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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

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26 WAP 2024 and 27 WAP 2024

FAITH A. GENSER, FRANK P. MATIS, and THE PENNSYLVANIA DEMOCRATIC PARTY,

Appellees,

v.

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

Appellants.

BRIEF OF THE PENNSYLVANIA DEMOCRATIC PARTY

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INTRODUCTION

As this Court has explained, "the purpose and objective of the Election Code … 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) (alterations in original) (quoting *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965)). That purpose is served by ensuring that qualified and registered voters who want to exercise their fundamental right to vote can have exactly one ballot counted in an election—not more, not less. Accordingly, the code—read as a whole, as it must be—provides that if an eligible voter submits a timely mail ballot that is identified as defective and segregated for disqualification, the voter may submit a provisional ballot in its place on election day, which will be counted in lieu of the original.[1]

Appellants' contrary position is that a voter who returns a mail ballot with a disqualifying error (here, a missing secrecy envelope) has thereby "voted," and thus cannot cast a provisional ballot that will count—even though the mail ballot will not count either. The Commonwealth Court correctly rejected that position based on settled principles of statutory construction, emphasizing the absurdity of its consequences.

Consider, for example, a voter who in the coming days—*i.e.*, weeks before election day—fills out and returns her mail ballot to her county board. The very

[1] Like appellants' brief, this brief uses "mail ballot" to mean both mail and absentee ballot unless the context indicates otherwise.

next day, she notices the ballot's secrecy envelope lying on her kitchen counter, and realizes she forgot to include it in her returned mail-ballot package. She immediately calls her county board, asking what she can do to ensure she can have one (and only one) ballot counted in the November election. According to appellants, the board must tell her she is out of luck; her mail ballot will be disqualified because it lacks a secrecy envelope, and any provisional ballot she submits on election day will not be counted because she has already "voted" (even though her mail ballot will not be counted). In fact, appellants would say a person has "voted" even if she returns an *empty* mail-ballot envelope (*i.e.*, had this voter left the ballot itself on her kitchen counter), and thus cannot submit a provisional ballot that will be counted.

That is indefensible—as both a matter of statutory construction and (relatedly) common sense. Construed as a whole, the Election Code requires both (1) that a registered and eligible person whose mail ballot will not be counted be allowed to submit a provisional ballot, and (2) that a provisional ballot cast in these circumstances be counted. Appellants' contrary position—which serves no purpose but to disenfranchise mail voters—depends on considering only a single phrase in isolation, in contravention of the General Assembly's mandate that statutes be construed not only to "effectuate the intention" behind them but also, "if possible, to give effect to all its provisions," 1 Pa. C.S. §1921(a).

Their position also runs counter to decades of practice under which qualified voters who submit defective ballots in other settings are allowed to

ensure their votes will be counted. For example, as the record in this case confirms, voters who submit a defective ballot at their polling place on election day are given the opportunity to spoil that ballot and submit a new one that will be counted. A-131 to 132. Similarly, when voters return their completed mail ballots in person, county election officials are advised to "remind voters to confirm" that they have not made errors that would prevent a ballot from being counted. Pennsylvania Department of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes, Version 4.0*, at 4 (Apr. 3, 2023), https://tinyurl.com/5n8hsk2j. Had the General Assembly intended to abandon this otherwise consistent approach when it comes to ballots returned by mail, it would have done so clearly. It did not.

Finally, appellants' position is inconsistent with the Pennsylvania Constitution's protection of the fundamental right to vote, enshrined in the Free and Equal Elections Clause, Pa. Const. art. I, §5. There simply is no reason—let alone the requisite compelling one—to disqualify a voter's provisional ballot after that voter's mail ballot is rejected as defective. This constitutional conflict both provides an additional reason to reject appellants' statutory construction (under the canon of constitutional avoidance) and provides an independent and alternative ground for affirmance.

STATUTORY BACKGROUND

A. Provisional Voting

1. The Help America Vote Act

In 2002, Congress enacted the Help America Vote Act ("HAVA"), 52 U.S.C. §§20901 *et seq.*, in response to the significant number of eligible voters who, because of various procedural errors, were denied their right to vote in the 2000 presidential election. *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). Provisional ballots are intended to provide "a fail-safe mechanism for voting on election day." 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, pt. 1, at 37 (2001).

2. Implementation Of Provisional Voting In Pennsylvania

Following HAVA's enactment, the General Assembly amended the Election Code to establish provisional balloting in Pennsylvania. 25 P.S. §3050. The code thus now provides (as relevant here) that a person who requested a mail ballot but "is not shown on the district register *as having voted* may vote by provisional ballot." *Id.* §3150.16(b)(2) (emphasis added). And 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) (emphasis added).

B. Mail Voting In Pennsylvania

The General Assembly amended the Election Code in 2019 by enacting Act 77, which gives all registered Pennsylvanians the right to vote by mail. *See* Act of October 31, 2019, P.L. 552, No. 77. To exercise that right, voters must complete their mail ballot, which involves several steps. *See generally* 25 P.S. §§3150.1 *et seq*. One of those steps is placing a completed ballot in a yellow "secrecy" envelope, which must be sealed and then placed into the outer ("declaration") envelope that is returned to the county board. *Id.* §3150.16(a). Another required step is signing and correctly dating the outside envelope. *Id.*

To ensure that each Pennsylvanian has no more than one ballot counted in any election, the Election Code states that any voter "who receives *and 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) (emphasis added). Accordingly, the code requires the district register at each polling place to clearly identify those who "have received *and voted* mail-in ballots as ineligible to vote at the polling place." *Id.* (emphasis added).

The adoption of no-excuse mail voting in Pennsylvania created the question of how to treat voters who request a mail ballot but do not vote it. The General Assembly answered that question by providing in Act 77 that (as noted) "[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). Provisional voting thus ensures that mail-ballot requestors in Pennsylvania have the opportunity to vote exactly once in each election—not twice (because a mail-ballot requestor is not allowed to vote provisionally if her mail ballot was voted), and not zero times (because provisional voting is available as a fail-safe if the mail ballot is not counted, whether because it is not submitted at all or because it is submitted with a disqualifying error).

C. The SURE System

The Statewide Uniform Registry of Electors ("SURE"), first implemented in the early 2000s, is "a single, uniform integrated computer system" used to track registered voters and their ballots. 25 Pa. C.S. §1222(a), (c). At the General Assembly's direction, SURE is administered by the Secretary of the Commonwealth. *Id.* §1222(f)(1). Each county must enter into SURE the data necessary both to identify "registered electors who have been issued absentee ballots," *id.* §1222(c)(19), and to identify "registered electors who vote in an election and the method by which their ballots were cast," *id.* §1222(c)(20). This can be done because SURE assigns a "unique SURE registration number to each qualified elector who becomes registered," *id.* §1222(c)(10).[2]

[2] The General Assembly directed the Department of State to implement SURE and to establish regulations for each county board of elections to connect to SURE and use it as its general register. 25 Pa. C.S. §1222(e). The Election Code also directs the Secretary of the Commonwealth to "promulgate regulations necessary to establish, implement and administer the SURE system." *Id.* §1222(f). Such

Following the enactment of Act 77, SURE was adapted to address the receipt of mail ballots. Upon receipt of a mail-ballot packet, a county election worker scans the packet into the SURE system and records certain information regarding the envelope. *See* 25 P.S. §3150.17. In particular, SURE provides each voter a unique identification code, which is used to track the date when the board of elections receives the voter's mail-ballot packet; this information enables officials to know whether the voter has been sent a mail ballot, whether the voter returned it, and (if so) the date the board of elections received the packet. *Id.* §§3150.17 (b)(4) & (5).

The Secretary of the Commonwealth has created "codes" (23 in total) that county boards can use to classify mail ballots in the SURE system, based on various issues (*e.g.*, no date, incorrect date, no signature, no secrecy envelope). *See* Pennsylvania Department of State, *Changes to SURE VR and PA Voter Services as of March 11, 2024*, at 6-10 ("*SURE Guidance*"). These include "canceled" codes (for ballots that have disqualifying errors and will not be counted because the relevant county does not allow voters to cure such errors) and "pending" codes (for ballots that have disqualifying errors but might still be counted because the relevant county does allow such cure). *Id.* Use of these

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regulations include providing "[u]niform procedures" for county boards relating to "the process and manner of entering information into" SURE and "the manner and form of communications" between county boards and the Department of State, *id.* §1222(f)(1). The secretary is also empowered to promulgate "[s]uch other regulations as are necessary to ensure" that SURE "compl[ies] with all other provisions" of the Election Code. *Id.* §1222(f)(3).

codes allows voters to follow the status of their ballots on the Department of State's "Track My Ballot" website. *See Track Your Ballot or Ballot Application*, Vote.Org, https://www.vote.org/ballot-tracker-tools.

When a county board of elections assigns a specific code to a ballot in the SURE system, an email is automatically sent to the voter (if the voter file contains the voter's email address). *SURE Guidance* at 6-10. For example, assigning the code for a mail ballot that is pending or canceled because it is missing a secrecy envelope triggers an automatic email to the voter explaining that the ballot may not be counted because of the error and that the voter may "go to your polling place on election day and cast a provisional ballot." *Id.*

D. Pre-Canvassing Under The Election Code

The Election Code 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." 25 P.S. §2602(q.1) (emphases added). The code does not permit boards to pre-canvass until 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, however, prevents election officials from reviewing mail-ballot packages before they are locked away for safe-keeping until election day. To the contrary, county boards must do so (in order

to keep track of mail ballots and mail-ballot applications) for several reasons. First, counties must record the date a mail-ballot packet 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, if proof exists of a voter's death prior to the opening of the polls, the canvassers must reject the voter's mail ballot, which requires that the board find and remove the ballot in a room of tens of thousands of them. *Id.* §3146.8(d). Fourth, if a voter's mail-ballot application has been challenged, the county board must review and set aside the ballot envelope. *Id.* §§3150.12b(a)(3), 3146.8(g)(4)-(5).

In addition, pre-election-day monitoring of mail-ballot packages is a practical necessity: Given the sheer volume of mail-ballot packages they receive (over 1.3 million were requested for this November election, *see 2024 General Daily Mail Ballot Report*, Commonwealth of Pennsylvania, https://tinyurl.com/bddwc266), counties must, and do, review the packages and address observable issues *before* election day so that *on* election day they can efficiently commence the required "counting, computing and tallying of the votes reflected on the ballots" that are qualified to be counted, 25 P.S. §2602(q.1).

COUNTER-STATEMENT OF THE CASE

A. Factual Background

1. Butler County's Policy

The Butler County Board of Elections ("Board") has implemented a written "ballot curing policy" ("Policy"). The Policy purports to address both (1) when voters may correct immaterial deficiencies with their mail-ballot envelopes, and (2) when voters will be permitted to cast provisional ballots that will be counted—even though the latter issue, as explained, is already controlled by state law. A-263 to 265.

Under the Policy, a voter who makes a mistake on her mail-ballot *declaration* envelope (for example, by forgetting to sign or date that envelope) can cure the error by appearing in person before 8:00 p.m. on election day and signing an "Attestation" curing the deficiency. A-264. The Policy also allows voters who make a curable error to instead vote via "[p]rovisional [b]allot" at "their polling place on Election Day." *Id.* The Board will count such provisional ballots along with all others properly submitted. A-145, 150-151.

The Policy does *not*, however, allow voters who submitted "naked" ballots—*i.e.*, voters who made a mistake with the (inner) secrecy envelope rather than the (outer) declaration envelope—to either cure that mistake or to cast a provisional ballot that will be counted. A-151. In other words, the Board allows voters who make certain mistakes with their mail ballots to nonetheless submit a

ballot that will be counted, while denying the same to voters who make other mistakes.

2. Genser And Matis

Respondents Faith Genser and Frank Matis ("Voters") were each qualified and registered to vote in the April 2024 primary, and each timely submitted a mail ballot. A-3, 130. Upon receiving those ballots, Butler County officials ran them through the county's "Agilis Falcon machine," which measures each outer envelope's dimensions and thickness to ensure that it is an official election envelope and contains all the required materials. A-3 to 4, 103-104. The machine enabled officials to determine that each Voter's mail-ballot package lacked a secrecy envelope. A-4. After making this determination, the Board updated the status of each Voter's mail ballot in SURE to "cancel, no secrecy envelope." A-117 to 118.

Each Voter then received an automatic email from the Department of State stating: "Your ballot will not be counted because it was not returned in a secrecy envelope." A-4; *see also* A-118. Each email stated that the Voter could request a new ballot or could "go to your polling place on election day and cast a provisional ballot." A-4; *see also* A118, 157, 213-214. (The Policy states that "[t]he Bureau shall not send the Ballot back to the Voter or issue the Voter a new Ballot due to the Deficiency" on a declaration envelope. A-264.) Following these instructions, the Voters each submitted a provisional ballot at their respective polling places on primary day. A-4, 130, 158, 217. However, adhering to the

Policy, the Board refused to count either Voter's provisional ballot, despite identifying no deficiency with either. A-130. The Voters were therefore deprived of their right to vote in the primary.

B. Opinions Below

1. Court Of Common Pleas

The Voters brought this action in the Butler County Court of Common Pleas to challenge the Board's denial of their right to vote. The trial court acknowledged "the abstract absurdity of the outcome[s]" that flow from the Board's practice but concluded that the practice nonetheless "does not violate either the Election Code or the Free and Equal clause of the Pennsylvania Constitution." A-58, 66. The court also accused the Voters of seeking to "burden" the Board with "a duty to review all mail-in ballots for compliance with vote-casting procedures," thereby "relieving [the Voters] of these burdens and granting them a second chance to vote." A-58 to 59. Moreover, the court stated, "any chance to correct a deficient ballot …, including by casting a provisional vote, constitutes a 'cure,'" which the court concluded the Board was not required to allow. A-64.

2. Commonwealth Court

The Commonwealth Court reversed the trial court's decision and directed the Board to count the Voters' provisional ballots, with a single noted dissent. A-35.

The Commonwealth Court began its analysis by quoting this Court's statement that "the Election Code should be liberally construed so as not to deprive … electors of their right to elect a candidate of their choice." A-24 (quoting *Boockvar*, 283 A.3d at 355-356) (quotation marks omitted). Citing this Court's decision last month in *Bold v. Department of Transportation*, 2024 WL 3869082 (Pa. Aug. 20, 2024), the Commonwealth Court then noted that ambiguity can be found when multiple interpretations of a statute are reasonable. A-24. The court further explained that "[a]mbiguity can be … contextual, arising from multiple parts of a statute considered and construed together." *Id.* (citing *Boockvar*, 238 A.3d at 390 (Wecht, J. concurring)).

Based on these principles, the Commonwealth Court concluded that the relevant provisions of the Election Code, when considered together, are ambiguous. A-25. In particular, the court explained that the relevant provisions require considering the meaning of "vote, voted, timely received, cast, and ballot"—all terms that the Election Code does not define and the meaning of which are "not plain [even] in context." *Id.* This lack of clarity, combined with the parties' competing interpretations and the divergent decisions of at least three trial courts, led the court "to conclude that 'the words of the [Code] are not explicit.'" A-29 (quoting 1 Pa. C.S. §1921(c)).

Having found statutory ambiguity, the court resolved it based on (among other things) this Court's command that "the imperative to protect the … franchise" means that courts "resolve any ambiguity in favor of protecting the

franchise and to avoid discarding an elector's vote." A-20 (citing *Boockvar*, 238 A.3d at 360-361, and *In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972)). Next, noting that the object of the General Assembly's conferral of the right to vote by mail on all qualified Pennsylvanians was to make voting more convenient, the court rejected an interpretation of the relevant provisions that would leave the Voters with "exactly zero votes," thus disenfranchising them, A-31, in favor of one that allows people to vote by provisional ballot so long as they have not already voted another ballot that has been or will be counted, A-33.

The court disagreed that its decision would "effectively write a mandatory ballot-curing procedure into the Code," which this Court rejected in *Boockvar*. A-33. The Commonwealth Court explained that while county boards are not required to implement a "notice and opportunity to cure" procedure for mail or absentee ballots, they are required to count validly submitted provisional ballots. It distinguished between "curing" defects in flawed mail ballots and casting a provisional ballot in its place—and explained that the trial court's equation of the two "was legal error." A-34.

Finally, the Commonwealth Court concluded that its prior unreported decision in *In re Allegheny County Provisional Ballots in the 2020 General Election*, No. 1161 C.D. 2020 (Nov. 20, 2020), *appeal denied*, 242 A.3d 307 (Pa. 2020), did not compel a different result. *Allegheny County*, the court explained, had improperly analyzed only one relevant provision of the Election Code in isolation, without addressing the other relevant provisions. A-24 to 25, 34.

Having concluded that the Election Code and canons of statutory construction required the Board to count the Voters' provisional ballots, the Court ordered the Board to do so. A-35.

SUMMARY OF ARGUMENT

I. The Election Code is designed 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, the code's provisions governing mail and provisional voting provide that if a voter's mail ballot has been disqualified, that voter is entitled to cast a provisional ballot that will be counted. Appellants' contrary argument rests on reading a single code provision in isolation, in violation of the requirement to both read statutes as a whole and interpret statutory provisions harmoniously.

II. To the extent the Election Code is ambiguous, the Commonwealth Court 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 canon of statutory interpretation supports that conclusion. Appellants' contrary construction is inconsistent with the Election Code's purpose, unreasonably burdens the right to vote, and would raise serious constitutional doubt.

III. This Court's holding in *Pennsylvania Democratic Party v. Boockvar* that county boards are not required to implement notice-and-cure procedures for defective mail ballots is consistent with the Commonwealth Court's decision

here. Appellants' contrary claim fails because provisional voting is not the same as ballot-cure. *Boockvar* itself confirms this: The claim the petitioners in that case made was about curing disqualified ballots, not provisional ballots—and so unsurprisingly, this Court's opinion barely even mentioned provisional ballots. Likewise, under the Commonwealth Court's correct construction of the Election Code here, disqualified mail ballots are not cured or counted; instead, separate, provisional ballots are counted in their place.

IV. Appellants' scattershot arguments that the Commonwealth Court's decision violates ballot-secrecy, election-uniformity, and/or separation-of-powers rules all lack merit. These arguments fail because, respectively, the Election Code allows county boards to determine whether a mail ballot is missing its secrecy envelope without opening it; any disuniformity would disappear with a ruling from this Court upholding the Commonwealth Court's decision, as counties would be required to follow the law as declared by this Court; and the Commonwealth Court's decision is faithful to the General Assembly's mail- and provisional-voting scheme.

V. If the Election Code were construed to disenfranchise voters whose mail ballots were canceled because they were not returned in a secrecy envelope, such denial of the franchise would violate the Pennsylvania Constitution's Free and Equal Elections Clause. That is because there is no legitimate reason—let alone a compelling one, as required—to disqualify a voter's provisional ballot when that voter's mail ballot has been rejected for lack of a secrecy envelope.

That is especially true given that voters who make other routine errors (*i.e.*, failing to properly sign or date the outside declaration envelope) *are* allowed to submit provisional ballots that will be counted. The Free and Equal Elections Clause provides an alternative basis on which to affirm.

ARGUMENT

When a state offers no-excuse mail voting, it must decide how to treat a voter who requests a mail ballot but does not return it before election day in such a way that it will be counted. In Pennsylvania, the General Assembly has chosen to address that situation through provisional voting: The Election Code evinces the legislature's intent that voters whose mail ballots will not be counted may vote a provisional ballot and have that ballot counted. Appellants' contrary position is that a mail *ballot* is "voted" whenever a mail-ballot *envelope* is returned, even if the mail ballot will not be counted—indeed, even if the envelope does not contain a ballot *at all*. A-133 to 135. That position cannot be reconciled with the text or purpose of the Election Code, common sense, or the fundamental right to vote protected by the Free and Equal Elections Clause of the Pennsylvania Constitution. It should be rejected, and the Commonwealth Court's judgment affirmed.

I. THE ELECTION CODE'S PLAIN LANGUAGE, CONSTRUED AS A WHOLE, REQUIRES COUNTY BOARDS TO COUNT PROVISIONAL BALLOTS TIMELY SUBMITTED BY VOTERS WHOSE MAIL BALLOTS WILL NOT BE COUNTED

1. All parties agree that a voter who has requested a mail ballot but who has not "voted" that ballot, 25 P.S. §3150.16(b)(2), is eligible to cast a provisional

ballot on election day and have it counted. *See, e.g.*, Appellants' Br.4-5. The Secretary, the Commonwealth Court, and the Democratic intervenors all take the straightforward position—supported by the plain text of the Election Code—that a person has not "voted," and therefore may vote provisionally, if she submits a mail ballot that will not be counted because of some defect. Appellants' position, by contrast, is that such a person has "voted" that ballot—and indeed that a person has done so even if she returns a mail-ballot envelope that contains no ballot at all. Such individuals, according to appellants, are simply disqualified from participating in the election.

That position cannot be squared with a proper reading of the Election Code. As the Commonwealth Court recognized (A-12 to 14), there are at least three relevant statutory clauses in this case—two of which appellants all but ignore. First, 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." 25 P.S. §3150.16(b)(2). Next, the "**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." *Id*. §3050(a.4)(5)(i). Finally, subclause (ii)—the "**Timely Received Clause**"—provides that a voter's provisional ballot will 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).

According to appellants (Br.25-29), matters begin and end with the Timely Received Clause, which they say shows that a provisional ballot submitted by a qualified and registered voter whose mail ballot has been disqualified cannot be counted—thereby disenfranchising the voter entirely. But the Commonwealth Court (A-33) correctly rejected that myopic focus on the Timely Received Clause, 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*, 2024 WL 3869082, at *5 n.43. 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). This principle is also enshrined in the Statutory Construction Act ("SCA"), which commands that "[e]very statute shall be construed, if possible, to give effect to all its provisions." 1 Pa. C.S. §1921(a). This exact language has been in the SCA for nearly a century. *See* Statutory Construction Act of 1937, art. 4, §51; *see also Bold*, 2024 WL 3869082, at *4. This Court has long interpreted the Election Code according to these principles. *See, e.g.*, *In re Philadelphia County Board of Elections*, 73 A.2d 34, 36 (Pa. 1950); *see also Shapiro v. Golden Gate National Senior Care, LLC*, 194 A.3d 1010, 1027 (Pa. 2018).[3]

[3] The SCA enacted in 1972 was a recodification of existing statutory construction law, including the Statutory Construction Act of 1937. See PPG *Industries*, Inc. v. *Commonwealth*, 790 A.2d 261, 267 (Pa. 2001).

2. Applying these interpretive 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.

a. The Having Voted Clause 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). The term "having voted" is best read to mean having submitted a ballot that will be counted, not merely the return of a mail-ballot package. That is the best reading because the Having Voted Clause was added to the Election Code in 2019 by Act 77 (Act of Oct. 31, 2019, P.L. 552, No. 77, §§6, 8), and other uses of "voted" in Act 77 (and in related follow-up legislation in 2020), indisputably refer to more than just the timely receipt of a mail-ballot package. For example, a provision that previously referred to a person "whose mail-in ballot is not timely received" was amended to refer to a person "whose *voted* mail-in ballot is not timely received." Act of Mar. 27, 2020, P.L. 41, No. 12, §9 (emphasis added); *see* 25 P.S. §3150.13(e); *id*. §3146.3(e) (same for absentee ballots). This addition of "voted" would have been meaningless if "voted" meant merely timely received. The General Assembly's use of "voted" in the Having Voted Clause thus reflects a legislative judgment that a county board may not refuse to count a provisional ballot just because the board timely received an invalid mail ballot (or an empty envelope). Rather, voters are ineligible to cast a provisional ballot only if they timely submitted mail ballots that will actually be counted.

That construction is also 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. Any other reading, meanwhile—including appellants' proposed interpretation of "voted" as referring simply to "when the voter's mail ballot is timely received," Br.35—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.

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

Take the Casting Clause first. As the Commonwealth Court noted (A-28), "[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." The latter meaning best harmonizes the Casting Clause with the Having Voted Clause: Consistent with the Election Code's purpose (permitting each eligible voter to have one and only one ballot counted), 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 appellants' contention (Br.32), interpreting "cast" to denote that a ballot was counted is consistent with the term's ordinary meaning as well as its use elsewhere in 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" are those that were counted, not those 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). 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, under this provision, 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 ballot packages.

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 the Commonwealth Court noted (A-28), "*received* obviously means 'to take into … possession (something offered or given by another)" or "to take delivery of (something) from another." 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.* (Appellants' proffered excuse for ignoring the Casting Clause when interpreting the Timely Received Clause—that the latter is an "[e]xcept[ion]" to the former (Br.31)—makes no sense. The fact that the clauses are intertwined is all the more reason to read them harmoniously, not a basis to ignore one when interpreting the other.)

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.[4]

3. The arguments appellants offer in support of their contrary construction lack merit. As noted, appellants rely primarily on the Timely Received Clause, which they characterize (Br.26) as "unambiguous." But even putting aside the context supplied by the Having Voted and Casting Clauses, the role of the Timely Received Clause in this case is anything but "unambiguous." To apply the Timely Received Clause, one must, of course, look to the provision establishing the deadline for receipt. And the "Deadline" provision sets a deadline for the receipt of a "*completed* mail-in ballot," 25 P.S. §3150.16(c) (emphasis added), which a neighboring provision makes clear is a ballot that, as relevant here, is "enclose[d] and securely seal[ed]" in a secrecy envelope, *id.* §3150.16(a). The Timely Received Clause thus seemingly has no application to mail-ballot packages returned *without* a secrecy envelope, and so arguably is not

[4] A prior unreported decision by the Commonwealth Court—*In re Allegheny County Provisional Ballots in the 2020 General Election*, No. 1161 C.D. 2020 (Nov. 20, 2020)—disagreed with the foregoing statutory analysis, holding that the Timely Received Clause unambiguously requires the rejection of provisional ballots in cases like this one. The Commonwealth Court here explained why that decision is wrong: Like appellants here, *Allegheny County* viewed the Timely Received Clause in isolation; it "did not cite or discuss the Casting Clause or attempt to reconcile it with the Timely Received Clause," A-34, and it "did not consider the Having Voted Clause," A-25. But again, "these three clauses must be construed together in the Code's statutory scheme, and not in isolation." *Id.* So read, the statute requires counting the Voters' provisional ballots.

implicated here. At a minimum, when considered together with the deadline that would make a receipt "timely," the phrase "timely received" is not "unambiguous," as appellants repeatedly assert.

Appellants next contend (Br.26) that the circumstances of this case are not among the "limited circumstances" in which "Pennsylvania law permits use of provisional ballots." But appellants concede that those "limited circumstances" include "where a voter 'request[s] a [mail] ballot [but] is not shown on the district register as having voted." Br.27 (quoting the Having Voted Clause (alterations in original). That is the situation here because, as explained, *see supra* pp.20-21, "having voted" means having submitted a ballot *that will be counted*. Relatedly, the fact that the term "cast" likewise denotes submission of a ballot that will be counted, *see supra* pp.21-23, defeats appellants' argument that a provisional voter whose mail ballot will not be counted cannot honestly affirm that her provisional ballot "'is the only ballot that [she] *cast*,'" Br.28 (quoting 25 P.S. §3050(a.4)(2)).

Finally, appellants protest (Br.28) that under the Commonwealth Court's construction, the "secrecy-envelope requirement[] would not be mandatory as the General Assembly wrote and intended." That is wrong. No one disputes that a mail ballot submitted without a secrecy envelope will not be counted, *i.e.*, that the secrecy-envelope requirement is mandatory. The question in this case is whether

a *separate*, provisional ballot—submitted to *replace* a mail ballot that will not be counted—must be counted. For all the reasons just given, the answer is yes.[5]

II. ANY AMBIGUITY IN THE ELECTION CODE MUST BE RESOLVED IN THE VOTERS' FAVOR

To the extent there is ambiguity in the meaning of the Having Voted, Casting, and/or Timely Received Clauses—and the "divergent decisions" of various courts suggests there is (A-29)—the Commonwealth Court correctly held that such ambiguity must be resolved in favor of counting provisional ballots submitted by voters whose mail ballots will not be counted.

To start, resolving any ambiguity that way advances "[t]he object to be attained" by the Election Code's provisional-voting provisions, 1 Pa. C.S. §1921(c)(4)); *see also Bold*, 2024 WL 3869082, at *5. Those provisions are designed to (1) provide "a fail-safe mechanism for voting on election day," 148 Cong. Rec. S10488, S10496 (daily ed. Oct. 16, 2002) (Sen. Durbin), so that voters are not disenfranchised for either bureaucratic or voter error, while (2) preventing provisional ballots from being a means of double-voting, *see* 25 P.S. §3050(a.4)(5). As explained, both parts of that purpose are served by holding

[5] As explained in detail in the proposed amicus brief submitted by the Pennsylvania affiliate of the American Federal of Teachers and the Pennsylvania Alliance for Retired Americans, appellants' position would place Pennsylvania among a very small handful of states that disqualify voters entirely for submitting a defective mail-ballot package. Of the all states that offer absentee voting, only five take such an extreme position (Alaska, Arkansas, Missouri, South Carolina, and South Dakota).

that boards *must* count a provisional ballot when the voter has not had any other ballot counted in the election (so that voters are not disenfranchised), and must *not* count a voter's provisional ballot if doing so would mean the voter would have two ballots counted in the election (so as to prevent such double voting). Under appellants' interpretation, by contrast, only the second of these purposes is advanced—and voters are unnecessarily denied the fail-safe mechanism of provisional voting.

Resolving any ambiguity in the Voters' favor also advances "the clear legislative intent underlying Act 77," which was "to provide electors with options" so as to further "enfranchise[], rather than disenfranchise[], the electorate," *Boockvar*, 238 A.3d at 361; that is, "to lift the voice of every voter in the Commonwealth," *McLinko v. Department of State*, 279 A.3d 539, 543 (Pa. 2022). Appellants' construction does the opposite, disenfranchising voters who attempt to vote by mail but inadvertently commit an error that is easily discernible by the county board before pre-canvassing. For instance, as the trial court recognized (A-22), appellants' 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." In other words, appellants' position is that a board has timely received a mail ballot even when it has received no ballot at all, such that the voter who attempted to vote by mail is henceforth barred from participating in the election. That absurd result is flatly inconsistent with the

General Assembly's intent; mail voting is intended to "enfranchise[]," *Boockvar*, 238 A.3d at 361, not to create an unnecessary risk of *dis*enfranchisement.

If the Election Code is ambiguous, moreover, 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 appellants' 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 the Commonwealth Court is consistent with these cases because it "sav[es]" votes, whereas the Board's position "void[s]" them, *id.* Because the Commonwealth Court'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.

Finally, the principle of constitutional avoidance supports the Commonwealth Court's statutory interpretation. "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) (citation and quotation marks omitted). The SCA 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). Finally, even if the relevant provisions of the Election Code *could* be construed to disenfranchise voters whose mistakes cause their mail ballots to be canceled, that construction would (as explained in Part V) raise at least "a serious doubt" about its constitutionality under the Pennsylvania Constitution's Free and Equal Elections Clause, Pa. Const. art. I, §5. Given that the statute can be construed in a way that avoids the need to resolve that constitutional question, this Court should do so.

III. *PENNSYLVANIA DEMOCRATIC PARTY V. BOOCKVAR* DOES NOT SUPPORT APPELLANTS

Central to appellants' challenge is their description (Br.23) of casting a provisional ballot as a means of "curing" a canceled mail ballot. The Election Code, they say (Br.20-24), cannot require counting such provisional ballots 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. None of that is correct.

For starters, as the Commonwealth Court explained (A-34), a "provisional ballot is a separate ballot, not a cured initial ballot." Curing a ballot in the context addressed in *Boockvar* involves fixing the mistake with the mail-ballot package where the mistake was made. For example, if a voter forgets to sign or date the declaration envelope, curing that mistake would involve adding a signature or date on that same declaration envelope. By contrast, casting a provisional ballot is a way to *replace* the originally defective ballot, not fix it. While both processes accomplish the same *end*—ensuring that the voter can submit a ballot that will be counted—they operate through different means.

Appellants call this "a distinction without a difference," asserting that the "[c]uring" addressed 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." Br.24. *Boockvar* provides no support for that claim. This Court did not address provisional voting there; the question presented was whether counties must allow voters a post-election-day opportunity to "cure … facial defect[s]," 238 A.3d at 372—*i.e.*, defects on the face of voters' initial *mail ballot envelopes*—not whether voters would be allowed to cast (separate) provisional ballots on election day in place of defective mail ballots. Indeed, as the Commonwealth Court observed (A-34), *Boockvar* "only tangentially discussed provisional voting—the phrase appears only in a single sentence of that opinion." Put simply, by declining to require county 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.

IV. THE COMMONWEALTH COURT'S DECISION DOES NOT THREATEN BALLOT-SECRECY, ELECTION-UNIFORMITY, OR THE SEPARATION OF POWERS

Appellants argue (Br.37) that counting the Voters' provisional ballots is "irreconcilable" with various statutory and constitutional provisions requiring secrecy in voting, uniformity in election-administration, and separation of powers. Each argument lacks merit.

1. Contrary to appellants' assertion (Br.37-41), the Election Code's pre-canvassing provisions, designed to protect ballot-secrecy and to ensure that vote totals do not become known before election day, do not preclude counting the Voters' provisional ballots.

The rule prohibiting county boards from "inspect[ing] *and opening* … envelopes containing … mail-in ballots" before election day, 25 P.S. §2602(q.1) (emphasis added), does not preclude boards determining if a mail-ballot's secrecy envelope is missing for the simple reason that that determination can be made *without* opening the outer envelope. Specifically, county boards may determine that a secrecy envelope is missing by assessing the mail ballot's dimensions, A-103 to 104, and/or by using an envelope design that allows officials to confirm with certainty that the yellow secrecy envelope is missing, *see* Pennsylvania Department of State, *Directive Concerning the Form of Absentee and Mail-in Ballot Materials, Version 2.0*, at 4 (July 1, 2024), https://tinyurl.com/bdepm77t.

Appellants' contention that hole-punching mail ballots amounts to opening them (Br.40) both defies common sense—no one would describe a hole-punched but sealed envelope as "open"—and ignores that the statutory phrase "opening … envelopes" refers on its face to an act that enables "removal of … ballots from the envelopes," 25 P.S. §2602(q.1). Hole-punching does not do that.

Nor does the prohibition on disclosing pre-canvass results preclude county boards notifying voters that their mail ballots are deficient for lack of a secrecy envelope. The pre-canvass results that may not be disclosed are the "votes reflected on the ballots," 25 P.S. §2602(q.1)—not, as appellants contend (Br.39), the "county board's preliminary disposition that a mail ballot is defective." For the same reason, notifying voters that their mail ballots will be canceled does not violate the constitutional requirement "[t]hat secrecy in voting be preserved," Pa. Const. art. VII, §4. Again, it is the votes on a ballot—not whether the ballot was enclosed in a secrecy envelope—that must remain secret. Under the Commonwealth Court's decision, they do.

If more were needed, appellants' argument is antithetical to the actual practice of election administration in Pennsylvania. Contrary to appellants' claim (Br.6), no provision of the Election Code requires county boards to turn a blind eye to any plain deficiencies with mail-ballot packages before locking them up to await election-day. In fact, several code provisions contemplate boards *will* review mail-ballot packages before election day. *See supra* pp.8-9 This pre-election-day work ensures that, when counting commences, it will be completed

quickly and accurately—no small feat given that more than 1.3 million Pennsylvanians have already requested mail ballots for the 2024 general election, *see 2024 General Daily Mail Ballot Report*, Commonwealth of Pennsylvania, https://tinyurl.com/bddwc266.

2. Likewise infirm is appellants' argument (Br.42-45) that the Commonwealth Court's decision engenders unconstitutional disuniformity in election administration—an argument that appellants failed to make before the trial court and Commonwealth Court and have thus forfeited, *see* Pa.R.A.P.302(a). Disuniformity would exist only if counties failed to comply with the Election Code as construed by the Commonwealth Court (and this Court, should it affirm). Any such disuniformity would be remedied simply by the application of controlling precedent to enforce the code.

3. Lastly, appellants' contention (Br.42) that the Commonwealth Court's decision violates the "separation of powers between the legislative and executive branches" is baseless. It is *appellants'* construction of the Election Code that, in their words (Br.42), "contradict[s] the unambiguous rules the General Assembly has enacted." As explained, the Commonwealth Court's construction is faithful to the Election Code's purpose—and, specifically, to the legislature's choice to provide for provisional voting as a fail-safe mechanism for mail voters to ensure their votes count.

For the same reason, the Commonwealth Court's decision does not violate the U.S. Constitution's Elections or Electors Clauses; the Commonwealth Court's decision *enforces*, not usurps, the General Assembly's proscribed election rules.

Further, appellants failed to raise either separation-of-powers argument before the trial court or the Commonwealth Court. Both arguments are accordingly waived. *See* Pa.R.A.P.302(a).

V. THE BOARD'S REFUSAL TO COUNT THE VOTERS' PROVISIONAL BALLOTS VIOLATES THE PENNSYLVANIA CONSTITUTION'S FREE AND EQUAL ELECTIONS CLAUSE

A. The Free And Equal Elections Clause Broadly Protects The Right To Vote, A Right Infringed By The Board's Challenged Practice

This Court can alternatively (or additionally) affirm on the ground that the Board's refusal to count the Voters' provisional ballots violates the Pennsylvania Constitution. Although the Commonwealth Court did not reach this issue (A-34 n.29), this Court is "not limited by the specific grounds … invoked by the court under review" and "may affirm for any valid reason," *Pennsylvania Department of Banking v. NCAS of Delaware, LLC*, 948 A.2d 752, 761-762 (2008).

1. The Pennsylvania Constitution's Free and Equal Elections Clause guarantees that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, §5. As this Court has explained, the clause reflects "the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and,

also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) ("*LWV*"). To achieve these ends, the clause both guarantees that "'each voter under the law has the right to cast his [or her] ballot and have it honestly counted,'" *id*. at 810 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)), and "mandates that all voters have an equal opportunity to translate their votes into representation," *id*. at 804.

Consistent with its expansive reading of the Free and Equal Elections Clause, this Court's precedent provides robust protection for the right to vote. Indeed, recognizing that "[n]o right is more precious" than the right to vote, *In re Nomination Papers of Nader*, 858 A.2d 1167, 1180 (Pa. 2004) (subsequent history omitted), the Court's precedent instructs, as noted, that "[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it," and that "voters are not to be disfranchised at an election except for compelling reasons," *Appeal of Norwood*, 116 A.2d at 554-555; *accord Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945); *In re Canvass of Absentee & Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1079 (2020) (plurality).

More specifically, this Court analyzes claims under the Free and Equal Elections Clause by weighing the alleged "violat[ion of] the fundamental right to vote" or alleged "disparate treatment of any group of voters" against the state interest supposedly advanced by the challenged action. *Banfield v. Cortes*, 110

A.3d 155, 178 (Pa. 2015). The magnitude of the state interest required to uphold a challenged law or practice depends on the severity of the burden it places on citizens' exercise of the franchise. When an election regulation "do[es] not severely restrict the right to vote," the Court has been relatively deferential—so long as the challenged action genuinely advances the Commonwealth's interest in ensuring "'honest and fair elections.'" *Boockvar*, 238 A.3d at 369-370 (quoting *Banfield*, 110 A.3d at 176-177). But "[w]hen a statute significantly interferes with the exercise of [the] fundamental right" to vote, it must be narrowly tailored to promote a compelling state purpose. *Id.* at 176 n.15; *accord Appeal of Norwood*, 116 A.2d at 555.

2. The Board's policy of rejecting provisional ballots submitted by eligible voters whose timely naked mail ballots are canceled denies the fundamental right to vote without advancing any compelling state interest. Indeed, far from employing "[e]very rationalization within the realm of common sense" to "sav[e] the ballot rather than void[] it," *Appeal of Norwood*, 116 A.2d at 554-555, the Board's practice does not even comport with "common sense." There is no sound reason to deny the Voters' right to vote entirely, by both canceling their mail ballots *and* refusing to count the provisional ballots they were advised to submit instead—while at the same time allowing voters who make other routine errors (*i.e.*, failing to properly sign or date the outside declaration envelope) to either correct the error *or* submit a provisional ballot that will be counted.

As discussed, the relevant governmental interests that the provisional-ballot regime serves are to (1) provide "a fail-safe mechanism for voting on election day," 148 Cong. Rec. S10488, S10496 (daily ed. Oct. 16, 2002) (Sen. Durbin), so that voters are not disenfranchised for either bureaucratic or voter error, and (2) prevent provisional ballots from being a means of double-voting, 25 P.S. §3050(a.4)(5). In other words, the purpose is to ensure that eligible voters who want to exercise the franchise can vote exactly *once* in any election—not more, not less.

The Board's provisional-ballot policy faithfully and rationally serves these interests insofar as it allows voters who fail to properly sign or date the declaration envelope for their mail ballot to cure those defects on the envelope itself or to submit a provisional ballot that will be counted in its place. Either way, the voter gets to cast one and only one ballot that will be counted. By contrast, the Board's practice provides no recourse to voters who fail to enclose their mail ballots in the required secrecy envelope: The Board denies them any opportunity to cure the defect, encodes their ballots as "canceled" in the SURE System, yet also rejects any provisional ballots they submit instead. There is no reason, let alone a compelling reason, for that draconian result.

If anything, refusing to count the Voters' provisional ballots *undermines* each of the relevant state interests. By denying the Voters the ability "to cast [a] ballot and have it honestly counted," *LWV*, 178 A.3d at 810, the Board's practice deprives eligible voters of the "freedom of choice" in public affairs, *Boockvar*,

238 A.3d at 365. And because "all voters do not have an equal opportunity to translate their votes into representation," *LWV*, 178 A.3d at 814, the practice deprives the public of "an honest election return" reflecting each eligible voter's equal say, *Boockvar*, 238 A.3d at 356.

Of course, to hold that the Board's challenged practice violates the Free and Equal Elections Clause, this Court need not conclude that that practice affirmatively undermines the relevant state interests. Rather, it is enough that there are no "compelling reasons" *for* the Board's infringement on the Voters' suffrage rights. *Appeal of Norwood*, 116 A.2d at 555; *accord Banfield*, 110 A.3d at 176-177 & n.15. Because the Board's practice infringes on the rights protected by the Free and Equal Elections Clause without serving any compelling state interest, it is unconstitutional and should be enjoined.

B. The Contrary Arguments That Have Been Offered In This Litigation Lack Merit

1. The Board's only argument for treating voters differently based on which ballot envelope their error involves (the inner secrecy envelope or the outer declaration envelope) is that there is no way to know with certainty before pre-canvassing begins at 7 a.m. on election day that a ballot was submitted without a secrecy envelope. A-180. The trial court accepted that argument, stating (A-64) that defects on a declaration envelope can be discovered "without the need to open any envelope and without compromising secrecy in voting, whereas the failure to include a secrecy envelope can only be determined when the

Declaration Envelopes are opened." That is not correct (as explained in the next paragraph), but even if it were—i.e., even if doubt remained until the outside envelope was opened about whether a mail-ballot package was *actually* missing the secrecy envelope—that would not justify disenfranchising eligible and registered Butler County voters. The government's interest in preventing double-voting could instead be fully served by having the voter submit a provisional ballot, and then counting the provisional ballot if and only if the Board confirmed the absence of a secrecy envelope on or after election day.

But appellants' argument is incorrect because, as explained, Butler County uses a machine—the Agilis Falcon—to evaluate the length, height, and thickness of the mail ballot envelope. A-103 to 104. The machine automatically segregates envelopes that are the wrong thickness (*i.e.*, envelopes whose thickness indicates no secrecy envelope was enclosed), and the Board then enters the corresponding SURE code "Canceled-No Secrecy Envelope." *Id*. Nothing in the record even suggests that this system is inaccurate; to the contrary, three days after the April 2024 primary, the Board manually confirmed that each Voter had in fact submitted a naked ballot. A-119. Moreover, because secrecy envelopes are yellow, counties can use a hole punch to confirm *before* pre-canvassing begins whether a secrecy envelope is missing. *See* Pennsylvania Department of State, Directive *Concerning the Form of Absentee and Mail-in Ballot Materials, Version 2.0*, at 4 (July 1, 2024), https://tinyurl.com/bdepm77t. Butler County has opted not to take advantage of this feature, but the Board's *choices* in this regard

are not a sound basis to deny qualified and registered residents of Butler County their fundamental right to vote and have their vote counted.

2. The trial court concluded (A-64) that the Free and Equal Elections Clause does not apply here because, in the court's view, "any chance to correct a deficient ballot … by casting a provisional vote[] constitutes a 'cure,'" and the clause does "not extend to opportunities to 'cure' deficiencies." Both steps in this reasoning are flawed (and either flaw alone suffices to defeat it).

The first step is wrong because, as the Commonwealth Court explained (A-34), a "provisional ballot is a separate ballot, not a cured initial ballot." *See supra* part III. And as to the second step, the trial court erred in assuming (A-64 to 65) that the Free and Equal Elections Clause does "not extend to opportunities to 'cure,'" applying only to "the process of submitting the [initial] ballot itself." As this Court has explained, based on the "expansive sweep of the words 'free and equal'" and the clause's otherwise "broad text," "the Clause should be given the broadest interpretation, one which governs *all aspects* of the electoral process," *LWV*, 178 A.3d at 804, 814 (emphasis added). Accordingly, this Court construes the clause to protect not only "the right to cast a ballot," but also the right to have one's votes "honestly counted." *Id.* at 810. Likewise, what the clause requires to be "equal" for "all voters" is not the opportunity merely to submit a ballot, but rather the "opportunity to translate [one's] votes into representation." *Id*. at 804. It is precisely these rights that the Board denied the Voters when it rejected their provisional ballots, whether or not those ballots are labeled a "cure."

3. The trial court reasoned (A-63)—and the Board (Br.15) and the RNC and RPP (Br.44) contended in the Commonwealth Court—that *Boockvar* forecloses a Free and Equal Elections Clause claim here. That is wrong. *Boockvar* rejected an argument that the constitution required a week-long post-election period for curing defective mail ballots, holding that the clause does not require county boards to "implement [such] a 'notice and opportunity to cure' procedure for" defective mail ballots, 662 Pa. at 374. Here, the Voters do not seek to compel the implementation of an administrative procedure to cure all defects in mail ballots. They claim that the Free and Equal Elections Clause bars a county board from refusing to count *provisional* ballots submitted to *replace* (not cure) mail ballots that were canceled for lack of a secrecy envelope, especially given that the Board counts provisional ballots submitted to replace similarly defective mail ballots and given that there is no legitimate (let alone compelling) reason for treating the Voters' provisional ballots differently.

Boockvar's recognition that "'the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections,'" 238 A.3d at 369-370 (quoting *Banfield*, 110 A.3d at 176-177, likewise does not support the Board here. For the reasons discussed above, the Board's challenged practice is manifestly unreasonable and inconsistent with basic notions of fairness.

* * *

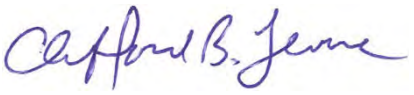
Courts have "broad authority to craft meaningful remedies" when "enforcing the Free and Equal Elections Clause." *Boockvar*, 238 A.3d at 371. If this Court reaches the constitutional issue, it can and should invoke that authority in affirming the Commonwealth Court's order requiring Butler County to count the Voters' provisional ballots.

CONCLUSION

The Commonwealth Court's judgment should be affirmed.

September 26, 2024

Respectfully submitted,

By: 

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CERTIFICATION OF COUNSEL

I hereby certify that this brief contains 10,336 words within the meaning of Pa.R.A.P. 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 26, 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