

APPENDIX

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APPENDIX A

**[J-82A-2024 and J-82B-2024]
IN THE SUPREME COURT OF
PENNSYLVANIA
WESTERN DISTRICT**

**TODD, C.J., DONOHUE, DOUGHERTY, WECHT,
MUNDY, BROBSON, McCAFFERY, JJ.**

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:
REPUBLICAN
NATIONAL
COMMITTEE AND
REPUBLICAN PARTY
OF PENNSYLVANIA

No. 26 WAP 2024

Appeal from the Order of
the Commonwealth Court
entered September 5,
2024, at No.
1074 CD 2024, Reversing
the Order of the Court of
Common Pleas of Butler
County entered
August 16, 2024, at No.
MSD-2024-40116.

SUBMITTED:
September 26, 2024

FAITH GENSER AND
FRANK MATIS

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BOARD OF
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REPUBLICAN PARTY
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DEMOCRATIC PARTY

APPEAL OF:
REPUBLICAN
NATIONAL
COMMITTEE AND
REPUBLICAN PARTY
OF PENNSYLVANIA

No. 27 WAP 2024

Appeal from the Order of
the Commonwealth Court
entered September 5,
2024, at No.
1085 CD 2024, Reversing
the Order of the Court of
Common Pleas of Butler
County entered
August 16, 2024, at No.
MSD-2024-40116.

SUBMITTED:
September 26, 2024

OPINION

JUSTICE DONOHUE

DECIDED: OCTOBER 23, 2024

I. Introduction

The Republican National Committee and the Pennsylvania Republican Party (collectively, “Republican Party” or “Appellants”) challenge the Commonwealth Court’s decision that the Butler County Board of Elections (“Board”) was required to count provisional ballots cast by two electors after the electors were notified that their mail ballots¹ would not be counted because of their failure to follow one of the mandatory requirements for voting by mail. For the reasons discussed in this opinion, we affirm the judgment of the Commonwealth Court.

Background

The manner in which mail-in ballots are to be submitted by a voter is prescribed in the Election Code.² Mail-in ballots are provided to voters in packages that contain not only the ballot, but two envelopes. One envelope, marked “Official Election Ballot,” has come to be referred to as the “Secrecy Envelope.” The second envelope, which we refer to as the “Declaration Envelope” or “Outer Envelope,” bears information including a declaration to be signed and dated by the voter and the address for the county board of elections where the ballot will be returned. Once a voter marks the ballot, the voter is required to place the ballot into the Secrecy Envelope, seal the Secrecy Envelope, and then place the Secrecy Envelope in the Declaration Envelope. 25 P.S.

¹ As pertinent to this appeal, absentee and mail-in ballots are treated similarly under the Election Code.

² Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2601-3591.

§ 3150.16(a).³ We refer to these three elements of a mail-in ballot so assembled as the “Return Packet.” The Declaration Envelope contains a unique bar code that links the Return Packet to the voter’s registration file contained in the Statewide Uniform Registry of Electors (“SURE”) System. Return Packets must be received by county boards of election by eight o’clock P.M. on the day of the election in which they are cast. *Id.* § 3150.16(c). Upon receipt, the Return Packet is reviewed for compliance with the signature, dating and Secrecy Envelope requirements.⁴ Non-compliant Return Packets are set aside. The Return Packets are placed in “sealed or locked containers,” where they remain, unopened, until seven o’clock in the morning on Election Day, which is when pre-canvassing of mail-in ballots may begin. *Id.* § 3146.8(a), (g)(1.1).⁵

The facts underlying this appeal are not in dispute. Two electors, Faith Genser and Frank Matis (hereinafter, “Electors”), chose to vote in the 2024 Primary Election by mail-in ballot. When completing their mail-in ballots, Electors failed to enclose their

³ “[T]he mail-in elector shall, in secret, proceed to mark the ballot ..., 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.” 25 P.S. § 3150.16(a).

⁴ *See, e.g.*, N.T., 5/7/2024, at 67-68 (Director McCurdy testifying regarding the initial sorting and scanning of Return Packets).

⁵ Pre-canvassing involves “the inspection and opening of all envelopes containing official ... mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots.” 25 P.S. § 2602(q.1).

ballots in the Secrecy Envelopes before mailing their ballots to the Board. Upon receipt by the Board, both Return Packets were scanned by an Agilis Falcon machine, which measured their dimensions and predicted that both lacked a Secrecy Envelope.⁶ The Board logged the receipt of Electors' mail-in ballots in the SURE System, noting the lack of a Secrecy Envelope, which triggered an automatic email ("Notice Email") to be sent to Electors.

The SURE System was established in 2002 under 25 Pa.C.S. § 1222. *In re Doyle*, 304 A.3d 1091, 1096 n.3 (Pa. 2023). The "registry is a 'single, uniform integrated computer system' maintained by the Pennsylvania Department of State which is 'adatabase of all registered electors in this Commonwealth.'" *Id.* (citing 25 Pa.C.S. § 1222(c)(1)). Each county registration commission "shall be required to use the SURE System as its general register." 25 Pa.C.S. § 1222(e). The SURE System contains voters' identifying information obtained during voter registration, and registrars, employees, and clerks of a commission who are responsible for voter registration are required to undergo training to work in the SURE System. *Doyle*, 304 A.3d at 1096 n.3 (quoting *McLinko v. Dep't of State*, 279 A.3d 539, 575 (Pa. 2022)).

All county registration commissioners are required to maintain their registration records in the SURE System and to "add, modify and delete information in the system as is necessary and appropriate." 25 Pa.C.S. § 1222(c) & (c)(4). Both county registration

⁶ Mail-in ballots that lack a Secrecy Envelope when received by a county board of elections are often referred to as "naked ballots."

commissioners and the Department of State of the Commonwealth are permitted “to review and search the system and to permit the sending of notices to the appropriate officials regarding death, change of address or other information which could affect the qualifications of an applicant or the registration of a registered elector.” *Id.* § 1222(c)(7). The SURE System must permit “the timely printing and transmission by commissions of district registers and all other information contained in the system as may be necessary for the operation of the polling places on Election Days.” *Id.* § 1222(c)(13). Among other functions, the SURE System also identifies “registered electors who vote in an election and the method by which their ballots were cast.” *Id.* § 1222(c)(20). There are uniform procedures for entering data into the SURE System, including designations of some information that must be entered and some information that may be entered. 4 Pa. Code § 183.4.

In this matter, when logging its receipt of Electors’ defective Return Packets, the Board updated the ballot status in the SURE System by selecting the option “CANC – NO SECRECY ENVELOPE[.]” N.T., 5/7/2024, at 68. Selecting this option indicates that the ballot will not be counted due to lack of a Secrecy Envelope. As a result, the Notice Email generated within the SURE System was sent to Electors and advised them 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 [S]ecrecy [E]nvelope. 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 [E]lection [D]ay and cast a provisional ballot.

Petition for Review, Ex. 1 (Declaration of Faith Genser); Ex. 2 (Declaration of Frank Matis).

On April 23, 2024, the date of the 2024 Primary in Pennsylvania, Electors appeared at their respective election districts and cast provisional ballots, as suggested by the Notice Email. When subsequently informed that their provisional ballots were not counted, Electors jointly filed a Petition for Review in the Nature of a Statutory Appeal (“Petition”) in the Court of Common Pleas of Butler County (“trial court”). *See* 25 P.S. § 3157. In their Petition, Electors argued that the Board was required to count their provisional ballots pursuant to Section 3050 of the Election Code,⁷ as well as the Free and Equal

⁷ Electors contended that the Board’s decision ran afoul of the following provisions:

(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:

* * *

(continued...)

Elections Clause of the Pennsylvania Constitution.⁸ Electors argued that they were unlawfully disenfranchised by the Board’s decision to reject their provisional ballots. In particular, they argued that the Board’s decision violated the Election Code and misinterpreted this Court’s decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (“*Pa. Democratic Party*”).

A date was set for a hearing on the Petition. On May 7, 2024, prior to the evidentiary hearing for Electors’ Petition, the trial court granted intervenor status to the Republican Party and the Pennsylvania Democratic Party (“PDP”).

At the hearing, the court received testimony from Electors and Chantell McCurdy, Director of Elections for the Board. Director McCurdy testified at length about the Board’s procedure with regard to the Electors’ Return Packets, including the use of the Agilis Falcon machine to detect potential defects within Return Packets, and the SURE System. She acknowledged that suspected defective ballots are flagged for further review upon receipt. She noted that at that juncture, the Board can only speculate as to whether the ballot was not enclosed in a Secrecy Envelope because they are prohibited from opening the Return Packets until pre-canvassing and

(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) (emphasis added).

⁸ “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.

canvassing.⁹ N.T., 5/7/2024, at 33-35. Electors' mail-in ballots were subsequently canvassed (i.e., the ballot was removed from the Declaration Envelope) and consistent with the Board's preliminary determination, the naked ballots were not counted. *Id.* at 26-27.

The hearing also explored the Board's "notice and cure" policy, which permits voters to remedy specific defects detected upon review when the Return Packets are received by the Board. Director McCurdy testified that while certain errors, such as missing signatures, may be cured under this policy, no such procedure exists for naked ballots. She also explained that where an elector submits both a provisional ballot and an untimely mail-in ballot, the provisional ballot is counted and the late mail-in ballot is deemed ineligible for counting.¹⁰ Director McCurdy's testimony corroborated that on occasion, voters were "misinformed" by the automated system that they could submit provisional ballots if their mail-in ballots

⁹ As defined by the Election Code, the process of "pre-canvassing" is "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). The process of "canvassing" is "the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots." 25 P.S. § 2602(a.1). We refer to these two stages broadly as "canvassing," when the distinction is not relevant.

¹⁰ According to Director McCurdy, with missing signatures and other errors subject to the Board's curing policy, electors are permitted to fix and resubmit the defective ballot or to vote by provisional ballot. N.T., 5/7/2024, at 50.

were rejected for lack of a Secrecy Envelope. Electors, for their part, testified that they were advised to cast provisional ballots, as evidenced by the Notice Email.

On August 16, 2024, the trial court issued a memorandum opinion and order dismissing Electors' Petition and upholding the Board's decision not to count the provisional ballots. Parsing Subsections (a.4)(5)(i) and (a.4)(5)(ii)(F) of the Election Code, the court concluded that the statute's plain language does not support the claim that a timely received but defective mail-in ballot allows for a provisional ballot to be counted in its stead. *See* Trial Court Opinion, 8/16/2024, at 16 ("Subsection 3050(a.4)(5)(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[.]") (emphasis in original).

The trial court went on to explain that the Election Code's prohibition against opening mail-in ballots before canvassing necessarily requires the Board to treat the receipt of a Return Packet as the act of casting a ballot, irrespective of what errors might be discovered within the Return Packet. *Id.* at 21. This, the trial court concluded, is consistent with the legislature's clear intent to place the onus on the voter to properly complete, enclose, and timely submit their ballot. *Id.* It emphasized that the Board's role is to examine the contents of the mail-in ballots only during canvassing to determine whether it can be counted.

The court also rejected Electors' constitutional challenges, finding no infringement of their right to vote. It reasoned that the procedural requirements of the Election Code, including those concerning provisional ballots, are designed to maintain electoral

integrity and determined that because receipt of a mail-in ballot does not ensure that it will be counted, any opportunity to correct a defect—such as casting a provisional ballot—constitutes an opportunity to “cure.” Citing this Court’s decision in *Pa. Democratic Party*, the trial court observed that the Election Code does not mandate a notice-and-cure process for defective mail-in ballots. As such, the trial court concluded that Electors’ claims did not implicate any fundamental deprivation of equal voting rights. *Id.* at 27.

Electors appealed to the Commonwealth Court, which consolidated their cases for its review. In a split decision, the Commonwealth Court held that Electors had not cast any other ballot within the meaning of Subsection (a.4)(5)(i). Accordingly, it concluded that Subsection (a.4)(5)(ii)(F) did not preclude the Board from counting their provisional ballots. *Genser v. Butler Cnty. Bd. of Elections*, 2024 WL 4051375 (Pa. Commw. Sept. 5, 2024).¹¹

Guided by the Statutory Construction Act,¹² the intermediate appellate court began its analysis with the language of the Election Code. The panel concluded that when reading Subsections (a.4)(5)(i) and (a.4)(5)(ii)(F) together with Section

¹¹ The majority opinion was authored by Judge Matthew S. Wolf and joined by President Judge Renée Cohn Jubelirer; Judge Lori A. Dumas dissented without opinion.

¹² 1 Pa.C.S. §§ 1501-1991.

3150.16(b)(2),¹³ ambiguity results.¹⁴ In particular, the court found that uses of the terms “vote,” “voted,” “received,” “cast,” and “ballot” in these provisions—none of which are defined within the Election Code or the Statutory Construction Act—present a contextual ambiguity within the broader statutory framework.

The court noted that while “cast” and “voted” are often treated as synonymous in everyday parlance, they bear distinct implications under the Election Code. A voter can **cast** a ballot merely by filling it out or also by delivering it to a location. *See* 25 P.S. § 3050(a.4)(3) (“After the provisional ballot has been **cast**, the individual shall place it in a [S]ecrecy [E]nvelope.”); *id.* § 3050(a.4)(5)(i) (describing a voter “registered and entitled to vote at the election district where the ballot was **cast**”). However, the term “cast” does not consistently differentiate between the mere submission of a ballot and the assurance that the vote

¹³ Pursuant to 25 P.S. § 3150.16(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).

¹⁴ The panel concluded that its prior decision in *In re Allegheny County Provisional Ballots in the 2020 General Election*, 1161 C.D. 2020, 2020 WL 6867946 (Pa. Commw. Nov. 20, 2020) (non-precedential), *appeal denied*, 242 A.3d 307 (Pa. 2020), did not compel a different result. The panel acknowledged that the decision held that Subsection (a.4)(5)(ii)(F) is unambiguous; however, it found that the *Allegheny* Court had improperly analyzed the clause in isolation, without addressing the other relevant provisions. Additionally, it noted that the *Allegheny* Court was not asked to address whether only valid ballots that will count trigger Subsection (a.4)(5)(ii)(F). *Genser*, 2024 WL 4051375, at *11 (citing *Gavin v. Loeffelbein*, 205 A.3d 1209, 1221 (Pa. 2019)).

is counted, depending on the specific provision being referenced. For instance, Subsection (a.4)(4)(vii) explicitly refers to a “vote,” rather than a “ballot,” being “cast.” *Id.* (“[T]he votes cast upon the challenged official provisional ballots shall be added to the other votes cast within the county.”).

The court asserted that the inconsistent use of these undefined terms obfuscates the determination of when a ballot is deemed “cast” and raises the critical question of whether exercising the right to vote requires merely submitting a ballot or necessitates a more comprehensive act that includes the counting and validation of that vote. Considering these factors, along with the reasonable interpretations posited by the parties and the divergent decisions rendered by at least three courts of common pleas, the Commonwealth Court ultimately concluded that “the words of the Code are not explicit.” *Genser*, 2024 WL 4051375, at *14 (citing 1 Pa.C.S. § 1921(c)) (brackets omitted).¹⁵

¹⁵ The Commonwealth Court compared the trial court’s opinion with that of two other common pleas court opinions. *Genser*, 2024 WL 4051375, at *14 (citing *Ctr. for Coalfield Just. v. Wash. Cnty. Bd. of Elections*, No. 2024-3953, slip op. at 25-27 (Wash. Cnty. Ct. Com. Pl. Aug. 23, 2024) (holding, inter alia, that the Subsection (a.4)(5)(ii)(F) is ambiguous and construing it in favor of counting provisional ballots); *Keohane v. Del. Cnty. Bd. of Elections*, No. 2023-4458, slip op. at 5 (Del. Cnty. Ct. Com. Pl. Sept. 21, 2023) (ordering provisional ballots under these same circumstances to be counted)).

The Commonwealth Court affirmed the order of the common pleas court in *Center for Coalfield Justice*, and this Court has granted further review of a related issue. *Ctr. For Coalfield Justice v. Wash. Cnty. Bd. of Elections*, 2024 WL 4272040 (Pa.

Having concluded that there is ambiguity, the intermediate appellate court turned to consideration of the factors of statutory construction to discern the intent of the General Assembly. Initially, the court explained that the overarching purpose of the Election Code is to “obtain freedom of choice, a fair election, and an honest election return” and that its language should be liberally construed in favor of the election franchise. *Genser*, 2024 WL 4051375, at *11 (citing *Pa. Democratic Party*, 238 A.3d at 355). The court further reasoned that this objective is fundamentally realized by safeguarding each qualified elector’s right to vote exactly once in any given election. Pursuant to the court’s rationale, to allow zero votes would strip away the elector’s freedom of choice and to permit two votes would compromise the integrity of the election return.

The court also noted that the introduction of Section 3150.16(b)(2) in 2019, along with Subsections (a.4)(5)(i) and (a.4)(5)(ii)(F), was intended to enhance convenience for eligible voters through universal mail-in voting while simultaneously preserving the integrity of the electoral process. It found that the provision allowing mail-in voters to cast a provisional ballot if they are “not shown on the district register as having voted” reflects the General Assembly’s intent to permit voters to remedy their circumstances when their initial mail-in ballot is invalid or incomplete. Consequently, the court interpreted these provisions as tethering the statutory right to vote to an actual act of voting (i.e., the vote is valid and counted), rather than merely the act of submitting or mailing a ballot,

Commw. Sept. 24, 2024), *appeal granted*, 2024 WL 4406776 (Pa. Oct. 5, 2024) (per curiam).

thereby defining the term “voted” to encompass the validity of the ballot and the exercise of the right to vote.

Thus, the court concluded that the General Assembly did not intend for provisional ballots to be summarily rejected when an elector has previously made an unsuccessful attempt to cast a ballot. *Id.* at *16. It reasoned that this interpretation not only aligns with the text of the Election Code but also ensures that every qualified voter retains the opportunity to cast their vote precisely once, thereby safeguarding the franchise and promoting justice. The Commonwealth Court dismissed the suggestion that its ruling introduced into the Election Code a judicially-created, mandatory ballot-curing procedure, a proposition rejected by this Court in *Pa. Democratic Party*. It explained that there is a fundamental difference between the process of “curing” defects in flawed ballots and the act of casting a provisional ballot. The court clarified that while county election boards are under no obligation to establish a “notice and opportunity to cure” procedure for defective mail-in ballots, the county boards are nonetheless required to count validly submitted provisional ballots.

Appellants and the Board filed petitions for allowance of appeal to this Court. We denied the Board’s petitions for allowance of appeal, and granted review on two questions presented by Appellants, reworded as follows:

- A. Whether, contrary to this Court’s binding precedent in [*Pa.*] *Democratic Party*, [] the Commonwealth Court improperly usurped the authority of the General Assembly by

effectively rewriting the Election Code to engage in court-mandated curing when it held that a voter is entitled to submit a provisional ballot and have that provisional ballot counted in the election tally after the voter has timely submitted a defective absentee or mail-in ballot, contrary to the Election Code.

- B. Whether the Commonwealth Court erred in holding that, due to purported ambiguities in the Election Code, the Butler County Board of Elections is required to count a provisional ballot cast by an elector who received a mail-in ballot and delivered the mail-in ballot to the county board of elections without the required [S]ecrecy [E]nvelope, despite the language of 25 P.S. § 3050(a.4)(5)(ii)(F), which provides that a provisional ballot shall not be counted if the elector's absentee ballot or mail-in ballot is timely received by a county board of elections.

Genser v. Butler Cnty. Bd. of Elections, 2024 WL 4248971 (Pa. 2024) (per curiam).

II. Parties' Arguments

Appellants' Arguments

Appellants argue that it is solely the province of the General Assembly to establish the rules for casting and counting a mail-in vote and to prescribe the consequences for noncompliance with any of those rules. Appellants' Brief at 20. Appellants state that the General Assembly has mandated that mail-in ballots comply with the signature, dating, and secrecy-

envelope requirements, and those mail-in ballots that do not comply are invalidated and cannot be counted. *Id.* at 20-21. This notion, they assert, comports with our decision in *Pa. Democratic Party*, which they interpret as holding that courts cannot mandate the curing of mail-in ballot defects when the General Assembly has not done so. *Id.* at 21. They note that since our decision in *Pa. Democratic Party*, the General Assembly has not revised the Election Code to include a “notice and cure” procedure. *Id.* at 22-23.

Appellants contend that the Commonwealth Court’s conclusion that provisional voting does not equate to curing presents a “distinction without a difference” because “[i]t permits a voter to have his ballot counted” despite the errors that the General Assembly determined would invalidate a voter’s “first (and only) ballot.” *Id.* at 23-24. Appellants proceed to argue that even if requiring provisional ballots to be counted when a mail-in ballot is defective does not constitute curing, the Commonwealth Court’s interpretation is contrary to the plain language of the Election Code. *Id.* at 24-25. Specifically, they highlight the statutory language 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.* at 25 (quoting 25 P.S. § 3050(a.4)(5)(ii)(F)). Appellants interpret this to mean that a county board of elections cannot count any provisional ballot if the voter also submitted a “mail-ballot package[]” prior to eight o’clock P.M. on Election Day, even if it is defective and will not be counted. *Id.* at 24-26.

Further, they argue that provisional ballots are only permitted in limited circumstances. *Id.* at 26-27.

Appellants believe that those voters who request a mail-in ballot but do not return them to their county board by Election Day are the only class of “would-be mail voters” who are permitted to vote by provisional ballot, pursuant to the Election Code. *Id.* at 27. Appellants support their position by looking to the statutorily prescribed affidavit that a voter who casts a provisional ballot must sign, which includes a statement that the provisional ballot “is the only ballot that I cast in this election.”¹⁶ *Id.* at 27-28 (quoting 25 P.S. § 3050(a.4)(2)). If the Commonwealth Court’s interpretation was correct, Appellants contend, any voter attempting to vote provisionally due to a defective mail-in ballot would be making a false statement because “they cast another ballot” in the election. *Id.* at 28.

Appellants then challenge the Commonwealth Court’s reading of Subsection (a.4)(5)(ii)(F). *Id.* at 29. Specifically, they highlight that the court reasoned that what must be “timely received” is a mail-in ballot that remains valid and will be counted; however, Appellants find this reading implausible, because it inserts words that do not appear in the statutory text. *Id.* at 29-30. Appellants argue that according to the

¹⁶ The affidavit, in its entirety, provides:

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). The elector must also sign, provide their current address, and check the reason for casting the provisional ballot. *Id.*

Commonwealth Court’s logic, because the validity of a mail-in ballot is not determined until canvassing after [E]lection [D]ay, a mail-in ballot “can **never** be timely received and will **never** be counted.” *Id.* at 30-31 (emphasis in original).

Similarly, Appellants argue that the Commonwealth Court’s construction would permit every voter who requested a mail-in ballot to be eligible to cast a provisional ballot, because none would be shown in the register as having “already voted[.]” *Id.* at 34-35 (citing 25 P.S. §§ 3146.6(b)(2), 3150.16(b)(2)). This, they argue, expands provisional voting beyond what the General Assembly intended. *Id.* at 35. To Appellants, whether a mail-in ballot has been “voted” must be determined prior to Election Day, because that conclusion determines whether a voter may cast a provisional ballot. *Id.* Thus, Appellants argue that to reconcile the provisional ballot procedure, we must read its plain language to mean that “a mail voter has completed voting if their [Return Packet]” is timely received by eight o’clock P.M. on Election Day. *Id.* at 35-36.

Appellants then proceed to argue that not only is the Commonwealth Court’s decision unsupported by the statutory language, but also there are provisions of the Election Code that preclude notice and an opportunity to cast a provisional ballot under circumstances like those presented here. *Id.* at 37-38. They note that county boards of election cannot open or inspect a Return Packet but can only log them into the SURE System as “received” and keep the ballots secure until pre-canvassing. *Id.* at 38-39. According to Appellants, any action beyond that violates the Pennsylvania Constitution’s requirement that

“secrecy in voting ... be preserved.” *Id.* at 41 (citing PA. CONST. art. VII, § 4).¹⁷

Additionally, Appellants argue that the Commonwealth Court’s decision infringes on the General Assembly’s authority, thereby violating the separation of powers doctrine. *Id.* at 42. They also contend that the Commonwealth Court’s decision violates the Free and Equal Elections Clause because it creates disparate treatment of voters and ballot-validity determinations based upon where a voter lives. *Id.* at 43-44 (citing PA. CONST. art. I, § 5). Lastly, Appellants argue that affirming the Commonwealth Court’s decision violates the Elections and Electors Clauses of the United States Constitution, because federal law requires that state legislatures are responsible for setting the rules for federal elections, and such an interpretation of our Election Code would go beyond the purview of this Court. *Id.* at 45-46 (citing U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. art. II, § 1, cl. 2).¹⁸

¹⁷ To the extent this argument implicates the use of coding in the SURE System to indicate the status of the Return Packet after receipt by the Board, we denied allowance of appeal of that issue. As to maintaining the secrecy of the ballot, the Declaration Envelopes of the Electors in this case were not opened until canvassing and the naked ballots were not counted in the canvass.

¹⁸ We did not accept allowance of appeal of the constitutional arguments raised by Appellants. The issues were not developed within their petition for allowance of appeal. *See* Republican Party’s Petition for Allowance of Appeal at 19 n.5.

Electors' Arguments

Electors argue that Appellants have conflated “notice and cure” procedures with Pennsylvania’s “longstanding statutory provisional-ballot process,” which has been in place for the last “forty-one statewide elections[,]” long before mail-in voting. Electors’ Brief at 16 & 19. The notice and cure procedure, they note, permits voters to cure deficiencies in the packaging of the actual mail-in ballot they submitted. *Id.* The provisional ballot process, they explain, is a federally-required protection to prevent the disenfranchisement of voters. *Id.* at 17. To that end, Electors argue that contrary to Appellants’ arguments, county boards of election are required to allow voters to submit a provisional ballot pursuant to Help America Vote Act of 2002 (“HAVA”).¹⁹ *Id.* at 18-19 (citing 52 U.S.C. § 21082(a)). The federal law, according to Electors, is intended to operate as a fail-safe mechanism to ensure that voters may preserve their right to vote. *Id.* at 19-20. As Electors emphasize, the provisional ballot process preserves the right to vote and ensures that voters cast only one ballot, as provisional ballots are not counted until the county boards of election determine that the voter has not already successfully voted in the election. *Id.* at 21.

Electors then contend that the case law relied upon by Appellants is inapposite. *Id.* at 23-24. Specifically, Electors argue that *Pa. Democratic Party* did not involve provisional ballots which are separate from

¹⁹ HAVA was originally enacted as 42 U.S.C. §§ 15301-15523, then subsequently reclassified in 52 U.S.C. §§ 20901-21145.

the initial ballot. *Id.* at 24-25 (citing *Genser*, 2024 WL 4051375).

Electors proceed to argue for this case to be resolved pursuant to our tools of statutory construction. *Id.* at 27. Specifically, they assert the language that a provisional ballot “shall count ... if the county board of elections confirms that the individual did not cast any other ballot” and that “a ballot shall not be counted if ... the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections” can be faithfully applied in their favor when examining that language in the context of the surrounding statutory framework. *Id.* at 27-28 (citing 25 P.S. § 3050(a.4)(5)(i)-(ii)(F)). Following the Commonwealth Court’s rationale, Electors argue that failure to comply with any of the requirements set forth in Section 3150.16, including the eligibility, signature, dating, Secrecy Envelope, and timely delivery requirements renders the submitted document “a legal nullity.” *Id.* at 29-30 (25 P.S. § 3150.16(a)-(c)).

In that vein, Electors dispute Appellants’ argument that to “cast”²⁰ a mail-in ballot that cannot be counted precludes filing of provisional ballots under the Election Code. *Id.* at 30-31. Like the Commonwealth Court, Electors note that “cast” is used differently throughout the Election Code,

²⁰ The Electors look to contemporaneous dictionary definitions of the word “cast” in support of their position. Electors’ Brief at 30-31 (citing *Cast*, BLACK’S LAW DICTIONARY, 230 (8th ed. 2004) (“To formally deposit (a ballot) or signal one’s choice (in a vote).”). To Electors, a vote cannot be signaled or formally deposited if it ultimately will not be counted.

rendering it ambiguous. *Id.* at 31-32. Should we agree that the provisions are ambiguous, Electors assert that we should interpret the statutory language in a way that “secures the right to vote.” *Id.* at 32. Further, Electors argue that where a defective mail-in ballot is “timely received,” this does not preclude the filing of a provisional ballot. *Id.* at 32-33. They observe that the meaning of “timely” is defined by the deadline set forth in Section 3150.16(c), i.e., eight o’clock P.M. on Election Day. *Id.* at 33. Further, what is required at that time is a “**completed** mail-in ballot.” *Id.* (emphasis in original). This, Electors argue, means a mail-in ballot that satisfies all of the statutory requirements. *Id.*

Because Electors view the Election Code as being ambiguous, they argue that in applying our tools of statutory construction to discern the intention of the General Assembly, we must favor the interpretation that enfranchises voters. *Id.* at 39. Electors explain that their interpretation enfranchises voters while also preventing double voting. *Id.* at 41. They argue that Appellants, on the other hand, go too far with their interpretation by precluding citizens, like themselves, from voting at all. *Id.* Moreover, Electors argue that the Appellants’ interpretation would lead to absurd results because it treats the receipt of a Return Packet—even one that lacks a mail-in ballot—as the return of an electors’ vote. *Id.* at 42-43.

Electors then proceed to argue that interpreting the Election Code in their favor will not subject voters in different counties to different rules, but rather will establish precedent that will bind every county board of elections to follow the same rules with respect to provisional voting. *Id.* at 46-47. Moreover, they believe

it would permit provisional votes to be counted when any defect results in the invalidation of a mail-in ballot, and that to do otherwise would run counter to the General Assembly's intent in enacting the provisional voting process. *Id.* at 47-48.

Further, Electors insist that their interpretation does not run afoul of the Election Code's pre-canvassing rules. *Id.* at 48. In this respect, Electors argue that Appellants' focus on the word "inspection" is misguided, as "merely looking" at an envelope or running it through a sorting machine is not pre-canvassing because it does not involve opening, counting and computing the ballots, all of which are included in the statutory definition of pre-canvassing. *Id.* at 49-50. Rather, they contend that county boards are permitted to identify and segregate defective mail-in ballots upon receipt at the election office, as it does not constitute pre-canvassing. *Id.* at 50.

Electors also offer, in the alternative, that not counting their provisional ballots would violate their right to vote under the Free and Equal Elections Clause. *Id.* at 51-52. Noting that the government is required to demonstrate a compelling reason when impinging on the right to vote, Electors argue that there is no reasonable basis to refuse to count their provisional ballots. *Id.* at 52-54. Electors view Appellants' approach as "essentially punitive in nature[.]" which they consider to be inconsistent with the Free and Equal Elections Clause's intent to promote voting. *Id.* at 54. Without reasonable justification to impinge upon an individual's vote, Electors contend that our Charter requires that a timely and properly completed provisional ballot be

counted, “when the alternative is to disenfranchise the voter.” *Id.* at 56-57.

Intervenor PDP’s Arguments

PDP argues that Appellants’ interpretation that a mail-in ballot is “voted” whenever a Return Packet is returned cannot be reconciled “with the text or purpose of the Election Code, common sense, or the fundamental right to vote protected by the Free and Equal Elections Clause of the Pennsylvania Constitution.” PDP’s Brief at 17 (citing PA. CONST. art. I, § 5). PDP recognizes that all parties agree that a voter who has requested a mail ballot but who has not “voted” that ballot is eligible to cast a provisional ballot and have it counted. *Id.* at 17-18 (citing 25 P.S. § 3150.16(b)(2)). It is PDP’s position that a person has not voted if the mail-in ballot they have submitted will not be counted because of a defect. *Id.* at 18. To PDP, that a person is eligible to vote so long as they are “not shown on the district register as **having voted**,” is “best read” to mean that they have submitted a ballot that will be counted, not merely that they have submitted a Return Packet. *Id.* at 19-20 (emphasis in original) (citing 25 P.S. § 3150.16(b)(2)). According to PDP, this is because the other uses of “voted” refer to more than the receipt of a Return Packet. *Id.* at 20. In particular, it notes that a provision that previously referred to a person “whose mail-in ballot is not timely received” was amended to refer to a person “whose **voted** mail-in ballot is not timely received.” *Id.* (citing Act of Mar. 27, 2020, No. 12, P.L. 41, § 9 (emphasis added); see 25 P.S. §§ 3150.13(e), 3146.3(e)). It argues that adding “voted” would have been a meaningless legislative action if it merely meant timely received, and instead it must mean that the voters are ineligible

“if they timely submit mail ballots that will actually be counted.” *Id.*

PDP argues that the rest of the Election Code must be read with this understanding of “voted” in mind. *Id.* at 21-22. For instance, PDP contends that “cast,” as it is used in Subsection (a.4), should be understood to mean “giving a vote.” *Id.* at 21. Pursuant to PDP’s understanding of “vote,” this entails that the vote is “validly cast.” *Id.* This understanding of “cast,” PDP argues, denotes that a “ballot was counted,” as opposed to “those that arrived but were discarded.” *Id.* (citing 25 P.S. § 3050(a.4)). This, PDP explains, means that a “timely received” ballot, as referenced in 25 P.S. § 3050(a.4)(5)(ii)(F), is one that will be counted. *Id.* at 23. Only when another ballot is already going to be counted can a county board refuse to count a provisional ballot, according to PDP. *Id.* at 23-24.

If there is any ambiguity found in the Election Code, PDP argues, like Electors, that it must be interpreted in favor of enfranchising voters. *Id.* at 26. It contends that Appellants’ construction achieves the opposite, “disenfranchising voters who attempt to vote by mail but inadvertently commit an error that is easily discernible by the county board before pre-c canvassing.” *Id.* at 27. Moreover, PDP argues, the principle of constitutional avoidance supports the intermediate court’s reading, because even if there was merit to Appellants’ interpretation of the Election Code, disenfranchising voters would raise “a serious doubt” about the constitutionality of those provisions under our Free and Equal Elections Clause. *Id.* at 29.

PDP proceeds to challenge Appellants’ arguments that counting provisional ballots is “irreconcilable”

with statutory and constitutional provisions “requiring secrecy in voting, uniformity in election-administration, and separation of powers.” *Id.* at 31. To PDP, because there is no opening of the envelope, the methods employed by county boards to determine that a Secrecy Envelope is missing are not prohibited by law. *Id.* Further, it maintains that notifying voters that their ballots are deficient prior to pre-canvass does not violate the secrecy requirements because it is the votes on a ballot that must remain secret, not the existence of a Secrecy Envelope. *Id.* at 32. As for uniformity, PDP argues that all counties must comply with the Election Code, and thus a decision interpreting the Election Code regarding provisional voting will not result in disparate systems across the Commonwealth.²¹ *Id.* at 33. With respect to the separation of powers concerns raised by Appellants, PDP asserts that the Commonwealth Court’s interpretation aligns with legislative intent, thus rendering Appellants’ argument on this point meritless. *Id.*

PDP expands on its argument that the refusal to count the provisional ballots violates the Pennsylvania Constitution’s Free and Equal Elections Clause. *Id.* at 34 (citing PA. CONST. art. I, § 5). It explains that the disparate treatment of any group of voters must be weighed against the state interest, and that the “magnitude of the state interest required to uphold a challenged law or practice depends on the severity of

²¹ PDP asserts that Appellants failed to make this argument before the lower courts, and thus it has been waived. PDP’s Brief at 33 (citing Pa.R.A.P. 302(a)). More saliently, and as noted, this Court did not accept allowance of appeal on this issue.

the burden it places on citizens' exercise of the franchise." *Id.* at 35-36. Because not counting a provisional ballot would "significantly interfere[]" with the fundamental right to vote, PDP asserts that the challenged law "must be narrowly tailored to promote a compelling state purpose." *Id.* at 36. PDP finds "no sound reason" to deny the right to vote entirely by both canceling a voter's mail-in ballot and refusing to count their provisional ballots as well, when other "routine errors" (e.g., failure to properly sign or date the Declaration Envelope) can be corrected or do not prohibit the submission of a provisional ballot. *Id.*²²

²² Multiple amicus briefs have been filed in support of both parties. Republican Legislative Leaders (House Republican Leader Bryan Cutler, President Pro Tempore of the Pennsylvania Senate Kim Ward, and Majority Leader of the Pennsylvania Senate Joe Pittman), Center for Election Confidence and American First Legal Foundation, and Restoring Integrity and Trust in Elections ("RITE") all filed amicus briefs in support of Appellants. Like Appellants, their amici argue that the Commonwealth Court's decision violates this Court's decision in *Pa. Democratic Party* and usurps legislative authority by mandating that counties provide curing of defective ballots in the form provisional ballots that, they assert, should not be counted under these circumstances, pursuant to the language of the Election Code.

The Secretary of the Commonwealth and Department of State, elections officials from twenty Pennsylvania counties, AFT Pennsylvania and the Pennsylvania Alliance for Retired Americans all submitted amicus briefs in support of Electors and PDP. These amici contend that provisional ballots are distinct from a cure. Further, they argue that the history of provisional voting supports an elector's ability to cast a provisional ballot under these circumstances and the language of the Election Code, construed with an eye towards its purpose of enfranchising

III. History of Provisional Voting

It is helpful to contextualize the present controversy by explaining the impetus for the provisional ballot provisions of the Election Code in Section 3050(a.4)(1) et seq. In the wake of the 2000 presidential election where the United States Supreme Court stepped in to resolve a voting controversy in Florida, *Bush v. Gore*, 531 U.S. 98 (2000), there was overwhelming bipartisan support to prevent such controversies from recurring. Brian Kim, *Help America Vote Act*, 40 HARV.J.LEGIS. 579, 579-82 (2003). Congress therefore enacted HAVA, which mandated statewide voter registration systems and provided funds to states to replace voting machines and train poll workers.

Relevantly, HAVA mandated states to provide provisional voting access as a “fail-safe” in recognition of the fact that even well-run voter registration lists were not perfectly up-to-date on Election Day and to address the other irregularities that occurred in 2000. Orion de Nevers, *What Happened to HAVA? The Help America Vote Act Twenty Years on and Lessons for the Future*, 110 GEO. L.J. ONLINE 168, 175 (2021) (citing Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L.R. 1206, 1213 (2005)); 52 U.S.C. § 21082. At the time, our Election Code in Pennsylvania did not provide for provisional voting, but the concept was not entirely new. *See, e.g.*, Act of

voters, supports counting the provisional ballots when a mail-in ballot is otherwise invalidated.

Oct. 7, 1999, ch. 232, 1999 N.J. Sess. Law 1377 (creating provisional balloting in New Jersey).

HAVA establishes the framework and minimum requirements for provisional ballots. If an individual declares that she is registered to vote in the jurisdiction in which she desires to vote, and eligible to vote in an election for federal office, but the individual's name either does not appear on the eligible voter list, or an election official asserts that the voter is ineligible, "such individual shall be permitted to cast a provisional ballot" following the procedures set forth. Namely, state election officials must provide notice to specific voters regarding the availability of provisional ballots. 52 U.S.C. § 21082(a)(1) (providing that the election official "shall notify the individual that the individual may cast a provisional ballot in that election" where the official does not find the individual's name on the eligible voter list or asserts that the individual is not eligible). Further, the individual must execute a written affirmation to cast a provisional ballot. *Id.* § 21082(a)(2)(A) & (B) (requiring affirmation that the individual is a registered voter in the jurisdiction where they desire to vote and that they are eligible to vote in that election).

HAVA provides that an election official at the polling place shall "transmit the ballot ... or the voter information contained in the written affirmation ... to an appropriate State or local election official for prompt verification under paragraph 4." *Id.* § 21082(a)(3). Then, if the individual is deemed eligible under State law to vote, the provisional ballot "shall be counted as a vote in that election in accordance with State law." *Id.* § 21082(a)(4).

Therefore, “HAVA creates a right to **cast** a provisional ballot— but not to have it **counted**.” de Nevers, *supra*, at 186 (emphasis in original). That question depends entirely on eligibility under State law.²³

In 2002, our Election Code was amended to accommodate HAVA’s provisional voting requirement. Act of Dec. 9, 2002, No. 150, P.L. 1246, *as amended* 25 P.S. § 3050. Section 3050 of the Election Code, which in its previous form already enshrined (as titled) the “Manner of Applying to Vote; Persons Entitled to Vote; Voter’s Certificates; Entries to Be Made in District Register; Numbered Lists of Voters; Challenges,” was augmented, though the original language and title were retained. Section 3050 is an expansive provision, but we focus on Subsection (a.4), where the General Assembly introduced provisional voting into our Election Code. 25 P.S. § 3050(a.4).

VI. Analysis

- A. Whether, contrary to this Court’s binding precedent in *Pa. Democratic Party*, the Commonwealth Court improperly usurped the authority of the General Assembly by effectively rewriting the Election Code to engage in court-mandated curing when it held that a voter is entitled to submit a provisional ballot and have that

²³ *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (explaining that because HAVA does not “strip from the states their traditional responsibility to administer elections[,]” a provisional ballot cast by a voter who was not registered in the precinct in which the provisional ballot was cast does not count under Ohio law, which provides that a voter is only eligible to vote in his or her precinct of residence).

provisional ballot counted in the election tally after the voter has timely submitted a defective absentee or mail-in ballot, contrary to the Election Code.

In *Pa. Democratic Party*, Petitioner²⁴ filed a petition for review “seeking declaratory and injunctive relief relating primarily to five issues of statutory interpretation involving Act 77 and the Election Code,” and this Court subsequently “exercised extraordinary jurisdiction to address these issues and to clarify the law of this Commonwealth in time for the 2020 General Election.” *Pa. Democratic Party*, 238 A.3d at 352. Relying on the Election Code in general and Article I, Section 5 of our Charter, Petitioner sought, inter alia, “to require that the [county boards] 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 with an opportunity to cure those defects.” *Id.* at 372. Petitioner argued that “voters should not be disenfranchised by technical errors or incomplete ballots,” and the proposed notice and cure procedure would ensure “that all electors who desire to cast a ballot have the opportunity to do so, and for their ballot to be counted.” *Id.*

This Court rejected that argument, concluding that Petitioner had “cited no constitutional or statutory basis that would countenance **imposing** the procedure Petitioner seeks to require (i.e., having the

²⁴ The *Pa. Democratic Party* Court collectively referred to multiple aligned entities and persons as “Petitioner.” *Pa. Democratic Party*, 238 A.3d 352.

[county boards] contact those individuals whose ballots the [county boards] have reviewed and identified as including ‘minor’ or ‘facial’ defects ... and then afford those individuals the opportunity to cure defects ...)” *Id.* at 374 (emphasis added). We explained:

While the Pennsylvania Constitution mandates that elections be “free and equal,” it leaves the task of effectuating that mandate to the Legislature. 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. To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a “notice and opportunity to cure” procedure to alleviate that risk is one best suited for the Legislature. We express this agreement particularly in light of the open policy questions attendant to that decision, 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, all of which are best left to the legislative branch of Pennsylvania’s government.

Id. (citation omitted).

Our decision in *Pa. Democratic Party* addressed only “the ‘notice and opportunity to cure’ procedure

sought by Petitioner.” *Id.* (emphasis added). We were not asked to nor did we consider provisional voting. Our concern in *Pa. Democratic Party* was whether the spirit of the Election Code or Article I, Section 5 of our Constitution **mandated** a notice and curing policy for defective mail ballots. We concluded that the Constitution left the task to the legislature and that the Election Code “does not provide for the ‘notice and opportunity to cure’ procedure sought by Petitioner.” *Id.* at 374. Again, Petitioner relied only on the Free and Equal Elections Clause and the “spirit of the Election Code.” *Id.* at 373. We rejected Petitioner’s attempt to impose such procedures on county election boards²⁵ through judicial means. *Id.*

Here, as the Commonwealth Court correctly discerned, the casting of a provisional ballot is specifically authorized in the Election Code, wholly unlike the amorphous proposed notice and cure policy discussed in *Pa. Democratic Party*. Indeed, as discussed above, the right to cast a provisional ballot is not just authorized by the Election Code, our General Assembly implemented HAVA’s mandate in 2002, long before Act 77 amended the code to permit no-excuse mail-in voting. Provisional ballots exist as a fail-safe to preserve access to the right to vote.

Nor is there any analogy to be drawn from *Pa. Democratic Party* to the case before us. As the Commonwealth Court aptly observed, no ballot is cured when a provisional ballot is counted after a mail ballot is rejected due to a fatal defect in the Return Packet. When the Commonwealth Court ordered that

²⁵ We have not spoken to whether or not the Election Code allows individual counties to utilize notice and cure procedures.

Electors' provisional ballots be counted by the Board, that did not displace the Board's decision not to count Electors' mail-in ballots; indeed, as required by law, those mail-in ballots were not counted. The propriety of counting a provisional ballot is a question of statutory interpretation that, unlike the proposed curing policies at issue in *Pa. Democratic Party*, flows directly from the text of the Election Code. *See* 25 P.S. §§ 3050(a.4)(1) (providing for casting provisional ballots); 3050(a.4)(5)(i) (requiring the counting of provisional ballots).

Appellants' distinction-without-a-difference argument is hollow. The procedure advocated by the Petitioners in *Pa. Democratic Party* contemplates correcting deficiencies in the Return Packet so that the mail-in ballot can be counted. We consider here the utilization of a distinct voting mechanism in the Election Code that is triggered because the mail-in ballot is not counted.

Appellants misstate both non-mandatory notice and cure procedures and statutory provisional voting rights. They argue that “[c]uring refers to fixing and **avoiding the consequences of the voter’s error on the mail ballot**, not necessarily making any changes to the ‘initial ballot’” and that “counting a provisional ballot in these circumstances remedies – and therefore cures – the voter’s failure to comply” with the General Assembly’s mandatory Secrecy Envelope protocol. Appellants’ Brief at 24 (emphasis added). As developed in the following section of the opinion addressing Appellants’ second issue, counting a provisional ballot occurs only when another ballot attributable to a voter has not been counted. A provisional ballot is intended to alleviate potential

disenfranchisement for eligible voters. Counting Electors' provisional ballots, when their mail ballots are void for failing to use a Secrecy Envelope, is a statutory right not contemplated in *Pa. Democratic Party*.

B. Whether the Commonwealth Court erred in holding that, due to purported ambiguities in the Election Code, the Butler County Board of Elections is required to count a provisional ballot cast by an elector who received a mail-in ballot and delivered the mail-in ballot to the county board of elections without the required [S]ecrecy [E]nvelope, despite the language of 25 P.S. § 3050(a.4)(5)(ii)(F), which provides that a provisional ballot shall not be counted if the elector's absentee ballot or mail-in ballot is timely received by a county board of elections.

The issue before us is narrow; it asks the Court to consider the effect of a naked mail-in ballot—that is, a mail-in ballot submitted without the Secrecy Envelope—on the statutory provisions governing the counting of provisional ballots.²⁶ In answering the question, the Commonwealth Court considered three provisions of the Election Code that it viewed as directly impacting the propriety of counting the provisional ballots under the circumstances. It first considered 25 P.S. 3150.16(b)(2), which defines the eligibility of mail-in electors to cast a provisional ballot. It states: “An elector who requests a mail-in

²⁶ Appellants did not challenge Electors' right to cast provisional ballots.

ballot and who is not shown on the district register as having voted may vote by provisional ballot [under the provisional ballot provisions of the Code].” The intermediate appellate court next interpreted the pertinent provisional ballot sections which provide in pertinent part:

25 P.S. § 3050(a.4)(5)(i):

Except as provided in Subclause (ii) ... the county board of elections ... shall count the [provisional] ballot if [it] confirms that the individual did not cast any other ballot, including an absentee ballot, in the election.

25 P.S. § 3050(a.4)(5)(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.

The Commonwealth Court found that the provisions read together and in context are ambiguous. The phrase “having voted” as used in Section 3150.16(b)(2) does not appear in Section 3050(a.4)(5)(i), which refers to “did not cast,” and (5)(ii)(F) is concerned with a “mail-in ballot [that] is timely received.” Because of the various usage of, in particular, the terms “cast” and “vote” in the Election Code,²⁷ the Commonwealth Court found the critical question to be whether exercising the right to vote requires merely submitting a ballot or necessitates the counting and validation of the vote. Given the

²⁷ See supra pp. 8-10.

ambiguity, by applying factors of statutory construction to discern the intent of the Legislature, the Commonwealth Court construed the terms to require “vote” and “ballot” to mean a valid vote that is counted. According to the intermediate appellate court, any other reading disenfranchises a voter in a circumstance where there is no possibility of the voter casting more than one vote.

Appellants see no ambiguity in the Election Code on this point. Their analysis would begin and end with the language of Section 3050(a.4)(5)(ii)(F), which provides that “[A] provisional ballot shall not be counted if the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.” They submit that the provision unambiguously means that a Board cannot count any provisional ballot if the voter submitted an Outer Envelope prior to eight o’clock P.M. on Election Day even if it is defective and a ballot will not be counted. According to Appellants, if the provisional ballot cannot be counted, there is no need to look to Section 3050(a.4)(5)(i) which only comes into play if a ballot is not excluded by Section 3050(a.4)(5)(ii)(F).

We begin and end our analysis with the identified provisional voting provisions set forth in Section 3050(a.4) and focus more specifically on the term “ballot” which is used in both provisions.²⁸

²⁸ Much of the ambiguity identified by the Commonwealth Court resulted from its attempt to reconcile the provisions of the Code defining when a mail-in voter is eligible to participate in the provisional ballot process. As noted, Appellants have not challenged Electors’ right to cast a provisional ballot, and reconciling the Sections is unnecessary. Moreover, the

This Court has previously addressed the consequences of submitting a naked ballot in *Pa. Democratic Party*, where Petitioner unsuccessfully sought a declaration that under Act 77, the county boards of election must “clothe and count naked ballots,” rather than invalidate them. *Pa. Democratic Party*, 238 A.3d at 374. We reviewed the statutory text to determine whether the Secrecy Envelope requirement was mandatory or directory. This was a critical inquiry because “[a] mandatory provision is one [for which] the failure to follow ... renders the proceeding to which it relates illegal and **void**. A directory provision is one the observance of which is not necessary to the validity of the proceeding.” *In re Nomination Papers of Am. Lab. Party*, 44 A.2d 48, 49 (Pa. 1945) (emphasis added).

In answering the question in *Pa. Democratic Party*, we recognized that the Election Code did not “delineate a remedy narrowly linked to the mail-in

Commonwealth Court struggled mightily to reconcile Section 3050 and Section 3150.16, and it made a convincing case that it cannot be done. These provisions were written at different times, and the General Assembly made no attempt to reconcile them. Whereas the relevant language of Section 3050 was established in the wake of HAVA, Section 3150.16 was enacted as a part of Act 77 in 2019 and the establishment of mail-in voting. Aside from tacking on Subsection (a.4)(5)(ii)(F), the General Assembly made minimal effort to align provisional voting and mail-in voting laws. For instance, Subsection 3050(a.4)(1) focuses on “casting,” whereas Section 3150.16’s language focuses on “voting.” The Commonwealth Court’s opinion convincingly demonstrates that there are differences in the formats and phrases of the provisions. Nonetheless, we need not resolve these ambiguities in applying the plain text of Subsections (a.4)(5)(i) and (a.4)(5)(ii)(F) to the facts before us.

elector's failure to utilize a [S]ecrecy [E]nvelope[.]” *Pa. Democratic Party*, 238 A.3d at 374 (citing 25 P.S. § 3150.16(a) (requiring the elector to “in secret, ... enclose and securely seal” the ballot in the Secrecy Envelope)). Therefore, we turned to another provision of the Election Code, Section 3146.8(g)(4)(ii), which also speaks directly to Secrecy Envelopes and identifies the appropriate remedy. *Id.* Under Section 3146.8(g)(4)(ii), if there are extraneous markings on the Secrecy Envelope “reveal[ing] the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein **shall be set aside and declared void.**” *Id.* (citing 25 P.S. § 3146.8(g)(4)(ii)) (emphasis added). Reading these provisions in pari materia, it became clear that the General Assembly intended that “during the collection and canvassing processes,” when the Declaration Envelope is unsealed and the sealed ballot removed, “it should not be readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted.” *Id.* The Secrecy Envelope “ensures that result.” *Id.* “Whatever the wisdom of the requirement,” we concluded it was “neither ambiguous nor unreasonable.” *Id.*

We distinguished the missing Secrecy Envelope from other minor ballot irregularities. For instance, the Court concluded that failure to place a mail-in ballot in its Secrecy Envelope is unlike writing in the name of a candidate who is already listed on the ballot, which is a “mere minor irregularit[y]” and substantially conformed to the statutory requirements. *Id.* (distinguishing *Shambach v. Bickhart*, 845 A.2d 793, 795 (Pa. 2004)). We found omitting a Secrecy Envelope to be qualitatively

dissimilar from completing a ballot in the wrong color of ink. *Id.* (distinguishing *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) (citing 25 P.S. § 3063)). The Election Code directs canvassers that “[a]ny ballot that is marked in blue, black or blue-black ink ... shall be valid and counted” but it does not provide a mandatory direction to electors. *Id.* at 379. Moreover, we noted, “the Legislature neither stated nor implied that ballots completed in a different color must not be counted.” *Id.* Neither of those irregularities was analogous to the directive to clothe a ballot in the Secrecy Envelope, a directive of constitutional magnitude. *Id.* (citing PA. CONST. art. VII, § 4 (“Methods of Election; Secrecy in Voting”)).

Instead, we deemed the Secrecy Envelope requirement most akin to the Election Code’s “in-person” ballot delivery requirement for absentee ballots considered in *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004) (“*Appeal of Pierce*”). In *Appeal of Pierce*, this Court considered whether absentee ballots could be delivered by third persons rather than the elector himself. The requirement that an elector deliver the absentee ballot was expressed in clear terms in the relevant Election Code provision. It stated that “the elector shall send [the absentee ballot] by mail, postage [prepaid], except where franked, or deliver it in person to [said county] board of election.” *Appeal of Pierce*, 843 A.2d at 1231 (quoting 25 P.S. § 3146.6). Delivery of the absentee ballot by a third party rather than the elector himself was not a “minor irregularity.” Though the provision at issue in *Appeal of Pierce* “did not expressly provide for voiding a ballot delivered by someone other than the voter,” we found

that reading the in-person requirement “as merely directory would render its limitation meaningless[.]” *Id.* at 1232. In *Appeal of Pierce*, we emphasized that when dealing with substantive matters, like “how to cast a reliable vote,” the Court does not have a power to remedy the error. *Id.* The delivery requirement of the absentee ballots was mandatory, and “the absentee ballots of non-disabled persons who had their ballots delivered in contravention of this mandatory provision are **void**.” *Id.* (citing *Am. Lab. Party Case*, 44 A.2d at 49 (providing that an act done in violation of a mandatory provision is void)) (emphasis added). The in-person delivery requirement, like the Secrecy Envelope requirement, “served the spirit of the Code.” *Pa. Democratic Party*, 238 A.3d at 345. As to both defects, we were equally staunch: any ballot submitted in contravention of the mandatory statutory provisions is void. *Id.* at 380. Thus, this Court echoed earlier declarations of the effect of such defects. The failure to follow a mandatory provision “renders the proceeding to which it relates illegal and **void**.” *Am. Lab. Party Case*, 44 A.2d at 49 (emphasis added).

The import of our holding in *Pa. Democratic Party* is clear: the failure to follow the mandatory requirements for voting by mail nullifies the attempt to vote by mail and the ballot.²⁹ Accordingly, we conduct our analysis with this understanding.

An “issue of statutory interpretation presents a question of law over which our standard of review is de novo and our scope of review is plenary.” *In re*

²⁹ Pursuant to Sections 3150.16(a) and 3146.6(a), signing and dating are likewise mandatory requirements to effectuate mail and absentee voting.

Major, 248 A.3d 445, 450 (Pa. 2021). As dictated by our Statutory Construction Act,³⁰ the object of statutory interpretation “is to ascertain and effectuate the intention of the General Assembly” and, if possible, we construe statutes such as our Election Code “to give effect to all its provisions.” 1 Pa.C.S. § 1921(a). When the words of our Election Code “are clear and free from all ambiguity,” we do not disregard the letter of the law “under the pretext of pursuing its spirit.” *Id.* § 1921(b). Thus, in ascertaining the General Assembly’s legislative intent in drafting the Election Code, our primary guide is its text. *See Sivick v. State Ethics Comm’n*, 238 A.3d 1250, 1263 (2020) (stating “we begin with the presumption that unambiguous statutory language embodies that intent, requiring no further investigation”). Consequently, before we entertain an argument that the terms of a statute are ambiguous, we must “consider the statutory language in its full context” and take care not to “overlabor to detect or manufacture ambiguity where the language reveals none.” *Id.* at 1264.

The pertinent facts of this case are undisputed. Electors sent their Return Packets to the Board without the mandatory Secrecy Envelope. Upon receipt of the Return Packets, the Board entered the code “CANC – NO SECRECY ENVELOPE”³¹ into the SURE System based on a prediction made by the Agilis Falcon machine that Electors’ Return Packets lacked Secrecy Envelopes. That code triggered the Notice Email to Electors informing them that their

³⁰ 1 Pa.C.S. §§ 1501-1991.

³¹ As Director McCurdy testified, this means “canceled, no secrecy envelope.” N.T., 5/7/2024, at 138.

mail-in ballot would not be counted because their Secrecy Envelopes were missing and informed Electors of their right to cast provisional ballots on Election Day. Both Electors subsequently cast provisional ballots. During canvassing, the Electors' mail-in ballots were not counted due to missing Secrecy Envelopes, as the Agilis Falcon machine accurately predicted. The mail-in ballots were not counted and the Board also refused to count their provisional ballots.

1. Subsection (a.4)(5)(i).

We begin with Subsection (a.4)(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**.

25 P.S. § 3050(a.4)(5)(i) (emphasis added).

This provision demonstrates that when deciding whether to count a provisional ballot, the county boards must know whether an elector had "cast any other ballot ... in the election." *Id.* The process of examining provisional ballots occurs after canvassing of all other ballots. A provisional ballot is a fail-safe that may be counted only after the Board determines

that there is no other ballot attributable to an elector. Moreover, it is at that same time that the county boards will know definitively from canvassing whether a Return Packet contains a ballot and whether the ballot was submitted in contravention of the mandatory Secrecy Envelope requirements of the Election Code such that it is void.

Assuming the other requirements for casting a provisional ballot are met, Subsection (a.4)(5) dictates when a provisional ballot must be counted, serving the dual purpose of preventing a double vote while simultaneously protecting an elector's right to have a vote counted. Subsection (a.4)(5)(i) provides the general rule, which is that "the county board of elections ... shall count the [provisional] ballot if the county board of elections confirms that the individual did not cast any other ballot ... in the election." 25 P.S. § 3050(a.4)(5)(i).

In this case, it is undisputed that Electors' mail-in ballots were naked and therefore had to be set aside and declared void. *Pa. Democratic Party*, 238 A.3d at 378. "Void" is unambiguous. Black's Law Dictionary defines it succinctly as an adjective expressing that something has "no legal effect." *Void*, BLACK'S LAW DICTIONARY (12th ed. 2024). Here, Electors' void mail-in ballots cannot be afforded legal effect. Because Electors failed to comply with the mandatory Secrecy Envelope requirement, they failed to cast a ballot.

Under Subsection (a.4)(5)(i), a county board must confirm that the "individual did not cast any other ballot ... in the election." Stated otherwise, it must confirm that it has no other ballot attributable to this individual. 25 P.S. § 3050(a.4)(5)(i). If there is no such

ballot, the Code dictates that the county boards “shall count the [provisional] ballot.” *Id.* The Board acknowledged that the naked ballots could not be counted,³² but it also treated the ballots as though they had legal effect. To construe a void ballot as a “ballot ... in the election” is to give it legal effect, in direct contravention of our holding in *Pa. Democratic Party* that a mail ballot lacking a Secrecy Envelope is void. Accordingly, once the Board confirmed that Electors’ ballots were void, pursuant to Subsection (a.4)(5)(i), the Board was required to count Electors’ provisional ballots.

2. Subsection (a.4)(5)(ii)(F)

Subsection (a.4)(5)(ii) describes the circumstances under which a provisional ballot will not be counted. It provides as follows:

- (ii) A provisional ballot shall not be counted if:
 - (A) either the provisional **ballot envelope** under clause (3) or the affidavit under clause (2) is not signed by the individual;
 - (B) the signature required under clause (3) and the signature required under clause (2) are either not genuine or are not executed by the same individual;
 - (C) a provisional **ballot envelope** does not contain a [S]ecrecy [E]nvelope;
 - (D) in the case of a provisional ballot that was cast under subsection (a.2)(1)(i),

³² N.T., 5/7/2024, at 75 (Director McCurdy testifying that “historically [the computation board] do[es] not count any ballot that lacks a secrecy envelope”).

within six calendar days following the election the elector fails to appear before the county board of elections to execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot and that the elector is indigent and unable to obtain proof of identification without the payment of a fee;

(E) in the case of a provisional ballot that was cast under subsection (a.2)(1)(ii), within six calendar days following the election, the elector fails to appear before the county board of elections to present proof of identification and execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of the proof of identification and an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot; or

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

25 P.S. § 3050(a.4)(5)(ii) (emphasis added).

Subsection (a.4)(5)(ii) is the flipside of Subsection 3050(a.4)(5)(i), as Subsection (a.4)(5)(i) describes when

a provisional ballot must be counted and Subsection (a.4)(5)(ii) describes when it must not be counted. In the circumstances of this case, only Subsection (a.4)(5)(ii)(F) is implicated.³³ Just as a void ballot cannot be given legal effect in Subsection (a.4)(5)(i), it cannot be given effect in Subsection (a.4)(5)(ii)(F). As a result of the determination that the Secrecy Envelope was not used, as a matter of law, no ballot was received by eight o'clock P.M. on Election Day and thus Subsection (a.4)(5)(ii)(F) was not triggered. Therefore, the Board could not refuse to count Electors' provisional ballots.

Contrary to the suggestion of Appellants, the text of Subsection (a.4)(5)(ii)(F) is clear that this exception to the counting of provisional ballots is not dependent on a timely-received Declaration Envelope.³⁴ The text of the provision plainly refers to a "ballot," not an envelope. The provisions of Subsection (a.4)(5)(ii) conclusively establish that the General Assembly knows the distinction between envelopes and ballots. Subsections (A) and (C) of (a.4)(5)(ii) specifically refer to envelopes. Pursuant to Subsection (a.4)(3), a provisional ballot must be submitted in a "[S]ecrecy [E]nvelope" and a "provisional ballot envelope." These requirements mimic the Secrecy Envelope and

³³ All other subsections address defects in connection with the provisional ballot that will disqualify it from being counted. *See* 25 P.S. § 3050(a.4)(5)(ii)(A)-(E).

³⁴ In this regard, the Commonwealth Court noted that under Appellants' interpretation of this provision, "the provisional ballot's status as not countable is locked in amber at the moment the Board receives a mail-in elector's [Declaration E]nvelope, without regard to whether [the Declaration Envelope even contains] a ballot[.]" *Genser*, 2024 WL 4051375, at *15.

Declaration Envelope used in connection with mail ballots submitted to county boards. If the General Assembly intended to trigger disqualification of a provisional ballot by the timely receipt of the Declaration Envelope, it would have said so. Instead, the General Assembly's language in Subsection (a.4)(5)(ii)(F) is straightforward—it is triggered by the timely receipt of a mail ballot. Thus, the county boards can only conclusively determine if a ballot has been timely received during canvassing when the ballots are separated from the Declaration Envelopes and Secrecy Envelopes.

Appellants, echoing the trial court, complain that this reading results in an absurdity, although their rationale is difficult to follow. They observe that at least some Return Packets will not be opened by county boards until after eight o'clock P.M. on Election Day (i.e., Return Packets not opened during pre-canvass). Consequently, Appellants believe that if the operation of Subsection (a.4)(5)(ii)(F) is dependent on the validity of a ballot, and the validity of some ballots will not be ascertainable until after the eight o'clock P.M. deadline, then none of those ballots would be timely received because their validity is not determined until after eight o'clock P.M. on Election Day. *See* Appellants' Brief at 30-31.

Given the reality of canvassing, the result is not absurd. It is required. The facts required to decide whether to count mail-in ballots are defined by eight o'clock P.M. on Election Day. Every mail ballot that is canvassed has necessarily been timely received because the boards of elections must stop receiving Return Packets at eight o'clock P.M. on Election Day. 25 P.S. § 3150.16(c). The county boards of election

must determine whether a ballot is timely received during canvassing, because that is when the Return Packets are opened. Subsection (a.4)(5)(ii)(F) is triggered by a timely-received ballot and, until pre-canvassing—which cannot begin until seven o’clock A.M. on Election Day—county boards of election cannot determine whether the Return Packet contains a ballot, and canvassing may begin as late as the “third day following the election.” 25 P.S. § 3146.8(g)(2). Return Packets arriving after eight o’clock P.M. on Election Day will not be canvassed at all as a mechanical function of the Election Code. Thus, when the county boards open the Return Packet at canvassing, any ballot contained therein was necessarily received before the statutory deadline. And, simultaneously, the county boards will definitively determine whether the Return Packet contains the required Secrecy Envelope clothing the ballot. Thus, our interpretation of the Election Code is harmonious with the actual process of canvassing. It is, in fact, Appellants who are engaging in wordplay to confuse the Code and reach an absurd result whereby a void mail-in ballot renders a provisional ballot uncountable as well.

The General Assembly wrote the Election Code with the purpose of enabling citizens to exercise their right to vote, not for the purpose of creating obstacles to voting. *Luzerne Cnty.*, 290 A.2d at 109. Certainly, the requirements of the Election Code will occasionally result in a vote not being counted when an elector fails to follow the rules for voting by mail ballot.³⁵ But any

³⁵ See *Pa. Democratic Party*, 238 A.3d at 380 (“It is clear that the Legislature believed that an orderly canvass of mail-in ballots

discernable integrity purpose of the Election Code regarding Electors' mail-in ballots was served in this case when the Board refused to count them. It is undisputed that Electors' mail-in ballots were void because they lacked the required Secrecy Envelopes as *Pa. Democratic Party* requires. *Pa. Democratic Party*, 238 A.3d at 380. No party challenges that decision and Appellants fail to substantiate their claim that chaos would ensue if similarly situated voters have their provisional votes counted after it is determined at canvassing that their mail ballot is void.

The procedures for counting provisional ballots cast by putative mail in voters are designed to preclude double voting.³⁶ Subsection (a.4)(5)(i) works in tandem with Subsection (a.4)(5)(ii)(F) to prevent the untenable result of permitting an elector to have the votes on two ballots counted. No party has identified any other purpose for Subsection (a.4)(5)(ii)(F).

required the completion of two discrete steps before critical identifying information on the ballot could be revealed. The omission of a secrecy envelope defeats this intention” and leads “to the inescapable conclusion that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified.”).

³⁶ This was the integrity concern identified by the Commonwealth Court, and we agree. *See Genser*, 2024 WL 4051375, at *7 (“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.”); *see also Election Integrity Project California, Inc. v. Weber*, 113 F.4th 1072, 1098 (9th Cir. 2024) (recognizing that California’s provisional ballot rules “protect against double-voting while ensuring that no otherwise eligible vote is turned away from the polls”).

Subsection (a.4)(5)(i) dictates generally when to count a provisional ballot, and Subsection (a.4)(5)(ii)(F), like Subsections (a.4)(5)(ii)(A)-(E), fleshes out the negative implications of that rule by stating more specifically when the county boards must not count a provisional ballot. Subsections (a.4)(5)(ii)(A)-(E) deal with the various defects in the provisional ballot packet that disqualify a provisional ballot. *See, e.g.*, 25 P.S. §§ 3050(a.4)(5)(ii)(A) (provisional ballot envelope not signed); 3050(a.4)(5)(ii)(C) (provisional ballot envelope does not contain a Secrecy Envelope). Those subsections establish the mandatory requirements for a provisional ballot, which, if not met, void the ballot. Only Subsection (a.4)(5)(ii)(F) targets the problem of double voting.

Appellants contend that “the terms ‘cast’ by a voter and ‘timely received’ by a board can and should be read in harmony to give Subsection (a.4) full force and effect as the General Assembly intended.” Appellants’ Brief at 32. This begs the question, give full force and effect to what? Appellants fail to offer any explanation as to how their interpretation of Subsection (a.4)(5) is in any way designed to prevent double voting, and they also fail to explain how their interpretation furthers the broader goal of the Election Code to enfranchise, rather than disenfranchise, voters. Instead, Appellants’ interpretation ignores the availability of provisional voting and manufactures an absurdity whereby we must accept that the General Assembly intended to wholly disenfranchise a voter on account of a mistake with their Return Packet for no discernable purpose. *See* 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.”) (emphasis added). Moreover, it is our responsibility to read and interpret the Election Code in a manner that does not violate the Constitution. It is difficult to discern any principled reading of the Free and Fair Election Clause that would allow the disenfranchisement of voters as punishment for failure to conform to the mail-in voting requirements when voters properly availed themselves of the provisional voting mechanism. Our interpretation of Subsection (a.4)(5)(ii)(F) gives effect to its purpose of preventing double voting, and it averts unnecessary disenfranchisement.

Nor does our reading render the “timely received” language as surplusage. A mail voter who completes and mails his Return Packet is not prohibited from having his provisional ballot counted if his mail ballot does not arrive by eight o’clock P.M. on Election Day. 25 P.S. § 3150.16(c). Only timely received mail ballots are counted and, therefore, only timely received mail ballots create a risk of double voting in this context. The timely received language ensures there is no double vote resulting from the counting of a provisional ballot.

Our interpretation also dovetails with other provisions of the Election Code that interact with Subsection (a.4)(5)(ii)(F). For instance, the mail-in ballot provision’s deadline requirement 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.” 25 P.S. §3150.16(c) (emphasis added). This provides that a mail-in ballot that is not “completed” does not satisfy the “deadline” requirement of Section

3150.16(c), and therefore cannot be timely received. This provision would make little sense if “completed” were read to mean that the ballot itself does not contain a vote for every office, or even if it is left blank in protest. An elector’s ballot is not defective merely because he or she chooses not to cast a vote for every office. In Section 3150.16(c), “completed” must then mean that the mandatory requirements for voting by mail-in ballot, defined in a provision preceding the deadline requirement, Section 3150.16(a), have been completed. If those requirements are not completed, the ballot is void.

Appellants also contend that every voter who seeks to cast a provisional ballot but has already submitted a mail ballot and signs the affidavit required under Subsection (a.4)(2) makes a false statement by affirming that “this is the only ballot that I cast in this election.” 25 P.S. § 3050(a.4)(2). Again, a void ballot is not a “ballot.” Where, as here, the electors have been advised that their mail ballot will not be counted, they are not making a false statement because the act of casting the ballot itself and the ballot have been nullified. The same is true where an elector is not certain that the Return Packet will arrive on time.

Appellants argue that this result is untenable or absurd by baldly asserting that our Election Code envisions one ballot per elector, i.e., the “first (and only) ballot.” Appellants’ Brief at 23-24. They offer no reason related to election integrity or otherwise to support the idea that a defective attempt to vote by mail dooms a voter to disenfranchisement. Our interpretation follows the dictates of the Election Code as construed by this Court that the mandatory requirements for casting a mail ballot must be

followed, thus protecting the integrity of the mail voting process. Here, the naked ballots nullified the attempts at mail voting and the ballots were voided. Appellants' reading of the Election Code ignores the General Assembly's enactment of provisional voting procedures and disregards the intent of the General Assembly as articulated by this Court that the "first ballot" was not a ballot.

Our interpretation is not novel to the Election Code, which until 2019, explicitly allowed for alternative voting methods when an absentee ballot was voided. Prior to 2019, for the absentee voter who did not meet the requirements to cast an absentee ballot on Election Day, the Election Code stated that the "absentee ballot cast by such elector shall, upon challenge properly sustained, be declared void." Act of Aug. 13, 1963, No. 379, P.L. 707, § 22 (Section 1306(b)). The elector was nonetheless permitted to procure an "Emergency Voting Form" from the court of common pleas and vote at their polling place. *Id.* Thus, the law recognized that there are not two "ballots" when the first was void. We agree that our Election Code only tolerates a "first (and only) ballot" that is counted. The Election Code offers electors the fail-safe of provisional ballots, and it contains mechanisms to prevent double voting such as Subsection (a.4)(5)(ii)(F).

Although our rationale differs from that of the Commonwealth Court, we likewise conclude that Subsection (a.4)(5)(ii)(F) does not prevent the counting of an elector's provisional ballot when the elector's mail ballot is a nullity. Provisional balloting procedures, as enacted in the Election Code and incorporating the mandate of HAVA, are designed in a way to assure access to the right to vote while also

preventing double voting. While Appellants and their amici³⁷ argue that “election integrity” mandates that Electors’ provisional ballots not be counted, we are at a loss to identify what honest voting principle is violated by recognizing the validity of one ballot cast by one voter. If Appellants presume that the General Assembly intended to disqualify the provisional ballot of a voter who failed to effectively vote by mail in order to punish that voter, we caution that such a construction is not reconcilable with the right of franchise. PA. CONST. art. I, § 5. We must presume that the General Assembly did not intend an unconstitutional interpretation of its enactments.

Conclusion

Following the commands of the Election Code as interpreted by this Court, the Board properly disregarded Electors’ mail-in ballots as void. However, it erred in refusing to count Electors’ provisional ballots. Subsection (a.4)(5)(i) required that, absent any other disqualifying irregularities, the provisional ballots were to be counted if there were no other ballots attributable to the Electors. There were none. Subsection (a.4)(5)(ii)(F) provides that the 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). Again, there were no other ballots attributable to Electors, so none could be timely received. Therefore, Subsection (a.4)(5)(ii)(F) is inapplicable and the command of Subsection (a.4)(5)(i) controls: “the county board of elections ... shall count the [provisional] ballot.” *Id.*

³⁷ See, e.g., Appellants’ Brief at 18; Republican Legislative Leaders’ Amicus Brief at 23-26.

§ 3050(a.4)(5)(i). For the reasons stated above, we affirm the Commonwealth Court's order directing the Board to count Electors' provisional ballots.

Chief Justice Todd and Justices Dougherty and McCaffery join the opinion.

Justice Dougherty files a concurring opinion.

Justice Mundy files a dissenting opinion.

Justice Brobson files a dissenting opinion in which Justices Wecht and Mundy join.

APPENDIX B

**[J-82A-2024 and J-82B-2024] [MO: Donohue, J.]
IN THE SUPREME COURT OF
PENNSYLVANIA
WESTERN DISTRICT**

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:
REPUBLICAN
NATIONAL
COMMITTEE AND
REPUBLICAN PARTY
OF PENNSYLVANIA

No. 26 WAP 2024

Appeal from the Order of
the Commonwealth Court
entered September 5,
2024, at No.
1074 CD 2024, Reversing
the Order of the Court of
Common Pleas of Butler
County entered
August 16, 2024, at No.
MSD-2024-40116.

SUBMITTED:
September 26, 2024

FAITH GENSER AND
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September 26, 2024

CONCURRING OPINION

JUSTICE DOUGHERTY

DECIDED: OCTOBER 23, 2024

I join the majority opinion in full. I write separately only to observe the fact that the majority and my learned colleagues in dissent interpret the relevant statutes differently does not in any way suggest “this Court has exceeded the scope of judicial review and usurped the General Assembly’s power to regulate federal elections.” Dissenting Opinion at 4 (Mundy, J.), *citing Moore v. Harper*, 600 U.S. 1, 36 (2023) (“state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections”). On the contrary, the majority’s cogent analysis **effectuates** the intent of our General Assembly to enable provisional voting, even if the dissenters disagree. In short, I am confident the Court has not “so exceed[ed] the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution[.]” *Moore*, 600 U.S. at 37, by merely resolving a state statutory interpretation question duly raised by the litigants in a case on our normal appellate docket. That is, quite literally, our job. *See, e.g., Robinson Twp., Washington Cty. v. Commonwealth*, 83 A.3d 901, 991 (Pa. 2013) (“Our Constitution vests . . . judicial power in a unified judicial system and, ultimately, in the Supreme Court. *See* PA. CONST. art. II, §1; art. IV, §1; art. V, §1. The judiciary interprets and applies the law, and its proper domain is in the field of the administration of justice under the law.”) (internal quotations and citation omitted).

APPENDIX C

[J-82A-2024 and J-82B-2024] [MO: Donohue, J.]
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SUBMITTED:
September 26, 2024

DISSENTING OPINION

JUSTICE MUNDY

DECIDED: OCTOBER 23, 2024

I dissent and join in full the thorough, cogent dissenting opinion of my colleague Justice Brobson. I write separately to emphasize that this Court’s role is to apply a fair reading of the unambiguous language of the Election Code. Regrettably, the Majority has exceeded the bounds of statutory interpretation and supplanted the power vested in our General Assembly to regulate elections.

No-excuse, universal mail-in voting is a voting method prescribed by the legislature. *See McLinko v. Dep’t of State*, 279 A.3d 539, 580 (Pa. 2022) (recognizing Article VII, Section 4 of the Pennsylvania Constitution “broadly authorizes the legislature to prescribe alternative methods of voting and the Constitution does not otherwise prohibit the General Assembly from enacting universal mail-in voting.”). The legislature did not have to permit our Commonwealth’s electors to vote by mail. It chose to allow voting by mail in Act 77,¹ and the rules it prescribed must govern the process of voting by mail as long as they comport with the Constitution. *See, e.g., In re: Canvass of Provisional Ballots in 2024 Primary Election*, ___ A.3d ___, 2024 WL 4181584, *5 (Pa. Sept. 13, 2024) (noting the state has “‘important regulatory interests’ in orderly elections, and those interests are sufficient to justify the enforcement of reasonable, nondiscriminatory rules governing candidate eligibility, voter registration, and the voting process”) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)); *Banfield v. Cortes*, 110 A.3d 155, 176-77 (Pa. 2015) (stating that “the right to vote is fundamental,” but nonetheless, “the state may enact

¹ Act of October 31, 2019, P.L. 552, No. 77.

substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner”); *In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014) (“Subject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania.”); *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (“The power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government.”).

This case involves the intersection of universal mail-in voting with provisional voting, another legislatively prescribed voting method. The issue is the interpretation of the legislative rule that a provisional ballot shall not be counted if “the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.” 25 P.S. § 3050(a.4)(5)(ii)(F). This directive is not difficult to understand, interpret, or apply. It is not ambiguous, particularly when viewed in the context of the entire statutory scheme enacted by the legislature to govern mail-in voting. In this regard, I join Justice Brobson’s analysis of the relevant provisions of the Election Code.

The Majority’s rationale hinges on its definition of the term “ballot” in Section 3050(a.4). *See* Maj. Op. at 29. In doing so, the Majority finds that electors who submit their mail-in ballots without a secrecy envelope have submitted “void mail-in ballots [that] cannot be afforded legal effect. Because Electors failed to comply with the mandatory Secrecy Envelope requirement,

they failed to cast a ballot.” *Id.* at 35. Applying this reasoning to Section 3050(a.4)(5)(ii)(F), the Majority opines that “[a]s a result of the determination that the Secrecy Envelope was not used, as a matter of law, no ballot was received by eight o’clock P.M. on Election Day and thus Subsection (a.4)(5)(ii)(F) was not triggered.” *Id.* at 37.

The Majority’s analysis is too far divorced from the legislature’s clear directives regarding mail-in voting to withstand any scrutiny. The Majority plainly reads into Section 3050 the requirement that the elector’s absentee or mail-in ballot must be valid and not void. However, the only qualification in Section 3050(a.4)(5)(ii)(F) is that the “mail-in ballot is timely received.” The Majority’s holding usurps the legislature’s unmistakable directives and supplants them with a new procedure for counting provisional ballots after a canvass has determined that the elector’s mail-in ballot is disqualified.

In this vein, Appellants argue that a court mandate to count provisional ballots cast by electors who have submitted timely received mail-in ballots violates the Elections² and Electors³ Clauses of United States

² “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 chusing Senators.” U.S. CONST. art. I, § 4, cl. 1.

³ “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United

Constitution. See Appellants' Brief at 45-46 (citing U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. art. II, § 1, cl. 2).⁴ “[T]he Elections Clause expressly vests power to carry out its provisions in ‘the Legislature’ of each State, a deliberate choice that this Court must respect.” *Moore v. Harper*, 600 U.S. 1, 34 (2023). Given the Majority’s interpretation of the Election Code, I find merit to Appellants’ argument that this Court has exceeded the scope of judicial review and usurped the General Assembly’s power to regulate federal elections. As the United States Supreme Court has recently held, “state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.” *Id.* at 36-37. In my view, the Majority’s decision to direct the counting of provisional ballots in cases where the electors’ mail-in ballots have been timely received, in direct contravention of Section 3050(a.4)(5)(ii)(F), is an unconstitutional intrusion upon the role reserved to state legislatures by the Federal Constitution.⁵

States, shall be appointed an Elector.” U.S. CONST. art. II, § 1, cl. 2.

⁴ Appellants did not raise a federal constitutional claim in their Commonwealth Court brief. However, as the respondents in the trial court and the appellees in the Commonwealth Court, they had no issue preservation obligations. See *HTR Rests., Inc. v. Erie Ins. Exch.*, 307 A.3d 49, 61 n.38 (Pa. 2023).

⁵ Although the first issue on which we granted review does not expressly mention the federal Elections and Electors Clause, it asks as a general matter whether the Commonwealth Court’s actions usurped the authority of the General Assembly. The question of whether such alleged usurpation violates the federal Constitution is logically subsumed within that issue as stated.

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For these reasons, I dissent.

APPENDIX D

**[J-82A-2024 and J-82B-2024] [MO: Donohue, J.]
IN THE SUPREME COURT OF
PENNSYLVANIA
WESTERN DISTRICT**

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:
REPUBLICAN
NATIONAL
COMMITTEE AND
REPUBLICAN PARTY
OF PENNSYLVANIA

No. 26 WAP 2024

Appeal from the Order of
the Commonwealth Court
entered September 5,
2024, at No.
1074 CD 2024, Reversing
the Order of the Court of
Common Pleas of Butler
County entered
August 16, 2024, at No.
MSD-2024-40116.

SUBMITTED:
September 26, 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:
REPUBLICAN
NATIONAL
COMMITTEE AND
REPUBLICAN PARTY
OF PENNSYLVANIA

No. 27 WAP 2024

Appeal from the Order of
the Commonwealth Court
entered September 5,
2024, at No.
1085 CD 2024, Reversing
the Order of the Court of
Common Pleas of Butler
County entered
August 16, 2024, at No.
MSD-2024-40116.

SUBMITTED:
September 26, 2024

DISSENTING OPINION

JUSTICE BROBSON

DECIDED: OCTOBER 23, 2024

Appellees Faith A. Genser and Frank P. Matis (Electors) cast provisional ballots at their respective polling places on April 23, 2024—the date of the Primary Election in Pennsylvania (Primary Election). The Butler County Board of Elections (Board) refused to count Electors’ provisional ballots because the Board had received timely mail-in ballots from both Electors. The Board also did not count Electors’ mail-in ballots, because Electors failed to place their mail-in ballots in the required secrecy envelopes. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020) (holding “that a mail-in ballot that is not enclosed in the statutorily[]mandated secrecy envelope must be disqualified” and that “the mail-in elector’s failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid”). Electors do not challenge the Board’s decision not to count their mail-in ballots. The question before the Court is whether the Board was authorized under the Pennsylvania Election Code (Election Code)¹ to count Electors’ provisional ballots under these circumstances.

On this question, the Election Code is clear and unambiguous. The Board not only lacked the authority to count Electors’ provisional ballots, the Election Code expressly prohibited the Board from counting them: “A provisional ballot shall not be counted if[] . . . the elector’s [mail]^[2] ballot is timely received by a

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2601-3591.

² Like the Majority, I use “mail ballot” to refer generally to both absentee and mail-in ballots given their similar treatment under the Election Code. For conciseness, and given the fact that

county board of elections.” Section 1210(a.4)(5)(ii)(F) of the Election Code, 25 P.S. § 3050(a.4)(5)(ii)(F). Because the Majority reaches the opposite conclusion, I respectfully dissent.

I. Relevant Provisions of the Election Code

Registered electors in Pennsylvania may vote in elections in one of two ways: (1) they may appear and vote in person at their voting district polling place on election day between the hours of 7 A.M. and 8 P.M.; or (2) they may vote by mail. Section 1306-D of the Election Code, 25 P.S. § 3150.16, prescribes the procedure by which electors vote a mail ballot. The elector voting by mail “shall . . . mark the ballot[,] . . . fold the ballot[, and] enclose and securely seal the same” in what is commonly referred to as a secrecy envelope. 25 P.S. § 3150.16(a). The elector must then place the secrecy envelope in a second envelope, commonly referred to as a declaration envelope, complete the required information on the declaration envelope, securely seal the declaration envelope, and mail or deliver the declaration envelope in person to the elector’s board of elections. *Id.* Pursuant to subsection (c) of Section 1306-D, “a completed mail-in ballot must be received in the office of the county board of elections no later than [8] P.M. on the day of the primary or election.” 25 P.S. § 3150.16(c).

Under subsection (b) of Section 1306-D of the Election Code, an “elector who receives *and votes* a mail-in ballot . . . shall not be eligible to vote at a polling place on election day.” 25 P.S. § 3150.16(b)

Electors here submitted mail-in ballots and not absentee ballots, I cite only to the pertinent provisions of the Election Code for mail-in ballots.

(emphasis added). The subsection goes on to describe how this election-day prohibition is administered. The district register³ for each voting district “shall clearly identify electors who have *received and voted* mail-in ballots as ineligible to vote at the polling place.” 25 P.S. § 3150.16(b)(1) (emphasis added). “[D]istrict election officers,” the provision continues, “shall not permit electors who *voted* a mail-in ballot to *vote* at the polling place.” *Id.* (emphasis added). Moreover, county boards of elections must maintain a record of, *inter alia*, “[t]he date on which the elector’s completed mail-in ballot *is received* by the county board.” Section 1307-D(b)(5) of the Election Code, 25 P.S. § 3150.17(b)(5) (emphasis added).

Subsection (b) of Section 1306-D of the Election Code gives additional options to electors who requested a mail ballot, but who nonetheless show up to vote at their polling place on election day. These options, however, only apply where the district register does not show the elector as “having voted.” If the elector appears at the polling place and remits to the judge of elections the elector’s mail ballot and

³ 25 Pa. C.S. § 1402 (relating to creation of district register for each election district). The Statewide Uniform Registry of Electors (SURE) system “is a ‘single, uniform integrated computer system’ maintained by the Pennsylvania Department of State.” *In re Doyle*, 304 A.3d 1091, 1096 n.3 (Pa. 2023) (quoting 25 Pa. C.S. § 1222(c)). “All [county registration] commissions shall be connected electronically to the SURE system[,] . . . shall maintain their registration records in the system,” and “shall be required to use the SURE system as its general register.” 25 Pa. C.S. § 1222(c), (e). Each district record is generated from the county general register maintained in the SURE system. 25 Pa. C.S. § 1402(b)(2).

declaration envelope “to be spoiled,” then the elector will be permitted “*to vote* at the polling place.” 25 P.S.

§ 3150.16(b)(3) (emphasis added). If, however, the elector does not remit the elector’s mail-in ballot, the elector will be permitted only to “*vote* by provisional ballot” pursuant to Section 1210(a.4)(1) of the Election Code, 25 P.S. § 3050(a.4)(1). 25 P.S.

§ 3150.17(b)(2) (emphasis added).

The above statutory provisions clearly and unambiguously establish that an elector completes the act of voting either when the elector appears at the polling place and votes in person (by official or provisional ballot) or upon receipt by the county board of elections of the elector’s mail ballot before the statutory deadline.⁴ Whether that elector’s vote is included in the official returns for a particular election is a separate question, which requires consideration of the direction given by the General Assembly to the county boards of elections in the Election Code.

Section 1210 of the Election Code, 25 P.S. § 3050, contains specific directives to county boards of elections on how to handle and determine whether to count provisional ballots cast in an election. Relevant here, subsection (a.4)(5)(i) provides:

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

⁴ This conclusion is buttressed by the other provisions of the Election Code relating to how county boards of elections must handle mail ballots upon receipt and the pre-canvassing and canvassing process, which I discuss below.

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) (emphasis added). Prior to the passage of what is commonly referred to as Act 77,⁵ subclause (ii) included only five express circumstances, (A) through (E), under which county boards of elections were prohibited from counting a provisional ballot—*i.e.*, “[a] provisional ballot shall not be counted if” 25 P.S. § 3050(a.4)(5)(ii). Act 77, which greatly expanded the circumstances under which electors could vote by mail in Pennsylvania, added a sixth, (F):⁶

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

. . . .

(F) the elector's [mail] ballot is timely received by a county board of elections.

25 P.S. § 3050(a.4)(5)(ii)(F) (emphasis added). This provision gives primacy to a timely received mail ballot over a provisional ballot cast on election day. To explain, an elector who requested and received a mail ballot may show up at the elector's polling place at 7

⁵ Act of October 31, 2019, P.L. 552, No. 77.

⁶ Section 3.2 of Act 77.

A.M. on election day to vote. The elector, however, does not produce the elector's mail ballot to be spoiled. To the contrary, the elector mailed the ballot into the county board of elections but was concerned that the ballot might arrive too late to be included in the count. A review of the district register does not reflect the elector as "having voted"—*i.e.*, that the county board of elections had not yet received the elector's mail ballot. Under these circumstances, as explained above, the elector would be permitted to cast a provisional ballot. If, as the elector feared, the county did not receive the elector's mail ballot prior to 8 P.M. on election day, the elector's provisional ballot would be counted.⁷ If, however, the county board of elections, before the polls close on election day, receives the elector's mail ballot, the county board of elections would be barred from including the provisional ballot in the official returns under Section 1210(a.4)(5)(ii)(F).

Of further importance to the question before the Court are the procedures county boards of elections must follow for the handling and canvassing of mail ballots, which are set forth in Section 1308 of the Election Code, 25 P.S. § 3146.8. At the outset, Section 1308(a) of the Election Code provides:

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

⁷ This assumes the provisional ballot did not suffer from some other fatal defect that would prevent the county board of elections from including it in the election returns.

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).

(Emphasis added.) Clearly, the above provision requires that, “upon receipt” of mail “ballots” *in their* “sealed . . . ballot envelopes,” county boards of elections are to keep those “ballots” in sealed or locked containers until canvassing. *Id.* And, as noted above, county boards of elections are required to record the date of receipt for every mail ballot under Section 1307-D(b)(5) of the Election Code and, pursuant to Section 1306-D of the Election Code, ensure that the district register reflects receipt of the mail ballot, such that it is clear that the mail elector is no longer eligible to vote at the elector’s polling place on election day. Notably, however, there is no provision in the Election Code that authorizes county boards of elections, upon receipt of a mail ballot, to verify—or speculate about—whether the mail ballot will ultimately be included in the certified election returns. To reiterate, county boards of elections must (a) record the date on which they receive a mail ballot, (b) update the district register accordingly, and (c) keep the ballot in a sealed or locked container until the canvass.

Subsection (g) of Section 1308 of the Election Code sets forth the actual canvassing procedures that county boards of elections must follow. Preliminarily, the subsection distinguishes between the casting of ballots and the receipt of ballots. With respect

specifically to military and overseas ballots, subsection (g)(1)(i) provides that said ballots “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).” 25 P.S. § 3146.8(g)(1)(i) (emphasis added). With respect to all other forms of mail ballots “cast,” subsection (g)(1)(ii) provides that they “shall be canvassed in accordance with this subsection if the [mail] ballot is *received* in the office of the county board of elections no later than [8] P.M. on the day of the primary or election.” 25 P.S. § 3146.8(g)(1)(ii) (emphasis added). These provisions clearly establish the General Assembly’s intent that mail ballots must be *both* “cast” by the voter and “received” timely by the proper county board of elections to be included in the canvass.

Section 1308(g)(1.1) and (2) of the Election Code, 25 P.S. § 3146.8(g)(1,1), (2), provides for the canvassing process to occur in two phases: (1) a pre-canvassing meeting, which may begin “no earlier than [7 A.M.] on election day to *pre-canvass all ballots received* prior to the meeting,” followed by (2) a canvassing meeting, which may begin “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 [mail] ballots not included in the pre-canvass meeting.”⁸ (Emphasis added.) Both are mandatory, and the county board of elections must publicly post notice of each meeting at least 48 hours in advance. Pertinently, the Election Code expressly prohibits the

⁸ See also Section 102 of the Election Code, 25 P.S. § 2602 (definitions of “canvass” and “pre-canvass”).

disclosure of “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) (emphasis added). The canvassing meeting “shall continue until all [mail] ballots received prior to the close of the polls have been canvassed.” 25 P.S. § 3146.8(g)(2).

Section 1308(g)(3), (4) of the Election Code, 25 P.S. § 3146.8(g)(3)-(4), directs the county boards of elections on how to conduct—*i.e.*, what to do during—the pre-canvass and the canvass:

(3) When the county board meets to pre-canvass or canvass [mail] *ballots* under paragraphs (1), (1.1) and (2), *the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d)*⁹ and shall compare the information thereon with that contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters’ list and/or the “Military Veterans and Emergency Civilians Absentee Voters File,” whichever is applicable. If the county board has verified the proof of identification as required under

⁹ Section 1308(d) of the Election Code, 25 P.S. § 3146.8(d), provides:

Whenever it shall appear by due proof that any absentee elector or mail-in elector who has returned his ballot in accordance with the provisions of this act has died prior to the opening of the polls on the day of the primary or election, the ballot of such deceased elector shall be rejected by the canvassers but the counting of the ballot of an absentee elector or a mail-in elector thus deceased shall not of itself invalidate any nomination or election.

this act and is satisfied that the declaration is sufficient and the information contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters’ list and/or the “Military Veterans and Emergency Civilians Absentee Voters File” verifies his right to vote, *the county board shall provide a list of the names of electors whose [mail] ballots are to be pre-canvassed or canvassed.*

(4) All absentee *ballots* which have not been challenged under [S]ection 1302.2(c) [of the Election Code, 25 P.S. § 3146.2b(c),¹⁰] and all mail-in *ballots* which have not been challenged under [S]ection 1302.2-D(a)(2) [of the Election Code, 25 P.S. § 3150.12b(a)(2),¹¹] and that have been verified under paragraph (3) *shall be counted and included with the returns of the applicable election district as follows:*

(i) The county board shall open the envelope of every unchallenged absentee elector and

¹⁰ Section 1302.2(c) of the Election Code, 25 P.S. § 3146.2b(c), pertains to challenges to the approval of absentee voter applications, which challenges “may be made only on the ground that the applicant was not a qualified elector” and “must be made to the county board of elections prior to [5 P.M.] on the Friday prior to the election.”

¹¹ Section 1302.2-D(a)(2) of the Election Code, 25 P.S. § 3150.12b(a)(2), pertains to challenges to the approval of mail-in voter applications, which challenges are subject to the same requirements listed *supra* at footnote 10 relative to challenges to the approval of absentee voter applications.

mail-in elector in such manner as not to destroy the declaration executed thereon.

(ii) If any of the envelopes on which are printed, stamped or endorsed the words “Official Election Ballot” contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

(iii) The county board shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes.

(iv) Following the close of the polls, the county board shall record and publish the votes reflected on the ballots.

(Emphasis added.)

To summarize, upon convening the pre-canvassing meeting and the canvassing meeting, the county boards of elections are required first to examine the declaration envelope of the ballots that have not already been set aside under Section 1308(d) of the Election Code (relating to deceased electors) in order to verify the identity of the elector, the sufficiency of the declaration, and the elector’s right to vote. 25 P.S. § 3146.8(g)(3). The Election Code then directs county boards of elections to compile a list of electors whose mail ballot declarations survive this initial screening and, as a consequence, whose mail ballots will proceed to the next portion of the pre-canvass or canvass. *Id.*

Pertinently, the next portion of the pre-canvass and canvass applies to “[a]ll [mail] ballots” that have not been challenged on the bases of Sections 1302.2(c)

and 1302.2-D(a)(2) of the Election Code, relating to the approval of absentee voter and mail-in voter applications, respectively, and that have been verified under Section 1308(g)(3) of the Election Code. 25 P.S. § 3146.8(g)(4). At this point in the process, however, any actual, specific ballot is still in the declaration envelope, which has not yet been opened. Accordingly, when the General Assembly in this provision refers to “all [mail] ballots,” it is referring to the sealed declaration envelope and its contents (whatever they may be). Of this universe of mail ballots, the Election Code commands the county boards of elections to follow the following procedures.

First, with respect to each such mail ballot, the county board of elections opens the declaration envelope in a manner that does not destroy the declaration thereon. 25 P.S. § 3146.8(g)(4)(i). Then, the county board of elections checks for the presence of a secrecy envelope and whether the secrecy envelope contains any prohibited “text, mark or symbol” and, if the secrecy envelope is missing or contains prohibited information, the county boards of elections are to set aside the mail ballot and declare it void. 25 P.S. § 3146.8(g)(4)(ii); *see Pa. Democratic Party*, 238 A.3d at 380. Second, and lastly, with respect to the remaining mail ballots that have not been disqualified up to this point, the county board of elections is directed to break the seals of the secrecy envelopes, remove the ballots, and “count, compute and tally” the votes. 25 P.S. § 3146.8(g)(4)(iii).

II. The Present Matter

As noted above, and it is undisputed, Electors requested and received mail ballots from the Board for

purposes of voting in the Primary Election. Electors, however, failed to follow the proper procedure for casting those mail ballots as provided in Section 1306-D(a) of the Election Code, as they failed to enclose their mail ballots in secrecy envelopes before depositing them in the declaration envelopes, completing the required information on those outer envelopes, and mailing them to the Board. Electors' failure to place their mail ballots in secrecy envelopes rendered their mail ballots invalid during the canvass, and, thus, the Board did not count those ballots. *See Pa. Democratic Party*, 238 A.3d at 380 (holding "that a mail-in ballot that is not enclosed in the statutorily[]mandated secrecy envelope must be disqualified" and that "the mail-in elector's failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid").

It is further undisputed that the Board received Electors' completed mail ballots before 8 P.M. on the day of the Primary Election—*i.e.*, the ballots were timely received by the Board under Section 1306-D(c) of the Election Code. The Majority emphasizes Section 1306-D(c) of the Election Code's reference to receipt of a "completed" ballot by 8 P.M. on election day. (Maj. Op. at 42.) "Completed," the Majority reasons, must "mean that the mandatory requirements for voting by mail-in ballot . . . have been completed"—referring, for example, to the need to place the ballot in the secrecy envelope before placing it in the declaration envelope and executing the declaration. (*Id.*) I disagree.

By taking this position, the Majority seems to ignore the time and space constraints of the election process itself. As set forth above, county boards of elections must keep a record of receipt of every mail

ballot under Section 1307-D(b) of the Election Code. This is because so much of what the General Assembly put into place in Act 77 springs from that event. A timely received mail ballot is a vote of the elector, even if it might ultimately be excluded from the certified election returns as part of the pre-canvass and canvass. Section 1306-D of the Election Code requires every district register to clearly identify electors who have received and voted their mail ballots so district election officers know that they are not eligible to vote at their polling place on election day. Under the Majority's interpretation of the word "complete" in Section 1306-D(c) of the Election Code, county boards of elections could never record receipt of a mail ballot until *after* election day and *after* the canvass of those ballots determines that the ballot is "complete." Consequently, the district registers at polling places on election day would never reflect whether county boards of elections received an elector's mail ballot, even if the county boards of elections actually did receive it. It follows, then, that, if the Majority view prevails on what the word "completed" means, no elector who votes by mail will ever be reflected in the district register as "having voted" until sometime after election day, meaning every elector who votes by mail can also vote provisionally under Section 1308-D(b)(2) of the Election Code without qualification. The Majority's interpretation of "completed ballot" guts the statutory qualifiers that limit who may, and may not, cast a provisional ballot at the polling place on election day. As we are required to interpret the laws of the General Assembly so as to avoid rendering any provision mere surplusage, the Majority's definition of "completed ballot" cannot withstand scrutiny. *See S &*

H Transp., Inc. v. City of York, 140 A.3d 1, 7 (Pa. 2016) (observing that, in construing language of statute, court must give effect to every word and may not assume any words were intended as mere surplusage).

What information is within the ability of county boards of elections to determine at the time they receive a mail ballot from an elector?¹² Section 1308(a) of the Election Code provides the answer. There, the General Assembly instructs county boards of elections to, “upon receipt of official absentee ballots in sealed official absentee ballot envelopes . . . and mail-in ballots as in sealed in official mail-in ballot envelopes, . . . safely keep the ballots in sealed or locked containers until they are to be canvassed.” 25 P.S. § 3146.8(a). This section reflects what the county boards of elections must receive from an elector for the mail ballot to be included in the canvass. Generally speaking, it must be a mail ballot in the mandatory, sealed, outside declaration envelope. A mail ballot in a secrecy envelope is not “complete.” A bare ballot is not “complete.” It is undisputed that Electors’ mail ballots were received by the Board in the required outside, sealed declaration envelopes. Accordingly, they were

¹² The Majority creates a new term—“Return Packet”—in order to bolster its position. (Maj. Op. at 2.) This term does not appear in the Election Code. Moreover, as noted above, county boards of elections must await the canvass to determine whether an elector has complied with all of the requirements for casting a mail ballot, particularly whether the elector who cast the ballot sealed it in a secrecy envelope. County boards of elections, therefore, can never ascertain whether they received a “Return Packet” prior to the canvass and the limitations imposed on election day voting for electors who requested and received mail ballots can never be implemented if the phrase “Return Packet” has the significance the Majority attributes to it.

“complete” for purposes of proceeding to the canvass and, under the Election Code provisions set forth above, the Board was required to record their receipt at that time for purposes of creating accurate district registers.

It is also undisputed that Electors showed up at their respective polling places and cast provisional ballots for the Primary Election.¹³ The crux of the dispute here is whether the Board was required to count Electors’ provisional ballots under the aforementioned circumstances, particularly given Section 1210(a.4)(5)(ii)(F) of the Election Code’s prohibition against counting an elector’s provisional ballot where “the elector’s [mail] ballot is timely received by a county board of elections.” Appellants argue that the provision clearly and unambiguously prohibits a county board of elections from counting a “provisional ballot cast by a voter whose mail ballot the county board ‘timely received’ before the deadline of 8 [P.M.] on [e]lection [d]ay,” irrespective of whether the timely received ballots are ultimately determined to be “valid” or “counted.” (Appellants’ Brief at 25.) Appellees counter, and the Commonwealth Court agreed, that ambiguity in Section 1210(a.4)(5)(ii)(F) arises when it is read in the context of other provisions of the Election Code, namely, Section 1210(a.4)(5)(i) and Section 1306-D(b)(2), and that resolution of the ambiguity leads to the conclusion that Section

¹³ For reasons set forth above, I believe it questionable, at least, as to whether Electors should have been permitted to cast provisional ballots, given that they had already “voted” their mail ballots. Regardless, they did, and my analysis depends on what the Board was authorized to do with those provisional ballots, not Electors’ eligibility to vote them.

1210(a.4)(5)(ii)(F) prohibits the counting of an elector's provisional ballot only when the elector's timely received ballot is ultimately "valid" or "counted." The Majority here takes a different path, reasoning, *inter alia*, that Section 1210(a.4)(5)(ii)(F)'s use of the term "ballot" refers only to a ballot that is not "void" because it was "naked"—*i.e.*, though sealed within the (exterior) declaration envelope, the ballot was not also sealed within the required (interior) secrecy envelope. (Maj. Op. at 35-38.) In the Majority's view, naked ballots are never received by county boards of elections under the Election Code. In my respectful view, Appellees' position and the Majority's rationale are untenable.¹⁴

¹⁴ The instant matter requires an "interpretation 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). Moreover,

[t]his Court's role in statutory interpretation is to ascertain and effectuate the intent of the Legislature, giving effect to all provisions of the statute under review, if possible. The best indication of legislative intent is the plain language of the statute. The plain language of each section of a statute must be read in conjunction with one another, construed with reference to the entire statute. When the words of a statute are clear and free from all ambiguity, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. Accordingly, only when the words of a statute are ambiguous should a reviewing court seek to ascertain the intent of the General Assembly through consideration of the various factors found in Section 1921(c) [of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1921(c)].

Id. at 166-67 (citations omitted).

Beginning with Section 1210(a.4)(5)(i) of the Election Code, that provision again provides:

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.

25 P.S. § 3050(a.4)(5)(ii)(F) (emphasis added). Subclauses (i) and (ii) are not “flipsides.” (Maj. Op. at 37.) County boards of elections cannot choose one over the other as if they were a coin or the A and B sides of a vinyl record. They most certainly are not on equal legal footing. “Except as provided in subclause (ii)” takes primacy over what follows it in subclause (i). A provisional ballot cannot be counted under subclause (i) if it is disqualified under subclause (ii). When circumstances are presented that satisfy the introductory language of Section 1210(a.4)(5)(i) through application of the exception provided in subclauses (ii), any further analysis under the terms of subclause (i) is improper. This is the only reasonable interpretation of Section 1210(a.4)(5).

Subclause (ii) of Section 1210(a.4)(5) of the Election Code begins, “[a] provisional ballot *shall not be counted if.*” 25 P.S. § 3050(a.4)(5)(ii) (emphasis added).

What immediately follows is a list of circumstances that a county board of elections must consider before counting a particular provisional ballot. If any of those circumstances apply, the directive to the county boards of elections is clear and mandatory—the provisional ballot must not be counted. As noted above, the first five of those circumstances relate to defects in the casting of the provisional ballot itself—*i.e.*, the elector failed to sign the ballot envelope or there is an issue with the elector’s signature. Exception (C) is particularly noteworthy. Here, the General Assembly expressly stated that a provisional ballot shall not be counted if it “does not contain a secrecy envelope.”¹⁵ The next two exceptions relate to an elector’s failure to appear before the county board of elections to verify the elector’s identity through proof of identification or execution of an affidavit.

The Board rejected Electors’ provisional ballots under exception (F) of Section 1210(a.4)(5)(ii) of the Election Code, which, as noted above, the General Assembly added to the list when it greatly expanded mail voting in Pennsylvania. That exception, unlike exception (C), makes no reference to a missing secrecy envelope. It makes no reference at all to the results of the canvass of mail ballots in Section 1308(g) of the Election Code. Instead, it simply and clearly provides that “[a] provisional ballot shall not be counted if . . . the elector’s [mail] ballot *is timely received* by [the]

¹⁵ Like mail ballots, provisional ballots, once cast by the elector, must be placed in an internal secrecy envelope and then placed in an outside provisional ballot envelope. Section 1210(a.4)(3) of the Election Code, 25 P.S. § 3050(a.4)(3).

county board of elections.” 25 P.S. § 3050.(a.4)(5)(ii)(F) (emphasis added).

As noted above, Act 77 made numerous amendments to the Election Code when it expanded mail voting. Many of those reference the county boards of elections’ receipt of an elector’s mail ballot and the duties, obligations, and limitations that spring from the county boards of elections’ receipt of the mail ballot.¹⁶ At the same time the General Assembly added the language in those sections to the Election Code, it added this very exception. It follows, then, that the General Assembly, when referring to the timely receipt of mail ballots by the county boards of elections in Section 1210(a.4)(5)(ii)(F) of the Election Code, intended it to mean what it means everywhere else—*i.e.*, the county board of elections timely receives the elector’s mail ballot when it receives, either in the mail or by hand-delivery, the ballot in the declaration envelope and sets it aside until the canvass. *See* 25 P.S. § 3146.8(a); *Bayview Loan Servicing, LLC v. Lindsay*, 185 A.3d 307, 313 (Pa. 2018) (“[S]tatutory interpretive principles also require that where the meaning of a word or phrase is clear when used in one section of a statute, it will be construed to have the same meaning in another section of the same statute.”).

Rather than begin its analysis of Section 1210(a.4)(5)(i) of the Election Code with that provision’s introductory clause and determining whether what follows in the provision applies at all in light of the exceptions set forth in Section

¹⁶ *See supra* pp. 5-7 (discussing provisions of Election Code that reference or rely on ballot receipt).

1210(a.4)(5)(ii), the Majority skips over the introductory clause and proceeds to interpret Section 1210(a.4)(5)(i)'s later requirement that a board of elections “confirm[] that the [elector] did not cast any other ballot.”¹⁷ (Maj. Op. at 34-35.) Aside from this misstep, the Majority proceeds to define the word “ballot” in both Section 1210(a.4)(5)(i) and Section 1210(a.4)(5)(ii)(F) differently than it can be defined in any other part of the Election Code—*i.e.*, as referring only to a ballot that is not “void.” The Majority then views the term “void” as meaning “of no legal effect,” which the Majority extrapolates to mean that we treat a “void” ballot as if the county board of elections never received it at all. (*Id.* at 35 (quoting *Void*, Black’s Law Dictionary (12th ed. 2024).)

Preliminarily, neither the plain language of Section 1210(a.4)(5)(i) of the Election Code nor the plain language of Section 1210(a.4)(5)(ii) of the Election Code reference mail ballots that are not “void” or, conversely, mail ballots that are “valid.” To get to its desired result, the Majority imports the word “void” from Section 1308(g)(4)(ii) of the Election Code, which relates to the canvass procedure for mail ballots that survive the initial screening by the county boards of elections. This provision expressly relates to secrecy envelopes that contain markings and provides:

If any of the envelopes on which are printed, stamped or endorsed the words “Official Election Ballot” contain any text, mark or symbol which reveals the identity of the

¹⁷ Appellees and the Commonwealth Court similarly give short shrift to the introductory language of Section 1210(a.4)(5)(i) of the Election Code.

elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside *and declared void*.

25 P.S. § 3146.8(g)(4)(ii) (emphasis added). Note that this provision does not expressly refer to *missing* secrecy envelopes—so called naked ballots. In *Boockvar*, this Court directly addressed the applicability and effect of this provision on naked ballots. Despite arguments that the above provision did not expressly refer to naked ballots and, thus, did not prohibit their inclusion in the count, this Court concluded that Section 1306-D(a) of the Election Code, 25 P.S. § 3150.16(a), which requires electors to seal their mail ballot in the secrecy envelope before placing it in the declaration envelope and delivering it to the county board of elections, when read *in pari materia* with Section 1308(g)(4)(ii) above, evidenced the General Assembly's intent "that a mail-in ballot that is not enclosed in the statutorily[]mandated secrecy envelope must be *disqualified*." *Boockvar*, 238 A.3d at 380 (emphasis added). Importantly, the Court did not hold that Section 1308(g)(4)(ii) applied to naked ballots. Indeed, by its plain terms, it does not. That being said, the Court used the textually inapplicable provision to interpret the General Assembly's overarching intent with respect to the necessity of a secrecy envelope and concluded that, to the General Assembly at least, the secrecy envelope was so important that its absence meant the ballot must be "disqualified."

The Majority now holds that naked ballots are "void" under Section 1308(g)(4)(ii) of the Election Code, a decision that is in tension with this Court's

decision in *Boockvar* and, if not, with the statutory language itself. That being said, unlike the Majority, I see no practical difference between the word “void,” as used in Section 1308(g)(4)(ii), and “disqualified,” as used by this Court in *Boockvar*. The effect is the same—the mail ballots (*i.e.*, the votes) cannot be included in the vote count. I disagree with the Majority ascribing any greater meaning to the word “void”—a meaning that would rewrite the history of the election. Not even the definition from Black’s Law Dictionary of “void” offered by the Majority, *see* Maj. Op. at 35, supports the Majority’s position that somehow the effect of the ballot being void causes the ballot to essentially “disappear” as if it never existed. Miriam Webster’s Dictionary defines “void” as “of no legal force or effect.” *Void*, Webster’s Third New International Dictionary 2562 (1993). That definition applies to all ballots that are excluded from the canvass, for whatever reason. That is clearly what this Court meant when it said in *Boockvar* that naked ballots are “disqualified.” Any ballot excluded from the count through the statutory canvass procedure has been “disqualified” or “voided”—*i.e.*, no legal effect, it will not be included in the count—as those terms are generally understood. “Void” does not and cannot reasonably mean that the very same ballots that were excluded from the vote as a result of the canvass were: (a) never timely received by the county board of elections and placed in a sealed or locked container under Section 1308(a) of the Election Code; (b) never recorded as having been received, as required under Section 1307-D(b)(5) of the Election Code; (c) never subjected to the initial screening that determines whether the ballots would be subject to the next phase

of the pre-canvass or canvass as required under Section 1308(g)(3); and, (d) in a twist of irony, never reviewed during the canvass under Section 1308(g)(4) to determine whether they should be counted.

The Majority highlights that Section 1210(a.4)(5)(ii)(F) of the Election Code clearly refers to a timely received “ballot,” not a timely received “envelope.” (Maj. Op. at 37.) The Majority adds that, given that other exceptions outlined in Section 1210(a.4)(5)(ii) refer to a “provisional ballot envelope,” the General Assembly clearly knew how to distinguish between ballots and envelopes and would have provided for the invalidation of a provisional ballot based on the timely receipt of an elector’s mail ballot “declaration envelope” if that was the General Assembly’s intent. *See* 25 P.S. § 3050(a.4)(5)(ii)(A), (C) (providing that “[a] provisional ballot shall not be counted if[] . . . the provisional ballot envelope . . . is not signed by the individual” or if “a provisional ballot envelope does not contain a secrecy envelope”). This line of reasoning also fails, as, for the reasons set forth above, it ignores all of the other places in the Election Code where the General Assembly refers to timely receipt of the ballot and chose to use that same phraseology in Section 1210(a.4)(5)(ii)(F). In addition, although the Majority notes, as discussed above, that the five exceptions listed in Section 1210(a.4)(5)(ii)(A)-(E) of the Election Code all focus on an elector’s provisional ballot, the Majority fails to acknowledge that those exceptions were all enacted prior to Act 77. Act 77 added the final exception set forth in Section 1210(a.4)(5)(ii)(F), the only exception to focus on mail ballots *received* and not on the provisional ballots themselves.

Speaking of what the General Assembly could have written, the exception in Section 1210(a.4)(5)(ii)(C) provides that a provisional ballot shall not be counted if it “does not contain a secrecy envelope.” The General Assembly’s interpretation of new exception (F) likewise requires a determination regarding the presence or absence of a secrecy envelope. As construed by the Majority, exception (F) means “[a] provisional ballot shall not be counted if . . . the elector’s [mail] ballot is timely received by [the] county board of elections” *and* if it is sealed in a secrecy envelope. If the secrecy envelope were the focus of the General Assembly in enacting exception (F), in all likelihood it would make it the focus as it did in exception (C). Instead, what the Majority does is ignore the words that the General Assembly actually used in exception (F), ignore how it used those same or similar words in other parts of the Election Code, and add words to exception (F) that the General Assembly used in other provisions that it could have used, but chose not to use, in exception (F).

To further illuminate the rationale behind my position, I offer the following final thoughts relative to the authority of both county boards of elections and this Court when it comes to our respective roles of effectuating and interpreting the Election Code. The Election Code establishes county boards of elections and prescribes their powers and duties. *See* Section 301(a) of the Election Code, 25 P.S. 2641(a) (providing 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 the [Election Code]”); Section 302 of the

Election Code, 25 P.S. § 2642 (providing that “[t]he county boards of elections, within their respective counties, shall exercise, in the manner provided by [the Election Code], all powers granted to them by this act, and shall perform all the duties imposed upon them by [the Election Code], which shall include” certain powers further enumerated in statute). “It is *a priori* that a governmental body such as an election board has only those powers expressly granted to it by the legislature.” *Hempfield Sch. Dist. v. Election Bd. of Lancaster Cnty.*, 574 A.2d 1190, 1191 (Pa. Cmwlth.), *appeal denied*, 581 A.2d 575 (Pa. 1990). Relatedly, “[p]rescribed procedures in election matters are creatures of statute and, unless one can point to statutory authority for the course which he chooses to follow, his action is without legal warrant.” *In re General Election Luzerne Cnty.*, 94 A.2d 565, 566 (Pa. 1953). Here, not only does the Board lack authority under the Election Code to count Electors’ provisional ballots when the Board timely received their mail ballots, Section 1210(a.4)(5)(ii)(F) of the Election Code expressly prohibits the Board from doing so.

Additionally, “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). In this regard, I am mindful that this Court is not at liberty to “ignore the clear mandates of the Election Code.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004). We are also directed not only to “listen attentively to what the statute says, but also to what it does not say.” *In re Canvassing Observation*, 241 A.3d 339, 349 (Pa. 2020) (quoting *Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d

304, 321 (Pa. 2017)). Of course, we may “not insert words into [a statute] that are plainly not there.” *Frazier v. Workers’ Comp. Appeal Bd. (Bayada Nurses, Inc.)*, 52 A.3d 241, 245 (Pa. 2012); *see also Shafer Elec. & Constr. v. Mantia*, 96 A.3d 989, 994 (Pa. 2014) (providing that “it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include” (quoting *Commonwealth v. Rieck Inv. Corp.*, 213 A.2d 277, 282 (Pa. 1965))). We likewise have “no authority to read ambiguity into plain language in order to effectuate what we discern to be the more favorable result.” *Commonwealth ex rel. Kane v. Univ. of Pittsburgh Med. Ctr.*, 129 A.3d 441, 475 (Pa. 2015) (Baer, J., concurring and dissenting). And, “while we must consider the statutory language in its full context before we assess ambiguity, we must not overlabor to detect or manufacture ambiguity where the language reveals none.” *Sivick v. State Ethics Comm’n*, 238 A.3d 1250, 1264 (Pa. 2020) (footnotes omitted). The Majority’s reasoning, in my respectful view, does not hew closely to any of these principles.

The Election Code provisions at issue are clear, and they dictate that the Board shall not count an elector’s provisional ballot if the elector’s mail ballot is timely received by the Board. Again, the General Assembly very well could have authorized the Board to count electors’ provisional ballots under circumstances where electors’ mail ballots were timely received by the Board yet found fatally defective during the canvass and excluded from the count. The General Assembly, however, clearly did not, and this Court is not at liberty to make additions or modifications to the unambiguous statutory language in order to effectuate

that result. To the extent that the General Assembly's chosen language represents bad policy, is unfair, or is inconsistent with the overarching intent of the Election Code,¹⁸ Appellees' complaints in this regard are better directed to that branch of government. *See Ursinus Coll. v. Prevailing Wage Appeals Bd.*, 310 A.3d 154, 173 (Pa. 2024) (explaining that "invocations

¹⁸ Insofar as the Majority faults Appellants for failing to establish how their interpretation, with which I align, advances the purposes and goals of the Election Code, I emphasize that discussions of a statute's purposes and goals are not to be considered when the statute's language is clear. *See* 1 Pa. C.S. § 1921(c) (providing that, "[w]hen the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering," *inter alia*, "[t]he occasion and necessity for the statute," [t]he mischief to be remedied," and "[t]he object to be attained"). Likewise, to the extent that the Majority opines that Appellants' position and my conclusion lead to absurdity, I disagree. The conclusion is the result of a *policy choice* that the Majority views as absurd. *See Commonwealth v. Green*, 291 A.3d 317, 330 (Pa. 2023) (discussing absurdity doctrine). Arguably, providing one chance to cast a valid ballot, be it in person or by mail (elector's choice), is consistent with this Commonwealth's longstanding election policy and statutory framework. Electors bear the responsibility to follow the law, whether placing their ballot in a secrecy envelope or showing up to vote on election day between the hours of 7 A.M. and 8 P.M. As addressed by the General Assembly in the Election Code, provisional ballots are for those electors who face a different type of obstacle not of their own making—*e.g.*, where the elector attempts to vote in person but is not on the district registry or where there is a risk the elector's mail ballot may not arrive on time in the mail. This does not mean that other policy considerations could not, one day, result in a change in the manner in which invalid mail ballots are handled or expand the circumstances under which a provisional ballot may be counted. That, as I have consistently stated, however, is a matter for the General Assembly and not the judiciary.

of, and arguments about, public policy cannot override the plain language of” statutory provisions or “contravene the plain meaning of the[ir] term[s],” that this Court cannot “re-construe [statutory language] because we believe an alternative interpretation would address certain unintended consequences of the law,” and that “[w]e leave the task of rectifying perceived deficiencies in the statutory scheme . . . to the legislature” (some alterations in original) (citations omitted)); *In re Canvass of Provisional Ballots in 2024 Primary Election*, A.3d , (Pa., 55 MAP 2024, filed Sept. 13, 2024), slip op. at 11, (Wecht, J., concurring) (“The onus is upon the legislature to make policy judgments about what is necessary to ensure the integrity of our elections, and it is the duty of the judiciary to construe these mandates as the plain language directs.”).

Finally, I do not herein address, or rely on, the particular process that the Secretary of the Commonwealth has established with respect to codes in the SURE system about ballots being cancelled prior to the canvass, (Notes of Testimony (N.T.), 5/7/2024, at 68), and SURE-generated email notices to electors, again prior to the canvass, that inform the electors that “[y]our ballot will not be counted”—a process that the Board followed here. Suffice it to say that I have serious questions about whether the codes and notices are authorized by the Election Code, consistent with the express secrecy provisions that the Election Code requires with respect to mail ballots up to and through the canvass, or are even true. (N.T., 5/7/2024, at 33-35.)

For all of the above reasons, and because the Board timely received Electors’ mail ballots, the Board was

compelled to refuse to count Electors' provisional ballots pursuant to Section 1210(a.4)(5)(ii)(F) of the Election Code. I would, therefore, reverse the Commonwealth Court's decision below.

Justices Wecht and Mundy join this dissenting opinion.

APPENDIX E

U.S. Const. art I, § 4, cl. 1

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 chusing Senators.

U.S. Const. art. II, § 1, cl. 2

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

1 Pa. Stat. § 1921. Legislative intent controls.

(a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.

(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 pursuing its spirit.

(c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

(1) The occasion and necessity for the statute.

- (2) The circumstances under which it was enacted.
- (3) The mischief to be remedied.
- (4) The object to be attained.
- (5) The former law, if any, including other statutes upon the same or similar subjects.
- (6) The consequences of a particular interpretation.
- (7) The contemporaneous legislative history.
- (8) Legislative and administrative interpretations of such statute.

25 Pa. Stat. § 3050. Manner of applying to vote; persons entitled to vote; voter's certificates; entries to be made in district register; numbered lists of voters; challenges.

* * *

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

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

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

(B) the signature required under clause (3) and the signature required under clause (2) are either not genuine or are not executed by the same individual;

(C) a provisional ballot envelope does not contain a secrecy envelope;

(D) in the case of a provisional ballot that was cast under subsection (a.2)(1)(i), within six calendar days following the election the elector fails to appear before the county board of elections to execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot and that the elector is indigent and unable to obtain proof of identification without the payment of a fee;

(E) in the case of a provisional ballot that was cast under subsection (a.2)(1)(ii), within six calendar days following the election, the elector fails to appear before the county board of elections to present proof of identification and execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of the proof of identification and an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot; or

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

25 Pa. Stat. § 3146.6. Voting by absentee electors.

(a) Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or

election, the 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.

(1) Deleted by 2019, Oct. 31, P.L. 552, No. 77, § 6, ind. effective.

(2) Any elector, spouse of the elector or dependent of the elector, qualified in accordance with the provisions of section 1301, subsections (e), (f), (g) and (h) to vote by absentee ballot as herein provided, shall be required to include on the form of declaration a supporting declaration in form prescribed by the Secretary of the Commonwealth, to be signed by the head of the department or chief of division or bureau in which the elector is employed, setting forth the identity of the elector, spouse of the elector or dependent of the elector.

(3) Any elector who has filed his application in accordance with section 1302 subsection (e) (2), and is unable to sign his declaration because of illness or physical disability, shall be excused from signing upon making a declaration which shall be

witnessed by one adult person in substantially the following form: I hereby declare that I am unable to sign my declaration for voting my absentee ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

(Date)	(Mark)
(Complete Address of Witness)	(Signature of Witness)

(b)(1) Any elector who receives and votes an absentee ballot pursuant to section 1301 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 absentee ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted an absentee ballot to vote at the polling place.

(2) An elector who requests an absentee ballot and who is not shown on the district register as having voted the ballot may vote by provisional ballot under section 1210(a.4)(1).

(3) Notwithstanding paragraph (2), an elector who requests an absentee 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 under 18 Pa.C.S. § 4904 (relating

to unsworn falsification to authorities) 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 and the envelope containing the declaration of the elector 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) Except as provided under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot), a completed absentee 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 Pa. Stat. § 3146.8. Canvassing of official absentee ballots and mail-in ballots.

(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).

(b) Watchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.

(b.1) Deleted by 2019, Oct. 31, P.L. 552, No. 77, § 7, imd. effective.

(c) Deleted by 1968, Dec. 11, P.L. 1183, No. 375, § 8.

(d) Whenever it shall appear by due proof that any absentee elector or mail-in elector who has returned his ballot in accordance with the provisions of this act has died prior to the opening of the polls on the day of the primary or election, the ballot of such deceased elector shall be rejected by the canvassers but the counting of the ballot of an absentee elector or a mail-in elector thus deceased shall not of itself invalidate any nomination or election.

(e) Deleted by 2019, Oct. 31, P.L. 552, No. 77, § 7, imd. effective.

(f) Any person challenging an application for an absentee ballot, an absentee ballot, an application for a mail-in ballot or a mail-in ballot for any of the reasons provided in this act shall deposit the sum of ten dollars (\$10.00) in cash with the county board, which sum shall only be refunded if the challenge is sustained or if the challenge is withdrawn within five (5) days after the primary or election. If the challenge is dismissed by any lawful order then the deposit shall be forfeited. The county board shall deposit all deposit money in the general fund of the county.

Notice of the requirements of subsection (b) of section 1306 shall be printed on the envelope for the absentee ballot or mail-in ballot.

(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).

(ii) An absentee ballot cast by any absentee elector as defined in section 1301(i), (j), (k), (l), (m) and (n), an absentee ballot under section 1302(a.3) or 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.

(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.

(2) 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. The county board of elections shall not record or publish any votes reflected on the ballots prior to the close of the polls. The canvass process shall continue through the eighth day following the election for valid military-overseas ballots timely received under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot). A county board of elections shall provide at least forty-eight hours' notice of a canvass meeting by publicly posting a notice 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 canvassed.

(3) When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians

Absentee Voters File,” whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters’ list and/or the “Military Veterans and Emergency Civilians Absentee Voters File” verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

(4) All absentee ballots which have not been challenged under section 1302.2(c) and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district as follows:

(i) The county board shall open the envelope of every unchallenged absentee elector and mail-in elector in such manner as not to destroy the declaration executed thereon.

(ii) If any of the envelopes on which are printed, stamped or endorsed the words “Official Election Ballot” contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

(iii) The county board shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes.

(iv) Following the close of the polls, the county board shall record and publish the votes reflected on the ballots.

(5) Ballots received whose applications have been challenged and ballots which have been challenged shall be placed unopened in a secure, safe and sealed container in the custody of the county board until it shall fix a time and place for a formal hearing of all such challenges, and notice shall be given where possible to all absentee electors and mail-in electors thus challenged and to every individual who made a challenge. The time for the hearing shall not be later than seven (7) days after the deadline for all challenges to be filed. On the day fixed for said hearing, the county board shall proceed without delay to hear said challenges, and, in hearing the testimony, the county board shall not be bound by the Pennsylvania Rules of Evidence. The testimony presented shall be stenographically recorded and made part of the record of the hearing.

(6) The decision of the county board in upholding or dismissing any challenge may be reviewed by the court of common pleas of the county upon a petition filed by any person aggrieved by the decision of the county board. The appeal shall be taken, within two (2) days after the decision was made, whether the decision was reduced to writing or not, to the court of common pleas setting forth the objections to the county board's decision and praying for an order reversing the decision.

(7) Pending the final determination of all appeals, the county board shall suspend any action in

canvassing and computing all challenged ballots received under this subsection irrespective of whether or not appeal was taken from the county board's decision. Upon completion of the computation of the returns of the county, the votes cast upon the challenged official absentee ballots that have been finally determined to be valid shall be added to the other votes cast within the county.

(h) For those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified:

(1) Deleted by 2019, Oct. 31, P.L. 552, No. 77, § 7, ind. effective.

(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.

(i) Notwithstanding the provisions of this section, a qualified absentee elector shall not be required to provide proof of identification if the elector is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (Public Law 99-410, 100 Stat. 924) or by an alternative ballot under the Voting Accessibility for the Elderly and Handicapped Act (Public Law 98-435, 98 Stat. 1678).

25 Pa. Stat. § 3150.16. Voting by mail-in electors.

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

(a.1) Signature.—Any elector who is unable to sign the declaration because of illness or physical disability, shall be excused from signing upon making a declaration which shall be witnessed by one adult person in substantially the following form:

I hereby declare that I am unable to sign my declaration for voting my mail-in ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

(Mark)

(Date)

(Complete Address of Witness)

(Signature of Witness)

(b) Eligibility.—

(1) Any elector who receives and votes a mail-in ballot under section 1301-D 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.

APPENDIX F

**IN THE SUPREME COURT OF
PENNSYLVANIA
WESTERN DISTRICT**

No. 27 WAP 2024

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

v.

BUTLER COUNTY BOARD OF ELECTIONS
Respondents/Appellants,
**REPUBLICAN NATIONAL COMMITTEE; AND
REPUBLICAN PARTY OF PENNSYLVANIA,**
Intervenors/Appellants.

PRINCIPAL BRIEF OF APPELLANTS

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

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STATEMENT OF JURISDICTION

The Court granted Appellants' Petition for Allowance of Appeal on September 20, 2024. *See* Order, Nos. 240 WAL 2024 & 241 WAL 2024 (Sept. 20, 2024) (per curiam).

ORDER IN QUESTION

The Commonwealth Court's order states: "AND NOW this 5th 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." Appendix ("App.") Ex. A at A.36.

SCOPE OF REVIEW AND STANDARD OF REVIEW

This appeal presents purely legal questions, for which the "scope of review is plenary and [the] standard of review is *de novo*." *Stilp v. Commonwealth*, 905 A.2d 918, 950 (Pa. 2006).

STATEMENT OF THE QUESTIONS INVOLVED

1. Whether, contrary to this Court's binding precedent in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 352 (Pa. 2020), the Commonwealth Court improperly usurped the authority of the General Assembly by effectively rewriting the Election Code to engage in court-mandated curing when it held that a voter is entitled to submit a provisional ballot and have that provisional ballot counted in the election tally after the voter has timely submitted a

defective absentee or mail-in ballot, contrary to the Election Code.

SUGGESTED ANSWER: Yes.

2. Whether the Commonwealth Court erred in holding that, due to purported ambiguities in the Election Code, the Butler County Board of Elections is required to count a provisional ballot cast by an elector who received a mail-in ballot and delivered the mail-in ballot to the county board of elections without the required secrecy envelope, despite the language of 25 P.S. § 3050(a.4)(5)(ii)(F), which provides that a provisional ballot shall not be counted if the elector's absentee ballot or mail-in ballot is timely received by a county board of elections.

SUGGESTED ANSWER: Yes.

STATEMENT OF THE CASE**A. The Election Code’s Requirements For Mail Ballots And Provisional Ballots**

The Election Code mandates that voters who cast mail ballots comply with various rules to have their ballots counted.¹ One of those rules mandates that voters seal their mail ballots in a secrecy envelope. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). This secrecy-envelope requirement is “mandatory”; a voter’s “failure to comply ... renders the ballot invalid” and ineligible to be counted by election officials. *Pa. Democratic Party*, 238 A.3d at 380. This requirement implements the Pennsylvania Constitution’s directive that “secrecy in voting be preserved,” Pa. Const. art. VII, § 4, and contributes to the integrity of Pennsylvania’s elections by guaranteeing that election officials who open mail ballots will not be able to discern “who the elector is, with what party he or she affiliates, or for whom the elector has voted,” *Pa. Democratic Party*, 238 A.3d at 378.

The Election Code further requires that a mail voter seal the secrecy envelope in an outer envelope and “fill out, date, and sign the declaration printed on” the outer envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). There is no dispute that the signature requirement is mandatory, and this Court has upheld the date requirement as mandatory. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2022); *Pa. Democratic Party*, 238 A.3d at 372-74; *see also Black Political Empowerment Project v. Schmidt*, No. 68 MAP 2024 (Pa. Sept. 13, 2024, Sept.

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

19, 2024); *Pa. State Conf. of NAACP Branches v. Sec’y*, 97 F.4th 120 (3d Cir. 2024). For a mail ballot to be counted, the voter must return the completed mail-ballot package—consisting of a ballot sealed in a secrecy envelope, inside an outer envelope with a completed declaration—in time for it to “be received in the office of the county board of elections no later than 8 o’clock P.M. on the day of the primary or election.” *Id.* §§ 3146.6(c), 3150.16(c).

The Election Code does not contain any “notice and opportunity to cure procedure” for voters to fix errors on their mail ballots, such as failures to comply with the signature, date, or secrecy-envelope requirements. *Pa. Democratic Party*, 238 A.3d at 374. Instead, the General Assembly has decided that mail ballots must be “rejected due to” even “minor errors made in contravention of those requirements.” *Id.* Indeed, that those requirements are *mandatory* means that noncompliance “renders the ballot invalid” and ineligible to be counted. *Id.* at 380.

The Election Code also does not confer a general right on voters to cast a provisional ballot and have it counted. Rather, Pennsylvania law confers a right to cast a provisional ballot and have it counted in only limited circumstances. *See Pa. Democratic Party*, 238 A.3d at 375 n.28. Those 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,” such as because the voter never returned their mail-ballot package to the county board. *Id.* §§ 3146.6(b)(2),

3150.16(b)(2). The Election Code, however, unambiguously directs: “A provisional ballot shall not be counted if the elector’s absentee or mail-in ballot is timely received by a county board of elections.” *Id.* § 3050(a.4)(g)(5)(ii)(F).

B. The Statewide Uniform Registry of Electors (SURE) And The Secretary’s Instructions And Automated Emails

Under the Election Code, the Department of State (“the Department”) “shall develop and establish a Statewide Uniform Registry of Electors to be known as the SURE System.” 25 Pa. C.S. § 1222(a). SURE is “a single, uniform integrated computer system” for “maintain[ing] [voter] registration records” across the Commonwealth. *Id.* § 1222(b). Among other functions, SURE must also “[i]dentify registered electors who have been issued absentee ballots for an election” and “[i]dentify registered electors who vote in an election and the method by which their ballots are cast.” *Id.* § 1222(c)(20)-(21).

The Department has programmed SURE to permit county boards to track voters’ mail-ballot requests, to document the sending of mail-ballot materials in response to those requests, and to log mail-ballot packages received back from voters. Until commencement of the pre-canvass no earlier than 7 a.m. on Election Day, *see* 25 P.S. § 3146.8(g)(1.1), the only actions the Election Code authorizes county boards to perform with respect to received mail-ballot packages are to scan and log them in SURE, 25 Pa. C.S. § 1222(c)(20)-(21), and to “safely keep [them] in sealed and locked containers until they are to be

canvassed by the county boards of elections,” 25 P.S. § 3146.8(a).

At various times, the Department has issued “instructions” to county boards regarding SURE’s ballot-tracking functions, including the logging of received mail-ballot packages. *See* May 7, 2024 Trial Court Hearing Transcript (“Hrg. Tr.”) 45:4-1, App. Ex. C at A.115. The Department has not issued these instructions as SURE regulations. *See* 25 Pa. C.S. § 1222.

The Department issued an updated instruction for the 2024 Primary Election on March 11, 2024 (“the March Instruction”). *See* App. Ex. C at A.267-A.284.² The March Instruction introduced new programming codes for logging received mail-ballot packages: “PEND” (Pending) and “CANC” (Canceled). *See id.* at A.262. “Pending” and “canceled” are not ballot statuses “referenced anywhere in the Election Code” and are not “legislatively-approved, or actual, ballot status[es].” Trial Court Op., App. Ex. B at A.56-A.57.

Nonetheless, the March Instruction laid out “PEND” and “CANC” logging codes for various potential defects, including “INCORRECT DATE,” “NO DATE,” “NO SIGNATURE,” or “NO SECRECY ENVELOPE.” App. Ex. C at A.268; A.272-A.277. The March Instruction directed county boards to use the “PEND” logging codes when a county board determines that a mail ballot may have a defect that the county board permits the voter to cure. *See id.* at

² The SURE Release Notes referred to as the “March Instruction” were introduced at the May 7, 2024 Hearing and are attached as an exhibit to the Hearing Transcript (App. Ex. C).

A.272-A.277. It directed county boards to use “CANC” logging codes when a county board makes a disposition that a mail ballot may have a defect that the county board does not permit the voter to cure. *See id.*

As laid out in the March Instruction, SURE sends an automated email to the voter when the county board logs the voter’s mail-ballot package as PEND or CANC. *Id.* The Department prescribes the content of the automated email for each code, and county boards cannot change that content. *See id.*; Trial Court Op., App. Ex. B at A.56 (language of automated emails “is not under the control of the Board”). The automated emails purported to advise voters of various options for addressing the suspected defect. *See* March Instruction, App. Ex. C at A.272-A.277. Every version of the automated email told voters that if they were unable to cure the defect through another method, “you can go to your polling place on election day and cast a provisional ballot.” *Id.*

Thus, during the 2024 Primary Election, the Department told voters whose mail-ballot packages were logged as “PEND” (and whose county boards permitted them to cure the suspected defect) and voters whose packages were logged as “CANC” (and whose county boards did not permit them to cure the suspected defect) that they had a right to cast a provisional ballot. *See id.* In other words, the Department notified *all* voters whose mail-ballot packages were timely received but logged as potentially defective of a purported right to cast a provisional ballot—*regardless* of whether the voter’s

county board permits curing at all or permits curing by provisional ballot. *See id.*³

SURE also provides another logging code, “Record – Ballot Returned.” *See id.* at A.276. The March Instruction contemplates use of this code for any mail ballot that the county board does not believe is defective. *See id.* However, a county board that uses the “Record – Ballot Returned” code for any ballot, including one it believes to be defective, has complied with the Election Code. *See* 25 Pa. C.S. § 1222(c)(20)-(21); Trial Court Op., App. Ex. B at A.56-A.57. The automated email triggered by the “Record – Ballot Returned” code makes no representation that the voter has a right to cure or to cast a provisional ballot. *See* March Instruction, App. Ex. C at A.276. To the contrary, that email expressly states “you are no longer permitted to vote at your polling place location.” *Id.*⁴

³ The Department also issued its Pennsylvania Provisional Voting Guidance 2.1 on March 11, 2024. The Guidance states that a voter is entitled to cast a provisional ballot if the 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.” Pennsylvania Provisional Voting Guidance 2.1 at 1 (Mar. 11, 2024). The Guidance was posted, and remains available, on the Department’s website. *See* <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-ProvisionalBallots-Guidance-2.1.pdf> (last visited Sept. 22, 2024).

⁴ In August 2024, months after the 2024 Primary Election at issue in this case, the Department issued another instruction to county boards (“August Instruction”). Under the August Instruction, the Department’s automated emails continue to advise all voters in the Commonwealth whose mail-ballot

**C. The Butler County Board Of Elections’
Curing Policy And Mail-Ballot Practices
For The 2024 Primary Election**

Prior to the 2024 Primary Election, the Butler County Board of Elections (“the Board”) adopted a policy (“the Policy”) that permitted voters who cast mail ballots to cure signature or dating defects on the declaration. *See* Policy, App. Ex. C at A.263-A.265; Trial Court Op., App. Ex. B at A.39-A.40. The Policy, however, did not permit voters to cure a secrecy-envelope defect, such as omitting, or making identifying marks on, the secrecy envelope. *See* Policy, App. Ex. C at A.263-A.265; Trial Court Op., App. Ex. B at A.39-A.40; *see also* 25 P.S. § 3146.8(g)(4)(ii) (requiring boards to discard any mail ballot in a secrecy envelope displaying identifying marks).

The Board conducts a preliminary scan of a mail-ballot package received from a voter by placing it into an Agilis Falcon machine. *See* Trial Court Op., App. Ex. B at A.43. The Agilis Falcon sorts the package by precinct and evaluates the package’s dimensions, including length, height, and weight, in an effort to ensure that it is, in fact, a completed Butler County mail-ballot package. Hrg. Tr., App. Ex. C at A.103-A.104. Any package that the Agilis Falcon does not flag for potential irregularities is automatically logged as “Record – Ballot Returned” in SURE. *Id.* at A.115.

packages are logged under a PEND or CANC code that they have a right to cure by casting a provisional ballot, regardless of whether the voter’s county board offers curing. *See* Petitioners’ Application For The Exercise Of King’s Bench Power 15, No. 108 MM 2024 (Pa. filed Sept. 18, 2024).

Packages that the Agilis Falcon flags for potential irregularities—such as being too thick, not thick enough, or from a different county—are reviewed individually by the Board. *Id.* at A.104; Trial Court Op., App. Ex. B at A.43. The Board then manually logs the package as “Record – Ballot Returned,” “PEND,” or “CANC” in accordance with the March Instruction. Hrg. Tr., App. Ex. C at A.117-A.118; Trial Court Op., App. Ex. B at A.43. The logging of mail-ballot packages in SURE triggers the Department’s automated email to the voter for the code the Board selects. *See* Trial Court Op., App. Ex. B at A.43.

After each mail-ballot package is logged in SURE, Board employees lock them in a cabinet, where they remain secure for the pre-canvass or canvass. Hrg. Tr., App. Ex. C at A.91; 25 P.S. § 3146.8(a). In Butler County, a Computation Board is responsible for conducting the official canvass of election results. *See* Trial Court Op., App. Ex. B at A.42. The Computation Board is made up of three members, each of whom is appointed by a member of the Board (which in turn is made up of the three Butler County Commissioners). *See id.* The Computation Board is currently made up of two Democratic members and one Republican member. *Id.*; Hrg. Tr., App. Ex. C at A.89.

The Computation Board’s responsibilities include computing vote totals and adjudicating the validity of write-in votes, provisional ballots, and mail ballots. Trial Court Op., App. Ex. B at A.42; Hrg. Tr., App. Ex. C at A.89. The Computation Board therefore judges whether, after mail-ballot packages opened, any mail ballots are defective and may not be counted. Hrg. Tr., App. Ex. C at A.88; A.120.

On occasion, a mail-ballot package preliminarily flagged and logged as potentially defective is discovered to have no defect when the outer envelope is opened. *Id.* at A.120. The Computation Board counts all such mail ballots. Thus, for example, if a package flagged as potentially lacking a secrecy envelope is later opened and in fact contains a secrecy envelope, the ballot would be counted. *Id.* at A.137-A.138.

The Computation Board, however, does not count a timely received mail ballot with a secrecy-envelope defect. *Id.* at A.145. It also cannot count any ballot when the voter's timely received mail-ballot package does not actually contain a ballot. *Id.* at A.133. Like many county boards across the Commonwealth, the Board permits any voter to cast a provisional ballot upon request, as the Board does not want to deny any voter that opportunity. *Id.* at A.112. But, consistent with the Policy, the Computation Board does not count any provisional ballot cast by a voter whose mail-ballot package was timely received but had a secrecy-envelope defect or omitted the returned ballot. *Id.* at A.133.

The Computation Board does count a regular in-person ballot or a provisional ballot cast by a voter who requested a mail ballot in two scenarios. Each scenario comports with the Election Code.

First, as prescribed by the Election Code, the Computation Board counts a regular in-person ballot cast by a voter who returns their uncompleted mail-ballot package to their polling location and surrenders it to the judge of elections in exchange for a regular in-person ballot. 25 P.S. § 3150.16(b)(3); Hrg. Tr., App. Ex. C at A.110-A.111; Trial Court Op., App. Ex. B at A.45.

Second, the Computation Board counts a provisional ballot cast by a voter who does not bring their uncompleted ballot mail-ballot package to the polling place and whose package was not timely received by the Board. *See* 25 P.S. § 3150.16(b)(2); Trial Court Op., App. Ex. B at A.45. That could occur, for example, when the voter misplaces the mail-ballot package. Prior to casting a provisional ballot, such a voter must attest to not having cast another ballot in the election. *See* 25 P.S. § 3050(a.4)(2); Trial Court Op., App. Ex. B at A.45.

D. The Department's Automated Emails And Petitioners Genser And Matis

As noted, the Department's automated emails are sent to voters when Board employees log the received mail-ballot package in SURE. *See* March Instruction, App. Ex. C. at A.272-A.277. But at that time, the Board has not conclusively determined that the package has a secrecy-envelope defect. That conclusive determination can be made only when the outer envelope is opened, Trial Court Op., App. Ex. B at A.44-45; Hrg. Tr., App. Ex. C at A.137-A.138, but the Election Code prohibits opening outer envelopes until the pre-canvass commences "no earlier than seven o'clock A.M. on election day," 25 P.S. § 3146.8(g)(1.1). Thus, as the majority below acknowledged, the code Board employees enter in SURE is "nothing more than a guess," as the package may be discovered to have a secrecy envelope when it is opened. Commonwealth Court Majority Opinion ("Maj. Op."), App. Ex. A at A.8; Hrg. Tr., App. Ex. C at A.120.

As sent to Butler County voters, the Department's automated email for "CANC – NO SECRECY

ENVELOPE” was not only premature but also inaccurate. The Board’s Policy did not permit curing of secrecy-envelope defects at all, let alone by casting a provisional ballot. Trial Court Op., Ex. B at A.56-A.57. Thus, even the Commonwealth Court majority acknowledged that the Department’s automated email for “CANC – NO SECRECY ENVELOPE” provided Butler County voters “with false directions.” Maj. Op., App. Ex. A at A.9. As the Court of Common Pleas noted, that automated email “caus[ed] confusion for electors.” Trial Court Op., App. Ex. B at A.57 n.9.

That is exactly what happened to Petitioners Faith Genser and Frank Matis. Genser and Matis acknowledge that their 2024 Primary Election mail-ballot packages were timely received but that they did not place their ballots in secrecy envelopes. *See id.* at A.39. Because it does not permit curing of secrecy-envelope defects, Board employees recorded their packages as “CANC – NO SECRECY ENVELOPE” in accordance with the Department’s March Instruction. *See id.* Petitioners each received the Department’s automated email advising them of a purported right to cast a provisional ballot on Election Day. *See id.* Each traveled to their polling place and cast a provisional ballot. *See id.*

Petitioners’ mail-ballot packages were not opened until Friday, April 26, 2024, three days after the 2024 Primary Election Day, when the Computation Board met to conduct the canvass. Hrg. Tr., App. Ex. C at A.92. The Computation Board confirmed that Petitioners’ mail ballots were not placed in secrecy envelopes. *Id.* at A.91, A.119. In accordance with the Policy, the Computation Board did not count

Petitioners' mail ballots or provisional ballots. *Id.* at A.94-A.97.

E. Procedural Background

On April 29, 2024, Petitioners filed their Petition for Review in the Nature of Statutory Appeal in the Court of Common Pleas of Butler County, appealing the Board's decision not to count their provisional ballots in the 2024 Primary Election. The Court of Common Pleas later granted the Republican National Committee and Republican Party of Pennsylvania intervention on the side of Respondent, and the Pennsylvania Democratic Party intervention on the side of Petitioners. *See* Trial Court Op., App. Ex. B at A.40.

The Court of Common Pleas convened a hearing, after which all parties submitted post-hearing briefs. *Id.* at A.40-A.41. The Court of Common Pleas issued a Memorandum Opinion and Order on August 16, 2024, rejecting Petitioners' claims that the Board's decisions not to count their provisional ballots violated the Election Code and the Free and Equal Elections Clause. *See id.* at A.48-A.65. It therefore dismissed the Petition. *See id.* at A.67.

Respondents appealed to the Commonwealth Court. A majority of a Commonwealth Court panel reversed over a dissent from Judge Dumas. The majority thought various Election Code provisions governing casting and counting of provisional ballots are "ambiguous." Maj. Op., App. Ex. A at A.24. Invoking that purported ambiguity, the majority departed from the Commonwealth Court's prior (unpublished) decision holding that the Election Code unambiguously forecloses a county board from

counting a provisional ballot submitted by a voter whose mail-ballot package was timely received but defective. *See id.* at A.35 (discussing *In re Allegheny County Provisional Ballots In The 2020 General Election*, No. 1161 CD 2020, 2020 WL 6867946 (Pa. Commw. Ct. Nov. 20, 2020)). To the contrary, the majority concluded that “when properly construed, [the Election Code] requires the [Board] to count the provisional ballots” submitted by voters, like Petitioners, whose mail ballots were timely received but lack a secrecy envelope. *Id.* at A.34. It therefore ordered the Board “to count [Petitioners’] provisional ballots.” *Id.* at A.35.

This Court granted Appellants’ Petition for Allowance of Appeal on the two questions presented on September 20, 2024. *See Order*, Nos. 240 WAL 2024 & 241 WAL 2024 (Sept. 20, 2024) (per curiam).

SUMMARY OF THE ARGUMENT

On its face, the Commonwealth Court majority’s mandate that the Board is “*require[d]*” to count provisional ballots cast by voters whose mail ballots the Board timely received, Maj. Op., App. Ex. A at A.34, is irreconcilable with the Election Code’s plain text: “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) (emphasis added). The majority arrived at its mandate only by departing from the Court’s controlling decision in *Pennsylvania Democratic Party*, usurping the General Assembly’s authority to set the rules for mail voting, disregarding the Election Code’s plain text, and pointing to purported statutory ambiguities that do not exist. And

those were not the majority's only legal errors: Its mandate runs afoul of the Election Code's specific requirements for handling mail ballots and violates both the Pennsylvania and the U.S. Constitutions. The Court should reverse.

I. As even the majority was forced to acknowledge, just four years ago, this Court considered and rejected the claim that courts can mandate a "ballot-curing procedure" for defective mail ballots. *Maj. Op.*, App. Ex. A at A.32; *see Pa. Democratic Party*, 238 A.3d at 374. The Court explained that it belongs to the General Assembly—not the Judiciary—both to prescribe the requirements "for casting and counting a vote by mail" and to decide whether to require "reject[ion]" of ballots due to, or provide "notice and an opportunity to cure," even "minor errors made in contravention of those requirements." *Pa. Democratic Party*, 238 A.3d at 374. The question whether to mandate curing thus is "best left to the legislative branch of Pennsylvania's government." *Id.*

To date, the General Assembly has not enacted a curing procedure. The majority therefore departed from *Pennsylvania Democratic Party* and usurped the General Assembly's authority when it mandated that the Board permit voters to cure secrecy-envelope defects by casting a provisional ballot and having it counted. *See id.*

II. Regardless of whether the majority's mandate constitutes "curing," it contravenes the Election Code's plain statutory text governing provisional voting. The Election Code unambiguously declares that "[a] provisional ballot shall not be counted if the elector's absentee ballot or mail-in ballot is timely received by

a county board of elections.” 25 P.S. § 3050(a.4)(5)(ii)(F). The Election Code also limits provisional voting to specific circumstances, but nowhere authorizes provisional voting by a voter whose mail ballot is timely received. The majority’s strained attempt to justify a mandate *requiring* the Board to *count* provisional ballots the Election Code directs shall *not* be counted requires inserting terms the General Assembly did not enact and rests upon purported ambiguities that do not exist. And in imposing its mandate, the majority improperly exempted Butler County voters from the mandatory secrecy-envelope requirement the General Assembly enacted to preserve the integrity of Pennsylvania’s elections. *See Pa. Democratic Party*, 238 A.3d at 380.

III. The majority’s mandate cannot coexist with the Election Code’s and the Pennsylvania Constitution’s specific requirements for handling, “confidentiality,” and “counting of” mail ballots and addressing secrecy-envelope defects. *Pa. Democratic Party*, 238 A.3d at 374.

A. The Election Code’s detailed provisions prohibit county boards from inspecting and opening mail-ballot packages until Election Day and thereafter and, thus, from confirming a secrecy-envelope defect prior to Election Day. These provisions also prohibit county boards from revealing the results of such an inspection and opening until after the polls close. Taken together, these provisions foreclose county boards from providing notice and an opportunity to cast a provisional ballot to a voter whose mail ballot is timely received and has a secrecy-envelope defect. And providing such notice and opportunity after county boards open mail-ballot packages would violate the

Pennsylvania Constitution because “secrecy in voting” would not “be preserved,” Pa. Const. art. VII, § 4, as election officials would be able to discern “who the [voter] is, with what party he or she affiliates, or for whom the [voter] voted,” *Pa. Democratic Party*, 238 A.3d at 378.

By requiring that the Board provide voters whose mail ballots lack a secrecy envelope be given an opportunity to cast a provisional ballot, the majority’s mandate is irreconcilable with these statutory and constitutional requirements.

B. By ordering a single Board to count provisional ballots in circumstances in which other county boards decline to count such ballots, the majority’s mandate injects disuniformity into ballot-validity determinations across the Commonwealth in violation of the Pennsylvania Constitution, Pennsylvania law, and the U.S. Constitution. And by impermissibly distorting the Election Code and this Court’s decision in *Pennsylvania Democratic Party*, the majority’s mandate violates the Electors and Elections Clauses of the U.S. Constitution.

For any and all of these reasons, the Court should reverse.

ARGUMENT

The majority’s mandate that the Board must count Petitioners’ provisional ballots brushes aside this Court’s controlling precedent, contravenes the Election Code’s plain text, relies upon purported statutory ambiguities that do not exist, and violates the Pennsylvania and U.S. Constitutions. The Court should uphold its own precedent and the General Assembly’s plain statutory directives, protect

Pennsylvania's voters from constitutional violations during the Commonwealth's elections, and reverse.

I. The Majority's Mandate Contravenes This Court's Controlling Precedent And Usurps The General Assembly's Authority.

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.”). Indeed, “[w]hile the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.” *Pa. Democratic Party*, 238 A.3d at 374.

Thus, as this Court explained just four years ago in *Pennsylvania Democratic Party*, it belongs to the General Assembly to decide the rules “for casting and counting a vote by mail.” *Id.* It also belongs to the General Assembly to prescribe the *consequences* for noncompliance with any of those rules. *See id.* Accordingly, the General Assembly may mandate that a mail ballot be rejected “due to” even “minor errors made in contravention of those requirements.” *Id.* The General Assembly has mandated that mail ballots with errors in compliance with the signature, dating, *see Ball*, 289 A.3d 1, and secrecy-envelope requirements, *see Pa. Democratic Party*, 238 A.3d at 380, are invalid and cannot be counted.

Thus, as this Court further explained in *Pennsylvania Democratic Party*, courts may not

mandate curing of such mail-ballot defects when the General Assembly has not done so. *See id.* at 374. The petitioners in that case sought “to require [county boards] to contact [qualified] voters whose [mail] ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail, and provide them an opportunity to cure those defects.” *Id.* at 372. The petitioners argued that the Free and Equal Elections Clause confers a right to cure on mail voters. *See id.*

The Secretary of the Commonwealth opposed the petitioners’ claim. *See id.* at 373. The Secretary noted this Court’s prior holdings that “the power to regulate elections is legislative,” not judicial, and therefore the Free and Equal Elections Clause “cannot create statutory language that the General Assembly chooses not to provide.” *Id.* The Secretary also explained that “as long as the voter follows the requisite voting procedures, he or she will have an equally effective power to select the representatives of his or her choice,” which is all the Clause guarantees. *Id.*

This Court rejected the petitioners’ claim. *See id.* at 373-74. The Court pointed out that there is “no constitutional or statutory basis” to require county boards to permit curing of mail-ballot defects. *Id.* Moreover, as this Court further explained, the decision whether to provide a “notice and cure’ procedure” for mail-ballot defects “is one best suited to the Legislature.” *Id.* at 374. This makes perfect sense: That decision 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.* “[A]ll of”

those questions “are best left to the legislative branch of Pennsylvania’s government.” *Id.*

Thus, only the General Assembly, and not Pennsylvania courts, may mandate curing for mail-ballot defects. *See id.* To date, the General Assembly has not done so. *See id.* In fact, since *Pennsylvania Democratic Party*, the General Assembly has extensively debated whether to create a curing procedure in the Election Code. *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 2021-2022.⁵ That the General Assembly believes legislation is necessary to authorize curing only underscores that courts may not mandate curing and that the decision whether, and under what “precise contours” to do so, “are best left to the legislative branch.” *Pa. Democratic Party*, 238 A.3d at 374.

The General Assembly’s decision not to mandate (or even authorize) curing is binding on the Pennsylvania courts and dispositive in this case. *See id.* There is no dispute that Petitioners’ mail ballots were invalid because they were not sealed in secrecy envelopes. *See id.* at 374-80; *see also* Trial Court Op., App. Ex. B at A-39. This secrecy-envelope requirement is “mandatory” such that a failure to comply “renders the ballot invalid” and ineligible to be counted. *Pa. Democratic Party*, 238 A.3d at 380. There is also “no constitutional or statutory basis” to permit Petitioners

⁵ https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?year=2021&sind=0&body=H&type=B&bn=1300

to cure that defect. *Id.* at 374. Therefore, the majority’s mandate that the Board permit Petitioners to cure their mail-ballot defects by casting a provisional ballot contravened *Pennsylvania Democratic Party* and improperly usurped the General Assembly’s authority *both* to impose the secrecy-envelope requirement and to decide whether to mandate curing. *See id.*

The majority acknowledged that *Pennsylvania Democratic Party* “considered and rejected” imposing by judicial fiat “a mandatory ballot-curing procedure” on county boards. Maj. Op., App. Ex. A at A.33. It nonetheless gave *Pennsylvania Democratic Party* short shrift and offered no persuasive explanation for departing from it. The majority noted that *Pennsylvania Democratic Party* “only tangentially discussed provisional voting,” *id.*, and baldly asserted that counting provisional ballots submitted by voters whose mail ballots were timely received does not “amount to ... curing” the mail ballot, *id.* at A.3; *see id.* at A.34 (majority claiming its holding “does not depend on any ballot curing process ... The provisional ballot is a separate ballot, not a cured initial ballot.”).

This *ipse dixit* is mere wordplay—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 A.34. And counting a provisional ballot in these circumstances *remedies*—and therefore *cures*—the voter’s failure to comply with the General Assembly’s mandatory secrecy-envelope “procedures for casting and counting a vote by mail.” *Pa. Democratic Party*, 238 A.3d at 374; *see also id.* at 380. It permits a voter to have his ballot counted where the General Assembly directed that even the voter’s

“minor errors” require “reject[ing]” the voter’s first (and only) ballot. *Id.* at 374, 380. The decision whether to permit voters to remedy a secrecy-envelope violation through provisional voting or some other “opportunity to cure” is “best left to the legislative branch.” *Id.* It is not one to be made by the courts or the majority below. *See id.* The Court should reverse.

II. The Election Code Prohibits The Majority’s Mandated Use Of Provisional Voting.

Even if the majority were correct that its mandate on the Board does not effect “curing,” Maj. Op., App. Ex. A at A.34, the mandate would still be unlawful and warrant reversal. The mandate “*requires*” the Board to count provisional ballots cast by voters whose mail-ballot packages were timely received, *id.* (emphasis added), in direct contradiction of the Election Code’s express directive that such ballots “shall *not* be counted,” 25 P.S. § 3050(a.4)(5)(ii)(F) (emphasis added). The majority’s effort to avoid the plain statutory text by pointing to purported ambiguities fails because no such ambiguities exist.

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

Neither this Court nor the majority 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); *see also Commonwealth v. Coleman*,

285 A.3d 599, 605 (Pa. 2022) (“Generally, the best expression of the General Assembly’s intent ‘is found in the statute’s plain language.’”).

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) (emphases added). 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 uses the terms, much less 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 the majority flip-flopped, the Election Code is “unambiguous” on this point, and courts are “not at liberty to disregard the clear statutory mandate that the provisional ballots to which this language applies must not be counted,” even if the voter’s mail ballot is defective and also cannot be counted. *In re Allegheny Cnty. Provisional Ballots*, 2020 WL 6867946, at *4-5; *see also Pa. Democratic Party*, 238 A.3d at 374 (courts bound by the General Assembly’s rules for “casting *and counting* a vote by mail”) (emphasis added).

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); *see also Frazier v. Workers’ Comp. Appeal Bd.*, 52 A.3d 241, 245 (Pa. 2012) (courts “should not insert words into [a statute] that are plainly not there”).

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.”).

The General Assembly’s decision to authorize provisional voting for a class of would-be mail voters (those who did not return their mail 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, *In re Nov. 3, 2020 Gen. Election*, 240 A.3d at 611.

Second, 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 they cast another ballot* in the election that is defective, not because they *did not* cast another ballot. *See id.*

Third, 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 to authorize provisional voting, when ballots are returned with “minor errors made in contravention of those requirements.” *Pa. Democratic Party*, 238 A.3d at 374. Thus, the Court has held that mail ballots are ineligible to be counted when they 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 provisional voting by voters who commit either type of error. Indeed, the signature, dating, and secrecy-envelope requirements would not be mandatory as the General Assembly wrote and intended them if courts were free to mandate counting of provisional ballots cast by voters whose noncompliant mail ballots are “timely received by the county board.” 25 P.S. § 3050(a.4)(5)(ii)(F). The fact that voters who fail to comply with the General Assembly’s mandatory requirements for mail ballots do not get a do-over is what makes those requirements mandatory.

B. The Majority’s Flawed Reading Contravenes The Plain Text And Rests On Nonexistent Ambiguities.

The majority attempted to justify its mandate by proffering an “alternative” reading of the Election Code. Maj. Op., App. Ex. A at A.27. That reading is not “plausible” and rests on purported statutory ambiguities that do not exist. *Id.*

Most fundamentally, the majority’s reading of Section 3050(a.4)(5)(ii)(F) improperly “suppl[ies] omissions” in the text, *In re Nov. 3, 2020 Gen. Election*, 240 A.3d at 611, and “insert[s] words ... that are plainly not there,” *Frazier*, 52 A.3d at 245. Indeed, the majority’s reading requires grafting the bolded terms preferred by the majority onto the language the General Assembly enacted:

“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 and is valid and will be counted by the board, such that the voter has already voted.”

Compare 25 P.S. § 3050(a.4)(5)(ii)(F), *with* Maj. Op., App. Ex. A at A.27.

In particular, the majority thought it “plausible” to read this provision to say that a voter’s mail ballot is “timely received ... only if that ballot is and remains *valid* and *will be counted*, such that the elector has already *voted*.” Maj. Op., App. Ex. A at A.27 (emphasis original). But there is nothing plausible about this reading: The General Assembly did not use the majority’s preferred verbiage in Section 3050(a.4)(5)(ii)(F). *See* 25 P.S. § 3050(a.4)(5)(ii)(F). Instead, it used the unambiguous term “timely received,” and never tied whether a ballot is “timely received” to whether it is “valid,” will be “counted,” or was successfully “voted.” *See id.* The majority, therefore, was wrong to read these terms into Section 3050(a.4)(5)(ii)(F). *See In re Nov. 3, 2020 Gen. Election*, 240 A.3d at 611; *Frazier*, 52 A.3d at 245. That is particularly true because the General Assembly is obviously familiar with these terms—including “counted,” which it uses in the first clause of Section 3050(a.4)(5)(ii)(F)—so its omission of them from the second clause must have been “intentional[.]” *In re Nov. 3, 2020 Gen. Election*, 240 A.3d at 611.

Moreover, as the Court of Common Pleas explained, the conflation of whether a mail ballot was “timely received” with whether it is “valid” and “will be counted” leads to an absurd result: A large volume of mail ballots would be *invalid* and *not* eligible to be counted. *See* Trial Court Op., App. Ex. B at A.53-A.55.

After all, the Election Code declares that mail ballots are timely received only if they arrive at the county board of elections by 8 p.m. on Election Day, *see* 25 P.S. §§ 3146.6(c), 3150.16(c), but county boards do not determine whether (hundreds of thousands of) mail ballots are “valid” and “will be counted” until the canvass *after* Election Day, *id.* § 3146.8(g)(ii)(2). Thus, if—as the majority reasoned—a mail ballot is “timely received” only when the county board determines that it is “valid,” then any mail ballot whose validity is determined during the canvass can *never* be timely received and will *never* be counted. *See* Trial Court Op., App. Ex. B at A.53-A.55. Merely to point out this absurdity is to confirm that the majority’s construction is erroneous.

Unsurprisingly, the majority’s various attempts to buttress its atextual reading of Section 3050(a.4)(5)(ii)(F) upon alleged “ambiguities” in the Election Code, *see* Maj. Op., App. Ex. A at A.24-A.29, fail. *First*, 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); Maj. Op., App. Ex. A at A.25-A.28. 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); *see also* Trial Court Op., App. Ex. B at A.52-A.53.

Thus, the Election Code unambiguously forecloses a county board from counting a provisional ballot submitted by a voter whose mail ballot it timely received, *regardless* of whether the voter previously “cast” a ballot in the election. *See* 25 P.S. § 3050(a.4)(5)(i)-(ii). The majority’s efforts to find ambiguity in the term “cast,” *see* Maj. Op., App. Ex. A at A.25-A.28, are therefore beside the point.

And even if they were not, the various definitions of “cast” the majority reviewed do not tie whether a ballot was cast to whether it is valid and will be counted. Rather, those definitions focus on actions the voter takes—and at least one makes clear that a voter’s casting of a ballot alone does not make it valid or guarantee that it will be counted. *See id.* at A.26 (“A voter can *cast* a ballot merely by filling it out without ever submitting it.”) (emphasis original). 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.

Second, the majority posited that the Election Code is ambiguous because it uses the term “voted” in two pairs of sections related to provisional voting. Maj. Op., App. Ex. A at A.22-27. The first pair are the “having voted” sections noted above, *see supra* at 4, 26-27, which direct 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,” Maj. Op., App. Ex. A at A.26-A.27 (discussing 25 P.S. §§ 3146.6(b)(2), 3150.16(b)(2)) (emphasis original). The second pair are the Election Code’s description of the mail-ballot instructions, which contemplate telling voters they may cast a provisional ballot if their “voted ballot is not timely received.” *Id.* at A.22 (citing 25 P.S. §§ 3146.3(e), 3150.13(e)).

Here as well, the majority erroneously conflates whether a voter has “voted” with whether their mail ballot is “valid and will be counted.” *Id.* at A.27. In the first place, the sections cited by the majority do not use the terms “valid” and “will be counted,” much less connect whether a mail ballot was “voted” to either concept. *See* 25 P.S. §§ 3146.3(e), 3146.6(b)(2), 3150.13(e), 3150.16(b)(2). And nothing in fact or law draws such a connection either. To the contrary, as a matter of fact, 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. Trial Court Op., App. Ex. B at A.53 n.4. Moreover, as a matter of law, a voter who casts a defective ballot *has* “voted,” but they have failed to make their ballot effective and eligible to be counted because they failed to follow the rules to do so. *See Pa. State Conf. of NAACP Branches*, 97 F.4th at 133-35 (citing *Ritter v. Migliori*, 142 S. Ct. 1824 (2022) (Alito, J., dissent)).

Furthermore, the majority not only disregards what these pairs of sections do *not* say; it also ignores what they *do* say. What they do say confirms they operate *subject*, not as *exceptions*, to the Election Code’s rules for casting and counting provisional ballots. For example, the “having voted” sections granting a right to vote provisionally *expressly* subject

that right to the usual provisional-voting rules in “section [3050].” 25 P.S. §§ 3146.6(b)(2) & n.2, 3150.16(b)(2) & n.2. Accordingly, that right is governed by the rule in Section 3050 that “[a] provisional ballot shall not be counted if the elector’s absentee ballot or mail-in ballot is timely received.” *Id.* § 3050(a.4)(5)(ii)(F).

For their part, the “voted ballot” sections also do not purport to exempt voters from the usual provisional-voting casting and counting rules. *See id.* §§ 3146.3(e), 3150.13(e). Instead, in context, the reference to “voted ballot[s]” not “timely received” being replaced with provisional ballots distinguishes that scenario from one where a voter surrenders an *unvoted* mail ballot in exchange for a *regular* ballot on Election Day. *See id.* §§ 3146.3(e), 3150.13(e). Thus, these sections do not carve out an exception to the rule that provisional ballots cast by voters whose mail ballots were timely received “shall not be counted.” *Id.* § 3050(a.4)(5)(ii)(F).

In addition, both the “having voted” and “voted ballot” sections make clear that election officials must make the “having voted” and “voted ballot” determinations prior to Election Day. Indeed, those sections operate to identify voters who are not “eligible to vote at a polling place on election day.” 25 P.S. §§ 3146.6(b)(1), 3150.16(b)(1) (“having voted” sections); *see also id.* §§ 3146.3(e), 3150.13(e) (“voted ballot” rule used to determine who may vote at the “polling place” on “election day”). But the majority’s atextual conflating of “voted” with “valid and will be counted” would again lead to the absurd result that election officials could not make either determination until Election Day or later, when they conduct the pre-

canvass and canvass and decide whether mail ballots are valid and will be counted. *See* Trial Court Op., App. Ex. B at A.53-A.55. Thus, the majority’s construction would leave the “having voted” and “voted ballot” sections with no “effect” or meaning. 1 Pa. C.S. § 1921(a) (“Every statute shall be construed ... to give effect to all its provisions.”).

In particular, under the majority’s construction, *every* voter who requested a mail ballot would be eligible to cast a provisional ballot because *none* could be shown in the district register as having “already voted,” 25 P.S. §§ 3146.6(b)(2), 3150.16(b)(2), or could yet be deemed to have submitted a “voted ballot,” *id.* §§ 3146.3(e), 3150.13(e), on Election Day. The majority’s construction, therefore, would dramatically expand provisional voting beyond the limited circumstances the General Assembly has authorized and turn into a dead letter the directive that “[a] provisional ballot shall not be counted if the elector’s absentee ballot or mail-in ballot is timely received.” *Id.* § 3050(a.4)(5)(ii)(F).

The only way “to give effect” to that directive, the “having voted” sections, and the “voted ballot” sections is to construe “having voted” and “voted ballot” as satisfied when the voter’s mail ballot is timely received. 1 Pa. C.S. § 1921(a). This approach, moreover, harmonizes those sections with the Election Code’s provisions authorizing “Voting by absentee electors” and “Voting by mail-in electors,” which make clear that a mail voter has completed voting if their mail-ballot package is timely “received in the office of the county board of elections no later than 8 o’clock P.M. on the day of the primary or election.” 25 P.S.

§§ 3146.6(c) (prescribing timely receipt as final step in absentee voting); 3150.16(c) (same for mail voting).

Third, the majority thought its construction necessary to avoid the result that a mail ballot is “timely received” when the voter’s mail-ballot package arrived by the deadline but is “found to be empty” and does not contain a ballot. Maj. Op., App. Ex. A at A.27. That hypothetical is a distraction. Whether receipt of an empty mail-ballot package (whose emptiness could not be conclusively determined until it is opened on Election Day or thereafter) is tantamount to receipt of a mail ballot is not presented in this case. After all, Petitioners *did* include their mail ballots in the returned mail-ballot package; what they omitted was the secrecy envelope. Trial Court Op., App. Ex. B at A.39. Thus, Petitioners’ mail ballots were “timely received,” and their provisional ballots “shall not be counted.” 25 P.S. § 3050(a.4)(5)(ii)(F). The majority’s mandate that the Board must count Petitioners’ provisional ballots turns the Election Code on its head and should be reversed.⁶

⁶ The Secretary has argued in another case that federal law requires allowing voters who have submitted defective mail ballots to vote provisionally. *See* Secretary of the Commonwealth’s Response to the Application for the Exercise of the King’s Bench Power at 25-26, 108 MM 2024 (Sept. 20, 2024) (citing 52 U.S.C. § 21082(a)). That is wrong. An individual has no federal right to vote provisionally unless he “declares” that he is “eligible” to do so under state law, but a voter whose mail ballot has been timely received is *not* “eligible” to vote in person under Pennsylvania law. *See* 25 P.S. § 3050(a.4)(5)(ii)(F). Regardless, even if the Court believes 52 U.S.C. § 21082(a) creates a blanket right to *cast* a provisional ballot, it obviously does not require election officials to *count* such ballots. In fact, 52 U.S.C. § 21082(a)(4) confirms such ballots can only be counted if they are

III. The Majority's Mandate Is Irreconcilable With Numerous Provisions Of The Election Code And Violates The Pennsylvania and U.S. Constitutions.

The majority's mandate is also irreconcilable with the Election Code's and the Pennsylvania Constitution's strict requirements for handling, "confidentiality," and "counting" of mail ballots and addressing secrecy-envelope defects. *Pa. Democratic Party*, 238 A.3d at 374; *see id.* at 380. The majority did not even mention these requirements, let alone explain how its mandate can possibly be reconciled with them. And the majority's mandate that a single Board must count provisional ballots that other county boards do not count injects unconstitutional disuniformity into ballot-validity determinations across the Commonwealth in violation of the Pennsylvania and U.S. Constitution. For these reasons as well, the Court should reverse.

A. The Majority's Mandate Is Irreconcilable With Numerous Provisions Of The

valid "under State law." *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 571 (6th Cir. 2004) (explaining such ballots are only counted if "the person was indeed entitled to vote at that time and place" (cleaned up)); *id.* at 576 ("[T]he ultimate legality of the vote cast provisionally is generally a matter of state law."). Here, of course, the Election Code unambiguously prohibits counting provisional ballots where an individual's mail ballot was "timely received" by election officials. 25 P.S. § 3050(a.4)(5)(ii)(F). Federal law thus cannot save the majority's mandate.

Election Code And The Pennsylvania Constitution.

The General Assembly has not only directed that a provisional ballot cast by a voter whose mail ballot is timely received “shall not be counted,” 25 P.S. § 3050(a.4)(5)(ii)(F); it has also enacted several other provisions of the Election Code that *preclude* providing notice and an opportunity to cast a provisional ballot in that scenario.

Start with the Election Code’s restrictions on the actions county boards may take with respect to received mail-ballot packages. The Election Code mandates that “upon receipt,” county boards are not permitted to inspect or open a mail-ballot package. *Id.* § 3146.8(a). Instead, county boards may only log them in SURE (which they can do without triggering the Department’s automated emails notifying voters of a purported right to cast a provisional ballot, *see supra* at 8) and “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).

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.*

Second, “no earlier than the close of polls on the day of the election and no later than the third day following the election,” 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).

Providing voters notice of secrecy-envelope defects and an opportunity to cast provisional ballots, as the majority’s mandate contemplates, is impossible to square with these requirements. For one thing, county boards may confirm a secrecy-envelope defect only by “inspect[ing] and opening” the mail-ballot package, but they are not permitted to take either action until Election Day at the earliest. *See id.* § 2602(q.1). Indeed, as even majority recognized, secrecy-envelope defects cannot be confirmed until the mail-ballot envelope is opened, making the ballot’s status before

then “nothing more than a guess.” Maj. Op., App. Ex. A at A.8.

Moreover, 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, *id.* at A.7—is a premature and 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 a premature and 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).

Further, because county boards cannot open and inspect mail-ballot packages for, or discover, secrecy-envelope 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 an opportunity to cast a provisional ballot if defects are discovered during the pre-canvass on Election Day—and, obviously, if defects are discovered during the canvass *after* Election Day. And notifying voters whose ballots were inspected during the pre-canvass on Election Day (and who theoretically could attempt to travel to the polling place and cast a provisional ballot before the close of the polls) violates the 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).

Finally, 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 cast a provisional ballot 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.

The majority's mandate thus cannot coexist alongside these strict requirements for handling, "confidentiality" and "counting of" mail ballots and addressing secrecy-envelope defects. *Id.* at 374. The majority's mandate contemplates that the Board will "inspect" mail ballots before the pre-canvass and canvass, and disclose the "results" of such an inspection prior to the close of the polls. 25 P.S. §§ 2602(q.1), 3146.8(g)(ii)(1.1). Even then, whether a mail ballot is defective is "nothing more than a guess." *Maj. Op.*, App. Ex. A at A.8. And if the Board attempts to notify voters of secrecy-envelope defects after opening mail-ballot packages, it has violated the Pennsylvania Constitution. Pa. Const. art. VII, § 4. The majority's mandate cannot stand and should be reversed.

B. The Majority's Mandate Violates The Pennsylvania And U.S. Constitutions.

The majority's mandate also should be reversed because it violates the Pennsylvania Constitution, Pennsylvania law, and the U.S. Constitution in several ways. *First*, for the reasons explained, it usurps the General Assembly's constitutional primacy over "ballot and election laws," *Winston*, 91 A. at 522, and upends 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 courts can mandate whatever provisional-ballot rules they prefer—including rules that directly contradict the unambiguous rules the General Assembly has enacted.

Second, 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 v. Commonwealth*, 178 A.3d 737, 808 (Pa. 2018), and requires 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 v. Gore*, 531 U.S. 98, 106-07 (2000).

The majority’s mandate that a single board count provisional ballots cast by voters whose mail ballots were timely received violates these principles because it creates *disuniformity* in ballot-validity determinations and disparate treatment of Pennsylvania voters based on where in the Commonwealth they live. If allowed to stand, the mandate would require the Board not to “uniformly conduct[]” elections with the rest of the Commonwealth, 25 P.S. § 2642(g), and not to treat Butler County voters “alike” or “in the same way” as similarly situated voters whose county boards do not count such ballots (including because they do not permit curing at all or through provisional voting), *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, the majority’s mandate would require the Board to deploy a different “standard[] to determine what [i]s a legal vote” than the standard the General Assembly has mandated and other boards properly apply. *Bush*, 531 U.S. at 106-07; *see also League of Women Voters*, 178 A.3d at 808. This disparate-treatment problem actually runs even

deeper because the majority's mandate would also result in disparate treatment of similarly situated voters *within* Butler County.

In particular, the mandate would require the Board to (unlawfully) inspect returned mail-ballot packages before the pre-canvass and canvass and to provide (unlawful) notice and an opportunity to cast a provisional ballot to voters who return their mail-ballot packages well in advance of the deadline and whose packages are flagged as potentially defective. *See* 25 P.S. §§ 3146.6(c); 3150.16(c). But the Board cannot provide such notice and opportunity to voters who timely submit their mail ballots only shortly before the deadline or whose mail-ballot packages are not flagged as potentially defective. All three sets of voters have timely returned mail ballots, but only voters in the first category, and not voters in the second and third categories, have an opportunity to learn of and cure a defective ballot and have it counted. In this way as well, the majority's mandate injects *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.

It is unsurprising that the majority's mandate results in this disuniformity. Because the Election Code provides no guidance on (and in fact forecloses) the majority's preferred use of provisional voting, there is no reason to expect that the majority's mandate against the single Board is universally followed by other county boards. In fact, it is *not* followed by any county board that does not permit

curing. The only proper remedy for this disuniformity and disparate treatment of similarly situated voters is to reverse because the General Assembly has not authorized the counting of provisional ballots that the majority's mandate requires in Butler County. *See Pa. Democratic Party*, 238 A.3d at 372-74.

Finally, the majority's mandate violates 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 that [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).

The majority's mandate "impermissibly distort[s]" both the Election Code and this Court's prior decision in *Pennsylvania Democratic Party*, *see* 238 A.3d at 372-80, and, thus, violates 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.).

CONCLUSION

The Court should reverse.

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Dated: September 24, 2024

Respectfully submitted,

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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 11,075 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

THE GALLAGHER FIRM LLC

Dated: September 24, 2024

/s/ Kathleen A. Gallagher

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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.

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APPENDIX G

**IN THE SUPREME COURT OF
PENNSYLVANIA**

No. _____ 2024

**FAITH A. GENSER; FRANK P. MATIS; AND
THE PENNSYLVANIA DEMOCRATIC PARTY,**

Respondents,

v.

BUTLER COUNTY BOARD OF ELECTIONS,

Respondent,

**REPUBLICAN NATIONAL COMMITTEE; AND
REPUBLICAN PARTY OF PENNSYLVANIA,**

Petitioners.

PETITION FOR ALLOWANCE OF APPEAL

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

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Petitioners, Republican National Committee and Republican Party of Pennsylvania (collectively “Republican Petitioners”), by counsel, The Gallagher Firm and Jones Day, hereby petition this Honorable Court pursuant to Pa.R.A.P. § 1111 to allow an appeal from the September 5, 2024 Order of the Commonwealth Court reversing the Order of the Court of Common Pleas of Butler County dismissing the Petition for Review in the Nature of Statutory Appeal filed on behalf of Faith A. Genser and Frank P. Matis. As discussed herein, special and important reasons exist to allow the appeal under Pa.R.A.P. § 1114.

INTRODUCTION

With the 2024 General Election fast approaching, this case requires the Court’s review and intervention. While the Commonwealth Court’s Order facially applies to only two provisional ballots cast in Butler County in the 2024 Primary Election, its reasoning would apply much more broadly. As explained more fully below, the Commonwealth Court’s Memorandum Opinion is incorrect as a matter of law, and the sweeping application of its rationale would effectuate an unconstitutional judicial revision of the Election Code. In direct contravention of the plain text and meaning of the Election Code, the Memorandum Opinion permits absentee and mail-in voters whose ballots lack a secrecy envelope to be fixed by submitting a second ballot in the election – a provisional ballot – a remedy that is not authorized by the Election Code. This is an obvious and improper effort to circumvent this Court’s binding decision in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372-74 (Pa. 2020) (hereinafter “*Pa. Dems.*”) holding that

courts **cannot** mandate notice and cure of defective absentee and mail-in ballots, a decision that is squarely within the purview of the General Assembly.

Contrary to the Commonwealth Court's Memorandum Opinion, *Pa. Dems.* is dispositive here: the naked ballots of Genser and Mathis ("Voter Respondents") are "invalid," there is no "constitutional or statutory" right to cure those ballots, and courts lack authority to order the Butler County Board of Elections ("Respondent Board") – or any county board – to permit the ballots to be cured, regardless of method. *Id.* at 374, 380. For this reason alone, this Court should hear this case. *See id.*

Additionally, to achieve its flawed result, the Commonwealth Court incorrectly read ambiguity into the relevant provisions of the Election Code where none exists. In doing so, the Commonwealth Court ignored both the statutory structure of 25 P.S. §§ 3050.11 through 3050.17 and the clear language of Section 3050.16(a), setting forth how to vote an absentee or mail-in ballot. That statutory structure and the clear language of Section 3050.16(a) wholly undermine the claimed ambiguity on which the Commonwealth Court's decision is founded. The Court should accept this Petition to correctly evaluate, interpret, and apply the relevant sections of the Election Code before the 2024 General Election.

As discussed in the Reasons for Allowance of Appeal Section below, the Commonwealth Court's decision provides grounds for granting this Petition under, *inter alia*, Rule 1114(b)(2), (3), and/or (4).

OPINION BELOW

The unreported Memorandum Opinion of the Commonwealth Court was authored by Judge Wolf and joined by Judge Jubelirer. Judge Dumas dissented without opinion. A copy of the Memorandum Opinion and related Order are attached as Appendix Exhibit A.

The Memorandum Opinion and Order of Court of President Judge Yeager of the Court of Common Pleas of Butler County, which was reversed by the Commonwealth Court, are attached as Appendix Exhibit B.

ORDERS IN QUESTION

The text of the Commonwealth Court's Order, included as Appendix Exhibit A, states: "AND NOW this 5th 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 Mathis in the April 23, 2024 Primary Election."

QUESTIONS FOR REVIEW AND PRESERVATION BELOW

1. Whether, contrary to this Court's binding precedent in *Pa. Dems.*, the Commonwealth Court improperly usurped the authority of the General Assembly by effectively rewriting the Election Code to engage in court-mandated curing when it held that a voter is entitled to submit a provisional ballot and have that provisional ballot counted in the election tally after the voter has timely submitted a defective absentee or mail-in ballot, which is contrary to the Election Code, and in violation of the separation of

powers provisions of the Pennsylvania Constitution (Pa. Const. art. II, § 1) and the Elections and Electors Clauses of the United States Constitution (U.S. Const. art. I, § 4, cl.1, 2).

Substantively addressed and preserved in Republican Petitioners’ trial court brief at pp. 6-7 and their Commonwealth Court brief at pp. 19-20; 25-27; 31-38. Ruled on in Republican Petitioners’ favor in the Trial Court’s August 16, 2024 Memorandum Opinion, attached hereto at Appendix Exhibit B, at pp. 22-24 (agreeing that the Pennsylvania Supreme Court in *Pa. Dems.* determined that the Election Code does not mandate a cure procedure for defective absentee and mail-in ballots and that the Butler County Board did not commit an error based on 25 P.S. § 3050 (a.4)(5)(i) and (ii) (F)); rejected by the Commonwealth Court in its September 5, 2024 Memorandum Opinion, attached hereto at Appendix Exhibit A, at p. 32 (rejecting “Appellees’ argument that reaching this result [counting a provisional ballot] would effectively write a mandatory ballot-curing procedure into the Code – a proposition our Supreme Court considered and rejected in *Boockvar...*”); *see also* p. 33 (“To conclude, as the Trial Court did, that ‘any chance to . . . cast [] a provisional vote [] constitutes a ‘cure’ is both to overread *Boockvar* and to read the provisional voting sections out of the code . . . This was legal error.”).

2. Whether the unauthorized manipulation of the SURE System by the Secretary of the Commonwealth to provide a voter notice of a suspected defective absentee or mail-in ballot, along with its recent Guidance on Provisional Voting, coupled with the Commonwealth Court’s holding regarding a voter’s

purported entitlement to submit a provisional ballot, violates this Court’s holding in *Pa. Dems.* and usurps the authority of the General Assembly.

Substantively addressed and preserved in Republican Petitioners’ trial court brief at p. 4 and their Commonwealth Court brief at pp. 6; 14-21; 29; 31-38. Addressed by the trial court at p. 19 (“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.”); addressed by the Commonwealth Court at pp. 30-31 (finding that where the “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 . . . 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.”).

3. Whether the Commonwealth Court erred in holding that, despite the clear language in 25 P.S. § 3050(a.4)(5)(ii)(F),¹ the Election Code authorizes a voter who submits an absentee or mail-in ballot that

¹ (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) (emphasis added).

is timely received by the county board of elections, but suspected of lacking the required secrecy envelope, to submit a provisional ballot and to have the provisional ballot counted in the election tally if the absentee or mail-in ballot is indeed defective.

Substantively addressed and preserved in Republican Petitioners' trial court brief at p. 7 and their Commonwealth Court brief at p. 20. Ruled on in Republican Petitioners' favor by the trial court at pp. 22, 23 (“[H]ad the legislature intended the [Voter Respondents'] 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.”); rejected by the Commonwealth Court at pp. 30-31 (quoted above).

4. Whether the Commonwealth Court erred in departing from its prior opinion in *In re Allegheny County Provisional Ballots*, No. 1161 C.D. 2020, 2020 WL 6867946 (Pa. Commw. Nov. 20, 2020), finding purported ambiguities in the Election Code, including by failing to consider the totality of 25 P.S. §§ 3150.11 through 3150.17, as well as the title of 25 P.S. § 3150.16 (Voting by mail-in electors) and the express terms of subsection (a) of that Code provision that set forth what it means to vote by mail and what constitutes a mail-in ballot.

Substantively addressed and preserved in Republican Petitioners’ trial court brief at p. 4 and their Commonwealth Court brief at p. 20. Ruled on in Republican Petitioners’ favor by the trial court at pp. 11, 15-16 (providing an analysis of the statutes and finding “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)(ii)(F) is also clear . . . [Voter Respondents’] argument that in order to be ‘timely received’ a mail-in ballot must be eligible for counting is simply not persuasive.”); rejected by the Commonwealth Court at pp. 23-28 (“Having determined that the words of Having Voted, Casting, and Timely Received Clauses are ambiguous, we are now tasked with resolving such ambiguity.”).

Notably, the Commonwealth Court’s Memorandum Opinion relies extensively on the *amicus* brief filed by the Secretary which contained arguments not raised in the trial court. Given the compressed briefing schedule in the Commonwealth Court, prohibition on filing Reply Briefs, and lack of oral argument, from a preservation standpoint, Republican Petitioners had no actual opportunity to address the Secretary’s arguments that were ultimately relied on by the Commonwealth Court in a true and substantive way.

STATEMENT OF THE CASE

A. The Butler County Board of Elections’ Procedures and Curing Policy for the 2024 Primary Election.

Following this Court’s holding in *Pa. Dems.*, Respondent Board adopted a curing policy for the 2024

Primary Election (the “Policy”).² See May 7, 2024 Hearing Transcript (hereinafter, “Hrg. Tr.”), attached hereto as Appendix Exhibit C (with exhibits thereto), at 48:24-53:11. The Policy, attached to Appendix Exhibit C as Exhibit 1, permitted voters to cure defects on the “Declaration Envelope”—the outer envelope into which the Election Code directs voters to place the sealed secrecy envelope containing the completed mail ballot. *Id.*; see also 25 P.S. §§ 3146.6(a), 3150.16(a). The voter must “fill out, date, and sign” the declaration contained on the outside of the Declaration Envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). The Policy permits voters to cure “deficiencies” in filling out, dating, and signing the Declaration Envelope. The Policy, however, did **not** permit voters to cure a voter’s failure to insert their ballot inside the required secrecy envelope. Hrg. Tr. at 50:13-51:22, Appendix Exh. C, Exh. 1.

The Director of Elections for the Board, Chantell McCurdy (“Director McCurdy”), testified that her office’s role is to tally votes in conjunction with the Computation Board that meets the Friday after Election Day and, as part of the canvass, to evaluate provisional ballots, write-ins, and absentee or mail-in ballots that may have potential defects which prevent them from being counted. See Hrg. Tr. at 18:3-10. The Board is comprised of three County Commissioners, each of whom appoints an individual to serve on the Computation Board. Hrg. Tr. at 18:23-19:2. At

² Due to the expedited nature of this appeal, the Reproduced Record filed with the Commonwealth Court is not available. Accordingly, Petitioners will attach the documents referenced herein as an Appendix.

present, the Computation Board is made up of two Democratic members and one Republican member. Hrg. Tr. at 19:18-23. The Computation Board computes the totals of the election and accounts for write-ins, as well as resolves issues involving provisional ballots and any absentee or mail-in ballots that need to be evaluated in order to determine whether they can be counted. Hrg. Tr. at 19:2-7.

B. The Statewide Uniform Registry of Electors (SURE) System and Provisional Ballots.

Under the Election Code, the Department of State (“Department”) is responsible for the creation and implementation of the SURE System, which is intended to be used by county boards of elections (“County Boards”) as a single, uniform integrated computer system **for maintaining registration records**. See Hrg. Tr. at 38:10-16; see also 25 Pa. C.S.A. § 1222.³ In implementing the SURE System, the Department created different options for County Boards to input when acting on a voter’s request for a mail-in or absentee ballot. The Department provides step-by-step instructions to the County Boards regarding how to record absentee and mail-in ballots into the SURE System, including when they are requested and received. Hrg. Tr. at 45:4-12.

When a mail-in ballot is requested by a voter, the Board inserts a code in the SURE System noting that request. See Hrg. Tr. at 39:11-14. After the Board processes the mail-in ballot request and forwards a

³ Maintaining voting and registration records is, substantively, the only statutorily defined purpose of the SURE System. See 25 Pa.C.S. § 1222.

voting packet to the voter, the Board updates the ballot's status in the SURE System as being "ballot sent." Hrg. Tr. at 39: 15-17. Director McCurdy explained that the packet sent to voters includes the ballot, a secrecy envelope in which to place the ballot, a Declaration Envelope, and instructions for completing and returning the ballot. Hrg. Tr. at 38:25-39:10; 25 P.S. § 3150.14(c). The Declaration Envelope bears a barcode which is uniquely identifiable to the individual voter and their assigned voter ID number. Hrg. Tr. at 32:21-33:1. Until the Board receives a returned Declaration Envelope from the voter, the status of the ballot in the SURE System is "pending not yet returned." Hrg. Tr. at 33:2-6.

In Butler County, when a mail-in ballot is returned to the Board by a voter, the Declaration Envelope is placed into an Agilis Falcon machine which sorts the envelopes by precinct and evaluates the envelope's dimensions, including length, height, and weight to ensure that submitted envelopes are election envelopes. Hrg. Tr. 33:19-34:3. The Agilis Falcon flags envelopes with potential irregularities, including dimensions outside the range expected of a compliant election envelope from Butler County, for further evaluation by the Board. If the envelopes are not flagged as being potentially irregular, the Board enters the default option of "record ballot returned" into the SURE System. Hrg. Tr. at 45:15-16. The flagged envelopes are evaluated individually by the Board to determine potential irregularities which may indicate a defective ballot. Hrg. Tr. at 34:4-18. The Board then manually updates the status of such mail-in ballots by entering one of the options provided by the Department in the SURE System. Hrg. Tr. at

47:25-48:7. Based on that selection, an auto-generated email is sent to the voter by the SURE System, which updates the current status of the ballot. Hrg. Tr. at 45:26-46:16.

In March 2024, in a clear effort to provide notice of mail-in ballot defects, the Department made changes to the SURE System: new options for logging the return of mail-in ballots, including “pending” options, and changing the language used in the auto-generated emails. Hrg. Tr. at 45:17-18; 45:22-46:16; *see also* the March 2024 update (hereinafter “2024 SURE Instructions”) attached to the Hearing Transcript (Appendix Exhibit C) at Exhibit 2. As noted above, the 2024 SURE Instructions contain auto-generated emails which contain the exact language that will be sent to voters for each option that the County Board can select regarding the ballot status. *Id.*, pp. 6-10. Per the 2024 SURE Instructions, the Department intended counties which permit curing to use the “Pending” options, while it advised counties which do not permit curing to utilize the “Cancelled” options. *Id.*, pp. 2, 6-10.

For a County Board like the Butler County Board, which does **not** permit curing of mail-in ballots which lack a secrecy envelope, the 2024 SURE Instructions and Department Release Notes each instruct the Board to use the “CANC- NO SECRECY ENVELOPE” option. *Id.*, p. 9; Hrg. Tr. at 67:24-68:14. The 2024 SURE Instructions provide the following explanation for this code:

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.

App. Exh. C, Exh. 2, p. 9. If this option is selected, the Department advises that the following auto-generated email will be sent to the voter:

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 Day], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.

Id.; *see also* Hrg. Tr. at 48:8-16. Director McCurdy testified that this email is sent to voters when the ballot is received, and *before* it is conclusively established that the secrecy envelope is in fact missing, so if it is found that there is a secrecy envelope when the ballot is later opened, the ballot would be counted. Hrg. Tr. at 67:24-68:23.

Critically, the content of the auto-generated email is inaccurate, since the voter's ballot **has not yet actually been rejected or cancelled at the time such email is sent.** Hrg. Tr. at 68:16-23. The email is also inaccurate and misleading because it implies that the Board will permit a defective ballot missing its secrecy envelope to be cured via provisional ballot, which the Policy does not allow. Indeed, Judge Yeager highlighted in his Opinion that while it is understandable that there will be some difficulty in distilling explanations for how ballots are to be disposed of into a relatively small number of canned responses, "the current wording in the pre-

programmed responses is apparently causing confusion for electors.” Appendix Exh. B, p. 20, n. 9.

In effect, the Secretary has co-opted the SURE System into a mechanism for providing “notice” to voters of a defective mail-in ballot using automatic emails which are not authorized under the Election Code, despite this Court’s prior holding that voters have no constitutional, statutory, or legal right to be provided such notice. *Pa. Dems.* 238 A.3d at 372-74. In doing so, as the Commonwealth Court acknowledged, the Secretary’s emails “provide Electors with false directions.” Appendix Exh. A, p. 8. It is these “false directions” issued by the Secretary – as opposed to some improper action by the Board – that results in “dummy [provisional] ballots” as the Commonwealth Court characterizes them. Appendix, Exh. C, Exh. 2, at 31.

Under the Election Code, in the event a voter requests and receives a mail-in ballot but decides to vote in-person instead of by their mail-in ballot, the voter is permitted to do so by either surrendering their mail-in ballot at the polling location or submitting a provisional ballot. Hrg. Tr. at 40:10-15. The first option is only available if the voter brings their ballot and declaration envelope to the polling location, and surrenders them, signing a form which states that they no longer wish to vote via mail-in ballot. Hrg. Tr. at 40:16-22; 41:10-22. If this is done, the Judge of Elections signs the surrender form, and the voter is permitted to sign the poll book and cast a regular in-person ballot. Hrg. Tr. at 40:19-24; 25 P.S. § 3150.16(b)(3). If this occurs, the Board does not update the SURE System to reflect the surrendered ballot. Hrg. Tr. at 40:25-41:4.

The second option, filing a provisional ballot, is available if the voter does not have their ballot and declaration envelope. Hrg. Tr. at 41:10-14; 25 P.S. § 3150.16(b)(2). Voters are permitted to cast a provisional ballot if they request one, regardless of whether they have already returned a mail-in ballot, as Director McCurdy testified that the Board does not want to deny voters that opportunity. Hrg. Tr. at 42:15-18.⁴ In essence, any voter who asks to submit a provisional ballot, regardless of whether they are legally qualified to do so, is permitted to do so. *Id.*

C. The Pre-Canvass and Canvass

Once mail-in ballots are received and scanned using the Agilis Falcon machine and the Board enters the appropriate code noting their receipt, they are secured in a locked cabinet. Hrg. Tr. at 21:14-15; 25 P.S. § 3146.8(a). Under the Election Code, the Board is not permitted to open mail-in ballot declaration envelopes until the pre-canvass, which begins at 7:00 a.m. on Election Day. Hrg. Tr. at 49:23-50:2; 25 P.S. § 3146.8(g)(1.1). As such, until the pre-canvass begins, no definite conclusion can be made regarding whether a secrecy envelope was correctly used. Hrg. Tr. at 50:3-5. Further, under the clear terms of the Election Code, any information gathered during the pre-canvass is not permitted to be disseminated, including whether a secrecy envelope is missing. Hrg. Tr. at 50:6-12.; 25 P.S. § 3146.8(g)(1.1).

⁴ This testimony renders inaccurate the unsupported assumption made by the Commonwealth Court in note 26 of its Memorandum Opinion that the County “permitted Electors to vote provisionally because the district register did not reflect that they had ‘voted.’” See Appendix Exh. A at 30, n. 26.

Director McCurdy testified that when the mail-in ballot declaration envelopes were opened, if the Computation Board found a secrecy envelope which did not contain a ballot, no vote could be counted, as there was no eligible ballot. Hrg. Tr. 63:4-19. This remained true even if the voter had proceeded to also cast a provisional ballot on Election Day, because the voter had already turned in a mail-in ballot which was timely received. Hrg. Tr. at 63:20-25. If, however, the voter submitted a mail-in ballot which was not received prior to the 8 p.m. Election Day deadline, and the voter cast a provisional ballot on Election Day, the Computation Board would count the voter's provisional ballot, as that was the first one the Board received. Hrg. Tr. at 64:9-24. In that case, the voter's provisional ballot was counted because the voter's mail-in ballot was ineligible to be canvassed, having arrived after the deadline for such ballots. Hrg. Tr. at 65:3-6.

While the Computation Board has the ultimate discretion to determine whether to count provisional ballots submitted in each unique circumstance, historically the Computation Board has not counted ballots which lack a secrecy envelope, and where a provisional ballot was subsequently cast by the same voter. Hrg. Tr. at 75:6-15. In other words, if the Board receives a voter's naked ballot, and the elector learns on or before Election Day that they have failed to include the secrecy envelope, there is nothing they can do to cure such defect. Hrg. Tr. at 65:17-22.

D. Voter Respondents.

Voter Respondents applied for and submitted mail-in ballots. Appendix Exhibit B, p 2. Each neglected to

enclose their ballot in the required secrecy envelope. *Id.* After their ballots were coded by Butler County as “CANC- NO SECRECY ENVELOPE,” they received auto-generated emails from the Department, advising them that they could vote a provisional ballot on Election Day, ostensibly to “cure” their defectively cast mail ballot. *Id.* Voter Respondents did so – each traveled to their polling location and submitted a provisional ballot. *Id.* However, pursuant to the pre-canvass procedure for secrecy of received mail-in ballots, the Voter Respondents’ mail-in ballots were not opened until Friday, April 26, 2024, when the Computation Board met to conduct the canvass. Hrg. Tr. at 22:7-9. This was the first opportunity for the Board to confirm whether the mail-in ballots lacked a secrecy envelope. Hrg. Tr. at 21:19-23; 49:18-22. When the Computation Board met to canvass the Voter Respondents’ ballots, it voted not to count their mail-in ballots, as they were submitted without a secrecy envelope. Hrg. Tr. at 24:23-25:21; 26:14-27:9. Because their mail-in ballots were timely received and eligible for canvass, Voter Respondents’ provisional ballots were not counted.

E. Procedural Background

On April 29, 2024, Voter Respondents filed their Petition for Review in the Nature of a Statutory Appeal in the Court of Common Pleas of Butler County, appealing the Board’s decision to not count their provisional ballots in the 2024 Primary Election pursuant to Section 3050 of the Election Code. Pet. at p. 2; 25 P.S. § 3050(a.4)(5)(i) and (ii)(F). Shortly thereafter, on May 6, 2024, Republican National Committee and Republican Party of Pennsylvania filed a Petition for Leave to Intervene on behalf of

Respondent. On May 7, 2024, a hearing on the Petition was held in front of the Honorable Judge Yeager, at which time the Respondent Pennsylvania Democratic Party (“Respondent PDP”) similarly filed a Petition to Intervene on Behalf of Voter Respondents. Both Petitions to Intervene were granted. *See* May 7, 2024 Trial Court Order.

On June 28, 2024, Voter Respondents and Respondent PDP each filed a Memorandum of Law in Support of the Petition, and the Respondent Board and Republican Petitioners filed briefs in opposition to the same. The Trial Court issued a Memorandum Opinion and Order on August 16, 2024, dismissing the Petition and holding that the Board did “not violate either the Election Code or the Free and Equal clause of the Pennsylvania Constitution.” *See* Appendix Exh. B, at 29.

Voter Respondents filed a Notice of Appeal on August 20, 2024 (Docket No. 1074 CD 2024), and Respondent PDP filed a separate Notice of Appeal on August 22, 2024 (Docket No. 1085 CD 2024). Those appeals were consolidated by Order of Court dated August 22, 2024. Voter Respondents and Respondent PDP each filed a Statement of Issues on August 22, 2024. On August 23, 2024, each of the parties filed their respective merits briefs. The Department of State and the Secretary of the Commonwealth, Al Schmidt, filed an Amicus Brief on August 23, 2024. On August 28, 2024, Respondent PDP filed a Notice of Supplemental Authority. The Commonwealth Court issued its Opinion and Order (Appendix Exh. A) on September 5, 2024.

REASONS FOR ALLOWANCE OF APPEAL**A. The Commonwealth Court’s Opinion is in Conflict with this Court’s Ruling in *Pa. Dems.* and its own prior Ruling in *In re Allegheny County* (Rule 1114(b)(1), (2) and (4)).⁵**

This Court has expressly held that that a voter has no constitutional, statutory, or legal right to be provided notice of and an opportunity to cure a defective mail-in ballot. *Pa. Dems.* 238 A.3d at 372-74. “To the extent that a voter is at risk of having his or her ballot rejected” due to their failure to comply with the Election Code’s requirements for mail-in ballots, “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature.” *Id.*; accord *Pa. State Conf. of NAACP Branches v. Sec’y Pa.*, 97 F.4th 120, 133-35 (3d. Cir. 2024) (“NAACP”) (“[A] voter who fails to abide by state rules prescribing how to make a vote effective is not ‘denied the right to vote’” or disenfranchised “when his ballot is not counted.”) (quoting *Ritter v. Migliori*, 142 S.Ct. 1824 (2022) (Alito, J., dissent)). In reaching its decision in *Pa. Dems.*, this Court recognized longstanding precedent that, “[t]he power to regulate elections is a legislative one, and has been exercised by the General Assembly since the

⁵ As will be set forth in Republican Petitioners’ principal brief, the Commonwealth Court’s Opinion likewise improperly usurped the authority of the General Assembly in violation of the separation of powers provisions of the Pennsylvania Constitution (Pa. Const. art. II, § 1) and the Elections and Electors Clauses of the United States Constitution (U.S. Const. art. I, § 4, cl.1, 2) to effectively rewrite the Election Code to engage in court-mandated curing.

foundation of the government.” *Id.* at 366 (internal citations omitted).

The Commonwealth Court claims that it does not offend this binding precedent because the Memorandum Opinion “rejects [the] view” that allowing a voter to submit a provisional ballot after they have voted a defective mail-in ballot “amount[s] to ballot curing.” Appendix Exh. A. at 2; *id.* at 32-33 (“The provisional ballot is a separate ballot, not a cured initial ballot”). Such a finding creates distinction without difference.

Indisputably, the voters here filled out and returned mail-in ballots with fatal defects (no secrecy envelope); despite this, the Memorandum Opinion permits them to remedy those defects by casting a second (provisional) ballot – a provisional ballot that, as explained below, is not authorized by the Election Code. Regardless of the Commonwealth Court’s semantic gymnastics – and consistent with President Judge Yeager’s opinion at the trial court level (*see* Appendix Exh. B, pp. 22-23, 26-27) – that is curing, which this Court held cannot be mandated under *Pa. Dems.* Despite this, the Commonwealth Court mandated it anyway.

Further, the Commonwealth Court has contradicted its prior holding and interpretation of the Election Code on this exact issue. In *In re Allegheny County Provisional Ballots*, the Commonwealth Court held that:

With regard to the small number of provisional ballots cast by a voter whose mail-in ballots were timely received, [...] Section 1204(a.4)(5)(ii)(F) plainly provides

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

2020 WL 6867946, at *4. The relevant facts that the Commonwealth Court reviewed in *Allegheny County* are the same as here: provisional ballots were submitted by voters who had already submitted a mail-in ballot that was timely received by the county board. Despite the Commonwealth Court’s recent reversal of course, 25 P.S. § 3050(a.4)(5)(ii)(F) is unambiguous and the Order and Opinion on appeal create a clear conflict between two Commonwealth Court opinions that this Court should resolve.

The Commonwealth Court has improperly weighed in on the political policy judgments regarding the administration of elections, which rests solely within the province of the General Assembly and the local boards of elections. In doing so, it has effectively rewritten the Election Code to attempt to bring into existence, via judicial fiat, their preferred election scheme. That is at odds with *Pa Dems*. To address this clear conflict between the Memorandum Opinion and this Court’s holding in *Pa. Dems*. and its own holding in *In re Allegheny County*, the Court should grant this Petition.

B. The Commonwealth Court Rewrote or Added Provisions to the Election Code by Finding Purported Ambiguities in the Code Where None Exist (Rule 1114(b)(3) and (4)).

Based on its finding of purported statutory ambiguities, the Commonwealth Court reversed the trial court, concluding that “(1) Electors did not cast any other ballot within the meaning of 25 P.S. § 3050(a.4)(1), and (2) 25 P.S. § 3050(a.4)(5)(ii)(F) does not prohibit the Board from counting Elector’s provisional ballots.” The Commonwealth Court equates a voted but fatally defective mail-in ballot that was timely received by the Board, with having never completed a mail-in ballot at all, through incorrectly reading ambiguity into the Election Code. The Commonwealth Court’s analysis is intentionally flawed to accomplish a desired result, when there is simply no ambiguity in the relevant sections of the Election Code.

The Commonwealth Court focused on three provisions of the Election Code – 25 P.S. § 3050.16(B)(2), the “Having Voted Clause”; 25 P.S. § 3050(a.4)(1), the “Casting Clause,” and 25 P.S. § 3050(a.4)(5)(ii)(F), the “Timely Received Clause.”⁶ While evaluating the purported statutory ambiguity of 25 P.S. § 3150.16 (Voting by mail-in electors), the Commonwealth Court did not discuss 25 P.S. § 3150.16(a), which sets forth the step-by-step process for voting by mail – the most relevant statutory subsection for this determination. Nor did it discuss

⁶ Pursuant to Rule 1115(a)(8) copies of cited sections of the Election Code and other statutes are set forth in full at Appendix Exhibit C.

the statutory structure and sequencing of 25 P.S. §§ 3150.11 through 3150.17, the parts of the Election Code addressing mail-in voting, as part of its analysis. When a proper analysis is done, there is no ambiguity. President Judge Yeager was correct that the General Assembly has not authorized use of a provisional ballot by a voter who has submitted a defective mail-in ballot, and any such provisional ballot cast by a voter who has submitted a defective mail-in ballot that was “timely received” by the board of elections cannot be counted under 25 P.S. § 3050(a.4)(5)(ii)(F). *See* Appendix Exh. B., p. 22. The Commonwealth Court’s Memorandum Opinion is erroneous.

1. 25 P.S. § 3050(a.4)(1) (the Opinion’s Casting Clause) and 25 P.S. § 3050(a.4)(5)(ii)(F) (the Opinion’s Timely Received Clause) Do Not and Cannot Conflict.

A conflict between or ambiguity as to 25 P.S. § 3050(a.4)(1) (the Opinion’s Casting Clause) and 25 P.S. § 3050(a.4)(5)(ii)(F) (the Opinion’s Timely Received Clause) is not possible. These provisions read as follows:

(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) (emphasis added). On its face, Section 3050(a.4)(5)(i) does not apply if subclause (ii) applies. Subclause (ii)(F) unambiguously states that “[a] provisional ballot shall not be counted if the elector’s absentee or mail-in ballot is timely received by a county board of elections,” *i.e.*, received before 8 p.m. on Election Day. 25 P.S. § 3050(a.4)(5)(ii)(F). It is undisputed that the Voter-Respondents’ mail-in ballots were timely received. Appendix Exh. B. at 18.

Section 3050(a.4)(5)(ii)(F) is an express exception to the general rule set forth in Section 3050(a.4)(5)(i), and by its plain terms, subclause (i) has no application where subclause (ii) applies. *See* 25 P.S. § 3050(a.4)(5)(i). As an exception to its rule, Section 3050(a.4)(5)(ii)(F) *per se cannot* conflict with Section 3050(a.4)(5)(i). Accordingly, as Judge Yeager found, and as the Commonwealth Court disregarded, there is no ambiguity or conflict in these sections of the Code, and therefore there is nothing for the court to interpret.

2. No Claimed Ambiguities Relied on By the Commonwealth Court Exist When the Mail-in

Voting Provisions of the Election Code are
Analyzed in Totality.

Undeterred by this clear lack of conflict or ambiguity between the Casting Clause and the Timely Received Clause, the Commonwealth Court searched for another possible source of purported ambiguity and landed on 25 P.S. § 3150.16(B)(2) (the Opinion's Having Voted Clause). This section of the Election Code provides, “[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 under Section [3050(a.4)(1)].” 25 P.S. § 3150.16(B)(2) (emphasis added). The Commonwealth Court found, *inter alia*, that the Election Code did not define “voted” or “vote” as used in Section 3050.16(B)(2). Appendix Exh. A., p. 24, 25. The Commonwealth Court then used this proclaimed lack of a definition to find “when viewing the terms *voted*, *received*, and *cast* in the Code’s broader scheme, they are contextually ambiguous” and “the most important tension is between *voting* and the other terms.” *Id.* pp. 25, 26 (emphasis in original). It then used that proclaimed ambiguity to rule against Republican Petitioners and reverse Judge Yeager. *Id.* pp. 28-33. This is both contrived and wrong.

While emphasizing that a statutory scheme must be read collectively and not in isolation (*id.* p. 24), the Commonwealth Court never examined the full statutory scheme for mail-in voting set forth by the General Assembly in 25 P.S. §§ 3150.11 through 3150.17. These provisions proceed in a clear, logical sequence, starting with qualifications for a mail-in elector (§ 3150.11), application for a mail-in ballot (§§ 3150.12 and 3150.12a) and approval for same

(§ 3150.12b), prescribing the official mail-in elector ballots and envelopes (§ 3150.13 and 3150.14), setting forth the process for delivering or mailing ballots to voters by the board (§ 3150.15), delineating the specific process to vote by mail (§ 3150.16), and finally, defining what becomes public records in relation to mail-in ballots (§ 3150.17). These Sections of the Election Code thus set forth the entire process for mail-in voting, including Section 3150.16, titled “**Voting** by mail-in electors” (emphasis added). The full series of statutory provisions provide the “context” needed to ensure that a statute is not read in “isolation,” a standard that the Commonwealth Court acknowledged (Appendix Exh. A, p. 22) and promptly ignored.

Unsurprisingly, under Section 3150.16 (**Voting** by mail-in electors), Subsection (a) – **which the Commonwealth Court does not address at all** – describes in detail, step-by-step, how an elector votes by mail. In the context of the statutory scheme and consistent with the title of Section 3150.16 (**Voting** by mail-in electors), the steps listed in subsection (a), which include how to complete and deliver a ballot (by mail or in person) to the Board, clearly define what it means to “vote” by mail. There is no ambiguity. Here, there is no doubt that each Voter Respondent “voted” under Section 3150.16(a) – although each made a mistake in failing to use the secrecy envelope, each filled out the ballot as proscribed in Section 3150.16(a) and delivered it to the Board. *See* Appendix Exh. A, pp. 2-3. By the plain terms of Section 3150.16(a), which plain terms the Commonwealth Court ignored, both Voter Respondents voted.

The Commonwealth Court's claimed ambiguity over the term "ballot" is also unfounded once the entire statutory scheme is analyzed. Section 3150.13, which is not discussed by the Commonwealth Court, describes exactly what the "official mail-in elector ballots" are and, along with Section 3150.16(a), requires that those ballots will arrive at the board of elections in the Declaration Envelopes prescribed by Section 3150.14.⁷ There is nothing "murky" here – "ballot" is the ballot described in Section 3150.13. *See* Appendix Exh. A, p. 28. And there simply is no confusion or ambiguity in what is meant by "timely" or "received" as used in Section 3050(a.4)(5)(ii)(F) – "received" is common sense⁸ and refers to the ballot being delivered by mail or in-person to the board (*see* Section 3150.16(a)) and, when read in conjunction with Section 3150.16(c), "timely" clearly means before 8 p.m. on Election Day. These terms on their face and in context bear no ambiguity.

Reviewing the Commonwealth Court's conclusions considering the above highlights their incorrectness. The Memorandum Opinion (Appendix Exh. A, pp. 25-26, 29-33) hinges on the term "voted" in Section 3150.16(b)(2) being ambiguous: "[a]n elector who requests a mail-in ballot and who is not shown on the

⁷ This case is not about a law school exam-type hypothetical where a voter sends an empty Declaration Envelope. Neither Ms. Genser nor Mr. Matis did that. President Judge Yeager correctly disregarded the hypothetical posed. Appendix Exh. B, p. 21. The Commonwealth Court, on the other hand, made this hypothetical a foundation for its conclusions. Appendix Exh. A. at 8-10, 15, 26-27, 31.

⁸ The Commonwealth Court agrees. Appendix Exh. A., p. 27.

district register as having **voted** may vote by provisional ballot under Section [3050(a.4)(1)].” 25 P.S. § 3150.16(B)(2) (emphasis added). But, what “voted” means is defined in the immediately preceding Section 3150.16(a), which must be read *in pari materia* with the same parts of the very same statutory section (1 Pa.C.S. § 1932(a)) and is further demonstrated by the title of the full statutory Section, **Voting** by mail in electors. See 1 Pa.C.S. § 1924 (“The Title and preamble of a statute may be considered in the construction thereof).

As the electors here had “voted” as set forth in Section 3150.16, they were not eligible to submit a provisional ballot per the **express** terms of Section 3150.16(b)(2). Further, any such provisional ballot could not be counted under the **express** terms of Section 3050(a.4)(5)(ii)(F) because the electors’ mail-in ballots (as “ballots” is defined in Section 3150.13 which, by further clear statutory instruction, are contained in the Declaration Envelopes sent to the elector by the board under Section 3150.14 when they are returned to the board by the elector and received by the board) were “timely received.” And, because Section 3050(a.4)(5)(ii)(F) applies, as the Commonwealth Court agrees in note 15 of the Opinion, Section 3050(a.4)(5)(1) (the “Casting Provision”) is simply inapplicable. This renders any purported ambiguity over the word “cast” moot.⁹

President Judge Yeager was correct and the Commonwealth Court – in a Memorandum Opinion that may have broad implications for the upcoming

⁹ Nor, is “cast” as used in Section 3050(a.4)(5)(1) ambiguous as explained *infra*. pp. 32-35.

2024 General Election – was wrong. Because there is no ambiguity, “the letter of [the Election Code sections at issue] is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). This Court should hear this appeal to overturn the Commonwealth Court’s inappropriate judicial activism in the conduct of elections and reset the terms of the Election Code regarding mail-in and provisional ballots.

3. The Commonwealth Court’s Opinion is Contrary to Other Provisions of The Election Code, Including Provisions Cited in the Memorandum Opinion, and this Court’s Holdings in *Pa. Dems.*

a. Other Provisions of the Election Code.

Other authority relied upon by the Commonwealth Court reinforces the lack of ambiguity. On pages 21 (quoting 25 P.S. §3150.13(e)) and 25-26, the Commonwealth Court discusses instructions provided to mail-in voters that indicate that voters are informed that they may vote a provisional ballot if their “**voted** ballot is not timely received.” Appendix Exh. A, pp. 21 (emphasis in original), 25-26. This “voted ballot is not timely received” language clearly indicates that the act of voting a mail-in ballot is **different than and independent of** its receipt and actual counting. For example, a “voted ballot” that was lost in the mail is not timely received and, therefore, a voter can submit a provisional ballot.

This clear “voted ballot is not timely received” language is directly contrary to the Commonwealth Court’s holding that “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 the elector has already *voted*.” See Appendix Exh. A, p. 26) (emphasis in original). In essence, the Commonwealth Court’s holding molds voting, receipt, and counting into a single operative event. If a ballot can only be deemed voted after it is received and determined to be valid, as the Commonwealth Court erroneously holds, then the above statutory language (“voted ballot is not timely received”) – which the Commonwealth Court itself cites – is semantically null.

Similarly, in defining how to vote by mail, Section 3150.16(a) makes no reference to counting or recording particular votes. The Election Code does not contain any provision that a ballot must be counted for an elector to be deemed to have voted by mail. Rather, it is nothing but a creation of the Commonwealth Court as it improperly legislates from the bench.

Further, the Election Code **prohibits** opening a mail-in ballot to determine if it does or does not in fact lack a secrecy envelope until, at the earliest, during the pre-canvass on Election Day (see 25 P.S. § 3146.8(a)).¹⁰ But, under the Commonwealth Court’s logic, no mail-in ballot is timely received until the mail ballots are opened and their validity determined. Thus, under the Commonwealth Court’s logic, **every** mail-in voter is entitled to submit a provisional ballot because it will not be known with certainty if mail-in ballots will or will not be included in the election tally

¹⁰ Given this fact, contrary to the Commonwealth Court’s assertion, the mail-in ballots were not “previously rejected” but rather “the status listed in the SURE System is nothing more than a guess.” Appendix Exh. A., p. 7, 11.

until after the close of the polls. Such abuse of provisional ballots is most certainly not the law as set forth in the Election Code.

If “voted” and “counted” are synonymous as the Commonwealth Court indicates, then poll books could never reflect whether a mail-in elector “voted” because a vote is not officially counted until after the polls close. Yet, the Code expressly requires that poll books “shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place.” 25 P.S. § 3150.16(b)(1).

The Election Code simply does not support the twisted construction utilized by the Commonwealth Court to hold that a mail-in ballot is not voted or timely received unless it is included in the election tally. *See* Appendix Exh. B., pp. 17-18. Rather, the Election Code establishes and codifies a three-step sequence for mail voting: (1) first, the voter casts/votes his or her ballot; (2) next, the county board receives the ballot; and (3) finally, the board canvasses the ballot to determine its validity and whether to count it. *See* 25 § 3146.8(g)(1)(i)-(ii); *see also In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1067 (Pa. 2020) (laying out that voters “cast their ballots . . . by absentee or no-excuse mail-in ballots,” the board “receiv[es]” the ballots, and “[t]he pre-canvassing or canvassing of absentee and mail-in ballots then proceeds.”).

The Election Code makes clear that “casting” (i.e., voting) the ballot is done *by the voter*, while “receiving” the ballot and then canvassing it to determine whether it is valid and can be counted in the election tally are done *by the county board*. *See* 25 P.S. § 3146.8(g)(1)(i)-

(ii). This use of “cast” is also consistent with the dictionary definition cited by the Commonwealth Court – “to deposit (a voting paper or ticket) (Appendix Exh. A, p. 27). Here, the voter deposits their mail-in ballot as placed in the Declaration Envelope and returned to the board.

Contrary to the Commonwealth Court’s holding, the Election Code further establishes that a voter’s “casting” a ballot occurs separate from—and *prior to*—the board “receiving” it, which in turn occurs separate from and prior to the board “canvassing” the ballot to determine whether it is valid:

An absentee ballot *cast by any absentee elector...* or 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.

25 P.S. § 3146.8(g)(1)(i)-(ii) (emphases added); *see also id.* § 3146.8(g)(i) (referring to certain absentee ballots being “cast, submitted and received”).

Other provisions of the Election Code confirm this construction. For example, the Election Code mandates that mail-in ballots “must be received in the office of the county board of elections no later than eight o’clock P.M.” on Election Day. *Id.* §§ 3146.6(c); 3150.16(c). Mail ballots necessarily *must* be voted by voters before that deadline. *See id.* §§ 3146.6(c); 3150.16(c). And the Election Code’s instructions regarding when and how a county board opens and counts mail-in ballots specify that a board may not determine a mail-in ballot’s validity until the “pre-

canvass” or “canvass,” which occur *after* the ballots are “received” by the board. *Id.* § 3146.8(g)(ii)(1.1), (2).

Thus, the Commonwealth Court’s holding that a mail-in ballot is not voted or “timely received” unless and until the board determines it can be included in the election tally is irreconcilable with the Election Code’s plain text and must be rejected. *See* 1 Pa.C.S. § 1921(a)-(b).

b. *Pa. Dems. is Contrary to the Commonwealth Court’s Holding*

This Court’s decision in *Pa. Dems.* further underscores that “casting” or voting a mail ballot is an action a voter takes no later than when the voter relinquishes control over the ballot and sends it to the county board, and that “receiving” the ballot and determining its validity are distinct actions the board takes sequentially thereafter. As one example, this Court noted that “[t]he Act directs that mail-in ballots cast by electors who died prior to Election Day shall be rejected and not counted”—or, in other words, that such a ballot is “cast” or voted before election officials receive it and determine its invalidity (and even before its invalidity arose). *See, e.g.*, 238 A.3d at 375. And when this Court addressed the secrecy envelope requirement, it noted that “naked ballots” were “*cast by*” mail voters *before* county boards “refus[ed] to count and canvass” them. *Id.* at 376 (emphasis added); *see also id.* at 374 (Election Code “provides the procedures for casting *and* counting a vote by mail”) (emphasis added); *Meixell v. Borough Council of Hellertown*, 88 A.2d 594 (Pa. 1952) (illegal votes were still “cast”); *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. 2:20-CV-1831-NR, 2021 WL 101683, at *4, n. 4 (W.D. Pa.

Jan. 12, 2021) (“[T]his case concerns ballots *cast* by lawful voters who wished to vote... but simply failed to comply with a technical requirement of the election code.”) (emphasis added).

c. The Election Code Establishes Only Very Limited Circumstances for Proper Use of a Provisional Ballot.

When the General Assembly has wanted to authorize use of provisional voting, it has expressly identified the limited circumstances for such use in the Election Code. Contrary to the Commonwealth Court’s holding, the General Assembly has **not** authorized the use of provisional voting to cure mail-in ballot defects. *See generally Pa. Dems.*, 238 A.3d at 373-74. Its silence is dispositive: provisional voting may not be used to cure mail-in ballot defects. *See id.*; *see also Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304, 321 (Pa. 2017) (“[W]hen interpreting a statute, we must listen attentively to what the statute says, but also to what it does not say.”) (internal quotes omitted).

This is particularly true given that the Code’s express provisions in Section 3150.16(b)(2) prohibit a provisional vote if the elector has already submitted their mail-in ballot. Indeed, there is no statutory or constitutional provision authorizing use of provisional voting because the voter committed an error that requires the voter’s mail ballot to be rejected. *See Pa. Dems.*, 238 A.3d at 373-74. The Commonwealth Court’s holding to the contrary is erroneous. *See id.*; *see also Discovery Charter Sch.*, 166 A.3d at 321.

Finally, contrary to the Commonwealth Court’s holding, provisional ballots are not intended to provide a voter a second chance to have their vote included in

the election tally. For example, if an in-person voter hits “Vote” on a voting machine or scans in their paper ballot, they cannot then go ask to vote a provisional ballot because they may have made a mistake. With mail voting, delivering the Declaration Envelope containing the ballot to the Board is the functional equivalent of hitting “Vote” or scanning the ballot. Once a voter does that, they do not get a second bite at the apple. In fact, all the provisions of the Election Code that expressly authorize provisional voting, are giving an elector only a first bite at the apple: 25 P.S. §§ 3050(a.2) (voter cannot produce required identification at the polling place); 3050(a.4)(1) (registration of individual who appears at the polling place cannot be verified); 3150.16(b)(2) (mail-in ballot never reached the board). The Commonwealth Court’s Memorandum Opinion runs counter to this “first bite” principle.

In short, the Election Code’s plain text and other authorities – contrary to the contrived holding of the Commonwealth Court – make clear that the electors here voted their mail-in ballots by sending those ballots to the Board in the Declaration Envelopes, and that the Board timely received their ballots prior to Election Day— *regardless* of whether those ballots were ultimately counted in the election tally. The Commonwealth Court’s Memorandum Opinion and the reasoning underlying it cannot stand. Given the above and the vital importance of the correct interpretation of the Election Code being confirmed ahead of the General Election, this Court should hear this appeal to clarify and reemphasize the terms of the Election Code when it comes to mail-in ballots and provisional ballots.

CONCLUSION

The Commonwealth Court's Memorandum Opinion flies in the face of this Court's binding precedent in *Pa. Dems.* and improperly writes new provisions into the Election Code, amounting to improperly legislating from the bench. In conjunction with the Secretary's non-statutory, non-regulatory authorized SURE System auto-emails that provide notice of mail-in ballot defects and "provide Electors with false directions" (Appendix Exh. A, p. 8), the Commonwealth Court's opinion amounts to court-ordered notice and curing in direct contravention of this Court's holding in *Pa. Dems.*

In order to function properly, elections must have rules, including neutral ballot-casting rules such as set forth in 25 P.S. § 3150.16(a). The judiciary may not disregard those rules, rewrite them, or declare them unconstitutional simply because a voter failed to follow them and, accordingly, had their ballot rejected or because the court might have a different preferred election policy or scheme to the rule implemented by the General Assembly. *See, e.g., Ins. Fed'n of Pa., Inc. v. Commonwealth, Ins. Dep't*, 970 A.2d 1108, 1122 n.15 (Pa. 2009). But that is exactly what the Commonwealth Court did. The Court should grant allowance of appeal so that the rules and procedures governing Pennsylvania elections are appropriately determined by this Court before the 2024 General Election is upon us.

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September 8, 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 Petition for Allowance of Appeal contains 8987 words, exclusive of the supplementary matter as defined by Pa. R.A.P. 2135(b).

THE GALLAGHER FIRM, LLC

Dated: September 8, 2024

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

Counsel for Petitioners

CERTIFICATE OF COMPLIANCE WITH
PA. R.A.P. 127

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

THE GALLAGHER FIRM, LLC

Dated: September 8, 2024

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

Counsel for Petitioners

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

THE GALLAGHER FIRM, LLC

Dated: September 8, 2024

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

Counsel for Petitioners

APPENDIX H

IN THE UNITED STATES SUPREME COURT

REPUBLICAN NATIONAL)
COMMITTEE, *et al.*,)
)
Applicants,)
) No. 24A408
v.)
)
FAITH GENSER, *et al.*,)
)
Respondents.)

DECLARATION OF ANGELA ALLEMAN

Pursuant to 28 U.S.C. § 1746, I, Angela Alleman, declare as follows:

1. I am over the age of 18 and am otherwise competent to testify.
2. I have personal knowledge of the matters in this declaration.
3. I am currently the Executive Director of the Republican Party of Pennsylvania (the “RPP”).
4. The 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 Committee” of the Republican Party as defined by 52 U.S.C. § 30101(15).
5. The RPP supports and seeks to uphold free and fair elections for all Pennsylvanians.

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

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

8. The RPP's mission 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, the 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, the RPP devotes substantial resources toward educating, mobilizing, assisting, and turning out voters in Pennsylvania.

11. RPP has statutory rights to appoint poll watchers to observe casting, counting, and canvassing of ballots at the polling place, 25 P.S. § 2687(a), 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), and an "authorized representative" to "remain in the room" and to "challenge any determination of the county board of elections with respect to the counting or partial counting of" a provisional ballot, *id.* § 3050(a.4)(4).

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”), the 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, to observe the pre-canvass and canvass of absentee and mail-in ballots at the county board of elections, and to observe and make appropriate and lawful challenges to the counting or partial counting of invalid provisional ballots.

14. As part of its EDO, the 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. The RPP has devoted substantial time and resources in mobilizing and educating voters in Pennsylvania in the past many election cycles and will do so again in 2024.

16. Each of the RPP’s EDO, training, and voter education programs relies upon, utilizes, and is built upon the clear language of the Election Code.

17. 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 Election Code’s rules preventing

election officials from counting unlawful and invalid ballots.

18. Accordingly, RPP's EDO, training, and voter education programs include training and information regarding the Election Code's rules regarding provisional voting, including the rules for when a provisional ballot is unlawful and invalid and cannot be counted.

19. I am aware that the Election Code generally provides that county boards shall not count an individual's provisional ballot if the individual's mail ballot is timely received by the county board of elections.

20. I am also aware that, on October 23, 2024, the Pennsylvania Supreme Court held that a county board shall count an individual's provisional ballot even when the individual's mail ballot was timely received if the mail ballot is invalid and cannot be counted.

21. The RPP has engaged in discussions with officials from county boards of elections across the Commonwealth regarding the Pennsylvania Supreme Court's decision.

22. The RPP understands that, for the ongoing 2024 General Election, county boards of elections intend to count provisional ballots in accordance with the Pennsylvania Supreme Court's decision.

23. The RPP further understands that some of those county boards of elections would not count the provisional ballots that the Pennsylvania Supreme Court's decision said shall be counted if that decision had not issued or is stayed or reversed by this Court.

24. The change in the governing law around provisional voting the Pennsylvania Supreme Court's decision has made harms the RPP 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.

25. In particular, so long as the Pennsylvania Supreme Court's decision is not stayed or reversed, the RPP will be required to alter its statewide EDO, training, and voter education programs to reflect that decision and to inform poll watchers, volunteers, and voters of the new circumstances in which a county board may count provisional ballots.

26. If the RPP alters its EDO, training, and voter education programs to reflect the Pennsylvania Supreme Court's decision, it will again have to alter those materials if the Court's order is stayed or reversed in the future.

27. Altering its statewide EDO, training, and voter education programs will require the RPP 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.

28. Moreover, if left uncorrected, the Pennsylvania Supreme Court's decision threatens to create voter confusion, to reduce voter confidence in the integrity of Pennsylvania's elections, and to decrease voter turnout in Pennsylvania, including by members of the RPP.

29. The Pennsylvania Supreme Court's decision also alters the competitive environment surrounding

elections in Pennsylvania in which the RPP, its members, its voters, and its candidates exercise their constitutional rights to vote and to participate.

30. Furthermore, the Pennsylvania Supreme Court's decision harms the electoral prospects of Republican candidates in Pennsylvania; makes it more difficult for the RPP, its members, its voters, and its candidates to win elections; and may change the outcome of elections in Pennsylvania.

31. Including in the official vote total ballots that were invalid under the Election Code has flipped the result in three elections in Pennsylvania since 2020. In particular, in those three elections, election officials counted ballots that did not comply the Election Code's date requirement for mail ballots.

32. In each of those elections, the Republican candidate would have prevailed if the invalid ballots had not been included in the vote total. In other words, in each of those elections, including the invalid 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.

33. 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).

34. 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)

35. In the third, a court order changed the 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. The 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 later reversed the court order on which the Montgomery County Board of Elections had relied to change the result of the election.

36. The county boards of elections' counting of provisional ballots that are unlawful under the Election Code could likewise flip the result of one or more races in the ongoing 2024 general election and beyond.

37. 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.

38. Accordingly, county boards counting provisional ballots that the General Assembly has mandated may not be counted because they were cast by individuals who submitted timely but defective mail ballots (including mail ballots that do not comply with the

Election Code's date requirement) could flip the outcome of one or more races in the 2024 general election.

39. As in the races described above, the counting of such invalid 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.

40. Any such outcome would further confuse voters, undermine public confidence in the Commonwealth's elections, and decrease voter turnout, including among Republican voters.

41. I declare under penalty of perjury that the foregoing is true and correct.

Date: 10/30/24

/s/ Angela Alleman
Angela Alleman