

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

No. 1232 C.D. 2022

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ELIZABETH ELKIN, *et al.*,

*Petitioners,*

v.

THE PHILADELPHIA CITY COMMISSIONERS, in their official capacities, *et al.*,

*Respondents.*

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**BRIEF OF *AMICUS CURIAE* LAWYERS DEMOCRACY FUND  
IN SUPPORT OF PETITIONERS**

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## STATEMENT OF INTEREST OF AMICUS CURIAE<sup>1</sup>

Lawyers Democracy Fund (LDF) is a non-profit organization established to promote the role of ethics, integrity, and legal professionalism in the electoral process. To accomplish this, LDF primarily conducts, funds, and publishes research and in-depth analysis regarding the effectiveness of current and proposed election methods, particularly those that fail to receive adequate coverage in the national media. Robust defense of reasonable, validly enacted election laws is essential to achieve these goals. As part of its mission, LDF is a resource for lawyers, journalists, policy-makers, courts, and others interested in elections.

LDF has filed numerous *amicus curiae* briefs in federal and state courts around the country in an effort to educate courts and assist them in reaching just and accurate decisions in cases concerning issues of election administration. LDF recently filed an *amicus* brief in the Pennsylvania Supreme Court in *Ball v. Chapman*, No. 102 MM 2022, in support of the Pennsylvania Code's clear requirement that absentee ballots be correctly dated to be counted. LDF also recently filed an *amicus* brief in Pennsylvania Supreme Court in *Republican Nat'l Comm. v. Chapman*, No. 447 MD 2022, to clarify for the Court why laches did not preclude

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<sup>1</sup> No person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief or authored in whole or in part this brief.

plaintiffs from bringing a challenge to counties' non-uniform absentee ballot cure procedures. Non-uniform procedures across Pennsylvania have again given rise to this case, namely the Philadelphia City Commissioners' (Commissioners) refusal, unlike other jurisdictions in Pennsylvania, to implement Poll Book Reconciliation to detect and prevent double voting from occurring in the imminent election.

This effort by Petitioners to compel Commissioners to adhere to procedures to prevent double voting is of grave importance. LDF supports efforts to ensure the upcoming 2022 general election and future elections are conducted in accordance with the rules that the General Assembly has prescribed by law, so that every lawful vote is counted and every unlawful vote is not. For these reasons, LDF has an interest in this action.

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## SUMMARY OF ARGUMENT

Double voting—when a voter returns a mail ballot and also votes in person in the same election—is an affront to the very foundation of American democracy, namely that everyone gets *one* vote and that each vote is counted equally. “Full and effective participation by all citizens in state government requires...that *each citizen* have an *equally effective voice* in the election of members of his state legislature.” *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (emphasis added).

Curiously, however, Commissioners currently have no plan in place to prevent double voting in the imminent election, even though, in past elections, they utilized effective procedures to prevent double voting. It is not as though double voting has never occurred in Philadelphia’s elections. *See e.g.*, Jonathan Lai, *40 cases of double votes discovered*, Philadelphia Inquirer (June 17, 2020) (“Officials identified 40 people who had returned a mail ballot and then also voted in person. The mail ballots caught in time were excluded to prevent double voting. (Four double votes had already been counted.)”). Yet despite the occurrence of double voting in past elections, Commissioners position themselves not only to permit double voting in Tuesday’s election but also to dilute the voting strength of every valid vote, which will no longer be equal if double votes are permitted.

As set forth in Plaintiffs’ Complaint, filed on October 27, 2022, Poll Book Reconciliation is necessary to prevent voters from double voting. Although

Commissioners had the opportunity to rectify this issue during their meeting on November 2, 2022, they nevertheless declined to take action to prevent double voting. Pl. Pet. for Special Inj. at 8. Serious injury to Pennsylvania voters and the fairness of Pennsylvania's election will certainly result if this Court does not intervene.

LDF submits this *amicus curiae* brief to showcase why double voting undermines free and fair elections. Several states, including Pennsylvania, have commonsense procedures election officials must follow to prevent double voting; Commissioners should not be the exception to the rule. This Court should grant Petitioner's Special Injunction and Preliminary Injunction to require Defendants to conduct Poll Book Reconciliation for the duration of the 2022 election.



## ARGUMENT

### **I. Double voting undermines free and equal elections and sabotages voter confidence.**

The Philadelphia City Commissioners (Commissioners) refuse to conduct Poll Book Reconciliation procedures as they have in previous elections to prevent voters from being able to cast both a mail ballot and a ballot in person in the fall 2022 election, which gravely undermines principles of democracy and voter confidence in the integrity of elections. “[T]he right to vote as the legislature has prescribed is fundamental,” and underlying the right to vote is the “equal weight accorded to each vote and the equal dignity owed to each voter.” *Bush v. Gore*, 531 U.S. 98, 104 (2000). Yet by refusing to conduct Poll Book Reconciliation, which allows Commissioners to identify which voters have requested and/or returned a mail ballot to prevent double voting, Commissioners seek to elevate the power of votes by those who break the law over validly cast ballots. Clearly, “[t]his is not a process with sufficient guarantees of equal treatment.” *Id.* at 107.

It is well established that “[e]very voter's vote is entitled to be counted *once*,” *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (emphasis added), not twice. “The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds*, 377 U.S. at 555. But that is what will happen here: the weight of every valid ballot will be diluted by every double vote accepted by

Commissioners. “[A]ll who participate in the election *are to have an equal vote*,” *Gray*, 372 U.S. at 379 (emphasis added), but without a procedure to prevent double voting in Philadelphia, the voters of Philadelphia and the entire Commonwealth are not guaranteed an equal vote.

Double voting is not a novel issue. *See e.g., Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 793-94 (2006) (detailing several instances of double voting in elections); Michael P. McDonald and Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 *Election L. J.* 111, 111-22 (2008) (estimating more than 10,000 intrastate double votes cast across the country during the 2004 presidential election); Sharad Goel, et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections*, 114 *Am. Pol. Sci. Ass’n Rev.* 1, 2 (Mar. 2020) (estimating there was about 1 double voter for every 4,000 voters in the 2012 presidential election). The problem is documented and significant, because every double vote that is counted in an election dilutes what would be the strength of every valid vote. Moreover, if one locality in a state permits double voting to occur while others prevent it, the double votes can be concentrated to support one candidate over another.

Commissioners are no strangers to double voting either. Just two years ago, it was reported that procedures used by Philadelphia officials prevented what would have resulted in 40 double votes (four double votes slipped through the cracks and

were counted) in Pennsylvania's 2020 primary election. Jonathan Lai, *Philly election officials caught 40 cases of double voting. It's not fraud, but it's still a problem.*, Philadelphia Inquirer (June 16, 2020), available at: <https://www.inquirer.com/politics/election/pa-primary-election-mail-ballots-double-voting-20200616.html>.

Although Commissioners are on notice that double voting has occurred and may again occur in this election in Philadelphia, they have argued in their briefs in this case that no double voting ever has occurred. *See* Defendants' Resp. at 25-27. That argument indicates that Commissioners prefer to turn a blind eye to a very real problem. And while they are abandoning the Poll Book Reconciliation procedures that caught these double votes, they now profess confidence in ineffective administrative procedures at the precincts that allowed this double voting to occur. *Id.* at 15. The only solution they now proffer is post-election referral for prosecution. But if double votes are not caught before votes are counted, a cast ballot cannot be uncast and an unfair and unequal election result is irreparable.

Philadelphia's lack of Poll Book Reconciliation, even if only one voter is able to double vote, undermines the very "essence of a democratic society," namely the right to vote freely for the candidate of one's choice and to have that vote counted equally with others—not more, not less. *Reynolds*, 377 U.S. at 555. But not only that, it undermines voter confidence. Voter confidence in Pennsylvania and across the country is currently dismal. *See The 2020 Elections in Pennsylvania*, Marist

Pennsylvania Poll (Sept. 27, 2022) (finding that 33% of Pennsylvania voters express not very much or no confidence in the election process); *see also* Bethany Shepherd, *Americans' faith in election integrity drops: POLL*, ABC News (Jan. 6, 2022) (finding only 20% of voters are very confident about the election system). As the bipartisan Commission on Federal Election Reform observed, the “electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.” Report of the Commission on Federal Election Reform, *Building Confidence in U.S. Elections* 18 (Sept. 2005). This is because “[f]raud...undermine[s] public confidence in the fairness of elections and the perceived legitimacy of the announced outcome.” *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021). Even mere perceptions of voter fraud “drive[] honest citizens out of the democratic process and breed[] distrust of our government” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). “Public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008). For Commissioners to abandon procedures that prevent double voting and ignore their duties under the Election Code is destructive to already-fragile voter confidence in elections.

This Court should enjoin Commissioners from ceasing Poll Book Reconciliation, for every vote must “be correctly counted and reported.” *Gray*, 372

U.S. at 380 (1963). Without these procedures, each voter's right under the law "to cast his ballot and have it honestly counted" will be violated. *League of Women Voters v. Com.*, 178 A.3d 737, 810 (Pa. 2018) (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)).

## **II. States and localities across the country responsibly follow commonsense procedures to prevent double voting.**

States and localities across the country follow meaningful procedures to prevent voters from double voting. Undeniably, states "have not only an interest in but also an obligation to provide orderly, honest elections." *Johnson v. Hood*, 430 F.2d 610, 613 (5th Cir. 1970). "Measures reasonably calculated to this end, such as the prevention of double voting, are solely within the ambit of State control." *Id.*

Preventing election fraud is a "strong and entirely legitimate state interest[.]" *Brnovich*, 141 S. Ct. at 2340. This is because fraud, like double voting, "can affect the outcome of a close election, and...dilute the right of citizens to cast ballots that carry appropriate weight." *Id.* Understanding this, Congress took steps when passing the Voting Rights Act to preclude double voting in elections. *See* 52 U.S.C. § 10307(e) ("Whoever votes more than once in a[] [federal] election...shall be fined not more than \$10,000 or imprisoned not more than five years, or both."). Because "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters[.]" *Crawford*, 553 U.S. at 196, states and localities abide by effective procedures to preclude ineligible double votes.

According to the National Conference of State Legislators, 32 states and Washington, D.C. prohibit voting twice in the same election, many of which prescribe penalties for voters who attempt to double vote.<sup>2</sup> *See* National Conference of State Legislators, Double Voting (Oct. 25, 2022), <https://www.ncsl.org/research/elections-and-campaigns/double-voting.aspx>. Thirteen states explicitly prohibit voting in more than one state in an election.<sup>3</sup> *Id.* Another seven states prohibit voting twice within the state or for the same office.<sup>4</sup> *Id.* But beyond prescribing penalties for voters who try to double vote or succeed in doing so, states have enacted meaningful procedures that, when followed, prevent double voting from occurring.

For example, in Arizona, voters who request a mail ballot are marked as having received one by election officials. *See* A.R.S. § 16-579(B). Election officials rely on these poll books to identify whether an in-person voter has received and/or

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<sup>2</sup> Alaska (Alaska Stat. § 15.56.040), Arkansas (Ark. Code Ann. § 7-1-103), California (Cal. Elec. Code § 18560), Connecticut (Conn. Gen. Stat. Ann. § 9-360), District of Columbia (DC Stat. § 1-1001.09), Florida (Fla. Stat. Ann. § 104.18), Georgia (Ga. Code Ann. § 21-2-572), Idaho (Idaho Code § 18-2306), Iowa (Iowa Code Ann. § 39A.2), Louisiana (LSA-R.S. 18:101, 1461.2), Massachusetts (M.G.L.A. 56 § 26), Michigan (M.C.L.A. § 168.932a), Minnesota (Minn. Stat. Ann. § 204C.14), Montana (Mont. Code Ann. § 13-35-210), Nebraska (Neb. Rev. Stat. § 32-1534), Nevada (Nev. Rev. Stat. § 293.780), New Jersey (N.J. Stat. Ann. §§ 19:34-11-12), New Mexico (N.M. Stat. Ann. § 1-20-8), New York (N.Y. Election Law § 17-132), North Carolina (N.C. Gen. Stat. Ann. § 163-275), North Dakota (N.D. Stat. § 16.1-01-02), Ohio (Ohio Rev. Code. § 3599.12), Oklahoma (26 Okl. Stat. Ann. § 16-102), Pennsylvania (25 P.S. § 3535), Rhode Island (RH §§ 17-23-4, 17-23-17), South Carolina (S.C. Code §§ 7-15-430, 7-25-110), Tennessee (Tenn. Code Ann. § 2-19-107), Texas (Tex. Code Ann., Election Code § 64.012), Utah (Utah Code Ann. § 20A-1-603), Vermont (17 Vt. Stat. Ann. §§ 1971, 1973), West Virginia (W. Va. Code § 3-9-17), Wisconsin (Wis. Stat. Ann. §§ 6.18, 12.13), and Wyoming (Wy. Stat. § 22-26-106).

<sup>3</sup> Alabama (Ala. Code §§ 17-13-24, 17-17-36), Arizona (Ariz. Stat. § 16-1016), Colorado (Colo. Rev. Stat. § 1-13-710), Kansas (Kan. Stat. Ann. § 25-2416), Kentucky (Ken. Rev. Stat. § 119.165), Maine (21-A M.R.S.A. § 674), Missouri (V.A.M.S. §§ 115.175, 631), New Hampshire (NH Stat. § 659:34-a), Oregon (Ore. Rev. Stat. §§ 260.715, 260.993), South Dakota (S.D. Code § 12-26-8), Virginia (Va. Code Ann. § 24.2-1004), Washington (Rev. Code of Wash. § 29A.84.650), and West Virginia (W. Va. Code § 3-9-17).

<sup>4</sup> Alabama (Ala. Code §§ 17-13-24, 17-17-36), Delaware (15 Del. Code §§ 3166, 5128), Hawaii (Haw. Rev. Stat. § 19-3), Illinois (10 ILCS 5/29-5), Maryland (MD Code, Election Law § 16-201), Mississippi (Miss. Code Ann. § 97-13-35), and West Virginia (W. Va. Code § 3-9-17).

returned a mail ballot. *Id.* If the voter nevertheless desires to vote in person after receiving a mail ballot, they are required by election officials to vote a provisional ballot that is held to the side and not counted until after the election to ensure the voter had not voted by mail. *See id.* Even Arizona voters seeking to vote in person who surrender their mail ballot to election officials on Election Day are still required to vote a provisional ballot unless election officials are using an electronic pollbook or similar system with continuous, real-time updates. *See id.*; *see also* Arizona Secretary of State, Arizona Election Procedures Manual 186 (2019).

Where these real-time voting systems show the voter's mail ballot has not yet been returned, the voter will be authorized to vote in person and the voter's mail ballot, upon receipt, will be canceled. *See* A.R.S. § 16-579(B)(1). Where the real-time system shows the voter's mail ballot has already been returned, the voter will only be allowed to vote by provisional ballot, which will only be counted if for some reason the voter's mail ballot was not returned. *See* A.R.S. § 16-579(B)(2). This system, in every circumstance, prevents the voter's mail ballot and in person ballot from both being counted.

Virginia also has adopted very specific procedures to prevent early/absentee voters from voting more than once—that is, once by mail and again in-person. On the day before Election Day, each local General Registrar is required to compile and submit to the State Board of Elections a list of voters who applied for an absentee

ballot. Va. Code § 710. This list serves as a master list of absentee ballot applicants to cross-check absentee ballot submissions and anyone who might appear to vote in person.

Before the polls open, the officers of election at each precinct must “mark, for each person on the absentee voter applicant list, the letters ‘AB’ (meaning absentee ballot) in the voting record column on the pollbook.” Va. Code § 711. By marking “AB” beside the name of each absentee ballot applicant in the precinct’s pollbook, election officers are able to identify any voter who presents to vote in person who also applied for an absentee ballot. As an additional check on potential double voting, “[t]he chief officer of election shall keep the copy of the absentee voter applicant list in the polling place as a public record open for inspection upon request at all times while the polls are open.” *Id.* This allows partisan election observers to compare the names of absentee ballot applicants—or absentee voters—to the names of voters who present to vote in person to check against double voting.

Similar to Arizona’s process, when a voter applied for an absentee ballot but nevertheless prefers to vote in person, the voter has several options for voting in person, each of which protects against the chance of double voting. First, if the voter appears on or before Election Day at the locality’s central absentee precinct or the office of the local General Registrar with his or her unmarked absentee ballot, the



voter can vote the absentee ballot in person and submit it to the election officials. Va. Code § 24.2-712(C).

Second, if the voter appears at his regular precinct on Election Day and presents his unmarked absentee ballot, he can return that ballot at the precinct, where it will be marked “Spoiled” by an election officer. The election officer scratches through the “AB” notation next to the voter’s name in the pollbook and marks the voter in the pollbook as an in-person voter. The voter is then allowed to cast a regular ballot in person at the precinct. Virginia Department of Elections, Virginia’s What Ifs: What to do when...A complete guide for helping voters with exceptional situations at 27 (July 2020).

Alternatively, if the absentee ballot applicant appears at his regular precinct on Election Day without his absentee ballot, the voter is required to vote a provisional ballot. Va. Code § 24.2-653.1. But even “before being given a printed ballot and permitted to vote the provisional ballot,” Virginia law requires that the voter must first “be required to present to the officer of election a statement signed by him that he did not receive the [absentee] ballot, has lost the ballot, or has not cast the ballot,” again subject to felony penalties for make false statements. *Id.* All of these methods prevent double voting.

Requiring an absentee ballot applicant who does not return his absentee ballot to vote a provisional ballot, instead of a regular ballot, allows election officials to

determine whether the individual actually voted an absentee ballot *before* appearing at the precinct to cast a ballot in person. At a meeting to evaluate provisional ballots the day after the election, the local electoral board will check the absentee voter list to determine if the individual cast an absentee ballot. If he did, then his in-person provisional ballot will not be counted. If his absentee ballot was not received, then the local board will count his in-person provisional ballot. Va. Code § 24.2-653.01. These procedures have been implemented in Virginia for decades, without problems, to protect the integrity of absentee ballots and to prevent double voting.

Procedures like these have not only been effective in preventing double voting, but they have also been upheld against challenges for how they prevent election fraud. *See, e.g., Florida v. U.S.*, 885 F.Supp.2d 299 (D. D. C. 2012); *League of Women Voters of South Carolina v. Andino*, 497 F.Supp.3d 59 (D. S.C. 2020) (upholding South Carolina’s law designed to prevent an absentee ballot voter from casting an absentee ballot and also appearing at the polls to vote on election day because it fulfilled a “compelling state interest in preventing double voting.”).

The Pennsylvania General Assembly also has adopted these procedures. But these procedures will not be adequately followed by the Commissioners in this election due to a gap in marking absentee voters during the week before the election in the regular poll books used by election officers in precincts on election day. Thus, Poll Book Reconciliation is a vital step in Pennsylvania’s procedures to prevent

double voting. Like detailed procedures in other states, it protects the integrity of the process while also ensuring that eligible voters can vote. Commissioners have no choice but to abide by the General Assembly's prescribed rules.

**III. The Pennsylvania General Assembly adopted procedures to prevent double voting, which Commissioners have followed in previous elections.**

The Pennsylvania Constitution requires that “[e]lections shall be free and equal[.]” Pa. Const. art. I, § 5. To further this mandate, the General Assembly has adopted vital provisions to prevent double voting—provisions that Commissioners are required to follow.

Pennsylvania requires election officials to follow similar procedures to those prescribed in Arizona, Virginia, and elsewhere. Where a voter requests a mail ballot, regardless of whether the voter has returned it yet or not, they are marked accordingly in a poll book that election officials reference to determine whether a voter is eligible to vote in person. *See* 25 P.S. § 3150.12b(a)(4). Once the voter's completed mail ballot is received by election officials, it is marked accordingly in the poll book, and the voter is thereby prohibited from also voting in person. *See* 25 P.S. §§ 3146.6(b)(1), 3150.16(b)(1).

Where a voter seeks to vote in person and the poll book shows that they received but have not yet returned their mail ballot, the voter is only allowed to vote by provisional ballot, which will only be counted if and only if the voter's mail ballot

is not returned before the deadline. *See* 25 P.S. § 3146.6(b)(2). A voter can avoid voting by provisional ballot and vote a standard ballot in person only if the voter relinquishes his or her mail ballot to election officials to be spoiled and signs an affidavit affirming the voter has done so. *See* 25 P.S. § 3146.6(b)(3).

Poll Book Reconciliation is a process that has been used by Philadelphia in the past to effectuate the requirements of the Election Code and avoid voters from voting both in person and by mail. Philadelphia is the only county in Pennsylvania that prints its poll books before the mail ballot request deadline; therefore, there exists roughly a one-week gap between when Philadelphia's paper poll books are sent to the printer and the last date when voters can request their mail ballots. In all other counties, officials are able to reference completed poll books that allow them to adhere to the Election Code mentioned above to prevent voters from casting a ballot by mail and in person.

The one-week gap in Philadelphia creates a unique problem, because voters who request a mail ballot in the week after the poll books are sent to the printer will *not* be marked in the poll book as having requested a mail ballot. Therefore, in prior elections, Commissioners directed all mail ballots received during this gap period to be set aside until all in-person votes cast on Election Day were processed. Once these votes were counted, election workers were able to reference the supplemental poll book provided by Commissioners to prevent any returned mail

ballots from being counted where the voter already voted in person. Without the supplemental poll book, these voters could present at the polls on Election Day and vote a regular ballot and still have their mail ballot counted after the election. To prevent such double voting, Philadelphia used the Poll Book Reconciliation process during the canvass to sequester mail ballots that were requested during the week-long gap and confirm that the voters had not voted in person prior to opening the outside envelopes and processing the mail ballots.

Therefore, to capture absentee voters from the week before the election who will not be marked in each precinct's pollbook, Poll Book Reconciliation is a vital process that allows election officials to crosscheck the voter's status in the poll book to determine the voter's eligibility to vote in person. Poll Book Reconciliation will fill the one-week gap in marking absentee voter applications and returns of absentee ballots that otherwise will not be captured in the regular procedures required by statute.

Poll Book Reconciliation is thus a necessary supplement to the procedures prescribed by the General Assembly to prevent double voting from occurring when officials rely on the poll books at the precinct. As a fail-safe, the election code prescribes that where there exists more valid votes than voters—one or more double votes—this shall be investigated and no votes are permitted to be recorded from the jurisdiction until an investigation is conducted to identify the source of the

discrepancy. *See* 25 P.S. § 3154(b). Clearly, however, this did not prevent Commissioners from accepting four double votes in 2020's primary election.

Pennsylvania also prescribes harsh penalties where an elector succeeds in double voting or advises another to do so. *See* 25 P.S. § 3535 (the double voter "shall be guilty of a felony of the third degree, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding fifteen thousand (\$15,000) dollars, or to undergo an imprisonment of not more than seven (7) years, or both, in the discretion of the court."). Clearly, the General Assembly considers double voting to be a serious problem. And while Commissioners intend to refer voters who cast multiple ballots to the District Attorney for prosecution under this statute, doing so in no way prevents double votes from being counted like Poll Book Reconciliation does.

In prior elections, Commissioners utilized Poll Book Reconciliation to prevent double voting, and, as mentioned above, were quite successful in preventing double votes. As detailed in Plaintiffs' Complaint and Petition for a Special Injunction, Commissioners recently decided to abandon this process of ensuring that no one whose mail ballot was requested or returned too late to be reflected on the printed poll book would be able to double vote by appearing to vote in person. They justified this action by claiming that double voting does not occur, despite 40 double votes being prevented in the 2020 election alone, and by claiming that Act 88's requirement of continuous canvassing prevents the reconciliation. Clearly, it is not

Petitioners who seek to change the rules too close to the election. *See* Order Denying Plaintiff’s Motion for Preliminary Injunction (Nov. 7, 2022). Rather, Commissioners waited until the Friday before the election to abandon these procedures.

Because the sole prevention for double voting offered by Commissioners is a post-election referral to the District Attorney for prosecution—long after two votes have been counted in the election for the one voter—Commissioners’ actions risk counting double votes in the 2022 general election and further undermining voter confidence in the electoral process.

**IV. Act 88 neither prevents Poll Book Reconciliation nor absolves Commissioners of their duty under the Election Code to prevent double voting.**

Commissioners are not above the law; rather, Commissioners are required to adhere to the Election Code not only in issuing mail-in ballots to electors who apply to vote by mail but also in receiving and canvassing ballots returned by absentee electors. *See* 25 Pa. Stat. §§ 3146.8, 3150.11–.15. Section 2–112(4) of the Philadelphia Code states: “All the powers, duties and functions of the City Commissioners in their capacity as the County Board of Elections relating to the conduct of primaries and elections shall continue to be exercised by the City Commissioners.” Because Commissioners exercise the same authority as County Boards of Elections, they hold the authority and duties prescribed by the Code. *See* 25 Pa. Stat. §§ 2641–42. As mentioned above, this includes preventing double voting

under the Election Code. Yet Commissioners dodge their mandatory duty under the law by claiming another provision of the law binds their hands—Act 88.

Act 88 was passed by the General Assembly in 2022 to ban private funding in elections and to create a process by which counties may request public funding to aid in administering elections. *See* 25 P.S. § 3260.2A. To receive funding under Act 88, however, counties are required to “begin canvassing mail-in ballots and absentee ballots at 8 p.m. on election day and...*continue without interruption* until each ballot has been canvassed.” 25 P.S. § 3260.2A(j)(2) (emphasis added). Commissioners now seek to evade their mandatory duty under the Election Code to prevent double voting by claiming conducting Poll Book Reconciliation would prevent them from canvassing continuously, and, therefore, jeopardize their funding.

It is absurd to suggest that conducting Poll Book Reconciliation is an interruption in the canvass. The canvass is the entire process of ascertaining which votes should be counted and counting them. The Election Code defines the canvass as “the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots.” *Id.* When requiring that ballots be gathered and counted, the General Assembly did not require that any available ballots be counted regardless of their validity simply so that the canvass could proceed. There is instead a presumption that only valid ballots are gathered



and counted; therefore, the ascertainment of validity is a necessary part of the gathering and counting required in the canvass.

An interruption is “a stoppage or hindering of an activity for a time[;] a break in the continuity of something.” Definition of Interruption, *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/interruption> (accessed Nov. 7, 2022). Far from being a stoppage or break in the continuity of the canvass, Poll Book Reconciliation is a necessary step in the canvass. Determining which ballots must be gathered to be counted so that every valid ballot is counted and no invalid ballots are counted is an essential part of the process of canvassing the votes in the election.

Even if this were not clear, Act 88 is part of the Election Code and must be read in harmony with the Election Code as a whole. *See, e.g., Commonwealth v. Office of Open Records*, 103 A.3d 1276, 1284-85 (2014) (“the principle of construing statutory parts harmoniously is one which is fundamental to our methodology of statutory construction”). It would be illogical for the General Assembly to prohibit procedures that prevent double voting and disallow the ascertainment of any double-voted ballots during the canvass with one hand while proscribing procedures to prevent double voting and harsh penalties for double voting, as described above, with the other hand. A consistent reading of the Election

Code allows, and even encourages, procedures to prevent double voting, such as Poll Book Reconciliation, during the canvass.

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## **CONCLUSION**

For these reasons, this Court should grant Petitioner's request for injunctive relief and compel Commissioners to conduct Poll Book Reconciliation as they have in previous elections to prevent double voting.

Date: November 7, 2022

/s/

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**CERTIFICATE OF COMPLIANCE WITH WORD LIMIT**

I, Linda A. Kerns, hereby certify that the within Brief was prepared in word processing program Microsoft Word (Microsoft Office Professional Plus 2016), and I hereby certify that, as counted by Microsoft Word (Microsoft Office Professional Plus 2016), this Brief contains 5,173 words, excluding the parts of the brief exempted by Pa.R.A.P. 2135(b).

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## **RULE 127 CERTIFICATE OF COMPLIANCE**

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

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