

**IN THE SUPREME COURT OF PENNSYLVANIA**

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**No. \_\_\_\_ MM 2024**

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Republican National Committee and Republican Party of Pennsylvania,

Petitioners,

v.

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

Respondents.

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**PETITIONERS' APPLICATION FOR THE EXERCISE OF  
KING'S BENCH POWER OR EXTRAORDINARY JURISDICTION**

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Respondents.

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## INTRODUCTION

Petitioners challenge a series of recent actions by Secretary Al Schmidt and county boards of elections across the Commonwealth that depart from this Court’s controlling precedent, are “causing confusion for electors,” *Genser v. Butler Cnty. Bd. of Elections.*, MsD. No. 2024-40116, slip op. at 20 n.9 (Butler Cnty. Ct. of Common Pleas Aug. 16, 2024) (“*Genser* Ct. Common Pleas slip op.”) (Appendix “App.” 20), *rev’d on other grounds*, No. 1074 C.D. 2024 (Pa. Commw. Ct. Sept. 5, 2024) (“*Genser* Commw. Ct. slip op.”) (App. 33-66), *pet’n for appeal pending* (Pa. filed Sept. 8, 2024), and threaten to unleash disuniformity, uncertainty, chaos, and an erosion of public confidence in the imminent 2024 general election.

In 2020, this Court held that voters who choose to vote by mail ballot have no constitutional, statutory, or legal right to cure defects in those ballots. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372-74 (Pa. 2020).<sup>1</sup> At that time, the Secretary *agreed* that “there is no statutory or constitutional basis for requiring [county boards of elections] to contact voters when faced with a defective ballot and afford them an opportunity to cure defects.” *Id.* at 373.

As this Court explained, the decision whether and in what form to allow curing presents “open policy questions,” including “what the precise contours of the

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<sup>1</sup> This Application uses “mail ballot” to refer to both absentee ballots and mail-in ballots. *See* 25 P.S. §§ 3146.6, 3150.16.

procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots.” *Id.* at 374. That decision, therefore, “is one best suited for the Legislature.” *Id.* To date, the General Assembly has not enacted any cure procedure for defective mail ballots.

Nonetheless, in recent elections, the 67 county boards have adopted a patchwork of notice-and-cure policies. Some have permitted curing for any signature, dating, or secrecy-envelope defects; at least two have permitted curing only for signature and dating defects; and others have declined to provide any notice or curing. Thus, in recent elections, implementation of the Election Code—and the determination of whether mail ballots and provisional ballots are valid and may be counted—have not been “uniform throughout the State,” in contravention of the Pennsylvania Constitution, Pa. Const. art. VII, § 6; *see also id.* art. I, § V, Pennsylvania law, *see* 25 P.S. § 2642(g) (elections must be “uniformly conducted” throughout Commonwealth), and the Equal Protection Clause, *see Bush v. Gore*, 531 U.S. 98, 106-07 (2000) (U.S. Constitution forbids use of “varying standards to determine what [is] a legal vote” from “county to county”).

County boards lack authority to adopt notice-and-cure procedures for the simple reason that the General Assembly has not granted them that authority. *Pa. Democratic Party*, 238 A.3d at 372-74. Indeed, the Election Code unambiguously *forecloses* curing by prohibiting “inspection” and “opening” of mail-ballot materials



until Election Day or thereafter, and by prohibiting any person from disclosing the “results” of such an inspection or opening before the close of the polls. 25 P.S. §§ 3146.8(g)(ii)(1.1), 2602(q.1). The Election Code thus bars election officials from providing notice of defects in time for them to be cured. And the Election Code unambiguously prohibits curing defective mail ballots by provisional voting: “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.” *Id.* § 3050(a.4)(5)(ii)(F) (emphasis added). Thus, in a preliminary posture just weeks before the 2022 general election, three Justices of this Court voted to enjoin county boards from providing notice and an opportunity to cure defective mail ballots. *See Republican Nat’l Comm. v. Chapman*, 284 A.3d 207, 208 (Pa. 2022) (Todd, CJ, Mundy, Brobson, JJ.).

The Secretary, however, has now flip-flopped on curing. Through two recent actions, the Secretary is informing voters across the Commonwealth that they have a right to cure mail-ballot defects—*regardless* of whether the voter’s county board provides any curing opportunity. *First*, the Secretary has issued two instructions to the county boards (the “Instructions”) purporting to direct how they record returned mail ballots in the Statewide Uniform Registry of Electors (“SURE”). *See* March 11, 2024 Instruction (“March Instruction”) (App. 68-85); August 23, 2024 Instruction (“August Instruction”) (App. 86-101). But when county boards record that a mail ballot may be defective in compliance with the Instructions, they trigger

an automated email from the Secretary to the voter telling the voter she has a right to cast a provisional ballot. The Secretary’s automated emails—which county boards cannot alter or control—are sent to *every* voter whose ballot is recorded as defective in SURE, including voters whose county boards do not offer curing.

*Second*, the Secretary has released a Guidance publicly representing that voters have a right to cast a provisional ballot if they believe their mail ballot is defective. *See* Provisional Voting Guidance (Mar. 11, 2024) (App. 103, 105) (“Guidance”). Once again, the Secretary’s indiscriminate Guidance makes this representation to all voters in the Commonwealth, without regard to county boards’ varying curing policies.

The Secretary’s Instructions, automated emails, and Guidance thus purport to identify a right to cure when none exists, *see Pa. Democratic Party*, 238 A.3d at 372-74; *Republican Nat’l Comm.*, 284 A.3d at 208 (Todd, CJ, Mundy, Brobson, JJ.), and contradict the policies of county boards across the Commonwealth. The consequences of the Secretary’s actions have been predictable—and untenable. The Secretary’s actions are “causing confusion” among voters, *Genser Ct. Common Pleas slip op.* at 20 n.9, and have *already* generated conflicting rulings from lower courts. A Court of Common Pleas has rejected a claim that Butler County voters who received the Secretary’s automated emails had a right to cure a mail-ballot defect by voting provisionally, and has held that the March Instruction and

automated emails contravene the Election Code. *See id.* at 19-20. Without squarely addressing whether the Secretary's actions are lawful, a divided Commonwealth Court panel renounced its prior precedent and held that the Butler County Board must count provisional ballots submitted by voters whose mail ballots were timely received but defective. *See Genser Commw. Ct. slip op.* And the Washington County Court of Common Pleas has held that the Washington County Board is *constitutionally obligated* to comply with the Secretary's March Instruction, trigger the automated emails, and allow voters who cast defective mail ballots to vote provisionally. *See Ctr. for Coalfield Just. v. Wash. Cnty. Bd. of Elections*, slip op. at 2-4, 26-27, No. 2024-3953 (Wash. Cnty. Ct. of Common Pleas Aug. 23, 2024) (App. 110-112, 134-135), *appeal pending*, No. 1172 CD 2024 (Pa. Commw. Ct.).

The Secretary's actions thus have created a real prospect that provisional ballots will be tallied using different standards in different counties. In fact, the Secretary's actions have aggravated an existing sharp disagreement among lower courts: Prior to the Secretary's actions and the Commonwealth Court majority's decision in *Genser*, the Commonwealth Court (in an unpublished decision) had held that voters who submit defective mail ballots cannot cure by casting provisional ballots, *see In re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 2020 WL 6867946, at \*4-5 (Pa. Commw. Ct. Nov. 20, 2020), while a Court of Common Pleas held that Delaware County voters *do* possess such a curing right, *see*

*Keohane v. Del. Cnty. Bd. of Election*, No. CV-2023-004458, slip op. (Del. Cnty. Ct. of Common Pleas Sept. 21, 2023) (App. 137-141).

Petitioners thus bring this action to remedy the “lack of clarity” caused by the Secretary’s actions, to secure statewide uniformity, and to forestall county boards from implementing policies for the 2024 general election (and beyond) at odds with the General Assembly’s commands. *Ball v. Chapman*, 289 A.3d 1, 13-14 (Pa. 2023). Because time is of the essence, Petitioners respectfully request that the Court (i) grant the Application; (ii) order the Secretary to rescind the public Guidance pending further order of the Court; (iii) order county boards to mark all mail ballots received from voters as “Record-Ballot Returned” in SURE, to segregate any returned mail ballots they believe may be defective, and not to provide notice or an opportunity to cure pending further order of the Court; and (iv) set a briefing schedule that will permit the Court to rule on the questions presented before county boards may commence the pre-canvass of mail ballots at 7 a.m. on Election Day, November 5, 2024. *See* 25 P.S. § 3146.8(g)(ii)(1.1). On the merits, the Court should set aside the Secretary’s Instructions, automated emails, and Guidance, and hold that county boards of elections may not provide notice-and-cure procedures for mail-ballot defects.

## **PARTIES**

### **I. Petitioners**

Petitioner Republican National Committee (“RNC”) is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). RNC manages the Republican Party’s business at the national level, including development and promotion of the Party’s national platform and fundraising and election strategies; supports Republican candidates for public office at all levels across the country, including those on the ballot in Pennsylvania; and assists state parties throughout the country, including the Republican Party of Pennsylvania, to educate, mobilize, assist, and turnout voters.

Petitioner Republican Party of Pennsylvania (“RPP”) is a major political party, 25 P.S. § 2831(a), and the “State committee” for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered “State [C]ommittee” of the Republican Party as defined by 52 U.S.C. § 30101(15). RPP, on behalf of itself and its members nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania.

RNC and RPP each have made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters in Pennsylvania in past election cycles and are doing so again in 2024. *See* Decl. of Angela Alleman ¶¶ 9-15 (“Alleman Decl.”) (App. 143-44).

These efforts include devoting substantial time and resources toward monitoring the vote-counting process in Pennsylvania and to ensuring it is conducted lawfully. *See id.* ¶¶ 11-14. Petitioners make expenditures to ensure they and their voters understand the rules governing the elections process, including applicable dates, deadlines, and requirements for voting by mail or absentee. *See id.* ¶¶ 17-19. These efforts require a uniform application of the law and a clear and transparent understanding of mail voting requirements, including any allowances for notice-and-cure procedures. *See id.* ¶¶ 22, 27-28. Because the county boards have adopted highly disparate curing policies, Petitioners are devoting substantial resources to understanding and educating voters as to whether and how they can cure mail ballots. *See id.* ¶¶ 27-29. And because the Secretary's actions have catalyzed litigation against multiple county boards and resulted in conflicting rulings across the Commonwealth, Petitioners are diverting resources to understanding how mail-ballot curing rules are evolving in various counties. *See id.* ¶¶ 25-26.

Petitioners also have a substantial and particularized interest in ensuring that Pennsylvania administers free and fair elections, and that its voters and candidates are subject only to rules lawfully promulgated by the General Assembly. *See id.* ¶¶ 30-34. Relatedly, Petitioners have a substantial and particularized interest in getting Republican candidates elected, and that interest is harmed by actions that result in mail ballots being counted despite the General Assembly's clear commands.

*See id.* ¶¶ 32-34. Indeed, in the last few years alone, multiple Republicans lost elections because mail ballots were unlawfully counted. *See id.* ¶¶ 35-39.

## **II. Respondents**

Respondent Al Schmidt is the Secretary of the Commonwealth and is sued in his official capacity only.

All 67 Pennsylvania county boards of elections are also named as Respondents. County boards are responsible for implementing the Election Code and administering elections in their respective counties. *See* 25 P.S. § 2642.

### **STATEMENT OF THE CASE**

#### **A. The Election Code Does Not Authorize Curing For Mail-Ballot Defects.**

In 2020, this Court held that voters who choose to vote by mail have no constitutional, statutory, or legal right to cure defects in their mail ballots. *See Pa. Democratic Party*, 238 A.3d at 372-74. As this Court concluded, the decision whether to allow voters to cure mail-ballot defects, as well as the particulars of any curing procedure, “are best left to the legislative branch of Pennsylvania’s government.” *Id.* at 374.

To date, the General Assembly has not authorized curing for mail-ballot defects, although it has extensively debated whether to do so. *See, e.g.*, Legislative Journal at 1024 (June 22, 2024). In June 2021, both the House and the Senate passed a bill that would have created curing opportunities for all Pennsylvania voters

statewide, but the Governor vetoed it. *See* House 1300, Regular Session 2021-2022.<sup>2</sup>

Moreover, the General Assembly has foreclosed curing mail-ballot defects through provisional voting. The Election Code thus directs: “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).

**B. County Boards Of Elections Have Adopted Varying Curing Policies In Past Elections.**

Despite the General Assembly’s decision not to authorize curing, numerous county boards have permitted voters to cure mail-ballot defects in recent elections. As prior litigation regarding county boards’ curing practices revealed, it is unclear precisely which county boards offer curing, and on what terms, because some boards do not have written curing policies or do not disclose their policies. *See Republican Nat’l Comm. v. Chapman*, 447 M.D. 2022, 2022 WL 16754061, at \*3 (Pa. Commw. Ct. Sept. 29, 2022) (referencing joint stipulation showing “there are a number of County Boards that have implemented notice and opportunity to cure procedures”). In any event, the 67 county boards’ approaches to curing have varied significantly. *See* Dep. of Deputy Sec’y Jonathan Marks 100:22-101:24, 110:9-14, *Ctr. for Coalfield Just. v. Wash. Cnty Bd. of Elections*, No. 2024-3953 (July 23, 2024) (“Marks Dep.”) (acknowledging “variations” between counties) (App. 209-10).

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<sup>2</sup> [https://www.legis.state.pa.us/cfdocs/billInfo/bill\\_history.cfm?year=2021&sind=0&body=H&type=B&bn=1300](https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?year=2021&sind=0&body=H&type=B&bn=1300)



Some boards, like Philadelphia, have allowed voters to correct any mail-ballot defect, including signature, dating, and secrecy-envelope defects. *See, e.g., Philadelphia City Commissioners, 2023 General - Ballots Administratively Determined to Have No Secrecy Envelope, or No Signature, No Date, or a Potentially Incorrect Date on Return Envelope* (“Philadelphia Policy”) (last visited Aug. 27, 2024)<sup>3</sup>; Billy Penn, *Cure your ballot: 1,800+ Philly mail voters have a chance to fix errors* (Nov. 3, 2023), [billypenn.com/2023/11/03/Philadelphia-mail-ballot-errors-voters-fix](https://billypenn.com/2023/11/03/Philadelphia-mail-ballot-errors-voters-fix). Other boards have allowed voters to cure only some of these defects. The Butler County and Bucks County Boards, for example, have allowed voters to cure signature or dating defects but not secrecy-envelope defects. *See Butler County Curing Policy* (App. 153-155); *Genser Ct. Common Pleas slip op.* at 2-3; *see* Brief for Appellant, *Republican Nat’l Comm. v. Chapman*, 2022 WL 17298488, at \*14-15 (Pa. Oct. 5, 2022) (“2022 RNC Brief”) (discussing stipulated facts). And about half the boards, like Washington County, believe the Election Code prohibits curing and thus have not offered it at all. *See Coalfield Just.*, slip op. at 5 (App. 113); Marks Dep. 109:21-110:11 (confirming “little more than half of the counties” “provide[d] some form of notice and cure” in the 2024 Primary Elections).

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<sup>3</sup><https://vote.phila.gov/news/2023/11/02/2023-general-ballots-administratively-determined-to-have-no-secrecy-envelope-or-no-signature-no-date-or-a-potentially-incorrect-date-on-return-envelope/>.

Accordingly, in recent elections, implementation of the Election Code—including curing procedures and determinations whether mail ballots and provisional ballots are valid and may be counted—have not been “uniform throughout the State.” Pa. Const. art. 7, § 6; *see also* 25 P.S. § 2642(g). Moreover, as explained below, county boards that permit curing have done so by departing from the Election Code’s strict procedures for handling mail ballots. *See infra* at 26-43.

In 2022, RNC, RPP, and other petitioners brought suit against the Secretary and all 67 county boards challenging notice-and-cure policies. In an unpublished decision, the Commonwealth Court denied preliminary relief, concluding “it [was] not clear . . . whether notice and cure procedures are permitted and/or prohibited by the Election Code.” *Republican Nat’l Comm.*, 2022 WL 16754061, at \*18. About two weeks before the election, this Court also declined to grant preliminary relief on an equally divided vote, although Chief Justice Todd, Justice Brobson, and Justice Mundy indicated they would have done so. 284 A.3d at 208. The Commonwealth Court ultimately did not issue a decision on the merits and dismissed the case on procedural grounds. *See Republican Nat’l Comm. v. Schmidt*, No. 447 M.D. 2022 (Pa. Commw. Ct. Mar. 23, 2023) (“*Rep. Nat’l Comm.* Slip Op.”) (App. 156-185).

**C. The Secretary Previously Confirmed That The Election Code Does Not Permit Curing Of Mail-Ballot Defects.**

In 2020, the Secretary advocated to this Court that “there is no statutory or constitutional basis for requiring [county boards of elections] to contact voters when

faced with a defective ballot and afford them an opportunity to cure defects.” *Pa. Democratic Party*, 238 A.3d at 373. Consistent with that position, the Secretary publicly told voters at the time that “if there’s a problem with your mail-in ballot, you won’t have the opportunity to correct it before the election.” 2022 RNC Brief (quoting Pennsylvania Dep’t of State, *Mail and Absentee Ballot*, “How do I know if my ballot was accepted or counted?”, <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (current as of Oct. 5, 2022)).

**D. The Secretary’s 2024 Instructions, Automated Emails, and Guidance Incorrectly Represent To Voters That They Have A Right To Cure.**

On March 11, 2024, the Secretary issued to the county boards a document titled “Changes to SURE VR and PA Voter Services” (the “March Instruction”) (App. 68-85). The Secretary issued a follow-on second Instruction on August 23, 2024 (the “August Instruction”) (App. 86-101). The Secretary did not promulgate either Instruction as a SURE regulation. *See id.*; Marks Dep. 31:4-18, 19-23; *see* 25 Pa. C.S. § 1222. The Instructions are designated as “TKP:AMBER+STRICT,” indicating the Secretary intended to keep them from the public. *See* March Instruction 1 (App. 68); August Instruction 1 (App. 86). Petitioners discovered the Instructions only because the Court of Common Pleas ordered the March Instruction disclosed in the *Genser* curing litigation.

The March Instruction describes programming changes the Department of State made in SURE for county boards logging received mail ballots for the 2024 Primary and General Elections. In particular, the March Instruction provides:

As part of this release, modifications have been made within the SURE VR system to add 6 OPTIONAL ‘Pending’ Status Reasons when recording ‘Response Types’ for absentee and/or mail in ballot labels.

...

Below are the new ‘Pending’ Status Reasons:

- PEND – INCORRECT DATE
- PEND – NO DATE
- PEND – NO SIGNATURE
- PEND – NO SECRECY ENVELOPE
- PEND – NO ID
- PEND – OTHER

March Instruction 2.

According to the March Instruction, these “OPTIONAL” “Pending” codes are for use by county boards that “offer[] ballot curing.” *Id.* The March Instruction also states that county boards that do not offer curing may enter similar “Canceled”—“CANC”—codes for mail ballots they decline to count based on a defect. *See id.* at 6-10.

The March Instruction discloses that when a county board logs a mail ballot as “PEND” or “CANC” “and the voter’s ballot application contains an email address, [SURE] will then send an email to the voter which will provide them with

information relating to the status of their ballot with a URL link to the Department of State website.” *Id.* at 2; *see also* August Instruction 11. The March Instruction laid out the content of the automated emails to the voter for each “PEND” and “CANC” category, *see* March Instruction 6-12, and the August Instruction updated that content, *see* August Instruction 11-13.

Under both the March Instruction and the August Instruction, the Secretary’s automated emails state that voters in curing counties have a right to cure. *See* March Instruction 6-12; August Instruction 11-13. The automated emails also inform *all* voters that they may cure their mail-ballot defects by casting a provisional ballot on Election Day—*regardless of whether the voter’s county board offers curing or permits curing through provisional voting.* *See* March Instruction 6-12; August Instruction 11-13. Under the August Instruction, the automated emails triggered by a county board’s selection of a “PEND” or “CANC” code tell voters that “[i]f you cannot address the error in time, you can go to your polling place on election day and cast a provisional ballot.” August Instruction 11-13. In other words, the Secretary’s automated emails tell voters who reside in counties where curing is available (and where county boards select “PEND”) and voters who reside in counties where curing is not available (and where county boards select “CANC”) that they have a right to cast a provisional ballot. *See id.*

The Instructions specify that when a county board enters a returned mail ballot under the code “Return-Ballot Received” in SURE, the automated email sent to the voter says nothing about curing or provisional voting. *See* August Instruction 14.

The same day he issued the March Instruction, the Secretary released a Guidance publicly stating that voters may cast a provisional ballot if they were “issued an absentee or mail-in ballot but believe[] they did not successfully vote the ballot” or “returned a completed absentee or mail-in ballot that will be rejected by the county board of elections.” Guidance 1 (App. 103). The Guidance makes these statements indiscriminately, without regard to whether the voter’s county board offers curing. *See id.*

**E. The Secretary’s Actions Have Confused Voters And Spawned Conflicting Lower Court Rulings.**

By stating that voters have a right to cure mail ballots, the Secretary’s Instructions, automated emails, and Guidance convey to voters that county boards are *obligated* to offer curing, *even if* the voter’s county board has a different policy. The result has been predictable: The Secretary’s actions are “causing confusion” among voters, *Genser* Ct. Common Pleas slip op. at 20 n.9, and have ensnared county boards in litigation and conflicting rulings.

For example, the petitioners in *Genser* received the Secretary’s automated emails after the Butler County Board logged their mail ballots as “CANC – NO SECRECY ENVELOPE” in compliance with the March Instruction. *See id.* at 7.

The petitioners then filed suit when the Butler County Board declined to count their provisional ballots because it does not permit curing of secrecy-envelope defects. *See id.* at 2-3, 7-8. In addition to being inaccurate, the Secretary's automated emails were also premature: At the time SURE sent the emails, the Butler County Board had not made a final determination that the petitioners' mail ballots lacked secrecy envelopes. *See id.* at 7-8. It could make that determination only when it opened the ballots during the pre-canvass or canvass. *See id.*; *Genser Commw. Ct. slip op.* 7.

The Butler County Court of Common Pleas held that Butler County voters have no right to cure secrecy-envelope defects or to cast provisional ballots, and even concluded that the March Instruction and automated emails contravene the Election Code. *See Genser Ct. Common Pleas slip op.* at 19-20. A Commonwealth Court panel, over a dissent from Judge Dumas, departed from its prior decision in *Allegheny County Provisional Ballots*, *see* 2020 WL 6867946, at \*4-5, and reversed the Court of Common Pleas' decision, *see Genser Commw. Ct. slip op.* 33-34. A Petition For Allowance To Appeal the Commonwealth Court's decision remains pending in this Court.

The Washington County Board of Elections did not allow curing of mail-ballot defects in the 2024 primary election. *See Coalfield Just.*, *slip op.* at 5. It therefore declined to adhere to the March Instruction because the Secretary's automated emails convey inaccurate information to Washington County voters. *See*

*id.* at 5-6. Instead, it logged all received mail ballots in SURE as “record -- ballot returned.” *See id.* Yet voters sued the Washington County Board on the theory that its failure to trigger the Secretary’s (inaccurate) automated emails violates an asserted constitutional right to notice of mail-ballot defects. *See id.* at 1-3, 5-6. The Washington County Court of Common Pleas agreed and ordered the Washington County Board to comply with the March Instruction and to trigger the automated emails. *See id.* at 2-4, 26-27. An appeal of that decision is pending in Commonwealth Court. *See* No. 1172 CD 2024 (Pa. Commw. Ct.).

Even prior to the Secretary’s actions, courts facing challenges to county curing policies across the Commonwealth have issued conflicting rulings. The Commonwealth Court had held in *Allegheny County Provisional Ballots* that county boards may not count provisional ballots submitted by individuals whose defective mail ballots were timely received, *see* 2020 WL 6867946, at \*4-5; *accord Genser* Ct. Common Pleas slip op. at 29, while a court held that Delaware County voters have a right to cure by casting provisional ballots, *see Keohane*, slip op. at 1-4.

### **BASIS FOR EXERCISE OF KING’S BENCH POWER OR EXTRAORDINARY JURISDICTION**

This Court possesses authority to “exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King’s Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.” 42 Pa. C.S. § 502. That authority includes the “power of general



superintendency over inferior tribunals even when no matter is pending.” *Bd. of Revision of Taxes, City of Phila. v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010); *see also Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884 (Pa. 2020); *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015).

“King’s Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law.” *Friends of Danny DeVito*, 227 A.3d at 884 (quoting *Williams*, 129 A.3d at 1206); *In re Bruno*, 101 A.3d 635, 672 (Pa. 2014). “[T]he power of King’s Bench allow[s] the Court to innovate a swift process and remedy appropriate to the exigencies of the event.” *In re Bruno*, 101 A.3d at 672.

The Court should grant the Application and exercise its King’s Bench authority here. The 2024 general election is rapidly approaching. The Election Code authorizes county boards to begin sending mail ballots to voters on September 16. *See* 25 P.S. § 3146.2a. Thereafter, some county boards will begin allowing certain voters to cure mail-ballot defects, while other county boards will not. The Secretary, moreover, will begin sending automated emails and will maintain his Guidance encouraging unlawful mail-ballot curing and provisional voting. *See supra* at 13-16; *Pa. Democratic Party*, 238 A.3d at 372-74. The Court therefore should resolve the questions presented now and eliminate the “confusion for electors,” *Genser Ct.*

Common Pleas slip op at 20 n.9, as well as the disuniformity, uncertainty, chaos, and erosion of public confidence in the imminent 2024 general election that the Secretary's actions and the county boards' varying policies are creating.

Indeed, there is not sufficient time for the “ordinary process[es] of law” to resolve the issues presented before Election Day. *Friends of Danny DeVito*, 227 A.3d at 884. The issues presented are also of vital importance: Voting is among the “most central of democratic rights,” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018), and as this Court previously recognized, whether to establish cure procedures implicates difficult policy questions, *Pa. Democratic Party*, 238 A.3d at 374, meaning this case obviously presents “issue[s] of public importance,” *Friends of Danny DeVito*, 227 A.3d at 884.

And lower courts have sharply divided on the questions of the lawfulness of the Secretary's actions and whether, and in what circumstances, county boards are obligated to, or may, offer curing. *Compare Genser Ct. Common Pleas slip op.* at 19-20, *with Genser Commw. Ct. slip op.* 33-34; *Coalfield Just.*, slip op. at 2-4, 26-27; *compare also Allegheny Cnty. Provisional Ballots*, 2020 WL 6867946, at \*4-5, *with Keohane*, slip op. at 1-4. Those courts, moreover, have not been presented a case in which the Secretary or all county boards have been joined, so their rulings are necessarily limited to the individual county boards before them. Granting immediate review, therefore, will secure uniformity across the Commonwealth,

promote “[c]onfidence in the integrity of our electoral process[],” facilitate “the functioning of our participatory democracy,” and eliminate the “consequent incentive to remain away from the polls” that the current state of affairs creates. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). The Court should grant the Application.

### **ARGUMENT**

The Secretary’s Instructions, automated emails, and Guidance contravene Pennsylvania law, as do any county boards’ policies that allow curing of mail-ballot defects. *First*, at a minimum, the Secretary’s Instructions, automated emails, and Guidance are unlawful because they purport to impose on county boards an obligation to offer curing that the Secretary lacks authority to impose. *Second*, the Secretary’s actions, as well as county board policies that permit curing, are unlawful because the General Assembly has not granted a right to cure in the Election Code. *Third*, numerous provisions of the Election Code confirm that the General Assembly has foreclosed curing of signature, dating, and secrecy-envelope defects. *Fourth*, in all events, the Election Code prohibits county boards from counting provisional ballots submitted by individuals whose defective mail ballots were timely received and, thus, prohibits curing through provisional voting.

The Court should set aside the Secretary’s Instructions, automated emails, and Guidance, and reaffirm that county boards of elections lack authority to provide notice of and an opportunity to cure mail-ballot defects.

## **I. The Secretary’s Actions Unlawfully Impose Curing On County Boards.**

Under the Pennsylvania Constitution, “ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914); *McLinko v. Dep’t of State*, 279 A.3d 539, 543 (Pa. 2022) (“[T]he power to regulate elections . . . has been exercised by the General Assembly since the foundation of the government.”); *Pa. Democratic Party*, 238 A.3d at 374 (“While the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.”). It therefore belongs to the General Assembly to decide the rules “for casting and counting a vote by mail”—and whether ballots should be “rejected due to minor errors made in contravention of those requirements.” *Pa. Democratic Party*, 238 A.3d at 374. Moreover, the decision whether “to provide a ‘notice and opportunity to cure’ procedure” for even “minor” mail-ballot defects presents “open policy questions,” “including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots.” *Id.* That decision is “best left to the legislative branch of Pennsylvania’s government.” *Id.* It is not to be made by the Judiciary, the Secretary, or county boards. *See id.*

The General Assembly has not authorized a “‘notice and opportunity to cure’ procedure” for mail-ballot defects. *Id.* Accordingly, the Secretary previously

acknowledged to this Court that there is “no statutory or constitutional basis” to obligate county boards to provide any such procedure. *Id.* at 373. The Secretary has gone even further before the General Assembly, admitting to lacking authority to order county boards to adopt curing for mail-ballot defects and “urg[ing] the Legislature to amend the laws and provide for a notice [and] cure process.” *See* Pa. House of Representatives, State Gov’t Comm. Hearing, *In re: Election Oversight Pennsylvania Department of State’s Election Guidance*, (Jan. 21, 2021), at 23-25 (former Secretary Boockvar), *available at* <https://tinyurl.com/4wxjvd4c>.

These admissions are correct. “[T]he Secretary has no authority to definitively interpret the provisions of the Election Code.” *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1078 n.6 (Pa. 2020). Moreover, the Secretary “does not have control over the County Boards’ administration of elections, as the General Assembly conferred such authority solely upon the County Boards.” *Rep. Nat’l Comm.* Slip Op. 19-20 (App. 177-78); *see also Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at \*10 (Pa. Commw. Ct. Aug. 19, 2022) (the Secretary acknowledging he “does not have the authority to direct the Boards to comply with [a court order]”). Indeed, Pennsylvania law generally grants the county boards the authority to implement the Election Code and administer elections. *See* 25 P.S. § 2642. By contrast, the Secretary’s “duties and responsibilities” under the Election Code “are limited,” *Rep.*

*Nat'l Comm.* Slip Op. 20 (App. 178), and relate to the narrow category of statewide matters such as approving forms, examining and approving voting machines, certifying names of candidates, certifying election results, and administering SURE, *see, e.g.*, 25 Pa. C.S. §§ 1222, 2621.

Thus, “under Pennsylvania law, the Secretary’s pre-election guidance is just that—guidance. County boards of elections ultimately determine what ballots to count or not count in the first instance,” subject to review by courts, not the Secretary. *Zicarelli v. Allegheny Cnty. Bd. of Elections*, 2:20-cv-1831-NR, 2021 WL 101683, at \*5 n.6 (W.D. Pa. Jan. 12, 2021).

The Secretary’s Instructions, automated emails, and Guidance contravene these principles in at least two ways. *First*, the Election Code does not authorize county boards to make a determination, prior to the Election Day pre-canvass or post-Election Day canvass, that a ballot is “pending” or “cancelled.” *Genser Ct. Common Pleas* slip op. at 19-20; *see also infra* at 26-43. Thus, the Secretary’s directive to treat certain ballots as “pending” or “cancelled” in SURE prior to Election Day “does not represent a legislatively-approved, or actual, ballot status.” *Genser Ct. Common Pleas* slip op. at 20. The Secretary may not “unilaterally develop” such statuses, let alone instruct county boards to use them. *See id.* at 19.

*Second*, the Secretary’s actions are invalid in their entirety because they convey that voters have a right to cure mail-ballot defects by casting a provisional

ballot, *see* August Instruction 11-13, and that county boards thus have a corresponding obligation to offer curing. The Secretary's actions are "causing confusion for electors," *Genser* Ct. Common Pleas slip op. at 20 n.9, particularly in counties where boards do not offer curing or offer only limited curing. And the county boards, rather than the Secretary, are paying the price: The boards, not the Secretary, have been forced to address concerns from misled and confused voters and to defend litigation arising from the Secretary's actions. *See supra* at 4-6, 16-18; *Genser* Ct. Common Pleas slip op. at 19-20; *Coalfield Just.*, slip op. at 1-3.

By conveying that boards have an obligation to offer curing, the Secretary's actions not only contradict the Secretary's own prior stated positions; they also contravene the General Assembly's decisions *not* to create a notice-and-cure procedure and to foreclose curing through provisional voting. *See Pa. Democratic Party*, 238 A.3d at 373-74. Moreover, the Secretary's actions transgress the strict limits on the Secretary's authority and usurp the county boards' authority over election administration. *See, e.g.*, 25 P.S. § 2642; 25 Pa. C.S. §§ 1222, 2621; *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d at 1078 n.6; *Rep. Nat'l Comm.* Slip Op. 19-20 (App. 176-77); *Chapman*, 2022 WL 4100998, at \*10; *Ziccarelli*, 2021 WL 101683 at \*5 n.6. And any agreement by the Secretary that his actions are not binding on county boards does not change this reality because the automated emails and Guidance are reaching—and misleading—voters, thereby causing voter

confusion, a risk of erosion of voter confidence in the Commonwealth’s elections, and tangible harm to county boards. Thus, regardless of whether the Court agrees that the Election Code forecloses county boards from offering curing through provisional voting or otherwise, *see infra* Parts II-III, the Court at a minimum should set aside the Secretary’s Instructions, automated emails, and Guidance.

## **II. The Election Code Does Not Authorize—And Actually Forecloses—Curing Of Mail-Ballot Defects.**

The Secretary’s actions and any county board policies that permit curing of mail-ballot defects contravene the clear mandates of the Election Code. The decision whether to provide curing of mail-ballot defects belongs to the General Assembly, which to date has not authorized curing. *See Pa. Democratic Party*, 238 A.3d at 372-74. In fact, the Election Code’s strict requirements for handling mail ballots underscore that curing is foreclosed as a matter of Pennsylvania law. For these reasons as well, the Court should set aside the Secretary’s Instructions, automated emails, and Guidance, and reiterate that county boards are not authorized to provide notice and curing of mail-ballot defects.

### **A. The General Assembly Has Not Authorized Curing.**

That the General Assembly has not authorized a “‘notice and opportunity to cure’ procedure” for mail-ballot defects *alone* requires holding that county boards may not offer curing. *See Pa. Democratic Party*, 238 A.3d at 372-74; *see also Winston*, 91 A. at 522.



If more were somehow needed, there is more—much more. *First*, the Court “must listen attentively to what the [Election Code] says, but also to what it does not say.” *In re Canvassing Observation*, 241 A.3d 339, 349 (Pa. 2020). And “[i]t is a well established principle of statutory interpretation that [this Court] may not supply omissions in [a] statute when it appears that the matter may have been intentionally omitted.” *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 611 (Pa. 2020).

By its plain terms, the Election Code omits any authorization of curing mail-ballot defects, and the General Assembly itself reads the Election Code that way. In recent years, the General Assembly has extensively debated whether to amend the Election Code to authorize such curing. It even enacted a bill to do just that in 2021, but the Governor vetoed it. *See supra* at 9-10. That the General Assembly believed legislation was necessary to authorize curing underscores that the Election Code does not already do so and that the absence of such authorization “ha[s] been intentional[.]” *In re Nov. 3, 2020 Gen. Election*, 240 A.3d at 611.

The General Assembly’s decision to provide a notice-and-cure procedure for defective mail-ballot *applications* further underscores that its decision not to provide such a procedure for defective mail *ballots* is “intentional[.]” *Id.* In particular, the General Assembly has crafted a notice-and-cure procedure for voters who fail to include an accurate identification number on their mail-ballot applications. *See* 25 P.S. § 3146.8(h). Its omission of a parallel procedure for defective mail ballots is

binding upon, and cannot be “suppl[ied]” by, this Court or county boards. *In re Canvassing Observation*, 241 A.3d at 349.

*Second*, the Court’s prior decisions make plain that election officials are bound by the General Assembly’s rules “for casting and counting a vote by mail,” as well as by its choice to require rejection, rather than notice and curing, of ballots returned with “minor errors made in contravention of those requirements.” *Pa. Democratic Party*, 238 A.3d at 374. Thus, the Court has held that county boards must decline to count ballots that fail to comply with the mandatory secrecy-envelope requirement, *see id.* at 374-80, and the mandatory date requirement, *see Ball*, 289 A.3d 1, even though the General Assembly has not authorized notice and curing for either type of defect. Indeed, the signature, dating, and secrecy-envelope requirements would not be mandatory as the General Assembly wrote and intended them if county boards were free to count noncompliant ballots through curing procedures of their own creation. *See, e.g., Pa. Democratic Party*, 238 A.3d at 372-80.

*Third*, permitting the Secretary and county boards to adopt curing policies the General Assembly has not authorized would violate the Pennsylvania Constitution, Pennsylvania law, and the U.S. Constitution in several ways. For one thing, it would usurp the General Assembly’s constitutional primacy over “ballot and election laws,” *Winston*, 91 A. at 522, and upend the Pennsylvania Constitution’s carefully

calibrated separation of powers between the legislative and executive branches, *see* Pa. Const. art. II, § 1 (“The legislative power of this Commonwealth shall be vested in a General Assembly.”); *id.* art. IV, § 15 (recognizing the Governor’s veto power). The General Assembly’s primacy and power to establish the Commonwealth’s ballot and election laws would be reduced to no power at all if the Secretary or county boards could adopt whatever curing policies they prefer—particularly when the General Assembly’s attempt to confer that authority was vetoed by the Governor.

For another thing, the Pennsylvania Constitution decrees that “[a]ll laws regulating the holding of elections ... shall be uniform throughout the State.” Pa. Const. art. VII, § 6. The Free and Equal Elections Clause’s mandate of “free and equal” elections, *id.* art. I, § 5, likewise prohibits discrimination against voters “based on considerations of the region of the state in which [voters] live[],” *League of Women Voters*, 178 A.3d at 808, and requires that election rules to “treat[] all voters alike” and “in the same way under similar circumstances,” *Winston*, 91 A. at 523.

The Election Code, moreover, requires that elections be “uniformly conducted” throughout the Commonwealth. 25 P.S. § 2642(g). And the Equal Protection Clause of the U.S. Constitution forbids use, in any statewide or multi-county election, of “varying standards to determine what [is] a legal vote” from “county to county.” *Bush*, 531 U.S. at 106-07.

But in recent elections, county boards' varying curing policies have impermissibly interjected into the Commonwealth's elections *disuniformity* and disparate treatment based on where voters live. After all, county boards that permit curing for signature, dating, or secrecy-envelope defects are not "uniformly conduct[ing]" elections with the rest of the Commonwealth, 25 P.S. § 2642(g), and are not treating voters "alike" or "in the same way" as similarly situated voters who cast defective mail ballots in counties where boards do not permit curing, *Winston*, 91 A. at 523; *Kerns v. Kane*, 69 A.2d 388, 393 (Pa. 1949) ("To be uniform in the constitutional sense, such a law must treat all persons in the same circumstances alike."); *see also League of Women Voters*, 178 A.3d at 808.

In addition, county boards that offer curing are deploying a different "standard[] to determine what [i]s a legal vote" than the standard the General Assembly has mandated and the non-curing boards properly apply. *Bush*, 531 U.S. at 106-07; *see also League of Women Voters*, 178 A.3d at 808. That is true in two scenarios: (1) when curing county boards count a defective (and cured) mail ballot that non-curing county boards would not count and (2) when curing county boards count a provisional ballot as a cure for a mail-ballot defect that non-curing county boards would not count.

This disparate-treatment problem actually runs even deeper because county curing policies also result in disparate treatment of similarly situated voters in the

*same* county. In particular, by (unlawfully) inspecting returned mail-ballot packages before the pre-canvass and canvass, curing boards are able to provide (unlawful) notice and an opportunity to cure mail-ballot defects to voters who return their ballots well in advance of the received-by deadline of 8 p.m. on Election Day. *See* 25 P.S. §§ 3146.6(c); 3150.16(c); *infra* at 33-35. But they cannot provide such notice and opportunity to cure to voters who timely submit their mail ballots only shortly before the deadline. Both sets of voters have timely returned mail ballots, but only voters in the first category, and not voters in the second category, have an opportunity to learn of and cure a defective ballot and have it counted. In this way as well, county board curing policies inject *disuniformity* into the determination of what constitutes a valid vote that may be counted in violation of the Pennsylvania Constitution, Pennsylvania law, and the U.S. Constitution. *See* Pa. Const. art. VII, § 6; *see also id.* art. I, § V; 25 P.S. § 2642(g); *Bush*, 531 U.S. at 106-07.

The only proper remedy for the disuniformity and disparate treatment of similarly situated voters flowing from county curing policies is to hold that county boards may not offer curing at all because the General Assembly has not authorized it. *See Pa. Democratic Party*, 238 A.3d at 372-74; *Republican Nat’l Comm.*, 284 A.3d at 208 (Todd, CJ, Mundy, Brobson, JJ.).

Finally, permitting the Secretary or county boards to offer curing where the General Assembly has not authorized them to do so would violate the Elections and

Electors Clauses of the U.S. Constitution. *See* U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. These two Clauses “expressly vest[] power to carry out [their] provisions” for setting the rules for federal elections “in ‘the Legislature’ of each State, a deliberate choice [courts] must respect.” *Moore v. Harper*, 600 U.S. 1, 34 (2023). Thus, state courts reviewing election laws legislatures enact under the Elections and Electors Clauses may not “transgress the ordinary bounds of judicial review,” *id.* at 36, or “impermissibly distort[]” state law “beyond what a fair reading require[s],” *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); *accord Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring) (endorsing this standard); *id.* at 34-36 (holding that federal courts must review state courts’ treatment of election laws passed by state legislatures regulating federal elections).

Permitting the Secretary or county boards to adopt curing procedures not expressly authorized by the General Assembly would “impermissibly distort” both the Election Code and this Court’s prior decision in *Pennsylvania Democratic Party*, *see* 238 A.3d at 372-80, and, thus, violate the Elections and Electors Clauses, *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); *accord Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring); *id.* at 34, 36 (maj. op.). The Court should decline to do so. Instead, it should invalidate the Secretary’s Instructions, automated emails, and Guidance, and reaffirm that county boards lack authority to provide notice and curing of mail-ballot defects.

**B. Numerous Provisions Confirm That The Pennsylvania Constitution And The Election Code Foreclose Notice And Curing.**

The General Assembly's decision not to authorize curing of mail-ballot defects forecloses the courts, the Secretary, and county boards from permitting it. *See supra* Part II.A. And if the General Assembly's silence were not enough, numerous provisions governing the county boards' handling of returned mail ballots confirm that Pennsylvania law forecloses notice and curing. *See* 25 P.S. § 2642(f) (election officials may not take action "inconsistent with law").

The Election Code mandates that "upon receipt," county boards are not permitted to inspect or open a mail-ballot package returned by a voter. *Id.* § 3146.8(a). Instead, county boards "shall safely keep the ballots in sealed or locked containers until they are to be canvassed." *Id.* County boards are authorized to inspect and open mail-ballot packages in only two settings: the "pre-canvass" and the "canvass" of mail ballots. *See id.* §§ 3146.8(g)(ii)(1.1), (2); *id.* § 2602(q.1). The Election Code's rules governing each setting foreclose providing notice and an opportunity to cure mail-ballot defects.

*First*, "no earlier than seven o'clock A.M. on election day," county boards may convene "to pre-canvass all [mail] ballots received prior to" the pre-canvass. *Id.* § 3146.8(g)(ii)(1.1). The "pre-canvass shall mean the *inspection and opening* of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes, and the counting, computing and tallying of the

votes reflected on the ballots.” *Id.* § 2602(q.1) (emphasis added). Thus, it is not until Election Day at the earliest that county boards may “inspect[]” or “open[]” mail-ballot packages. *See id.*; *id.* § 3146.8(g)(ii)(1.1).

Moreover, the pre-canvass “does not include the recording or publishing of the votes reflected on the ballots.” *Id.* § 2602(q.1). In fact, “[n]o person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.” *Id.* § 3146.8(g)(ii)(1.1). Thus, no person—including any county board official or employee—may “disclose the result[]” of a county board’s preliminary disposition that a mail ballot is defective “prior to the close of the polls.” *Id.* County boards that offer curing, however, do precisely that when they notify voters of a suspected defect in their ballot, through SURE and the Secretary’s automated emails or otherwise. And at least one board, Philadelphia, goes even further: It notifies the *public* of *all* voters whose mail ballots are suspected to have defects by posting a list of all such voters online. *See* Philadelphia Policy.

*Second*, “no earlier than the close of polls on the day of the election and no later than the third day following the election,” the county boards meet to “canvass [mail] ballots ... not included in the pre-canvass.” *Id.* § 3146.8(g)(ii)(2). At the canvass, the boards “shall open the envelope of every unchallenged [mail] ballot” and “count, compute and tally the votes.” *Id.* § 3146.8(g)(4)(i)-(iii).



**Signature And Dating Defects.** Providing notice and an opportunity to cure signature and dating defects on the mail-ballot outer envelope is “inconsistent with [the] law” governing the pre-canvass and canvass in several respects. *Id.* § 2642. For one thing, county boards may discover a signature or dating defect only by “inspect[ing]” the declaration on the mail-ballot package, but they are not permitted to “inspect[]” those packages until Election Day at the earliest. *See id.* § 2602(q.1). Until that time, all county boards may do with mail ballots is secure and store them. *See id.* § 3146.8(a).<sup>4</sup> Thus, any pre-Election Day inspection or examination of the mail-ballot package for a signature or dating defect violates the Election Code. *See id.* §§ 2602(q.1); 3146.8(a).

For another thing, because county boards cannot inspect mail-ballot packages for, or discover, defects until Election Day or thereafter, they cannot notify voters of those defects. As a practical matter, it is simply too late to provide notice and curing if defects are discovered during the pre-canvass on Election Day—and, obviously, if defects are discovered during the canvass *after* Election Day. Moreover, notifying voters whose ballots were inspected during the pre-canvass on Election Day (and who theoretically could attempt to cure before the close of the polls) violates the

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<sup>4</sup> County boards can (and do) also log the receipt date for each mail-ballot package, which they accomplish by scanning the barcode on each outer envelope. *E.g.*, Marks Dep. 35:3-23. That ministerial action does not involve an “inspection” of the mail-ballot “envelopes.” 25 P.S. § 3146.8(a).

Election Code’s prohibition on “disclos[ing] . . . prior to the close of the polls” the “result[] of any” inspection conducted or preliminary disposition made with regard to whether a ballot is defective. *Id.* § 3146.8(g)(ii)(1.1). The Secretary and county boards, however, are providing such disclosures through SURE, the Secretary’s automated emails, or, in the case of Philadelphia, posting a list of voters online.

**Secrecy-Envelope Defects.** For all of these same reasons, and more, providing notice and an opportunity to cure secrecy-envelope defects is “inconsistent with” Pennsylvania law. *Id.* § 2642.

Indeed, any pre-Election Day examination of mail-ballot packages for the presence of a secrecy envelope—whether through a hole in the outer envelope or a measurement of the ballot package’s dimensions, Marks Dep. 44:5-19; *see Genser* Commw. Ct. slip op. at 6—is an unlawful “inspection,” 25 P.S. §§ 2602(q.1), 3146.8(g)(ii)(1.1), 3146.8(g)(ii)(2). And either method of examination is inconsistent with the Election Code for other reasons. Punching a hole in the outer envelope is an unlawful “opening” of the mail-ballot package prior to the pre-canvass on Election Day. *See id.* § 2602(q.1) (“pre-canvass shall mean the . . . *opening* of [outer] envelopes”) (emphasis added). Measuring the mail-ballot package cannot definitively confirm a secrecy-envelope defect, particularly a defect of identifying marks appearing on the secrecy envelope. *See id.* § 3146.8(g)(4)(ii) (requiring boards to discard any mail ballot in a secrecy envelope displaying

identifying marks). As even the Commonwealth Court majority in *Genser* recognized, such defects cannot be discovered until the mail-ballot envelope is opened, making the ballot's status before then "nothing more than a guess." *Genser* Commw. Ct. slip op. 7. County boards, however, may not "open[]" the package until Election Day at the earliest. *See id.* § 2602(q.1); *Genser* Ct. Common Pleas slip op. at 7-8.

Moreover, whenever county boards discover a secrecy-envelope defect *after* opening the outer envelope, they can discern "who the [voter] is [and] for whom the [voter] has voted." *Pa. Democratic Party*, 238 A.3d at 378. Providing notice and an opportunity to cure at that point would *violate* the Pennsylvania Constitution because "secrecy in voting" would not have been "preserved." Pa. Const. art. VII, § 4. Thus, as this Court has already held, the secrecy-envelope requirement is mandatory, and secrecy-envelope defects require election officials to reject the ballot, not provide an unauthorized curing opportunity. *Pa. Democratic Party*, 238 A.3d at 374-80.

Further, as with signature and dating defects, it is too late to notify voters and offer them an opportunity to cure secrecy-envelope defects on Election Day or thereafter. And any such notice on Election Day would, once again, constitute unlawful "disclos[ure]" of "the result of any portion of the pre-canvass meeting prior to the close of the polls." 25 P.S. § 3146.8(g)(ii)(1.1).

For all of these reasons, the Election Code expressly forecloses the Secretary and county boards from offering curing of mail-ballot defects. The Court should invalidate the Secretary’s Instructions, automated emails, and Guidance, and reiterate that county boards may not permit curing that the General Assembly has not authorized.

**C. Section 2642(f) Does Not Permit County Boards to Adopt Curing.**

The Secretary and some county boards will likely argue that county boards have authority to fashion their own notice-and-cure procedures under Section 2642(f) of the Election Code. That provision authorizes county boards “[t]o make and issue such rules, regulations, and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” 25 P.S. § 2642(f). But for at least two reasons, Section 2642(f) does not empower county boards to adopt notice-and-cure procedures.

*First*, notice-and-cure procedures are “inconsistent with law.” *Id.* After all, the decision whether to adopt notice-and-cure procedures is “best suited for the Legislature,” and the General Assembly has declined to adopt such procedures to date. *Pa. Democratic Party*, 238 A.3d at 374; *Republican Nat’l Comm.*, 284 A.3d at 208 (Todd, CJ, Mundy, Brobson, JJ.). Moreover, as established, the Election Code and its provisions for handling mail ballots *foreclose* county boards from adopting notice-and-cure procedures. *See supra* Part II.B.

*Second*, Section 2642(f)’s plain text prohibits county boards from invoking the provision to establish new voter rights and obligations. Section 2642(f) allows county boards only to establish rules that give “*guidance*” to election officials and voters. 25 P.S. § 2642(f) (emphasis added). As in the federal administrative-law context, “guidance” suggests a county board can clarify how the Election Code will be implemented in the particular county. *See* 5 U.S.C. § 551(4); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000). For example, in *In re Canvassing Observation*, this Court held that county boards wield authority and discretion under Section 2642(f) to issue guidance regarding how far the parties’ authorized representatives can stand from election workers conducting canvassing, where the Election Code stated only that such representatives may “remain in the room.” 241 A.3d at 350.

By contrast, this Court has never suggested that Section 2642(f) empowers county boards to establish new rights or obligations not grounded in the Election Code. For example, it cannot be disputed that county boards have no authority to adopt a new voter-identification requirement not contained in the Election Code, or to extend to non-military and non-overseas voters the unique procedures and rules that the Election Code establishes for military and overseas voters. Nor could it be: “the power to regulate elections . . . has been exercised by the *General Assembly* since the foundation of the government.” *McLinko*, 279 A.3d at 543 (cleaned up).

This Court’s decision in *In re Nov. 3, 2020 Gen. Election* is instructive. There, this Court assumed King’s Bench jurisdiction to consider “[w]hether the Election Code authorizes or requires county election boards to reject voted absentee or mail-in ballots during pre-canvassing and canvassing based on signature analysis where there are alleged or perceived signature variances.” 240 A.3d at 595. The Court concluded that the Election Code “does not impose a duty on county boards to compare signatures.” *Id.* at 609. The Court also reiterated that “[i]t is a well established principle of statutory interpretation that we ‘may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.’” *Id.* (cleaned up) (quoting *Sivick v. State Ethics Comm’n*, 238 A.3d 1250 (Pa. 2020)). Under that principle, this Court held that “county boards of elections are *prohibited* from rejecting absentee or mail-in ballots based on signature comparison conducted by county election officials or employees, or as the result of third-party challenges based on signature analysis and comparisons.” *Id.* at 611 (emphasis added). In other words, nothing in Section 2642(f) could authorize county boards to conduct signature matching when the Election Code did not do so. *See id.*

So too here. The General Assembly has clearly refused to authorize mail-ballot curing procedures. Therefore, neither this Court nor county boards may “supply” a curing procedure the General Assembly “intentionally omitted” from the Election Code. *Id.*

Constitutional considerations also necessitate rejecting reading Section 2642(f) to grant county boards free-wheeling power to establish any election rule not expressly foreclosed by the Election Code. Such a power would routinely result in constitutional violations. For example, as discussed above, the decision of some county boards to offer notice and cure procedures have resulted in starkly disparate treatment of similarly situated voters. *See supra* at 30-32. That outcome violates both the Free and Equal Elections Clause, *see League of Women Voters*, 178 A.3d at 807, and the Pennsylvania Constitution’s guarantee that “[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State,” Pa. Const. art. 7, § 6; *accord* 25 P.S. § 2642(g) (requiring elections to be “uniformly conducted” throughout Commonwealth). And it violates the U.S. Constitution’s Equal Protection Clause, which forbids the establishment of “varying standards to determine what [is] a legal vote” from “county to county.” *Bush*, 531 U.S. at 106-07. To avoid the constitutional violations in this case (and others that could easily arise in the future), the Court should read Section 2642(f) narrowly.

Further, a broad reading of Section 2642(f) also jeopardizes the provision’s constitutionality under Pennsylvania’s nondelegation doctrine. “It is axiomatic that the Legislature cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority.” *Gilligan v. Pa. Horse Racing Comm’n*, 422 A.2d 487, 489 (Pa. 1980). “When the General Assembly

empowers [a county board] to act,” the Pennsylvania Constitution requires “that the basic policy choices involved in legislative power actually be made by the Legislature as constitutionally mandated.” *Protz v. Workers’ Comp. Appeal Bd.*, 161 A.3d 827, 833 (Pa. 2017). If county boards have unlimited discretion to adopt any rule—no matter how important—not expressly foreclosed by the Election Code, the General Assembly would have delegated vast swaths of legislative power to the county boards, with no instruction on how to use it. By contrast, interpreting Section 2642(f) to allow county boards to provide “guidance” implementing the Election Code and “fill[ing] up the details” of the Legislature’s policy choices avoids that grave constitutional problem. *Cf. Wayman v. Southard*, 23 U.S. 1, 31, 43 (1825). For this reason as well, Section 2642(f) does not authorize county boards to permit curing.

### **III. The Election Code Prohibits, Rather Than Permits, Use Of Provisional Voting To Cure Mail-Ballot Defects.**

By its plain terms, the Election Code prohibits a county board from counting a provisional ballot submitted by a voter whose defective mail ballot the board timely received. Thus, at a minimum, the Election Code precludes curing through provisional voting, and the Secretary’s Instructions, automated emails, and Guidance, as well as any county boards’ curing policies, are invalid to the extent they assert otherwise.



**A. A Provisional Ballot Cast By A Voter Whose Mail Ballot Was Timely Received By The County Board “Shall Not Be Counted.”**

Neither this Court, the Secretary, nor the county boards may “ignore the clear mandates of the Election Code.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Election*, 843 A.2d 1223, 1231 (Pa. 2004); *see also Ball*, 289 A.3d at 36. “When 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).

The General Assembly’s mandate here could not have been clearer: “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). Thus, a county board may *not* count *any* provisional ballot cast by a voter whose mail ballot the county board “timely received” before the deadline of 8 p.m. on Election Day. *Id.* Nothing in this plain text turns on whether the voter’s mail ballot is valid and will be counted; instead, the prohibition on counting a provisional ballot arises whenever the voter’s mail ballot has been “timely received.” *Id.* Accordingly, as the Commonwealth Court held before a panel majority recently departed from that precedent, the Election Code is “unambiguous” on this point, and the Secretary and the county boards are “not at liberty to disregard the clear statutory mandate that the provisional ballots to which this language applies must not be counted.” *In re Allegheny Cnty. Provisional Ballots*, 2020 WL 6867946, at \*4-5.

Another provision of the Election Code confirms that voters whose mail ballots have been timely received by the county board may not vote provisionally. Every voter who casts a provisional ballot must first sign an affidavit that states:

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.**

25 P.S. § 3050(a.4)(2) (emphasis added). Therefore, every voter who seeks to cast a provisional ballot in order to cure a deficient mail ballot and signs this affidavit makes a false statement: Any such voter is attempting to vote provisionally *because he cast another ballot* in that election that is defective, not because he *did not* cast another ballot. *See id.*

Moreover, allowing the Secretary or county boards to permit curing through provisional voting would be unlawful for all the same reasons explained above that make it unlawful to permit county boards to provide *any* form of curing of mail-ballot defects. *See supra* Parts II.A-C. *First*, the Court “must listen attentively to what the [Election Code] says, but also to what it does not say,” *In re Canvassing Observation*, 241 A.3d at 349, and “may not supply omissions in the statute when it appears that the matter may have been intentionally omitted,” *In re Nov. 3, 2020 Gen. Election*, 240 A.3d at 611.

Pennsylvania law permits use of provisional ballots in only limited

circumstances. *See Pa. Democratic Party*, 238 A.3d at 375 n.28. Those limited circumstances include, for example, a voter who is unable to produce required identification at the polling place, *see, e.g.*, 25 P.S. § 3050(a.2), or whose registration to vote cannot be verified, *id.* § 3050(a.4)(1). They also include the scenario where a voter “request[s] a [mail] ballot [but] is not shown on the district register as having voted.” *Id.* §§ 3146.6(b)(2), 3150.16(b)(2); *see also id.* §§ 3146.6(b)(1), 3150.16(b)(1) (“The district register at each polling place shall clearly identify electors who have received and voted [mail] ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a [mail] ballot to vote at the polling place.”). This could occur, for example, if the voter never received the mail ballot after requesting it or never completed or returned it to election officials. *See, e.g., id.* §§ 3146.6(b)(2), 3150.16(b)(2).

The General Assembly’s decision to authorize provisional voting for a class of would-be mail voters (those who did not vote those ballots) underscores that the General Assembly was aware of mail voters and could have authorized mail voters whose ballots are timely received but defective to vote by provisional ballot. Its omission of such voters from the list of those authorized to vote provisionally—and its direction to the contrary that provisional ballots submitted by such voters “shall not be counted,” 25 P.S. § 3050(a.4)(5)(ii)(F)—were obviously “intentional[.]” and binding on the courts, the Secretary, and the county boards. *In re Nov. 3, 2020 Gen.*

*Election*, 240 A.3d at 611.

*Second*, allowing the Secretary and county boards to permit curing by provisional voting would eviscerate the General Assembly’s mandatory rules “for casting *and counting* a vote by mail,” such as the signature and dating requirement and the secrecy-envelope requirement, by subjecting them to override by election officials. *Pa. Democratic Party*, 238 A.3d at 374 (emphasis added); *see also id.* at 374-80; *Ball*, 289 A.3d 1; *supra* at 28-29.

*Third*, allowing the Secretary and county boards to permit curing by provisional voting in contravention of the General Assembly’s clear mandate would violate the Pennsylvania Constitution, Pennsylvania law, and the U.S. Constitution in several ways. Such allowance would usurp the General Assembly’s constitutional primacy over “ballot and election laws,” *Winston*, 91 A. at 522, upend the Pennsylvania Constitution’s carefully calibrated separation of powers, *see* Pa. Const. art. II, § 1; *id.* art. IV, § 15, inject both inter-county and intra-county disuniformity and disparate treatment of similarly situated voters, Pa. Const. art. VII, § 6; *id.* art. 1, § 5; *League of Women Voters*, 178 A.3d at 808; *Winston*, 91 A. at 523; 25 P.S. § 2642(g); *Bush*, 531 U.S. at 106-07, and violate the Elections and Electors Clauses, U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2; *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Moore*, 600 U.S. at 34; *supra* at 30-32.

*Finally*, allowing the Secretary and county boards to permit curing by

provisional voting would sanction their violations of the Election Code’s strict requirements for handling returned mail ballots, conducting the pre-canvass and canvass, and not disclosing any results of the pre-canvass prior to the closing of the polls. *See supra* at 33-38.

The Court should decline the invitation to authorize these consequences and at a minimum hold that county boards may not permit curing by provisional voting.

**B. The Commonwealth Court Majority’s Contrary Conclusion Is Erroneous.**

In its *Genser* decision issued just days ago, a divided Commonwealth Court panel departed from its prior precedent and held that the Election Code “does not prohibit counting . . . provisional ballots” submitted by Butler County voters whose mail ballots were timely received by the county board but were defective and, thus, could not be counted. *Genser* Commw. Ct. slip op. 2; *see also id.* at 33 (Election Code “requires [county boards] to count [such] provisional ballots”). This holding was erroneous: It contravenes this Court’s binding holding in *Pennsylvania Democratic Party*, misreads the Election Code, and rests upon a finding of statutory ambiguity where none exists.

*First*, the majority started from the premise that counting provisional ballots submitted by voters whose mail ballots were timely received does not “amount to . . . curing” the mail ballot. *Id.* at 2; *see id.* at 33 (Court’s holding “does not depend on any ballot curing process . . . The provisional ballot is a separate ballot, not a

cured initial ballot.”). But this *ipse dixit* is a distinction without a difference. “Curing” refers to fixing and avoiding the consequence of the voter’s *error* on the mail ballot, not necessarily making any changes to the “initial ballot.” *Id.* at 33. And counting a provisional ballot in these circumstances *remedies*—and therefore *cures*—the voter’s failure to comply with the General Assembly’s “procedures for casting and counting a vote by mail.” *Pa. Democratic Party*, 238 A.3d at 374. It permits a voter to have his ballot counted where the General Assembly directed that the voter’s “minor errors” require “reject[ing]” the voter’s first (and only) ballot. *Id.* The decision whether to permit that result through provisional voting or some other “opportunity to cure” the error is “best left to the legislative branch.” *Id.* It is not one to be made by the courts, the Secretary, or the county boards. *See id.*

*Second*, the majority suggested that the Election Code is “ambiguous” because subclause (i) of Section 3050(a.4)(5) directs the county board to count a provisional ballot if it confirms that the voter “did not cast any other ballot, including an absentee ballot, in the election.” 25 P.S. § 3050(a.4)(5)(i); *Genser Commw. Ct. slip op.* 24-27. That direction, however, creates no ambiguity. As subclause (i) expressly states, that direction applies “[e]xcept as provided in subclause (ii)” of Section 3050(a.4)(5). 25 P.S. § 3050(a.4)(5)(i). And subclause (ii) contains the General Assembly’s direction 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.” *Id.* § 3050(a.4)(5)(ii)(F).

Thus, the Election Code unambiguously forecloses a county board from counting a provisional ballot submitted by a voter whose mail ballot it has timely received, *regardless* of whether the voter previously “cast” a ballot in the election. *See id.* § 3050(a.4)(5)(i)-(ii). The Commonwealth Court majority’s efforts to find ambiguity in the term “cast,” *see Genser Commw. Ct. slip op.* 24-27, are therefore beside the point. And even if they were not, the majority erred in conflating whether a ballot was “cast” with whether it is “valid” and must be counted. As the various definitions of “cast” reviewed by the majority make clear, a voter “casts” a ballot when he relinquishes control of it to election officials, regardless of whether the ballot is valid. *See, e.g., id.* at 25. Thus, the terms “cast” by a voter and “timely received” by a board can and should be read in harmony to give Section 3050(a.4) full force and effect as the General Assembly intended. *See* 1 Pa. C.S. § 1921(b); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Election*, 843 A.2d at 1231; *see also Ball*, 289 A.3d at 26.

*Third*, the majority posited that the Election Code is ambiguous because it directs that a person is “not entitled to cast a provisional ballot at their polling place on Election Day if the district register shows they have already *voted*.” *Genser Commw. Ct. slip op.* 25-26 (emphasis original); *see also* 25 P.S. §§ 3146.6(b)(2), 3150.16(b)(2). Once again, the majority erred in equating whether a person “*voted*”

with whether their mail ballot is “*valid and will be counted.*” *Genser Commw. Ct. slip op. 26* (emphases original). For example, a person may “vote” by “leaving sections blank” or “even leaving the entire ballot blank” as a form of expression or “protest,” but such a ballot cannot be counted. *Genser Ct. Common Pleas slip op. 16 n.4.*

More to the point, the rule that voters whom the district register identifies as “having voted” are “not entitled to cast a provisional ballot” does not mean that all voters whom the district register does *not* identify as “having voted” *are* entitled to cast a provisional ballot. If it did, the Election Code’s numerous other rules delineating who may or may not cast a provisional ballot would be superfluous. *See, e.g., 25 P.S. §§ 3050(a.2), 3050(a.4)(1), 3146.6(b)(2), 3150.16(b)(2).* And regardless of who may *cast* a provisional ballot, the Election Code unequivocally forecloses the county board from “*count[ing]*” any provisional ballot if “the elector’s absentee ballot or mail-in ballot is timely received by the county board of elections.” *Id.* § 3050(a.4)(5)(ii)(F) (emphasis added); *Pa. Democratic Party*, 238 A. 3d at 374 (General Assembly’s rules for “casting *and counting*” a ballot are binding).

*Fourth*, the majority overlooked that applying its regime of curing through provisional voting—like *any* curing regime not authorized by the General Assembly—violates the Election Code’s detailed instructions for handling returned mail ballots, the Pennsylvania Constitution, and the U.S. Constitution. *See supra* at



28-33.

The Court should reject the majority's atextual, untenable, and unconstitutional construction of the Election Code. At a minimum, it should uphold the General Assembly's decision not to permit curing through provisional voting.

#### **IV. This Court Should Immediately Issue Relief.**

This Court should issue relief in time for the imminent 2024 general election. Ultimately, the Court should set aside the Secretary's Instructions, automated emails, and Guidance, as well as reiterate that county boards lack authority to offer notice and curing of mail-ballot defects. *See supra* Parts I-III.

Moreover, in the interim, the Court should protect Petitioners' right to relief and its remedial jurisdiction by (i) ordering the Secretary, pending further order of this Court, to rescind the Guidance publicly stating that voters may cure mail-ballot defects by casting provisional ballots; (ii) ordering the county boards, pending further order of this Court, to mark all mail ballots received from voters as "Record-Ballot Returned" in SURE, to segregate any mail ballots that they believe may be defective, and not to provide notice and an opportunity to cure; and (iii) issuing a briefing schedule to facilitate a final decision on the questions presented by the commencement of mail-ballot pre-canvasses on Election Day. *See, e.g., Republican Party of Pa. v. Degraffenreid*, No. 20A84, Order (U.S. Nov. 6, 2020) (Alito, J.) (ordering segregation of ballots pending result of dispute regarding Election Day

received-by deadline); *McCormick for Senate v. Chapman*, 286 M.D. 2022, 2022 WL 2900112, \*16 (Pa. Commw. Ct. June 2, 2022) (ordering county boards of elections “to segregate the ballots that lack a dated exterior envelope” pending resolution of validity of such ballots). These commonsense interim remedies will protect the interests of the parties and promote judicial economy. The issue of whether county boards may count cured mail ballots or provisional ballots cast by voters whose mail ballots are timely received “could well affect the outcome of the fall elections” in Pennsylvania. *Ritter v. Migliori*, 142 S. Ct. 1824 (2022) (Alito, J., dissenting from the denial of the application for stay). Ordering county boards of elections to segregate ballots is therefore “necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.” *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

The Court should grant Petitioners all of their requested relief for at least four reasons.

*First*, Petitioners have established a likelihood of success on the merits of their claims. *See supra* Parts I-III; *Summit Towne Ctr.*, 828 A.2d at 1001.

*Second*, without immediate relief, Petitioners will suffer “immediate and irreparable harm that cannot be adequately compensated by damages.” *Id.* They will be forced to continue diverting resources toward understanding the counties’ various cure policies, and then educating voters and volunteers about those

policies—and to do all of that in a legal environment unsettled by the Secretary’s actions. *See* Alleman Decl. ¶¶ 22, 26-29 (App. 146-47); *cf., e.g., Ball*, 289 A.3d at 19-20 (holding that Republican Party committees have “a substantial interest” in the “expenditure of resources to educate candidates, electors, and voting officials concerning adherence to the Election Code” and that “the Secretary’s guidance regarding an unsettled legal question” impaired their ability “to educate candidates, electors, and voting officials effectively”); *S. Fayette Twp. v. Pa. Dep’t of Transp.*, 404 M.D. 2021, 2022 WL 2359779, at \*12 (Pa. Commw. Ct. June 30, 2022) (holding that petitioners had standing because they “will have to divert resources to accommodate the impact of” a statewide bridge-repair initiative); *Applewhite v. Commonwealth*, 330 M.D. 2012, 2014 WL 184988, at \*7 (Pa. Commw. Ct. Jan. 17, 2014) (holding that organizations suffered “direct harm” because they “diverted valuable resources as a consequence of Respondents’ inconsistent evolving unchecked decisions expanding and contracting the criteria for compliant photo IDs under the Voter ID Law”); *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306 (5th Cir. 2022) (recognizing political committees suffered “direct” and “substantial” harm because of risk that “legal landscape” would change, causing committees to “expend resources regarding . . . recruitment [and] training”).

Moreover, Petitioners and their candidates will be harmed if they have to compete under unlawful county curing regimes that deviate from the rules set by the

General Assembly. *See* Alleman Decl. ¶¶ 30-34 (App. 147-48); *cf., e.g., Shays v. FEC*, 414 F.3d 76, 86-87 (D.C. Cir. 2005) (candidates suffer injury when changes to election laws and procedures “alter the competitive environment’s overall rules” and force them to “adjust their campaign strategy”); *Mecinas v. Hobbs*, 30 F.4th 890, 898 & n.3 (9th Cir. 2022) (candidates and political parties have a “shared interest in fair competition” and suffer injury when forced “to participate in an illegally structured competitive environment” (cleaned up)). Petitioners’ members (Republican voters) will also be harmed by being subject to substantial disparate treatment of their mail votes based solely on where they reside in the Commonwealth. *See* Alleman Decl. ¶¶ 32-33 (App. 147-48); *cf., e.g., Texas v. Lesage*, 528 U.S. 18, 21 (1999) (recognizing that “inability to compete on an equal footing” confers standing).

These harms alone are sufficient to warrant the requested relief. The harm to Petitioners, their candidates, and their voters is even more acute if the Secretary’s actions and county boards’ disparate curing policies end up “affect[ing] the outcome of the fall elections” in Pennsylvania. *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting from the denial of the application for stay). This fall, millions of Pennsylvania voters will cast their votes for President, U.S. Senator, Representative, and scores of state and local offices. Many of those races are expected to be close—and the outcome of such a race may well turn on whether county boards are permitted to count

defective mail ballots that have been cured or provisional ballots cast by voters who previously cast defective mail ballots. *See* Alleman Decl. ¶¶ 35-43 (App. 148-51).

This is no mere hypothetical: In the last few years alone, multiple Republican candidates received the highest vote total in elections across the Commonwealth, only to be declared the losers to Democratic opponents when defective mail ballots were unlawfully counted. *See id.* ¶¶ 35-39; *see also Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020) (political committees are injured when a law “unequally favors supporters of other political parties”); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014) (political parties who were “subject to” a law and whose candidates “were affected” by it suffered injury); *Nelson v. Warner*, 12 F.4th 376, 384 (4th Cir. 2021) (candidate suffers concrete harm when a law “injur[es] his chances of being elected”). Definitively resolving the questions presented *before* mail ballots are inspected, opened, and counted is essential to safeguarding public confidence in the integrity of the Commonwealth’s elections across the State.

*Third*, granting the requested relief will prevent the “greater injury” of vote dilution that “would result from refusing [the] injunction” and flow from the counting of defective mail ballots that the General Assembly has mandated may not be counted. *Summit Towne Center*, 828 A.2d at 1001. The requested relief will therefore protect all Pennsylvania voters and “will not substantially harm other

interested parties.” *Id.* And the requested relief will “properly restore the parties to their status” under the plain statutory terms of the Election Code and this Court’s reasoning in 2020. *Id.*

*Fourth*, relief against the Secretary’s Instructions, automated emails, and Guidance is essential for county boards like the Butler County and Washington County Boards of Elections. Without clarity from this Court, county boards will continue to face lawsuits demanding the establishment of curing rights—and conflicting rulings regarding those demands. Those lawsuits, threatened litigation, and related Right to Know requests have imposed, and will continue to inflict, significant nonrecoverable litigation and compliance costs on the county boards.

*Finally*, the requested relief will advance the “public interest.” *Id.* It will help ensure that the Commonwealth’s elections are conducted in the uniform manner the General Assembly has prescribed in the Election Code. Thus, such an order will promote “[c]onfidence in the integrity of our electoral processes,” facilitate “the functioning of our participatory democracy” by eliminating significant unequal county-based treatment, and eliminate the “consequent incentive to remain away from the polls” occasioned by the decisions of county boards and the Secretary to disregard the Election Code and this Court’s prior rulings. *Purcell*, 549 U.S. at 4–5. The Court should grant the Application and grant Petitioners’ requested relief.

## **RELIEF REQUESTED**

Petitioners respectfully request that this Honorable Court:

- a. Grant this Application for the Court to exercise its King's Bench power or extraordinary jurisdiction;
- b. Enter an order directing the Secretary, pending final resolution of this case, to rescind the Guidance publicly stating that voters may cure mail-ballot defects by casting provisional ballots;
- c. Enter an order directing county boards, pending final resolution of this case, to record all mail ballots received from voters as "Record Ballot-Received" in SURE, to segregate any returned mail ballots they believe may be defective, and not provide notice and an opportunity to cure, including by provisional ballot;
- d. Set a briefing schedule that will facilitate a decision from the Court on the questions presented before Election Day;
- e. Set aside the Secretary's Instructions, automated emails, and Guidance;
- f. Declare that county boards lack authority to provide notice and curing of mail-ballot defects; and
- g. Grant any other relief this Court deems necessary and appropriate.

Dated: September 18, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

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**CERTIFICATION OF WORD COUNT**

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum contains 13,535 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

*/s/ Kathleen A. Gallagher*  
\_\_\_\_\_  
*Counsel for Petitioners*

## **CERTIFICATE OF COMPLIANCE**

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

**THE GALLAGHER FIRM LLC**

Dated: September 18, 2024

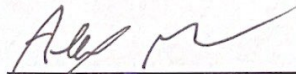
/s/ Kathleen A. Gallagher  
Kathleen A. Gallagher

*Counsel for Petitioners*

VERIFICATION OF REPUBLICAN NATIONAL COMMITTEE

I, Alex Meyer, Deputy Political Director at the Republican National Committee, am authorized to make this verification on behalf of the Republican National Committee. I hereby verify that the factual statements set forth in the foregoing Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



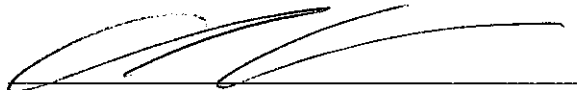
Alex Meyer  
Deputy Political Director  
Republican National Committee

Date: 9/16/24

**VERIFICATION OF REPUBLICAN PARTY OF PENNSYLVANIA**

I, Angela Alleman, Executive Director at the Republican Party of Pennsylvania, am authorized to make this verification on behalf of the Republican Party of Pennsylvania. I hereby verify that the factual statements set forth in the foregoing Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



Angela Alleman  
Executive Director  
Republican Party of Pennsylvania

Date: 9/13/24

## APPENDIX

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**IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,  
PENNSYLVANIA**

<b>FAITH A. GENSER and FRANK P. MATIS,</b>	:	<b>CIVIL DIVISION</b>
	:	<b>MsD. No. 2024-40116</b>
<b>Petitioners,</b>	:	
"	:	
<b>v.</b>	:	
	:	
<b>BUTLER COUNTY BOARD OF ELECTIONS,</b>	:	
	:	
<b>Respondent,</b>	:	
<b>v.</b>	:	
	:	
<b>REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PARTY OF PENNSYLVANIA, AND THE PENNSYLVANIA DEMOCRATIC PARTY,</b>	:	
	:	
<b>Intervenors.</b>	:	

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**Yeager, P. J.**

**August 16, 2024**

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**MEMORANDUM OPINION**

Before the court for disposition is Petitioners', Faith A. Genser and Frank P. Matis, *Petition for Review in the Nature of a Statutory Appeal*. After a hearing and subsequent briefing in this matter, the *Petition* is ripe for decision.

**A. Background Facts**

This matter arises from Petitioners' *Petition for Review in the Nature of a Statutory Appeal* relative to the decision of the Respondent's, the Butler County Bureau of Elections (hereinafter, "Board" or "Board of Elections"), to reject Petitioners' respective provisional ballots cast in the April 23, 2024, Primary Election.

By way of background,<sup>1</sup> each Petitioner is a resident of Butler County, Pennsylvania. Each of the Petitioners requested a mail-in ballot for his or her respective voting district to vote in the April 23, 2024, Primary Election. Each of the Petitioners marked their mail-in ballots with their chosen candidate(s), placed their ballots directly into the provided Declaration Envelopes, signed and dated their respective Declaration Envelopes, and mailed the Declaration Envelopes to the Butler County Board of Elections. Each of the Petitioners failed to place his or her ballot into the secrecy envelope as required by law. The Board of Elections received both Declaration Envelopes prior to the deadline for receipt of mail-in ballots. Subsequently, each Petitioner was advised via the Statewide Uniform Registry of Electors (hereinafter, "SURE") system that the Board rejected his or her mail-in ballot for lack of a secrecy envelope. The notification additionally stated that if he or she did not have time to request a new ballot before April 16, 2024, each Petitioner could proceed to his or her polling place on Election Day and cast a provisional ballot. Upon learning her mail-in ballot was rejected, Petitioner Genser telephoned the Board of Elections and was advised by an employee that she could complete a provisional ballot at her polling place on Election Day, but the provisional ballot would not be counted. Each of the Petitioners proceeded to his or her designated polling place on Election Day and cast a provisional ballot. Each of the Petitioners was subsequently informed that his or her provisional ballot was rejected.

The Butler County, Pennsylvania, Board of Elections has adopted a curing policy relative to mail-in ballots that permits those mail-in electors whose Declaration Envelopes have facial defects, e.g., lack of signature or date, or incorrect date, to cure these defects by

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<sup>1</sup> The facts of this case are not in dispute; therefore, except where necessary to a disputed issue, the court will summarize the testimony given by the three (3) witnesses, who are Petitioners, Frank P. Matis and Faith A. Genser, and Chantel McCurdy, the Butler County, Pennsylvania, Director of Elections, without reference to the record.



either appearing personally at the Bureau and correcting same, or casting a provisional ballot at their respective polling locations. The County did not, however, include in this policy any “cure” for mail-in ballots deemed defective for lack of the required secrecy envelope. Thus, the current controversy does not concern whether Petitioners’ initial mail-in ballots should have been counted despite the lack of secrecy envelopes; rather, the question presented is whether, after mailing in a ballot lacking the secrecy envelope, Petitioners had the right to vote provisionally at their respective polling places on Election Day and have the votes thereon counted in the official tabulation results.

In their *Petition*, Petitioners proffer three arguments in support of their requested relief.<sup>2</sup> First, Petitioners argue the Butler County Board of Elections misinterpreted *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) when it drafted its Curing Policy. However, despite alleging this “misinterpretation” entitles them to relief, Petitioners appear to utilize the *Boockvar* case only as a tool to develop their arguments relative to their other asserted bases for relief. As such, the court will not address *Boockvar* as a ground for relief in and of itself. Second, Petitioners argue the Board’s rejection of their provisional ballots violates the Pennsylvania Election Code, 25 P.S. § 3050(a.4)(5)(i) and (ii)(F). Third, and finally, Petitioners argue the Board’s rejection of their provisional ballots violates their right to vote as guaranteed by the Pennsylvania Constitution.

A hearing was held on Petitioners’ *Petition for Review* on May 7, 2024. Prior to the hearing, also on May 7, 2024, the Court granted Intervenor Status to the Republican National Committee, the Republican Party of Pennsylvania, and the Pennsylvania Democratic Party.

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<sup>2</sup> Although a discussion was held during the hearing on whether the policy violated the Constitution of the United States, Petitioners did not brief the issue in their subsequently submitted Memorandum of Law. Therefore, to the extent it was raised, the court finds said issue has been abandoned, and will not address it herein.

Following the hearing, Respondent and Intervenors requested the opportunity to submit briefs relative to the legal issues raised by Petitioners. Said request was granted, and all parties agreed to a deadline of June 28, 2024, to submit their respective briefs. All such briefs were timely submitted.

## **B. Standard of Review**

Regarding this court's standard of review, 25 P.S. § 3157, Appeals to court from decisions of the county board, provides:

(a) Any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election ... may appeal therefrom within two days after such order or decision shall have been made, whether then reduced to writing or not, to the court specified in this subsection, setting forth why he feels that an injustice has been done, and praying for such order as will give him relief.... Upon the payment to the prothonotary of a fee for filing such appeal, a judge of the court shall fix a time and place for hearing the matter in dispute within three days thereafter, of which due notice shall be served, with a copy of such appeal, by the appellant upon a member of the county board whose action is complained of and upon every attorney, watcher or candidate who opposed the contention of the appellant before the county board, and upon any other person that the judge shall direct, at least two days before the matter shall be reviewed by the court. Proof of such notice or the waiver thereof must be filed therein before any appeal is sustained.

25 P.S. § 3157. Pursuant to this section, this court can reverse the Butler County Board of Election's decision "only for an abuse of discretion or error of law." *In re Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election*, 241 A.3d 1058, 1070 (Pa. 2020).

## **C. Discussion**

A brief recitation of the relevant mail-in ballot election procedures follows.

Chantell McCurdy is the Director of Elections for the Butler County, Pennsylvania, Board of Elections (hereinafter, "Board"); her role on Election Day is to tally votes in conjunction with the Computation / Canvassing Board (hereinafter, "Computation Board") that meets the Friday after Election Day to evaluate any provisional ballots, write-ins, and absentee or mail-in ballots with which there may be issues. (Hr'g Tr., McCurdy, 18:3-10; 25 P.S. § 2642(a)). The Board of is comprised of the three County Commissioners. (Hr'g Tr., McCurdy, 18:23-25). Each of the Commissioners appoints an individual to serve on the Computation Board. (Hr'g Tr., McCurdy, 18:25-19:2). The Computation Board is comprised of two (2) Democratic members and one (1) Republican member. (Hr'g Tr., McCurdy, 19:18-23). These individuals evaluate the totals of the election and manage write-ins, any issues involving provisional ballots, and any absentee and mail-in ballots that need to be evaluated for quality purposes to determine whether they can be counted. (Hr'g Tr., McCurdy, 19:2-7).

With regard to mail-in voting, when a mail-in ballot is requested by a qualified elector (hereinafter, "voter" or "elector"), the Board notes in the SURE system that the mail-in ballot has been requested. (Hr'g Tr., McCurdy, 39:11-14). Once the Board sends the voting packet to the elector, the Board updates the ballot's status in the SURE system as "ballot sent." (Hr'g Tr., McCurdy, 39:15-17). The voting packet sent to the voter includes the ballot for the voter's respective precinct, a secrecy envelope in which to enclose the ballot, the declaration envelope, and instructions. ((Hr'g Tr., McCurdy, 38:25-39:10; 25 P.S. § 3150.14(c)). Each declaration envelope has a label affixed to it with a barcode "that is uniquely identifiable to an individual voter and their assigned voter ID number." (Hr'g Tr., McCurdy, 32:21-33:1). Pending the Board's receipt of a returned declaration envelope and its contents (hereinafter, "Declaration Envelope") the status of the ballot is denoted in the SURE System as "pending

not yet returned.” (Hr’g Tr., McCurdy, 33:2-6). The Department of State provides step-by-step instructions to the county Boards on how to record absentee and mail-in ballots into the SURE system once they received. (Hr’g Tr., McCurdy, 45:4-12; Rep. Party Resp. Inter. Ex. 2). The Department of State provided new recording options on March 11, 2024. (Hr’g Tr., McCurdy, 45:17-18). The Department added “pending” options and changed the language in a variety of responses; additionally, it changed the manner in which the Boards are to record responses. (Hr’g Tr., McCurdy, 45:22-15; Rep. Party Resp. Inter. Ex. 2).

Procedurally, once the Board receives a returned Declaration Envelope, it is placed into a machine called the Agilis Falcon. The Agilis Falcon sorts the Declaration Envelopes by precinct and evaluates their dimensions, including length, height, and weight, to ensure any submitted envelope is, in fact, an official election envelope. (Hr’g Tr., McCurdy, 33:19-34:3). If the machine detects a possible issue with a Declaration Envelope, for example, if it is too thick, not thick enough, or from the wrong county, the machine separates those Declaration Envelopes from Declaration Envelopes without suspected issues. Once they are sorted, all Declaration Envelopes without suspected issues are automatically updated in the SURE system with a status of “record ballot returned.” (Hr’g Tr., McCurdy, 34:4-9, 45:15-18). However, the Board must manually update the status of any Declaration Envelopes flagged as possibly having defects, with the Board being required to choose one of a number of predetermined options. (Hr’g Tr., McCurdy, 47:25-48:7; Rep. Party Resp. Inter. Ex. 2). Once the Board selects the most applicable option, an E-mail communication is sent to the voter, with the language of the E-mail depending on the option selected. (Hr’g Tr., McCurdy, 46:4-14; Rep. Party Resp. Inter. Ex. 2).

As mentioned, the Butler County Board of Elections has adopted a curing policy that permits a voter to cure deficiencies on the outer, Declaration Envelope. (Rep. Party Resp. Inter. Ex. 1). The policy permits an elector to cure these deficiencies by either attestation in the Board's office or by voting "via provisional ballot acting as the attestation at the polling place." (Hr'g Tr., McCurdy, 50:15-21; Rep. Party Resp. Inter. Ex. 1). Since Butler County has a curing policy for these defects, when manually updating the status for one of these Declaration Envelopes, the Board is to select one of the newer options in the SURE system: "pending no signature" or "pending no date." (Hr'g Tr., McCurdy, 51:7-13; Rep. Party Resp. Inter. Ex. 2, pp. 8-9). Once selected, an automatic follow-up E-mail is sent to the elector, which informs them, "their county has a curing policy that allows them to correct the issue; to contact their Bureau of Elections or go to their polling place on Election Day and cast a provisional ballot." (Hr'g Tr., McCurdy, 51:13-17; Rep. Party Resp. Inter. Ex. 2). However, because the Board does not offer a curing opportunity for mail-in ballots lacking secrecy envelopes, when the Agilis Falcon identifies a Declaration Envelope as possibly lacking a secrecy envelope, the only option for the Board to select in the SURE system is "cancelled no secrecy envelope." (Hr'g Tr., McCurdy, 67:24-68:14; Rep. Party Resp. Inter. Ex. 2, pp. 6-11). When the Board selects "cancelled no secrecy envelope," the voter receives an automatic E-mail from the Department of State informing the elector the county has determined the elector's mail-in ballot may be lacking a secrecy envelope, the elector's ballot has been cancelled, and the elector may contact their county for a replacement ballot or, if the elector cannot do so or if it is too late to request a new one, the voter can go to his or her polling place on Election Day and vote provisionally. (Hr'g Tr., McCurdy, 48:8-16; Rep. Party Resp. Inter. Ex. 2, p. 9). Despite the E-mail stating such, the elector's ballot has not been rejected or

cancelled; if the Declaration Envelope is opened on the date of computation and it is found to contain a secrecy envelope, the ballot is valid and will be counted. (Hr’g Tr., McCurdy, 68:16-23). Additionally, the Butler County Curing Policy does not permit an elector whose mail-in ballot containing such a defect to request a replacement or to cure this deficiency by voting provisionally at their polling location. (Rep. Party Resp. Inter. Ex. 1).

In the instance an elector requests and receives a mail-in ballot, but decides to vote at the polls instead of mailing in their ballot, he or she may vote at their precinct polling station; however, *how* they get to vote depends on two things. (Hr’g Tr., McCurdy, 40:10-15). If the elector brings his or her ballot *and* declaration envelope to the polling station, the elector can surrender the ballot by signing a form stating the elector no longer wishes to have this active mail-in ballot and wishes to surrender it. (Hr’g Tr., McCurdy, 40:16-22, 41:10-22). The Judge of Elections also signs the surrender form. (Hr’g Tr., McCurdy, 40:19-20). The voter may then sign the poll book and cast a regular ballot at the polling station. (Hr’g Tr., McCurdy, 40:22-24; 25 P.S. § 3150.16(b)(3)). In this scenario, the Board does not update the SURE system to reflect the status of the surrendered ballot. (Hr’g Tr., McCurdy, 40:25-41:4). If the voter does not have his or her ballot *and* declaration envelope, the voter may only cast a provisional ballot. (Hr’g Tr., McCurdy, 41:10-14; 25 P.S. §3150.16(b)(2)). Prior to casting a provisional ballot, the elector must attest they have not cast another ballot. (Hr’g Tr., McCurdy, 41:15-24; 25 P.S. §3050(a.4)(2)). However, whether elector mailed a mail-in ballot without a secrecy envelope has no bearing on whether that voter may vote provisionally at the polling station. (Hr’g Tr., McCurdy, 41:25-42:16). Any elector may fill in a provisional ballot at the polling place; “We never want to deny them that opportunity.” (Hr’g Tr., McCurdy, 42:15-18). If the issuance of a mail-in ballot is the reason the elector was

required to vote provisionally, once the provisional ballots are returned to the office, the Board must look up each of these electors in the SURE system to verify if a ballot was returned from them. (Hr'g Tr., McCurdy, 42:18-22). If the elector has timely returned their mail-in ballot, their provisional ballot is ineligible to be counted, as the standard practice of the Computation Board is to treat a timely received mail-in ballot as the elector's official ballot. (Hr'g Tr., McCurdy, 43:2-5; 25 P.S. 3050(a.4)(5)(i) and (ii)(F)).

With regard to the counting of mail-in and provisional ballots, the Computation Board meets the Friday after the election, in this case, April 26, 2024, and meets for two to three days to evaluate those mail-in ballots with possible issues, as well as provisional ballots and write-ins. (Hr'g Tr., McCurdy, 19:8-10, 20:1-5). The Computation Board is required to submit its information to the Department of State the Tuesday after the election. (Hr'g Tr., McCurdy, 19:10-11). Upon meeting on April 26, 2024, the Computation Board elected to first evaluate all absentee and mail-in ballots that may have issues, followed by provisional ballots, and then write-ins. (Hr'g Tr., McCurdy, 21:5-8). Prior to this time, these mail-in ballots were locked in a cabinet in the back room. (Hr'g Tr., McCurdy, 21:14-15; 25 P.S. §3146.8(a)). Declaration Envelopes are first permitted to be opened on Election Day during the pre-canvass. (Hr'g Tr., McCurdy, 49:23-50:2; 25 P.S. § 3146.8(g)(1.1)). Until the pre-canvass, though, no conclusion can be made regarding the presence or absence of a secrecy envelope. (Hr'g Tr., McCurdy, 50:3-5). Any information gathered in the pre-canvass as to whether a secrecy envelope is missing is prohibited from being disseminated. (Hr'g Tr., McCurdy, 50:6-12). The mail-in ballots at issue here were first opened on Friday, April 26, 2024, in front of the Computation Board; this is the first time the seals are broken (McCurdy,

22:7-9), and the first instance the Board is able to officially and concretely determine whether a mail-in ballot lacks a secrecy envelope. (Hr'g Tr., McCurdy, 21:19-23; 49:18-22).

On cross-examination, Director McCurdy testified that if, when opening the Declaration and secrecy envelopes on the Friday after the election, the Computation Board finds an empty secrecy envelope, no mail-in ballot would be counted for that voter because there is no eligible ballot. (Hr'g Tr., McCurdy, 63:4-19). If that voter also completed a provisional ballot at the polling station on Election Day, the Computation Board would not count the provisional ballot because the voter was deemed to have remitted a mail-in ballot. (Hr'g Tr., McCurdy, 63:20-25). The Board's policy is to count, as any mail-in elector's official ballot, the timely received Declaration Envelope marked in the SURE system, even if the elector omitted to enclose any actual ballot. (Hr'g Tr., McCurdy, 63:4-25). She additionally testified that if a voter places a mail-in ballot into the mail the day before the election and the Board does not receive it prior to the deadline, if that elector also casts a provisional ballot, the Computation Board would count the elector's provisional ballot as their official ballot, as in this case, the provisional ballot is the first one received. (Hr'g Tr., McCurdy, 64:9-24). The tardy mail-in ballot would be ineligible because it arrived after the deadline. (Hr'g Tr., McCurdy, 65:3-6). Thus, if the Board timely receives an elector's naked ballot, and the elector learns on or before Election Day that they have done so, there is nothing the voter can do to have a vote counted in that election. (Hr'g Tr., McCurdy, 65:17-22). It is in the discretion of the Computation Board in each individual instance whether to count provisional ballots submitted by voters whose naked, mail-in ballots were timely received. (Hr'g Tr., McCurdy, 75:6-10). Historically, the Computation Board does not count any ballot that lacks a secrecy envelope where one is required, and she is not aware of any



instance when the Computation Board has counted a provisional ballot cast by a voter after receiving that voter's naked ballot. (Hr'g Tr., McCurdy, 75:10-15). Finally, Director McCurdy confirmed the Board has enacted a process to ensure no voter double-votes. (Hr'g Tr., McCurdy, 61:4-10).

**a. "Rejecting Petitioners' Provisional Ballots Violated the Pennsylvania Election Code."**

In their first ground for appeal, Petitioners argue the Board misinterpreted the relevant provisions of 25 P.S. § 3050(a.4)(5). Petitioners assert that because they sent naked, and therefore invalid, ballots to the Board, for purposes of subsection (a.4)(5)(ii)(F), the Board did not "timely receive[]" a mail-in ballot capable of being canvassed or counted by either of the Petitioners. Therefore, they assert they do not fall into the subsection (a.4)(5)(ii)(F) exception to subsection (a.4)(5)(i). Additionally, they reason that because they submitted invalid ballots to the Board, they never "cast" their mail-in ballots for purposes of subsection (a.4)(5)(i). Thus, because their "mail-in ballot submissions were rejected, their first attempts to vote by mail were nullified, and they retained the right to cast a provisional ballot at their polling places on Election Day." (Pet'rs'. Mem. of Law, p. 9). Petitioners additionally maintain the Board unfairly treats mail-in ballots with deficiencies in the outer Declaration Envelopes as having not yet been "received" when the Postal Service delivers them to the Board, yet treats mail-in ballots lacking secrecy envelopes as having been immediately "received" when the Postal Service delivers them to the Board. (Pet'rs'. Mem. of Law, p. 12). Petitioners argue that to the extent sections (a.4)(5)(i) and (ii)(F) of the statute are ambiguous, they are to be read harmoniously to give effect to both, stating, "if the Board receives and rejects or cancels a defective mail-in ballot package, no 'mail-in ballot' legally capable of

being counted has been ‘timely received’ by the Board, and no ballot has yet been ‘cast’ by the voter. To be ‘timely received’ and ‘cast,’ a ‘mail-in ballot’ must be eligible for counting.” (Pet’rs’ Mem. of Law, p. 14). Petitioners argue the Election Code should be construed liberally in favor of the constitutional right to vote.

Intervenor, the Pennsylvania Democratic Party, emphasizes both federal and Pennsylvania law require that voters be provided the opportunity to vote provisionally as a “fail-safe mechanism for voting on election day,” citing the Help America Vote Act (“HAVA”), 52 U.S.C. §§ 20901 et seq. (Pa.Dem.Pty. Brief, p.3). Said Intervenor argues provisional ballots must be available to voters who themselves make an error. (Pa.Dem.Pty. Brief, p. 3). The Party argues voting provisionally is distinct from “curing” a defective mail-in ballot, the Election Code must be construed in favor of counting Petitioners’ provisional ballots, and a ballot cancelled for lack of a secrecy envelope cannot be said to have been “cast” for purposes of 25 P.S. § 3050(a.4)(5)(i).

Respondent, the Butler County Board of Elections, asserts the court’s review is limited in appeals brought under 25 P.S. § 3157. Respondent maintains the court may only address whether the Board abused its discretion or committed an error of law in its decisions not to count Petitioners’ provisional ballots, claiming the relief sought by Petitioners exceeds this limit by seeking sweeping declaratory judgment to invalidate the Butler County Curing Policy. Respondent argues the court cannot grant Petitioners such relief. Further, Respondent defends its actions, asserting its Curing Policy is consistent with the Election Code, and that it did not abuse its discretion or commit any error of law in its decisions.

Intervenors, the Republican National Committee and Republican Party of Pennsylvania, argue the case of *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345

(Pa. 2020) forecloses Petitioners' appeal. They further assert the Election Code prohibits Petitioners from curing *any* defect by provisional ballot.<sup>3</sup> These Intervenor argue Petitioners misconstrue the Election Code, as 25 P.S. § 3050(a.4)(5)(ii)(F) clearly states a provisional ballot shall not be counted if the elector's mail-in ballot is timely received. They also argue Petitioners' misconstrue the word "cast" in 25 P.S. § 3050(a.4)(5)(i); "casting a ballot," they argue, is an action performed by the elector, not the Board.

First, addressing Respondent's concerns for the sweeping declaratory relief apparently sought by Petitioners under 25 P.S. § 3157, and their assertion the court may consider only whether the Board abused its discretion or committed an error of law in its decisions relative to Petitioners' provisional ballots, the court agrees. However, the court finds the Petitioners' assertion that the Computation Board violated statutory and constitutional law when it failed to count Petitioners' provisional ballots falls within the limited scope of this court's jurisdiction under Section 3157. Although these assertions tangentially involve the Butler County Curing Policy, yet they invoke the actions of the Board and the computation, or lack thereof, of Petitioners' provisional ballots.

Next, considering the issue of whether Petitioners' provisional ballots should have been included in the official tabulation of votes under 25 P.S. § 3050(a.4)(5)(i), the rules of statutory interpretation provide:

The purpose of statutory interpretation is to ascertain the General Assembly's intent and give it effect. 1 Pa.C.S. § 1921(a). In discerning that intent, the court first resorts to the language of the statute itself. 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 to the case at hand and not look beyond the statutory language to ascertain its meaning. See 1 Pa.C.S. § 1921(b) ("When 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

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<sup>3</sup> This argument is outside the scope of any issue raised in the *Petition*. As such, the court will not address it.

pursuing its spirit.”). “Relatedly, it is well established that resort to the rules of statutory construction is to be made only when there is an ambiguity in the provision.” *Oliver v. City of Pittsburgh*, 608 Pa. 386, 11 A.3d 960, 965 (2011) (citations omitted).

*Mohamed v. Com., Dep't of Transp., Bureau of Motor Vehicles*, 40 A.3d 1186, 1193 (Pa. 2012).

The relevant statutory provisions related to this issue are as follows. First, regarding mail-in ballots, 25 P.S. § 3150.16 states in part:

**(b) Eligibility.--**

(1) Any elector who receives and votes a mail-in ballot under section 1301-D1 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 section 1210(a.4)(1).**

(3) Notwithstanding paragraph (2), an elector who requests a mail-in ballot and who is not shown on the district register as having voted the ballot may vote at the polling place if the elector remits the ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and the elector signs a statement subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) which shall be in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

(Date)

(Signature of Elector) ..... (Address of Elector)

(Local Judge of Elections)

**(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.

25 P.S. § 3150.16(b) and (c) (emphasis added). Further, 25 P.S. § 3150.13(e) holds:

(e) Notice.--The official mail-in voter ballot shall state that a voter who receives a mail-in ballot under section 1301-D3 and whose voted mail-in ballot is not timely received may only vote on election day by provisional ballot unless the elector brings the elector's mail-in ballot to the elector's polling place, remits the ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and signs a statement subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) to the same effect.

25 P.S. § 3150.13. As referenced in 25 P.S. §3150.16(b)(2), section 1210(a.4)(1), codified at

25 P.S. § 3050(a.4)(5)(i), states:

(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:

...

(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)(i) and (ii)(F).

Presently, there was no testimony or evidence as to whether the Petitioners were shown on the register as having voted their mail-in ballot, as referenced in 25 P.S. § 3150.16(b). Regardless, there is no dispute the Petitioners did not remit their mail-in ballots and envelopes to the election officials at their polling stations, did, in fact, submit their declaration envelopes and mail-in ballots to the Board through the Postal Service, and thereafter cast provisional ballots at their respective polling stations. Turning to 25 P.S. §

3050(a.4)(5)(i), the language in the first part of this sentence is clear. Subsection (a.4)(5)(i) provides the rule for counting provisional ballots *only if* an exception set forth in subsection (a.4)(5)(ii) is not applicable. Subsection (a.4)(5)(ii)(F) is also clear, and states a provisional ballot shall not be counted if the elector's mail-in ballot is timely received by a county board of elections. Petitioners' argument that in order to be "timely received" a mail-in ballot must be eligible for counting is simply not persuasive.

To submit a mail-in ballot that qualifies for inclusion in the official vote tabulation, the elector must take certain enumerated steps set forth in 25 P.S. § 3150.16(a). First, the elector must complete the ballot.<sup>4</sup> Next, they must place the completed ballot into the secrecy envelope. Then, they are to place the secrecy envelope into the outer envelope (Declaration Envelope). The elector must fill out, date, and sign the declaration printed on the Declaration Envelope. Finally, the elector must securely seal the Declaration Envelope and either mail or hand deliver it to the county Board of Election by 8:00 o'clock P.M. on the date of election.<sup>5</sup> Title 25 P.S. 3150.16(c) provides that 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.<sup>6</sup>

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<sup>4</sup> The term "complete," as used in this sentence, refers to filling in those sections of the ballot on which the voter wishes to cast his or her vote, as undervotes, leaving sections blank, and even leaving the entire ballot blank as a form of protest vote are, of course, permissible as being the will of the voter.

<sup>5</sup> See 25 P.S. § 3150.16(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").

<sup>6</sup> 25 P.S. § 3150.16(c) provides, "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."

As set forth above, an elector must submit a trifecta of documents for a valid, countable mail-in ballot to exist. One of the parameters for submitting a valid, countable mail-in ballot is that it *must* be enclosed within the designated Declaration Envelope. The very earliest Declaration Envelopes may be opened is during the pre-canvass<sup>7</sup>; however, Declaration Envelopes continue to be opened after the deadline for receipt of mail-in ballots.<sup>8</sup> Until such time as the Declaration and secrecy envelopes are physically opened, the absence or presence of a secrecy envelope, as well as the absence or presence of other defects in the contents within the secrecy envelope, cannot be conclusively determined. As Director McCurdy testified, any Declaration Envelopes flagged as having possible issues are segregated from those not so flagged, and are taken up specially with other types of ballots by the Computation Board the third day following the close of the polls. This is the first time these ballots, which included Petitioners' mail-in ballots, are evaluated. Under Petitioners' proposed interpretation of the statute, a mail-in ballot would not be "received" until it is opened, the secrecy envelope confirmed to be present, and the document therein confirmed to be a valid, filled-in ballot. However, such a practice would result in any *valid* mail-in ballot not included in the pre-canvass, including those arriving at 7:59 P.M. on election night or those ballots with a suspected but no actual defect, among others, being automatically

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<sup>7</sup>See 25 P.S. § 3146.8(a) ("The county boards of election, upon receipt of official ... mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections") and 25 P.S. § 3146.8(g)(1.1) ("The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting").

<sup>8</sup>Title 25 P.S. § 3146.8(g)(2) states, "The county board of elections shall meet no earlier than the close of polls on the day of the election and no later than the third day following the election to begin canvassing absentee ballots and mail-in ballots not included in the pre-canvass meeting. The meeting under this paragraph shall continue until all absentee ballots and mail-in ballots received prior to the close of the polls have been canvassed"). Additionally, 25 P.S. § 3146.8(g)(ii) provides, "[A] mail-in ballot cast by a mail-in elector shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is 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."



invalidated as untimely. Any such ballot would not be opened and confirmed, and therefore, “received,” until after the voting deadline, and the otherwise valid ballot would not be included in the official tabulation of votes. An argument could be made that a mail-in ballot opened after the deadline that is found to be valid would “relate back” to the actual timely date of receipt; however, this argument highlights the extent to which the court would have to twist otherwise plain statutory language in order for Petitioners’ proposed interpretation to work without producing the unfortunate result of disenfranchising numerous voters.

The correspondence sent to Petitioner Genser by the Department confirms that her ballot had been received by the Board. Said correspondence states, “After you ballot was *received* by BUTLER County, it received a new *status*.” (Pet. for Rev., Ex. 2) (emphasis added). The court also notes Petitioners repeatedly admit in their Memorandum of Law that their mail-in ballots were “received” by the Board, but thereafter inject wording into the statute in order for their reading to produce their desired results. For example, they state:

Likewise, the Board did not “timely receive[]” a “mail-in ballot” *that was capable of being canvassed or counted* from either Petitioner because Petitioners’ *submitted ballots* were ineligible to be counted.”

(Pet’rs’. Mem. of Law, p. 9) (emphasis added). Additionally, they state,

The Board’s error in failing to count petitioners’ provisional ballots because of the *timely received, but uncountable, naked ballots*....

(Pet’rs’. Mem. of Law, p. 11) (emphasis added), and

[I]f the Board *receives* and rejects or cancels a defective mail-in ballot package, no “mail-in ballot” *legally capable of being counted* has been “timely received” by the Board.

(Pet’rs’. Mem. of Law, p. 14) (emphasis added). Subsection (a.4)(ii)(F) *does not* state a provisional ballot shall not be counted if a mail-in ballot *legally capable of being counted* is timely received.



Regarding Petitioners' argument that the Board unfairly treats mail-in ballots with deficiencies in the outer declaration envelopes as having not yet been "received" when the Postal Service delivers it to the Board, yet treats mail-in ballots with defects involving inner secrecy envelopes as having been immediately "received" when the Postal Service delivers it to the Board, the court does not find any evidence for such an assertion. There was no testimony or other evidence the Board does not deem Declaration Envelopes with signature or date defects as not having been "received" when they are placed under the control of the Board; rather, the Board has adopted a curing policy that permits these voters to correct these deficiencies *despite* them having been received by the Board. Petitioners' arguments in this regard appear to arise from the wording utilized by the Secretary of the Commonwealth in the SURE system, not the actual practice of the Board. Although some of the options for recording the status of ballots into the SURE system may utilize the word "pending," and "cancelled," this language is not under the control of the Board, is not reflected in its Curing Policy, and is not referenced anywhere in the Election Code. Where the Election Code does not give the Board the discretion of determining whether or when a Declaration Envelope is "received," and does not give the Board discretion to "cancel" a "ballot" for lack of a secrecy envelope prior to it being opened and confirmed lacking, the Secretary of the Commonwealth cannot unilaterally develop such a practice. *See In re Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election*, 241 A.3d 1058, 1073 (Pa. 2020) (explaining the Election Code does not require Declaration Envelopes to include handwritten names or addresses, and that the decision to include spaces on the Declaration Envelope for handwritten names and addresses was made solely by the Secretary of the Commonwealth, not the General Assembly; therefore, a voter's failure to fill in that part of the Declaration Envelope was "at

best, a ‘minor irregularity’ and, at worst, entirely immaterial”). Consequently, the Secretary’s designation of certain ballots as “pending” in the SURE system for those counties with curing policies, or “cancelled” when the Agilis Falcon *suspects* a secrecy envelope is missing and the county does not provide a curing procedure, does not represent a legislatively-approved, or actual, ballot status.<sup>9</sup> Consequently, when a mail-in voter purports to send their mail-in ballot to the Board by mailing their Declaration Envelope, and this 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, and regardless of the language utilized by the Secretary in the E-mailed responses to the elector. Thus, the Board’s treatment of the Petitioners’ mail-in ballots as “received” when the Declaration Envelopes were delivered to the Board accords with 25 P.S. § 3050(a.4)(5)(i) and (ii)(F).

Petitioners further challenge the Board’s decision to treat as the official ballot of any particular voter (except those who sent defective Declaration Envelopes that may be cured under the policy), the first “ballot” received by the Board for that voter. Petitioners note that under this policy, a voter who mails a timely but empty Declaration Envelope who then casts a provisional ballot will be treated as having “cast” their mail-in ballot if that empty, mailed-in Declaration Envelope is received by the Board prior to the close of polls even though no actual ballot was in the Declaration Envelope, resulting in the properly filled in provisional ballot not being counted. The court will note neither of the Petitioners submitted empty envelopes such that the above scenario has been invoked; however, as the Board utilized the

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<sup>9</sup> Petitioners, of course, cannot be faulted for believing their mail-in ballots had been “cancelled” at the time of the E-mail, as this is exactly what they were informed; nor is the Board to blame for the confusion surrounding the status of Petitioners’ mail-in ballots. The court additionally recognizes the Secretary of the Commonwealth is attempting to distil into a relatively few number of canned responses the curing policies, or lack thereof, of sixty-seven (67) different Commonwealth counties, which cannot be alleged to be an easy feat. However, the current wording in the pre-programmed responses is apparently causing confusion for electors.

“first come, first counted” approach to Petitioners’ ballots, which ostensibly involves the discretion of the Board, the court will address the argument.

First, the court understands the abstract absurdity of the outcome of the posed hypothetical above; however, when a mail-in elector (here, the Petitioners), sends to the Board their Declaration Envelope, that is, the official envelope prescribed by the Secretary of the Commonwealth for the return of ballots, labeled with that elector’s unique voter identification number, and purporting to contain that elector’s official mail-in ballot, the Board must designate that elector’s ballot as having been received without first ensuring the voter has actually included all necessary paperwork within. As discussed above, a valid mail-in ballot must be enclosed within the designated Declaration Envelope, and it is a violation of law for any mail-in Declaration Envelope to be opened prior to the pre-canvass. Thus, under the current the statutory scheme, the Board *must* treat a received Declaration Envelopes as that voter’s return of their ballot, even if that Declaration Envelope is empty. As the Petitioners’ mail-in ballots were timely received by the Board, Sections 25 P.S. 3050(a.4)(i) and (ii)(F) *direct* the Board *not* to count Petitioners’ provisional ballots. Therefore, the Board did not abuse its discretion when it adhered to the mandates of 25 P.S. 3050(a.4)(i) and (ii)(F).

The Petitioners here seek to shift to the Board the burden of the duties and responsibilities placed by the legislature upon the Petitioners. The legislature has placed on the elector the burden of correctly filling in, enclosing, signing, and timely submitting a mail-in ballot. The legislature directs the mail-in voter to take specific steps to ensure their mail-in ballot will be included in the official tabulation, again, directing:

**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").

25 P.S. § 3150.16(a) General rule (emphasis added). Thus, it is the voter's burden is to ensure they have completed the steps necessary for their mail-in ballot to be included in the tabulation. Petitioners are attempting to shift these burdens to the Board by imposing upon it a duty to review all mail-ballots for compliance with vote-casting procedures prior to designating these ballots as having been received by the Board, thereby relieving Petitioners of these burdens and granting them a second chance to vote. However, the Board's only duty regarding compliance with vote-casting procedures is to review during the pre-canvass and canvass the trifecta of documents submitted by the elector (Declaration Envelope, secrecy envelope, mail-in ballot) to determine whether the votes cast on the ballot therein will be included in the official tabulation. Therefore, as the Petitioners' mail-in ballot return statuses clearly fell within the exception set forth in 25 P.S. § 3050(a.4)(5)(ii)(F), no analysis under 25 P.S. § 3050(a.4)(5)(i), including whether Petitioners "cast" a ballot, is necessary.

The court additionally notes that had the legislature intended the Petitioners' proposed interpretation, it could easily have provided that a mail-in voter who is informed they have or may have submitted an invalid or void mail-in ballot may cast a provisional ballot on Election Day and have that provisional ballot counted if, in fact, their initial ballot was defective and not counted. As noted by Respondent-Intervenors, the Pennsylvania Supreme Court has determined the current Election Code does not mandate a cure procedure for defective mail-in

ballots. *See Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (“As noted herein, 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”).

Finally, this holding does not run afoul of the purpose of the Help America Vote Act, as argued by Intervenor, The Pennsylvania Democratic Party. That Act ensures all voters are given the *opportunity* to vote, with the determination of whether the provisional ballot will be counted to occur in accordance with State Law.<sup>10</sup> Consistent with the Act, both Petitioners

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<sup>10</sup> Title 52 U.S.C.A. § 21082. Provisional voting and voting information requirements, states in part,

(a) Provisional voting requirements.

If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is--

- (A) a registered voter in the jurisdiction in which the individual desires to vote; and
- (B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, **the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.**

(5)(A) At the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.

(B) The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.

States described in section 20503(b) of this title may meet the requirements of this subsection using voter registration procedures established under applicable State law. The appropriate State or local

were provided with and took advantage of the right to cast a provisional ballot. However, whether their provisional ballots were to be included in the official tabulation depends on the applicable provisions in 25 P.S. § 3050(a.4)(5)(i) and (ii)(F), as discussed above.

For all the above reasons, the court concludes the Butler County Computation Board did not commit an error of law or abuse its discretion when it declined to count Petitioners' provisional ballots, as its actions are in accord with 25 P.S. § 3050(a.4)(5)(i) and (ii)(F).

**b. “Rejecting Petitioners’ Provisional Ballots Violated Their Right to Vote Guaranteed by the Pennsylvania Constitution”**

Regarding Petitioners' argument that the Board's decision not to count their provisional ballots violates the Free and Equal Clause of the Pennsylvania Constitution, Petitioners argue, “The Pennsylvania Constitution requires the Board to demonstrate a compelling argument to justify its policy not to count provisional ballots intended to cure mail-in ballots missing a secrecy envelope because such an action will disenfranchise voters.” (Pet. for Rev. ¶ 76). Petitioners argue the Pennsylvania Constitution forbids counties from restricting the right to vote when a regulation denies the franchise or “make[s] it so difficult as to amount to a denial.” (*Id.* at ¶ 77). Petitioners argue *Boockvar* does not foreclose Petitioners' right to cast provisional ballots and have those ballots counted. (Pet'rs.' Mem. of Law, p. 18).

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official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under paragraph (5)(B). Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.

52 U.S.C.A. § 21082(a) (West).

Respondent, the Butler County Board of Elections, again argues Petitioners lack standing to attack the County's curing policy, and that its procedures are consistent with the Election Code.

Intervenors, the Republican National Committee and Republican Party of Pennsylvania, argue the holding in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) forecloses Petitioners' argument that they must be permitted to cure their defective ballots via provisional vote. Intervenors assert that because the current ballot-casting rules do not violate the Free and Equal Clause, and because there is no constitutional right to cure a defective ballot, the omission of a curing opportunity cannot violate the Free and Equal Clause.

Intervenor, The Pennsylvania Democratic Party, argues the Board lacked any compelling reason for rejecting Petitioners' provisional ballots, permitted other mail-in electors who submitted deficient ballots to cure their ballots, and therefore, did not treat all voters equally. Intervenor argues the Board's decision was arbitrary and capricious.

The Free and Equal Clause of the Pennsylvania Constitution provides:

Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Pa. Const. art. I, § 5. The Pennsylvania Supreme Court engaged in an intensive and extensive analysis of said clause in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), which the court will not duplicate in full here. However, that Court summarized the underpinnings the clause as follows:

[T]his provision must be understood then as a salutary effort by the learned delegates to the 1790 convention to end, once and for all, the primary cause of popular dissatisfaction which undermined the governance of Pennsylvania: namely, the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs



based on considerations of the region of the state in which they lived, and the religious and political beliefs to which they adhered.

*League of Women Voters v. Commonwealth*, 178 A.3d 737, 808–09 (Pa. 2018). The Court went on to state,

In accordance with the plain and expansive sweep of the words “free and equal,” we view them as indicative of the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government. Thus, Article I, Section 5 guarantees our citizens an equal right, on par with every other citizen, to elect their representatives. Stated another way, the actual and plain language of Section 5 mandates that all voters have an equal opportunity to translate their votes into representation.

...

[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

*League of Women Voters v. Commonwealth*, 178 A.3d 737, 804, 810 (Pa. 2018) (internal citations and quotations omitted). The Pennsylvania Supreme Court has clarified, “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.”

*Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 369–70 (Pa. 2020) (citing *Banfield v. Cortes*, 110 A.3d 155, 176–77 (Pa. 2015) (internal citation and quotation marks omitted)).

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.

To the extent further discussion is warranted, the court also finds that deficiencies in the outer Declaration Envelope and those arising from lack of a secrecy envelope implicate distinct and substantively different voting concerns. The defects the Board has deemed “curable” are readily and conclusively apparent on the face of the Declaration Envelope upon receipt. These defects are discovered as the Declaration Envelopes are received by the Board without the need to open any envelope and without compromising secrecy in voting, whereas the failure to include a secrecy envelope can only be determined when the Declaration Envelopes are opened, which occurs during the official pre-canvass or canvass of the election returns, and which does, in fact, implicate secrecy in voting concerns. The Pennsylvania Constitution states,

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.

Pa. Const. art. VII, § 4. As discussed above, there exist distinct differences between the types of defects involved, where they are located, when and how they are discovered, and the voting interests they invoke.

Further, these curing opportunities or lack thereof are equally applied to every mail-in elector according to the category of their defect. *All* mail-in electors submitting Declaration Envelopes lacking signatures or having an incorrect or no date are provided two methods by which to cure these deficiencies. Conversely, *no* mail-in elector submitting a ballot without a secrecy envelope is permitted to cure this defect. Currently, in-person electors who submit an overvote are notified via message on the machine utilized at the polling stations that they have done so, and are provided the opportunity to correct that overvote. Conversely, in-person electors who submit an undervote in one or more categories are not given that opportunity. The policy makes sense in light of the harms to be avoided; an overvote will invalidate a ballot, whereas an undervote will not. Here, one set of defects does not implicate secrecy in voting concerns and one does. To accept Intervenor's, The Pennsylvania Democratic Party, argument that secrecy in voting was upheld in this instance because the election officials "didn't look" at the votes cast on Petitioners' naked ballots, would be an injudicious holding paving a path for pernicious legislation, and does not warrant further comment.

Finally, Petitioners' argument the Curing Policy makes the franchise so difficult that it denies the franchise itself is misplaced. Only vote-casting regulations are in the position to cause difficulty in the vote-casting process; a cure provision that springs into applicability only after a ballot has been submitted cannot sensibly be said to affect the process of submitting the ballot itself. Consequently, the court finds the actions of the Board of Election of Butler County, Pennsylvania, did not violate the Free and Equal Clause of the Pennsylvania Constitution.

#### **D. Conclusion**

The court is not unsympathetic to the Petitioners. Unlike many other qualified electors, Petitioners endeavored to exercise their right to vote so as to participate as fully as possible in their governance. The court understands their frustration, and additionally, that of persons who deposit their ballot into the mail only to return home to find the secrecy envelope on a table, yet, despite knowing with certainty their secrecy envelope was not included in their return, may do nothing to have their vote counted in the election. However, as stated by the Court in *Boockvar*, this is a task for the legislature, not the courts, given the attendant issues that must be addressed. The court would urge the legislature to consider the situation of the Petitioners, to develop and implement a procedure for those who return defective ballots to correct same to ensure as full participation as possible in the voting franchise. However, the actions of the Board in adopting a narrow cure policy that applies in such a way as to uphold voting deadlines and ensure secrecy in voting is maintained, but that allows electors the greatest possible chance of having their vote counted, does not violate either the Election Code or the Free and Equal clause of the Pennsylvania Constitution.

Accordingly, we enter the following.

**IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,  
PENNSYLVANIA**

**FAITH A. GENSER and FRANK P. MATIS,**

**Petitioners,**

**v.**

**BUTLER COUNTY BOARD OF  
ELECTIONS,**

**Respondent,**

**v.**

**REPUBLICAN NATIONAL COMMITTEE,  
REPUBLICAN PARTY OF  
PENNSYLVANIA, AND THE  
PENNSYLVANIA DEMOCRATIC PARTY,**

**Intervenors.**

**CIVIL DIVISION**

**MsD. No. 2024-40116**

PROTHONOTARY'S  
OFFICE-BUTLER CO.  
CLERKED & FILED  
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**Yeager, P. J.**

**August 16, 2024**

**ORDER OF COURT**

AND NOW, this 16<sup>th</sup> day of August, 2024, at the time set for hearing on May 7, 2024, on the Petitioners', Faith A. Genser and Frank P. Matis, *Petition for Review in the Nature of a Statutory Appeal*, Benjamin D. Geffen, Esquire, and Kate Steiker-Ginzberg, Esquire, appeared on behalf of said Petitioners. Kathleen Jones Goldman, Esquire, appeared on behalf of Respondent, Butler County Board of Elections. Kathleen A. Gallagher, Esquire, and Thomas W. King, III, Esquire, appeared on behalf of the Intervenors, the Republican National Committee and the Republican Party of Pennsylvania. Clifford B. Levine, Esquire, appeared on behalf of the Intervenor, the Pennsylvania Democratic Party.

Upon consideration of Petitioners', Faith A. Genser and Frank P. Matis, *Petition for Review in the Nature of a Statutory Appeal* and *Petitioners' Memorandum of Law in Support of Election Appeal*; Respondent's, the Butler County Board of Elections, *Board of Elections Answer to Petition for Review in the Nature of a Statutory Appeal* and *Memorandum in Opposition to Petition for Review in the Nature of a Statutory Appeal*; Intervenor's, the Pennsylvania Democratic Party, *The Pennsylvania Democratic Party's Brief in Support of Petitioners' Petition for Review in the Nature of a Statutory Appeal*; and the Intervenor-Respondents', Republican National Committee and Republican Party of Pennsylvania joint *Brief in Opposition to Petition for Review in the Nature of a Statutory Appeal*, and following hearing thereon, in accordance with the above *Memorandum Opinion*, the Petitioners', *Petition for Review in the Nature of a Statutory Appeal* is DISMISSED.

BY THE COURT,

  
S. MICHAEL YEAGER  
PRESIDENT JUDGE

received  
8/11/2019

FAITH GENSER, FRANK MATIS

VS.

BUTLER COUNTY BOARD OF ELECTIONS, REPUBLICAN NATIONAL  
COMMITTEE, REPUBLICAN PARTY OF PENNSYLVANIA, THE PENNSYLVANIA  
DEMOCRATIC PARTY

IN THE COURT OF COMMON PLEAS  
OF BUTLER COUNTY, PA  
CIVIL DIVISION  
50TH JUDICIAL DISTRICT

CASE NUMBER  
MSD-2024-40116

## CERTIFICATION

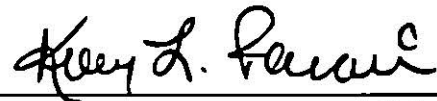
**I hereby certify:**

RULE 236 NOTICE THE PROTHONOTARY OF BUTLER COUNTY, PENNSYLVANIA HEREBY CERTIFIES THAT A COPY OF THE FOREGOING ORDER WAS MAILED TO: AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION; BUCHANAN INGERSOLL & ROONEY PC; DENTONS COHEN & GRISBY PC; DMKC&G LLP; PUBLIC INTERSET LAW CENTER; DECHERT LLP; THE GALLAGHER FIRM LLC; JONES DAY ON 8/16/24, BY FIRST CLASS MAIL, POSTAGE PREPAID.

**IN TESTIMONY WHEREOF**, I have hereunto set my hand and official seal of the Said Court, this August 16, 2024.

**Attorney for the Plaintiff**

PUBLIC INTEREST LAW CENTER  
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PHILADELPHIA, PA 19102



Kelly Ferrari

Butler County Prothonotary

**Attorney for the Defendant**

BUCHANAN, INGERSOLL & ROONEY, P.C.  
UNION TRUST BUILDING  
501 GRANT STREET SUITE 200  
PITTSBURGH, PA 15219-1410

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Faith Genser and Frank Matis,	:	<b>CASES CONSOLIDATED</b>
Appellants	:	
	:	
v.	:	
	:	
Butler County Board of Elections,	:	
Republican National Committee,	:	Trial Ct. No. MSD-2024-40116
Republican Party of Pennsylvania, and	:	
The Pennsylvania Democratic Party	:	No. 1074 C.D. 2024
	:	
Faith Genser and Frank Matis,	:	
	:	
v.	:	
	:	
Butler County Board of Elections,	:	
Republican National Committee,	:	
Republican Party of Pennsylvania, and	:	
The Pennsylvania Democratic Party	:	
	:	
Appeal of: The Pennsylvania	:	No. 1085 C.D. 2024
Democratic Party	:	Submitted: August 28, 2024

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge  
HONORABLE LORI A. DUMAS, Judge  
HONORABLE MATTHEW S. WOLF, Judge

**OPINION NOT REPORTED**

MEMORANDUM OPINION BY  
JUDGE WOLF

FILED: September 5, 2024

The Pennsylvania Election Code allows mail-in and absentee voters to vote provisionally under some circumstances. In this case, two Pennsylvania voters—Faith Genser and Frank Matis (Electors)—tried to vote by mail in the 2024

Primary Election. Their mail-in ballots were fatally defective and were not counted. Electors also went to their polling places on Primary Election Day, April 23, 2024, and submitted provisional ballots. Those ballots also were not counted. Thus, neither Elector has had any vote counted in the 2024 Primary Election.

The question in this appeal is whether the Election Code prohibits counting Electors' provisional ballots because their fatally flawed mail-in ballots were timely received by Election Day. Importantly, that is a question about provisional voting and counting provisional ballots, which is distinct from the question whether an elector can cure a defect in a mail-in ballot. The Court of Common Pleas of Butler County (Trial Court) held, in an August 16, 2024 decision, that the provisional ballots cannot be counted pursuant to the Pennsylvania Election Code (Election Code or Code),<sup>1</sup> in part because that would amount to ballot curing. We reject that view. We hold that the Election Code, properly construed, does not prohibit counting Electors' provisional ballots. Accordingly, we reverse the Trial Court's order and direct the Butler County Board of Elections (Board) to count them.

## **I. BACKGROUND**

The facts are not in dispute. Electors are registered voters residing in Butler County, Pennsylvania (County). They sought to vote in the 2024 Primary Election by mail-in vote. Both Electors received their mail-in ballot materials from the Board, marked their mail-in ballots with their candidates of choice, deposited the ballots directly into the declaration envelopes, and mailed the declaration envelopes to the Board. The Board received Electors' declaration envelopes well in advance

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<sup>1</sup> Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591. To promote clarity, and because the Trial Court and the parties in this case refer to the various provisions of the Election Code by their unofficial Purdon's citations, so do we.



of the Election Code’s statutory deadline,<sup>2</sup> and upon receipt placed them into a machine called the Agilis Falcon. The Agilis Falcon detected that Electors failed to place their mail-in ballots in secrecy envelopes before depositing them in the declaration envelopes, as required by 25 P.S. § 3150.16(a).<sup>3</sup> As a result, the Board updated the status of Electors’ mail-in ballots in the Statewide Uniform Registry of Electors (SURE) System, and they received an automatic email notice advising as follows:

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.**

Petition for Review in the Nature of a Statutory Appeal, Ex. 1 (Declaration of Faith Genser, Ex. B); Ex. 2 (Declaration of Frank Matis ¶ 9) (emphasis added).

Electors appeared at their respective polling places on April 23, 2024—the day of the 2024 Primary Election—and cast provisional ballots. They were subsequently informed that their provisional ballots were rejected.

Electors filed a Petition for Review in the Nature of a Statutory Appeal (Petition) with the Trial Court. Therein, Electors argued they were disenfranchised when the “Board rejected [Electors’] mail-in ballots due to lack of an inner secrecy envelope, but then refused to count the provisional ballots [Electors] cast on Election

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<sup>2</sup> The Code requires that mail-in ballots must be received “on or before eight o’clock P.M. the day of the primary or election.” 25 P.S. § 3150.16(a).

<sup>3</sup> Absentee ballots are also required to be placed in a secrecy envelope. *See* 25 P.S. § 3146.6(a), added by Section 11 of the Act of March 6, 1951, P.L. 3. Absentee and mail-in ballots that are returned without a secrecy envelope are often referred to as “naked ballots.”

Day.” Pet. ¶ 2.<sup>4</sup> Specifically, they argued that the Board’s decision to reject their provisional ballots violates the Election Code, is based on a misinterpretation of Pennsylvania Supreme Court precedent,<sup>5</sup> and violates Electors’ right to vote guaranteed by the free and equal elections clause of the Pennsylvania Constitution, PA. CONST. art. I, § 5. The Trial Court granted intervention to the Republican National Committee and the Republican Party of Pennsylvania (collectively, Republican Party, and with the Board, Appellees) and the Pennsylvania Democratic Party (Democratic Party, and with Electors, Appellants). On May 7, 2024, the Trial Court held a hearing on Electors’ Petition.

Chantell McCurdy, Director of Elections for the Board (Director McCurdy), and Electors testified. Director McCurdy testified at length about the tracking of mail-in votes through the SURE System, the Board’s procedures in canvassing mail-in and provisional ballots, and the Board’s notice and cure policy.

In regard to electors who wish to vote by mail, Director McCurdy explained that the SURE System begins tracking a mail-in ballot at the moment a qualified elector requests one. Hearing Transcript, May 7, 2024 (Hr’g Tr.) at 39. Once the mail-in ballot materials have been sent to the elector, the status in the SURE System is changed to “ballot sent.” *Id.* Those materials include (1) the ballot for that elector’s precinct, (2) a secrecy envelope, (3) the declaration envelope, and (4) instructions. *Id.* at 38. Each declaration envelope has a label affixed to it containing a barcode that identifies the voter by his or her voter identification number. *Id.* at

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<sup>4</sup> Notably, Electors do not challenge the Board’s decision to reject their mail-in ballots for lack of a secrecy envelope. They challenge solely the Board’s decision not to count their provisional ballots.

<sup>5</sup> Specifically, Electors argued the Board misinterpreted *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (*Boockvar*), to conclude that electors who return naked mail-in ballots are forbidden to cure the error.

32-33. Pending the Board's receipt of a returned declaration envelope, the SURE System status indicates the ballot is "pending not yet returned." *Id.* at 33.

Director McCurdy testified that the Department of State communicates internally with county boards of elections to advise how to record mail-in ballots into the SURE System once those ballots are received. Hr'g Tr. at 45. She explained that

[w]hen we receive a ballot back in the office, we are to as quickly as possible in order to timely release the information to the Department of State record those ballots in. What I mean by record is I had mentioned earlier on the declaration envelope there is a label. That label contains a barcode that is uniquely identifiable to an individual voter and their assigned voter ID number once they are registered as a registered voter in Butler County. We scan those in, and the way we scan them in determines how it's relayed to the Department of State. So the standard response for a ballot before it's returned is pending not yet returned. When we record it in as received, it is, record ballot returned.

*Id.* at 32-33. However, not all declaration envelopes received by the County are entered into the SURE System as "record ballot returned." Director McCurdy explained that other statuses may be entered manually into the SURE System if a defect on the declaration envelope is detected:

[County's Counsel]: Now, how does—how does that happen? What is sort of the magic of how that information is collated? We discussed earlier that these ballots haven't been opened. []

[Director McCurdy]: Correct.

[County's Counsel]: How is any of the information disseminated?

[Director McCurdy]: So I guess first it relates to how the

ballots are recorded in.

[County's Counsel]: Okay.

[Director McCurdy]: In which case the Butler County Office has a machine called—it's an Agilis Falcon, and all of the ballots that come in through the mail are placed in this machine. It sorts them. It also evaluates the dimensions of the envelope, specifically the length, height, to make sure that this is in fact an official election envelope with the required materials inside. As long as it does, it goes through, sorts by precinct. That information is exported onto a USB that I then import myself on my computer into the SURE [S]ystem as record ballot returned.

If there are any ballots that it finds any sort of an issue with in that process, meaning it isn't thick enough, it's too thick, one of those two, or we've gotten envelopes for other counties; theirs are slightly longer or taller, it also ends up in the first bin. That bin then has to be evaluated by our office to record in individually.

When we record them in individually, we record them in to the best of our ability as to what we think is possibly wrong with the issue. If it's another county's ballot, we do our best to get that ballot to the county. If it is our ballot, we record it in given the best possible response from the Department of State options. When we scan in the barcode, there is a list of options that it gives us that we're able to chose from, and we chose the most likely based on the scenario.

[County's Counsel]: But you're guessing? Is that a fair—

[Director McCurdy]: Yes.

[County's Counsel]: —way to summarize what you're doing is you're guessing what's wrong with it?

[Director McCurdy]: Correct.

[County's Counsel]: And, you know, you could open up

the envelope on the day of the canvass and realize that somebody has put something that has nothing to do with the election in the envelope?

[Director McCurdy]: Yes. And that did happen.

[County's Counsel]: And can you explain to the Court, you know, that circumstance, just by way of illustration?

[Director McCurdy]: Yes. So the machine evaluated an envelope as correct. It recorded it in as ballot returned. On Election Day, during the—in the morning when we're starting to open our envelopes, we have envelope openers that do it. They open the outside envelope, separate the inner secrecy envelope, all to preserve voter secrecy. That's very paramount for us.

Then they open the internal envelopes. The internal secrecy envelopes for this individual, the one envelope we opened, and it contained a copy of medical records for a person. But the way that it was folded in such, it matched the width dimensions of what the machine thought would be a ballot.

[County's Counsel]: So you can't know then with any degree of certainty whether or not somebody has included the secrecy envelope or included their medical records or their kid's report card until your Computation Board has assembled to open those envelopes? Is that a fair summary?

[Director McCurdy]: That's correct. . . .

Hr'g Tr. 33-35. Because the Election Code forbids mail-in ballots to be opened before seven o'clock A.M. on Election Day,<sup>6</sup> unless the defect is obvious from the face of the declaration envelope, the status listed in the SURE System is nothing more than a guess. *Id.*

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<sup>6</sup> 25 P.S. § 3146.8(a), (g)(1.1).

For defects that are readily detectable on the face of a declaration envelope, Director McCurdy testified that the County has instituted a notice and cure policy (Curing Policy or Policy).<sup>7</sup> She explained that the Curing Policy permits electors to cure deficiencies on the declaration envelope by signing an attestation at the Board's office, "or by voting via provisional ballot acting as the attestation at the polling place." Hr'g Tr. at 50. Therefore, if an elector, for example, fails to sign the declaration envelope, he or she has two ways to fix that problem and have the vote count. *Id.* at 60-61. Director McCurdy testified that while defects to the declaration envelope are curable pursuant to the Policy, the County did not adopt any curing procedures for naked ballots. When questioned about the automated email advising Electors that they could vote by provisional ballot because their mail-in votes would not count, Director McCurdy agreed that the SURE System's automated email provided Electors with false directions:

[County's Counsel]: Okay. So Butler County was not offering [Electors] the opportunity to come in and cast a provisional ballot in the event they didn't have—their secrecy envelope was missing. But, as I understand what you're saying now, the [Department] of State website automatically advised these folks that they could vote by provisional ballot?

[Director McCurdy]: That's correct.

*Id.* at 48-49. Director McCurdy was also questioned about how the Board would treat a timely received declaration envelope that contained a secrecy envelope but omitted the actual mail-in ballot. *Id.* at 63-64.

[Electors' Counsel]: Okay. I want to ask some questions also about—going back to mail-in balloting, when you opened the envelopes on the Friday after the election for

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<sup>7</sup> The Curing Policy can be found in the Original Record, Item No. 25, Ex. 1.

mail-in ballots, what would happen if you received one that had a secrecy envelope inside, but not the actual ballot inside?

[Director McCurdy]: I'm not sure I understand. So during the Computation Board?

[Electors' Counsel]: Correct. Computation Board, they open the envelopes they find—they open the outer envelope; inside there's a secrecy envelope. They open the secrecy envelope; it's empty.

[Director McCurdy]: Okay.

[Electors' Counsel]: What would happen in that situation? Would there be a mail-in vote—there would not be a mail-in vote counted for that voter? Right?

[Director McCurdy]: Correct, because there is no eligible ballot.

[Electors' Counsel]: Right. What if that voter had also completed a provisional ballot at the polling place on Election Day? Would the Computation Board count that provisional ballot?

[Director McCurdy]: No.

[Electors' Counsel]: And why not?

[Director McCurdy]: Because they've already turned in a ballot.

[Electors' Counsel]: What ballot did they already turn in?

[Director McCurdy]: The one that was marked in the SURE [S]ystem, record ballot returned.

[Electors' Counsel]: Okay. So, in other words, even if the voter didn't send in a ballot because they sent in the outer envelope and the secrecy envelope, [the County] still marks that as a ballot returned in the SURE [S]ystem?

[Director McCurdy]: Yes.

*Id.*

Finally, Director McCurdy testified about electors who intend to vote by mail but are concerned that their ballots may not be timely received and therefore also appear on Election Day and complete a provisional ballot. Hr’g Tr. at 64. She explained that where the Board has an elector’s provisional ballot and also receives that elector’s mail-in ballot past the statutory deadline, it will count the elector’s provisional ballot. *Id.* at 64-65. The elector’s tardy mail-in ballot is deemed ineligible because it was received after the statutory deadline. *Id.* at 65.

Electors also testified. Mr. Matis testified that after he received the email from the Department of State that his mail-in vote would not be counted, he called the Bureau of Elections and was advised that he “had to do a provisional ballot” and “could not come in and fix [his] ballot.” Hr’g Tr. at 88. Ms. Genser also testified that she called the Bureau of Elections after receiving the email from the Department of State that her mail-in vote would not be counted. *Id.* at 144-45. Ms. Genser explained that she was upset by the response to her questions about her mail-in ballot, and ultimately believed that her provisional ballot would not count. *Id.* at 146, 150; Pet., Ex. 1 ¶¶ 15-17. She chose to cast a provisional ballot anyway. *Id.* at 169.

On August 16, 2024, the Trial Court issued a memorandum opinion and order (Trial Court Opinion) dismissing Electors’ Petition and affirming the Board’s decision not to count Electors’ provisional ballots. The Trial Court found the Board did not commit an error of law or abuse its discretion when it rejected Electors’ provisional ballots, as its actions were in accord with 25 P.S. § 3050(a.4)(5)(i) and (ii)(F), which it read to foreclose the counting of provisional ballots cast by electors who had timely submitted mail-in ballots, even if those electors’ timely submitted



mail-in ballots were previously rejected. The Trial Court also found Electors' constitutional challenges without merit. Appellants appealed the Trial Court's order to this Court.<sup>8, 9</sup>

## II. STATUTORY FRAMEWORK

As it is critical to our analysis, we first discuss the relevant provisions of the Election Code. Voting by qualified mail-in electors is addressed in Article XIII-D of the Election Code, 25 P.S. §§ 3150.11-3150.17.<sup>10</sup>

25 P.S. § 3150.16, titled "Voting by mail-in electors," provides:

**(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.

....

**(b) Eligibility.**--

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<sup>8</sup> By Order dated August 22, 2024, this Court consolidated Appellants' appeals.

<sup>9</sup> This appeal requires this Court to interpret provisions of the Election Code, which, 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).

<sup>10</sup> Article XIII-D of the Code was added by the legislation commonly called Act 77, Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

(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(a.4)(1)].

....

(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.

25 P.S. § 3150.16 (emphasis added). Pursuant to subsection(b)(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(a.4)(1). This subsection will be hereinafter referred to as the “Having Voted Clause.”

As cross-referenced in the Having Voted Clause, 25 P.S. § 3050 discusses voting by provisional ballot. Relevant here are subsections (a.4)(5)(i), which we refer to as the “Casting Clause,” and (a.4)(5)(ii)(F), which we refer to as the “Timely Received Clause.” Together, the Casting Clause and the Timely Received Clause direct when provisional ballots shall and shall not be counted. They provide:

(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:

....

(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)(i), (ii)(F). The parties' arguments advance competing interpretations of the Having Voted, Casting, and Timely Received Clauses, and at various times, rely on other Election Code provisions to support their arguments. Other Election Code provisions, where necessary, will be discussed and set forth *infra*.

### III. ARGUMENTS

#### A. Parties' Arguments

##### 1. Appellants

Appellants<sup>11</sup> argue that the plain language of the Election Code, properly construed, requires the Board to count the provisional ballots. To support their proffered construction, they review the history and purpose of provisional voting, which they stress is intended to prevent disenfranchisement. They explain that the 2002 Help America Vote Act (HAVA), in part, required states to implement provisional-voting regimes for federal elections. 52 U.S.C. § 21082 (*formerly* 42 U.S.C. § 15482). The General Assembly added 25 P.S. § 3050(a.4) to the Code to

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<sup>11</sup> We present Appellants' arguments together because they are substantially aligned. We note differences between their arguments where appropriate. We take the same approach with Appellees' arguments in Part III.A.2, *infra*.

fulfill HAVA's mandate. The purpose of provisional voting is to act as a fail-safe to ensure that voters can vote exactly once—not zero times and not twice. Determinations about whether a provisional ballot can be counted are routinely and necessarily made after canvassing has begun, and the Board considers whether the voter has already cast a valid ballot to prevent double voting. Appellants point out that the Election Code specifically authorizes provisional voting by electors who request mail-in or absentee ballots but do not vote those ballots. 25 P.S. §§ 3150.16(b)(2), 3146.6(b)(2).

Appellants focus on two phrases in 25 P.S. § 3050(a.4)(5), which directs the Board to count, or not count, certain provisional ballots that have been cast. They argue these two clauses are ambiguous when read together because they could simultaneously require and prohibit counting of a given provisional ballot. First, the Board must count a provisional ballot if the voter “did not cast any other ballot.” *Id.* § 3050(a.4)(5)(i). Second, the Board must *not* count the provisional ballot if “the absentee or mail-in ballot is timely received.” *Id.* § 3050(a.4)(5)(ii)(F). In support they cite *Keohane v. Delaware County Board of Elections* (Del. Cnty. Ct. Com. Pl., No. CV-2023-4458, filed Sept. 21, 2023), where the Delaware County Court of Common Pleas held that a provisional ballot must be counted if an earlier mail-in ballot is rejected as defective, even if it was also received—the opposite of the statutory interpretation the Trial Court reached here.

Regarding the Casting Clause, Appellants essentially argue that *cast* is a term of art, implying a formal submission of a ballot that will be processed and counted in order to register the elector's choice. They argue that, as the trial court held in *Keohane*, voters who have *tried to* cast mail-in ballots, but did not successfully do so because those ballots were later cancelled as defective, cannot be

said to have *cast* a ballot under the Casting Clause. Thus, they claim the Casting Clause requires the Board to count the provisional ballots because the earlier mail-in ballots were never actually cast. They point to the affidavit voters must sign to vote provisionally under 25 P.S. § 3050(a.4)(2), stating that the provisional ballot is the “only ballot [the voter] cast in this election.”

Further, Appellants argue the Timely Received Clause does not prohibit counting the provisional ballots. The “ballot” that triggers that clause once timely received must also be a *valid* ballot—one that is not later cancelled, rejected, or otherwise not given effect. If it is not a valid ballot, it is not “a . . . ballot,” so there is no ballot that was “timely received.” Thus, timeliness is only one aspect of the Timely Received Clause, and timely receipt comes into play only if there is a valid ballot submitted. Appellants disagree with the construction Appellees propound and the Trial Court adopted: that the Code requires “the Board [to] treat a received *Declaration Envelopes* [sic] as that voter’s return of their ballot, *even if that Declaration Envelope is empty.*” Trial Court Op. at 21 (emphasis added). This, they argue, conflates “ballot”—the word the statute actually uses—with “envelope.” It cannot be, they argue, that timely receipt of *any* declaration envelope purporting to contain a ballot—even a naked ballot, a blank ballot, or no “ballot” at all—can mean that a “*ballot* [was] timely received,” as the Timely Received Clause requires. They point out that the empty-envelope hypothetical was precisely Director McCurdy’s testimony and that the Trial Court acknowledged the abstract absurdity of that construction. *See* Trial Court Op. at 21.

Appellants ask us to resolve the ambiguity in the clauses to require Electors’ provisional ballots to be counted. They argue that under their proposed interpretation, the Casting and Timely Received Clauses can be harmonized—and

critically, can be construed consistently with the Code’s other provisional voting sections. For the Casting Clause, they propose that *cast* refers to ballots that are or will be counted. It does not include those that have been submitted and which might later be found to contain—or have already been found to contain— fatal defects and not be counted. For the Timely Received Clause, they argue that a *ballot* is not received unless it is a validly cast ballot, regardless of whether the envelope purporting to contain the ballot is physically received by the Board. Appellants argue resolving the ambiguity in this way favors enfranchisement, effectuates the purpose of provisional voting to ensure that each elector can vote exactly once (not zero times), and is more consistent with a commonsense reading of the Code’s provisions as a whole.

Appellants argue that caselaw on which Appellees rely is either distinguishable or not persuasive. In *Boockvar*, the Supreme Court held that counties are not required under the Code to allow curing of defective mail-in ballots. 238 A.3d at 374. Electors specifically distinguish *Boockvar* because it addressed only ballot curing, not the distinct issue raised here—whether a board of elections must count a provisional ballot. Second, Appellants would reject our decision in *In re Allegheny County Provisional Ballots in the 2020 General Election* (Pa. Cmwlth., No. 1161 C.D. 2020, filed November 20, 2020) (*Allegheny County*), *appeal denied*, 242 A.3d 307 (Pa. 2020),<sup>12</sup> as nonbinding and unpersuasive. In *Allegheny County*, this Court held that the Timely Received Clause in 25 P.S. § 3050(a.4)(5)(ii)(F) is unambiguous and prohibits counting provisional ballots if an earlier mail-in or absentee ballot is timely received. *Allegheny County*, slip op. at 8. Appellants point

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<sup>12</sup> Unreported decisions of this Court issued after January 15, 2008, are not binding precedent. Section 414(a) of the Commonwealth Court’s Internal Operating Procedures, 210 Pa. Code § 69.414(a).

out, however, that *Allegheny County* did not consider the ambiguity that arises when that clause is read together with, instead of in isolation from, the Casting Clause in 25 P.S. § 3050(a.4)(5)(i), and it made no attempt to reconcile those provisions. Nor did the *Allegheny County* Court consider the argument presented here: that only *valid* ballots that will *count* can trigger the Timely Received Clause. Appellants also argue *Allegheny County* was wrongly decided because it failed to give due weight to the presumption in favor of constructions that expand the franchise.

Appellants distinguish the issue of counting their provisional ballots from *curing* their defective mail-in ballots. They claim the Trial Court erred in conflating those issues. *See, e.g.*, Trial Court Op. at 22-23 (citing *Boockvar*, 238 A.3d at 361, for the proposition that the Election Code does not require a curing process for defective mail-in ballots); *id.* at 27 (“[A]ny chance to correct a deficient ballot . . . , including by casting a provisional vote, constitutes a ‘cure.’”). Although the Election Code is silent on ballot curing, leaving that choice up to each county, Appellants argue the Election Code requires that their provisional ballots be counted, regardless of any notification about or curing of defects in their mail-in ballots.

Finally, Appellants argue that adopting the Board’s construction would cause the Election Code to violate the free and equal elections clause of the Pennsylvania Constitution. First, rejecting the provisional ballots, when the earlier mail-in ballots were also cancelled, amounts to a restriction on voting that must be tied to a compelling reason, which the Board has failed to articulate. Second, the Board’s construction would be an unreasonable restriction on the franchise, and the Constitution requires that *any* restriction on voting—whether a ballot casting rule or a ballot counting rule—must be reasonable and nondiscriminatory. Appellants

invite us to avoid these constitutional problems by construing the Code as they propose.

## 2. *Appellees*

Appellees argue the Election Code—specifically the Timely Received Clause found in 25 P.S. § 3050(a.4)(5)(ii)(F)—prohibits the Board from counting Electors’ provisional ballots. They claim that the Timely Received Clause is not in conflict with the Casting Clause in 25 P.S. § 3050(a.4)(5)(i) because the latter expressly says it applies “except as provided in subclause (ii).” Thus, they argue because the exception—the Timely Received Clause—is triggered, the general rule does not apply and there is nothing left for the Court to interpret. Appellees argue all that is necessary for a ballot to count as “timely received” for purposes of 25 P.S. § 3050(a.4)(5)(ii)(F) is for the elector to mail a declaration envelope to the Board and for the Board to receive the envelope timely. This is true, they argue, independent of what the declaration envelope contains, whether a ballot or anything else. Appellants argue this Court reached precisely that holding in *Allegheny County*.

Appellees claim that Appellants’ proffered construction misunderstands the word “received” in the Timely Received Clause. In their view, receipt means actual receipt, and they argue that the voting equipment’s designation of a mail-in ballot as “pending” or “cancelled” is legally irrelevant to whether the Timely Received Clause prohibits counting a provisional ballot. Similarly, they argue, receipt cannot depend on opening the declaration envelope to verify that the ballot was properly and validly cast, since that does not occur until votes are being canvassed. Similarly, Appellees argue that “casting” is distinct from “receiving”—the former is done by an elector, while the latter is done by the Board. Both of those



acts occur before the ballot is canvassed, so neither can depend on whether the vote is valid (which, in the case of non-facial defects, is not known with certainty until the ballot is canvassed).

In response to Appellants' insistence on the connection between mail-in voting and the need for provisional ballots, Appellees stress that provisional ballots have nothing to do with mail-in voting. Relatedly, they dismiss the SURE System notification provided to Electors, which invited them to cast provisional ballots because their mail-in ballots were invalid, as "legally unfounded," nonauthoritative guidance from the Secretary of the Commonwealth (Secretary). Republican Party's Br. at 29. In support, they cite *Boockvar* for the proposition that the Secretary cannot compel counties to allow cure of defective mail-in ballots, arguing that this, in turn, implies the Secretary cannot tell voters when they are permitted to cast provisional ballots.

Throughout their arguments, Appellees contend that the Board's counting the provisional ballots would have effectively been a "cure" of Electors' defective mail-in ballots via provisional voting. The Board specifically argues that Appellants' proffered construction is an attempt at declaratory or injunctive relief requiring counties to implement notice and cure policies via provisional voting. This, it argues, would violate the Election Code which, as construed in *Boockvar*, does not require counties to implement notice and cure procedures for mail-in or absentee ballots.

Finally, the Republican Party responds to Appellants' constitutional arguments emphasizing the equality of opportunity afforded to Electors, on the basis that they *could have cast* valid mail-in ballots just as every other voter could have done. It argues this settles the constitutional issue because the free and equal

elections clause limits only voter-qualification rules and rules amounting to a denial of the franchise, not ballot casting rules like those Electors failed to follow here.

### **B. Arguments of *Amici Curiae***

The Department of State and the Secretary have filed a joint brief as *amici curiae*.<sup>13</sup> The Secretary begins by clarifying that, in his view, the Trial Court and Appellees have wrongly conflated ballot curing with provisional voting. This case, he argues, is not about ballot curing at all. The only question is whether Electors' provisional ballots must be counted under the Election Code, which provides separately for provisional voting. Unlike for ballot curing, which is discretionary, all county boards of elections must follow the Code's provisional voting sections.

The Secretary argues that the two Code clauses that control provisional ballot counting are ambiguous, but the ambiguity should be resolved to require the Board to count the provisional ballots. As a preface to that argument, the Secretary emphasizes that HAVA created provisional voting to ensure that “a ballot would be submitted on election day but counted if and only if the person was later determined to have been entitled to vote.” *Sandusky Cnty. Dem. Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004). The Secretary describes the process of voting provisionally and points out that the Timely Received Clause is just one among many bases on which a provisional ballot might not be counted, even if the voter is eligible to vote. Other reasons include failure to comply with rules for submitting the provisional ballot. *See* 25 P.S. § 3050(a.4)(5)(ii)(A)-(F).

Given that context, the Secretary argues that the Election Code, when considering all its provisional voting sections, is ambiguous regarding how

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<sup>13</sup> We refer to these arguments as the Secretary's because the Secretary is the head of the Department of State.

provisional ballots should be treated. He first cites the instructions given to voters on mail-in and absentee ballots themselves: that they may cast a provisional ballot if their “**voted** ballot is not timely received.” 25 P.S. § 3146.3(e)<sup>14</sup> (for absentee ballots); *accord id.* § 3150.13(e) (for mail-in ballots) (emphasis added). Critically, he explains, the General Assembly added the word *voted* to those instructions by amendment in 2020; they had previously only referred to a “ballot” or “mail ballot” without the concept of a “**voted** ballot.” *See* Secretary’s Br. at 12 (citing Section 9 and 12.1 of the Act of Mar. 27, 2020, P.L. 41, No. 12). And in Act 77 of 2019, the word *voted* was also added when authorizing mail-in voters to vote by provisional ballot. By statute, the district register lists only voters whose earlier ballot has been “received **and voted**” as having voted. 25 P.S. § 3150.16(b)(1) (for mail-in ballots); *see also id.* § 3146.6(b)(1) (same, for absentee ballots). Also by statute, if an absentee or mail-in voter’s name is not listed on the district register as having “**voted** the [mail-in or absentee] ballot,” then that voter “may vote by provisional ballot.” *Id.* § 3146.6(b)(2); *accord id.* § 3150.16(b)(3). The Secretary explains that the Trial Court construed the Timely Received Clause in isolation, and its reading cannot be consistent with these other amendments to the Code. These provisions clearly require that one’s right to vote by provisional ballot is not contingent on the Board’s bare receipt of a ballot, but on having already **voted**. *See* Secretary’s Br. at 25-26.

The Secretary insists that we must resolve these ambiguities to avoid unreasonable results by construing *in pari materia* the terms *timely received* and *voted* to refer only to an earlier ballot that will be counted because it was successfully voted and is valid. In other words, a ballot that is invalid, cancelled, or not properly cast cannot trigger the Timely Received Clause. The Secretary urges us to resolve

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<sup>14</sup> Added by Section 11 of the Act of March 6, 1951, P.L. 3.

the ambiguity in favor of counting ballots and expanding the franchise, rather than disenfranchising Electors.

#### IV. DISCUSSION

We begin with the principles of statutory construction set forth by our Supreme Court:

When presented with matters of statutory construction, [we are] guided by Pennsylvania’s Statutory Construction Act [of 1972], 1 Pa.C.S. § 1501-1991. Under this Act, “the object of all statutory construction is to ascertain and effectuate the General Assembly’s intention.” *Sternlicht v. Sternlicht*, [] 876 A.2d 904, 909 ([Pa.] 2005) (citing 1 Pa.C.S. § 1921(a) (“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly[.]”)). When the words of a statute are clear and unambiguous, “the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). However, when the words of a statute are not explicit, the General Assembly’s intent is to be ascertained by consulting a comprehensive list of specific factors set forth in 1 Pa.C.S. § 1921(c). *See also* [Pa.] *Associated Builders & Contractors, Inc. v. Dep’t of Gen. Servs.*, [] 932 A.2d 1271, 1278 ([Pa.] 2007) (recognizing that when the “words of the statute are not explicit, the General Assembly’s intent is to be ascertained by considering matters other than statutory language, like the occasion and necessity for the statute; the circumstances of its enactment; the object it seeks to attain; the mischief to be remedied; former laws; consequences of a particular interpretation; contemporaneous legislative history; and legislative and administrative interpretations”).

....

[The Supreme] Court has previously observed that the purpose and objective of the Election Code . . . is “[t]o obtain freedom of choice, a fair election and an honest election return[.]” *Perles v. Hoffman*, [] 213 A.2d 781, 783

([Pa.] 1965). To that end, the Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice. *Id.* at 784.

*Boockvar*, 238 A.3d at 355-56 (some citations omitted).

Because Appellants and the Secretary urge us to find the Election Code ambiguous, the following principles are especially important. We find ambiguity when multiple interpretations of a statute are reasonable, including competing interpretations proffered by the parties. *Id.* at 360. Divergent judicial interpretations of a statute can also signal that multiple interpretations are reasonable, and thus that the statute is not clear. *See Bold v. Dep’t of Transp., Bureau of Driver Licensing*, \_\_\_ A.3d \_\_\_, 2024 WL 3869082, (Pa., No. 36 MAP 2023, filed Aug. 20, 2024), slip op. at 11-12. Ambiguity can be textual, but it can also be contextual, arising from multiple parts of a statute considered and construed together when they must be. *See id.* at 390 (Wecht, J., concurring); *King v. Burwell*, 576 U.S. 473, 474-75 (2015) (“[O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’”) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). When searching for clear meaning, as at every other time, this Court “must always read the words of a statute in context, not in isolation.” *Gavin v. Loeffelbein*, 205 A.3d 1209, 1221 (Pa. 2019).

**A. The Casting Clause and Timely Received Clause Are Ambiguous When Considered Together With the Having Voted Clause**

The parties dispute whether the Casting Clause and Timely Received Clause are ambiguous. In *Allegheny County*, we considered the Timely Received Clause in isolation and opined that it is unambiguous. Slip op. at 8. But we did not

consider the Casting Clause because we were not asked to. And we did not consider the Having Voted Clause. We agree with the Secretary that these three clauses must be construed together in the Code’s statutory scheme, and not in isolation. *Gavin*, 205 A.3d at 1221.

The Having Voted Clause specifically authorizes a mail-in voter to “*vote* by provisional ballot” so long as he “is not shown on the district register as having *voted*.” 25 P.S. § 3150.16(b)(2) (emphasis added). The Timely Received Clause uses a different term: the Board must not count the ballot if “the elector’s absentee ballot or mail-in ballot is timely *received*.” *Id.* § 3050(a.4)(5)(ii)(F) (emphasis added). Finally, and only if the Timely Received Clause is not triggered,<sup>15</sup> the Casting Clause comes into play. It requires that, absent any other ground to not count the ballot under subsection (a.4)(5)(ii), the Board must count the provisional ballot “if . . . the individual did not *cast* any other ballot, including an absentee ballot, in the election.” *Id.* § 3050(a.4)(5)(i). Among other important issues, we are required to consider the meaning of *vote*, *voted*, *timely received*, *cast*, and *ballot*.<sup>16</sup> The Election Code does not define these words for purposes of the provisions at issue here.<sup>17</sup> Nor does the Statutory Construction Act supply default definitions. *See* 1 Pa.C.S. § 1991.

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<sup>15</sup> We agree with Appellees that the Casting Clause becomes controlling if, and only if, no part of subsection (a.4)(5)(ii)—including the Timely Received Clause—is triggered. This is obvious: the paragraph containing the Casting Clause applies by its terms “[e]xcept as provided in subclause (ii).” 25 P.S. § 3050(a.4)(5)(i).

<sup>16</sup> There is no congruence across the language of these clauses. They use different verbs (sometimes used adjectivally as past participles). *Vote* or having *voted* is not *received* is not *cast*. All three sections refer to the noun *ballot* but none defines it. This lack of congruence is apparent here where Electors’ ballots were timely received, but they had not voted.

<sup>17</sup> *Ballot* is the only one of these words defined anywhere in the Election Code. It is defined in 25 P.S. § 3031.1 as follows:

**(Footnote continued on next page...)**

In order to faithfully effectuate the language of the legislature, we look to the way these terms are used in the Code for context. A voter can *cast* a ballot merely by filling it out without ever submitting it. *See* 25 P.S. § 3050(a.4)(3) (“After the provisional ballot has been *cast*, the individual shall place it in a secrecy envelope.”). Other uses of *cast* obviously refer to delivery to a location, not filling out. *See id.* § 3050(a.4)(5)(i) (describing a voter “registered and entitled to vote at the election district where the ballot was *cast*”). Still other uses refer to a *vote*, rather than a ballot, being *cast*. *See id.* § 3050(a.4)(4)(vii) (“[T]he votes *cast* upon the challenged official provisional ballots shall be added to the other votes *cast* within the county.”). Thus, even in parts of the Code not at issue here, the word *cast* is used in different senses.

Perhaps the most important tension is between *voting* and the other terms. The Secretary convincingly argues that the Code’s provisional voting sections have been recently amended—in 2019 and 2020—to tether the statutory right to vote by provisional ballot to not just the receipt of a mail-in or absentee ballot, but also to whether that ballot was *voted*. *See* 25 P.S. §§ 3146.6(b)(1)-(2) (absentee ballots); 3150.16(b)(1)-(2) (mail-in ballots).<sup>18</sup> Both of those provisions use *voted* not just with respect to a ballot, but also more generally—a person is not

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“Ballot” means ballot cards or paper ballots upon which a voter registers or records his vote or the apparatus by which the voter registers his vote electronically and shall include any ballot envelope, paper or other material on which a vote is recorded for persons whose names do not appear on the ballot labels.

But that definition is not controlling because, by its terms, it applies only “as used in [that] article [, i.e., Article XI-A of the Code, 25 P.S. §§ 3031.1-3031.22],” which we are not construing here.

<sup>18</sup> Although only mail-in ballots are at issue here, we, like the Secretary, believe that the parallel absentee ballot provisions are also useful in construing terms like *voted*, because they closely mirror the language of the mail-in ballot provisions and were amended at nearly the same time.

entitled to cast a provisional ballot at their polling place on Election Day if the district register shows they have already *voted*. That language is in tension with Appellees’ proffered construction of the Timely Received Clause. They claim all that is relevant is receipt of a ballot by the Board, regardless whether that ballot has been *voted* or whether the elector has already *voted*. And they go further, claiming that *ballot* in the Timely Received Clause refers not to a ballot but to the **declaration envelope** which, once received, prevents counting a provisional ballot, even if the received envelope is found to be empty. As the Secretary points out, there is an alternative plausible meaning—considering the Code as a whole, the 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*. If the ballot is cancelled or invalid, it should not be considered to trigger the Timely Received Clause, because the elector has not already voted. Thus, when viewing the terms *voted*, *received*, and *cast* in the Code’s broader scheme, they are contextually ambiguous.

We can resort to dictionaries for plain meaning, but they give no clarity in this case. A *ballot* was historically “a small colored ball *placed in a container to register* a secret vote,” and since refers “by extension [to] a ticket, paper, etc., *so used*.”<sup>19</sup> This sense, which bakes in the concept of *use* or *placing in*, differs from the way *ballot* is defined for Article XI-A of the Code (which is, again, not controlling here) which refers to paper on which a voter “records” or “registers” his vote, without reference to use. The ambiguity is highlighted by what *is* clear in the Code’s

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<sup>19</sup> *Ballot*, OXFORD ENGLISH DICTIONARY (OED), [https://www.oed.com/dictionary/ballot\\_n1?tab=meaning\\_and\\_use#28858985](https://www.oed.com/dictionary/ballot_n1?tab=meaning_and_use#28858985) (last visited Aug. 31, 2024); *accord Ballot*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“An instrument, such as a paper or ball, *used for casting a vote*.” (emphasis added)).



language: regardless of what *ballot* means, it certainly does not mean an empty declaration envelope, as the Trial Court concluded and as Appellees argue. Though an envelope is not enough, it is not clear what is enough to be a mail-in or absentee *ballot*—must it be completed, or voted, or valid, or is a blank ballot sufficient? Dictionaries do not tell us.

The words *cast* and *voted* may be roughly synonymous. *Cast* means “[t]o deposit (a voting paper or ticket); to give (a vote).”<sup>20</sup> *Voted* as an adjective or participle means “[e]stablished or assigned by vote.”<sup>21</sup> But the verb *vote* means “[t]o give or register a vote; to exercise the right of suffrage; to express a choice or preference by ballot or other approved means.”<sup>22</sup> But which of these meanings applies in the Code is not clear. For a ballot to be *cast* may mean merely that it was “deposited,” but it may also entail “giv[ing] a vote,” which implies that the vote itself—not just the paper that records it—is validly cast. And for a ballot to be *voted* may entail not just completion or transmission, but that the elector has actually “exercise[d] the right of suffrage” through voting the ballot. Finally, *received* obviously means “to take into . . . possession (something offered or given by another)” or “to take delivery of (something) from another.”<sup>23</sup> But though that word

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<sup>20</sup> *Cast*, OED (transitive verb sense I.1.f), [https://www.oed.com/dictionary/cast\\_v?tab=meaning\\_and\\_use&tl=true#10038401](https://www.oed.com/dictionary/cast_v?tab=meaning_and_use&tl=true#10038401) (last visited Aug. 31, 2024); see also *Cast*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“To formally deposit (a ballot) or signal one’s choice (in a vote).”).

<sup>21</sup> *Voted*, OED (adjective sense 2), [https://www.oed.com/dictionary/voted\\_adj?tab=meaning\\_and\\_use#15491584](https://www.oed.com/dictionary/voted_adj?tab=meaning_and_use#15491584), (last visited Aug. 31, 2024).

<sup>22</sup> *Vote*, OED (intransitive verb sense II.3.a) (emphasis added), [https://www.oed.com/dictionary/vote\\_v?tab=meaning\\_and\\_use#15490698](https://www.oed.com/dictionary/vote_v?tab=meaning_and_use#15490698) (last visited Aug. 31, 2024); see also *Vote*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining the noun *vote* as “the expression of one’s preference . . . in . . . an election”).

<sup>23</sup> *Receive*, OED (transitive verb sense III.9.a), [https://www.oed.com/dictionary/receive\\_v?tab=meaning\\_and\\_use#26542154](https://www.oed.com/dictionary/receive_v?tab=meaning_and_use#26542154) (last visited Aug. 31, 2024).

is clear, the meaning of the thing that is to be received—the *ballot*—is not, so the Timely Received Clause remains murky.

The Timely Received Clause, considered with its companion clauses, uses nonuniform and undefined terminology, the meaning of which is not plain in context. This—together with the competing interpretations offered by the parties and divergent decisions accompanied by opinion from at least three courts of common pleas<sup>24</sup>—leads us to conclude that “the words of the [Code] are not explicit.” 1 Pa.C.S. § 1921(c).

### **B. Resolving the Election Code’s Ambiguity**

Having determined the words of the Having Voted, Casting, and Timely Received Clauses are ambiguous, we are now tasked with resolving such ambiguity. In so doing, we are guided by the following principles.

Once ambiguity is found, we look beyond the words of the statute so that it can have a meaning, and thus have effect, as the General Assembly intended.<sup>25</sup> We faithfully resolve the ambiguity in favor of the legislature’s object, using the interpretive tools set forth in Section 1921(c) of the Statutory Construction Act. 1 Pa.C.S. § 1921(c). Section 1921(c) permits the court to ascertain the intention of the General Assembly by considering, *inter alia*, the object to be attained, and the consequences of a particular interpretation. *Id.* § 1921(c)(4), (6). Notably, when

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<sup>24</sup> Compare Trial Court Opinion, with *Ctr. for Coalfield Justice v. Wash. Cnty. Bd. of Elections* (Wash. Cnty. Ct. Com. Pl. No. 2024-3953, filed Aug. 23, 2024), slip op. at 25-27 (holding that the Timely Received Clause is ambiguous and construing it in favor of counting provisional ballots); *Keohane*, slip op. at 5 (ordering provisional ballots under these same circumstances to be counted).

<sup>25</sup> Notably, we engage in this analysis only and precisely because we have concluded that the Code is ambiguous. Cf. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1082 (Pa. 2020) (Wecht, J., concurring and dissenting) (observing that we have “only one juridical presumption *when faced with unambiguous language*: that the legislature meant what it said” (emphasis added)).

resolving ambiguity in election cases, we must also consider the imperative to protect the elective franchise. *See Boockvar*, 238 A.3d at 360-61. Thus, we resolve any ambiguity in favor of protecting the franchise and to avoid discarding an elector's vote. *Boockvar*, 238 A.3d at 361; *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972). In that enterprise, “[w]ords and phrases which may be necessary to the proper interpretation of a statute and which do not conflict with its obvious purpose and intent, nor in any way affect its scope and operation, may be added in the construction thereof.” 1 Pa.C.S. § 1923; *id.* § 1928 (requiring statutes to be “liberally construed to effect their objects and to promote justice”).

Applying these tools, we first look to the object to be attained by the Election Code, which includes Act 77's addition of the Having Voted Clause, and amendments to the Casting and Timely Received Clauses. As observed by our Supreme Court in *Boockvar*, “the purpose and objective of the Election Code, which contains Act 77, is ‘to obtain freedom of choice, a fair election and an honest election return.’” *Boockvar*, 238 A.3d at 356 (quoting *Perles*, 213 A.2d at 783). This objective is advanced by ensuring that each qualified elector 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.

In 2019, the General Assembly amended the Code by passing Act 77, which established universal mail-in voting in the Commonwealth, the object of which is to make voting more convenient for qualified electors. In enacting 25 P.S. § 3150.16, the General Assembly included the Having Voted Clause. Despite its use of ambiguous terms as described above, the General Assembly clearly included the Having Voted Clause to give mail-in electors the opportunity to vote

provisionally so long as they are “not shown on the district register as having voted” by mail. Indeed, a mail-in elector can *only* vote provisionally if the district register so shows.<sup>26</sup> Appellees’ proffered construction of the Clauses at issue fails to make voting more convenient for qualified mail-in electors, the object of Act 77, and in actuality, renders it impossible for them to have voted. In other words, by adopting Appellees’ proffered construction, Electors wind up with exactly zero votes in the 2024 Primary. This falls short of the object the General Assembly sought to attain by enacting Act 77 and the Election Code as a whole. This construction disenfranchises Electors. Appellants’ and the Secretary’s proffered construction, however, comports with the objects of the Election Code, including Act 77, by permitting Electors to vote exactly once in the 2024 Primary Election. Their reading resolves the noted ambiguities reasonably in favor of protecting the franchise and avoids depriving Electors of their vote. *Boockvar*, 238 A.3d at 361.

When considering the consequences of the parties’ competing interpretations, 1 Pa.C.S. § 1921(c)(6), it becomes even more clear that Appellants’ reading achieves the General Assembly’s intention while Appellees’ reading does not. *See Boockvar*, 238 A.3d at 380 (citing 1 Pa.C.S. § 1922(1)) (“[W]e must in all instances assume the General Assembly does not intend a statute to be interpreted in a way that leads to an absurd or unreasonable result.”). Here, Electors were notified that their vote “would not count” in advance of the 2024 Primary. They appeared at their respective polling places on the day of the 2024 Primary and were permitted to cast a provisional ballot. Under Appellees’ construction, Electors’ provisional voting was an exercise in futility, as Electors’ provisional vote, under no

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<sup>26</sup> While there is no testimony here regarding whether Electors were “shown on the district register as having voted,” we presume the County followed the Code and only permitted Electors to vote provisionally because the district register did not reflect that they had “voted.”

circumstances, would be counted. Appellees assert Electors are foreclosed from voting entirely because the Board timely received their declaration envelope. Under Appellees' construction, they had "already voted"—despite that their mail-in ballots will not be counted.

Other concerns about consequences were conceded by the Trial Court and borne out by Director McCurdy's testimony. *See supra* pp. 8-10.<sup>27</sup> Under Appellees' proffered construction, an elector could omit his mail-in ballot altogether but return the secrecy and declaration envelopes to the Board, and still be unable to vote provisionally. A commonsense reading of the Code, of course, would permit this mail-in elector to cast a provisional ballot because no "voted" ballot was timely received by the Board, and thus the voter cannot be marked as having "voted" on the district register. 25 P.S. §§ 3146.6(b)(1), 3150.16(b)(1). However, Appellees' position would result in the Board denying that elector's provisional ballot even though he never submitted a mail-in ballot. This would render the Having Voted Clause, which authorizes voting by provisional ballot, without any effect. What can be the effect of casting a provisional ballot that, as a matter of certain statutory operation, could never be counted?

That construction of the Code would not just create surplusage. It would also be unfair and misleading to the electorate because it would invite electors to cast dummy ballots that were nullities before they were ever cast. By Appellees' construction, the provisional ballot's status as not countable is locked in amber at the moment the Board receives a mail-in elector's declaration envelope, without regard to whether the enclosed ballot is later determined to be invalid, or not to be a ballot at all. Appellees' construction would reduce the statutory right to cast a

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<sup>27</sup> Director McCurdy could not reconcile what constitutes a "ballot" in the above hypothetical. Hr'g Tr. at 63-64. This underscores the ambiguities in the Code.

provisional ballot as a failsafe 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 Appellees’ view, it really never had a chance.<sup>28</sup>

Thankfully, we need not construe the Election Code to yield that result. Because its language is ambiguous on this point, we can and must construe the Code to give effect to the legislature’s intent. 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. This entails the proposition that the provisional ballots so authorized could be counted under some circumstances. The General Assembly *did not* intend for those authorized provisional ballots to be rendered meaningless, essentially void *ab initio*, whenever the elector has made an earlier but unsuccessful *attempt* to cast or vote a ballot. 1 Pa.C.S. § 1922(2) (the Court presumes the General Assembly intended the statute to be effective and certain).

We reject Appellees’ argument that reaching this result would effectively write a mandatory ballot-curing procedure into the Code—a proposition our Supreme Court considered and rejected in *Boockvar* when it held that “[b]oards

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<sup>28</sup> Appellees position also rewards less-diligent mail-in electors while simultaneously punishing more-diligent ones. Electors in this case mailed their declaration envelopes to the Board well in advance of the 2024 Primary. Accepting Appellees’ construction would require us to hold that Electors forfeited their right to vote in the 2024 Primary as of the Board’s receipt of their declaration envelopes—no vote could ever be counted. Now consider a mail-in elector who mails his declaration envelope to the Board on the eve of the 2024 Primary Election. Realizing that the mail system may not deliver his ballot to the Board in time, that mail-in voter also appears at his polling place on the day of the 2024 Primary and casts a provisional ballot. If the mail-in elector’s ballot was indeed tardy, the Board would count his provisional ballot. The lackadaisical mail-in elector winds up with one vote; the diligent elector winds up with none.

are not required to implement a ‘notice and opportunity to cure’ procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly.” 238 A.3d at 374. The County has a ballot curing policy, but the 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. The *Boockvar* Court only tangentially discussed provisional voting—the phrase appears only in a single sentence of that opinion. *See Boockvar*, 238 A.3d at 375 n.28 & accompanying text. To conclude, as the Trial Court did, that “any chance to . . . cast[] a provisional vote[] constitutes a ‘cure’” is to both overread *Boockvar* and to read the provisional voting sections out of the Code. Trial Court Op. at 27. This was legal error.

Finally, we agree with Appellants and the Secretary that *Allegheny County* does not compel a different result. That unreported panel decision was reached in a different matter and is thus not binding. More importantly, the Court there was not presented with developed arguments on the issue now before us. The Court did not cite or discuss the Casting Clause in 25 P.S. § 3050(a.4)(5)(i) or attempt to reconcile it with the Timely Received Clause in 25 P.S. § 3050(a.4)(5)(ii)(F) that the Court found unambiguous. Perhaps because the parties in that case did not argue that the Code’s provisions are ambiguous when taken together, the Court did not analyze that question, and we reach a conclusion here with the benefit of those arguments.<sup>29</sup>

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<sup>29</sup> Given our construction of the Code, we do not consider Appellants’ constitutional arguments.

## **V. CONCLUSION**

For the foregoing reasons, we conclude that (1) Electors did not cast any other ballot within the meaning of 25 P.S. § 3050(a.4)(5)(i), and (2) 25 P.S. § 3050(a.4)(5)(ii)(F) does not prohibit the Board from counting Electors' provisional ballots. Accordingly, because the record does not indicate any other basis under subsection (a.4)(5)(ii) on which the Board could have declined to count the provisional ballots, we reverse the Trial Court's decision and order the Board to count Electors' provisional ballots.

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MATTHEW S. WOLF, Judge

Judge Dumas dissents.



Faith Genser and Frank Matis,	:	<b>CASES CONSOLIDATED</b>
Appellants	:	
	:	
v.	:	
	:	
Butler County Board of Elections,	:	
Republican National Committee,	:	Trial Ct. No. MSD-2024-40116
Republican Party of Pennsylvania, and	:	
The Pennsylvania Democratic Party	:	No. 1074 C.D. 2024
	:	
Faith Genser and Frank Matis,	:	
	:	
v.	:	
	:	
Butler County Board of Elections,	:	
Republican National Committee,	:	
Republican Party of Pennsylvania, and	:	
The Pennsylvania Democratic Party	:	
	:	
Appeal of: The Pennsylvania	:	
Democratic Party	:	No. 1085 C.D. 2024

AND NOW, this 5<sup>th</sup> day of September, 2024, the order of the Court of Common Pleas of Butler County is REVERSED. The Butler County Board of Elections is ORDERED to count the provisional ballots cast by Appellants Faith Genser and Frank Matis in the April 23, 2024 Primary Election.

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## **Changes to SURE VR and PA Voter Services as of March 11, 2024**

The following information outlines the additions and changes which will be deployed after the close of business on March 11, 2024, as part of the B 23.9.0 release. Please contact the SURE Help Desk for further information or with questions regarding any item(s) on the list provided below.

### **Contents**

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## SURE VR

### Ballot Response Type Updates

As part of this release, modifications have been made within the SURE VR system to add 6 OPTIONAL 'Pending' Status Reasons when recording 'Response Types' for absentee and/or mail in ballot labels. These options may be used if a county offers ballot curing. If a county chooses to apply these Status Reasons and the voter's ballot application contains an email address, the system will then send an email to the voter which will provide them with information relating to the status of their ballot with a URL link to the Department of State website. Email details are provided later in this document.

Below are the new 'Pending' Status Reasons:

- PEND – INCORRECT DATE
- PEND – NO DATE
- PEND – NO SIGNATURE
- PEND – NO SECRECY ENVELOPE
- PEND – NO ID
- PEND – OTHER

The new response types are available for selection for each of the following ballot labels:

- Absentee Ballot Label
- Mail-In Ballot Label
- PA – Bedridden Veteran Ballot Label
- PA – Email – Bedridden Veteran Ballot Label
- PA – Email – Military and Civilian Overseas Ballot Label
- PA – Email – Remote/Isolated Bedridden Veteran Ballot Label
- PA – Email – Remote/Isolated Overseas Ballot Label
- PA – Military and Civilian Overseas Ballot Label
- PA – Remote/Isolated Bedridden Veteran Ballot Label
- PA – Remote/Isolated Overseas Ballot Label



The response types are available in the following areas within the SURE VR system:

- **Record Mailings Screen**

Response Date: 02/22/2024 Letter Type: Absentee Ballot Label  
Ballot Counted: Resp Type:  
Ballot Re  
Record Response Response History  
☒ Submit for Printing Later ☒ ID-Only  
Bar Code(ID): Name: R  
Name:  
Res:  
Mail:  
CANC - EMAIL BALLOT UNDELIVERABLE  
CANC - INCORRECT DATE  
CANC - LABEL CANCELLED  
CANC - NO DATE  
CANC - NO ID  
CANC - NO SECRECY ENVELOPE  
CANC - NO SIGNATURE  
CANC - OTHER  
CANC - REPLACED  
CANC - RETURNED AFTER DEADLINE  
CANC - UNDELIVERABLE  
CANC - VOTE CHALLENGED  
PEND - INCORRECT DATE  
PEND - NO DATE  
PEND - NO ID  
PEND - NO SECRECY ENVELOPE  
PEND - NO SIGNATURE  
PEND - NOT YET RETURNED  
PEND - OTHER  
RECORD - BALLOT RETURNED

- **Bulk Ballot Response Utility Screen**

Bulk Ballot Response Utilities  
Bulk Ballot Response Utilities  
File Upload Affected Voters Exception Com Record Response Exception Response  
Record Response  
Election: 2024 GENERAL ELECTION (11/05/2024)  
Response Type:  
Response Date:  
Ballot Received M:  
Record:  
Total Number of:  
CANC - EMAIL BALLOT UNDELIVERABLE  
CANC - INCORRECT DATE  
CANC - LABEL CANCELLED  
CANC - NO DATE  
CANC - NO ID  
CANC - NO SECRECY ENVELOPE  
CANC - NO SIGNATURE  
CANC - OTHER  
CANC - REPLACED  
CANC - RETURNED AFTER DEADLINE  
CANC - UNDELIVERABLE  
CANC - VOTE CHALLENGED  
PEND - INCORRECT DATE  
PEND - NO DATE  
PEND - NO ID  
PEND - NO SECRECY ENVELOPE  
PEND - NO SIGNATURE  
PEND - NOT YET RETURNED  
PEND - OTHER  
RECORD - BALLOT RETURNED  
Cancel



- **Ballots** tab on the **Absentee/Mail-In Voting** screen

Absentee/Mail-In Voting

ADAMS, LISA A  
35-012-1  
S ABINGTON W-00 P 1-2

Select Application: 2024 GENERAL PRIMARY (04/23/24) ID: 116910675

Application App Details App Status **Ballots** Permanent ID Verification Application Queue

Ballot Received Method	Status-Reason	Ballot Delivery	Date Sent	Date
USPS	PEND - NOT YET RETURNED	USPS		
Comments:	CANC - EMAIL BALLOT UNDELIVERABLE CANC - EMAIL BALLOT UNDELIVERABLE CANC - INCORRECT DATE CANC - LABEL CANCELLED CANC - NO DATE CANC - NO ID CANC - NO SECURITY ENVELOPE CANC - NO SIGNATURE CANC - OTHER CANC - REPLACED CANC - RETURNED AFTER DEADLINE CANC - UNDELIVERABLE CANC - VOTE CHALLENGED FWAB OVERRIDE-OFFICIAL BALLOT RECEIVED PEND - INCORRECT DATE PEND - NO DATE PEND - NO ID PEND - NO SECURITY ENVELOPE PEND - NO SIGNATURE PEND - NOT YET RETURNED PEND - OTHER RECORD - BALLOT RETURNED RECORD - FWAB RETURNED			

Records: 1

Record Vote New Ballot Delete Ballot OK Cancel

**Please Note:** Although changes were made to include the new response types under the **Ballots** tab of the **Absentee/Mail-In Voting** screen, the Department of State strongly recommends if a Status Reason update is needed, that the change should be made by utilizing the **Record Mailings** or **Bulk Ballot Response Utility** screens.

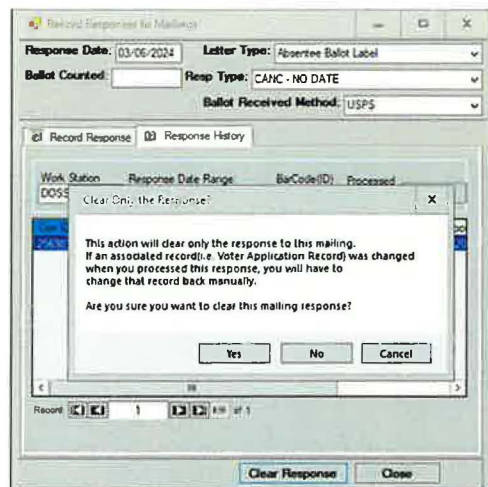




By current design, changing the Status Reason from the **Absentee/Mail In Voting** screen, *Ballots* tab will not properly update the *Correspondence* tab on the voter record.

If using the **Record Mailings** screen, it will be necessary to access the *Response History* tab of the **Record Mailings** screen to clear the previous response before you can proceed to update the new response type.

Please reference the “Clearing an Absentee Ballot Label Response” in the Absentee Processing User Guide for detailed steps to clear a response.



Additionally, the response type of 'CANC-VOTE CANCELLED' has been removed as a drop-down selection. Any previous ballot applications associated with this status will not be affected for historical purposes.



## **Ballot Response Email Verbiage Updates**

As part of this release, emails that are triggered upon recording a response have been updated to include the new pending Response Types and will provide the applicant with more information regarding their current ballot status. These apply when a change has been made to the ballot or when the ballot has been recorded as received,

The table below lists each of the 'Response Types' as well as the 'Business Reason' for which they apply. The 'Second Paragraph Email Verbiage' describes language that is associated to each Response Type and will appear as dynamic text in the second paragraph of the emails. This information will also appear on the PAVS Election Ballot Status Tracker updates described later below.

Response Type	Business Reason	Second Paragraph Email Verbiage
PEND – OTHER	To be used when a county offers the opportunity for voters to replace or correct a submission error, and the county has noticed a submission error.	The county has noticed an error with your ballot envelopes, which means your ballot may not be counted. If you cannot fix the errors in time, you can go to your polling place on election day and cast a provisional ballot.
PEND – INCORRECT DATE	To be used when a county offers the opportunity for voters to replace or correct a submission error, and the county has noticed that the voter used the wrong date.	Your mail ballot may not be counted because you did not correctly date the declaration on your ballot return envelope. If you do not have time to request a new ballot before [Ballot Application Deadline Date], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.
PEND – NO DATE	To be used when a county offers the opportunity for voters to replace or correct a submission error, and the county has noticed that the voter left	The county has noticed that you did not date your ballot return envelope. This means your ballot may not be counted. Your county offers you the opportunity to fix your ballot envelope, and you should go to <a href="https://www.vote.pa.gov/Voting-in-PA/Pages/Return-Ballot.aspx">https://www.vote.pa.gov/Voting-in-PA/Pages/Return-Ballot.aspx</a> to get more information.



	the ballot return envelope undated.	If you cannot fix your ballot return envelope in time, you can go to your polling place on election day and cast a provisional ballot.
PEND – NO SIGNATURE	To be used when a county offers the opportunity for voters to replace or correct a submission error, and the county has noticed that the voter left the ballot return envelope unsigned.	The county has noticed that you did not sign your ballot return envelope. This means your ballot may not be counted. Your county offers you the opportunity to fix your ballot return envelope, and you should go to <a href="https://www.vote.pa.gov/Voting-in-PA/Pages/Return-Ballot.aspx">https://www.vote.pa.gov/Voting-in-PA/Pages/Return-Ballot.aspx</a> to get more information. If you cannot fix your ballot return envelope in time, you can go to your polling place on election day and cast a provisional ballot.
PEND – NO SECRECY ENVELOPE	To be used when a county offers the opportunity for voters to replace or correct a submission error, and the county has noticed that the voter returned the ballot without a secrecy envelope.	The county has noticed that when you returned your ballot, you placed it in the ballot return envelope without placing it into the secrecy envelope that says "OFFICIAL ELECTION BALLOT." This means your ballot may not be counted. Your county offers you the opportunity to fix your ballot envelopes, and you should go to <a href="https://www.vote.pa.gov/Voting-in-PA/Pages/Return-Ballot.aspx">https://www.vote.pa.gov/Voting-in-PA/Pages/Return-Ballot.aspx</a> to get more information. If you cannot fix your ballot envelopes in time, you can go to your polling place on election day and cast a provisional ballot.
CANC – EMAIL BALLOT UND BATCH	This is used by SURE VR when an email ballot correspondence cannot be delivered to the absentee email address. Ballots with this type of response were automatically placed in an UND DEL absentee application batch.	Your ballot will not be counted because your emailed balloting materials have been returned as undeliverable.
CANC – EMAIL BALLOT UNDELIVERABLE	Cancels a ballot label that has been sent via email if the email has been returned as undeliverable.	Your email balloting materials were returned as undeliverable. Your county will send you a new paper ballot to the address on file.





	Recording a ballot label as CANCEL - Email Ballot Undeliverable will automatically queue a paper ballot label for the voter.	
CANCEL – INCORRECT DATE	This cancels the ballot if it is returned to the county with an incorrect date on the ballot envelope. It should only be used when the county has made a final decision as to the ballot, or it does not offer the opportunity to cure.	Your mail ballot may not be counted because you did not correctly date the declaration on your ballot return envelope. If you do not have time to request a new ballot before [Ballot Application Deadline Date], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.
CANCEL – LABEL CANCELLED	Used if a ballot label is misplaced or damaged and is cancelled in order to create another one; also used to generate 2 <sup>nd</sup> ballot labels.	Your ballot status has been updated to cancelled because your original ballot has been misplaced or damaged. A new ballot is being created and will be provided to you.  <b>No email generated.</b>
PENDING – NO ID	To be used by any county that has received a ballot for a voter who did not include the required ID, and who wants to alert the voter to this issue.	Your ballot application did not include valid identifying information, and your ballot was returned without the necessary ID. Your ballot will not be counted unless you bring valid identifying information to your county election official. You can find more information on the necessary ID here: <a href="https://www.vote.pa.gov/Voting-in-PA/Documents/DOS_Identification_for_absentee_voting.pdf">https://www.vote.pa.gov/Voting-in-PA/Documents/DOS_Identification_for_absentee_voting.pdf</a> .
CANCEL – NO DATE	Cancels the ballot if it is returned to the county with no date on the ballot envelope. It should only be used when the county has made a final decision as to	Your mail ballot may not be counted because you did not date the declaration on your ballot return envelope. If you do not have time to request a new ballot before [Ballot Application Deadline Date], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.



	the ballot, or it does not offer the opportunity to cure.	
CANC – NO ID	Cancels ballot if absentee or mail-in requiring ID is not provided.	Your ballot will not be counted because you did not timely provide proof of identification.
CANC – NO SECRECY ENVELOPE	Cancels ballot if county receives ballot and it is not in the inner secrecy envelope. It should only be used when the county has made a final decision as to the ballot, or it does not offer the opportunity to cure.	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 [Ballot Application Deadline Date], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.
CANC – NO SIGNATURE	Cancels the ballot if it is returned to the county with no signature on the ballot envelope. It should only be used when the county has made a final decision as to the ballot, or it does not offer the opportunity to cure.	Your ballot will not be counted because you did not sign the declaration on your ballot return envelope. If you do not have time to request a new ballot before [Ballot Application Deadline Date] or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.
CANC – REPLACED	Used to cancel a lost ballot if a replacement is sent.	No email generated.
CANC – RETURNED AFTER DEADLINE	After Deadline Cancels the ballot if it is invalid due to being returned after the deadline.	Your ballot will not be counted because it was received after the deadline.
CANC – UNDELIVERABLE	Cancels the ballot if it is returned undeliverable by the Post Office.	Your ballot will not be counted because it was returned as undeliverable by the United States Postal Service (USPS). If you do not have time to request a new ballot before [Ballot Application Deadline Date], or if the deadline has passed, you



		can go to your polling place on election day and cast a provisional ballot.
CANC – OTHER	The CANC– OTHER status reason should be used <i>only</i> when no other field more aptly applies. This may be for a secrecy envelope with disqualifying markings on it, or other issues that do not fall into another SURE categories. Do not use this code for any other cancellation reason.	The county has identified an error with your ballot envelope(s), and your ballot will not be counted. If you do not have time to request a new ballot before [Ballot Application Deadline Date], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.
CANC – VOTE CHALLENGED	Used if a ballot is not counted because of a successful challenge.	Your ballot will not be counted because of a successful challenge.
PEND – NOT YET RETURNED	Status the label is in after the ballot is sent and before it is returned.	No email generated.
RECORD – BALLOT RETURNED	Records the voter's ballot as returned prior to the deadline.	Your ballot has been received by [County Name] County as of [DateRecorded]. If your county election office identifies an issue with your ballot envelopes that prevents the ballot from being counted, you may receive another notification. Otherwise, you will not receive any further updates on the status of your ballot and you are no longer permitted to vote at your polling place location.
RECORD-FWAB RETURNED	Used to record a Federal Write In Ballot was received prior to the Official Ballot being returned.	Your ballot has been received by [CountyName] County as of [DateRecorded].
FWAB OVERRIDE-OFFICIAL BALLOT RECEIVED	Used to record an Official Ballot as returned and	Your ballot has been received by [CountyName] County as of [DateRecorded].





	overrides the Federal Write In Absentee Ballot previously recorded.	
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**Sample Emails:**

The email gives the voter notice that their ballot has been received and has additional language stating that the voter may receive further communication if an error is identified with their ballot.

**Subject Line:** Your Ballot Has Been Received

**Email Body:**

Dear [ApplicantName],

Your ballot has been received by [CountyName] County as of [DateRecorded].

Please note, if [CountyName] County observes an issue with your ballot envelopes, you may receive another email from this account with additional information. To get more information on your ballot's status, you can look it up at <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

If you have questions about your ballot, please contact [CountyName] County at [CountyContact].  
Thank you.

To read this information in Spanish, go to [ballot tracker URL] - In Spanish

To read this information in Chinese, go to [ballot tracker URL] - In traditional Chinese

\*\*\*\*Please do not reply to this email.\*\*\*\*

**FWAB Ballots**

**Subject Line:** Your Ballot Has Been Received

**Email Body:**

Dear [ApplicantName],

Your ballot has been received by [CountyName] County as of [DateRecorded]. To get more information on your ballot's status, you can look it up at <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

If you have questions about your ballot, please contact [CountyName] County at [CountyContact].  
Thank you.

To read this information in Spanish, go to [ballot tracker URL] - In Spanish

To read this information in Chinese, go to [ballot tracker URL] - In traditional Chinese



**TLP:AMBER+STRICT**

Department of State  
Statewide Uniform Registry of Electors (SURE) Project  
B 23.9.0\_County Release Notes  
March 11, 2024

\*\*\*\*Please do not reply to this email.\*\*\*\*

Your Ballot Status Has Changed

The email below is generated when certain cancel codes and pending codes are recorded in SURE VR.  
The second paragraph dynamic email language will be the same as shown in the table above.

**Subject Line:** Your Ballot Status Has Changed – Check for Updates

**Email Body:**

Dear [ApplicantName],

After your ballot was received by [CountyName] County, it received a new status.

(THE SECOND PARAGRAPH DYNAMIC EMAIL LANGUAGE WILL APPEAR HERE.)

You can get more information on your ballot's new status by going to  
<https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

If you have questions or need more information after checking your ballot's status, please contact  
[CountyName] County at [CountyContact].

To read this information in Spanish, go to [ballot tracker URL] – In Spanish

To read this information in Chinese, go to [ballot tracker URL] – In traditional Chinese

Thank you.

\*\*\*\*Please do not reply to this email.\*\*\*\*



## SURE VR Disconnects

Modifications to the SURE VR system to address county reported issues with the 'Add Last Scan Document' and 'Add Last Scan' buttons, stemming from a discovered issue with system disconnects from the 'Z Drive'. Currently, users must select a map drive button in CITRIX when this issue occurs. This release will include systematic logic to reconnect the drive when the system detects a disconnect has occurred.

- The system will now give an updated error message when an incorrect file format is being used.

Voter Applications

Address Not Verified New

Application App Status Correspondence HAVA Checks

Source: [v]  
[x] New

Last Name: [ ] Suffix: [v] First Name: [ ]

House #: 1/2 Dir: [v] Street Name: [ ] Zip Code: [v]

Address Line 2: [ ] Mail Addr Line 1: [ ]

Birth Date: [ ] SSN: [ ] Drivers Lic: [v]

Email Address: [ ]

App Date: 03/11/2024 Reg Date: [ ] Assistance: [v]

Old Name: [v] Title: [v] Last Name: [v] Suffix: [v] First Name: [ ] Middle Name: [ ] Voter Number: [ ]

Old Address: [v] House #: [v] Street Name: [v] Unit: [v] Unit #: [v] City: [v] State: [v] Zip Code: [v] County: [v]

Approve App Process App Delete App OK Cancel

Record [v] 0 of 0

Invalid Scan  
TIF format file not exists in Z:\Windows\temp  
OK



## PA VOTER SERVICES

### Election Ballot Status Tracker

In addition to the updates mentioned above, modifications have also been made to the PAVS Election Ballot Status Tracker for a voter wishing to view their ballot status for a ballot application as follows:

- The 'Ballot Type' column has been updated to display either "Absentee" or "Mail-In".
- The 'Status' column displays the Response Types associated to the ballot.
- Below each ballot line item will be a brief description of the status listed to give additional information to the voter.
- In the event multiple Response Types exist for an active election, then each of the ballot line items will be displayed along with the status of each ballot.

The tracker and all columns have been updated to appear in English, Spanish, and Traditional Chinese based on the selection made by the voter.

Please see the screenshots below:





**TLP:AMBER+STRICT**

Department of State  
Statewide Uniform Registry of Electors (SURE) Project  
B 23.9.0\_County Release Notes  
March 11, 2024

**You cannot use the tracker to track the status of a ballot voted in person on Election Day.**

First Name (as it appeared on your application)

Lee

Last Name (as it appeared on your application)

Johnson

Date of Birth (mm/dd/yyyy)

08/26/1963

County

LACKAWANNA

Submit

**Your Ballot Status Result(s)**

Ballot Type	Election	Application Received	Application Processed	Ballot Mailed On	Ballot Received	Status
Absentee	2024 GENERAL PRIMARY	02/16/2024	02/16/2024			CANC -- OTHER

The county has identified an error with your ballot envelope(s), and your ballot will not be counted. If you do not have time to request a new ballot before [April 06, 2024], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.

The table above provides a summary of your application and ballot status. The columns will update as your county processes your application or ballot. The status column will read as "Vote Recorded" after your county has received your voted ballot.

If you have any questions about the status of your ballot, please contact LACKAWANNA County at (570) 963-6737 or visit [www.vote.pa.gov/county](http://www.vote.pa.gov/county) for more information.

**Column Descriptions**

**Ballot Type** - Absentee or Mail-In

**Election** - The requested ballot is for this election.

**Application Received** - The date when your county received your application.

**Application Processed** - The date when your county processed your application.

**Ballot Mailed On** - The date when your county mailed your ballot to the address on your application.

**Ballot Received by County** - The date when your county received your voted ballot.

**Status** - The status of your ballot request is the last known state of where your ballot request stands.





#### Estado de la boleta electoral

Puede rastrear el estado de su **papeleta de voto por correo o en ausencia** completando los campos abajo. **No puede usar el rastreador para rastrear el estado de la papeleta que completó en persona el día de las elecciones.**

Nombre (tal y como aparecía en su solicitud)

Lee

Apellido (tal y como aparecía en su solicitud)

Johnson

Fecha de Nacimiento (MM/DD/YYYY)

08/26/1963

Condado

LACKAWANNA

Enviar

#### Resultado(s) del estado de su boleta

Tipo de boleta	Elección	Solicitud recibida	Solicitud procesada	Boleta enviada por correo	Boleta recibida	Estado
Absentee	2024 GENERAL PRIMARY	02/16/2024	02/16/2024			CANC – OTHER

El condado ha identificado un error en el (los) sobre(s) de su papeleta y su papeleta no será contada. Si no tiene tiempo para solicitar una nueva papeleta antes de la April 08, 2024, o si la fecha límite ya pasó, puede ir a su lugar de votación el día de las elecciones y emitir una papeleta provisional

El cuadro de arriba presenta un resumen de su solicitud y estado de boleta. Las columnas se actualizarán a medida que en su condado se procese su solicitud o boleta. En la columna de estado aparecerá "Vote Recorded" después de que su condado haya recibido su boleta de votación.

Si tiene alguna pregunta sobre el estado de su boleta, por favor comuníquese con el Condado de LACKAWANNA en (570) 963-6737 o visite [www.vote.pa.gov/county](http://www.vote.pa.gov/county) para más información.

#### Descripciones de las columnas

Tipo de boleta - Ausente o por correo

Elección - La boleta solicitada es para esta elección.

Solicitud recibida - La fecha en la que su condado recibió su solicitud.

Solicitud procesada - La fecha en la que su condado procesó su solicitud.

Boleta enviada por correo - La fecha en la que su condado le envió su boleta a la dirección que figura en su solicitud.

Boleta recibida por el condado - La fecha en la que su condado recibió su boleta de votación.

Estado - El estado de su solicitud de boleta es el último estado conocido en el que se encuentra su solicitud de boleta.



選票狀態

填寫下列欄位，即可追蹤您的郵寄或缺席選票狀態。若選票是在選舉日當天由本人投入，則您無法使用追蹤器進行追蹤。

名字 (如申請上所示)

Lee

姓氏 (如申請上所示)

Johnson

出生日期 (月/日/年)

08/26/1963

縣

LACKAWANNA

提交

您的選票狀態結果

選票類型	選舉	申請接收日期	申請處理日期	選票郵寄日期	選票已接收	狀態
Absentee	2024 GENERAL PRIMARY	02/16/2024	02/16/2024			CANC - OTHER

如果本縣發現您的選票信封有錯誤，您的選票將不予計數。如果您在 April 08, 2024 前沒有時間申請一張新選票，或如果截止日期已過，您可在選舉當日前往投票站投下一張臨時選票。

上表提供您申請與選票狀態的摘要。只要您的縣處理您的申請或選票，欄就會更新。縣收到您的投票選票之後，狀態欄就會變成「投票已記錄」。

若您對您的選票狀態有任何疑問，請聯絡 LACKAWANNA 縣 ((570) 963-6737)，或造訪 [www.vote.pa.gov/county](http://www.vote.pa.gov/county) 以獲取更多資訊。

備說明：

選票類型 - 缺席還是郵寄

選舉 - 申請的選票用於此選舉。

申請接收日期 - 您的縣收到您申請的日期。

申請處理日期 - 您的縣處理您申請的日期。

選票郵寄日期 - 您的縣將您的選票寄到您申請地址的日期。

縣收到選票日期 - 您的縣收到您投票選票的日期。

狀態 - 您選票申請的狀態是您選票申請最近的已知狀態。



## Election Ballot Status

Your **Mail-in or Absentee Ballot status** can be tracked by completing the fields below.  
You cannot use the tracker to track the status of a ballot voted in person on Election Day.

First Name (as it appeared on your application)

Jeff

Last Name (as it appeared on your application)

Penndot

Date of Birth (mm/dd/yyyy)

10/03/1965

County

LACKAWANNA

Submit

## Your Ballot Status Result(s)

Ballot Type	Election	Application Received	Application Processed	Ballot Mailed On	Ballot Received	Status
Mail-In	2024 GENERAL PRIMARY	03/06/2024	03/06/2024			PEND - NOT YET RETURNED
Your ballot has not yet been returned to LACKAWANNA county. The status of your ballot will be updated once the county receives your ballot.						
Absentee	2024 GENERAL PRIMARY	02/20/2024	02/20/2024			CANC - OTHER

The county has identified an error with your ballot envelope(s), and your ballot will not be counted. 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.

Note: The above shows multiple Response Types that are associated to the ballot.

Pages A86-A101 have been omitted pending resolution  
of an application to file under seal.



# Pennsylvania Provisional Voting Guidance

Date: March 11, 2024

Version: 2.1



## Background

This revised guidance addresses the issuance, voting, and examination of provisional ballots under the Election Code. Provisional ballots were originally mandated by section 302 of the Help America Vote Act of 2002 (HAVA).

Generally, under the applicable statutes, if a voter is not eligible to be issued a regular ballot, that voter is entitled to submit a provisional ballot at the polling place. Provisional ballots may be issued at the polling place until the close of polls on Election Day absent a court order extending voting hours.

## Using Provisional Ballots

Provisional ballots are utilized when a voter believes that they are eligible to vote, but the poll worker is unable to confirm the voter's eligibility. Provisional ballots permit the voter to submit a ballot, although the ballot is initially segregated from the regular ballots returned by voters whose eligibility was confirmed at the polls on Election Day. After Election Day, the county board of elections must adjudicate the provisional ballot voter's eligibility to vote. If the board determines that the voter is eligible and did not already vote in that election, then the provisional ballot is counted or partially counted, if applicable.

Voters are entitled to a provisional ballot when their eligibility to vote is uncertain. A poll worker must inform voters that they have a right to use a provisional ballot if their eligibility is uncertain. The circumstances which would create a situation where a voter may be issued a provisional ballot include, but are not necessarily limited to:

- Voter's name was not in the poll book or supplemental poll book.
  - For example, the voter reported to the wrong precinct, or
  - The voter did not report a recent change in residence to the county election office.
- Voter is required to show ID but cannot do so.
- Voter eligibility was challenged by an election official.
- Voter was issued an absentee or mail-in ballot but believes that they did not successfully vote the ballot, and the ballot and outer return envelope were not surrendered at the polling place to be spoiled.
- Voter returned a completed absentee or mail-in ballot that will be rejected by the county board of elections, and the voter believes they are eligible to vote.
- A special court order was issued with respect to the voter's status.
- A special court order was issued related to extending the hours of voting.

- Voter claims they are registered in a political party with which they are not affiliated (for primary elections only).

## Process for the Voter

Any voter who intends to submit a provisional ballot shall follow these steps:

- 1) Before receiving a provisional ballot, the voter must complete the sections on the provisional ballot envelope labeled Voter Information, Voter Affidavit for Provisional Ballot, and Current Address in front of election officials.
- 2) Upon completion of the above sections of the provisional ballot envelope, the voter must mark their provisional ballot.
- 3) After the voter marks their provisional ballot, they must seal their ballot in the secrecy envelope and then place the secrecy envelope in the provisional ballot envelope.
- 4) 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.
- 5) The voter must sign both the Voter Affidavit for Provisional Ballot and the front of the provisional ballot envelope.
- 6) The Judge of Elections and the Minority Inspector will then sign the affidavit after noting the reason for the provisional ballot.

Voters can check the status of their provisional ballot after the election by calling their county board of elections, checking the PA Voter Services website, or calling the PA Department of State.

*Note: The online provisional ballot search will return results only for the active election and cannot be used to search provisional ballots from previous elections.*

Voters will need to provide their provisional ballot number or their full name and date of birth to check the status of their provisional ballot.

- Voters can find the phone number for their county election office online at [vote.pa.gov/county](http://vote.pa.gov/county).
- The website for PA Voter Services is [vote.pa.gov/provisional](http://vote.pa.gov/provisional).
- The phone number for the PA Department of State is 1-877-VOTESPA (1-877-868-3772), option 6.

## Process for Poll Workers

Voters who requested an absentee or mail-in ballot may arrive at their polling place on Election Day seeking to vote. Poll workers should follow the instructions below for these voters.

- 1) For voters who were issued an absentee or mail-in ballot but **did not** successfully return their ballot to the board of elections:
  - a. These voters' names will be found in section 1 of the poll book, and the signature line will say either "Remit Absentee Ballot or Vote Provisionally" or "Remit Mail-in Ballot or Vote Provisionally."
    - i. Option A. If the voter has their unvoted absentee or mail-in ballot and outer envelope with them, the poll worker shall permit the voter to surrender their mail ballot and envelope and sign the Elector's Declaration to Surrender their Mail Ballot form (see **Appendix A**). After the voter does this, the poll worker shall allow the voter to vote by regular ballot the same as any other voter.
    - ii. Option B. If the voter is designated in the poll book as having been issued an absentee or mail-in ballot but the voter does not have their absentee or mail-in ballot and outer envelope with them, the voter may submit only a provisional ballot, and the poll worker shall offer them this option.
- 2) For voters who **did** successfully return their absentee or mail-in ballot:
  - a. If a voter was issued an absentee or mail-in ballot and successfully returned their ballot, their name will be found in section 2 of the poll book, and the signature line will say either "Absentee – Ballot Cast/Not Eligible" or "Mail-in – Ballot Cast/Not Eligible."
  - b. If a voter listed in section 2 of the poll book believes that they have not successfully voted their absentee or mail-in ballot or otherwise contests their ballot status, the poll worker must provide the voter a provisional ballot.

For **everyone** receiving a provisional ballot, poll workers must ensure that, before the provisional ballot is issued, the Voter Information, Voter Affidavit for Provisional Ballot, and Current Address sections on the provisional ballot envelope are completed by the voter. Again, the voter must sign **both** the Voter Affidavit for Provisional Ballot **and** the front of the provisional ballot envelope.

Poll workers must ensure that the voter signs their name in the presence of both the Judge of Elections and the Minority Inspector. Poll workers must also ensure that both the Judge of Elections and Minority Inspector sign the affidavit.

If polling place hours are extended beyond 8:00 p.m. on Election Day by court order, all votes submitted after 8:00 p.m. shall be submitted via provisional ballot only.

## Process for County Elections Officials

***Within seven days after the election, the county board of elections must review and make a determination for each provisional ballot cast on Election Day.***



Counties should notify parties and the public a week in advance of the date that election officials will meet to examine and reconcile provisional ballots during the post-election official count. Under no circumstance should the county board of elections schedule the meeting without providing the notice required by the Sunshine Act<sup>1</sup> for public meetings.

### Parameters for canvassing provisional ballots

- When determining whether to count a provisional ballot, the county board of elections must reconcile provisional ballots with ballots cast in person on Election Day and with returned absentee and mail-in ballots. If a voter cast an Election Day ballot or successfully voted an absentee or mail-in ballot, the provisional ballot shall not be counted.
- A county board of elections can approve a provisional ballot for counting only if the voter is qualified and eligible to vote in the election.
- When researching provisional ballots during the canvassing period, the county election staff should enter the voter's provisional voting information from the provisional envelope into the SURE system to maintain an accounting of the number of provisional ballots issued for the election.
- If a voter's mail-in or absentee ballot was rejected for a reason unrelated to the voter's qualifications, and the voter submitted a provisional ballot and meets other provisional ballot requirements, the provisional ballot shall be counted if the county determines that the voter is eligible to vote.<sup>2</sup>
- Counties are prohibited from counting a provisional ballot submitted by a qualified registered voter of another county.
- During the canvass, the county board of elections must determine, for each provisional ballot, whether:
  - The provisional ballot should be counted in full (i.e., all contests on the ballot are counted);
  - The provisional ballot should be partially counted (i.e., some contests but not all contests on the ballot are counted) and the reason(s) for the partial counting;

<sup>1</sup> 65 Pa.C.S. § 701, *et seq.*

<sup>2</sup> The Department agrees with the analysis of the Delaware County Court of Common Pleas in *Keohane v. Delaware County Board of Elections*, No. 2023-004458 (Sept. 21, 2023); *but see In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 (Pa. Commw. Ct. 2020) (unpublished).

- The provisional ballot is invalid because the voter successfully submitted another ballot; or
- The provisional ballot should be rejected for another reason(s) and the reason(s) for the rejection.

### Hearings for provisional ballots challenged during the canvass

If a provisional ballot is challenged during the canvass, the county board of elections must schedule a hearing within seven days of the challenge to consider the challenge and determine the disposition of the ballot. Additionally, notice shall be given where possible to the challenged provisional voter and to the attorney, watcher, or candidate who made the challenge.

- It is recommended that counties notify parties and the public of the hearing a week in advance of the date, noting that election officials will meet to examine and reconcile provisional ballots during the post-election official count. Under no circumstance should the county board of elections schedule the meeting without providing the notice required by the Sunshine Act<sup>3</sup> for public meetings.
- During the hearing, the county board of elections must decide whether to uphold or dismiss the challenge. The county board is not bound by the Pennsylvania Rules of Evidence. Any testimony presented must be stenographically recorded.

###

Version	Date	Description
1.0	3.5.2020	Initial document release
1.1	10.21.2020	Updated per Act 12 of 2020
2.0	10.12.2023	Updated to reflect judicial guidance
2.1	3.11.2024	Updated to implement clarifying edits and modified affidavit form.

<sup>3</sup> 65 Pa.C.S. § 701, *et seq.*

## **Elector's Declaration to Surrender Their Mail Ballot**

### **For the Voter:**

I hereby declare that I am a qualified registered elector who was issued an absentee or mail-in ballot for this election, but that I have not mailed or cast an absentee or mail-in ballot in this election. Instead, I am hereby remitting my absentee or mail-in ballot and its declaration envelope to the judge of elections at my polling place to be spoiled. I request that my absentee or mail-in ballot be voided, and that I be permitted to sign the poll book and vote a regular ballot.

I verify that the statements made in this declaration are true and correct to the best of my knowledge and belief. I understand that false statements made herein are subject to the criminal penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

---

(Printed Name of Elector)

---

(Signature of Elector)

---

(Address of Elector)

---

### **For Election Officials Only:**

I hereby declare I have received the voter's ballot and envelope containing the voter's declaration from the voter and I am spoiling it and permitting the voter to sign the poll book and vote a regular ballot.

---

(Printed Name of Judge of Elections)

---

(Judge of Elections Signature)

---

(Precinct)

Instructions after completion: This form should be attached to the voter's surrendered balloting material and returned in the [container] [bag] designated for spoiled ballots. Do not forget to check the **"BALLOT REMITTED?"** option next to the voter's name in the poll book.



FILED  
August 23, 2024 4:21 PM  
Office of the Prothonotary  
Washington County, Pennsylvania  
Notice of Judgment, Order or Decree  
Entered on August 23, 2024  
Pursuant to Pa.R.C.P. 236  
To all parties or counsel of record.  
See distribution list or docket for more information

# IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

## CIVIL DIVISION

CENTER FOR COALFIELD JUSTICE, )  
WASHINGTON BRANCH NAACP, )  
BRUCE JACOBS, JEFFREY MARKS, )  
JUNE DEVAUGHN HYTHON, )  
ERIKA WOROBEK, SANDRA MACIOCE, )  
KENNETH ELLIOTT, AND DAVID DEAN, )

Plaintiffs, )

vs. )

No. 2024-3953

WASHINGTON COUNTY BOARD OF )  
ELECTIONS, )

Defendant. )

vs. )

REPUBLICAN NATIONAL COMMITTEE and )

REPUBLICAN PARTY OF PENNSYLVANIA )

Intervenors.

## SUMMARY

According to current law, the Washington County Board of Elections may decide to have a policy that does not notify qualified electors of an error on their mail-in packets and an opportunity to cure the error. As the law stands today, it is clear that only the legislature can address that specific issue. However, any policy the Washington County Board of Elections adopts must not go beyond the scope of “notice and opportunity to cure” by including provisions which violate a qualified electors’ statutory rights. The current Washington County Board of Elections’ policy violates an elector’s right to challenge the canvass boards determination that there is an error on the mail-in packet.<sup>1</sup> The Washington County Board of Elections’ policy also seemingly violates the law by preventing a qualified elector from casting a provisional ballot when the elector has not “voted”.

<sup>1</sup> This Court uses the term mail-in packet to denote the entire item sent in by an elector including the ballot itself as well as the declaration envelope.

The Pennsylvania Supreme Court in *Pennsylvania Democratic Party v. Boockvar*<sup>2</sup>, resolved the issue of “notice and opportunity to cure.” The issues being addressed in this opinion are issues of first impression.

The procedural due process issue raised in this case is relatively straightforward. The legislature included a provision in the Election Code to allow electors the right to challenge the decision of the canvass board, an unelected body.<sup>3</sup> The policy adopted by the Washington County Board of Elections clearly did not give notice to any elector whose mail-in packet had an error and that their ballot would not be counted. The elector has a statutory right to challenge the decision of the canvass board. This challenge may not ultimately be successful; however, the elector still has a right to be heard by a fair and impartial tribunal. A governmentally appointed board does not have unfettered decision-making power to decide if a ballot will be cast and counted. The policy adopted by the Washington County Board of Elections clearly violated the statutory right to allow a person checks and balances against the government. Plaintiffs’ motion for summary judgment is GRANTED on this issue.

The Washington County Board of Elections shall notify any elector whose mail-in packet is segregated for a disqualifying error, so the voter has an opportunity to challenge (not cure) the alleged defects. The Washington County Board of Elections shall input the accurate status of the mail-in packet in the SURE system and provide the status to the elector if requested.

The next issue is whether a qualified elector whose mail-in packet has been segregated for a disqualifying error should be able to cast a provisional ballot. This issue is also addressed by Pennsylvania’s Election Code. 25 P.S. § 3150.16(2) provides that “[a]n elector who requests a

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<sup>2</sup> 662 Pa. 39, 238 A.3d 345 (2020).

<sup>3</sup> 25 P.S. § 3157.

mail-in ballot and who is not shown on the district register as having **voted** may vote by provisional ballot.”<sup>4</sup>

The legislature and current law do not define the word voted. Based on the current information this Court received, this Court finds an elector whose mail-in packet is segregated for a disqualifying error and whose ballot will not be counted, did not vote. Taking into consideration all of the information provided to this Court, the motions for summary judgment requested by all parties for this issue are DENIED. However, the plaintiff’s request for an injunction is GRANTED. The Washington County Board of Elections shall indicate in each district poll register a person whose mail-in packet is being segregated as a person who has not voted, allowing the individual to submit a provisional ballot at the polls.

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<sup>4</sup> Emphasis added.

## **OPINION AND ORDER**

AND NOW, this 23<sup>rd</sup> day of August, 2024, upon consideration of the cross-filed motions for Summary Judgment, the materials attached thereto, the Parties' Joint Stipulation of Facts, the deposition transcripts provided to the Court, and the arguments of Counsel, the Court ORDERS, ADJUDGES, and DECREES that the Plaintiff's Motion for Summary Judgment against Defendant Washington County Board of Elections is GRANTED in part and DENIED in part and Plaintiff's request for a permanent injunction is GRANTED in part. Defendant Washington County Board of Elections' and Intervenors Republican National Committee and Republican Party of Pennsylvania's Motions for Summary Judgment are DENIED. Defendant Washington County Board of Elections is hereby ordered to notify any elector whose mail-in packet is segregated for a disqualifying error, so the voter has an opportunity to challenge (not cure) the alleged defects. The Washington County Board of Elections shall input the accurate status of the mail-in packet in the SURE system and provide the status to the elector if requested.

Defendant Washington County Board of Elections is hereby ordered to properly document in the poll books that the elector has not "voted" when an elector's mail-in packet is segregated for a disqualifying defect in accordance with 25 P.S. § 3150.16 (which will allow the elector the opportunity to cast a provisional ballot) and choose the most appropriate selection in the SURE system to reflect as such.

## FACTUAL BACKGROUND

In 2023, the Washington County Board of Elections (“Board”) adopted a “notice and cure” policy regarding mail-in packets cast in the 2023 primary and general elections.<sup>5</sup> In conjunction with this policy, voters who submitted defective packets were notified and permitted to “cure” their packets by going to the Elections office to correct a defective signature, request a replacement mail-in packet, or vote a provisional ballot on Election Day.<sup>6</sup> At a meeting on March 12<sup>th</sup>, 2024, the Board discussed whether it would continue this policy for the 2024 primary election.<sup>7</sup> On April 11<sup>th</sup>, 2024, after mail-in packets had already been sent out, the Board voted to enact a policy that does not provide any notice or cure for mail-in packets.<sup>8</sup> Despite public comment opposing the Board’s decision and their awareness that 170 packets had already been segregated for disqualifying errors, the Board did not change their decision at an April 18<sup>th</sup>, 2024 meeting.<sup>9</sup>

In accordance with this policy, all packets received by the Elections office were marked in the State’s SURE system as “record – ballot returned” regardless of whether they were segregated for disqualifying errors or not.<sup>10</sup> Electors who inquired about the status of their mail-in packet were told whether their packet had been received, but were not informed if their packet had been segregated.<sup>11</sup> The poll books on election day indicated only whether a voter had requested a mail-in packet and whether that packet had been received, but did not note whether the packet had a

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<sup>5</sup> Joint Stip. of Facts, ¶ 26.

<sup>6</sup> *Id.* ¶ 27-28.

<sup>7</sup> *Id.* ¶ 29.

<sup>8</sup> *Id.* ¶ 31, 33-35.

<sup>9</sup> *Id.* ¶ 36-39.

<sup>10</sup> *Id.* ¶ 41-42.

<sup>11</sup> *Id.* ¶ 44.



disqualifying error.<sup>12</sup> No voters whose packets had been set aside cast a provisional ballot on election day and no voter plaintiff contested their vote under 25 P.S. § 3157.<sup>13</sup>

On May 17<sup>th</sup>, 2024, the Board responded to a Right-To-Know-Law request which revealed 259 timely received mail-in packets were not counted due to various errors including “incomplete date[s]”, “incorrect date[s]”, lack of signature, ect.<sup>14</sup> These mail-in packets accounted for 2% of all timely-received mail-in packets and included both Democratic and Republican voters.<sup>15</sup> On July 1<sup>st</sup>, 2024, Plaintiffs filed their Complaint against the Board alleging a violation of Plaintiffs’ Procedural Due Process. Plaintiffs are composed of the Center for Coalfield Justice (“CCJ”) and the Washington Branch NAACP (“Washington NAACP”), both non-profit organizations, as well as seven named voter plaintiffs.<sup>16</sup>

On July 3<sup>rd</sup>, 2024, Plaintiffs filed a motion for a preliminary injunction. Parties appeared before this Court on July 9<sup>th</sup>, 2024, to present this motion and engaged in a scheduling conference to expedite this matter. As a result, no ruling was made on this motion and the parties submitted a joint stipulation which was confirmed by this Court permitting the Republican National Committee and the Republican Party of Pennsylvania (“Republican Intervenors”) to intervene. The Joint Stipulation also agreed that the matter would be settled through motions for summary judgment and set forth a schedule for motions, briefs, response, and a stipulation of facts to be submitted to the Court. On July 26<sup>th</sup>, per the joint stipulation order, the parties filed a Joint Stipulation of Facts along with Motions for Summary Judgment and accompanying briefs. This Court heard Argument

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<sup>12</sup> *Id.* ¶ 46.

<sup>13</sup> *Id.* ¶ 49-50.

<sup>14</sup> *Id.* ¶ 51-52.

<sup>15</sup> *Id.* ¶ 52.

<sup>16</sup> *Id.* ¶ 1-4, 7-15.

on August 5<sup>th</sup>, 2024, regarding the motions for Summary Judgment filed by the Plaintiffs, Board, and Republican Intervenors, and this opinion and order follows.

## DISCUSSION

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”<sup>17</sup> “As the Supreme Court of the United States has explained, the right to vote comprises not just ‘the right of qualified voters within a state to cast their ballots,’ but also the right ‘to have their ballots counted.’”<sup>18</sup>

“A trial court should grant summary judgment only in cases where the record contains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”<sup>19</sup> The trial court “must accept as true all well-pleaded facts in the non-moving party's pleadings, and give to [them] the benefit of all reasonable inferences to be drawn therefrom.”<sup>20</sup> “[T]he court may grant summary judgment only when the right to such a judgment is clear and free from doubt.”<sup>21</sup> “If there is evidence that would allow a fact-finder to render a verdict in favor of the non-moving party, then summary judgment should be denied.”<sup>22</sup>

Further, to be awarded a permanent injunction, the party seeking relief must establish “(1) that his right to relief is clear, (2) that an injunction is necessary to avoid an injury that cannot be compensated by damages, and (3) that greater injury will result from refusing rather than granting

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<sup>17</sup> *Pennsylvania Democratic Party v. Boockvar*, 662 Pa. 39, 238 A.3d 345, 386-87 (2020).

<sup>18</sup> *Id.* at 387.

<sup>19</sup> *Bourgeois v. Snow Time, Inc.*, 242 A.3d 637, 649-50 (Pa. 2020), citing *Summers v. Certaineed Corporation*, 997 A.2d 1152, 1159 (Pa. 2010).

<sup>20</sup> *Jefferson v. State Farm Ins. Companies*, 551 A.2d 283, 284 (Pa. Super. 1988).

<sup>21</sup> *Erie Insurance Exchange v. Moore*, 175 A.3d 999, 1008 (Pa. Super. 2017)(citations omitted).

<sup>22</sup> *Reinoso v. Heritage Warminster SPE LLC*, 108 A.3d 80, 85 (Pa. Super. 2015), quoting *Mull v. Ickes*, 994 A.2d 1137, 1139-40 (Pa. Super. 2010).

the relief requested.”<sup>23</sup> “However, unlike a claim for a preliminary injunction, the party need not establish either irreparable harm or immediate relief and a court may issue a final injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law.”<sup>24</sup>

## **1. Justiciability Issues**

Before this Court can determine whether summary judgment should be granted on the merits of the case, issues related to the justiciability of the matter must be addressed.<sup>25</sup> Both the Board and the Republican Intervenors raised the issues of whether the Plaintiffs have standing, and whether the matter is either not yet ripe to be addressed or moot.<sup>26</sup> This Court addresses each issue as follows.

### **a. Standing**

To establish standing, “courts require a plaintiff to demonstrate he or she has been ‘aggrieved’ by the conduct he or she challenges.”<sup>27</sup> “To determine whether the plaintiff has been aggrieved, Pennsylvania courts traditionally examine whether the plaintiff’s interest in the outcome of the lawsuit is substantial, direct, and immediate.”<sup>28</sup> “A party’s interest is substantial when it surpasses the interest of all citizens in procuring obedience to the law; it is direct when the asserted violation shares a causal connection with the alleged harm; finally, a party’s interest is immediate when the causal connection with the alleged harm is neither remote nor speculative.”<sup>29</sup>

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<sup>23</sup> *City of Philadelphia v. Armstrong*, 271 A.3d 555, 560-61 (Pa. Commw. Ct. 2022) (quoting *Kuznik v. Westmoreland County Board of Commissioners*, 902 A.2d 476, 489 (Pa. 2006)).

<sup>24</sup> *Id.* (quoting *Buffalo Township v. Jones*, 813 A.2d 659, 663-64 (Pa. 2003)).

<sup>25</sup> *See, Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 481 (Pa. 2021).

<sup>26</sup> Defendant Washington Cnty. Bd of Elections Motion for Summary Judgment, ¶ 1-5; Intervenor’s Motion for Summary Judgment ¶ 5.

<sup>27</sup> *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 481 (Pa. 2021).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

### **i. Voters**

The Board alleges the voter plaintiffs lack standing because any harm they face is speculative and lacks a causal connection between the harm and relief.<sup>30</sup> Republican Intervenors allege voter plaintiffs lack standing because their interests are no different than any other voter in Washington County.<sup>31</sup> In response, the Plaintiffs argue it is not speculative that if subjected to the Board's policy during the general election,<sup>32</sup> if any errors are made on voter plaintiffs mail-in ballots, they will not know they made an error which caused their ballot to be disqualified or what kind of error was made.<sup>33</sup> Plaintiffs argue there is a direct causal connection between the relief they seek - being provided with information about whether their ballot was segregated due to a disqualifying error, and the harm they seek to address – their vote not counting, because having accurate information about their ballot would allow them to vote a provisional ballot, thereby providing a remedy.<sup>34</sup> Plaintiffs also argue the right to notice they are seeking under due process does not require a concrete relief, rather the pre-deprivation process itself is a form of relief.<sup>35</sup> In response to the arguments presented by the Republican Intervenors, Plaintiffs argue “the fundamental thrust of the ‘substantial interest’ inquiry is whether the Board’s actions have ‘some discernible adverse effect’ on Voter Plaintiffs’ procedural due process rights beyond an ‘abstract

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<sup>30</sup> Washington Cnty. Bd of Elections Br. in Support of Motion for Summary Judgment, p. 18.

<sup>31</sup> Intervenors’ Br. in Support of Motion for Summary Judgment, p. 23.

<sup>32</sup> The Board and Republican Intervenors argue that the Board has not yet decided what policy will be in place for the November general election, however, there has been no indication that the policy will be changed and therefore the policy used in the April primary is still in effect. “Past practice in 2023, what was followed in the primary, was again voted and decided to follow in the general election, so based on that, most likely it will be the same.” Ostrander Depo. Tr. 127:10-14.

<sup>33</sup> Pl. Omnibus Memo. of Law in Opposition, p. 45.

<sup>34</sup> *Id.* at 53-54.

<sup>35</sup> *Id.* at 54.

interest’ in ensuring the Board does not violate the Pennsylvania Constitution” and voter plaintiffs have “concrete, identifiable interests that distinguish them from the public at large.”<sup>36</sup>

After considering all the arguments, this Court finds the voter plaintiffs have a substantial interest in protecting their due process rights in the upcoming election. This Court finds the Board’s failure to notify the voter plaintiffs as to disqualifying errors deprived qualified electors the ability to challenge the decision made by the canvass board to reject the elector’s mail-in packet.<sup>37</sup> Electors also were deprived of their right to have an opportunity to cast a provisional ballot. Finally, this Court finds the voter plaintiffs’ interest is immediate as the November general election is only a few months away and voter plaintiffs intend to cast their votes via mail-in packets subject to the Board’s actions. As such, this Court finds the voter plaintiffs have standing.

## **ii. Organizational Standing**

The Board and Republican Intervenors both allege the organizational plaintiffs lack standing because “an organization’s expenditure of resources alone ordinarily does not confer standing,” and an organization cannot “base standing on the diversion of resources from one program to another” and because a causal connection is lacking.<sup>38</sup> Organizational Plaintiffs argue they have established cognizable legal interests in the litigation as the Board’s conduct interferes with their ability to conduct their respective missions by forcing them to mitigate the impact of the Board’s actions on their members.<sup>39</sup>

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<sup>36</sup> *Id.* at 44. *See also, Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975); *Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009).

<sup>37</sup> This Court notes that the Parties focused on whether there was a causal connection between harm and relief, however, this is not what the “direct” aspect of standing requires. A party’s interest “is direct when the asserted **violation** shares a causal connection with the alleged **harm.**” *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 481 (Pa. 2021) (emphasis added).

<sup>38</sup> Washington Cnty. Bd of Elections Br. in Support of Motion for Summary Judgment, p. 21; Intervenors’ Br. in Support of Motion for Summary Judgment, p. 26. *See also, Ball v. Chapman*, 289 A.3d at 19 n.103.

<sup>39</sup> Pl. Omnibus Memo. of Law in Opposition, p. 50-51.

Organizational plaintiffs must establish that their interest in the outcome of the lawsuit is substantial, direct, and immediate, the same as individual plaintiffs. Here, both Organizational Plaintiffs have programs targeted toward increasing civic engagement and voting participation.<sup>40</sup> Unlike members of the general public, the Organizational Plaintiffs business activities were directly interfered with by the Boards actions as they provide voting information to their members and the public in Washington County. Organizational plaintiffs' interests are direct because the Board's actions in failing to provide notice to individuals has interfered with organizational plaintiffs' ability to provide clear and accurate information in their civic engagement programs. Organizational plaintiffs' resources were drawn away from all other initiatives. This interest is immediate as it will remain ongoing through the November general election as organizational plaintiffs work to ensure their members are able to actively participate in the election process. Based on the above reasoning, this Court finds the organizational plaintiffs have standing in this matter.

## **b. Timing Issues**

### **i. Ripeness**

To decide whether the doctrine of ripeness bars consideration of an action, it must be determined “whether the issues are adequately developed for judicial review and what hardships the parties will suffer if review is delayed.”<sup>41</sup> Factors in an inquiry as to if the issues are adequately developed include: “whether the claim involves uncertain and contingent events that may not occur as anticipated or at all; the amount of fact finding required to resolve the issue; and whether the parties to the action are sufficiently adverse.”<sup>42</sup> “Under the ‘hardship’ analysis, we may address

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<sup>40</sup> Joint Stip. of Facts, ¶ 1, 3.

<sup>41</sup> *Twp. of Derry v. Pennsylvania Dep't of Lab. & Indus.*, 593 Pa. 480, 482, 932 A.2d 56, 58 (2007).

<sup>42</sup> *Id.*

the merits even if the case is not as fully developed as we would like, if refusal to do so would place a demonstrable hardship on the party.”<sup>43</sup> “[T]he justiciability doctrines of standing and ripeness are closely related because both may encompass allegations that the plaintiff’s harm is speculative or hypothetical and resolving the matter would constitute an advisory opinion.”<sup>44</sup> “However, ripeness is distinct from standing as it addresses whether the factual development is sufficient to facilitate a judicial decision.”<sup>45</sup>

The Board and Republican Intervenors argue the matter is not ripe as the alleged harm is entirely speculative.<sup>46</sup> Plaintiffs argue the matter is clearly ripe as the procedures put into place by the Board ahead of the April 2024 primary remain in place “unless and until the Board decides to change course.”<sup>47</sup> In considering all of the factors and arguments made, this Court finds although the Board may change its policy, the policy used at the April 2024 primary election is still in effect; the parties have stipulated to sufficient factual findings for this Court to resolve the issue, and the parties are sufficiently adverse. Additionally, this Court finds that even if the case could be developed more, doing so would place a hardship on the parties in not having a result in time for the November general election. Therefore, this Court finds that the matter is ripe to be addressed.

## **ii. Mootness**

“[A]t every stage of the judicial process, an actual case or controversy must usually exist to avoid dismissal for mootness.”<sup>48</sup> “Moreover, a change in the facts may render a case moot even

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<sup>43</sup> *Id.*

<sup>44</sup> *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 482 (Pa. 2021).

<sup>45</sup> *Id.*

<sup>46</sup> Washington Cnty. Bd of Elections Br. in Support of Motion for Summary Judgment, p. 18; Intervenors’ Br. in Support of Motion for Summary Judgment, p. 19.

<sup>47</sup> Pl. Omnibus Memo. of Law in Opposition, p. 40-42. Plaintiffs point to the fact that in 2023, the Board conducted a vote prior to the May primary but no new vote was held in September in order to continue the policy, therefore while the Board may meet to discuss whether or not to maintain the policy for the November 2024 general election, no vote will be needed unless the policy is being changed.

<sup>48</sup> *Erie Ins. Exch. v. Claypoole*, 673 A.2d 348, 353 (Pa.Super.Ct. 1996).

though it had once been actual.”<sup>49</sup> In addition to their claim the case is not ripe, the Board also claims that Plaintiff’s case is moot because the SURE-generated emails sent in response to the codes entered by the Election Office are being modified by the Pennsylvania Department of State for the November election.<sup>50</sup> In response, Plaintiffs argue even if this Court were to find the matter moot if the Board could guarantee all voter plaintiffs’ votes would be counted in November, it may still consider this matter for two reasons: 1) that the matter is capable of repetition yet evading review, and 2) that the matter is of public importance.<sup>51</sup>

This Court need not consider any exceptions to the mootness doctrine as this Court finds that Plaintiff’s claims are not moot. Any changes to the SURE generated emails do not address the issue of plaintiff voters and any other similarly situated individuals being unaware that their mail-in ballots have been segregated and will not be counted due to disqualifying errors.

## **2. Procedural Due Process**

Having determined the matter presented to this Court is justiciable, this Court’s analysis shifts to address Plaintiffs’ claim that the Board’s actions “concealing voters’ mail-in ballot status and affirmatively misleading many voters violates Plaintiffs’ procedural due process rights.”<sup>52</sup>

Under the United States Constitution, no state may “deprive any person of life, liberty, or property, without due process of law.”<sup>53</sup> “This axiom of American jurisprudence, termed procedural due process, ‘imposes constraints on governmental decisions which deprive individuals’ of any of these fundamental rights.”<sup>54</sup> “Courts examine procedural due process in two

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<sup>49</sup> *Id.*

<sup>50</sup> Washington Cnty. Bd of Elections Br. in Support of Motion for Summary Judgment, p. 16-17.

<sup>51</sup> Pl. Omnibus Memo. of Law in Opposition, p. 46.

<sup>52</sup> Pl. Compl. ¶ 153.

<sup>53</sup> U.S. CONST. amend. XIV § 1.

<sup>54</sup> *Washington v. PA Dep’t of Corr.*, 306 A.3d 263, 284 (Pa. 2023). *See also*, *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).



steps: the first asks whether there is a life, liberty, or property interest with which the state has interfered, and the second examines whether the procedure attendant to that deprivation are constitutionally sufficient.”<sup>55</sup>

“[T]he basic elements of procedural due process are ‘adequate notice, the opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction over the case.’”<sup>56</sup> “Importantly, the right to procedural due process is distinct from the right the government seeks to impair.”<sup>57</sup> “Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.”<sup>58</sup> Numerous issues related to Plaintiffs’ due process claim have been raised by the parties such as whether Plaintiffs’ claim is barred by the Legislative Act Doctrine, whether Plaintiffs have a cognizable liberty interest, and whether Plaintiffs’ claim has been previously decided under *Pennsylvania Democratic Party v. Boockvar*.<sup>59</sup> This Court addresses each issue and any related matters as follows.

#### **a. Legislative Act Doctrine**

“It is well settled that procedural due process concerns are implicated only by adjudications, not by state actions that are legislative in character.”<sup>60</sup> The Board and Republican Intervenors argue that Plaintiffs are challenging a purely legislative act by challenging the Board’s policy, and therefore their due process claim must fail.<sup>61</sup> In response, Plaintiffs argue they “are challenging the series of individualized determinations the election staff have made and will make

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<sup>55</sup> *S.F. v. Pennsylvania Dep’t of Hum. Servs.*, 298 A.3d 495, 510 (Pa. Commw. Ct. 2023). *See also, Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989).

<sup>56</sup> *S.F. v. Pennsylvania Dep’t of Hum. Servs.*, 298 A.3d 495, 510 (Pa. Commw. Ct. 2023).

<sup>57</sup> *Washington v. PA Dep’t of Corr.*, 306 A.3d 263, 285 (Pa. 2023).

<sup>58</sup> *Id.* *See also, Carey v. Piphus*, 435 U.S. 247, 259, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978).

<sup>59</sup> 662 Pa. 39, 238 A.3d 345 (2020).

<sup>60</sup> *Small v. Horn*, 554 Pa. 600, 613, 722 A.2d 664, 671 (1998).

<sup>61</sup> Washington Cnty. Bd of Elections Br. in Support of Motion for Summary Judgment, p. 23-24; Intervenors’ Br. in Support of Motion for Summary Judgment, p. 46.

going forward: to set aside a voter's mail ballot because it has a known disqualifying error on the envelope; to miscode that ballot in the SURE system so that the voter never knows the ballot will not count even though there is still time for the voter to preserve their fundamental right to vote; and ultimately to not count the voter's mail ballot.”<sup>62</sup>

“Adjudicative agency actions are those that affect one individual or a few individuals, and apply existing laws or regulations to facts that occurred prior to the adjudication. Agency actions that are legislative in character result in rules of prospective effect and bind all, or at least a broad class of, citizens.”<sup>63</sup> For example, a bulletin requiring all inmates to wear prison uniforms rather than civilian clothing<sup>64</sup> and a city-wide assessment value increase on taxable property<sup>65</sup> were legislative in character while a tax for the cost of paving a road abutting a group of landowners property<sup>66</sup> and a Department of Corrections policy for deducting funds from inmates accounts<sup>67</sup> were adjudicative.

Here, like in *Londoner* or *Washington*, the process of elections office staff screening and segregating mail-in ballots for those with disqualifying errors and then coding the ballot in the SURE system in a manner which provides no way for an individual voter to know that their ballot has been segregated affects a small portion of all mail-in voters and results in an adjudicative action.

Further, the Supreme Court of Pennsylvania has established that “a local ordinance is invalid if it stands ‘as an obstacle to the execution of the full purposes and objectives’ of the

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<sup>62</sup> Pl. Omnibus Memo. of Law in Opposition, p. 14.

<sup>63</sup> *Sutton v. Bickell*, 656 Pa. 278, 286, 220 A.3d 1027, 1032 (2019), quoting *Small v. Horn*, 554 Pa. 600, 613 n.12, 722 A.2d 664, 671 n.12 (1998).

<sup>64</sup> See, *Small v. Horn*, 554 Pa. 600, 722 A.2d 664 (1998).

<sup>65</sup> See, *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1915).

<sup>66</sup> See, *Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (1908).

<sup>67</sup> See, *Washington v. PA Dep't of Corr.*, 306 A.3d 263 (Pa. 2023).

General Assembly, as expressed in a state law.”<sup>68</sup> “To determine whether the county has created such an obstacle, we assess the effect of the challenged ordinance on the proper functioning and application of the state enactment.”<sup>69</sup> “If the local ordinance impedes the operation of the state statute, the ordinance is preempted.”<sup>70</sup> “County legislation tailored to the particular locality is permitted, if the enactment merely aids and furthers the goals of the state statute.”<sup>71</sup> “But, ‘local legislation cannot permit what a state statute or regulation forbids or prohibit what state enactments allow.’”<sup>72</sup>

As this Court finds that the Board’s policy is an adjudicative action and that this Court may properly examine whether the Board’s policy is valid under state law, this Court finds that the Plaintiffs’ claims are not barred by the Legislative Acts Doctrine.

#### **b. Liberty Interest at stake in Due Process**

“In order to determine whether a constitutional violation has occurred, a determination must initially be made that a protected liberty interest exists and, if so, what process is due.”<sup>73</sup> “Protected liberty interests may be created by either the Due Process Clause itself or by state law.”<sup>74</sup> The Board and Republican intervenors argue that Plaintiffs lack an underlying liberty interest protected by due process as no Pennsylvania Court has ever held that voting is a liberty interest protected by due process.<sup>75</sup> Plaintiffs argue “[t]his position is directly at odds with the

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<sup>68</sup> *Fross v. Cnty. of Allegheny*, 610 Pa. 421, 438, 20 A.3d 1193, 1203 (2011) (quoting *Holt's Cigar Co. v. City of Philadelphia*, 608 Pa. 146, 10 A.3d 902, 907 (2011)).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (quoting *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855, 862 (2009)).

<sup>73</sup> *Wilder v. Dep't of Corr.*, 673 A.2d 30, 32 (Pa. Commw. Ct. 1996).

<sup>74</sup> *Id.* See also, *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995); *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

<sup>75</sup> Washington Cnty. Bd of Elections Br. in Support of Motion for Summary Judgment, p. 25-28; Intervenors’ Br. in Support of Motion for Summary Judgment, p. 39-40.

Pennsylvania Supreme Court's recognition of the inextricable link between the Pennsylvania Constitution's enumerated fundamental rights and the interests protected by the Due Process Guarantee. The Board's view also flies in the face of the origins of the right to vote in the constitution, and its place in the Declaration of Rights alongside entitlements to other individual freedoms."<sup>76</sup>

Here, this Court finds that it is the right to challenge the decisions made by the county board at the canvass that constitute a liberty interest. Under 25 P.S. § 3157, "any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election...may appeal therefrom within two days after such order or decision shall have been made...setting forth why he feels that an injustice has been done, and praying for such order as will give him relief." At deposition, Director of the Washington County Board of Elections, Melanie Ostrander, confirmed that electors have the right to challenge the canvass board:

Q: For someone whose ballot is not counted because it's missing a signature or a date, do they have a right to challenge that action or appeal from that decision if you know?

A: During the canvass, the voter can challenge a decision made by the canvass board.

Protected liberty interests for purposes of procedural due process may be created by state law. Here, Pennsylvania has created a statutory right to receive due process regarding decisions made by the county board canvassing election returns. Additionally, under 25 P.S. 3150.16(2), electors have a statutory right to cast a provisional ballot if they are not shown on the district register as having voted. It is these protected liberty interests at issue in Plaintiffs complaint. As such, this Court must determine what process is due and whether Constitutional violations have occurred.

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<sup>76</sup> Pl. Omnibus Memo. of Law in Opposition, p. 17-18.

**c. *Anderson/Burdick* test vs *Mathews* test**

Having found that the Plaintiffs set forth a cognizable liberty interest for procedural due process, this Court will proceed to a due process analysis.

In examining whether the procedures associated with any deprivation of Plaintiffs' right to challenge canvass decisions made by the canvass board are constitutionally sufficient or whether Plaintiffs' due process rights have been violated, this Court must first decide upon the applicable standard. Plaintiffs argue that the applicable test is a three-part balancing test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976).<sup>77</sup> The *Mathews* test "determine[s] what procedural due process requires in a given context...balanc[ing] (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures."<sup>78</sup> The Board argues that the appropriate test is the *Anderson/Burdick* framework.<sup>79</sup> Under *Anderson/Burdick*, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'"<sup>80</sup> "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of

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<sup>77</sup> Pl. Omnibus Memo. of Law in Opposition, p. 22-25.

<sup>78</sup> *C.S. v. Commonwealth, Dep't of Hum. Servs., Bureau of Hearings & Appeals*, 184 A.3d 600, 607 (Pa. Commw. Ct. 2018).

<sup>79</sup> Washington Cnty. Bd of Elections Br. in Support of Motion for Summary Judgment, p. 35-39. This Court notes the Republican Intervenors do not make this argument.

<sup>80</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992)).

voters, ‘the State's important regulatory interests are generally sufficient to justify the restrictions.’”<sup>81</sup>

Considering all of the parties’ arguments, this Court finds that the appropriate test is *Mathews*. As such, this Court balances (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures.<sup>82</sup>

#### **d. Free and Fair Elections vs Due Process**

Further, the Board and Republican Intervenors argue if this Court finds that Plaintiffs’ claim has not yet been barred by the preceding reasons discussed above, it is precluded by the Pennsylvania Supreme Court’s decision in *Pennsylvania Democratic Party v. Boockvar*, 662 Pa. 39, 238 A.3d 345 (2020).<sup>83</sup> The Board and Republican Intervenors argue “the Pennsylvania Supreme Court has found that no constitutional, statutory, or legal right to notice and an opportunity to cure a defective mail-in ballot exists.”<sup>84</sup> In *Pennsylvania Democratic Party v. Boockvar*, Petitioners filed suit against Secretary of the Commonwealth and all 67 County Election Boards regarding a number of issues related to mail-in voting.<sup>85</sup> The issue raised in *Pennsylvania Democratic Party v. Boockvar* relevant here is whether Boards of Election should be required to “contact qualified electors whose mail-in or absentee ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail, and provide them

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<sup>81</sup> *Id.*

<sup>82</sup> *C.S. v. Commonwealth, Dep’t of Hum. Servs., Bureau of Hearings & Appeals*, 184 A.3d 600, 607 (Pa. Commw. Ct. 2018).

<sup>83</sup> Washington Cnty. Bd of Elections Br. in Support of Motion for Summary Judgment, p. 28-29; Intervenors’ Br. in Support of Motion for Summary Judgment, p. 27-29.

<sup>84</sup> *Id.* at 28 (citing *Pennsylvania Democratic Party v. Boockvar*, 662 Pa. 39, 238 A.3d 345, 372-74 (2020)). See also, Intervenors’ Br. in Support of Motion for Summary Judgment, p. 27.

<sup>85</sup> 662 Pa. 39, 51, 238 A.3d 345, 352 (2020).

with an opportunity to cure those defects.”<sup>86</sup> In supporting their claims, Petitioner in *Pennsylvania Democratic Party v. Boockvar* relied upon the Free and Equal Elections Clause.<sup>87</sup> The Court in *Pennsylvania Democratic Party v. Boockvar* denied Petitioner’s claim on this matter concluding that “the Boards are not required to implement a ‘notice and opportunity to cure’ procedure for mail-in and absentee ballots that voters have failed out incompletely or incorrectly.”<sup>88</sup> The Court further stated “[p]ut simply, as argued by the parties in opposition to the requested relief, Petitioner has cited no constitutional or statutory basis that would countenance imposing the procedure Petition seeks to require...”<sup>89</sup>

Unlike in *Pennsylvania Democratic Party v. Boockvar*, Plaintiffs here do not argue that relief should be granted under the Free and Equal Elections Clause, rather the actions of the Board are a violation of Plaintiffs due process rights. As the Petitioners in *Pennsylvania Democratic Party v. Boockvar* did not raise due process and the Pennsylvania Supreme Court therefore did not conduct a due process analysis, their holding does not bar Plaintiffs’ claim before this Court.

**i. Notice under 25 P.S. § 3157 vs “notice and opportunity to cure”**

Additionally, the matter before this Court is distinguishable from *Pennsylvania Democratic Party v. Boockvar* as Plaintiffs are not asking this Court to direct the Board to adopt a “notice and opportunity to cure” policy.<sup>90</sup> Instead “Plaintiffs are asking for pre-deprivation notice under Article I, Section 1 of the Pennsylvania Constitution so voters have an opportunity to exercise their right to vote.”<sup>91</sup> As set forth above, “the basic elements of procedural due process are ‘adequate notice, the opportunity to be heard, and the chance to defend oneself before a fair and

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<sup>86</sup> *Pennsylvania Democratic Party*, 662 Pa. 39, 83, 238 A.3d 345, 372 (2020).

<sup>87</sup> *Id.* at 84, 372. *See also* Pa. Const. art. I, § 5.

<sup>88</sup> *Id.* at 86, 374.

<sup>89</sup> *Id.*

<sup>90</sup> Pl. Omnibus Memo. of Law in Opposition, p. 5.

<sup>91</sup> *Id.* at 5-6.

impartial tribunal having jurisdiction over the case.”<sup>92</sup> As such, the issue before this Court is merely whether electors have a right to know that their vote will not be counted and be afforded the opportunity to challenge the canvass board’s decision. This case does not attempt to overturn or contradict the holding of *Pennsylvania Democratic Party v. Boockvar* as it relates to the Free and Fair Election Clause and “notice and opportunity to cure.”

Here, Pennsylvania Election law provides electors a clear and unequivocal right to challenge the decisions made by the canvass board under 25 P.S. § 3157. As set forth above, “any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election...may appeal therefrom within two days after such order or decision shall have been made...setting forth why he feels that an injustice has been done, and praying for such order as will give him relief.”<sup>93</sup> This is the private interest affected under *Mathews*. The risk of erroneous deprivation of that interest is high as electors have no notice that their ballot has been segregated and presumptively will not be counted. The burden on the government is low as there is a framework in place where a different entry code can be placed into a computer to provide notice to an elector that their ballot will not be counted and is subject to challenge. Also, the great staff in the elections office have proven to be more than capable of contacting electors based on the Board’s 2023 policy. Weighing all of these factors, this Court finds that under the *Mathews* test, the Board has violated Plaintiffs procedural due process.

In the alternative, if this Court were to evaluate Plaintiffs’ due process claims under the *Anderson/Burdick* framework as proposed by the Board, the result remains the same. Here, the Board’s regulation burdens Plaintiffs’ First and Fourteenth Amendment rights by depriving them of any notice whatsoever that their ballot – their vote – will not be counted. This lack of notice

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<sup>92</sup> *S.F. v. Pennsylvania Dep’t of Hum. Servs.*, 298 A.3d 495, 510 (Pa. Commw. Ct. 2023).

<sup>93</sup> 25 P.S. § 3157.



further deprives Plaintiffs any meaningful ability to challenge this decision.<sup>94</sup> This Court finds no state interest of compelling importance supported by this regulation. Therefore, even under the test proposed by the Board, the Board's regulation fails as it violates Plaintiffs' due process rights.

Therefore, this Court finds that there is no issue of material fact and Plaintiffs' are entitled to judgment as a matter of law and grants Plaintiffs' motion for summary judgment on this issue.

**ii. "Cure" vs Provisional ballot and the Pennsylvania Election Law under 25 P.S. § 3150.11, 25 P.S. § 3150.16, and 25 P.S. § 3050.**

The Board and Republican Intervenors argue that the relief sought by plaintiffs is illusory as provisional ballots cannot be used to "cure" deficient mail-in ballots.<sup>95</sup> The Board and Republican Intervenors also argue any grant of relief in favor of the Plaintiffs would essentially force this Court to rewrite election law.<sup>96</sup> Plaintiffs argue voting a provisional ballot is not "curing" as "the federal Help America Vote Act ("HAVA") and the Pennsylvania Election Code have long mandated the availability of provisional voting as a distinct failsafe to prevent voter disenfranchisement."<sup>97</sup>

According to Miriam Webster dictionary, "to cure" is defined as "1) to restore to health, soundness, or normality, 2) to bring about recovery from, or 3) to deal with in a way that eliminates or rectifies."<sup>98</sup> For the 2023 election cycle, Washington County adopted a voluntary "notice and cure" policy. Under this policy, if a voter's ballot was segregated for a disqualifying error, such as a missing or incorrect date, or a missing signature, the voter could come into the elections' office

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<sup>94</sup> The Board argued at the hearing that any elector wishing to challenge whether their ballot will count or not is able to attend the canvass board meeting which is advertised on the Board's website. This Court likens this procedure to conducting a sheriff's sale of property without any advertisement of which properties are to be sold and expecting any concerned individual to appear to ensure that their property is not one affected.

<sup>95</sup> Washington Cnty. Bd of Elections Br. in Support of Motion for Summary Judgment, p. 24-26; Intervenors' Br. in Support of Motion for Summary Judgment, p. 30-34.

<sup>96</sup> Washington Cnty. Bd of Elections Br. in Support of Motion for Summary Judgment, p. 14-15, 19; Intervenors' Br. in Support of Motion for Summary Judgment, p. 29, 44.

<sup>97</sup> Pl. Omnibus Memo. of Law in Opposition, p. 9.

<sup>98</sup> *Cure*, Miriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/cure>, accessed August 14<sup>th</sup>, 2024.

and sign the declaration envelope to resolve a missing signature or fill out a new ballot and declaration envelope to resolve a missing or incorrect date.<sup>99</sup> These methods enabled voters to restore or recover their mail-in ballot. On the other hand, a provisional ballot is a separate ballot entirely. “A provisional ballot records your vote while the county board of elections determines whether it can be counted.”<sup>100</sup> Further, in *Pennsylvania Democratic Party v. Boockvar*, the Court makes no mention of provisional ballots, rather it agreed with respondents that procedures to “cure” minor or facial defects are best left to the legislature to address the precise contours.<sup>101</sup> Upon this analysis, this Court finds that the process of a voter submitting a provisional ballot is not a “cure” of their deficient mail-in packet, but an altogether independent action. It is important to point out that are proper safeguards in place to ensure double voting does not occur and that the integrity of our elections is upheld.

Nevertheless, the Board and Republican Intervenors argue that the Election Code prohibits a provisional ballot from being counted if the elections office has received and found a voter’s mail-in ballot deficient.<sup>102</sup> The Elections code addresses mail-in voting and provisional ballots in primarily three Sections: 25 P.S. § 3150.11, 25 P.S. § 3150.16, and 25 P.S. § 3050. Under 25 P.S. § 3150.11(a), “a qualified mail-in elector shall be entitled to **vote** by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article.”<sup>103</sup> 25 P.S. § 3150.16 dictates that “(1) [a]ny elector who receives and **votes** a mail-in ballot under section 1301-D1<sup>104</sup> shall not be eligible to vote at a polling place on election day. The district

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<sup>99</sup> Ostrander Depo. Tr. 40:1-11, 42:22-43:6.

<sup>100</sup> Voting by Provisional Ballot, Official Website of the Commonwealth of Pennsylvania, <https://www.pa.gov/en/agencies/vote/voter-support/provisional-ballot.html>, accessed August 14<sup>th</sup>, 2024.

<sup>101</sup> 662 Pa. 39, 83-86, 238 A.3d 345, 372-74 (2020).

<sup>102</sup> Washington Cnty. Bd of Elections Br. in Support of Motion for Summary Judgment, p. 24; Intervenors’ Br. in Support of Motion for Summary Judgment, p. 32.

<sup>103</sup> Emphasis added.

<sup>104</sup> 25 P.S. § 3150.11.

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 and (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 section 1210(a.4)(1)<sup>105</sup>.<sup>106</sup> Finally under 25 P.S. § 3050(5)(ii)(F), “[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.”<sup>107</sup>

When read individually, each statute appears clear and unambiguous, however, reading them *in pari materia* they appear to conflict, and this Court must examine further to determine if ambiguity truly exists. “A statute is ambiguous when there are at least two reasonable interpretations of the text.”<sup>108</sup> In construing and giving effect to the text, “we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear.”<sup>109</sup> The United States Supreme Court also takes a contextual approach in assessing statutes and in determining predicate ambiguity.<sup>110</sup>

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<sup>105</sup> 25 P.S. § 3150.11.

<sup>106</sup> Emphasis added.

<sup>107</sup> Emphasis added.

<sup>108</sup> *A.S. v. Pennsylvania State Police*, 636 Pa. 403, 418-19, 143 A.3d 896, 905-06 (2016). *See Freedom Med. Supply*, 131 A.3d at 984; *Warrantech Consumer Prod. Servs. v. Reliance Ins. Co. in Liquidation*, 626 Pa. 218, 96 A.3d 346, 354–55 (2014); *Delaware County v. First Union Corp.*, 605 Pa. 547, 992 A.2d 112, 118 (2010).

<sup>109</sup> *Id.* at 420, 906.

<sup>110</sup> *See generally King v. Burwell*, — U.S. —, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) (“If the statutory language is plain, we must enforce it according to its terms. But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, **we must read the words in their context and with a view to their place in the overall statutory scheme.**” (internal quotation marks and citations omitted and emphasis added)); *Yates v. United States*, — U.S. —, 135 S.Ct. 1074, 1081–82, 191 L.Ed.2d 64 (2015) (“Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, ‘[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.’ Ordinarily, a word’s usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.” (internal citations omitted)).

“The Statutory Construction Act provides that the object of all statutory interpretation ‘is to ascertain and effectuate the intention of the General Assembly.’”<sup>111</sup> “Generally, the best expression of the General Assembly's intent ‘is found in the statute's plain language.’”<sup>112</sup> “When 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.”<sup>113</sup> “Moreover, ‘we should not insert words into [a statute] that are plainly not there.’”<sup>114</sup> “Only in instances of ambiguous statutory language ‘may courts consider statutory factors to discern legislative intent.’”<sup>115</sup> “Words and phrases shall be construed according to rules of grammar and according to their common and approved usage,” though “technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in [the Statutory Construction Act] shall be construed according to such peculiar and appropriate meaning or definition.”<sup>116</sup> “We also presume that ‘the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable,’ and that ‘the General Assembly intends the entire statute to be effective and certain.’”<sup>117</sup>

Here, the statutory scheme under 25 P.S. § 3150.11, 25 P.S. § 3150.16, and 25 P.S. § 3050 is ambiguous as 25 P.S. § 3150.16(2) provides that “[a]n elector who requests a mail-in ballot and who is not shown on the district register as having **voted** may vote by provisional ballot” while 25 P.S. § 3050 states 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.” There is no argument that “received” means when the ballot is delivered by mail to the elections office or brought to the

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<sup>111</sup> *Commonwealth v. Coleman*, 285 A.3d 599, 605 (Pa. 2022), citing 1 Pa. C.S. § 1921(a).

<sup>112</sup> *Id.* citing *Commonwealth v. Howard*, — Pa. —, 257 A.3d 1217, 1222 (2021).

<sup>113</sup> 1 Pa. C.S. § 1921(b).

<sup>114</sup> *Commonwealth v. Coleman*, 285 A.3d 599, 605 (Pa. 2022), citing *Frazier v. Workers’ Comp. Appeal Bd. (Bayada Nurses, Inc.)*, 616 Pa. 592, 52 A.3d 241, 245 (2012).

<sup>115</sup> *Id.* citing *Commonwealth v. Howard*, — Pa. —, 257 A.3d 1217, 1222 (2021).

<sup>116</sup> 1 Pa. C.S. § 1903(a).

<sup>117</sup> *Berner v. Montour Twp. Zoning Hearing Bd.*, 655 Pa. 137, 217 A.3d 238, 245 (2019) (quoting 1 Pa. C.S. § 1922(1)-(2)). *Commonwealth v. Coleman*, 285 A.3d 599, 605 (Pa. 2022).

elections office in person. The meaning of “voted” is not so straightforward. The Board argues that an elector has “voted” a mail-in ballot when they remit it either by placing it in the mail or handing it over at the elections office regardless of any possible defect. However, common sense meaning of the word “voted” denotes an expectation that the opinions expressed through that vote will be counted.<sup>118</sup>

When an elector votes at a polling place, they know their vote is counted once their paper ballot is scanned into the machine. To the contrary, mail-in packets with a disqualifying error are never opened and the ballot remains in the packet. It is clear that an elector whose mail-in packet is deemed to have a disqualifying error did not vote.

Nonetheless, this Court finds that “accept[ing] as true all well-pleaded facts in the [Board and Republican Intervenor’s] pleadings, and [giving] [them] the benefit of all reasonable inferences to be drawn therefrom” summary judgment is inappropriate, and the Board and Republican Intervenor’s should have the opportunity to explore this issue further.<sup>119</sup>

Although, summary judgment is denied on this issue, this Court finds that a permanent injunction is appropriate. To be awarded a permanent injunction, the party seeking relief must establish “(1) that his right to relief is clear, (2) that an injunction is necessary to avoid an injury that cannot be compensated by damages, and (3) that greater injury will result from refusing rather than granting the relief requested.”<sup>120</sup> “However, unlike a claim for a preliminary injunction, the party need not establish either irreparable harm or immediate relief and a court may issue a final

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<sup>118</sup> See, 52 USCA § 10101(e) (“When used in this subsection, the word “vote” includes **all action necessary to make a vote effective** including, but not limited to, registration or other action required by State law prerequisite to voting, **casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast** with respect to candidates for public office and propositions for which votes are received in an election.”) (emphasis added).

<sup>119</sup> *Jefferson v. State Farm Ins. Companies*, 551 A.2d 283, 284 (Pa. Super. 1988).

<sup>120</sup> *City of Philadelphia v. Armstrong*, 271 A.3d 555, 560-61 (Pa. Commw. Ct. 2022) (quoting *Kuznik v. Westmoreland County Board of Commissioners*, 902 A.2d 476, 489 (Pa. 2006)).

injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law.”<sup>121</sup>

Here, this Court finds Plaintiffs have established a right to relief, an injunction is necessary to avoid an injury that cannot be compensated by damages, and greater injury will result by the refusal of the relief requested. As such, this Court finds the most uniform resolution is to GRANT a preliminary injunction as requested by Plaintiffs and directs that the elections office must properly document in the poll books that the elector whose mail-in packet is segregated for a disqualifying error has not “voted” in accordance with 25 P.S. § 3150.16 and choose the most appropriate selection in the SURE system to reflect as such.<sup>122</sup>

### CONCLUSION

For the reasons set forth above, this Court finds there are no genuine issues of material fact and Plaintiffs are entitled to judgment as a matter of law regarding their right to notice regarding their ballot status in order to challenge the canvass board’s decisions. As such, Plaintiffs’ motion for summary judgment is GRANTED in that regard. Defendant Washington County Board of Elections is hereby ordered to notify any elector whose mail-in packet is segregated for a disqualifying error, so the voter has an opportunity to challenge (not cure) the alleged defects. The Washington County Board of Elections shall input the accurate status of the mail-in packet in the SURE system and provide the status to the elector if requested.

This Court finds that as there are genuine issues of material fact regarding all other matters, therefore, the remainder of the motion for summary judgment filed by the Plaintiffs, as well as the motions for summary judgment filed by Defendant Washington County Board of Elections and

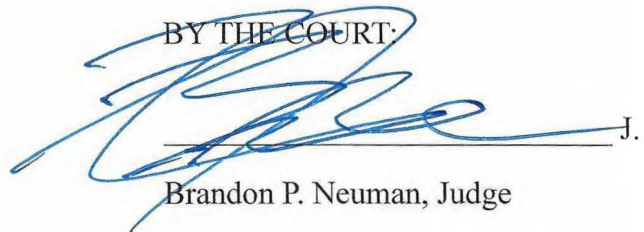
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<sup>121</sup> *Id.* (quoting *Buffalo Township v. Jones*, 813 A.2d 659, 663-64 (Pa. 2003)).

<sup>122</sup> This Court acknowledges that this injunction will not provide relief for *every* elector, however, it is the most uniform resolution available.

Intervenors Republican National Committee and Republican Party of Pennsylvania are all DENIED. Plaintiffs' request for a permanent injunction is GRANTED and Defendant Washington County Board of Elections shall properly document in the poll books that the elector whose mail-in packet is segregated for a disqualifying error has not "voted" in accordance with 25 P.S. § 3150.16 and choose the most appropriate selection in the SURE system to reflect as such.

BY THE COURT:



J.

Brandon P. Neuman, Judge



IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION AT LAW

SONJA KEOHANE, RICHARD KEOHANE :  
and BARBARA WELSH :  
v. :  
DELAWARE COUNTY BOARD OF :  
ELECTIONS :

No.: 2023-004458

ORDER

AND NOW, this 21<sup>st</sup> day of September, 2023, upon consideration of the Motion for Judgment on the Pleadings of Petitioners Sonja Keohane, Richard Keohane, and Barbara Welsh, a Memorandum of Law in support thereof, Respondent Delaware County Board of Elections' response to the Motion in which Respondent does not oppose the relief requested by Petitioners, and Petitioners' reply in support of the Motion, it is ORDERED that the Motion for Judgment on the Pleadings is GRANTED. It is further ORDERED that Respondent is directed to count Petitioners' provisional ballots submitted at their respective polling places on Primary Election Day, May 16, 2023, and amend the official vote count from the May 2023 Primary Election to include the votes indicated on Petitioners' provisional ballots. In support of the foregoing, the Court hereby sets forth the following:

1. The facts of this case are not in dispute as this matter concerns the decision of Respondent Delaware County Board of Elections ("the Board") not to count three provisional ballots submitted by Petitioners, who each voted by mail but whose mail-in ballots were canceled due to disqualifying defects on the outer envelopes;
2. In each instance, the Board contacted Petitioners and provided a "notice and cure letter" explaining the opportunity to cure the defective ballots in person at the Board's



office in Media, Delaware County, Pennsylvania or to request a replacement ballot be issued by mail in advance of primary Election Day, May 16, 2023;

3. The Petitioners did not request replacement ballots nor appear in person in Media, Delaware County, Pennsylvania to avail themselves of the “notice and cure” procedure offered by the Board but rather each Petitioner voted provisionally at their polling place on primary Election Day, May 16, 2023;

4. Subsequently, at the provisional ballot challenge hearing, the Board voted to not count these ballots based on *In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 (Pa.Cmwlt. 2020) which stands for the proposition that voters who have cast another ballot and/or whose ballots have been timely received by the Board may not have subsequent provisional ballots counted;

5. This Court recognizes the Election Code contains two provisions which are at issue and relate to casting a provisional ballot following an unsuccessful attempt to cast a mail-in or absentee ballot. The first subsection states that “[e]xcept as provided in clause (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.” 25 P.S. § 3050(a.4)(5)(i);

6. The second subsection states that a provisional ballot “shall not be counted” if “the elector’s absentee ballot or mail-in ballot are timely received by a county board of elections.” 25 P.S. § 3050(a.4)(5)(ii)(F);

7. To the extent there is any ambiguity between § 3050(a.4)(5)(i) and § 3050(a.4)(5)(ii)(F), Pennsylvania law demands that statutory provisions be read harmoniously to give effect to both provisions and should be construed in a way that does not nullify or exclude another provision. *See, e.g., In re Borough of Downingtown*, 161 A.3d 844, 871 (Pa. 2017) (noting that when two statutory provisions can be read as harmonious or in conflict, courts should construe them as in harmony with each other).

8. “It is the longstanding and overriding policy in this Commonwealth to protect the elective franchise. The Election Code must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice. It is therefore a well-settled principle of Pennsylvania election law that every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058, 1071 (Pa. 2020).

9. In this instance, these three qualified voters who attempted to submit mail-in ballots to the Board and were later notified by the Board that their respective mail-in ballots were defective, cannot be said to have “cast” a ballot.

10. All parties and this Court are concerned with the risk of double voting; however, the Board has safeguards in place to prevent double voting in this situation.

11. “When the Board receives a mail-in or absentee ballot, Board staff examines the outer envelope for obvious defects such as a missing signature or date. If such a defect is found, the Board provides a notice via e-mail or regular mail to the affected voter and offers them the opportunity to cure their ballot at Government Center in person, or mails a replacement ballot.” (Board’s 7/28/23 Memorandum of Law, p. 6).

12. The defective mail-in ballot is segregated from other mail-in ballots and is not counted or included in the pre-canvass and canvass. (Board's 7/28/23 Memorandum of Law, p. 6). It is treated by the Board's staff as if the ballot was not received at all.

*Id.* Then, the voter may vote their replacement ballot;

13. The Board also provided this Court with additional protections afforded by the provisional ballot challenge hearing process. These include:

- a. "The Board schedules and holds a provisional ballot challenge hearing within seven days of each primary or election. *See* 25 P.S. § 3050(a.4)(4);
- b. Prior to the hearing, the Board checks all provisional ballots against Election Day poll books and by-mail ballots to determine if each voter who voted provisionally also voted a different way;
- c. The Board also collects the names and addresses of each voter who cast a provisional ballot in Delaware County and makes those available to party leaders and candidates;
- d. The Board further publishes all mail-in and absentee voters on its website. Therefore, ahead of the hearing, representatives and the Board, and any other interested party, can confirm that voters have not cast a provisional ballot and also voted in some other way."

(Board's 7/28/23 Memorandum of Law, p. 7).



14. With these safeguards in place, Respondent shall count Petitioners' provisional ballots submitted at their respective polling places on Primary Election Day, May 16, 2023, and amend the official vote count from the May 2023 Primary Election to include the votes indicated on Petitioners' provisional ballots.

BY THE COURT:



JOHN J. WHELAN, J.



6. RPP has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections consistently throughout the Commonwealth.

7. RPP's members include all registered Republican voters, candidates, and officeholders in Pennsylvania.

8. RPP's core business includes supporting Republican candidates for federal, state, and local office in Pennsylvania and preserving and promoting a free and fair electoral environment in which Republican candidates can win election.

9. Accordingly, RPP, on behalf of itself and its members (including its voters) nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania.

10. Additionally, RPP devotes substantial resources toward educating, mobilizing, assisting, and turning out voters in Pennsylvania.

11. RPP has statutory rights to appoint both poll watchers to observe casting, counting, and canvassing of ballots at the polling place, 25 P.S. § 2687(a), and an "authorized representative" to "remain in the room" at the county board of elections and observe the pre-canvass and canvass of "absentee ballots and mail-in ballots," *id.* §§ 3146.8(g)(1.1)-(2).

12. RPP has exercised these statutory rights in the past several election cycles and is doing so again for the 2024 elections.

13. In conjunction with its Election Day Operations (“EDO”), RPP devotes substantial time and resources toward the recruitment and training of poll workers, poll watchers, and volunteers throughout the 67 counties of the Commonwealth to assist voters on election day, to observe the casting and counting of ballots at the polling place, and to observe the pre-canvass and canvass of absentee and mail-in ballots at the county board of elections.

14. As part of its EDO, RPP also devotes substantial time and resources toward the recruitment and training of a “ground team” of lawyers throughout the Commonwealth who stand ready on Election Day to assist poll workers, poll watchers, and volunteers should questions arise as to elections laws or the voting process within the Commonwealth.

15. RPP has devoted substantial time and resources in mobilizing and educating voters in Pennsylvania in the past many election cycles, is doing so again in 2024, and will do so in future election cycles.

16. Each of RPP’s EDO, training, and voter education programs relies upon, utilizes, and is built upon the clear language of the Election Code.

17. In particular, following the enactment of Act 77, which fundamentally changed the manner in which Pennsylvanians are permitted to vote, most notably by providing a new universal mail-in voting regime, RPP significantly updated and altered its EDO, training, and voter education programs.

18. Following the enactment of Act 77, RPP substantially increased the amount of its time and resources dedicated to educating voters, poll workers, poll watchers, volunteers, and its legal teams throughout Pennsylvania's 67 counties regarding the provisions of Act 77.

19. RPP's EDO, training, and voter education programs include training and information regarding the requirements for voters to cast lawful and valid ballots, and the governing rules delineating unlawful and invalid ballots and preventing election officials from pre-canvassing, canvassing, or counting such ballots.

20. I am aware that, in *Pennsylvania Democratic Party v. Boockvar*, the Pennsylvania Supreme Court held that voters have no right to cure mistakes on mail ballots, and that only the General Assembly can authorize curing.

21. I am also aware that some county boards of elections have nonetheless established notice-and-cure procedures for mail ballots despite lacking authority to do so from the General Assembly. I am unaware of every county board's curing policy, as some county boards do not publicly state their policies in writing. Nevertheless, I am aware that multiple counties, including Philadelphia, Montgomery, and Allegheny County—three of the most Democratic counties in Pennsylvania—allow voters to cure mail ballots with missing dates, incorrect dates, missing signatures, and missing secrecy envelopes.



22. RPP is investing substantial resources in order to understand the various curing policies in Pennsylvania's 67 counties. RPP's EDO, training, and voter education programs include training and information regarding these curing policies. But for the county boards' curing policies, RPP could invest these resources into other priorities, including turning out Republican voters.

23. I am also aware that Al Schmidt, the Secretary of the Commonwealth, has published a guidance document telling voters and election officials that voters who submit defective mail ballots have a right to cast provisional ballots.

24. I am likewise aware that Secretary Schmidt has altered Pennsylvania's Statewide Uniform Registry of Elections ("SURE") system to encourage the curing of mail ballots in all Pennsylvania counties—including those that do not offer cure procedures.

25. Additionally, I am aware that the Secretary's actions have contributed to lawsuits against county boards of elections that do not offer curing opportunities for certain mail-ballot errors.

26. The Secretary's actions have imposed pressure on county boards to reconsider and potentially adjust their curing policies, thus forcing RPP to divert resources to understand the shifting legal landscape. The Secretary's actions are also forcing RPP to update its trainings for volunteers.

27. The actions of both the county boards and the Secretary have harmed,

and will continue to harm, RPP in its core business by rendering its EDO, training, and voter education programs less effective, wasting the resources it has devoted to such programs, and requiring it to expend new resources to update those programs.

28. In particular, RPP will be required to alter its statewide EDO, training, and voter education programs to educate candidates, volunteers, and voters about continually evolving curing policies across the Commonwealth.

29. Altering its statewide EDO, training, and voter education programs will harm RPP in its core business by requiring it to divert resources from its intended mission of nominating, promoting, and assisting Republican candidates in Pennsylvania and of educating, mobilizing, assisting, and turning out voters in Pennsylvania.

30. For at least four reasons, the inconsistent curing policies of the county boards of elections and the Secretary's actions are also harming RPP in its core business of securing election of Republican candidates to office.

31. In the first place, the county boards' inconsistent curing policies and the Secretary's actions are creating voter confusion, reducing voter confidence in the integrity of Pennsylvania's elections, and decreasing voter turnout in Pennsylvania, including by members of RPP.

32. In the second place, the county boards' inconsistent curing policies and the Secretary's actions are altering the competitive environment surrounding

elections in Pennsylvania in which RPP, its members, its voters, and its candidates exercise their constitutional rights to vote, participate, and seek to elect Republican candidates to office.

33. In the third place, the county boards' inconsistent curing policies and the Secretary's actions are subjecting RPP's voters to unequal treatment across the Commonwealth. I am aware that predominantly Democratic counties are offering the most expansive curing opportunities, while predominantly Republican counties generally offer no curing or only limited curing. This unequal treatment of voters across the Commonwealth thus doubly injures RPP because it increases the number of Democratic mail ballots that are counted and decreases the number of Republican mail ballots that are counted, even when those ballots exhibit the exact same error or defect.

34. In the fourth place, the county boards' inconsistent curing policies and the Secretary's actions are harming the electoral prospects of Republican candidates in Pennsylvania; making it more difficult for RPP, its members, its voters, and its candidates to win elections; and may change the outcome of elections in Pennsylvania.

35. The risk that the county boards' inconsistent curing policies and the Secretary's actions could change the outcome of elections in Pennsylvania is real, and no mere hypothetical concern. In recent years, numerous races across the

Commonwealth have been decided by extremely slim margins. Moreover, the outcomes of some of those races have flipped to the detriment of RPP, its candidates, and voters when county election officials counted mail ballots that the General Assembly has mandated may not be counted.

36. For example, including in the official vote total mail ballots that did not comply with the General Assembly's date requirement has flipped the result in three races in Pennsylvania since 2020. In each of those races, the Republican candidate would have prevailed if the noncompliant ballots had not been included in the vote total. In other words, in each of those races, including the noncompliant ballots in the vote total flipped the outcome and resulted in a Democratic candidate being declared the winner and a Republican candidate being declared the loser.

37. The first was the State Senate race involving Republican Nicole Zicarelli in 2020. *See In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020).

38. The second was the Court of Common Pleas race involving Republican David Ritter in 2021. *See Migliori v. Cohen*, 36 F.4th 153, *cert. granted and judgment vacated*, *Ritter v. Migliori*, 143 S. Ct. 297 (2022)

39. In the third, a court order changed the apparent result of the November 2023 election for Towamencin Township Board of Supervisors

(Montgomery County). The Republican candidate, Richard Marino, prevailed by 4 votes over his Democratic challenger, Kofi Osei, with all ballots counted under the rules in effect on election day, November 7, 2023. A court order issued two weeks later. Invoking that order, the Montgomery County Board of Elections counted six ballots that did not comply with the date requirement. Including those ballots in the vote total resulted in a tie between Mr. Marino and Mr. Osei. On November 30, 2023, the Montgomery County Board of Elections resolved that tie through a casting of lots by which Mr. Osei was declared the winner. Mr. Osei, rather than Mr. Marino, was eventually sworn into office. The Third Circuit eventually reversed the court order on which the Montgomery County Board of Elections had relied to change the result of the election.

40. The county boards' inconsistent curing policies and the Secretary's actions could likewise flip the outcome of one or more races in the 2024 general election and beyond.

41. Indeed, numerous races in the 2024 general election across the Commonwealth will be hotly contested, including the races for President, U.S. Senator, U.S. Representatives, and various state and local elections. It is anticipated that some of those races will be decided by narrow margins.

42. Accordingly, county boards allowing voters to cure, and ultimately counting, defective mail ballots that the General Assembly has mandated may not

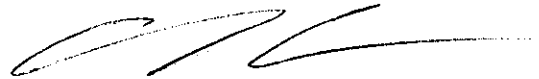
be cured or counted could flip the outcome of one or more races in the 2024 general election.

43. As in the races described above, the counting of such defective mail ballots could result in a Democrat being declared the winner of a 2024 general election race in which the Republican candidate received the highest number of lawfully cast votes according to the rules set by the General Assembly.

44. Any such outcome would further confuse voters, undermine public confidence in the Commonwealth's elections, and decrease voter turnout, including among Republican voters.

45. I declare under penalty of perjury under the law of the Commonwealth of Pennsylvania that the foregoing is true and correct. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Signed on the 13<sup>th</sup> day of September 2024, at 3501 N. Front St  
Suite 200, Harrisburg,  
Dauphin County, Pennsylvania, United States of America.

  
\_\_\_\_\_  
Signature

Angela Alleman  
\_\_\_\_\_  
Printed Name

## BUTLER COUNTY BALLOT CURING POLICY

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### **I.     Introduction**

This ballot curing policy for Butler County is established to allow registered voters the opportunity to cure immaterial deficiencies on their absentee or mail-in ballot declaration envelopes.

### **II.    Definitions**

As used herein, the following terms shall have the meanings indicated:

**Attestation:** The form at the Bureau which a Voter can correct information deemed as defective on the Declaration Envelope.

**Ballot:** An absentee or mail-in ballot which a Voter may use to cast a vote in an election.

**Bureau:** The Butler County Bureau of Elections.

**County:** Butler County.

**County Board:** Butler County Board of Elections.

**Deficiency:** A defect on the Declaration Envelope recognized by the Department of State as curable by applicable law, i.e. a lack of signature

**Declaration Envelope:** Pennsylvania law provides that two envelopes shall be mailed to each absentee or mail-in elector; the larger of these envelopes is referred to alternatively as the Declaration Envelope. This envelope contains a declaration which the Voter must sign.

**Designated Agent:** An individual which the Voter has authorized to transport the Attestation and witness the Voter's signature or mark upon said Attestation. The Designated Agent is only allowed to serve as a Designated Agent for **one** Voter, unless the additional voter(s) live in the same household and similarly require a Designated Agent due to a Disability.

**Disability:** A disability as defined in the Americans with Disabilities Act.

**Party Committee:** The Butler County Democratic Committee and the Butler County Republican Committee, as designated by their respective state organizations.

**Voter:** Any person who shall possess all the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth.



### **III. Cure Procedure**

- A. Upon identifying a Deficiency on a Declaration Envelope submitted by a Voter, the Bureau will segregate said Declaration Envelope and place the Voter's name and contact information (including phone number, if one is provided) on a list.
- B. During a Primary Election, the list of Voters who submitted Deficient Declaration Envelopes shall be made available to the Party Committees once a day upon request of the Party Committee.
- C. The Party Committees may contact the Voter who submitted a Declaration Envelope with a Deficiency to advise that there is a Deficiency with their Declaration Envelope and that the Voter is permitted to appear at the Bureau to remedy such Deficiency by means of an Attestation.
- D. During a General Election, in addition to Party Committees, the list of Voters who submitted Declaration Envelopes with Deficiencies will be made available to any duly authorized representative of any recognized political party other than the Party Committees which have a candidate on the Ballot.

It is acknowledged that Voters registered as Independent will not have a duly authorized party representative. The Bureau will publicize through its regular course that any Voter can check the status of their Ballots via the Department of State website and that cure procedures are available.

- E. To effect a cure, a Voter must appear in person at the Bureau before 8:00 P.M. on Election Day and sign an Attestation that includes the Deficiency; which shall be recorded with their Ballot.

In such case as a Voter with a Disability as recognized by the American Disability Act may not be able to appear in person at the Bureau, a Witness Form shall be used to allow a Designated Agent to transport the Attestation to and from the Bureau in order to obtain a signature or mark from the Voter.

- F. The Bureau shall not perform any remedy on behalf of the Voter but will only provide the opportunity for the Voter to remedy the defect.
- G. The Bureau shall not send the Ballot back to the Voter or issue the Voter a new Ballot due to the Deficiency.
- H. This Policy shall not modify any procedures regarding Provisional Ballots with the exception of allowing a Provisional Ballot to be counted for a Voter who cannot come into the Bureau to remedy a Deficiency on the Ballot envelope but is able to go to their polling place on Election Day.

**Adopted by the Butler County Board of Elections on 5/2/2023.**

**Appointed Board of Elections: Michael English (Chairman), Patrick Casey, and Carol McCarthy**

**Modified by the Butler County Board of Elections on 2/14/24.**

**Board of Elections: Leslie Osche (Chairman), Kimberly Geyer, and Kevin Boozel**

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; :  
National Republican Senatorial :  
Committee; National Republican :  
Congressional Committee; Republican :  
Party of Pennsylvania; David Ball; :  
James D. Bee; Debra A. Biro; Jesse D. :  
Daniel; Gwendolyn Mae Deluca; Ross :  
M. Farber; Connor R. Gallagher; Lynn :  
Marie Kalcevic; Linda S. Kozlovich; :  
William P. Kozlovich; Vallerie :  
Siciliano-Biancaniello; S. Michael :  
Streib, :

Petitioners :

v. :

Al Schmidt, in his official :  
capacity as Acting Secretary of the :  
Commonwealth; Jessica Mathis, in :  
her official capacity as Director of the :  
Pennsylvania Bureau of Election :  
Services and Notaries; Adams County :  
Board of Elections; Allegheny County :  
Board of Elections; Armstrong County :  
Board of Elections; Beaver County :  
Board of Elections; Bedford County :  
Board of Elections; Berks County Board :  
of Elections; Blair County Board of :  
Elections; Bradford County Board of :  
Elections; Bucks County Board of :  
Elections; Butler County Board of :  
Elections; Cambria County Board of :  
Elections; Cameron County Board of :  
Elections; Carbon County Board of :  
Elections; Centre County Board of :  
Elections; Chester County Board of :  
Elections; Clarion County Board of :  
Elections; Clearfield County Board of :  
Elections; Clinton County Board of :  
Elections; Columbia County Board of :  
Elections; Crawford County Board of :

No. 447 M.D. 2022

Elections; Cumberland County Board :  
 of Elections; Dauphin County Board of :  
 Elections; Delaware County Board of :  
 Elections; Elk County Board of :  
 Elections; Erie County Board of :  
 Elections; Fayette County Board of :  
 Elections; Forest County Board of :  
 Elections; Franklin County Board of :  
 Elections; Fulton County Board of :  
 Elections; Greene County Board of :  
 Elections; Huntingdon County Board :  
 of Elections; Indiana County Board of :  
 Elections; Jefferson County Board of :  
 Elections; Juniata County Board of :  
 Elections; Lackawanna County Board :  
 of Elections; Lancaster County Board :  
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 Elections; Northampton County Board :  
 of Elections; Northumberland County :  
 Board of Elections; Perry County :  
 Board of Elections; Philadelphia County: :  
 Board of Elections; Pike County Board :  
 of Elections; Potter County Board of :  
 Elections; Schuylkill County Board of :  
 Elections; Snyder County Board of :  
 Elections; Somerset County Board of :  
 Elections; Sullivan County Board of :  
 Elections; Susquehanna County Board :  
 of Elections; Tioga County Board of :  
 Elections; Union County Board of :  
 Elections; Venango County Board of :  
 Elections; Warren County Board of :  
 Elections; Wayne County Board of :

Elections; Westmoreland County Board :  
of Elections; Wyoming County Board of:  
Elections; and York County Board of :  
Elections, :  
Respondents :

BEFORE: HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE CEISLER

FILED: March 23, 2023

In this original jurisdiction action, the Republican National Committee (RNC), and the Republican Party of Pennsylvania (RPP) (collectively, Republican Committee Petitioners),<sup>1</sup> and David Ball, James D. Bee, Debra A. Biro, Jesse D. Daniel, Gwendolyn Mae DeLuca, Ross M. Farber, Connor R. Gallagher, Lynn Marie Kalcevic, Linda S. Kozlovich, William P. Kozlovich, Vallerie Siciliano-Biancaniello, and S. Michael Streib (collectively, Voter Petitioners)<sup>2</sup> (all collectively referred to as Petitioners), filed a petition for review directed to this Court’s original jurisdiction seeking declaratory and injunctive relief (petition for review or petition) on September 1, 2022, and later a First Amended Petition for Review Directed to

<sup>1</sup> The National Republican Senatorial Committee (NRSC) and the National Republican Congressional Committee (NRCC) voluntarily terminated their claims against all Respondents via praecipe on January 30, 2023. As such, the term “Petitioners” used throughout this opinion does not include either the NRSC or the NRCC, except where indicated.

<sup>2</sup> Voter Petitioners are 12 registered voters who reside in Washington County, Cambria County, Northampton County, Indiana County, Beaver County, Westmoreland County, Allegheny County, Fayette County, Delaware County, and Butler County, who regularly vote in both primary and general elections. (First Amended Petition for Review (Amended Pet.) ¶¶ 33-44.) They repeat that they intend to vote for candidates in all races, including for federal and statewide offices, that will be on the ballot in the 2022 General Election, notwithstanding that election has since passed. (Amended Pet. ¶ 45.)

Court’s Original Jurisdiction Seeking Declaratory and Injunctive Relief (Amended Petition), on February 17, 2023,<sup>3</sup> against Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth (Acting Secretary),<sup>4</sup> and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries (collectively, Commonwealth Respondents); and the Commonwealth’s 67 County Boards of Elections (County Boards).<sup>5</sup> In the Amended Petition, Petitioners again challenge the various County Boards’ actions in developing and implementing notice and opportunity to cure procedures with respect to absentee and mail-in ballots that fail to comply with the Pennsylvania Election Code’s (Election Code)<sup>6</sup> signature and ballot secrecy requirements. Specifically, Petitioners allege that the County Boards’ “practice of conducting these pre-canvass activities” before Election Day “under the guise of [notice and opportunity to cure] procedures” is in direct contravention of multiple provisions of the Election Code; the Pennsylvania Supreme Court’s holding in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); article I, section 5 and article VII, section 6 of the Pennsylvania

<sup>3</sup> On this date, the Court, *inter alia*, granted Petitioners’ unopposed Application for Leave to File Amended Petition for Review, and struck as moot the preliminary objections filed to the original petition for review.

<sup>4</sup> By Order dated February 16, 2023, this Court substituted Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth, as a party respondent for Leigh M. Chapman, in her official capacity as former Acting Secretary of the Commonwealth pursuant to Pennsylvania Rule of Appellate Procedure 502(c), Pa.R.A.P. 502(c).

<sup>5</sup> Notwithstanding its apparent omission from the caption, as noted in this Court’s September 29, 2022 Memorandum Opinion in this case, the Court considers the Washington County Board of Elections to be a Respondent in this case. *See Republican Nat’l Comm. v. Chapman* (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022) (single-Judge op.) (Ceisler, J.) (*RNC I*), slip op. at 3 n.2, *aff’d by evenly divided court*, 284 A.3d 207 (Pa. 2022) (Oct. 21, 2022) (Pa., No. 100 MAP 2022).

<sup>6</sup> Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

Constitution, Pa. Const. art. I, § 5 (free and equal elections clause)<sup>7</sup> & art. VII, § 6 (relating to uniformity with respect to laws regulating elections);<sup>8</sup> and Article I, Section 4, Clause 1 of the United States Constitution, U.S. Const. art. I, § 4, cl. 1 (Elections Clause).<sup>9</sup> (First Amended Petition for Review (Amended Pet.) ¶¶ 2-14, 17-19.) They seek declarations in these regards under the Declaratory Judgments Act (DJA),<sup>10</sup> as well as statewide, permanent injunctive relief enjoining the 67 County Boards from implementing such procedures and prohibiting the Acting Secretary from issuing any guidance as to such procedures in violation of the Election Code.

Presently before the Court are the Preliminary Objections (POs) of: (1) Commonwealth Respondents; (2) Bucks County Board of Elections; (3) Bedford, Carbon, Centre, Columbia, Dauphin, Fayette, Jefferson, Huntingdon, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York County Boards of Elections; (4) Chester County Board of Elections; (5) Delaware County Board of Elections; (6) Montgomery County Board of Elections; (7) Philadelphia County Board of Elections; (8) the Democratic National Committee and the Pennsylvania Democratic Party (DNC and PDP); and (9) the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee (DSCC and

<sup>7</sup> The free and equal elections clause provides: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

<sup>8</sup> It provides: “All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State,” with certain exceptions not applicable to this case. Pa. Const. art. VII, § 6.

<sup>9</sup> The Elections Clause provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.” U.S. Const. art. I, § 4, cl. 1.

<sup>10</sup> 42 Pa.C.S. §§ 7531-7541.

DCCC)<sup>11</sup> (all collectively referred to as Respondents, unless otherwise indicated). Respondents ask the Court to dismiss Petitioners' Amended Petition based on (1) lack of subject matter jurisdiction; (2) lack of standing (3) laches; and (4) legal insufficiency and/or failure to state a claim as to all counts.

For the reasons that follow, the Court sustains the POs asserting lack of subject matter jurisdiction and dismisses as moot the remaining POs.

### **Background & Procedural History**

By way of brief background, Petitioners initially alleged in the petition for review that several County Boards took it upon themselves to develop and implement notice and opportunity to cure procedures with respect to absentee and mail-in ballots that failed to comply with the Election Code's signature and ballot secrecy requirements, for the November 8, 2022 General Election and beyond, in direct contravention of the Election Code and the Supreme Court's holding in *Pennsylvania Democratic Party*; and that the County Boards' cure procedures usurped the General Assembly's exclusive legislative authority to adopt cure procedures and constituted a violation of the authority granted to the General Assembly to regulate the manner of federal elections under the Elections Clause. They requested declarations in those regards, as well as a declaration that the County Boards may not adopt **cure** procedures other than as the General Assembly expressly provided in the Election Code<sup>12</sup> and, further, statewide injunctive relief prohibiting

<sup>11</sup> The Court permitted the intervention of the DNC and the PDP, and the DSCC and the DCCC on September 22, 2022.

<sup>12</sup> See Section 1308(h) of the Election Code, added by the Act of March 6, 1951, P.L. 3, which provides:

(h) For those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified:



the 67 County Boards from developing or implementing **cure** procedures and directing the Acting Secretary to take no action inconsistent with such injunction order.<sup>13</sup>

Petitioners then filed the Amended Petition upon leave of this Court on February 17, 2023. Also on that date, this Court set an expedited briefing schedule, and further directed the parties to file and serve separate briefs addressing the Supreme Court's recent decision in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), and the effect of that decision, if any, on the instant matter. The Court also indicated, among other things, that following the filing of the above briefs, the Court would determine whether this matter would be argued or decided on the papers.

The Parties have complied with this Court's February 17, 2023 Order and filed pleadings and/or POs and comprehensive supporting briefs, as well as briefs addressing *Ball*.<sup>14</sup> As noted above, Respondents filed nine sets of POs, and eight

(1) Deleted by [the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), effective immediately] . . . .

(2) If the proof of identification is received and verified prior to the sixth calendar day following the election, then the county board of elections shall canvass the absentee ballots and mail-in ballots under this subsection in accordance with subsection (g)(2).

(3) If an elector fails to provide proof of identification that can be verified by the county board of elections by the sixth calendar day following the election, then the absentee ballot or mail-in ballot shall not be counted.

25 P.S. § 3146.8(h).

<sup>13</sup> In a single-Judge Memorandum Opinion and Order issued on September 29, 2022, this Court denied Petitioners' separate request for preliminary injunctive relief because Petitioners failed to meet their heavy burden of proving entitlement to such sweeping relief. On appeal, the Supreme Court affirmed this Court's decision on the basis that the Justices were evenly divided on the question before them. *See RNC I, aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022).

<sup>14</sup> The following Parties filed briefs addressing the Supreme Court's decision in *Ball*: Berks County; DNC and PDP; Montgomery County; Bedford, Carbon, Centre, Columbia,

Answers, some with New Matter,<sup>15</sup> to the Amended Petition. Petitioners filed responses generally opposing the POs, and an omnibus brief addressing all of the POs. In light of the Parties' comprehensive filings, and the proximity of the May 16, 2023 Municipal Primary Election and the County Boards' distribution of absentee and mail-in ballots to voters, the Court determined that argument was not necessary and, by Order dated March 16, 2023, directed that the POs and responses opposing them would be decided on the papers already filed, without oral argument, unless otherwise ordered.

Dauphin, Fayette, Jefferson, Huntingdon, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York Counties (collectively, Bedford County, et al.); Lehigh County; Chester County; Commonwealth Respondents; Philadelphia County; Bucks County; Petitioners; Delaware County; Allegheny County; Luzerne County; Potter County; and DSCC and DCCC.

Lehigh, Bucks, and Delaware Counties join in Montgomery County's brief. Chester County joins in Commonwealth Respondents' and Philadelphia County's briefs. Allegheny County joins in all Respondents' briefs to the extent they address, among other things, lack of standing.

Berks and Potter Counties take no position on *Ball*'s applicability to this case, and Bedford County, et al., Luzerne County, and DNC and PDP opine that *Ball* is not relevant to this case. DNC and PDP additionally opine that *Ball* reaffirms the broad authority of County Boards in administering elections. Aside from Petitioners, the other Respondents observe that *Ball* is applicable here with respect to, *inter alia*, standing and the broad authority of County Boards.

<sup>15</sup> Adams, Allegheny (with New Matter), Berks, Lehigh, Luzerne, Northampton (with New Matter), and Potter Counties filed Answers to the Amended Petition, generally denying the averments of the Amended Petition. In addition to filing an Answer, Luzerne County filed a Statement in Lieu of Brief in Support of Answer. Blair County filed a no answer letter, indicating therein that it will not be filing an answer in this case.

In its New Matter, Allegheny County contends that Petitioners claims are barred by laches and res judicata, that this Court lacks subject matter jurisdiction, and that Petitioners failed to state a claim upon which relief can be granted and lack standing. (Allegheny Ans. & New Matter ¶¶ 1-5.) Northampton County asserts in its New Matter that Petitioners' claims are barred by laches and the applicable statute of limitations, and that Petitioners have failed to state a claim upon which relief may be granted and failed to exhaust other remedies available to them. (Northampton Ans. & New Matter ¶¶ 163-66.)

### Amended Petition

In their Amended Petition, Petitioners repeat the same background information regarding Voter Petitioners and Republican Committee Petitioners, respectively, and the factual circumstances of the case described in this Court's September 29, 2022 Memorandum Opinion, which the Court will not repeat here in its entirety for the sake of brevity. (*See Republican Nat'l Comm. v. Chapman* (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022) (single-Judge op.) (Ceisler, J.) (*RNC I*), slip op. at 11-17, *aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022) (Oct. 21, 2022) (Pa., No. 100 MAP 2022); *compare* original petition for review ¶¶ 2-12, 13-39, 40-64, 65-80, 82-85, 86-92 (count I), 93-96 (count II), 97-103 (count III), *with* Amended Pet. ¶¶ 2-23, 27, 28-52, 53-77, 93-104, 111-14, 117-20, 127-33 (Count I), 152-55 (Count III), 156-62 (Count IV).)

The Court observes, however, that in the Amended Petition, Petitioners add to their argument from their original petition that the County Boards are prohibited from developing and implementing **notice and cure** procedures<sup>16</sup> not expressly created by the General Assembly, now asserting and seeking a declaration under the DJA that the Boards' implementation of such procedures directly violates the Election Code's various pre-canvassing and provisional ballot provisions; that the furnishing of voters' personally identifying information to political party representatives, candidates, and/or special interest groups violates voters' constitutional right to informational privacy under article I, section 1 of the Pennsylvania Constitution, Pa. Const. art. I, § 1,<sup>17</sup> and *Pennsylvania State Education*

<sup>16</sup> In their Amended Petition, Petitioners now highlight "**notice and cure** procedures," as opposed to just "**cure** procedures" mentioned in the original petition for review.

<sup>17</sup> It provides: "All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own

*Association v. Department of Community and Economic Development*, 148 A.3d 142 (Pa. 2016); and that the Acting Secretary has issued guidance directing the County Boards to engage in pre-canvass activities under the guise of making “administrative determinations” and statements encouraging the Boards to contact voters whose defective ballots have been cancelled due to errors on the ballots’ outer envelopes so they may have the opportunity to have their votes count. (See Amended Pet. ¶¶ 29, 79-92, & 134-35 (Count I).)

As to the pre-canvass and provisional ballot provisions specifically, Petitioners newly argue that notice and cure procedures are “inconsistent with law” under Section 302(f) of the Election Code, 25 P.S. § 2642(f),<sup>18</sup> and directly violate the Election Code, because “[t]he Election Code tightly constrains what Boards may do with absentee and mail-in ballots once they receive them.” (Amended. Pet. ¶¶ 76, 78.) In this regard, they first assert that absentee and mail-in ballots must be kept in sealed or locked containers until Election Day under Section 1308(a) of the Election Code, 25 P.S. § 3146.8(a),<sup>19</sup> and that County Boards are thus prohibited

happiness.” Pa. Const. art. I, § 1. Petitioners do not develop this argument in the Amended Petition.

<sup>18</sup> Section 302(f) provides that County Boards have authority “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” 25 P.S. § 2642(f).

<sup>19</sup> Section 1308(a) provides:

(a) The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections. An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be canvassed in accordance with subsection (g). A mail-in ballot shall be canvassed in accordance with subsection (g).

25 P.S. § 3146.8(a).

from doing anything else with the ballots until Election Day. (*Id.* ¶¶ 79-80.) Second, they claim that notice and cure procedures are effectively an “inspection . . . of” absentee and mail-in ballots under the definition of “pre-canvass” in Section 102(q.1) of the Election Code, 25 P.S. § 2602(q.1);<sup>20</sup> however, they highlight that County Boards cannot begin the pre-canvass of those ballots until 7:00 a.m. on Election Day under Section 1308(g)(1.1) of the Election Code, 25 P.S. § 3146.8(g)(1.1).<sup>21</sup> (*Id.* ¶¶ 81-82.) Third, they argue that the County Boards’ email

<sup>20</sup> Section 102(q.1) provides:

(q.1) The word “pre-canvass” shall mean **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) (emphasis added).

<sup>21</sup> Section 1308(g)(1.1) provides:

(g)(1)(i) An absentee ballot cast by any absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).  
. . . .

(1.1) The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours’ notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose 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).

and/or internet notification to voters via the SURE System and others regarding signature, date, or secrecy envelope defects in absentee or mail-in ballots following their “inspection” is “inconsistent with law” because Section 1308(g)(1.1)’s prohibition on nondisclosure of the results of the pre-canvass until the polls close on Election Day necessarily includes a prohibition on the disclosure of a Board’s determination that a ballot will not count due to such a defect. (*Id.* ¶¶ 83-85.) Last, Petitioners acknowledge that those voters who requested absentee and mail-in ballots but did not cast them may vote provisionally. (*Id.* ¶ 90 n.2 (citing Sections 1306(b)(2)-(3) and 1306-D(b)(2)-(3) of the Election Code, 25 P.S. §§ 3146.6(b)(2)-(3), 3150.16(b)(2)-(3)).)<sup>22</sup> They argue, however, that the County Boards cannot encourage voters who improperly cast their absentee or mail-in ballot to cast a second vote via provisional ballot, claiming this “cure” essentially requires voters to make knowingly false statements subject to the penalty of perjury on their provisional ballots. (Amended Pet. ¶¶ 87-92 (citing Sections 1306(b)(1), 1306-D(b)(1), and 1210(a.4)(2) of the Election Code, 25 P.S. §§ 3146.6(b)(1) (providing that an elector who receives and votes an absentee ballot “shall not be eligible to vote at a polling place on election day”), 3150.16(b)(1) (same with respect to mail-in ballots), 3050(a.4)(2) (requiring an elector to sign affidavit prior to voting a provisional ballot)).)

Petitioners also add a new Count II to the Amended Petition, in which they request a declaration that the disparate approaches taken by the County Boards with respect to notice and cure procedures violate the free and equal elections clause (Pa. Const. art. I, § 5), the clause requiring uniformity in the laws regulating the holding

<sup>22</sup> Section 1306 was added to the Election Code by the Act of March 6, 1951, P.L. 3. Section 1306-D was added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

of elections in the Commonwealth (Pa. Const. art. VII, § 6), and Section 302(g) of the Election Code, 25 P.S. § 2642(g).<sup>23</sup> (*See* Amended Pet. ¶¶ 136-51 (Count II).)

Petitioners seek declarations from this Court under the DJA that the County Boards' development and implementation of notice and cure procedures violates Pennsylvania law and is prohibited, (Amended Pet. ¶¶ 127-35 & Wherefore Clause, pp. 34-35 (Count I) & ¶¶ 136-51 & Wherefore Clause, p. 38 (Count II)); and that the adoption of such procedures not expressly authorized by the General Assembly for federal elections violates the Elections Clause of the United States Constitution (Amended Pet. ¶¶ 152-55 & Wherefore Clause, p. 39 (Count III)). They further seek a statewide, permanent injunction prohibiting the County Boards from developing or implementing notice and cure procedures. (Amended Pet. ¶¶ 156-62 & Wherefore Clause, p. 41 (Count IV).) In addition to the relief sought in Counts I, II, and IV, Petitioners request that this Court prohibit the Acting Secretary from issuing guidance or other statements directing the County Boards to violate provisions of the Election Code. (Amended Pet. at 34-35 (Count I, Wherefore Clause), 38 (Count II, Wherefore Clause), 41 (Count IV, Wherefore Clause).)

Notably, Petitioners further allege that this Court has original jurisdiction over the Amended Petition under Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), "because this matter is asserted against Commonwealth officials in their official capacities." (Amended Pet. ¶ 28.)

As mentioned above, Commonwealth Respondents and some County Boards have filed the following POs, asserting that the Amended Petition should be

<sup>23</sup> Section 302(g) provides that County Boards have authority "[t]o instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted." 25 P.S. § 2642(g).

dismissed based on this Court's lack of subject matter jurisdiction, Petitioners' lack of standing, the doctrine of laches, and the legal insufficiency of the Amended Petition and/or Petitioners' failure to state a claim as to some or all counts of the Amended Petition.<sup>24</sup>

### **Standard of Review**

In ruling on preliminary objections, the Court accepts as true all well-pleaded material allegations in the petition for review and any reasonable inferences that may be drawn from the averments. *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Cmwlth. 1994). This Court, however, is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the petition for review. *Id.* The Court may sustain preliminary objections only when the law makes clear that the petitioner cannot succeed on the claim, and the Court must resolve any doubt in favor of the petitioner. *Id.* “[The Court] review[s] preliminary objections in the nature of a demurrer under the above guidelines and may sustain a demurrer only when a petitioner has failed to state a claim for which relief may be granted.” *Armstrong Cnty. Mem’l Hosp. v. Dep’t of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Cmwlth. 2013).

Because it is jurisdictional, the Court will first address the POs asserting the Court lacks subject matter jurisdiction, followed by the other POs, if necessary.

<sup>24</sup> Specifically, Delaware County, Commonwealth Respondents, Chester County, and Philadelphia County demur to the Amended Petition based on lack of subject matter jurisdiction, lack of standing, and failure to state a claim as to all or various counts of the Amended Petition.

Bucks County and DSCC and DCCC demur to the Amended Petition based on lack of standing and failure to state a claim. Bucks County additionally asserts, along with Montgomery County, that laches bars the relief sought in the Amended Petition.

Bedford County, et al. and DNC and PDP demur to the Amended Petition solely based on failure to state a claim.



### **Subject Matter Jurisdiction**

Commonwealth Respondents (PO 1) and some County Boards<sup>25</sup> first argue that this Court lacks subject matter jurisdiction<sup>26</sup> under Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), because neither of the Commonwealth Respondents is an indispensable party to this matter; the County Boards are neither Commonwealth agencies nor part of the Commonwealth government, and, as such, the County Boards must be sued in their respective local court of common pleas; and the Acting Secretary has only limited powers over the County Boards relating to elections. (Cmwlth. Resp'ts' POs ¶¶ 33-55 (citing *In re Voter Referendum Pet. Filed Aug. 5, 2008*, 981 A.2d 163, 170 (Pa. 2009)), Cmwlth. Resp'ts' Br. at 14-23; Delaware POs ¶¶ 10-37, Delaware Br. at 3-7 (citing *Finan v. Pike Cnty. Conserv. Dist.*, 209 A.3d 1108, 111 (Pa. Cmwlth. 2019), and *Blount v. Phila. Parking Auth.*, 965 A2d 226, 231-32 (Pa. 2009)); Chester POs ¶¶ 37-54, Chester Br. at 12-14; Phila. POs ¶¶ 47-72 (citing *Blount*), Phila. Br. at 15-20.) Commonwealth Respondents further assert that Petitioners do not challenge any Department of State (Department) requirement or statewide practice, and they have not alleged what, if any, type of action the Acting Secretary might take here if Petitioners' requested relief is granted. (Cmwlth. Resp'ts' POs ¶¶ 39-40, 43-46 (citing ¶ 116 of the Amended Petition); Chester POs ¶ 53; Chester Br. at 16 (noting the Amended Petition fails to seek any meaningful relief from either Commonwealth Respondent).) Chester County additionally highlights an inconsistency in paragraphs 68 and 103 of Petitioners' Amended Petition, noting that paragraph 103 asserts injunctive relief is necessary to stop Commonwealth Respondents from "encouraging" implementation of notice

<sup>25</sup> These include: Delaware County (PO 1), Chester County (PO 2), and Philadelphia County (PO 1).

<sup>26</sup> See Pa.R.Civ.P. 1028(a)(1).

and cure procedures, but that paragraph 68 cites guidance showing Commonwealth Respondents oppose implementation of notice and cure procedures. (Chester POs ¶¶ 48-51; Chester Br. at 15-16.)

Petitioners respond that this Court has subject matter jurisdiction because the Acting Secretary is an indispensable party, and the County Boards are part of the Commonwealth government. (Pet’rs’ Omnibus Br. at 16-17.) As support for their assertion the Acting Secretary is an indispensable party, Petitioners point to the Acting Secretary’s November 3, 2022 guidance, issued in response to the Supreme Court’s November 1, 2022 order in *Ball*,<sup>27</sup> regarding the mechanics of absentee and mail-in voting and the County Boards’ inspection of ballots and whether a right to cure exists, as well as the former Acting Secretary’s recent litigation against three County Boards in *Chapman v. Berks County Board of Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed August 19, 2022), regarding whether Boards may exercise discretion to count absentee and mail-in ballots without dates or with incorrect dates. (Pet’rs’ Omnibus Br. at 17.) Petitioners claim that the Acting Secretary’s guidance “is precisely the type of inspection included within the definition of ‘pre-canvass’ under the Election Code, which cannot begin until 7:00 a.m. on Election Day”; thus, according to Petitioners, the Acting Secretary is instructing the County Boards to directly violate the Election Code. (*Id.* at 17-18.)<sup>28</sup> Petitioners therefore claim that

<sup>27</sup> According to Petitioners, the Acting Secretary issued guidance on this date, directing County Boards to examine all absentee and mail-in ballots to determine if the return envelopes are signed and dated. (Pet’rs’ Omnibus Br. ¶ 17 (citing Pa. Dep’t of State, *Guidance on Undated and Incorrectly Dated Mail-in and Absentee Ballot Envelopes Based on the Pennsylvania Supreme Court’s Order in Ball v. Chapman*, issued November 1, 2022, <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-11-03-Guidance-UndatedBallot.pdf> (last visited Mar. 22, 2023).)

<sup>28</sup> Further, and notwithstanding that the 2022 General Election has already occurred, Petitioners again point to the Acting Secretary’s guidance issued days before that election, in which former Acting Secretary Chapman “encouraged” County Boards to contact voters whose ballots

this case challenges actions taken by the Acting Secretary, thus making him an indispensable party. (*Id.* at 18.) Petitioners do not address in their Amended Petition or subsequent briefs whether Director Mathis is an indispensable party.

As for the County Boards, Petitioners assert they are not “local authorities” excluded from the definition of “Commonwealth government,” as they are not created by political subdivisions. (Pet’rs’ Omnibus Br. at 19.) Rather, the County Boards are formed by statute, i.e., Section 301(a) of the Election Code, 25 P.S. § 2641(a) (relating to county boards of elections and membership), and, thus, they constitute a component part of the “Commonwealth government” as that term is defined under 42 Pa.C.S. § 761. (*Id.* at 18-19 (pointing to definition of “Commonwealth government” and specifically “boards” in the definition in 42 Pa.C.S. § 102, and citing *In re Nom. Pets. of Griffis*, 259 A.3d 542 (Pa. Cmwlth. 2021),<sup>29</sup> and *Cnty. of Fulton v. Sec. of the Cmwlth.*, 276 A.3d 846, 861 (Pa. Cmwlth. 2021) (stating that both the Secretary and County Boards “are government agencies created by the General Assembly”)).<sup>30</sup>

were cancelled due to defects so that those voters could have the opportunity to have their vote count. (Pet’rs’ Omnibus Br. at 18 (citing an inactive link to the Department’s website).)

<sup>29</sup> Petitioners’ reliance on *In re Nomination Petitions of Griffis*, 259 A.3d 542 (Pa. Cmwlth. 2021), for the proposition that the 67 County Boards are part of the Commonwealth government for jurisdictional purposes is misplaced, as the case was properly brought in this Court’s **appellate** jurisdiction and involved review of a trial court’s order denying the objectors’ petitions to set aside the nomination petitions of a candidate for office who failed to properly file her statement of financial interests (SOFI) with the “governing authority” of a specific county. This Court held that the candidate’s filing of her SOFI with the county elections office satisfied the requirements of the applicable statute and regulations because the county’s commissioners were the “governing authority” of that county and the county’s board of elections under the Election Code. *In re Griffis*, 259 A.3d at 548.

<sup>30</sup> Petitioners’ reliance on *County of Fulton v. Secretary of the Commonwealth*, 276 A.3d 846, 861 (Pa. Cmwlth. 2021), is also misplaced, as it dealt with responsibilities of the Secretary and the County Boards in relation to election equipment. In that case, this Court noted that it was not clear whether the Secretary or the County Boards had the responsibility of preventing tampering with election equipment, but that “[b]oth are government agencies created by the

In considering this PO, the Court “begin[s] with the undisputed basic principle that this Court, as any other court, must have subject matter jurisdiction over a controversy because, without it, any judgment rendered would be void.” *Stedman v. Lancaster Cnty. Bd. of Comm’rs*, 221 A.3d 747, 755 (Pa. Cmwlth. 2019) (quoting *Patterson v. Shelton*, 175 A.3d 442, 449 (Pa. Cmwlth. 2017)). “Thus, ‘whenever a court discovers that it lacks jurisdiction over the subject matter or a cause of action, it is compelled to dismiss the matter under all circumstances.’” *Id.* (quoting *Hughes v. Pa. State Police*, 619 A.2d 390, 393 (Pa. Cwmlth. 1992)). Our Supreme Court previously set forth the well settled scope and standard of review regarding questions of subject matter jurisdiction as follows:

Jurisdiction over the subject matter is conferred solely by the Constitution and laws of the Commonwealth. The test for whether a court has subject matter jurisdiction inquires into the competency of the court to determine controversies of the general class to which the case presented for consideration belongs. Thus, as a pure question of law, the standard of review in determining whether a court has subject matter jurisdiction is *de novo* and the scope of review is plenary. Whether a court has subject matter jurisdiction over an action is a fundamental issue of law which may be raised at any time in the course of the proceedings, including by a reviewing court *sua sponte*.

*Office of Att’y Gen. ex rel. Corbett v. Locust Twp.*, 968 A.2d 1263, 1268-69 (Pa. 2009).

Relevant here, Section 761(a)(1) of the Judicial Code states that “[t]he Commonwealth Court shall have original jurisdiction of all civil actions or proceedings . . . (1) Against the Commonwealth government, including any officer

General Assembly with discrete and separate roles to fulfill toward the end of honest elections in Pennsylvania” and that “[b]oth agencies are presumed to act lawfully and reasonably in the exercise of their statutory duties.” *County of Fulton*, 276 A.3d at 861. The case is otherwise irrelevant for purposes of the instant matter, except as indicated below.

thereof, acting in his official capacity . . . .” 42 Pa.C.S. § 761(a)(1). Section 102 of the Judicial Code defines the term “Commonwealth government” as follows:

**“Commonwealth government.”** The government of the Commonwealth, including the courts and other officers or agencies of the unified judicial system, the General Assembly and its officers and agencies, the Governor, and the departments, boards, commissions, authorities and officers and agencies of the Commonwealth, **but the term does not include any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority.**

42 Pa.C.S. § 102 (emphasis added). Although the Acting Secretary and Director Mathis are each an “officer” of the Commonwealth, “this alone is not sufficient to establish jurisdiction.” *Stedman*, 221 A.2d at 756 (quoting *Pa. Sch. Bds. Ass’n, Inc. v. Cmwlt. Ass’n of Sch. Admins.*, 696 A.2d 859, 867 (Pa. Cmwlt. 1997), and stating that “[t]he mere naming . . . of the Commonwealth or its officers in an action does not conclusively establish this [C]ourt’s jurisdiction, and [that] the joinder of such parties when they are only tangentially involved is improper”).

Rather, “for this Court to have original jurisdiction over a suit against the Commonwealth and another, non-Commonwealth party, the Commonwealth or one of its officers must be an indispensable party to the action.” *Stedman*, 221 A.3d at 757 (citations omitted). “A party is indispensable when ‘his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.’” *Stedman*, 221 A.3d at 757 (quoting *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conserv. & Nat. Res.*, 201 A.3d 273, 279 (Pa. Cmwlt. 2018)).<sup>31</sup> “‘Thus, the main inquiry for determining whether a party is indispensable

<sup>31</sup> Section 7540(a) of the DJA further explains the concept of an indispensable party by providing that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration.” 42 Pa.C.S. § 7540(a).

involves whether justice can be accomplished in the absence of the party.” *Stedman*, 221 A.3d at 758 (quoting *Rachel Carson Trails*, 201 A.3d at 279). In conducting this inquiry,<sup>32</sup> “the nature of the particular claim and the type of relief sought should be considered.” *Rachel Carson Trails*, 201 A.3d at 279. “A Commonwealth party may be declared an indispensable party when meaningful relief cannot conceivably be afforded without the Commonwealth party’s direct involvement in the action.” *Ballroom, LLC v. Cmwlt.*, 984 A.2d 582, 588 (Pa. Cmwlt. 2009). Importantly, “‘where a petitioner ‘seeks absolutely no relief’ from the Commonwealth party, and the Commonwealth party’s involvement is only ‘minimal,’ we have held that it is not an indispensable party.” *Stedman*, 221 A.3d at 758 (quoting *Rachel Carson Trails*, 201 A.3d at 280).

With these principles in mind, the Court will evaluate the alleged indispensability of the Acting Secretary and Director Mathis.

In this case, Petitioners named the Acting Secretary and Director Mathis, in their official capacities, as Respondents, apparently due to their responsibilities under the Election Code. Petitioners identify the Acting Secretary’s responsibilities as including receiving the returns of primaries and elections from the County Boards, the canvassing and computing of the votes cast for candidates, proclaiming the results of such primaries and elections, and issuing certificates of election to the successful candidates at such elections. (Amended. Pet. ¶ 50 (citing Sections 201(f) and 1409 of the Election Code, 25 P.S. §§ 2621(f), 3159).) However, the only

<sup>32</sup> This analysis requires an examination of the following four factors: (1) “[d]o absent parties have a right or interest related to the claim?”; (2) “[i]f so, what is the nature of that right or interest?”; (3) “[i]s that right or interest essential to the merits of the issue?”; and (4) “[c]an justice be afforded without violating the due process rights of absent parties?” *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conserv. & Nat. Res.*, 201 A.3d 273, 279 (Pa. Cmwlt. 2018).

material allegations made against former Acting Secretary Chapman in the Amended Petition relate to the following:

- her position in the *Pennsylvania Democratic Party* litigation from 2020, (Amended Pet. ¶ 58);
- her recent guidance that voters will not have the opportunity to correct their ballots before the election if there is a problem, (Amended Pet. ¶ 68 (quoting the Acting Secretary’s guidance that “if there’s a problem with your mail-in ballot, you won’t have the opportunity to correct it before the election[,]” and citing <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (last visited Mar. 22, 2023)));
- confusingly, her purported failure to take action to stop the County Boards’ unauthorized notice and cure procedures following her involvement as a party in an unrelated federal case, (Amended Pet. ¶¶ 103-04);
- the notion that in Counties that have not implemented cure procedures, the SURE system, maintained by the Acting Secretary, provides notice via email to voters that their ballots may not be counted, (Amended Pet. ¶ 116);
- the Acting Secretary’s November 3, 2022 guidance, issued in response to *Ball*, directing County Boards to examine all mail-in ballots received to determine if the return envelopes are signed and dated, which according to Petitioners directs the Boards to violate the Election Code, (Amended Pet. ¶¶ 121-24); and
- former Acting Secretary Chapman’s guidance issued prior to *Ball* in apparent response to the *Berks County* case, but before the November 2022 General Election, encouraging Boards to contact voters whose ballots have been cancelled due to defects on the outer envelopes so they can have their votes

count, which constitutes an endorsement of notice and cure, according to Petitioners, (Amended Pet. ¶¶ 125-26).

Based on these averments, Petitioners request that this Court prohibit the Acting Secretary from issuing guidance or other statements directing the County Boards to violate provisions of the Election Code. (*See* Amended Pet. at 34-35 (Count I, Wherefore Clause), 38 (Count II, Wherefore Clause), 41 (Count IV, Wherefore Clause).)

Here, Petitioners have not made any claims implicating the duties and responsibilities of the Acting Secretary under the Election Code identified in the Amended Petition, which duties and responsibilities the Court notes are limited,<sup>33</sup> but rather, Petitioners merely take issue with the various guidance the Acting Secretary has issued over the past three years in response to the developing case law in this area, which does not implicate what is truly at the heart of this case: ***some of the County Boards' development and implementation of notice and opportunity to cure procedures.*** Although the Acting Secretary may have a generalized interest in issues surrounding the administration of elections in the Commonwealth and the enfranchisement of voters, generally, the Acting Secretary's interests in this regard are not essential to a determination of whether some County Boards are unlawfully implementing notice and cure procedures with respect to absentee and mail-in ballots that are defective under the Election Code. Further, the Acting Secretary does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely upon the County Boards, as will be discussed *infra*. Compare 25 P.S. § 2642 (outlining County Boards' extensive powers and duties over administration and conduct of elections), with 25 P.S. §§

<sup>33</sup> See 25 P.S. §§ 2621, 3159.



2621 (outlining limited powers and duties of Secretary), 3159 (providing for Secretary’s duties to tabulate, compute, and canvass returns). That the Acting Secretary *may, in the future*, issue guidance or statements on this issue is too “tangential” and “minimal” of an involvement, and speculative even,<sup>34</sup> to make him an indispensable party to this matter. Because Petitioners could conceivably obtain meaningful relief with respect to the County Boards’ purportedly unlawful actions without the Acting Secretary’s involvement in this case, the Acting Secretary is not an indispensable party.

As for Director Mathis, Petitioners observe she is responsible for overseeing the Election Services and Voter Registration divisions of the Department, as well as the Bureau of Election Services and Notaries, which is responsible for planning, developing, and coordinating the statewide implementation of the Election Code. (Amended Pet. ¶ 51 (citing <https://www.dos.pa.gov/about-us/Pages/Director-Bureau-of-Elections-and-Notaries.aspx> (last visited Mar. 22, 2023)).) Other than this statement of her duties, Petitioners do not make any claims or request any relief as to Director Mathis in the Amended Petition. Because no relief is sought against Director Mathis, she is not indispensable to this matter. *See Stedman*, 221 A.3d at 758.

<sup>34</sup> Petitioners have also not identified any authority whatsoever that would **require** an order from this Court **at this juncture** prohibiting the Acting Secretary from issuing any guidance or statements on this issue later. The Court cannot predict whether the Acting Secretary will again issue guidance or any statements regarding notice and cure procedures, and notes that the former Acting Secretary has most recently issued guidance in response to the Supreme Court’s recent decision in *Ball* essentially **opposing** the implementation of any notice and cure procedures, which does not help Petitioners’ case. (*See* <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (last visited Mar. 22, 2023)).) Presumably, if the Acting Secretary was to issue any guidance or statements on this issue in the future, the Court opines that he would do so in accordance with whatever is the controlling case law on the issue at that time.

Having concluded that neither the Acting Secretary nor Director Mathis are indispensable parties to this action, the POs in this regard are sustained, and the Acting Secretary and Director Mathis are dismissed from this action.

The Court must now consider whether it has original jurisdiction over the remaining Respondents, i.e., the 67 County Boards, or whether original jurisdiction lies in the respective courts of common pleas. As the Parties suggest, these questions hinge on whether the County Boards are Commonwealth agencies, as Petitioners contend, or local agencies that are excluded from the definition of “Commonwealth government,” as Respondents contend. This Court agrees with Respondents.

As set forth above, this Court has original jurisdiction over all civil actions brought against the “Commonwealth government.” 42 Pa.C.S. § 761(a)(1). However, that term does not include any political subdivision, municipal, or other local authority, or any officer or agency of any such political subdivision or local authority. 42 Pa.C.S. § 102. The Court must therefore determine whether the County Boards fall into one of these categories.

In *Finan*, this Court considered, in the context of an appeal from a trial court order sustaining a preliminary objection challenging its jurisdiction, whether the Pike County Conversation District created pursuant to the Conservation District Law<sup>35</sup> qualified as a local agency or a Commonwealth agency for jurisdictional purposes. 209 A.3d at 1110. In doing so, this Court recognized that

[t]he type of agency dictates the proper court of original jurisdiction; for actions against local agencies, the proper court is the county court of common pleas, whereas actions against Commonwealth agencies are properly filed in the Commonwealth Court. *Blount*[, 965 A.2d 226.] Our analysis for determining the type of agency depends on the purpose for which we review agency status. [*James J. Gory Mech. Contr’g, Inc.*

<sup>35</sup> Act of May 15, 1945, P.L. 547, as amended, 3 P.S. §§ 849-864.

*v. Phila. Hous. Auth.*, 855 A.2d 669 (Pa. 2004); *T & R Painting Co., Inc. v. Phila. Hous. Auth.*, 353 A.3d 800 (Pa. 1976); *Quinn v. Se. Pa. Transp. Auth. (SEPTA)*, 659 A.2d 613 (Pa. Cmwlth. 1995).]

Generally, for purposes of jurisdiction, Commonwealth agency status is narrowly construed. *Gory*; see *Dep't of Aging v. Lindberg*, . . . 469 A.2d 1012 (Pa. 1983) (construing this Court's jurisdiction under 42 Pa.C.S. § 761(a)(1) narrowly). When the enabling statute does not specify the court of original jurisdiction, in analyzing the type of agency for jurisdictional purposes, "the pivotal factors are whether the entity [1] operates on a statewide basis and [2] is predominantly controlled by the state." *Gory*, 855 A.2d at 677 (emphasis added). We discern legislative intent to confer jurisdiction on this Court where the entity acts throughout the state and under state control. *Id.* By contrast, where "the entity operates within a single county . . . and is governed in large part by that county . . . the entity must be characterized as a local agency and sued in the courts of common pleas." *Id.* at 678.

*Finan*, 209 A.3d at 1111-12 (footnote omitted). This Court further observed that *Blount*, cited above, is "[t]he seminal case in determining agency status for jurisdiction purposes[.]" *Id.* at 1114.

In *Blount*, the Supreme Court analyzed whether the Philadelphia Parking Authority (PPA) qualified as a Commonwealth agency such that this Court was the court of original jurisdiction. In so doing, the Supreme Court considered multiple factors, including the PPA's functions, reach of operations, and the degree of state control over finance and governance, and ultimately concluded that the PPA was a Commonwealth agency, and that jurisdiction in this Court was proper, because the PPA undertook both state functions and operated outside Philadelphia. See *Finan*, 209 A.3d at 1114 (discussing *Blount*); see also *Blount*, 965 A.2d at 229-34.

Returning to *Finan*, this Court concluded that the Pike County Conservation District did not meet the *Blount* factors for Commonwealth agency status because the District operates solely within the confines of Pike County, which reach of authority indicated local agency status addressing issues within a single county;

implements statewide policies and initiatives and fees, but only in Pike County; is not controlled by the Commonwealth, as its governing body was not selected by the Governor or any other Commonwealth agent; and there is little state control over the District's budget or finances. *Finan*, 209 A.3d at 1114-15. The Court further noted that although the Department of Environmental Protection (DEP) delegated certain functions to the District through a delegation agreement, such delegation did not confer Commonwealth agency status upon the District. *Id.* Accordingly, absent any state control or exercise of statewide authority, the Court concluded there was no basis for deeming the District to be a Commonwealth agency for jurisdictional purposes. *Id.* at 1115 (citing *Blount*; *T & R Painting*). Moreover, the Court rejected the District's proffered third factor for consideration, i.e., that this Court's jurisdiction should extend to county conservation districts because they share implementation and enforcement authority with two statewide agencies (DEP and the State Conservation Commission created under the Conservation District Law) and thus deal with implementation of statewide laws. *Id.* at 1115.

Considering the *Blount* factors, and *Finan*, as they relate to the instant matter, the Court concludes that the 67 County Boards are local agencies for jurisdictional purposes. Notably, the Judicial Code does not define what constitutes a local agency. However, Section 1991 of the Statutory Construction Act of 1972 defines "political subdivision" as "[a]ny county, city, borough, incorporated town, township, school district, vocational school district and county institution district." 1 Pa.C.S. § 1991; see *Blount*, 965 A.2d at 230 (observing, *inter alia*, the definition of "local authority" under the rules of statutory construction for purposes of determining whether the PPA was a Commonwealth or local agency). Section 102(b) and (c) of the Election Code defines "county" as "any county of this Commonwealth" and

“county board” or “board” as “the county board of elections of any county [t]herein provided for.” 25 P.S. § 102(b), (c).

Importantly, Section 301(a) of the Election Code provides that “[t]here **shall be a county board of elections in and for each county of this Commonwealth**, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act.” 25 P.S. § 2641(a) (emphasis added). Section 301(b) of the Election Code further provides that “[i]n each county of the Commonwealth, the county board of elections shall consist of the county commissioners of such county ex officio, or any officials or board who are performing or may perform the duties of the county commissioners . . . .” 25 P.S. § 2641(b). Section 302 of the Election Code outlines the powers and duties of the County Boards, providing that “[t]he county boards of elections, **within their respective counties**, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act,” including the 16 powers and duties enumerated in that section. 25 P.S. § 2642 (emphasis added). Included in these powers are those at issue in the instant matter, namely Section 302(f) and (g), which authorize the County Boards:

(f) To make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.

(g) To instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.

25 P.S. §§ 2642(f), (g).

Section 305(a) of the Election Code further provides that “[t]he county commissioners or other appropriating authorities of the county shall appropriate annually, and from time to time, to the county board of elections of such county, the funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county . . . .” 25 P.S. § 2645(a); *see also* Section 305(a)1.-4. of the Election Code, 25 P.S. § 2645(a)1.-4. (providing additional expenses related to elections for which the Counties are liable). Conversely, under Section 201 of the Election Code, the Secretary’s powers and duties are limited, and include different powers than those granted solely to the County Boards in Sections 301 and 302. *See* 25 P.S. § 2621.

Because these provisions of the Election Code reflect that the County Boards are local agencies, but do not expressly state the same, the Court must analyze the legislative intent behind the statute. “In discerning legislative intent to confer Commonwealth agency status, courts consider whether conferring jurisdiction on a particular court would lead to an absurd or unreasonable result.” *Finan*, 209 A.3d at 1113 (citing 1 Pa.C.S. § 1921). “When the matter involves a local community, and ‘the issues involved were matters strictly within the concern of a particular locality rather than a concern of the Commonwealth generally,’ then it would be absurd to conduct the litigation in Harrisburg as opposed to the locality.” *Finan*, 209 A.3d at 1113 (citing *T & R Painting*, 353 A.2d at 802 (citation omitted)).

Here, the County Boards do not meet the *Blount* factors, which means they are local agencies. First, the General Assembly granted jurisdiction to administer and conduct primaries and elections solely within the confines of the respective Counties of the Commonwealth to the County Boards under Section 301(a) of the Election Code. The County Boards’ authority indicates local agency status because

it has jurisdiction to administer and conduct elections and primaries **within each respective county**, not statewide. Second, the County Boards are not controlled by the Commonwealth, as the County Boards are governed by the county commissioners under Section 301(b) of the Election Code, and, under Section 302(f) and (g), the County Boards are authorized to make rules, regulations, and instructions necessary for the guidance of, among others, elections officers and electors and to instruct elections officers in their duties. The Court therefore rejects Petitioners' argument that the County Boards are Commonwealth agencies because they were created by statute; rather, under *Blount*, it is the degree of Commonwealth control over them that is dispositive. As the Court observed in *County of Fulton*, the Department does not control the County Boards. *See County of Fulton*, 276 A.3d at 861-62 (stating that "[t]he county boards of elections are not bureaus within the Department of State subject to management by the Secretary of the Commonwealth" and that "[t]hey are separate and stand-alone government agencies").

Further, the County Boards are funded by the county commissioners or other appropriating authorities of the county annually under Section 305 of the Election Code, not by the Department or other Commonwealth entity. Thus, although the subject matter of this litigation implicates elections, both local and statewide,<sup>36</sup> which are governed by the Election Code,<sup>37</sup> all signs point to the County Boards

<sup>36</sup> In *Finan*, this Court declined "to expand this Court's original jurisdiction to include cases challenging local implementation of statewide laws in the interest of uniformity. The potential for conflicting constructions of statewide laws by the county courts of common pleas exists whenever a statewide law is applied differently by different local agencies." *Finan*, 209 A.3d at 1115-16.

<sup>37</sup> This Court has exclusive original jurisdiction in the following election-related matters only:

(1) Contested nominations and elections of the second class under the . . . [Election Code.]

falling under the designation of “political subdivision,” suits against which are excluded from this Court’s original jurisdiction under Section 761(a)(1) of the Judicial Code. *See also In re Voter Referendum Pet.*, 981 A.2d at 171 (recognizing that a county board of elections is a local agency). As a result, jurisdiction for an action challenging a County Board’s development and implementation of notice and cure procedures properly lies in the respective County’s court of common pleas. *See* 42 Pa.C.S. § 931 (providing that “[e]xcept where exclusive original jurisdiction of an action or proceeding is by statute or by general rule . . . vested in another court of this Commonwealth, the courts of common pleas shall have unlimited original jurisdiction of all actions and proceedings, including all actions and proceedings heretofore cognizable by law or usage in the courts of common pleas”). Accordingly, because this Court lacks subject matter jurisdiction over Petitioners’ claims against the 67 County Boards in the absence of the Acting Secretary and Director Mathis, the POs in this regard are sustained,<sup>38</sup> and the Amended Petition is dismissed.<sup>39</sup>



---

ELLEN CEISLER, Judge

(2) All matters arising in the Office of the Secretary of the Commonwealth relating to Statewide office, except nomination and election contests within the jurisdiction of another tribunal.

42 Pa.C.S. § 764.

<sup>38</sup> Given the Court’s disposition, Respondents’ other POs are dismissed as moot.

<sup>39</sup> Ordinarily, this Court would transfer the matter to the proper court with original jurisdiction over the matter. *See* 42 Pa.C.S. § 5103(a). However, given the impracticality of doing so in this case and given the fact that some County Boards may have changed their procedures since the November 2022 General Election, the Court will not transfer this matter and, instead, will dismiss the Amended Petition. Should Petitioners wish to file suit in the respective courts of common pleas where notice and cure procedures are challenged, they may do so.



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; :  
National Republican Senatorial :  
Committee; National Republican :  
Congressional Committee; Republican :  
Party of Pennsylvania; David Ball; :  
James D. Bee; Debra A. Biro; Jesse D. :  
Daniel; Gwendolyn Mae Deluca; Ross :  
M. Farber; Connor R. Gallagher; Lynn :  
Marie Kalcevic; Linda S. Kozlovich; :  
William P. Kozlovich; Vallerie :  
Siciliano-Biancaniello; S. Michael :  
Streib, :

Petitioners :

v. :

Al Schmidt, in his official :  
capacity as Acting Secretary of the :  
Commonwealth; Jessica Mathis, in :  
her official capacity as Director of the :  
Pennsylvania Bureau of Election :  
Services and Notaries; Adams County :  
Board of Elections; Allegheny County :  
Board of Elections; Armstrong County :  
Board of Elections; Beaver County :  
Board of Elections; Bedford County :  
Board of Elections; Berks County Board :  
of Elections; Blair County Board of :  
Elections; Bradford County Board of :  
Elections; Bucks County Board of :  
Elections; Butler County Board of :  
Elections; Cambria County Board of :  
Elections; Cameron County Board of :  
Elections; Carbon County Board of :  
Elections; Centre County Board of :  
Elections; Chester County Board of :  
Elections; Clarion County Board of :  
Elections; Clearfield County Board of :  
Elections; Clinton County Board of :  
Elections; Columbia County Board of :  
Elections; Crawford County Board of :

No. 447 M.D. 2022

Elections; Cumberland County Board :  
 of Elections; Dauphin County Board of :  
 Elections; Delaware County Board of :  
 Elections; Elk County Board of :  
 Elections; Erie County Board of :  
 Elections; Fayette County Board of :  
 Elections; Forest County Board of :  
 Elections; Franklin County Board of :  
 Elections; Fulton County Board of :  
 Elections; Greene County Board of :  
 Elections; Huntingdon County Board :  
 of Elections; Indiana County Board of :  
 Elections; Jefferson County Board of :  
 Elections; Juniata County Board of :  
 Elections; Lackawanna County Board :  
 of Elections; Lancaster County Board :  
 of Elections; Lawrence County Board :  
 of Elections; Lebanon County Board :  
 of Elections; Lehigh County Board of :  
 Elections; Luzerne County Board of :  
 Elections; Lycoming County Board of :  
 Elections; McKean County Board of :  
 Elections; Mercer County Board of :  
 Elections; Mifflin County Board of :  
 Elections; Monroe County Board of :  
 Elections; Montgomery County Board :  
 of Elections; Montour County Board of :  
 Elections; Northampton County Board :  
 of Elections; Northumberland County :  
 Board of Elections; Perry County :  
 Board of Elections; Philadelphia County: :  
 Board of Elections; Pike County Board :  
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 Elections; Schuylkill County Board of :  
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 Elections; Sullivan County Board of :  
 Elections; Susquehanna County Board :  
 of Elections; Tioga County Board of :  
 Elections; Union County Board of :  
 Elections; Venango County Board of :  
 Elections; Warren County Board of :  
 Elections; Wayne County Board of :

Elections; Westmoreland County Board :  
of Elections; Wyoming County Board of:  
Elections; and York County Board of :  
Elections, :  
Respondents :

## **ORDER**

AND NOW, this 23<sup>rd</sup> day of March, 2023, it is hereby **ORDERED** as follows:

1. The first Preliminary objection (PO) of Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth, and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries; the first PO of the Delaware County Board of Elections; the second PO of the Chester County Board of Elections; and the first PO of the Philadelphia County Board of Elections, relating to lack of subject matter jurisdiction, are **SUSTAINED**.
2. All remaining POs are **DISMISSED AS MOOT**.
3. Petitioners' First Amended Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief is **DISMISSED**.



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ELLEN CEISLER, Judge



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# Transcript of Jonathan Marks

**Date:** July 23, 2024

**Case:** Center for Coalfield Justice, et al. -v- Washington County Board of Elections

**Planet Depos**

**Phone:** 888.433.3767

**Email:** [transcripts@planetdepos.com](mailto:transcripts@planetdepos.com)

**www.planetdepos.com**

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY,  
PENNSYLVANIA

-----X

CENTER FOR COAL FIELD JUSTICE, :

WASHINGTON BRANCH NAACP, :

BRUCE JACOBS, JEFFREY MARKS, :

JUNE DEVAUGHN HYTHON, ERIKA :

WOROBEC, SANDRA MACIOCE, :

KENNETH ELLIOT, and DAVID :

DEAN, :

Plaintiffs, :

V. : Case No. 2024-3953

WASHINGTON COUNTY BOARD :

OF ELECTIONS, :

Defendant. :

-----X

Deposition of JONATHAN MARKS

Harrisburg, Pennsylvania

Tuesday, July 23, 2024

10:01 a.m.

Job: 546180

Pages: 1 - 132

Transcribed by: Robert Kreb

1           Deposition of JONATHAN MARKS, held at the  
2       offices of:

3  
4  
5           OFFICE OF GENERAL COUNSEL  
6           333 Market Street, 17th Floor  
7           Harrisburg, Pennsylvania 17101  
8           (717) 783-6563

9  
10  
11          Pursuant to Notice, before KYLAN BARRY, Notary  
12       Public in and for PENNSYLVANIA.

1 A P P E A R A N C E S

2 ON BEHALF OF THE PLAINTIFF:

3 KATHLEEN A. MULLEN, ESQUIRE

4 OFFICE OF CHIEF COUNSEL DEPARTMENT OF  
5 STATE

6 306 North Office Building 401 North Street  
7 Harrisburg, PA 17120  
8 (717) 783-0839

9

10 ON BEHALF OF THE PLAINTIFF:

11 MARTIN BLACK, ESQUIRE

12 DECHERT, LLP

13 Cira Centre, 2929 Arch Street

14 Philadelphia, PA United States of America  
15 19104-2808

16 (215) 994-2222

17

18 ON BEHALF OF THE DEFENDANT:

19 KATHLEEN A. GALLAGHER, ESQUIRE

20 THE GALLAGHER FIRM, LLC

21 3100 Koppers Building 436 Seventh Avenue

22 Pittsburgh, PA 15219

23 (412) 308-5512

24

25

A P P E A R A N C E S

ON BEHALF OF THE DEFENDANT:

DAVID J. BERARDINELLI, ESQUIRE

DEFOREST KOSCELNIK & BERARDINELLI

436 Seventh Avenue 30th Floor

Pittsburgh, PA 15219

(412) 227-3135

ALSO PRESENT:

Brad Sydorick - Videographer

Konly Harding -Planet Depos Tech

Sara-Paige Silvestro - Public interest law

Claudia De Palma - Public interest law

Mimi Mckenzie - Public Interest Law

Marian K. Schneider, Esquire

Kate Steiker-Ginzberg, Esquire

Witold Walczak, Esquire



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C O N T E N T S

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(Retained by counsel.)

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1 P R O C E E D I N G S

2 THE VIDEOGRAPHER: Here begins media  
3 number 1 in the videotaped deposition of Jonathan  
4 Marks in the matter of Center for Coalfield Justice  
5 et al, v. Washington County Board of Elections in the  
6 Court of Common Pleas, Washington County,  
7 Pennsylvania, case number 2024-3953.

8 Today's date is July 23rd, 2024. And the  
9 time on the video monitor is 10:11 a.m. the  
10 videographer today is Brad Sydorick, representing  
11 Planet Depos. This video deposition is taking place  
12 at 333 Market Street on the 17th floor in Harrisburg,  
13 Pennsylvania, 17101.

14 Would counsel please voice identify  
15 themselves and state whom they represent?

16 MS. GALLAGHER: Kathleen Gallagher on  
17 behalf of the Republican National Committee and for  
18 purposes of this deposition, I'll also be asking  
19 questions on behalf of the Republican Party of  
20 Pennsylvania.

21 MR. BERARDINELLI: David Berardinelli for  
22 the Washington County Board of Elections.

23 MR. BLACK: And Martin Black from Dechert,  
24 LLP for the plaintiffs.

25 MS. SCHNEIDER: Marian Schneider from the

1       ACLU Pennsylvania for Plaintiffs.

2               MS. MULLEN: Kathleen Mullen, Deputy Chief  
3       Counsel, Pennsylvania Department of State for the  
4       Witness, Deputy Secretary Marks.

5               THE VIDEOGRAPHER: The court reporter  
6       today is Kylan Barry, representing Planet Depos. The  
7       witness will now be sworn.

8       Whereupon,

9                       JONATHAN MARKS,  
10       being first duly sworn or affirmed to testify to the  
11       truth, the whole truth, and nothing but the truth,  
12       was examined and testified as follows:

13               THE REPORTER: Thank you. We may begin.

14               EXAMINATION BY COUNSEL FOR THE DEFENDANT  
15       BY MS. GALLAGHER:

16               Q       Can you state your name, please?

17               A       Yes. First name is Jonathan, J-O-N-A-T-H-  
18       A-N, last name Marks M-A-R-K-S.

19               Q       Mr. Marks, I'm Kathy Gallagher. And we'll  
20       be asking you some questions today. Preliminarily,  
21       thank you and your counsel for being available for  
22       us. We know it was relatively short notice.  
23       Hopefully we're not going to get -- take too long,  
24       too long today and be to get you through and out of  
25       here. Could you tell us, please give us some of your

1 begin pre-canvassing or canvassing the ballots.

2           You know, in the interim, you know, they  
3 may be organizing them, you know, by precinct, for  
4 example, to prepare for the pre-canvassing. But  
5 generally once they've recorded the ballot, they are  
6 required by statute to keep those ballots securely  
7 until pre-canvassing begins.

8           Q     And when does the pre-canvass begin?

9           A     It cannot begin earlier than election day  
10 7:00 a.m., I believe, on election day.

11          Q     Okay. What occurs during the pre-canvass?

12          A     Basically, the county election office, or  
13 the County Board of Elections will go through all of  
14 the ballots that have been submitted by voters,  
15 confirm that the information is accurate and  
16 complete. They will set aside any ballots that may  
17 have a defect at that time, the rest of the ballots  
18 ultimately will be approved. And then the outer  
19 envelope is opened exposing the secrecy envelope that  
20 contains the ballot. Those are ultimately opened and  
21 then tabulated by the Board of Elections.

22          Q     And is there a name for the process when  
23 they're tabulated?

24          A     Well, it's -- they're tabulated as part of  
25 the -- of the pre-canvass or the official canvas.

1 Q And when does the official canvass start?

2 A The official canvass of all of the votes  
3 from the election starts on Friday morning, the  
4 Friday after election day.

5 Q Right.

6 A So the pre-canvass and canvass of mail-in  
7 ballots is distinct from the official canvas. I know  
8 the term is used a lot, but --

9 Q That's what I would --

10 A -- they're different --

11 Q -- trying to get --

12 A -- distinct.

13 Q -- trying to breaking down. Could you  
14 tell us what those differences are?

15 A Well, the pre-canvass and canvass of mail-  
16 in ballots applies strictly to ballots cast --  
17 absentee or mail-in ballots cast by voters. The  
18 official canvass is actually the process of going  
19 through all of the votes cast. Those include  
20 election ballots cast at a polling place on election  
21 day, as well as mail-in ballots. It includes a  
22 little further downstream, the actual, you know, the  
23 canvass and tabulation of any military and oversea  
24 civilian ballots that may have come in up to seven  
25 days after the election.

1           In the case of a -- of an absentee or  
2 mail-in ballot where the voter's ID could not be  
3 verified prior to election day, voters within six  
4 days have an opportunity to provide a valid form of  
5 ID and have those counted. So that official canvass  
6 includes all of those activities. It also includes  
7 reconciling all of the records of the counties during  
8 the -- during the election. So it's a -- it's a long  
9 tedious process to get to the end.

10          Q     Are you familiar with the term provisional  
11 ballot?

12          A     I am, yes.

13          Q     And when are provisional ballots processed  
14 or canvased?

15          A     Provisional ballots are canvased during  
16 the official canvass period.

17          Q     Subsequent -- upon completion of the  
18 canvass process, is that what process then begins, or  
19 what is the next step in the responsibility of the  
20 Board of Elections?

21          A     Once the official canvass has completed,  
22 the next step is the process of certifying the  
23 official election results.

24          Q     And what does that mean?

25          A     So the County Board of Elections, after it

1 is -- it is done, all of the activities that we just  
2 talked about, will basically provide an unofficial  
3 tabulation of the votes for the election. And at  
4 that point, most counties call it their first  
5 signing, where they'll sign off, the board will sign  
6 off on the official returns, and then that starts a  
7 five-day clock within which individuals -- individual  
8 voters can request recount, for example, if they --  
9 if they believe that any of the election results are  
10 in error for any reason. And then once that five-day  
11 clock ends, the county will sign off on the official  
12 return.

13 Q And with respect to the official return,  
14 so a voter in Pennsylvania, you did objection to form  
15 here, can either vote at the polls on the machine, or  
16 by mail-in ballot. Correct? Are they reported  
17 differently or are they reported in the same manner?

18 MS. MULLEN: Objection.

19 A I'm not sure what you mean by reported.

20 Q Are the results of the election -- of any  
21 election on the -- in the certification process, does  
22 the totals, are they broken down by how the voter  
23 cast a ballot?

24 A They are, yes.

25 Q Okay. Could you -- and how is that?

1           A     So -- and you can see this on our website,  
2     so it'll be broken down by election day votes cast  
3     for candidates, votes cast by mail, as well as votes  
4     cast by provisional ballot.

5           Q     With respect to mail-in ballots, is there  
6     a breakdown of ballots which were -- for this, we'll  
7     say, counted and ballots which were not counted for a  
8     potential defect or a defect?

9           MS. MULLEN:  Objection.

10          A     Those can be reported by the county  
11     election officer.  I wouldn't -- I wouldn't say  
12     that's necessarily part of the certification of the  
13     official results.  The certification of the results  
14     of the election is the certification of the vote  
15     totals, so that would only include vote totals from  
16     ballots that were ultimately counted, but the county  
17     can report on ballots that were not counted and the  
18     reason they were not counted.  And the same is true  
19     of, you know, whether it's mail ballots or  
20     provisional ballots, the county can provide an  
21     accounting of why certain ballots were not counted,  
22     or the votes on certain ballots were not counted to  
23     be very particular.

24          Q     Thank you.  I'd like to talk a little bit  
25     about the SURE system.  For the record, could you



1 absolute latest that counties can begin delivering  
2 mail ballots.

3 Q Okay. And I think we can go on. I'd like  
4 to use the -- it would be this document. Yes. We'll  
5 mark this as Marks' 1.

6 Martin, you guys gave (indiscernible) 00:32:22,  
7 didn't you?

8 MS. MULLEN: That's from Ostrander?

9 MS. GALLAGHER: Excuse me.

10 MR. BLACK: No, it's fine. She just  
11 remarking it Marks' 1.

12 MS. SCHNEIDER: You're remarking the  
13 Ostrander case.

14 MS. GALLAGHER: I would just -- was going  
15 to leave those as Ostrander just to keep it more  
16 simple.

17 MS. SCHNEIDER: Okay.

18 MS. GALLAGHER: I thought it would be  
19 easier.

20 MS. SCHNEIDER: Thank you.

21 (Marks' 1 was marked for identification  
22 and is attached to the transcript.)

23 BY MS. GALLAGHER:

24 Q Showing you what's been marked as your  
25 Exhibit 1. Could you take a look at that for us

1 please and tell me -- tell us if you're familiar with  
2 that document. Yeah, that's fine.

3 A Yes, I am familiar with this.

4 Q And could you tell us what this document  
5 is, please?

6 A These are -- they're release notes for a  
7 deployment of changes that we made to the SURE system  
8 back in March of this year.

9 Q And what's a release note?

10 A A release note is basically something that  
11 we issue to the counties that outlines the changes  
12 that we've made to the SURE system. It -- sometimes  
13 it provides them with, you know, a job aid or some  
14 other information that they may need to know the  
15 process work under the new changed, you know,  
16 application. In this case here, these release notes  
17 were primarily related to changes that we were making  
18 to the ballot response types in the SURE system.

19 Q We can get to that in a moment, but could  
20 you tell us how -- this document we've spoken about,  
21 guidance, directive, regulation, is this document any  
22 one of the three of those?

23 A It is not, no.

24 Q And how is a release note developed?

25 A A release note is essentially a summary of

1 changes that we've made to the SURE system. So it is  
2 developed with our election staff in concerts with  
3 the IT staff that is developing the changes to the  
4 SURE system. But it is really designed to summarize  
5 for the counties what is -- what is being changed in  
6 the SURE system.

7 Q Almost a user manual, is that -- is that  
8 if --

9 A I don't know that I would call it a user  
10 manual so much as it's -- it's kind of a -- trying to  
11 think of a good analogy, it would be almost like a  
12 product notification. So for example, if Microsoft  
13 make changes to one of its products, they may issue a  
14 document that summarizes those changes. That's what  
15 this is.

16 Q Okay.

17 A It is sometimes accompanied with updated  
18 guidance if the process has changed and the guidance  
19 that it's been issued previously needs to be changed  
20 as a result.

21 Q Was the March 11th, 2024 release notes,  
22 were they accompanied by a guidance?

23 A It would be referenced here, and I'm not -  
24 - we may have updated a job aid that goes through the  
25 process of processing absentee and mail-in ballots as

1     need to do additional follow up with the County Board  
2     of Elections to resolve that.

3           Q     Fair enough. With respect to what the  
4     board, putting aside the update and what's contained  
5     in the release notes, which we'll get to in a moment,  
6     what is the obligation of a county board to input  
7     into the SURE system when it receives a mail-in  
8     ballot?

9           MULLEN: Objection.

10          Q     I'm not asking for a legal just to be  
11     clear, but from a practical standpoint, what does the  
12     SURE system have to reflect?

13          A     The SURE system would at least have to  
14     reflect that a ballot was received.

15          Q     And again, not, I'm asking you legal  
16     conclusion, I'm sure your counsel will object,  
17     received, is there any other information that has to  
18     be provided about that information to the best of  
19     your knowledge?

20          MS. MULLEN: Objection.

21          Q     About ballot, excuse me. Other than it  
22     was received.

23          A     The date I want you is received.

24          Q     If you could take a look at, in the top  
25     left hand corner, there is a -- I'm not sure what

1 can that ballot be counted?

2 A If at the -- if at the time of the canvass  
3 the ballot does not contain a signature, then the  
4 board would have to set that ballot aside.

5 Q I believe the next pending is no secrecy  
6 envelope.

7 A Correct.

8 Q And if a ballot does not contain a secrecy  
9 envelope, can that ballot ultimately be counted?

10 A No.

11 Q All right. At the time that a ballot is  
12 received -- strike that.

13 Could you describe for us for the record, so  
14 it's clear where the secrecy envelope is with respect  
15 to a mail ballot

16 A Where it is when it's returned by the  
17 voter?

18 Q Yes.

19 A It is enclosed inside the outer  
20 declaration.

21 Q And is the ballot itself then in turn  
22 inside the secrecy envelope?

23 A Yes.

24 Q Can declaration envelopes be opened or the  
25 contents of the envelope determine the declaration

1 envelope prior to the pre-canvass?

2 MS. MULLEN: Objection.

3 A Can they be determined, yes.

4 Q Okay. On what basis?

5 A Well, a lot of counties will use -- they  
6 have a whole punch in there that will enable them,  
7 you know, and it serves a couple of purposes. One  
8 of, of course, is it enables the county to determine  
9 whether there's a secrecy envelope inside that  
10 declaration envelope. It also helps them on the back  
11 end of the process to verify that they've actually  
12 removed all the secrecy envelopes from the  
13 declaration envelope.

14 Other counties are able to determine that  
15 based on the equipment that they use to process  
16 incoming mail ballots. In some cases they can  
17 actually weigh the ballot to determine whether it  
18 contains a secrecy envelope and the ballot inside the  
19 declaration envelope.

20 Q Would you agree with me, Deputy Secretary  
21 Marks that, and again, not asking for a legal  
22 conclusion, but it does come out of the -- my  
23 question is, practice and that comes out of the  
24 election vote. When is the first time that a mail-in  
25 ballot that is received can be opened?

1 MS. MULLEN: Objection.

2 A The first time that a ballot can be  
3 removed from its secrecy envelope, or?

4 A I mean, let's -- I want to be very clear.  
5 Now, the ballot arrives in the declaration envelope.

6 A Right.

7 Q When is the first time under the election  
8 code, if you're aware, that that declaration envelope  
9 can actually be opened?

10 A My understanding is that the declaration  
11 envelope cannot be opened until the pre-canvass or  
12 the canvass of mail-in ballots.

13 Q Would you agree with me that the opening  
14 of the envelope allows the county to board to know on  
15 whether or not the -- excuse me, whether or not a  
16 secrecy envelope is included?

17 MR. BLACK: Objection to form.

18 A I mean, certainly that is one way to  
19 determine, it's not the only way, though.

20 Q Okay. We'll get back to that. But by  
21 opening it, that would be the way -- one way to  
22 determine it, correct?

23 A Correct.

24 Q Okay. And we've agreed that a ballot that  
25 does not contain a secrecy envelope or is not

1 BY MR. BLACK:

2 Q Going back to Marks' 1, which is the  
3 release note. You were asked some questions about  
4 the cancel incorrect date on page 8. Do you recall  
5 that?

6 A I do, yes.

7 Q The email response that would go out if  
8 that code is selected, is stated in the right-hand  
9 column, it starts with your mail ballot may not be  
10 counted, et cetera. Do you see that?

11 A I do, yes.

12 Q It says in the second sentence that if you  
13 do not have time to request a new ballot before  
14 ballot application deadline, or if deadline has  
15 passed, and then it says you can go cast a  
16 provisional ballot. Right?

17 A Right.

18 Q Under what circumstance would someone be  
19 able to request a new ballot after having already  
20 sent in a mail-in ballot?

21 MR. BERARDINELLI: Objection; form.

22 A If -- so if -- so, the counties that do  
23 notice and cure actually have different practices,  
24 probably not a surprise to anyone in this room. In  
25 some cases, the county will actually cancel the



1 original ballot and issue a new ballot to the voter.  
2 In other cases, they're asking the voter to perfect  
3 their original ballot. So we tried to capture in  
4 this language, and keep in mind we are -- we're  
5 trying to capture in a message that all counties have  
6 to use a variety of different practices in individual  
7 counties.

8 So -- but that might be a circumstance  
9 under which the voter becomes aware either from the  
10 county or otherwise, that something is wrong with  
11 their ballot. They reach out to the -- to the County  
12 Board of Elections and the county's practice is to  
13 cancel that initial ballot and reissue another one.  
14 And that typically happens, you know, two, three  
15 weeks before election day when there's still time to  
16 facilitate that.

17 Q Has it struck you at all that the U in  
18 SURE uniform is not really uniform?

19 MR. BERARDINELLI: Yeah, object to the  
20 form.

21 MS. MULLEN: Objection.

22 A The system is uniform. County practices  
23 are not in many cases, and this is one of those  
24 cases.

25 Q So the system is uniform, but it's not

1 poll book will indicate that in one section.

2           You can actually take your ballot, your  
3           unvoted ballot remit that to the local election  
4           officials, sign the poll, and then you can vote in  
5           the normal manner. If the poll book indicates that  
6           you've already returned your ballot then your option  
7           is to vote by provisional ballot. So the poll book  
8           will indicate that you've already returned your  
9           ballot and you're not entitled to vote the  
10          traditional manner, would have to by provisional  
11          ballot.

12          Q     In an county that uses notice and cure, if  
13          they sent a notice out of a defective ballot and that  
14          person then shows up at the polling place, can they  
15          vote a provisional ballot?

16               MR. BERARDINELLI: Object to the form.

17          A     If that voter shows up the polling place,  
18          and they affirm that they're qualified to vote, and  
19          understand that their ballot may not have been  
20          correctly submitted, they are entitled to vote by  
21          provisional ballot.

22          Q     Do canceled votes versus recorded --  
23          strike that.

24               In a county that does notice and cure, if  
25          a voter sends in a ballot, which is rejected because

1 it's missing a signature and they receive the email  
2 stating that it was missing the signature, and they  
3 show up at the polls, does their name show up in a  
4 different part of the poll book than people who  
5 recorded properly?

6 A Yes. If they return their ballot, it is -  
7 - those are in a separate section of the poll book.  
8 So basically anyone who returned their ballot to the  
9 county are kind of segregated from the rest of the  
10 voters so that counties can keep -- or local poll  
11 workers can keep straight or distinguish between  
12 folks who may be able to remit their balloting  
13 materials versus those who've already submitted them  
14 to the county.

15 Q Do you know roughly how many counties are  
16 currently allowing notice and cure and how many are  
17 not?

18 MR. BERARDINELLI: Object to the form.

19 MS. MULLEN: Objection. Do you want a  
20 time period, primary, general, or?

21 Q Good point. For the last primary  
22 election, do you have any sense of what the rough  
23 number of counties that are --

24 A I don't recall the -- the number of  
25 counties. I know it is -- I believe it is at least

1 half the -- provide some --

2 MR. BERARDINELLI: Excuse me. (sneezes)

3 MR. BLACK: Bless you.

4 MR. BERARDINELLI: Thank you.

5 A -- some form of notice and cure.

6 MR. BERARDINELLI: I'm sorry my sneeze  
7 locked out the answer. What was the percentage? I'm  
8 sorry.

9 THE WITNESS: I believe it is -- it is at  
10 least half, probably little more than half of the  
11 counties that provide some form of notice and cure.

12 MR. BERARDINELLI: Thank you.

13 THE WITNESS: Keeping in mind that there  
14 are variations in that.

15 BY MR. BLACK:

16 Q You mentioned the feedback session that  
17 you had with the county election officials.

18 A Yes.

19 Q Do you recall whether there were any  
20 specific comments by representatives of Washington  
21 County?

22 A I don't recall any comments by the  
23 election director.

24 Q Are there minutes or any record of that  
25 conversation?