.g.*, Pa. Const. art. VIII, § 19 (1874); Act of Aug. 13, 1963, P.L. 707, No. 379, §§ 22, 24; Act of Dec. 11, 1968, P.L. 1183, No. 375, § 8. Yet, if it turned out that the civilian voter was not actually absent and could vote in person on Election Day, their absentee ballot was voided. Act of Aug. 13, 1963, P.L. 707, No. 379, § 22 (amending Section 1306(b) of the Code); Act of Dec. 11, 1968, P.L. 1183, No. 375, § 8

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[6] Because this interpretation is grounded in the Election Code and the General Assembly's intent, it does not violate the U.S. Constitution. *Contra* RNC Br. at 45-46.

(same). But a voter whose absentee ballot was "void" did not forfeit their right to vote by other means. *Contra* RNC Br. at 29 (suggesting voters must be punished if they tried, but failed, to vote by one method). Instead, the General Assembly first permitted, and then required, the no-longer-absentee voter to vote in person, Act of Aug. 13, 1963, P.L. 707, No. 379, § 22 (amending Section 1306(b) of the Code); Act of Dec. 11, 1968, P.L. 1183, No. 375, § 8 (same). To prevent double voting, the General Assembly simply required the absentee ballot be set aside. *Ibid*. These requirements remained in place until Act 77.

In 2019, when the General Assembly added no-excuse mail-in voting with Act 77, it once again expanded the methods of voting while preventing double voting. For example, if county records show that a voter requested a mail ballot, then that voter cannot vote on the electronic voting system (and instead must vote provisionally) at the polling place—even if the voter believes their mail ballot is fatally flawed and will not be counted. 25 P.S. §§ 3146.6(b)(1)-(2), 3150.16(b)(1)-(2), *see also supra* at 8-11. This is entirely sensible. Mail ballots are returned to county boards, which cannot begin pre-canvassing mail ballots before 7 a.m. on Election Day. *Id.* § 3146.8(g)(1.1). No mail voter should be

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permitted to vote in person on an electronic voting machine (and risk double voting) before the county has made a final determination about whether to count their mail ballot. At the same time, the voter should not be denied the opportunity to cast a provisional ballot if they believe their mail ballot will not be counted.

With Act 12 of 2020, the General Assembly demonstrated yet again its commitment to allowing eligible individuals to vote while protecting against double voting. Act of Mar. 27, 2020, P.L. 41, No. 12, §§ 11, 14. Following that amendment, if a mail voter remits their ballot and return envelope at the polling place—thereby ensuring no double vote—then the mail voter can vote in person on the electronic voting system. 25 P.S. §§ 3146.6(b)(3), 3150.16(b)(3).

The General Assembly has also adopted robust protections for canvassing provisional ballots to ensure that they are not abused to double vote. County boards do not canvass provisional ballots until up to seven days after Election Day. 25 P.S. § 3050(a.4)(4). Representatives of each candidate and political party may be present during this canvass to challenge provisional ballots. *Id.* § 3050(a.4)(4). And, most importantly: a provisional ballot will not be *counted* unless and until the county board

of elections confirms both that "the individual was registered and entitled to vote" and that "the individual did not cast any other ballot, including an absentee ballot, in the election." *Id.* § 3050(a.4)(5)(i), (7)(i)(A).

2.   This history and evolution exhibit a clear legislative intent to ensure that every registered, eligible voter can vote once and only once. There is no suggestion of legislative intent to penalize "voters who fail to comply with the General Assembly's mandatory requirements" by prohibiting them from using a different, available method for voting by mail ballot. RNC Br. at 28. Nor, then, is there reason to believe the General Assembly intended to deny provisional voting to a voter whose mail ballot *will not be counted*.

In this context, the best reading of the words "timely received," *id.* § 3050(a.4)(5)(ii)(F), is that the General Assembly intended to refer only to valid mail ballots that *are counted* by the county board of election. This interpretation is entirely consistent with the overarching principle that a provisional ballot should be counted only if "the individual did not cast any other ballot, including an absentee ballot, in the election." *Id.* § 3050(a.4)(5)(i), (7)(i)(A).

This interpretation does not create "an absurd result." *Contra* RNC Br. at 30-31. A mail ballot is timely received if it arrives at the county board of elections by 8 p.m. on Election Day. For purposes of § 3050(a.4)(5)(ii)(F), a county's timely receipt of an invalid mail ballot will not preclude the mail voter from having their otherwise procedurally compliant provisional vote count. *When* the county determines that the mail ballot is invalid is immaterial. Indeed, the Election Code gives counties up to seven days to meet to review provisional ballots precisely so that they can determine whether the voters who voted provisionally were eligible to do so, which includes determining whether they had successfully cast a mail ballot.

3. Interpreting the Election Code in this way further accords with the "longstanding and overriding policy in this Commonwealth to protect the elective franchise." *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004). Permitting mail voters to have a provisional ballot counted when their mail ballot is not counted adopts a construction of the law that "favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate." *Pa. Democratic Party*, 238 A.3d at 361.

Any other reading of the Election Code would mean that the General Assembly intended specifically to deny provisional voting *only* to mail voters who return their mail ballots before 8 p.m. on Election Day—even if that eligible individual will not have voted any other ballot in the election. It would also mean the General Assembly decided to deny provisional voting to absentee voters who timely return fatally flawed ballots, after nearly two decades of allowing such practice.

This interpretation, embraced by the RNC, Br. at 28-29, not only has no basis in how the Court must interpret the Election Code, it has no basis in logic. By the RNC's telling, the General Assembly with one hand chose to offer no-excuse mail voting to all Pennsylvanians, but with the other chose to reject provisional ballots only when the same voter had submitted a flawed mail ballot before the statutory return deadline. This makes no sense—especially when provisional ballots and absentee ballots have coexisted without any such limitations for nearly two decades.

4. Finally, this interpretation avoids the constitutional violation that would exist if the Election Code denied mail voters—and mail voters only—the ability to cast a provisional vote just because they returned a

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fatally flawed mail ballot. *See infra* at 28-31. Principles of constitutional avoidance counsel against reading the Election Code to impose a meaningless and arbitrary burden on the right to vote. *MCI WorldCom, Inc.*, 844 A.2d at 1249. Instead, the better reading is that a county board of elections has not "timely received" an invalid and uncounted mail ballot.

III. Rejecting provisional ballots cast by voters who returned an invalid and uncounted mail ballot violates the Free and Equal Elections Clause.

If the Election Code unambiguously requires county boards to reject a provisional ballot solely because the voter timely returned an invalid and uncounted mail ballot, then the Code imposes an unconstitutional burden on the right to vote in violation of the Pennsylvania Constitution, Article I, Section 5.

In Pennsylvania, "the right to vote is fundamental and pervasive of other basic civil and political rights." *Banfield*, 110 A.3d at 176 (cleaned up). Eligible Pennsylvanians have a constitutionally guaranteed right to vote in elections that are "free and equal." Pa. Const. art. I, § 5; *see also* Pa. Const. art. I, § 26; Pa. Const. art. VII, § 1.

To that end, regulations that burden the right to vote must be "reasonable, non-discriminatory regulations to ensure honest and fair elections that proceed in an orderly and efficient manner." *Banfield*, 110 A.3d at 176-77; *accord Pa. Democratic Party*, 238 A.3d at 369 (citing language from *Banfield*); *In re Recount of Ballots Cast in Gen. Election on Nov. 6, 1973*, 325 A.2d 303, 308 (Pa. 1974) ("Unreasonable impairment or unnecessary restrictions upon [the right of suffrage] cannot be tolerated."); *Independence Party Nomination*, 57 A. 344, 345 (Pa. 1904) ("[The right of suffrage] cannot be denied, qualified, or restricted, and is only subject to such regulation as to the manner of exercise as is necessary for the peaceable and orderly exercise of the same right in other electors.").

If the Election Code requires counties to reject a provisional ballot only from a voter who chose to vote (unsuccessfully) by mail, and only because the voter timely returned a mail ballot that *will not be counted*, then it would constitute just such an unconstitutional burden on the right to vote.

Refusing to count provisional ballots from voters whose *mail ballots will not count* has no relationship to ensuring free, honest, and fair

elections. *See Banfield*, 110 A.3d at 176-77. It does not prevent fraud or double voting, since it is undisputed that those defective mail ballots will not be counted. It is also arbitrary, since it applies only to mail voters *who timely return their ballots*. A mail voter whose fatally flawed mail ballot is late (and will not be counted) can vote provisionally, but a mail voter whose fatally flawed mail ballot is timely (but will still not be counted) cannot. This backwards result, which would penalize the voter who acted timely, makes no sense. And it would not ease the administrative burden on counties, since they are already required to meet to review provisional ballots. Denying mail voters a provisional vote—a process set up precisely to resolve the problem of voters disenfranchised when questions exist about their eligibility—serves no legitimate election purpose.

Instead, the only purpose would be to punish "voters who fail to comply with the General Assembly's mandatory requirements" on the grounds that "rejecting the voter's first (and only) ballot" is "what makes those requirements mandatory." RNC Br. at 28, 24 (cleaned up). But these mandatory requirements are what make a *ballot* valid, not a voter eligible. The General Assembly has never punished a voter for

unsuccessfully attempting to vote by one method with a prohibition on exercising another available method. *See supra* at 22-27. Any Election Code provision that actively denies the franchise in this way is an anathema to the Free and Equal Elections Clause.

IV. Affirming would ensure uniformity.

Finally, the RNC argues that affirming Commonwealth Court would create unconstitutional disuniformity among the counties. RNC Br. at 42-45. But this is not how common law works. It is a foundational principle of our legal system that when a court resolves a legal dispute between parties, the opinion's legal conclusions hold precedential weight in future disputes. The Court's decision in this matter will create precedent for all 67 counties, as it has in others. *E.g.*, *In re Canvass of 2024 Provisional Ballots*, 2024 WL 4181584, at *5 (resolving dispute over a single provisional ballot with precedential holding about signatures on provisional ballot envelopes); *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020) (resolving dispute over mail ballots counted by Philadelphia and Allegheny with precedential holding about dates on mail ballot envelopes).

Moreover, this Court has recently concluded that the Secretary and the Department of State are not indispensable parties in two Election Code lawsuits raising facial statutory and constitutional claims. Order, *Zimmerman v. Schmidt*, No. 63 MAP 2024 (Pa. Sept. 25, 2024); Orders, *BPEP v. Schmidt*, No. 68 MAP 2024 (Pa. Sept. 13, 2024, Sept. 19, 2024). Short of this Court taking up every election matter under its King's Bench power, cases arising from the decision of a "single board" are now the only mechanism for resolving disputes about the Election Code.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of Commonwealth Court.

September 26, 2024

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CERTIFICATE 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.

Date: September 26, 2024   /s/ *Aimee D. Thomson*
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CERTIFICATE OF LENGTH

I certify that this brief complies with the word count requirement set forth in Pennsylvania Rule of Appellate Procedure 531(b)(3). Excluding matters identified in Pennsylvania Rule of Appellate Procedure 2135(b), this brief is 6,272 words. I have relied on Word's word count function to determine the length of this brief.

Date: September 26, 2024   /s/ *Aimee D. Thomson*
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