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No. ___ WM ___

IN THE

Supreme Court of Pennsylvania

Western District

IN RE: ALLEGHENY COUNTY PROVISIONAL BALLOTS IN THE 2020 GENERAL ELECTION

PETITION FOR ALLOWANCE OF EMERGENCY APPEAL
FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

MEMORANDUM OPINION AND ORDER DATED NOVEMBER 20, 2020
1161 C.D. 2020

FILED ON BEHALF OF

ALLEGHENY COUNTY BOARD OF ELECTIONS

Andrew F. Szefi
County Solicitor
Pa. I.D. #83747
Andrew.Szefi@AlleghenyCounty.US

Virginia Spencer Scott
Assistant County Solicitor
Pa. I.D. #61647
Virginia.Scott@AlleghenyCounty.US

Frances M. Liebenguth
Assistant County Solicitor
Pa. I.D. #314845
Frances.Liebenguth@AlleghenyCounty.US

ALLEGHENY COUNTY LAW DEPARTMENT
300 Fort Pitt Commons
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
Tel.: (412) 350-1173

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REFERENCE TO THE OPINIONS BELOW

The Memorandum Opinion of the Commonwealth Court is attached at the end of this PETITION as Exhibit "A." The Opinion of the Court of Common Pleas of Allegheny County is attached at the end of this PETITION as Exhibit "B."

TEXT OF THE ORDER IN QUESTION

AND NOW, this 20th day of November 2020, the November 18, 2020 order of the Court of Common Pleas of Allegheny is REVERSED, and this matter is REMANDED to the court of common pleas for further proceedings in accordance with the accompanying opinion.

s/ Patricia A. McCullough, Judge

QUESTIONS PRESENTED FOR REVIEW

1. Does the Election Code require the Allegheny County Board of Elections to disenfranchise qualified voters who submitted provisional ballots, signed their ballot's outer envelope in one of two provided locations on the outer envelope, but did not fully complete the outer envelope in a second location, where no fraud or irregularity has been alleged?

2. Does the Election Code require the Allegheny County Board of Elections to disenfranchise qualified voters who submitted provisional ballots, where there is no

issue of fraud or irregularity, the ballot is timely received, and the voter only voted once in the election, but had submitted a mail-in ballot that was not counted because of a recognized deficiency?

CONCISE STATEMENT OF THE CASE

On Saturday, November 14, 2020, the Allegheny County Board of Elections (the "Board") met to consider whether the ballots cast by approximately 270 Voters should be canvassed in accordance with Section 3050 of the Election Code. The Board determined that these Voters were entitled to have their ballots canvassed in accordance with Section 3050. The Board directed the Manager of the County's Elections Division to proceed with canvassing these Voters' provisional ballots.

The Voters' ballots in question were divided into three categories and a vote was taken on each category. Those categories were as follows:

1. Voters' ballots containing an affidavit signature by the voter under 25 P.S. § 3050(a.4)(3), but not a signature pursuant to 25 P.S. § 3050 (a.4)(3);

2. Voters' ballots containing the signature under 25 P.S. § 3050(a.4)(3), but not the affidavit signature under 25 P.S. § 3050(a.4)(3); and,

3. Voters' ballots for which a Voter voted a provisional ballot which corresponded to a previously submitted mail-in or absentee ballot which was determined to lack the secrecy envelope, and which was therefore not counted by the Board.

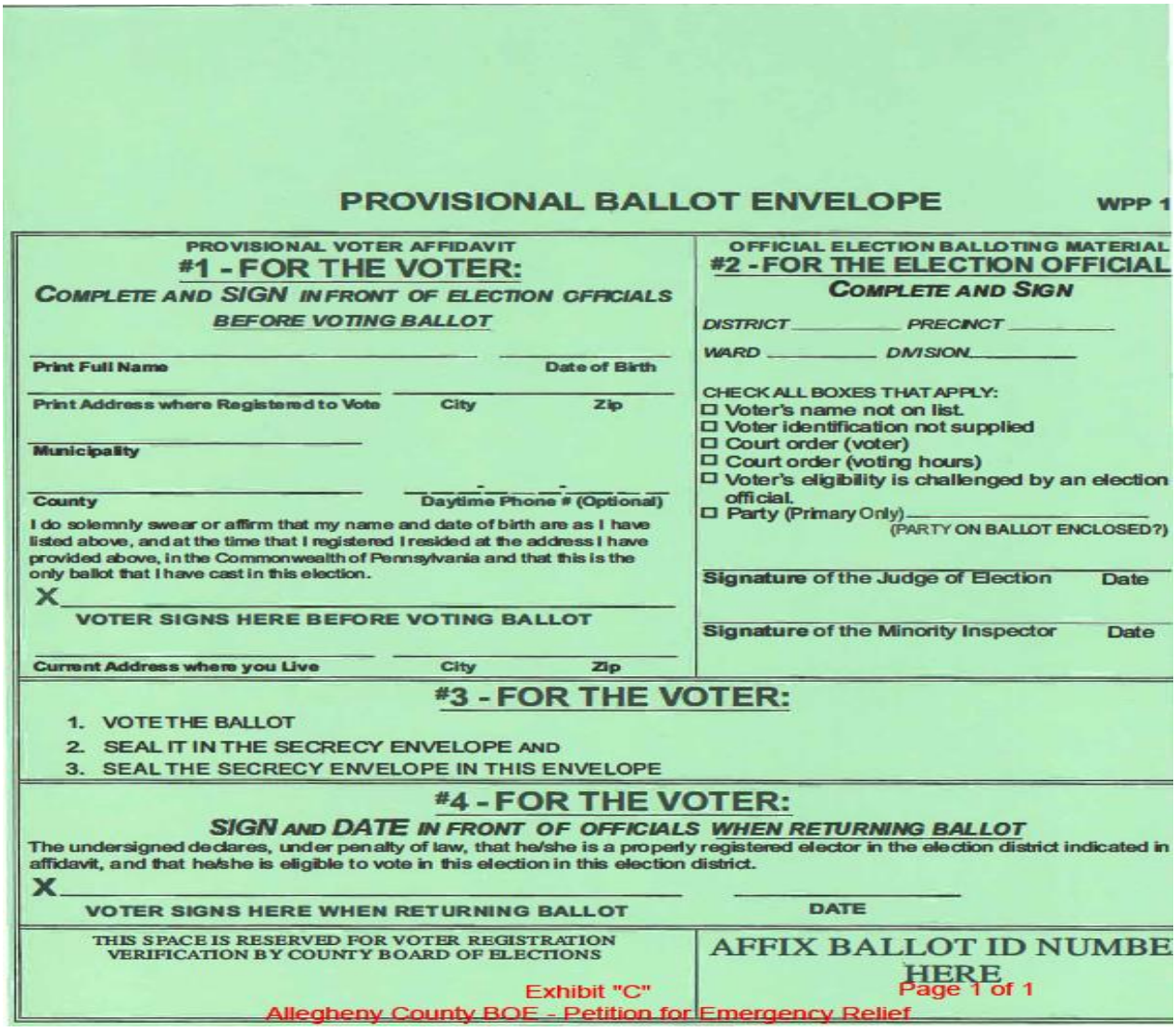
The Voters' ballots at issue in the first two categories totaled approximately 250. The Voters' ballots at issue in the third category totaled approximately 20.

Categories one and two from the list above implicate the provisions of the Election Code that require "prior to voting the provisional ballot," the voter must sign an affidavit affirming, *inter alia*, that the provisional ballot is the only one that was cast by the elector in that election. 25 P.S. § 3050(a.4)(2). The Election Code also provides that "after the provisional ballot has been cast," the voter must place the provisional ballot in a secrecy envelope and "shall place his signature on the front of the provisional ballot envelope." 25 P.S. § 3050(a.4)(3).

There is no dispute that the approximately 250 Voters who submitted provisional ballots (categories one and two) were cast by qualified electors who did not vote twice in the election. Furthermore, Ms. Ziccarelli did not allege any fraud associated with these ballots. The Board thus properly held that the 250 Voters' ballots were properly voted and that the absence of a second voter signature on the outer envelope should not result in the disenfranchisement of the Voter; recognizing the "longstanding and overriding policy" of this Commonwealth "to protect the elective franchise."

The "deficiency" now identified by Ms. Ziccarelli is that the approximately 250 Voters did not sign both signature boxes on the outer envelope, which can only be described as a minor technicality. There is no reason – much less a compelling

one – to disenfranchise approximately 250 Voters for a minor deficiency or error that likely resulted from the incorrect advice or instruction of an election worker given that the voter must fill out the Voter Signature section on the provisional ballot envelope in front of the Judge of Elections and the Minority Inspector and the Judge of Elections and the Minority Inspector must then sign and date the envelope after noting the reason for the provisional ballot. Below is an exemplar of the outer envelope of a provisional ballot.



PROVISIONAL BALLOT ENVELOPE WPP 1

PROVISIONAL VOTER AFFIDAVIT

#1 - FOR THE VOTER:

COMPLETE AND SIGN IN FRONT OF ELECTION OFFICIALS BEFORE VOTING BALLOT

Print Full Name _____ Date of Birth _____

Print Address where Registered to Vote _____ City _____ Zip _____

Municipality _____

County _____ Daytime Phone # (Optional) ___-___-____

I do solemnly swear or affirm that my name and date of birth are as I have listed above, and at the time that I registered I resided at the address I have provided above, in the Commonwealth of Pennsylvania and that this is the only ballot that I have cast in this election.

X _____

VOTER SIGNS HERE BEFORE VOTING BALLOT

Current Address where you Live _____ City _____ Zip _____

OFFICIAL ELECTION BALLOTING MATERIAL

#2 - FOR THE ELECTION OFFICIAL

COMPLETE AND SIGN

DISTRICT _____ PRECINCT _____

WARD _____ DIVISION _____

CHECK ALL BOXES THAT APPLY:

- ☐ Voter's name not on list.
- ☐ Voter identification not supplied
- ☐ Court order (voter)
- ☐ Court order (voting hours)
- ☐ Voter's eligibility is challenged by an election official.
- ☐ Party (Primary Only) _____ (PARTY ON BALLOT ENCLOSED?)

Signature of the Judge of Election _____ Date _____

Signature of the Minority Inspector _____ Date _____

#3 - FOR THE VOTER:

1. VOTE THE BALLOT
2. SEAL IT IN THE SECRECY ENVELOPE AND
3. SEAL THE SECRECY ENVELOPE IN THIS ENVELOPE

#4 - FOR THE VOTER:

SIGN AND DATE IN FRONT OF OFFICIALS WHEN RETURNING BALLOT

The undersigned declares, under penalty of law, that he/she is a properly registered elector in the election district indicated in affidavit, and that he/she is eligible to vote in this election in this election district.

X _____ _____

VOTER SIGNS HERE WHEN RETURNING BALLOT DATE

THIS SPACE IS RESERVED FOR VOTER REGISTRATION VERIFICATION BY COUNTY BOARD OF ELECTIONS

AFFIX BALLOT ID NUMBE HERE

Exhibit "C"

Page 1 of 1

Allegheny County BOE - Petition for Emergency Relief

Category three from the list above involves Section 3050(a.4)(5)(ii)(F) of the Election Code which states that provisional ballots shall not be counted if the voter's "absentee ballot or mail-in ballot is timely received by a county board of elections." The concern with Section 3050(a.4)(5)(ii)(F) is to prevent double voting. No risk of double voting can result when the county board does not count an absentee or mail-in ballot. Thus, the provisional ballot must be counted. *Pa. Democratic Party v. Boockvar*, —— Pa. ——, 238 A.3d 345, 378 (2020) (look to legislative purpose and whether it is served). Interpreting Section 3050(a.4)(5)(ii)(F) to prohibit the counting of these Voters' ballots would render Sections 3146.6(b)(2) and 3150.16(b)(2) meaningless. It would give Voters an illusory right to cast a provisional ballot that could never be counted. Mail-in ballots not counted by the Board because of a recognized deficiency are not "timely received" by the Board for purposes of determining eligibility to vote provisionally under Section 3050 of the Election Code.

CONCISE STATEMENT OF REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

This Honorable Court should review the final order of the Commonwealth Court because the Commonwealth Court's decision creates an emergency and raises questions of immediate and significant importance that directly affects individual Allegheny County voters. As it currently stands the Commonwealth Court's decision, if not corrected, will cause a significant number of Allegheny County

voters who voted provisionally to lose their vote because of a minor technical irregularity with the outer envelope of their provisional ballot or because their mail-in ballot was defective, and the voter submitted a provisional ballot as their vote instead. This situation is of crucial importance to these voters and the Allegheny County Board.

This Court, may assume, in its discretion, plenary jurisdiction over this case because it presents a question of such substantial public importance that it requires prompt and definitive resolution by this Court. Jurisdiction is appropriate because the intermediate appellate court has so far departed from accepted judicial practices as to call for the exercise of this Court's supervisory authority.

Given that Allegheny County Board of Elections, and other counties boards, are still in the process of completing their vote counts, the situation is urgent and immediate. This Court's intervention is needed on an emergency basis to correct this injustice.

The Commonwealth Court has also departed from accepted judicial practices in the interpretation it has made of the precedent of this Court, specifically: *In re Nov. 3, 2020 Gen. Election*, No. 149 MM 2020, 2020 WL 6252803 (Pa. Oct. 23, 2020); *Pa. Democratic Party v. Boockvar*, —— Pa. ——, 238 A.3d 345 (2020); and the long line of precedent of this Court which requires that, in the absence of fraud (which is not alleged in this case) the Election Code is required to be interpreted in

such a manner as to enfranchise voters and excuse technical errors. *See e.g.*, *Appeal of James*, 377 Pa. 405, 105 A.2d 64 (1954); *Perles v. Hoffman*, 419 Pa. 400, 213 A.2d 781 (1965); *Weiskerger Appeal*, 447 Pa. 418, 290 A.2d 108 (1972); *Shambach v. Bickhart*, 577 Pa. 384, 845 A.2d 793 (2004).

CONCLUSION

For the foregoing reasons, Allegheny County Board of Elections requests that this Honorable Court GRANT this PETITION FOR ALLOWANCE OF APPEAL.

Respectfully submitted,

/s/ *Andrew F. Szefi*
Andrew F. Szefi
County Solicitor
PA ID # 83747

/s/ *Virginia Spencer Scott*
Virginia Spencer Scott
Assistant County Solicitor
PA ID # 61647
Virginia.Scott@AlleghenyCounty.us

/s/ *Frances M. Liebenguth*
Frances M. Liebenguth
Assistant County Solicitor
PA ID # 314845
Frances.Liebenguth@Alleghenycounty.us

ALLEGHENY COUNTY LAW DEPARTMENT
Firm No. 057
300 Fort Pitt Commons Building
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
(412) 350-1173

Attached on the following pages is the Memorandum Opinion and Order from the Commonwealth Court.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Allegheny County Provisional Ballots in the 2020 General Election	:	No. 1161 C.D. 2020
Appeal of: Nicole Ziccarelli	:	Submitted: November 19, 2020

BEFORE: HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: November 20, 2020

Nicole Ziccarelli, a Republican candidate for State Senator from the 45th Senatorial District in the General Election (Candidate), appeals from the November 18, 2020 order of the Court of Common Pleas of Allegheny County (trial court) which denied Candidate's petition for review and affirmed the decision of the Allegheny County Board of Elections (Elections Board) to canvass and count 270 provisional ballots for the November 3, 2020 General Election. The disputed provisional ballots at issue were submitted by voters who either failed to affix the necessary signatures under the Pennsylvania Election Code[1] (Election Code), and/or whose mail-in ballots were timely received, but ultimately found defective.

[1] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§2600-3591.

Factual and Procedural Background

Of the approximately 17,000 provisional ballots cast in Allegheny County in the 2020 General Election, these approximately 270 ballots were challenged on one of the following three grounds:

> i. The provisional ballot contained an affidavit signed by the voter under [section 1210(a.4)(2) of the Election Code, 25 P.S. §3050(a.4)(2),] but did not contain the signature required by [section 1210(a.4)(3) of the Election Code,] 25 P.S. §3050(a.4)(3);
>
> ii. The provisional ballot contained the requisite signature under 25 P.S. § 3050(a.4)(3), but lacked the affidavit signed under 25 P.S. §3050(a.4)(2);
>
> iii. The provisional ballot was cast by an elector whose mail-in or absentee ballot was timely received by the Elections Board, but was somehow defective (i.e., missing or incomplete secrecy envelope, identifying mark, etc.).

On November 14, 2020, the Elections Board conducted a hearing, during which it considered whether the three classes of disputed provisional ballots described above should be set aside as invalid. Considering each of the three challenges separately, the Elections Board decided, by a vote of 2-1 relative to each category, to canvass and count the disputed provisional ballots.

On November 16, 2020, Candidate filed a petition for review in the trial court. The Pennsylvania Democratic Party and Democratic candidate for State Senator from the 45th Senatorial District, James Brewster, were permitted to intervene. On November 17, 2020, the trial court conducted a hearing. At the hearing, the Elections Board provided the trial court with an example of a provisional ballot envelope.[2] The

[2] The provisional ballot envelope used in the Allegheny County 2020 General Election is attached to the Pennsylvania Democratic Party/James Brewster's Brief as Exhibit B.

provisional ballot outer envelope contains two similar voter declarations. The first declaration, contained in Box 1, states: "I do solemnly swear or affirm that my name and date of birth are as I have listed above, and at the time that I registered I resided at the address I have provided above, in the Commonwealth of Pennsylvania and that this is the only ballot that I have cast in this election." The second declaration, contained in Box 4, states: "The undersigned declares, under penalty of law, that he/she is a properly registered elector in the election district indicated in my affidavit, and that he/she is eligible to vote in this election in this election district." Notably, at the hearing, counsel for the Elections Board suggested, but provided no evidence, that these 270 electors received faulty instructions from election officials to sign the provisional ballot envelope only once.

On November 18, 2020, the trial court issued an order denying the petition for review and affirming the Elections Board on the grounds that these eligible electors "should not be penalized because they were given and relied on incorrect information by the election administration." (Trial Ct. Op. at 5.) That same day, Candidate filed a timely appeal with this Court[3] contending that the disputed provisional ballots are invalid and cannot be counted. The parties have submitted briefs in support of their respective arguments on the merits.[4]

Candidate submits that the trial court erred when it concluded that provisional ballots lacking one of the necessary signatures could be counted. Candidate argues that the trial court's decision is in plain contravention of the mandatory language

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[3] This Court has jurisdiction over this election-related appeal pursuant to Section 762(a)(4)(i)(c) of the Judicial Code, 42 Pa.C.S. § 762(a)(4)(i)(c). *See Dayhoff v. Weaver*, 808 A.2d 1002, 1005-06 & n.7 (Pa. Cmwlth. 2002).

[4] This matter calls for the Court to review and determine the meaning of the Election Code. "[S]tatutory interpretation of the Election Code . . . as a question of law, is subject to a de novo standard of review and a plenary scope of review." *Banfield v. Cortes*, 110 A.3d 155, 166 (Pa. 2015).

of section 1210 of the Election Code, which states that a provisional ballot "shall not be counted" if "either the provisional ballot envelope . . . or the affidavit . . . is not signed by the individual;" 25 P.S. §3050(a.4)(5)(ii)(A), or if "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). She asserts that a mail-in ballot that the Elections Board rejected for lack of an inner secrecy envelope is "timely received" by the Elections Board pursuant to section 1210, thus prohibiting the voter from being eligible to cast a provisional ballot. Lastly, Candidate argues that there was no evidence to support the trial court's finding that the electors were given incorrect instructions, and even assuming arguendo that the defects in the disputed provisional ballots were the result of erroneous instructions by election officials, the Elections Board was nonetheless required to set them aside under both settled and recent Supreme Court decisions.

In response, the Pennsylvania Democratic Party, James Brewster, and the Elections Board (collectively, Appellees) concede that 270 voters each filled out a provisional ballot that included one of the signatures referenced in section 1210 of the Election Code, but not the other. (Brief of the Pennsylvania Democratic Party and James Brewster at 6.) They argue however that the absence of a second voter signature on the outer envelope should not result in the disenfranchisement of any of the affected voters. They submit that there is no reason to disenfranchise 270 voters for a "minor technicality" that most likely resulted from an election worker providing incorrect advice. *Id.* at 13.

Discussion

Section 1210(a.4)(2) of the Election Code, 25 P.S. §3050(a.4)(2), provides that, "[p]rior to voting the provisional ballot, the elector *shall be required to sign* an affidavit" stating the elector's name, date of birth, address at the time of registration,

and attesting that the provisional ballot is the only ballot that the elector cast in the election. 25 P.S. §3050(a.4)(2) (emphasis added). Section 1210(a.4)(3) further provides: "After the provisional ballot has been cast, the individual shall place it in a secrecy envelope. The individual shall place the secrecy envelope in the provisional ballot envelope and *shall place his signature on the front of the provisional ballot envelope*." *Id.* (emphasis added). These provisions plainly contemplate separate signatures for each delineated item.

Section 1204(a.4)(5)(ii)[5] specifies the circumstances under which a provisional ballot will not be counted, and provides, in relevant part:

> A provisional ballot **shall not be counted** if:
>
> > (A) **either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual;**
> >
> > * * *
> >
> > (F) 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)(A), (F) (emphasis added).

We conclude that, pursuant to the plain language of this statute, the provisional ballots at issue **shall not be counted**. **Section 1204(a.4)(5)(ii)(A) makes quite clear that, if "either" the provisional ballot envelope "or" the affidavit are not "signed by the individual," then the "provisional ballot shall not be counted."** *Id.* Stated otherwise, *both* signatures are required.

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[5] Added by the Act of October 8, 2004, P.L. 807, and amended by the Act of October 31, 2019, P.L. 552.

Notably, the specificity of the statutory language renders this circumstance quite unlike the question that our Supreme Court confronted in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 374-380 (Pa. 2020), concerning mail-in ballots that lack a secrecy envelope—so-called "naked" ballots. The argument presented to the *Boockvar* Court revolved around the absence of any statutory provision requiring such "naked" ballots to be disqualified. *Id.* at 375-76. Ultimately, notwithstanding that absence, our Supreme Court held that the requirement that a voter utilize the secrecy envelope was mandatory, and was so essential to the preservation of secrecy in voting—a constitutional imperative[6]—that the failure of a voter to enclose his ballot in the secrecy envelope necessitates disqualification of the ballot. *Id.* at 380. Here, the analysis is much more straightforward. Unlike the statutory provision at issue in *Boockvar*, Section 1204(a.4)(5)(ii) of the Election Code plainly speaks to the disqualification of provisional ballots that fail to meet the specified requirements.[7] Here there is a plain, unambiguous, and directly applicable statutory command.

This case is also quite distinct from *Appeal of James*, 105 A.2d 64 (Pa. 1954), relied upon below. In *James*, certain challenged ballots used "sticker votes" to write in a candidate who already appeared on the ballot. *Id.* at 64-65. Noting the importance of "ascertainment of the intent of the voter," and repeating the admonition

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[6] *See Boockvar*, 238 A.3d at 379 (citing PA. CONST. art. VII, §4 ("All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.")).

[7] Moreover, we note that, like "the failure to 'fill out, date *and sign* the declaration printed on the ballot' return envelope, as required by 25 P.S. §3150.16(a)," the failure to sign a provisional ballot in the places required by 25 P.S. §3050(a.4)(2)-(3) is a defect that is "capable of objective assessment pursuant to uniform standards," and requires no resort to "subjective assessments" that could lead to inconsistent determinations. *Boockvar*, 238 A.3d at 389 (Wecht, J., concurring) (emphasis added).

that "[t]echnicalities should not be used to make the right of the voter insecure," *id.* at 65-66, the *James* Court held that the voters who marked their ballots in the challenged manner had "unmistakably, unerringly and precisely demonstrated their intention" to vote for the candidate. *Id.* at 65. The ballots, therefore, were not to be deemed void. What *James* did not involve, however, is an unambiguous statutory provision directing that ballots shall not be counted if they contain specified deficiencies. Because we are faced with such a statutory provision here, *Appeal of James* is plainly inapposite.

Importantly, Appellees do not dispute that the provisional ballots at issue facially failed to satisfy the statutory requirements. The Elections Board characterizes the ballots in question as "[b]allots containing an affidavit signature by the voter. . . but not a signature pursuant to 25 P.S. §3050(a.4)(3)" and "[b]allots containing the signature under 25 P.S. §3050(a.4)(3), but not the affidavit signature . . . ." (Elections Board Br. at 2.) The Pennsylvania Democratic Party and James Brewster similarly state that, "[i]n Allegheny County, 270 voters each filled out a provisional ballot that included one of the signatures referenced in [25 P.S. §3050], but not the other." (Brief of the Pennsylvania Democratic Party and James Brewster at 6.) Accordingly, it is uncontested that the ballots failed to conform to statutory requirements. Appellees' position instead is premised upon the rule that we must interpret the Election Code liberally in favor of the right to vote, and that we should avoid disenfranchising voters due to minor irregularities in their ballots. (Elections Board Br. at 11 (citing *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004); Pennsylvania Democratic Party and James Brewster Br. at 7 (same)).) However, unlike matters which involve ambiguous statutory language where courts apply principles of statutory construction to interpret same, this matter requires no application of statutory construction principles, for the language is plain and unambiguous—the provisional ballots at issue "shall not be

counted." 25 P.S. §3050(a.4)(5)(ii). Although we do not take lightly the disqualification of any ballot, it is a cardinal rule that, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. §1921(b); *see Trust Under Agreement of Taylor*, 164 A.3d 1147, 1155 (Pa. 2017) ("If the language of the statute clearly and unambiguously sets forth the legislative intent, it is the duty of the court to apply that intent and not look beyond the statutory language to ascertain its meaning.").

With regard to the small number of provisional ballots cast by a voter whose mail-in ballots were timely received, our analysis is the same. Section 1204(a.4)(5)(ii)(F) 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.

That said, the decision below cannot stand on numerous grounds. Here, the entire foundation of the decision of the trial court rested on this line of reasoning:

> The Board argues that if an error or defect is caused by the misrepresentation or error of the election administration, the voter should not be penalized. Here, voters presented at their polling location and voted with a provisional ballot. Poll workers handed them all of the materials and gave them instructions how to fill out the outer envelope. Many people are unfamiliar with this process and rely on the information given to them at the polling location.

(Trial court op. at 2.)

While counsel's argument is one thing, evidence is another. Having reviewed the evidence generated in this matter, we conclude that the trial court's

finding that the 270 or so voters, throughout the entire County of Allegheny, in various and different polling places in that county, were subjected to and heeded misleading advice from election officials, lacks the requisite support in the record. Indeed, there is no evidence in the record to establish that the failure to comply with the Election Code was the result of voters being misled by election officials.

Assuming arguendo, there *was* evidence of election officials providing misleading advice to these voters, this Court, nonetheless, would be unable to excuse the defects in the ballot based on Pennsylvania Supreme Court precedent that, because our General Assembly "pronounced a bright-line rule couched in strong admonitory terms," we "are not free to disregard the explicit legislative direction based on equitable considerations." *In re Nomination Petition of Guzzardi*, 99 A.3d 381 (Pa. 2014) (candidate not excused from filing timely financial statement through principles of equity, even if the election office provided him with misleading information). In other words, "where the Legislature has attached specific consequences to particular actions or omissions, Pennsylvania courts may not mitigate the legislatively prescribed outcome through recourse to equity," and this holds true even where, as here, election officials allegedly provide erroneous advice and the recipient relies on that advice. *See id.* As explained above, our General Assembly, in clear and unmistakable language, dictated that, in circumstances like this case, the "provisional ballot[s] **shall not be counted**." 25 P.S. §3050(a.4) (emphasis added). This Court is not at liberty to ignore this mandate.

Finally, although our decision may be perceived as disenfranchising voters, the Election Code mandates that these deficient ballots **shall not be counted**. This Court emphasizes that it is following and faithfully applying the mandates of our General Assembly and our Supreme Court precedent. Accordingly, the plain language

of the Election Code and the lack of evidence in support of the position advanced by the Appellees require this Court to reverse the trial court's decision.

This matter is remanded to the trial court to issue an order sustaining the Candidate's challenge to the Elections Board's determination and directing the Elections Board to exclude the 270 challenged ballots from the certified returns of election for the County of Allegheny under section 1404 of the Election Code, 25 P.S. §3154.

s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Allegheny County Provisional Ballots in the 2020 General Election	:	No. 1161 C.D. 2020
Appeal of: Nicole Ziccarelli	:	

ORDER

AND NOW, this 20th day of November, 2020, the November 18, 2020 order of the Court of Common Pleas of Allegheny County is hereby REVERSED, and this matter is REMANDED to the court of common pleas for further proceedings in accordance with the accompanying opinion.

s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge

Certified from the Record

NOV 23 2020

And Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Allegheny County Provisional Ballots in the 2020 General Election	:	No. 1161 C.D. 2020
	:	Submitted: November 19, 2020
Appeal of: Nicole Ziccarelli	:	

BEFORE: HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE WOJCIK

FILED: November 20, 2020

I respectfully dissent from the majority's decision to reverse the order of the Court of Common Pleas of Allegheny County (trial court) in this matter.

The Pennsylvania Supreme Court has explained:

> 'The power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons. * * * 'The purpose in holding elections is to register the actual expression of the electorate's will' and that 'computing judges' should endeavor 'to see what was the true result.' There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.'
>
> In resolving election controversies it would not be amiss to consider the following criteria:

1. Was any specific provision of the Election Code violated?

2. Was any fraud involved?

3. Was the will of the voter subverted?

4. Is the will of the voter in doubt?

5. Did the loser suffer an unfair disadvantage?

6. Did the winner gain an unfair disadvantage?

Appeal of James, 105 A.2d 64, 67 (Pa. 1954) (citation omitted). It is undisputed that only the first of the foregoing six criteria is at issue with respect to the contested ballots herein.

Regarding the submission of a vote by provisional ballot, Section 1204(a) and (a.4)(1)-(3), (5)(i), (ii)(A) and (F) of the Pennsylvania Election Code[1] provides, in relevant part:

> (a) At every primary and election each elector who appears to vote and who desires to vote shall first present to an election officer proof of identification. The election officer shall examine the proof of identification presented by the elector and sign an affidavit stating that this has been done.
>
> * * *
>
> (a.4)(1) At all elections an individual who claims to be properly registered and eligible to vote at the election district but whose name does not appear on the district register and whose registration cannot be determined by the inspectors of election or the county election board shall be permitted to cast a provisional ballot. Individuals who appear to vote shall be required to produce proof of identification pursuant to subsection (a)

[1] Act of June 3, 1937, P.L. 1333, as *amended*, 25 P.S. §3050(a), (a.4)(1)-(3), (5).

and if unable to do so shall be permitted to cast a provisional ballot. An individual presenting a judicial order to vote shall be permitted to cast a provisional ballot.

(2) Prior to voting the provisional ballot, the elector shall be required to sign an affidavit stating the following:

I do solemnly swear or affirm that my name is _____, that my date of birth is _____, and at the time that I registered I resided at _____ in the municipality of _____ in _____ County of the Commonwealth of Pennsylvania and that this is the only ballot that I cast in this election.

Signature of Voter/Elector

Current Address

Check the Reason for Casting the Provisional Ballot.

Signed by Judge of Elections and minority inspector

(3) After the provisional ballot has been cast, the individual shall place it in a secrecy envelope. The individual shall place the secrecy envelope in the provisional ballot envelope and shall place his signature on the front of the provisional ballot envelope. All provisional ballots shall remain sealed in their provisional ballot envelopes for return to the county board of elections.

* * *

(5)(i) Except as provided in subclause (ii), if it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector's registration form and, if the signatures are determined to be genuine, shall count the ballot if the county board of elections confirms that the individual did

not cast any other ballot, including an absentee ballot, in the election.

(ii) A provisional ballot shall not be counted if:

(A) either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual;

* * *

(F) the elector's absentee ballot or mail-in ballot is timely received by a county board of elections.

At issue in the instant matter are approximately 270 provisional ballots cast in Allegheny County in the November 3, 2020 General Election that purportedly have one of the following technical defects: (1) the provisional ballot contained an affidavit signed by the voter as required by Section 1204(a.4)(2), but did not contain a signature on the provisional ballot envelope as required by Section 1204(a.4)(3); (2) the provisional ballot contained the signature on the provisional ballot envelope as required by Section 1204(a.4)(3), but did not contain the affidavit signed by the voter as required by Section 1204(a.4)(2); or (3) the provisional ballot was cast by a voter whose absentee or mail-in ballot was timely received by the Allegheny County Board of Elections, but the absentee or mail-in ballot was defective and, therefore, invalid in some respect.

There is no dispute that the voters who cast the questioned 270 ballots were qualified, registered electors. Moreover, there is no allegation that any of the 270 voters in question had voted more than once. The only sins that would lead these votes to be discarded is that the qualified, registered voters failed to properly enter his or her signature on all of the multiple documents required to be signed, or his or her desire to correct a previously submitted, but admittedly invalid absentee or mail-in ballot through the submission of a properly executed provisional ballot.

I view the foregoing technical provisional ballot requirements as similar to the issue of the color of ink that is used to fill in an absentee or mail-in ballot. With respect to such ballots, Sections 1306(a)[2] and 1306-D(a)[3] of the Pennsylvania Election Code plainly state the voter "***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." 25 P.S. §§3146.6(a), 3150.16(a) (emphasis added).[4] Our Supreme Court approved the marking of absentee ballots with green or red pen to be appropriate despite the General Assembly's use of the word "shall" when describing the method of marking the ballots. *See In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972). There, our Supreme Court construed the Election Code liberally so as to not disenfranchise Pennsylvania voters over a technicality.

In light of the foregoing criteria outlined in *Appeal of James*, I would do so here as well, and I would not blithely disenfranchise those 270 voters who merely neglected to enter a signature on one of the various signed documents of an otherwise properly executed and timely-submitted provisional ballot. Likewise, I would not penalize a properly registered voter's attempt to exercise his or her right

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[2] Added by the Act of March 6, 1951, P.L. 3, as *amended*, 25 P.S. §3146.6(a).

[3] Added by the Act of October 31, 2019, P.L. 552, 25 P.S. §3150.16a.

[4] The same requirements apply to the execution of all documents relating to the submission of a provisional ballot. *See* Section 1204(a.3)(1) of the Pennsylvania Election Code, 25 P.S. §3050(a.3)(1) ("All electors, including any elector that shows proof of identification pursuant to subsection (a), shall subsequently sign a voter's certificate in blue, black or blue-black ink with a fountain pen or ball point pen, . . . and hand the same to the election officer in charge of the district register.").

of franchise by correcting a previously submitted, but admittedly invalid absentee or mail-in ballot, by submitting a properly executed provisional ballot.

Accordingly, unlike the majority, I would affirm the trial court's order in this case.

MICHAEL H. WOJCIK, Judge

Attached on the following pages is the Memorandum Opinion and Order from the Court of Common Pleas of Allegheny County.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

NICOLE ZICCARELLI,

Petitioner,

v.

ALLEGHENY COUNTY BOARD OF ELECTIONS,

Respondent,

and

PENNSYLVANIA DEMOCRATIC PARTY AND JAMES BREWSTER,

Intervenors.

No. GD 20-011793

MEMORANDUM AND ORDER OF COURT

Honorable Joseph M. James

Copies Sent To:

Matthew H. Haverstick, Esquire
Andrew F. Szefi, Esquire
Allan J. Opsitnick, Esquire
Michael J. Healey, Esquire

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

NICOLE ZICCARELLI, Petitioner, v. ALLEGHENY COUNTY BOARD OF ELECTIONS, Respondent and PENNSYLVANIA DEMOCRATIC PARTY AND JAMES BREWSTER, Intervenors.	No. GD 20-011793

MEMORANDUM AND ORDER OF COURT

James, J. November 18, 2020

Petitioner Nicole Ziccarelli, candidate for the Senate of Pennsylvania from the 45th Senatorial District, filed a Petition for Review of Decision by the Respondent Allegheny County Board of Elections ("the Board") on November 16, 2020, seeking to set aside

approximately 300 provisional ballots cast by voters in the November 3, 2020 General Election. Voters were required to sign on two lines and on these ballots they only signed one. Petitioner seeks review of the Board's decision to overrule Petitioner's objection to count these ballots. The Court conducted a hearing on November 17, 2020 via Microsoft Teams. The Pennsylvania Democratic Party and James Brewster moved to intervene in the action. Petitioner and the Board did not object and the motion was granted by the Court. Petitioner stated that she was not claiming any voter fraud regarding the challenged ballots. The Board argues that if an error or defect is caused by the misrepresentation or error of the election administration, the voter should not be penalized. Here, voters presented at their polling location and voted with a provisional ballot. Poll workers handed them all of the materials and gave them instructions how to fill out the outer envelope. Many people are unfamiliar with this process and rely on the information given to them at the polling location. Pennsylvania law holds that there is a breakdown in the administrative process when the facts demonstrate that "an administrative board or body is negligent, acts improperly or unintentionally misleads a party." Union Electric Corp. v. Board of Property Assessment, 746 A.2d 581, 584 (Pa. 2000). In construing election laws, while we must strictly enforce all provisions to prevent fraud, the overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not to disenfranchise. *See*, James Appeal, 105 A.2d 64 (Pa. 1954), In re Luzerne Cty. Return Bd., 290 A.2d 108, 109 (Pa. 1972). Similarly, in the In re Nomination Petitions of Howells case, 20 A.3d 617, (Pa. Cmwlth. 2011), an incumbent candidate running for magisterial district judge was given erroneous instructions by the Lehigh County Board of Elections about filing his statement of financial

interest. The Commonwealth Court held that given his reliance upon erroneous information provided by the county elections department that fatal error was curable. Finally, in In re Hall Nomination Petition, 362 A.2d 475, 477 (Pa. 1976), a candidate's petition was presented for filing within the deadline established by the Election Code but was not properly filed due to an error by the Election Bureau and not by the candidate himself. Keeping in mind that the Election Code must be liberally construed so as not to deprive an individual of his right to run for office or the voters their right to elect a candidate of their choice, the Court permitted the candidate to file *nunc pro tunc*.

In light of the fact that there is no fraud alleged in this case, these provisional ballots submitted by registered and eligible voters must be counted. They should not be penalized because they were given and relied on incorrect information by the election administration. The Petition for Review is denied and the Board's decision is affirmed.

Joseph M. James

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

NICOLE ZICCARELLI, Petitioner, v. ALLEGHENY COUNTY BOARD OF ELECTIONS, Respondent, and PENNSYLVANIA DEMOCRATIC PARTY AND JAMES BREWSTER, Intervenors.	No. GD 20-011793

ORDER OF COURT

And NOW, this 18th day of November 2020, upon consideration of the Petition For Review In the Nature Of A Statutory Appeal filed by Nicole Ziccarelli, and any responses thereto, it is hereby ORDERED that the Petitioner's appeal is dismissed and the decision of the Board of Elections is affirmed.

BY THE COURT:

Joseph M. James

PROOF OF SERVICE

I, Virginia Spencer Scott, certify that on this day, I caused a true and correct copy of the foregoing PETITION to be served on counsel for Respondent and Intervenors via this Court's electronic filing system.

Date: November 20, 2020

By: */s/ Virginia Spencer Scott*
Virginia Spencer Scott

CERTIFICATE OF COMPLIANCE WITH CONFIDENTIAL INFORMATION RULE

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

Date: November 20, 2020

By: */s/ Virginia Spencer Scott*
Virginia Spencer Scott

CERTIFICATE OF COMPLIANCE - WORD COUNT APPELLATE RULE OF PROCEDURE 2135(d)

I certify that this PETITION word count is 1,281 and, accordingly, complies with the limitations set forth in Pennsylvania Rule of Appellate Procedure 2135.

Date: November 20, 2020

By: */s/ Virginia Spencer Scott*
Virginia Spencer Scott