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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 26 WAP 2024 and 27 WAP 2024

FAITH A. GENSER; FRANK P. MATIS; AND THE PENNSYLVANIA DEMOCRATIC PARTY,
Petitioners/Appellees

v.

BUTLER COUNTY BOARD OF ELECTIONS
Respondents/Appellants,

REPUBLICAN NATIONAL COMMITTEE; AND REPUBLICAN PARTY OF PENNSYLVANIA,
Intervenors/Appellants

BRIEF OF VOTER-APPELLEES FAITH GENSER and FRANK MATIS

On Appeal from the September 5, 2024 Memorandum Opinion and Order of the Pennsylvania Commonwealth Court at Consolidated Case Nos. 1074 CD 2024 and 1085 C.D. 2024 reversing the August 16, 2024 Memorandum Opinion of the Court of Common Pleas of Butler County at No. MSD-2024-40116

MARIAN K. SCHNEIDER (No. 50337)
STEPHEN A. LONEY (No. 202535)
KATE STEIKER-GINZBERG (No. 332236)
ACLU of Pennsylvania
P.O. Box 60173
Philadelphia, PA 19102
215-592-1513
267-573-3054 (fax)
mschneider@aclupa.org
sloney@aclupa.org
ksteiker-ginzberg@aclupa.org

MARY M. MCKENZIE (No. 47434)
BENJAMIN D. GEFFEN (No. 310134)
PUBLIC INTEREST LAW CENTER
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102
mmckenzie@pubintlaw.org
267-546-1319
bgeffen@pubintlaw.org
267-546-1308

WITOLD J. WALCZAK (No. 62976)
RICHARD T. TING (No. 200438)
ACLU OF PENNSYLVANIA
P.O. Box 23058
Pittsburgh, PA 15222
412-681-7864
vwalczak@aclupa.org
rting@aclupa.org

MARTIN J. BLACK (No. 54319)
JEFFREY S. EDWARDS (No. 73978)
LUKE M. REILLY (No. 324792)
STEVEN F. OBERLANDER (No. 334207)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-4000
martin.black@dechert.com
jeffrey.edwards@dechert.com
luke.reilly@dechert.com
steven.oberlander@dechert.com

Attorneys for Voter-Appellees Faith Genser and Frank Matis

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I. INTRODUCTION

Appellees Faith Genser and Frank Matis ("Voter-Appellees") attempted to vote by mail in the April 23, 2024 primary election in Butler County. Before Primary Day, they both learned that they had mistakenly omitted the inner secrecy envelope when they returned their mail-in ballot packets, and that as a result their mail-in votes would not count. Voting is important to Ms. Genser and Mr. Matis, and they each sought to preserve their right to vote by casting a provisional ballot at their polling place on Election Day. But the Butler County Board of Elections ("Board") refused to count their provisional ballots because Voter-Appellees had already returned their uncountable mail-ballot packets.

The purpose of the statutory right to vote by provisional ballot is to give an elector a chance to mark a ballot on Election Day but have it counted only if, during the post-Election-Day review, the board of elections determines that the voter is a qualified, registered elector and did not successfully vote any other ballot in the election. This comports with the broader goal of the Election Code, which is to ensure that the process of voting runs smoothly and that every eligible citizen is able to vote exactly once. Neither the Election Code's text nor its spirit creates the legal equivalent of a minefield, where one misstep is fatal to an elector's chance to cast a vote. Moreover, the longstanding provisional-ballot process is separate and distinct from a notice-and-cure program that a county board may voluntarily adopt.

The Commonwealth Court correctly held that the Election Code requires the Board to count Voter-Appellees' provisional ballots. Appellants the Republican National Committee and Republican Party of Pennsylvania (collectively, "RNC") now ask this Court to reverse the decision of the Commonwealth Court and to reinstate the legally erroneous decision of the Butler County Court of Common Pleas ("trial court"). The trial court read the Pennsylvania Election Code to mean that if a voter hands in a defective mail-ballot packet, and the voter's county does not offer a process for curing the defect with that packet, then the voter has irrevocably blown her chance to participate in that election. This is indefensible as a matter of statutory interpretation. As demonstrated by a split among courts on the meaning of the statute's text, the relevant provisions are not "clear and free from all ambiguity," 1 Pa.C.S. § 1921(b), and it is thus incumbent on a reviewing court to use interpretative tools to ascertain "the intention of the General Assembly," *id*. § 1921(c). The RNC's and the trial court's attempts to rest this case entirely on one isolated phrase from the Election Code have led them to bizarre conclusions. In one instance, the trial court even admitted the "absurdity of the outcome." Trial Court Op. A.58.

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

This case can and should be resolved solely as a matter of statutory interpretation. In the alternative, the Board's refusal to count Voter-Appellees' provisional ballots is irreconcilable with the Pennsylvania Constitution's guarantee of "free and equal" elections. That constitutional provision forbids county boards from making the right to exercise the franchise "so difficult as to amount to a denial." *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). The fact that Voter-Appellees made a technical slipup that prevented their mail-in ballots from being counted is not the end of the constitutional inquiry but the beginning. Counting their provisional ballots would introduce no risk of double voting and no harm to the voting process. The only harm here is to Voter-Appellees' right to vote. The constitutional imperative is to count their provisional ballots.

II. COUNTER-STATEMENT OF THE CASE

A. Form of Action and Procedural History

The RNC appeals from the Opinion and Order of the Commonwealth Court, which reversed the Butler County Court of Common Pleas and directed the Board to count the Voter-Appellees' provisional ballots.

Voter-Appellees Faith Genser and Frank Matis are two qualified Butler County voters who cast provisional ballots in the April 23, 2024, Primary Election at their respective polling places, after learning that their mail-in votes would not be

counted because of a disqualifying mistake. On April 26, 2024, the Board decided not to count Voter-Appellees' provisional ballots.

On April 29, 2024, Voter-Appellees commenced this action by filing a Petition for Review in the Nature of a Statutory Appeal (Dkt. No. 2)[1] in the trial court. The Petition was an election appeal pursuant to 25 P.S. § 3157, challenging the April 26, 2024, decision of the Board not to count Voter-Appellees' provisional ballots.

On May 7, 2024, the trial court held an evidentiary hearing on the Petition for Review. Before the hearing began, also on May 7, the trial court granted intervenor status to the Republican National Committee, the Republican Party of Pennsylvania, and the Pennsylvania Democratic Party. *See* Dkt. Nos. 10, 11. At the hearing, the trial court heard testimony from Ms. Genser, Mr. Matis, and Chantell McCurdy, who is the Director of Elections for the Board. On June 28, 2024, all parties, including intervenors, submitted briefs to the trial court. *See* Dkt. Nos. 23-27.

On August 16, 2024, the trial court issued a Memorandum Opinion and Order ("Trial Court Op.," A.38-A.68) dismissing the Petition for Review and affirming the

[1] References herein to "Dkt. No." refer to the Docket of the Butler County Court of Common Pleas.

Board's decision not to count Ms. Genser and Mr. Matis' provisional ballots. Trial Court Op. A.68.[2]

After Voter-Appellees' timely appeal, and expedited briefing by the parties, the Commonwealth Court issued an opinion and order on September 5, 2024 ("Op.," A.2-A.36) holding that the Election Code, properly construed, requires the Board to count Voter-Appellees' provisional ballots. Op. A.35. Accordingly, the Commonwealth Court reversed the trial court's order and directed the Board to count the provisional ballots cast by Ms. Genser and Mr. Matis in the April 2024 primary.

On September 8, 2024, the Board and the RNC both filed petitions for allowance of appeal. On September 20, this court granted the RNC's petition for allowance of appeal as to two questions, and it denied the Board's petition.

B. Factual Chronology

The relevant facts are not in dispute. Op. A.3; *see also* Trial Court Op. A.39 n.1. Voter-Appellees Faith Genser and Frank Matis are qualified Butler County electors who each attempted to vote by mail-in ballot in the April 23, 2024 primary election. Both Voter-Appellees forgot to include the required secrecy envelope in their mail-in ballot packets. Shortly after receiving their flawed mail-in ballot packets, the Board entered data into the Pennsylvania Department of State's

[2] References herein to page numbers A.1-A.298 refer to the Bates-stamped Appendix to the RNC's Principal Brief.

statewide voter database (the "SURE system"), which generated an automated email notice to both Voter-Appellees that their mail-in ballots would not be counted because of this mistake. On Primary Day, Ms. Genser and Mr. Matis each cast a provisional ballot at their respective polling places, following instructions in the SURE system email and information provided to them via telephone by Board employees. The Board rejected (i.e., did not count) their mail-in votes because Ms. Genser and Mr. Matis had failed to enclose their ballots inside the required secrecy envelope. On April 26, the Board also voted not to count Voter-Appellees' provisional ballots.

1. Voting by Mail in Pennsylvania

Under Pennsylvania law, a voter seeking to vote by mail must complete and submit to her county board of elections an application that includes her name, address of registration, and proof of identification. 25 P.S. §§ 3146.2 (absentee ballots), 3150.12 (mail-in ballots).[3] Upon receipt of this application, the county board verifies the voter's identity and eligibility and then sends her a mail-ballot packet that contains: (1) a ballot; (2) a "secrecy envelope" marked with the words "Official Election Ballot"; and (3) a pre-addressed outer return envelope that

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

contains a voter declaration with spaces to sign and handwrite the date (the "declaration envelope"). 25 P.S. §§ 3146.6(a), 3150.16(a).

Each declaration envelope bears a label with a barcode that identifies the voter by a unique number. Op. A.5; *see also* May 7, 2024 Trial Court Hearing Transcript ("Hrg. Tr.," A.70-A.261) 32:25 (McCurdy), A.102. Using this barcode, the county board enters information about the status of the voter's mail-in ballot into the SURE system. Op. A.6; Hrg. Tr. 33:2-9 (McCurdy), A.103.

A voter must complete several steps to successfully return a mail-in ballot. The mail-in voter must mark the ballot, place it in the secrecy envelope, and then place the secrecy envelope in the outer declaration envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). Next, the voter must "fill out, date and sign" the printed declaration on the declaration envelope. *Id*. Finally, the voter must return the entire mail-ballot packet by mail or in person to her county board of elections at its main office or at a designated satellite office or drop-off location. To be considered "timely," the "completed" mail-ballot packet must arrive at the county board of elections by 8:00 P.M. on Election Day. *Id*. §§ 3146.6(c), 3150.16(c).

It is not uncommon for voters to make mistakes with their mail-ballot packets. Under Pennsylvania law in effect at the time of the April 2024 primary election, a board of elections was required to reject a mail-ballot packet if it had any of numerous defects, the most common of which are: (a) no voter signature on the

declaration envelope; (b) no date or an "incorrect" date on the declaration envelope; or (c) no secrecy envelope. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) ("*Pa. Democratic Party*"). Each of these common mistakes has a corresponding status code in the SURE system. A county board's entry of one of these status codes triggers an email notification to the voter. Hrg. Tr. 34:4-18, 46:2-16 (McCurdy), A.104, A.116.

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

The Board is the local government agency responsible for overseeing the conduct of all elections in Butler County, including adjudicating and deciding whether to count provisional ballots in accordance with the Pennsylvania Election Code. *See* 25 P.S. § 2642 (powers and duties of county boards of elections); *id.* § 3050(a.4) (adjudication of provisional ballots); Hrg. Tr. 18:23-19:7 (McCurdy), A.88-A.89 (explaining that the Board of Elections designates the Computation Board to adjudicate provisional ballots); 25 P.S. §§ 3153-3154 (computation of returns).

Ms. Genser and Mr. Matis both attempted to vote by mail for the April 2024 Primary. However, they each made a mistake when assembling their mail-ballot packets for return to the Board: they failed to place the ballot inside the required secrecy envelope before inserting it into the outer declaration envelope. Hrg. Tr.

60:2-7 (McCurdy), A.130; *see also* Hrg. Tr. 94:15-17 (Matis), A.164. Ms. Genser and Mr. Matis each submitted their incomplete mail-ballot packets to the county election office, which the Board received "well in advance of the Election Code's statutory deadline." Op. A.3-A.4.

Upon receipt of Ms. Genser's and Mr. Matis's mail-ballot packets, the Board screened the packets with a machine and determined that the secrecy envelopes appeared to be missing, which would prevent the Board from counting Voter-Appellees' mail ballots.[4] Hrg. Tr. 33:19-25, 34:4-8 (McCurdy), A.103-A.104 (describing the Agilis Falcon machine); *id.* 60:2-10 (McCurdy), A.130 (confirming that Voter-Appellees' mail-in ballots were not counted); *see also* Op. A.4 ("The Agilis Falcon detected that Electors failed to place their mail-in ballots in secrecy

[4] When the Board receives mail-ballot packets, it runs them through a sorting machine that evaluates the dimensions of the declaration envelope "to make sure that this is in fact an official election envelope with the required materials inside." Hrg Tr. 33:19-25 (McCurdy), A.103. This machine evaluates the dimensions of the declaration envelope, including its length, height, thickness, and weight. *Id.* 33:19-25, 34:4-8 (McCurdy), A.103-A.104. While Ms. McCurdy testified that the Board does not know with certainty that the secrecy envelope is missing until the Computation Board meets and opens the outer envelope, the machine's determinations were correct that Ms. Genser's and Mr. Matis's mail-in ballot packets lacked secrecy envelopes.

On or after election day, the Board can verify that a mail-in packet lacks a secrecy envelope without removing the ballot from the declaration envelope to reveal the individual's selection of candidates. *Id.* 35:24-36:6 (McCurdy), A.105. Ms. McCurdy testified that the Computation Board opened Voter-Appellees' mail-in packets to confirm they were missing a secrecy envelope, but that "nobody looked at them to see who they voted for." *Id.* 65:9-16 (McCurdy), A.135; *see also id*. (those naked ballots "have always remained and remain secret" and are currently "locked in a cabinet in the room that we open all the ballots").

envelopes before depositing them in the declaration envelopes, as required by 25 P.S. § 3150.16(a).").

When the machine detects that a mail-ballot packet is missing the required secrecy envelope, the Board records the ballot status for that voter as "CANCELED – No Secrecy Envelope." Trial Court Op. A.43-A.44; Hrg. Tr. 68:10-14 (McCurdy), A.138; Op. A.4. The Board marked both Voter-Appellees' mail-in ballots into the SURE system as "CANCELED – No Secrecy Envelope." Hrg. Tr. 48:3-4 (McCurdy), A.118.

On April 11, 2024, Ms. Genser received an automated email via the SURE System that said:

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

A.298 (emphasis added). Mr. Matis received the same email from the SURE System. Hrg. Tr. 87:5-9 (Matis), A.157.

Ms. Genser and Mr. Matis each called the Butler County Bureau of Elections after receiving this email notification. An election office employee told Mr. Matis that he could not fix his mail ballot at the office, and that he "had to do a provisional ballot" at his polling place. Hrg. Tr. 87:25-88:4; 98:4-10 (Matis), A.157-A.158,

A.168. An election official informed Ms. Genser that she could cast a provisional ballot on Election Day, but she understood from the conversation that it likely would not be counted. Hrg. Tr. 150:12-19, 169:4-5 (Genser), A.220, A.239 ("I guess I had a vague hope that it would be [counted], but I wasn't counting on it.").

3. The Butler County Board of Elections Curing Policy

The Board has adopted a curing policy for mail-in voters who make mistakes when completing their mail-ballot packets. If the voter has properly completed the declaration envelope, the Board records that voter's ballot into the SURE system as "RECORD—Ballot Returned." Trial Court Op. A.43; Hrg. Tr. 33:2-6, 34:4-9, 45:15-18 (McCurdy), A.103-A.104, A.115. If the voter has neglected to sign or date the declaration envelope, the Board records the voter's ballot into the SURE system as "PENDING—No Signature" or "PENDING—No Date." Trial Court Op. A.44; Hrg. Tr. 51:11-17 (McCurdy), A.121. Under the Board's "curing" policy, such individuals are permitted to "cure" the mistake by signing an attestation at the election office, or by submitting a provisional ballot on Election Day, in which case the Board will treat the submission of the provisional ballot as the attestation and will tabulate the voter's original mail ballot (and not the provisional ballot). *See* Hrg. Tr. 50:15-21 (McCurdy), A.120; *see also* "Butler County Ballot Curing Policy" (Feb. 14, 2024), A.263-A.265.

In both instances, the Board will count the voter's mail ballot. Hrg. Tr. 50:13-21, 60:17-61:4 (McCurdy), A.120, A.130; *see also* Op. A.9 ("[I]f an elector . . . fails to sign the declaration envelope, he or she has two ways to fix that problem and have the vote count."). The Board has steps in place to guarantee that it will not count both a mail ballot and a provisional ballot from a single voter at a single election. Hrg. Tr. 61:5-10 (McCurdy), A.131.

The Board's "curing" policy does not address whether voters who mistakenly submit a "naked ballot" (i.e., a mail ballot not placed within a secrecy envelope) may have their vote counted by casting a provisional ballot on Election Day. Trial Court Op. A.44; Hrg. Tr. 65:17-21 (McCurdy), 135.

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

On April 23, 2024 (Primary Day), Ms. Genser and Mr. Matis appeared in person at their respective local polling places, where they each submitted a provisional ballot. Op. A.4.

On April 26, 2024, the Board, through its designated Computation Board, reviewed all provisional ballots submitted on Primary Day and voted not to count Voter-Appellees' provisional ballots. Hrg. Tr. 60:2-16 (McCurdy), A.130. The Computation Board rejected three ballots in total from voters who had "cast a provisional ballot when they had already turned in an absentee or mail-in ballot that lacked a secrecy envelope." Hrg. Tr. 25:19-21 (McCurdy), A.95; *see also* "F. Matis

Provisional Ballot Search," A.294 (showing provisional ballot status "rejected" because Mr. Matis "voted by . . . absentee/mail-in").

III. SUMMARY OF ARGUMENT

The General Assembly drafted the Election Code to ensure that provisional ballots like Voter-Appellees' would be counted. The RNC's and Board's objections to counting Voter-Appellees' provisional ballots, echoed by the trial court, are grounded in a misconception that the Commonwealth Court's decision would force the Board to adopt a "cure" process and would require judicial redrafting of the Election Code. But the statutorily mandated provisional-ballot process is separate and distinct from the discretionary notice-and-cure processes permitted by the Election Code.

For more than two decades, provisional voting has played a critical role in protecting the franchise in Pennsylvania. This legislatively enacted process preserves the right to vote by ensuring that a qualified voter who attempts to vote by mail, only to have that attempt rejected by the county board of elections because the voter made a mistake, has the right to cast a provisional ballot and to have that ballot counted.

As the Commonwealth Court recognized, a commonsense interpretation of Pennsylvania's Election Code leads to only one conclusion: a voter who makes a mistake that prevents the voter's mail ballot from counting "did not cast any other

ballot in the election" under 25 P.S. § 3050(a.4)(5)(i), and did not have a "mail-in ballot" "timely received" by the board under 25 P.S. § 3050(a.4)(5)(ii)(F) where the voter's submission did not meet the requirements set forth in 25 P.S. § 3150.16. Thus, a provisional ballot voted in this circumstance must be counted. This reading of the relevant Election Code provisions, which are ambiguous, is consistent with "[t]he occasion and necessity for the statute," 1 Pa.C.S. § 1921(c); avoids absurd results; and, most importantly, enfranchises, not disenfranchises, voters. This reading is also consistent with the obvious purpose of section 3050: to ensure that each voter gets to vote once and only once. If the Board were allowed to reject both the mail-ballot submissions and the provisional ballots from Voter-Appellees, they would not get to vote at all.

Although the question of whether a provisional ballot must be counted is a matter of statutory interpretation, the Pennsylvania Constitution's Free and Equal Elections Clause, Pa. Const. art. I, § 5, independently demands that Voter-Appellees' provisional ballots count in these circumstances. This Clause requires the government to act in a reasonable and non-discriminatory fashion and to identify a valid governmental interest before disenfranchising a voter. Neither the RNC nor the trial court has offered any such reason for refusing to count the disputed provisional ballots, which were unquestionably valid.

In sum, this Court should affirm the Commonwealth Court and order the Board to count Voter-Appellees' provisional ballots.

IV. ARGUMENT

The Commonwealth Court recognized that this case is not about whether a voter in Butler County can cure a mail-ballot packet that has a disqualifying mistake, such that the voter's mail ballot will be counted. Rather, the Commonwealth Court grappled with the legal question presented: whether the provisional-ballot portions of the Election Code preserve the fundamental right to vote for a voter who fails to successfully vote by mail. Consistent with the federal Help America Vote Act of 2002 ("HAVA") and a reasonable construction of ambiguous provisions in the Pennsylvania Election Code, the Commonwealth Court correctly concluded that the answer is yes. This court should affirm. In the alternative, this Court should affirm on state constitutional grounds.

A. Casting a Provisional Ballot is Distinct from Curing a Mail Ballot

Provisional voting in Pennsylvania predates Act 77's introduction of "no excuse" mail voting by nearly two decades. The General Assembly enacted provisional voting to fortify the right to vote. The Commonwealth Court correctly reviewed the statutory scheme implementing provisional voting and rejected the RNC's attempt to reframe the case as a dispute about notice and cure, a distinct concept.

1. Provisional Voting Predates "No Excuse" Mail Voting and Was Enacted to Preserve the Right to Vote.

The RNC, unlike the Commonwealth Court below, erroneously conflates "notice and cure" programs with Pennsylvania's longstanding statutory provisional-ballot process. "Notice and cure" is a term of art in election administration that refers to programs carried out by boards of elections to notify voters of deficiencies in their mail-in ballot submissions and to offer them an opportunity to correct the deficiencies before an election. *See, e.g.*, Bipartisan Policy Ctr., *Logical Election Policy* (Jan. 2020) at 43-44, https://bipartisanpolicy.org/wp-content/uploads/2020/01/Bipartison_Elections-Task-Force_R01-2.pdf. "Cure" programs most often allow voters to appear in person at their county election office and correct the deficiencies on site.

Pennsylvania's longstanding provisional-voting process is separate and distinct from such a "notice and cure" program. The Commonwealth Court recognized as much, holding that "the [Election] Code independently authorizes electors to vote by provisional ballot, and, when properly construed, it requires the County to count the provisional ballots here. That does not depend on any ballot curing process, whether optional or mandatory. The provisional ballot is a separate ballot, not a cured initial ballot." Op. A.34.

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

Provisional voting has a separate statutory source and history from Act 77 of 2019. Twenty-two years ago, the General Assembly amended the Pennsylvania Election Code and added sections establishing a provisional-voting procedure *See* P.L. 1246, Act No. 150 of 2002, § 12, codified at 25 P.S. §§ 3050(a.4) *et seq.* The initial enactment of provisional voting in Pennsylvania occurred following Congress's passage of HAVA, now codified at 52 U.S.C. §§ 20901 *et seq.* HAVA established a provisional-voting regime for federal elections and required that "[e]ach state and jurisdiction shall . . . comply with the requirements of [the provisional voting] section on and after January 1, 2004." 52 U.S.C. § 21082(d). Act 150 of 2002 was Pennsylvania's implementation of the mandatory requirements of HAVA, and it went beyond the requirements of HAVA by applying the new procedures to both federal and state elections. *See* 33 Pa.B. 6119 (Dec. 13, 2003) (summarizing the requirements of HAVA on provisional voting and noting that "Act 150 of 2002, establishes procedures for the implementation of provisional voting in Pennsylvania").

The policy rationale underlying provisional voting was clear and simple: to prevent the disenfranchisement of voters. *E.g.*, *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1076-77 (N.D. Fla. 2004) ("Congress enacted HAVA at least partly in response to [Florida's failure to, inter alia] allow the casting of a ballot by

a person who presented at a polling place on election day but who was determined by election officials at that time not to be eligible to vote. If the determination that the voter was not eligible later turned out to be erroneous, the problem could not be cured. Those turned away from the polls during the November 2000 election, even erroneously, thus had no opportunity to vote.").

The floor debates over HAVA were replete with statements emphasizing the need for preventing wholesale disenfranchisement. For example, Senator Dick Durbin stated that HAVA "*provides a fail-safe mechanism for voting on election day*. It requires that all states allow voters to cast a provisional ballot at their chosen polling place if the voter's name isn't on the list of eligible voters, or an election official, for whatever reason, declares a voter ineligible." 148 Cong. Rec. S10496 (Oct. 16, 2002) (Statement of Sen. Durbin) (emphasis added). In keeping with this purpose, HAVA requires states to allow any individual to cast a provisional ballot if he is not listed as eligible in the pollbook but declares that he is eligible to vote. 52 U.S.C. § 21082(a).

The RNC claims that this federal law does not allow a voter like Ms. Genser or Mr. Matis even to submit a provisional ballot at their polling place, RNC's Br. at 36 n.6, but the relevant question under federal law is whether the individual "declares" himself eligible to vote, not whether the poll workers or county board of elections agree with him. Specifically, HAVA provides that if an individual "declares"

(1) "that such individual is a registered voter in the jurisdiction in which the individual desires to vote," and (2) "that the individual is eligible to vote in an election for Federal office," then the individual must be "permitted to cast a provisional ballot." 52 U.S.C. § 21082(a).

The voter also has the right to vote a provisional ballot if "an election official asserts that the individual is not eligible to vote," *id.,* for whatever reason, including the reason in this case, that the voter may have already returned a mail-ballot packet. The right to cast a provisional ballot under HAVA is "unambiguous" and "couched in mandatory terms." *Sandusky Cnty. Democratic Party v. Blackwell,* 387 F.3d 565, 572-73 (6th Cir. 2004) (internal quotation marks and citation omitted). Congress mandated the availability of provisional ballots to ensure that if there is any question as to a person's eligibility, that person should have a way to mark his preferred candidates on election day so that if he is eventually adjudicated to have been eligible to do so, he will not have irreparably missed the opportunity to have his choices included in the vote count. *See e.g., Fla. Democratic Party*, 342 F. Supp. 2d at 1079.

In Pennsylvania, the General Assembly added 25 P.S. § 3050(a.4) to the Election Code to implement Congress's command that each state comply with, and establish, HAVA's fail-safe mechanism for voters. For the past forty-one statewide elections, Pennsylvania law has ensured that provisional ballots are available to voters to preserve the right to vote for a variety of reasons, such as when the voter's

name is not in the pollbook and the voter believes she is registered to vote, or the voter is unable to present an acceptable form of proof of identification as required when voting in a polling location for the first time. Most recently, when the General Assembly made mail-in voting available to all Pennsylvania electors with P.L. 552, Act No. 77 of 2019, the legislature reaffirmed that provisional voting serves as a fail-safe to preserve the right to vote by providing that a mail voter who has not voted her mail ballot may cast a provisional ballot. 25 P.S. § 3150.16(b)(2). Relying on this history and context, the Commonwealth Court correctly held that "the General Assembly obviously *did* intend that mail-in and absentee voters can vote by provisional ballot if they have not already voted an earlier ballot, as 25 P.S. §§ 3146.6(b)(2) and 3150.16(b)(2) provide." Op. A.33.

3. Provisional Voting Preserves the Right to Vote by Ensuring Voters Cast One and Only One Ballot.

Ensuring that voters in an election vote once, and only once, is baked into the provisional-ballot process. During the floor debate on HAVA, Senator Mitch McConnell stated: "a voter's eligibility will be verified, however, prior to the counting of the ballot to *ensure that those who are legally entitled to vote are able to do so and do so only once*; again, making it easier to vote and harder to cheat." 148 Cong. Rec. S10412 (Oct. 15, 2002) (emphasis added). The ballot is "provisional" because the poll workers at the precinct are unable to determine the voter's eligibility, and so that assessment must be conducted after the fact by the board of elections.

See U.S. Election Assistance Comm'n, *Election Management Guidelines* 106 (2d ed. 2023), https://www.eac.gov/sites/default/files/electionofficials/EMG/EAC_Election_Management_Guidelines_508.pdf.

Pennsylvania's statutory regime explicitly codifies the after-the-fact evaluation of a provisional ballot to determine whether the voter was eligible to cast it. 25 P.S. §3050(a.4)(4). The board of elections must evaluate two things: (1) whether the voter is a qualified, registered elector in the election district; and (2) whether the voter already successfully voted in the election. *Id*. The Commonwealth Court below analyzed these after-the-fact assessments of provisional ballots in conjunction with the legislative intent to allow provisional voting for voters who have not voted a mail ballot. Op. A.30-A.33. After correctly concluding that the provisional voting was available to voters who had made errors on their mail ballot packets, the Commonwealth Court noted that its construction advanced the purpose and objective of the Election Code, which is "'to obtain freedom of choice, a fair election and an honest election return.'" Op. A.30 (quoting *Pa. Democratic Party*, 238 A.3d at 356).[5] The Commonwealth Court further explained that "[t]his objective is advanced by ensuring that each qualified elector

[5] The Commonwealth Court's holding aligns with the decision of the Delaware County Court of Common Pleas in *Keohane v. Delaware County Board of Elections*, No. CV-2023-4458 (Del. Cnty. Ct. Com. Pl. Sept. 21, 2023), in which the court ordered the Delaware County Board of Elections to count provisional ballots under similar circumstances.

has the opportunity to vote **exactly once** in each primary or election. Not zero times, which would deprive an elector of the freedom of choice, and not twice, which would prevent an honest election return." *Id.* In keeping with § 3050(a.4)(4), the Board has procedures in place to guarantee that no voter "accidentally has two different votes counted" in the same election. Hrg Tr. 61:5-10 (McCurdy), A.131.

Despite the Board's procedures to avoid double voting, the Cutler Amici argue that when a voter has made a disqualifying error on a mail ballot, provisional voting is unavailable because then the voter would "cast[] multiple ballots in the same election." Cutler Br. at 21. However, the point of a provisional ballot is to ensure that an eligible voter will have one *successful* opportunity to vote. The Commonwealth Court correctly rejected such a harsh reading of the provisional ballot process, highlighting that under their "construction, Electors' provisional voting was an exercise in futility, as Electors' provisional vote, under no circumstances, would be counted." Op. A.31-A.32. The Commonwealth Court further noted that their construction "would reduce the statutory right to cast a provisional ballot as a fail-safe for exercising the right to vote, just in case, to a meaningless exercise in paperwork. Such a provisional ballot would be 'provisional' only euphemistically. In [the RNC's and Board's] view, it really never had a chance." *Id.* at A.32-A.33.

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

B. No Case Law Stands in the Way of Counting Voter-Appellees' Provisional Ballots.

The Commonwealth Court agreed with Voter-Appellees that the case law on which the RNC and the Board rely is either "distinguishable or not persuasive." Op. A.17. In doing so, the Commonwealth Court unambiguously and correctly rejected the trial court's reasoning that the provisional ballots cannot be counted because doing so "would amount to ballot curing." Op. A.3. As the Commonwealth Court observed, this case can be resolved by deciding whether Voter-Appellees' provisional ballots must be counted as a matter of statutory interpretation under the Election Code, which is "distinct from the question whether an elector can cure a defect in a mail-in ballot." *Id.*

The RNC and the Cutler Amici point to two cases that they mischaracterize as controlling in the instant matter. One of them, *Pa. Democratic Party*, addressed a completely different issue and is not relevant to the disposition of this case. The

other, *In re Allegheny County Provisional Ballots in the 2020 General Election*, No. 1161 CD 2020, 2020 WL 6867946 (Pa. Cmwlth. Nov. 20, 2020), supplied only a cursory analysis of the statutory interpretation issue and has now been rejected by the Commonwealth Court as incorrectly decided on this point.

1. *Pa. Democratic Party v. Boockvar* is Inapposite.

The Commonwealth Court correctly held that *Pa. Democratic Party* is not on point. In *Pa. Democratic Party*, this Court held that county boards of elections are not required to implement a "cure" procedure for defective mail-in ballots, because "although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the 'notice and opportunity to cure' procedure sought by Petitioner." 238 A.3d at 374. In contrast to the legislative silence about "curing" mail-in ballots, the Election Code specifies the procedures for casting and counting provisional ballots.

This case turns on statutory interpretation of those procedures in the Election Code. This Court has never previously been presented with or considered the statutory provisions regarding whether a voter's provisional ballot must be counted following the rejection of a mail-in ballot. *See* Op. A.34 (observing that the *Pa. Democratic Party* Court "only tangentially discussed provisional voting—the phrase appears only in a single sentence of that opinion"). This Court need not reexamine

nor disturb *Pa. Democratic Party* to affirm the Commonwealth Court's resolution of the discrete statutory interpretation issue presented in this case.

The RNC and the Cutler Amici repeatedly cite *Pa. Democratic Party* for the proposition that the provisional ballots should not be counted because a court cannot compel a county board to allow "curing" of mail-in ballots. The Commonwealth Court correctly rejected this argument, writing: "To conclude, as the Trial Court did, that 'any chance to . . . cast[] a provisional vote[] constitutes a 'cure'' is to both overread [*Pa. Democratic Party*] and to read the provisional voting sections out of the Code." Op. A.34 (quoting Trial Court Op. A.64). As the Commonwealth Court concluded, the statutory right to cast a provisional ballot—and to have it counted—"does not depend on any ballot curing process, whether optional or mandatory. *The provisional ballot is a separate ballot, not a cured initial ballot*." *Id.* (emphasis added); *see also Pa. Democratic Party*, 238 A.3d at 372 (discussing "curing" as fixing "mail-in or absentee ballots [that] contain minor facial defects," not as submitting provisional ballots to be counted in lieu of defective mail ballots).

2. The Commonwealth Court Properly Rejected *In re Allegheny County*.

The Commonwealth Court correctly held that its prior unreported panel decision in *In re Allegheny County* "does not compel a different result," Op. A.34, because it was decided on only a limited record with a cursory statutory analysis. *See* 2020 WL 6867946, at *1. As the Commonwealth Court observed, the panel in

that case "was not presented with developed arguments" on the issue of statutory interpretation that were before it in the present case. Op. A.34. And in any event, this Court certainly has no obligation to follow a Commonwealth Court decision.

The panel in *In re Allegheny County* did not engage in the thorough statutory interpretation required to resolve the ambiguous provisions in the Election Code that are at issue here; instead, it engaged chiefly with two other questions concerning provisional ballots and mentioned the question under review in this case in only one short paragraph, in which it noted that a "small number of provisional ballots" in the election implicated this question. 2020 WL 6867946 at *4. The panel's reasoning is reproduced here in full:

> [The Timely Received Clause] plainly provides that a provisional ballot shall not be counted if "the elector's absentee ballot or mail-in ballot is timely received by a county board of elections." 25 P.S. § 3050(a.4)(5)(ii)(F). Like the language relating to the requisite signatures, this provision is unambiguous. We are not at liberty to disregard the clear statutory mandate that the provisional ballots to which this language applies must not be counted.

Id. The panel read the Timely Received Clause in isolation, without considering its ambiguity when read in the broader context of the Election Code. *See Phila. Hous. Auth. v. Com., Pa. Labor Relations Bd.*, 499 A.2d 294, 299 (Pa. 1985) ("A cardinal rule of statutory construction is that we must give terms in a statute the meaning dictated by the context in which they are used."). It did not consider how receipt of a defective mail-ballot packet could constitute "timely" receipt of a valid "mail-in

ballot." Nor did it explain how a defective mail-ballot packet could simultaneously be (1) a "ballot" for purposes of depriving the voter of the right to cast a provisional ballot and (2) not a "ballot" for purposes of being counted.

C. Voter-Appellees Did Not "Cast," and the Board Did Not "Timely Receive," a "Mail-In Ballot".

This case can be resolved purely on statutory construction grounds. The statutory construction issue boils down to the proper interpretation of the emphasized language in two provisions of the Election Code:

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

- 25 P.S. § 3050(a.4)(5)(ii)(F) ("Timely Received Clause"): "*A provisional ballot shall not be counted if . . . the elector's absentee ballot or mail-in ballot is timely received* by a county board of elections." (emphasis added)

In interpreting these provisions, the Commonwealth Court correctly reviewed the surrounding statutory framework and faithfully applied this Court's precedents holding that any ambiguity should be resolved in favor of upholding the right to vote. Op. A.28-A.33. On appeal, the RNC proposes a flawed construction that would deny

Voter-Appellees the opportunity to have *any* ballot counted in the April 2024 primary and would more generally entail absurd consequences. The Commonwealth Court correctly rejected the RNC's cramped view of the right to vote a provisional ballot, and this Court should do the same.

1. That Statutory Framework: "Voting by Mail-in Electors" (25 P.S. § 3150.16)

The Commonwealth Court began its analysis by reviewing 25 P.S. § 3150.16, entitled "Voting by mail-in electors." This statutory section has three parts that work together to define what mail voting means under the Election Code. Subsection (a) describes the process a voter must follow to vote successfully by mail, including the requirements with respect to dating, signature, and the secrecy envelope:

> § 3150.16. Voting by mail-in electors
>
> (a) General rule.—At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail,

> postage prepaid, except where franked, or deliver it in person to said county board of election.

Subsection (b), entitled "Eligibility," describes who is entitled to cast a mail-in ballot:

> (b) Eligibility.—
>
> > (1) Any elector who receives and votes a mail-in ballot under [25 P.S. § 3150.11] shall not be eligible to vote at a polling place on election day. The district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place.
> >
> > (2) An elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot under [25 P.S. § 3050].

Subsection (c), entitled "Deadline," sets the deadline for delivering "a ***completed*** mail-in ballot":

> (c) Deadline.—Except as provided under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot), a completed mail-in ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

These three subsections create a holistic and detailed definition of what constitutes voting by mail in the Commonwealth. Compliance with all three provisions of

§ 3150.16, including delivery of a "completed mail-in ballot," is required. Anything less is a legal nullity.

2. The Casting Clause is Not a Bar to Counting Voter-Appellees' Provisional Ballots

Here, Voter-Appellees' mail-ballot submissions were invalid because they were missing the secrecy envelope required by § 3150.16(a). *See Pa. Democratic Party*, 238 A.3d at 380 (holding that a voter's failure to "enclos[e] the ballot in the secrecy envelope renders the ballot invalid"). The RNC asserted below that the Casting Clause prohibited the Board from counting Voter-Appellees' provisional ballots on the ground that they had already "cast" their mail-in ballots and forfeited the right to vote. The Cutler Amici have also adopted that approach. Cutler Br. at 15 ("The Casting Clause is where the Commonwealth Court erred most significantly . . . ."). That is an unreasonable construction of the Casting Clause and should be rejected.

Although Voter-Appellees *tried to* "cast" mail-in ballots, they failed to do so, and their attempts were properly rejected by the Board. Voter-Appellees had not "cast" mail-in ballots where they delivered a mail-in packet that was not legally permitted to be canvassed or counted. This comports with a contemporaneous edition of Black's Law Dictionary, which defines "cast" as "[t]o formally deposit (a ballot) or signal one's choice (in a vote)." *Black's Law Dictionary* 230 (8th ed. 2004). A voter cannot be said to have "formally deposit[ed]" or "signal[ed her] choice" on

a mail-in ballot when she has made a procedural mistake regarding the formalities that will result in the Board rejecting her submission and not tabulating her choice of candidates.

The Commonwealth Court observed that the Election Code uses the term "cast" in different senses. A25. Four of the five courts that have carefully examined these clauses have read the Election Code as ambiguous on this point. *Compare* Op. A.29, *and Center for Coalfield Justice v. Wash. Cnty. Bd. of Elections*, No. 1172 CD 2024 (Pa. Cmwlth. Sept. 10, 2024), *and Center for Coalfield Justice v. Wash. Cnty. Bd. of Elections*, No. 2024-3953 (Pa. Ct. Com. Pl. Wash. Cnty. Aug. 23, 2024), *and Keohane v. Del. Cnty. Bd. of Elections*, No. CV-2023-4458 (Del. Cnty. Ct. Com. Pl. Sept. 21, 2023) (favoring Voter-Appellees' interpretation), *with* Trial Court Op. A.57 (opposite interpretation). This disagreement among courts manifests the ambiguity of the provisions. *Bold v. Dep't of Transp., Bureau of Driver Licensing*, __ A.3d __, No. 36 MAP 2023, 2024 WL 3869082, at *5 (Pa. Aug. 20, 2024) ("Granting due respect to the capable Pennsylvania jurists who have examined this terminology in the past and reached divergent conclusions, we think it clear that both accounts of the statute are reasonable."); *Warrantech Consumer Prods. Servs., Inc. v. Reliance Ins. Co. in Liquidation*, 96 A.3d 346, 354-55 (Pa. 2014) ("A statute is ambiguous when there are at least two reasonable interpretations of the text under review.").

In short, by its terms, the Casting Clause allows voters who have provided a defective mail-ballot packet to vote provisionally. Nevertheless, if the Court finds the provision ambiguous—alone or in conjunction with the operation of the related mail-in and provisional ballot statutes—then it should adopt the interpretation that secures the right to vote.

3. The Timely Received Clause is Not a Bar to Counting Voter-Appellees' Provisional Ballots

The RNC asserts that the Timely Received Clause prohibits counting Voter-Appellees' provisional ballots. The Commonwealth Court correctly rejected that position as well. The odd result proposed by the RNC—that a voter who makes a minor error in the mail-ballot submission process *ipso facto* surrenders the right to vote provisionally—is avoided when the phrase "mail-in ballot is timely received" is properly construed in the full context of the Election Code.

The timeliness requirement referenced in 25 P.S. § 3050 is derived from 25 P.S. § 3150.16, which, as discussed above, is entitled "Voting by mail-in electors" and defines when and how a mail-in ballot must be returned to the county board of elections. Sections 3050 and 3150.16 must be read together.

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

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

Importantly, the Timely Received Clause is not self-executing. While the Clause uses the phrase "timely received," § 3050 on its own provides no guidance whatsoever as to what "timely" means. As a result, it is impossible to discern the meaning of the Timely Received Clause without also looking at its statutory sibling in § 3150.16. Indeed, it is subsection (c) of the latter section, entitled "Deadline," that provides the rule of timeliness for mail-in ballots. That provision states: "a ***completed*** mail-in ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election." *Id.* (emphasis added). The "completed mail-in ballot" of § 3150.16(c) plainly refers to the object described in § 3150.16(a), which is *a mail-in ballot packet with a signature, date, and secrecy envelope*. It would be incoherent to conclude that the deadline set by section 3150.16(c) is for the submission of anything less than the legally prescribed paperwork in section 3150.16(a). The RNC's construction of the statutory framework, under which an empty declaration envelope is a completed

mail-in ballot, does violence to the statutory language and leads to absurd results. That could not have been what the General Assembly intended.

Under Voter-Appellees' commonsense reading, which synthesizes the statutory text, the Board did not "timely receive" any "mail-in ballots" from the Voter-Appellees under 25 P.S. § 3050(a.4)(5)(ii)(F). As of 8:00 P.M. on Election Day, the Voter-Appellees had failed to completely follow the vote-submission process set out in section 3150.16, which mandates use of a secrecy envelope. They therefore did not supply a "timely" vote to the Board, did not meet the deadline for providing a "completed mail-in ballot," and did not lose their right to vote provisionally.

4. The RNC's Criticisms of the Commonwealth Court Analysis Should be Rejected

The RNC levels various criticisms at the Commonwealth Court's analysis, but none hit the mark. First, their request for reversal on the ground that the Commonwealth Court misconstrued the Having Voted Clause in 25 P.S. § 3150.16(b)(2) should be rejected. The Commonwealth Court concluded that when the Having Voted Clause is read in conjunction with the Casting Clause and the Timely Received Clause, the Election Code is ambiguous with respect to how to treat a provisional ballot cast by a failed mail-in ballot voter. A.23-28. There was no error in that conclusion.

The words "vote", "cast", "ballot," and "voted" are used in different senses in the Election Code and do not have a fixed meaning. A.26-28. Resort to dictionary definitions does not clarify matters. A.27-28. The Commonwealth Court's principal point—that the Election Code uses these terms inconsistently—mandates application of the canons of construction used to interpret ambiguous terms in the Election Code.[6]

Second, the RNC points to the oath a provisional voter must sign to cast a provisional ballot, which states "this is the only ballot that I cast in this election." RNC's Br. at 28 (citing 25 P.S. § 3050(a.4)(2)). A voter who realizes she mailed in a naked ballot that will not be counted has a good-faith belief that she has not "cast" a ballot in the election. That is because the commonsense and plain reading of this section of the Election Code obligates the Board to count a properly submitted provisional ballot after the Board has determined, during the canvass, that the voter

[6] The Commonwealth Court's opinion might be read to suggest that if the district register (i.e., pollbook) lists a voter as "having voted," that voter may not submit a provisional ballot at the polling place, or the board of elections must not count such a provisional ballot. The Having Voted Clause should not receive either such reading. As the Board's hearing witness confirmed, and consistent with the mandate of HAVA, *anyone* who does not appear in the district register as eligible to vote on the machine should be allowed to fill out and hand in a provisional ballot. Hrg Tr. 42:16-18, 175:9-11 (McCurdy), A.112, A.245. The RNC has likewise acknowledged that "any voter who asks to submit a provisional ballot, regardless of whether they are legally qualified to do so, is permitted to do so." RNC's Petition for Allowance of Appeal (Sept. 8, 2024), at 15. Otherwise, a typographical error by county election staff resulting in a faulty annotation in the district register might prevent a voter from beginning the provisional voting process. Whether such a provisional ballot should ultimately be counted is a question to be resolved during the canvass, based on whether that voter has successfully submitted a mail-in ballot.

failed to submit a mail-in ballot eligible to be counted. The RNC argues nonetheless that a voter who sends in a flawed mail-in ballot but signs such a statement is making a false statement. This is remarkable given that the Board told Voter-Appellees over the phone that they could cast provisional ballots, knowing that both of them had tried to vote by mail. If anything, the Board's course of dealing with its constituents shows that the ordinary sense of "cast" excludes a failed mail-in ballot. At minimum, the Board should be estopped from asserting otherwise here.

Third, the RNC offers tangled hypotheticals predicated on the fact that ballot counting does not begin until Election Day and that for many mail-in ballots validity will not be known with certainty until after it is too late to cast a provisional ballot. *See* RNC's Br. at 30-32. But this case does not seek to change the rules for the validity of mail ballots or when the ultimate decision on whether to count a mail ballot should be made. As Voter-Appellees argued below, affirmed by the Commonwealth Court, if a voter attempts to vote by mail and later realizes she omitted the secrecy envelope or made some other disqualifying mistake, the Election Code permits her to cast a provisional ballot to preserve her right to vote; and if the Board ultimately concludes that she in fact made a disqualifying mistake, the Election Code requires the Board to count her provisional ballot. It makes no difference whether the voter learned of her mistake from a phone conversation with the Board; or from an email notification via the SURE system; or by "return[ing]

home to find the secrecy envelope on a table." Trial Court Op. A.66. Nor does it matter whether the Board identifies a disqualifying mistake before Election Day or afterward during the pre-canvass or canvass. All that matters is whether the voter submitted a countable mail-in ballot. Voter-Appellees ask simply that because they learned before Election Day that their attempts to vote by mail had failed, their provisional ballots should be counted instead.

Fourth, the RNC criticizes the Commonwealth Court for finding ambiguity in the use of the term "voted" in multiple sections relating to provisional voting. RNC's Br. 32. By way of example, 25 P.S. § 3150.13(e) states that voters may cast a provisional ballot if their "***voted*** ballot is not timely received." *Id.* (emphasis added). The RNC argues there is no difference between a "voted ballot" and a "ballot," but plainly that is not the case. Again, at the minimum, that difference in language is the subject of ambiguity. When Voter-Appellees had submitted naked ballots that could not be entered into the machine the Board uses to tabulate mail votes, it is at least ambiguous whether they had "voted." There was certainly no error in the Commonwealth Court's conclusion that these "voted ballot" provisions created an ambiguity requiring further analysis. A.26-27 (adopting the Secretary of State's argument that the amendments in 2019 and 2020 to add "voted" to the mail-in and absentee ballot statutes is entitled to significant weight).

Fifth, the RNC claims a vetoed 2021 bill "would have created curing opportunities for all Pennsylvania voters statewide" and "underscores that courts may not mandate curing." RNC's Br. at 22. If this failed bill can be probative of anything, it would support Voter-Appellees' position and undermine the RNC's. The bill would have codified that submitting a naked mail ballot is an "incurable" mistake. HB 1300 of 2021, at 105:5-6, https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2021&sessInd=0&billBody=H&billTyp=B&billNbr=1300&pn=1869. And it would have obligated the voter's county board of elections to "direct the elector to vote on election day using a provisional ballot." *Id.* at 105:12-13. The bill would not have amended 25 P.S. § 3050. Thus, the relevant effects of the bill would have been (1) to require notice to voters that they could vote by provisional ballot if they had submitted a naked mail ballot, without removing the supposed barrier to provisional voting presented by the Timely Received Clause; and (2) to reaffirm that casting a provisional ballot is not "curing." Contrary to the RNC's description, this bill indicates agreement by both houses of the General Assembly with the Commonwealth Court's interpretation of the Election Code.

5. Because the Election Code is Ambiguous, the Statutory Construction Act and Precedent Require Affirmance

Because the Election Code is ambiguous and the legal issue in this case cannot be resolved by the plain letter of the statute, the Court should look to the intention

of the General Assembly. 1 Pa.C.S. § 1921(c). In doing so, the Court should consider, among other things, "[t]he occasion and necessity for the statute," "[t]he mischief to be remedied," "[t]he object to be obtained," and "[t]he consequences of a particular interpretation." *Id.*

With respect to the Election Code in particular, when a provision lends itself to two possible interpretations, courts must choose the one that enfranchises voters. *See, e.g.*, *In re Canvass of Provisional Ballots in 2024 Primary Election*, __ A.3d __, No. 55 MAP 2024, 2024 WL 4181584, at *5 (Pa. Sept. 13, 2024) (reiterating the "venerable and well established" "precepts" that when Election Code provisions are ambiguous, "technicalities should not be used to make the right of the voter insecure," and "the Election Code is subject to a liberal construction in favor of the right to vote" (internal quotation marks and citation omitted)); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) ("In construing election laws . . . [o]ur goal must be to enfranchise and not to disenfranchise."); *see also* 1 Pa.C.S. § 1928(c) ("All other provisions of a statute shall be liberally construed to effect their objects and to promote justice.").

Resisting this workaday application of the Statutory Construction Act of 1972, the RNC argues that the Commonwealth Court has "usurp[ed] the General Assembly's authority to set the rules for mail voting." RNC's Br. at 16. Interpretation is not usurpation. It's what courts do all the time. "[T]he proper

interpretation of statutory provisions for purposes of resolving a controversy brought before the courts is a matter entrusted to the Judiciary." *HSP Gaming, L.P. v. City of Phila.*, 954 A.2d 1156, 1181 (Pa. 2008); *accord Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2258 (2024) ("'[T]he interpretation of the meaning of statutes, as applied to justiciable controversies,'" [is] "'exclusively a judicial function'" (quoting *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 544 (1940))).

For the same reasons, the Commonwealth Court in no way "'transgress[ed] the ordinary bounds of judicial review.'" RNC's Br. at 45 (quoting *Moore v. Harper*, 600 U.S. 1, 36 (2023)). It simply applied the Statutory Construction Act. *See generally Commonwealth v. Griffin*, 207 A.3d 827, 830 (Pa. 2019) ("In deciding issues of statutory interpretation, we are guided by the Statutory Construction Act, which directs us to ascertain and effectuate the intent of the General Assembly." (citations omitted)). Courts do not "arrogate to themselves the power vested in state legislatures to regulate federal elections," *Moore*, 600 U.S. at 36, when they use traditional tools of statutory construction to ensure that ambiguous election statutes are implemented with fidelity to the legislature's intent.

With these principles in mind, the Commonwealth Court's interpretation must prevail because it is consistent with the purpose of Pennsylvania's provisional voting law and preserves the right to vote, while the interpretation offered by the RNC prevents electors from voting and leads to absurd results.

a. Ambiguity is Resolved in Favor of the Voter

Voter-Appellees' statutory interpretation recognizes the ambiguity of the crucial terms and is consistent with the purpose of section 3050(a.4)(5)—to ensure that each voter gets to vote once and only once. On the one hand, if a voter's legally completed mail-ballot packet arrives at the Board by the deadline, and the voter also submits a provisional ballot at the polling place, then the provisional ballot must not be counted, because that would constitute double-voting. On the other hand, counting provisional ballots from voters whose mail-in ballots are rejected is standard practice in most Pennsylvania counties and introduces no risk of double voting. *See, e.g.*, *Keohane* ¶ 10 ("[T]he Board has safeguards in place to prevent double voting in this situation.").

The RNC's and the trial court's interpretation of the Election Code goes beyond preventing double voting, with the effect of keeping citizens like Ms. Genser and Mr. Matis from voting at all. This interpretation violates the principle of interpreting election laws "to enfranchise and not to disenfranchise" and should be rejected. *In re Luzerne Cnty. Return Bd.*, 290 A.2d at 109. Under 1 Pa.C.S. § 1921(c), "[t]he occasion and necessity for the statute" is to ensure that every elector gets no more and no less than one vote counted; "[t]he mischief to be remedied" is disenfranchisement; "[t]he object to be obtained" is a free and equal election, with the public confident that the vote totals did not wrongfully exclude the votes of

eligible electors; and "[t]he consequences of a particular interpretation" include the potential rejection of large numbers of provisional ballots cast by eligible voters who had made innocent paperwork mistakes when attempting to vote by mail.

b. The RNC's Statutory Interpretation Leads to Absurd Results.

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

For example, the error in refusing to count Voter-Appellees' provisional ballots is accentuated by Ms. McCurdy's testimony about the Board's peculiar treatment of another type of voter mistake. Ms. McCurdy testified that if a voter mails in an outer envelope containing a properly sealed but empty secrecy envelope, the Board would consider the voter to have submitted a "mail-in ballot" for purposes of 25 P.S. § 3050(a.4)(5)(ii)(F), even though the Board had received *no ballot at all*. *See* Hrg Tr. 63:4-64:8 (McCurdy), A.133-A.134. The trial court acknowledged the "abstract absurdity" of this, but then compounded the absurdity by holding that "the Board *must* treat a received Declaration Envelopes [sic] as the voter's return of their

ballot, even if that Declaration Envelope is empty." Trial Court Op. A.58; *see also id.* at A.57 (holding that when a "Declaration Envelope is received by the Board, that elector's 'mail-in ballot' has been 'received,' regardless of any errors or omissions made by the elector"). In other words, the trial court, while professing to hew closely to the statutory text, held that the term "mail-in ballot" in section 3050(a.4)(5)(ii)(F) can mean "empty declaration envelope."

The RNC downplays this consequence of its argument as a "hypothetical" and a "distraction," RNC's Br. at 36, but voters really do make mistakes like this. *See, e.g.*, Hrg Tr. 35:13-18 (McCurdy), A.105 (describing incident when the Board opened a secrecy envelope "and it contained a copy of medical records for a person. But the way that it was folded . . ., it matched the width dimensions of what the machine thought would be a ballot."). The RNC's interpretation of the Election Code would unavoidably beeline into this dead end, and would mean that when a voter mistakenly mails in his cholesterol test results instead of the paper indicating his choices of candidates, the Board has received a "mail-in ballot." The Court should not accept this absurdity.

This result is avoided when section 3050(a.4)(5)(ii)(F)'s ambiguous terminology of "timely received" "mail-in ballot" is interpreted to exclude incomplete mail-in ballot packets. *See* A.26 ("[T]he Timely Received Clause is triggered once a ballot is received timely, but only if that ballot is and remains *valid*

and *will be counted*, such that that elector has already *voted*."). This interpretation does not add new content to the statute; rather, it faithfully implements the statute by applying it in a coherent manner that is consistent with the General Assembly's intent to offer provisional balloting as a fallback option to protect the right to vote while also preventing double-voting.

Voter-Appellees' construction is also consistent with the provisions of the Election Code that allow for provisional voting by a citizen who has requested a mail-in ballot but has not returned it by 8:00 P.M. on Election Day. For example, if a voter obtains a mail-in ballot, fills it out, and drops it in a mailbox on the day before Election Day, she may reasonably fear that the Postal Service might not deliver her mail-in ballot to the Board until Wednesday. In this circumstance, if she goes to her polling place on Election Day, the district register (i.e., pollbook) will show that she is ineligible to vote using an ordinary in-person ballot because she has been sent a mail-in ballot that might be timely received by the Board. She would be allowed to fill out a provisional ballot instead. 25 P.S. § 3150.16(b)(2).

Under the Commonwealth Court's correct interpretation of the Election Code, this voter's mail-in ballot would count if it arrived at the Board by 8:00 P.M. on Election Day and complied with all the rules in § 3150.16(a); if not, her provisional ballot would count. Under the RNC's curious interpretation of the Election Code, if the voter sent in a naked mail-in ballot that arrived by the 8:00 P.M. Tuesday

deadline, neither the mail-in nor the provisional ballot would count; but if the naked ballot arrived on Wednesday, the provisional ballot *would* count. Hrg Tr. 64:9-65:8 (McCurdy), A.134-A.135. A table illustrates the absurdity of this theory about counting a mail-in ballot ("MIB"):

Voter-Appellees: Which Ballot Counts?

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

Board: Which Ballot Counts?

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

In other words: according to the RNC, if a voter submits a mail-in ballot that is naked but on time, she may not have her provisional ballot counted; but if a voter makes *two* mistakes by mailing in a naked ballot *and* doing so tardily, she *may* have her provisional ballot counted. *See* Op. A.33 n.28 (noting Board's more generous treatment of "lackadaisical" voters than "diligent" voters). The Election Code should not be read to require this nonsensical disparity. *See, e.g.*, *In re Canvass of Provisional Ballots in 2024 Primary Election*, __ A.3d __, No. 55 MAP 2024, 2024 WL 4181584, at *6 (Pa. Sept. 13, 2024) (General Assembly should not be presumed to have intended an absurd result).

There is no practical problem in counting a provisional ballot after rejecting a mail-in ballot. As Ms. McCurdy testified at the hearing, the Board has procedural safeguards in place to prevent any risk of double voting if a voter submits a defective mail-in ballot and then casts a provisional ballot on Election Day.

D. Resolution of this Appeal Will Create Uniform Binding Precedent Applicable in All Counties and to All Forms of Mail-Ballot Defects.

The RNC now argues that resolution of this appeal will mean that voters in Butler County will be subject to different rules than voters in other counties, in contravention of uniformity requirements from state and federal law. RNC's Br. at 42-43.[7] To the contrary, the Court's decision in this case will bind the boards of elections in all sixty-seven counties and thus will promote uniformity in election administration.

The Commonwealth Court analyzed various provisions of the Election Code—a set of statutes enacted by the General Assembly, applicable across the entire Commonwealth. This Court's decision reviewing that determination will set a statewide precedent. *See, e.g.*, *Commonwealth Dep't of Pub. Welfare v. Adams Cnty.*, 392 A.2d 692, 696 (Pa. 1978) (holding that the Court's ruling interpreting a

[7] The RNC took the opposite position in this case earlier this month in its successful petition for allowance of appeal and should be judicially estopped from reversing its position here. *See* RNC's Petition for Allowance of Appeal (Sept. 8, 2024), at 1 ("While the Commonwealth Court's Order facially applies to only two provisional ballots cast in Butler County in the 2024 Primary Election, its reasoning would apply much more broadly.").

statute about food stamps in a case brought against one county was applicable to every county).

Any implication that a decision here will not be binding on any county board except Butler County's and will not apply beyond the context of two votes in the April 2024 primary is wrong. This Court's interpretation of the Election Code would have precedential force for all county boards of elections and would provide clarity for all election officials and voters as to what the law requires regarding provisional ballots. That would not impair the rights of any non-party, including boards of elections in counties other than Butler, because no county may deviate from what Pennsylvania law requires. There is simply no rule in an election case brought by a voter whose ballot was rejected that all sixty-seven county boards of election must be joined to create a statewide rule of decision.

This is how the common law has worked for centuries—individual parties develop the law through individual cases, which are then applied by way of stare decisis across the judicial landscape. *E.g.*, *Klar v. Dairy Farmers of Am., Inc.*, 300 A.3d 361, 376 (Pa. 2023) ("The doctrine of *stare decisis* maintains that for purposes of certainty and stability in the law, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different. This is a principle as old as the common law itself." (internal quotation marks and citations omitted)).

Moreover, this Court's decision will apply to all forms of mail-in ballot defects. The statute does not differentiate between naked ballots and other types of errors, such as omitting a signature from the declaration envelope or making identifying marks on the secrecy envelope. The construction of the relevant terms in the statute does not change depending on the nature of a voter's mistake. If this Court agrees with Voter-Appellees and affirms the Commonwealth Court's interpretations of these words, its holding will apply to all mistakes a voter may make when attempting to vote by mail-in ballot. In other words, 25 P.S. § 3050(a.4) requires the fail-safe provisional-voting option to be available to all voters who attempted to vote by mail but forgot to insert the inner secrecy envelope and/or made other errors that prevent counting their mail ballots. Holding otherwise would run contrary to the General Assembly's intent in enacting the provisional voting process, by rendering thousands of provisional ballots meaningless and blocking qualified voters from being able to vote once and only once.

E. This Case is Not About Pre-Canvassing

Resolution of the legal question at the heart of this case does not turn on how or when an elector learns of a mail-ballot-packet defect. Nonetheless, the RNC contends the Commonwealth Court's decision would require the Board to violate the Election Code's pre-canvassing rules. RNC's Br. at 41-42. That argument should be rejected out of hand.

Under the RNC's interpretation of pre-canvassing, the Board has been regularly violating the Election Code since long before the Commonwealth Court issued the decision under review. The Board routinely examines the outer declaration envelope to ensure completeness, and it runs unopened mail-ballot packets through a sorting machine that can detect when a secrecy envelope is likely missing. *See* footnote 4 *supra*. That is not "pre-canvassing" under the Election Code. To the contrary, pre-canvassing is a multi-step process that begins at 7:00am on Election Day, *see* 25 P.S. § 3146.8(g)(1.1), and consists of:

> 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. The term does not include the recording or publishing of the votes reflected on the ballots.

25 P.S. § 2602(q.1).

Focusing only on the word "inspection," the RNC argues that the Commonwealth Court has now ordered the Board to "'inspect' mail ballots before the pre-canvass and canvass." RNC's Br. 41. But straightforward principles of statutory interpretation make clear that merely *looking* at the unopened outer declaration envelope or running it through a sorting machine is not pre-canvassing. Instead, pre-canvassing is a process that necessarily must include inspecting *and* opening *and* counting *and* computing of ballots. *See, e.g.*, *Rivera v. Phila. Theological Seminary of St. Charles Borromeo, Inc.*, 507 A.2d 1, 8 (Pa. 1986)

("Grammatically, this construction is indicated by the dual presence of the conjunctive 'and' in the list"). *Bloomsburg Town Ctr., LLC v. Town of Bloomsburg*, 241 A.3d 687 (Pa. Cmwlth. 2020) (The use of "and" in a provision connotes "a conjunctive rather than a disjunctive list of requirements"). Indeed, like boards of election across the state, the Board identifies and segregates mail-in ballots with disqualifying errors upon receipt at the election office. *See, e.g.*, *Ball v. Chapman,* 284 A.3d 1189, 1192 (Pa. 2022) ("We hereby DIRECT that the Pennsylvania county boards of elections segregate and preserve any ballots contained in undated or incorrectly dated outer envelopes.").

Nor does notifying voters of disqualifying errors with respect to their mail-ballot packets violate the Election Code's prohibition on "disclos[ing] the results of any portion of any pre-canvass meeting prior to the close of the polls." 25 P.S. § 3146.8(g)(1.1), as the RNC argues. RNC Br. 41. The "results" referred to in this section are the outcomes of races; in other words, the vote counts after pre-canvassed ballots are tabulated. The RNC would have the Court adopt an overly expansive reading of the word "results," when it clearly refers to the outcomes of races. Every state prohibits disclosure of tabulated election results before the close of the polls. *See* Bipartisan Policy Ctr., *From Examination to Tabulation* (Sept. 2022) at 3-4, https://bipartisanpolicy.org/explainer/ballot-pre-processing-explained/. In short,

nothing in the Commonwealth Court's decision interferes with or runs afoul of the "pre-canvassing" provisions under the Election Code.

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

Voter-Appellees argue in the alternative that the Board's decision not to count their provisional ballots violated their right to vote under the Pennsylvania Constitution's Free and Equal Elections Clause. Pa. Const. art. I, § 5.

The Commonwealth Court did not rule on this alternative argument. Op. A.34 n.29. If this Court affirms on statutory-construction grounds, it likewise need not address the constitutional claim. As discussed above, 25 P.S. § 3050 should be interpreted to require the Board to count the disputed provisional ballots. Where there is statutory ambiguity, this Court can and should construe the Election Code to require counting of the votes. It is well established that the Court should adopt a construction that renders a statute constitutional if at all possible. *E.g.*, *Working Families Party v. Commonwealth*, 209 A.3d 270, 278 (Pa. 2019).

If the Court nevertheless reaches the constitutional question, it should find the Board's policy unconstitutional.

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

Article I, Section 5 of the Pennsylvania Constitution guarantees that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Under this guarantee,

> all aspects of the electoral process, to the greatest degree possible, [must] be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government.

League of Women Voters v. Commonwealth, 178 A.3d 737, 804 (Pa. 2018).

To effectuate the constitutional right to vote, courts require governmental entities to demonstrate a compelling reason when impinging on the right to vote. *See Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964) ("[E]ither an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons."); *see also Shambach v. Bickhart*, 845 A.2d 793, 801-02 (Pa. 2004) (the Pennsylvania Election Code "must be liberally construed to protect voters' right to vote"). Pennsylvania constitutional law forbids boards of elections from taking action that denies the franchise or "make[s] it so difficult as to amount to a denial." *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914); *see also De Walt v. Bartley*, 24 A. 185, 186 (Pa. 1892) ("The test is whether such legislation denies the franchise, or renders its exercise so difficult and inconvenient

as to amount to a denial"); *In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) (noting that "the right to vote" is "fundamental"), *overruled on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016).

The trial court gave a nod to the core principles of *League of Women Voters* but misconstrued the Supreme Court's detailed explication of the Free and Equal Elections Clause as being limited to redistricting and similar cases. Trial Court Op. A.64. Describing this as a "curing" case, the trial court failed to apply the constitutionally required analysis of *Pa. Democratic Party*, in which the Court considered various provisions of the Election Code one by one, recognizing that "the state may enact substantial regulation containing *reasonable, non-discriminatory restrictions* to ensure honest and fair elections that proceed in an orderly and efficient manner." Trial Court Op. A.63 (citing *Pa. Democratic Party*, 238 A.3d at 369-70) (emphasis added). Here, the Board had to show that its refusal to count the disputed provisional ballots was both reasonable and non-discriminatory, a burden it failed to discharge.[8]

[8] This Court in *Pa. Democratic Party* also declined to issue a mandatory injunction that would have created from whole cloth a notice-and-cure regime for fixing defects with mail-ballot packets, on the grounds that doing so would be a complex undertaking and a legislative function. 238 A.3d at 372-75. The question presented here, by contrast, is only whether a vote that had been cast via provisional ballot should be counted. And on this question, unlike in the question of notice and cure, the General Assembly has already spoken, by enacting 25 P.S. § 3050(a.4).

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

There is no dispute that Voter-Appellees properly filled out valid provisional ballots that could otherwise be counted. Under the Board's policy, if a mail ballot arrives after the Election Day 8:00 P.M. deadline, whether naked or not, the Board will count the voter's provisional ballot, demonstrating that provisional ballots are a safe and effective method of voting.

The RNC and the Board have not contested these facts or explicitly identified a state interest in support of their position. Their approach is essentially punitive in nature—the voter who fails to dot every *i* and cross every *t* must have his right to vote extinguished for that election. This approach is inconsistent with the mandate of the Free and Equal Elections Clause to promote voting rights to "the greatest degree possible." *League of Women Voters*, 178 A.3d at 804.

The RNC and the Board have tried to justify this harsh position on the grounds that the Board has no obligation to allow curing or help the voter in any way, but they are observing the problem through the wrong end of the telescope. The Free and Equal Elections Clause does not ask whether a state has an inherent right to punish voters for not following the rules, but *whether a regulation denying the right to vote is reasonable*. It is the government's burden to establish that a restriction on voting is reasonable, and here the relevant issue is whether the Board should count a vote in hand at the time of the canvass or simply reject it as a penalty for

noncompliance with mail-voting technicalities. Such behavior is unreasonable, is directly in conflict with the mandate of the Free and Equal Elections Clause to promote voting, and serves no valid governmental interest.

In rejecting Voter-Appellees' constitutional claim, the trial court failed to apply the relevant constitutional analysis and instead applied erroneous reasoning to flawed premises:

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

Trial Court Op. A.63-A.64. There are at least three flaws with the above analysis.

First, rather than focusing on whether counting provisional ballots imposes any burden on the Board, the court miscast the question as turning on "the equal opportunity to correct a mistake" and then concluded there is no constitutional right to be treated equally with respect to "correct[ions]." Trial Court Op. A.64. But the

question here is whether the Board can refuse to count an otherwise valid provisional ballot as a penalty for making an error on a mail-in ballot.

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

Third, the trial court's blanket holding that only "vote-casting regulations" implicate the Free and Equal Clause and not provisions like the Board's provisional-ballot-counting policy here, Trial Court Op. A.64-A.65, is simply wrong. No court has held that policies of boards of elections regarding the counting of provisional ballots are immune from the reach of the Free and Equal Elections Clause. To the contrary, boards violate the Clause when, as here, their restrictions deny the franchise or "make [exercise of the franchise] so difficult as to amount to a denial" of the vote. *Winston v. Moore*, 91 A. at 523. Here, the Board fully denied Voter-

Appellees' right to vote when it refused to count their provisional ballots, knowing that their earlier mail ballots were uncountable.

In short, the proper way to look at the constitutional issue is to evaluate whether there is any justification in the record for refusing to count an otherwise timely and properly completed provisional ballot, when the alternative is to disenfranchise the voter. Because the Board offered no such reason, it should be ordered to count Voter-Appellees' provisional ballots.

V. CONCLUSION

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

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Respectfully submitted,

/s/ Benjamin D. Geffen

MARIAN K. SCHNEIDER (No. 50337)
STEPHEN A. LONEY (No. 202535)
KATE STEIKER-GINZBERG (No. 332236)
ACLU of Pennsylvania
P.O. Box 60173
Philadelphia, PA 19102
215-592-1513
267-573-3054 (fax)
mschneider@aclupa.org
sloney@aclupa.org
ksteiker-ginzberg@aclupa.org

WITOLD J. WALCZAK (No. 62976)
RICHARD T. TING (No. 200438)
ACLU OF PENNSYLVANIA
P.O. Box 23058
Pittsburgh, PA 15222
412-681-7864
vwalczak@aclupa.org
rting@aclupa.org

MARY M. MCKENZIE (No. 47434)
BENJAMIN D. GEFFEN (No. 310134)
PUBLIC INTEREST LAW CENTER
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102
mmckenzie@pubintlaw.org
267-546-1319
bgeffen@pubintlaw.org
267-546-1308

MARTIN J. BLACK (No. 54319)
JEFFREY S. EDWARDS (No. 73978)
LUKE M. REILLY (No. 324792)
STEVEN F. OBERLANDER (No. 334207)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-4000
martin.black@dechert.com
jeffrey.edwards@dechert.com
luke.reilly@dechert.com
steven.oberlander@dechert.com

Attorneys for Voter-Appellees Faith Genser and Frank Matis

CERTIFICATION OF WORD COUNT

I certify that the foregoing brief complies with the 14,000-word limit established by Pa.R.A.P. 2135. According to the word count of the word-processing system used to prepare this brief, the brief contains 13,900 words, not including the supplementary matter as described in Pa.R.A.P. 2135(b).

Dated: September 26, 2024

/s/ Benjamin D. Geffen
Benjamin D. Geffen

CERTIFICATION OF COMPLIANCE

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

Dated: September 26, 2024

/s/ Benjamin D. Geffen
Benjamin D. Geffen