

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

FAITH GENSER and FRANK MATIS,	)	CIVIL DIVISION
	)	
Petitioners,	)	MSD No. 2024-40116
	)	
v.	)	
	)	Hon. Dr. S. Michael Yeager,
BUTLER COUNTY BOARD OF ELECTIONS,	)	President Judge
	)	
Respondent,	)	
	)	
v.	)	
	)	
REPUBLICAN NATIONAL COMMITTEE and	)	
REPUBLICAN PARTY OF PENNSYLVANIA,	)	
	)	
Respondents/Intervenors,	)	
	)	
v.	)	
	)	
PENNSYLVANIA DEMOCRATIC PARTY,	)	
	)	
Respondent/Intervenor.	)	

**PETITIONERS' MEMORANDUM OF LAW  
IN SUPPORT OF ELECTION APPEAL**

Petitioners Faith Genser and Frank Matis ("Petitioners"), qualified registered electors of Butler County, by and through their undersigned counsel, submit this memorandum of law as directed by the Court at the conclusion of the hearing on May 7, 2024.

**I. INTRODUCTION**

This election appeal concerns the decision of the Respondent Butler County Board of Elections ("Respondent" or the "Board") following the April 23, 2024 Primary Election not to count Petitioners' provisional ballots. Specifically, the Board refused to count the provisional ballots cast by Petitioners Genser and Matis, even though they were qualified, registered electors who properly completed and submitted provisional ballots at their polling places on Primary

Election Day, April 23, 2024 (“Election Day”). The Board’s sole basis for refusing to count the provisional ballots was that Ms. Genser and Mr. Matis had previously each returned a mail-in ballot to the Board without enclosing it in a secrecy envelope. The Board rejected those “naked” mail-in ballots, as required by state law, effectively nullifying their attempts to vote by mail. Then, the Board rejected Ms. Genser’s and Mr. Matis’ provisional ballots on the basis that mail-in voters who submit naked ballots have no option to “cure” such a mistake. But regardless of the “curing” policy enacted by a county board in its discretion, the Pennsylvania Election Code has provided provisional ballots for more than two decades as a failsafe to prevent voter disenfranchisement. Thus, by refusing to count Ms. Genser’s and Mr. Matis’ provisional ballots after rejecting their mail-in ballots, the Board deprived Ms. Genser and Mr. Matis of their fundamental right to vote. The Board erred in its decision on both statutory construction grounds and state constitutional grounds.

The Court held an evidentiary hearing on May 7, 2024, at which both Petitioners testified, as did Chantell McCurdy, the Director of Elections for the Butler County Bureau of Elections. The hearing established six facts that form the heart of this case, and about which there is no dispute: (1) Ms. Genser and Mr. Matis submitted mail-in ballots ahead of the April 23, 2024, Primary Election; (2) the Board rejected (i.e., did not count) those mail-in ballots solely because Petitioners failed to enclose their mail-in ballots inside the required secrecy envelope; (3) shortly after receiving these flawed mail-in ballots, the Board entered data into the Pennsylvania Department of State’s statewide voter registration database (the “SURE system”); (4) the SURE system generated an emailed notice to both Petitioners that their mail-in ballots would not be counted, and both Ms. Genser and Mr. Matis received that email; (5) on Election

Day, Ms. Genser and Mr. Matis submitted provisional ballots at their local polling places; and (6) the Board decided not to count those provisional ballots.

With those facts established, all that remains is a legal question: In these circumstances, was the Board required to count Petitioners' provisional ballots? As a matter of statutory construction, or in the alternative as a matter of Pennsylvania constitutional law, the answer is yes.

Last year, the Delaware County Court of Common Pleas considered this identical legal issue and concluded that provisional ballots must be counted in these circumstances. *Keohane v. Del. Cnty. Bd. of Elections*, CV-2023-004458 (Del. Cnty. Ct. Com. Pl. Sept. 21, 2023) (attached to Petition for Review as Ex. 3). Such a result harmonizes the relevant Election Code sections and realizes the General Assembly's intention that provisional ballots act as a safety net to protect the fundamental right to vote. In addition, it ensures the enfranchisement of all the Commonwealth's voters. *See generally Barsfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) ("[T]he right to vote is fundamental and pervasive of other basic civil and political rights.") (internal quotation marks and citation omitted). This Court should reverse the Board's decision and order it to count Petitioners' provisional ballots and to file an amended vote count.

## II. BACKGROUND

The relevant facts are not in dispute. Petitioners Faith Genser and Frank Matis are both qualified electors who are and were at the time of the 2024 Primary Election registered to vote in Butler County, Pennsylvania. Transcript of Testimony of May 7, 2024, ("Tr.")<sup>1</sup> at 139:3-8 (Genser); 86:1-3 (Matis). Respondent Board is the local government agency responsible for overseeing the conduct of all elections in Butler County, including adjudicating and deciding

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<sup>1</sup> Excerpts of the May 7, 2024, hearing transcript are Attachment 1 to this brief.

whether to count provisional ballots in accordance with the Pennsylvania Election Code. *See* 25 P.S. § 2642 (powers and duties of county boards of elections); *id.* § 3050(a.4) (adjudication of provisional ballots); *see also* Tr. at 19:1-7 (McCurdy) (explaining that the Board of Elections delegates the Computation Board to adjudicate provisional ballots); 25 P.S. §§ 3153-3154 (computation of returns)

Initially, Ms. Genser and Mr. Matis both attempted to vote by mail-in ballot ahead of the Primary Election on April 23, 2024. Ms. Genser and Mr. Matis each validly requested, received, and marked their mail-in ballots prior to Election Day. Tr. 139:12-14 (Genser); 86:18-25 (Matis). However, Ms. Genser and Mr. Matis each made a mistake in assembling their mail-in ballot packages for return to the Board by failing to place the ballot inside the required secrecy envelope. Tr. at 60:5-7 (McCurdy); *see also* Tr. 94:15-17 (Matis) (“I made a mistake . . . I wholeheartedly admit that I didn’t put it in the secrecy envelope.”).

Upon receipt of Ms. Genser’s and Mr. Matis’ mail-in ballot packages, the Board screened the ballot packages with a machine and determined that the secrecy envelopes were missing, which would prevent the Board from counting Petitioners’ mail-in ballots under current Pennsylvania law.<sup>2</sup> Tr. 60:8-10 (McCurdy) (confirming that both Petitioners’ mail-in ballots

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<sup>2</sup> When the Board receives mail-in ballots, it runs them through a sorting machine that evaluates the dimensions of the envelope “to make sure that this is in fact an official election envelope with the required materials inside.” Tr. 33:19-25 (McCurdy). When the machine detects a mail-in ballot package that appears to be missing a secrecy envelope, the Board enters the “Canceled – No Secrecy Envelope” code for that ballot into the SURE system. *Id.* 68:1-14. While Ms. McCurdy testified that the Board does not know with certainty that the secrecy envelope is missing until the Computation Board meets and opens the outer envelope, the machine’s determinations were correct that Ms. Genser’s and Mr. Matis’ mail-in ballot packages lacked secrecy envelopes. The process allows the Board to easily verify that a mail-in ballot is lacking a secrecy envelope without opening the ballot to see the individual’s selections. Ms. McCurdy confirmed that the Computation Board checked Petitioners’ mail-in ballots to verify they were missing a secrecy envelope, but that “[n]obody looked at them to see who they voted for.” Tr.

were not counted). The Butler County Bureau of Elections recorded both Petitioners' mail-in ballots into the SURE system as "Canceled – No Secrecy Envelope." Tr. 48:3-4 (McCurdy).

On April 11, 2024, Ms. Genser received an automated email via the Department of State's SURE system that said the following:

After your ballot was received by BUTLER County, it received a new status.

Your ballot will not be counted because it was not returned in a secrecy envelope. If you do not have time to request a new ballot before April 16, 2024, or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.<sup>3</sup>

Mr. Matis received the same email from the SURE system alerting him to the missing secrecy envelope issue. Tr. 87:5-7. Ms. McCurdy testified that the specific language in the email automatically sent to the voter is generated "[d]epending on how [the election office] record[s] it" into the SURE system. Tr. 46:9-14.

Ms. Genser and Mr. Matis each separately called the Butler County Bureau of Elections after receiving the email notification that there was a problem with their mail-in ballot. A Bureau representative told Mr. Matis that he could not fix his mail-in ballot at the office but that he could cast a provisional ballot at his polling place. Tr. 87:25-88:4, 98:9-10 (Matis). Mr. Matis "made the assumption that" his provisional ballot would count based on his telephone conversation with the election official. Tr. 98:13-14 (Matis). Ms. Genser made multiple phone calls to the Butler County elections office in an effort to "rectify" the problem with her mail-in ballot. Tr. 144:13 (Genser). On April 11, the election official, Tom Baker, confirmed to Ms. Genser by phone that she had neglected to include the secrecy envelope. Tr. 144:13-145:1

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65:9-16 (McCurdy); *see also id.* (those naked ballots "have always remained and remain secret" and are "locked in a cabinet in the room that we open all the ballots").

<sup>3</sup> Petitioners' Exhibit D at the May 7, 2024 hearing, attached as Attachment 2; Tr. 142:19-144:8 (Genser).

(Genser). Mr. Baker informed her that she could cast a provisional ballot on Election Day, but he also told her that if she cast a provisional ballot it would not ultimately count. Tr. 150:12-19. Several days later, Ms. Genser called the Butler County election office a second time. She was "extremely confused" and did not "understand the disconnect between [the] State of PA email [and the] Butler County information" that she had received. Tr. 165:16-24. As Ms. Genser told the court, "I am eligible to vote. I made a mistake, and I should be able to fix that mistake." Tr. 150:22-24.

The Butler County Board of Elections, it turns out, does not allow voter mistakes of the type made by Petitioners to be "cured" as part of the "curing" policy the Board adopted for mail-in voters who make mistakes when completing their envelope packet. Butler County's "curing" policy does not permit voters who mistakenly submit a "naked ballot" (i.e., a mail-in ballot not placed within a secrecy envelope) to fix that mistake and have their mail-in ballots counted in the election. The Board's policy *does* permit voters who make mistakes when completing the outer Declaration Envelope (e.g., omitting their signature or the date) to "cure" in either of two ways: by signing an attestation at the election office, or by submitting a provisional ballot on Election Day, in which case the Board will treat the submission of the provisional ballot as the attestation. In both instances, the Board will count the voter's mail-in ballot. Tr. 50:13-21, 60:17-61:4 (McCurdy); *see also* Respondent Intervenor Exhibit 1 ("Butler County Curing Policy").<sup>4</sup> The Board has steps in place to guarantee that it will not count both a mail-in ballot and a provisional ballot from a single voter during a single election. Tr. 61:5-10 (McCurdy).

On Election Day on April 23, 2024, both Mr. Matis and Ms. Genser appeared in person at their respective polling places and properly submitted a provisional ballot, consistent with the

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<sup>4</sup> Attached as Attachment 3.

instructions provided by the Department of State's email and the Butler County elections office. Tr. 148:14-19 (Genser); 87:10-13 (Matis); 60:11-13 (McCurdy); *see also* Tr. 42:16-22 (McCurdy) ("Any voter is always welcome to fill out a provisional ballot at a polling place. We never want to deny them that opportunity."). Mr. Matis had recently had a foot operation and was wearing a "surgical shoe" on Election Day. Tr. 89:19-22 (Matis). But Mr. Matis still made an effort because voting is important to him, and he was "under the impression" that casting a provisional ballot was "the only way" his vote would be counted in that election. Tr. 90:2-4 (Matis). Ms. Genser cast a provisional ballot because "it's my right to vote and have my vote counted." Tr. 169:10-11 (Genser).

On April 26, 2024, the Board, through its designated computation board, reviewed the provisional ballots submitted on Election Day and voted to not count Ms. Genser's and Mr. Matis' mail-in ballots or provisional ballots. Tr. 69:2-16 (McCurdy) (confirming that the provisional ballots submitted by Petitioners were not counted). Ms. McCurdy testified that the Computation Board rejected three ballots in total from voters who had "cast a provisional ballot when they had already turned in an absentee or mail-in ballot that lacked a secrecy envelope." Tr. 25:19-21 (McCurdy); *see also* Petitioners' Exhibit B ("F. Matis Provisional Ballot Search")<sup>5</sup> and Petitioners' Exhibit E ("F. Genser Provisional Ballot Search")<sup>6</sup> (showing Ms. Genser's and Mr. Matis' provisional ballot status as "rejected" because they had already "voted by conventional alternative or absentee/mail-in"). The Board's decision contradicts current Department of State guidance, which makes clear that provisional voting is a failsafe option for mail-in voters who made a disqualifying error when completing their mail-in ballot—regardless

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<sup>5</sup> Attached as Attachment 4.

<sup>6</sup> Attached as Attachment 5.

of the type of defect. See Pa. Dep't of State, *Pa. Provisional Voting Guidance, Version 2.1* at 4 (Mar. 11, 2024) (stating that if a voter's mail-in ballot "was rejected for a reason unrelated to the voter's qualifications and the voter submitted a provisional ballot . . . the provisional ballot shall be counted if the county determines that the voter is eligible to vote."<sup>7</sup>)

This election appeal timely followed the Board's decision not to count Petitioners' provisional ballots.

### III. ARGUMENT

#### A. Legal Standard

This case arises under 25 P.S. § 3157. Under that provision, this Court has "full power and authority to hear and determine all matters pertaining to any fraud or error committed in any election district to which such appeal relates, and to make such decree as right and justice may require." *Id.* § 3157(b).

#### B. A Plain Reading of the Statutory Text Commands that the Board Count Petitioners' Provisional Ballots.

This case can be resolved purely on statutory construction grounds. The legal issue boils down to the proper interpretation of the following two provisions of the Pennsylvania Election Code (emphases added):

- 25 P.S. § 3050(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

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<sup>7</sup> Attached as Attachment 6. The Pennsylvania Department of State agrees that the right thing to do is to count provisional ballots of voters to ensure that voters are heard. It informed each Petitioner by email that "you can go to your polling place on election day and cast a provisional ballot." Petitioners' Exhibit D (Attachment 2). Although the Department's statements on this issue do not bind county boards of elections, they have value as persuasive authorities. The Guidance acknowledges that the Department agrees with the analysis in the *Keohane* decision in Delaware County. Attachment 6 at 4 n.2. The Department's reading of the Election Code, which is within the Department's "sphere of expertise," should be accorded persuasive weight under these circumstances. Cf. *Winslow-Quattlebaum v. Md. Ins. Group*, 752 A.2d 878, 881 (Pa. 2000).



envelope with the signature on the elector's registration form and, if the signatures are determined to be genuine, *shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election.*" (Emphasis added.)

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

The Board's position is that Petitioners "cast" mail-in ballots when they mailed their naked ballots to the Board, and that such mail-in ballots were "timely received" by the Board. Under the Board's interpretation of the above two portions of § 3050(a.4)(5), by timely submitting a naked mail-in ballot, Petitioners surrendered the opportunity to vote by provisional ballot on Election Day, ignoring the fact that Petitioners' attempts to submit a mail-in ballot were unsuccessful because of a procedural defect.

As set forth in more detail below, a plain, commonsense reading of these two provisions would lead to the opposite conclusion. Under this reading, Petitioners never "cast" a mail-in ballot, because the packet of papers they mailed to the Board could not be counted as a vote. Likewise, the Board did not "timely receive[]" a "mail-in ballot" that was capable of being canvassed or counted from either Petitioner because Petitioners' submitted ballots were ineligible to be counted. Thus, Petitioners' mail-in ballot submissions were rejected, their first attempts to vote by mail were nullified, and they retained the right to cast a provisional ballot at their polling places on Election Day.

When interpreting a provision of the Election Code, Pennsylvania's Statutory Construction Act of 1972 instructs that "the polestar of statutory construction is to determine the intent of the General Assembly" and that "the best indication of legislative intent is the plain language of a statute." *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1230 (Pa. 2004) (citations omitted); 1 Pa.C.S. § 1921(a) ("The object of all

interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.”); *id.* § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”).

Here, plainly read, § 3050(a.4)(5) requires the Board to count Petitioners’ provisional ballots after the Board canceled their mail-in ballots. This reading is consistent with the obvious purpose of § 3050(a.4)(5) — to ensure that each voter gets to vote once and only once. By rejecting *both* Petitioners’ mail-in ballot submissions *and* their provisional ballots, however, the Board ensured that Ms. Genser and Mr. Matis did not get to vote at all.

The Delaware County Court of Common Pleas recently considered this precise issue of statutory interpretation. In 2023, the court ordered the Delaware County Board of Elections to count provisional ballots cast by voters who were notified that their mail-in ballots for the Primary Election had been rejected due to disqualifying defects in their mail-in ballot submissions and then to amend the official vote count to include those provisional ballots. *Keohane v. Del. Cnty. Bd. of Elections*, CV-2023-4458 (Del. Cnty. Ct. Com. Pl. Sept. 21, 2023) (attached to Petition for Review as Ex. 3). The material facts were nearly identical to the situation presented here: three qualified, registered, Delaware County voters learned that the local Board of Elections had rejected their mail-in ballots because of a disqualifying defect involving their envelopes. *Id.* ¶ 1.<sup>8</sup> In an attempt to correct the defect, the voters completed provisional ballots at their polling places. *Id.* ¶ 3. The Board of Elections subsequently decided not to count these provisional ballots. *Id.* ¶ 4.

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<sup>8</sup> The defects in *Keohane* involved the “outer” envelopes, which voters are supposed to sign and date, not the inner secrecy envelopes. *See Keohane* at ¶ 1. This distinction is irrelevant to the soundness of *Keohane* and its applicability to naked ballots.

*Keohane* held that a qualified voter who attempted to submit a mail-in ballot to the Board, only to have that attempt rejected due to a disqualifying mistake, cannot sensibly be said to have “cast” a ballot within the ordinary meaning of that word. *Id.* ¶ 9 (“[V]oters who attempted to submit mail-in ballots to the Board and were later notified by the Board that their respective mail-in ballots were defective, cannot be said to have ‘cast’ a ballot.”). Similarly, Black’s Law Dictionary defines “cast” as “[t]o formally deposit (a ballot) or signal one’s choice (in a vote).” *Black’s Law Dictionary* 230 (8th ed. 2004). A voter cannot be said to have “formally deposit[ed]” a ballot when she has made a procedural mistake that results in the Board rejecting her ballot such that her choices of candidates will never be processed or counted.

Here, Ms. Genser’s and Mr. Matis’ mail-in ballot submissions were nullified because they were missing the required secrecy envelope. See *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020) (holding that a voter’s failure to “enclos[e] the ballot in the secrecy envelope renders the ballot invalid”). Although Petitioners *tried to* “cast” mail-in ballots, they failed to do so, and their attempts were rejected by the Board despite timely receipt. Petitioners had in no sense “cast” mail-in ballots where they had submitted a mail-in packet that was not legally permitted to be canvassed or counted.

Nor had the Board “timely received” a “mail-in ballot” from either Petitioner under 25 P.S. § 3050(a.4)(5)(ii)(F), because the ballots submitted by Petitioners were missing the secrecy envelope and, therefore, not eligible to be counted.

The Board’s error in failing to count petitioners’ provisional ballots because of the timely received, but uncountable, naked ballots is underscored by Ms. McCurdy’s testimony about the Board’s peculiar treatment of two other types of voter mistakes. First, she explained that if a voter mails in a ballot without signing or dating the outer envelope, the Board will allow the

voter to cure this mistake by casting a provisional ballot. Tr. 50:13-21 (McCurdy). In other words, the Board believes that a mail-in ballot with a defect involving its outer envelope *has not* yet been “received” when the Postal Service delivers it to the Board; but the Board also believes that a mail-in ballot with a defect involving its inner envelope *has* been irremediably “received” when the Postal Service delivers it to the Board. Second, Ms. McCurdy testified that if a voter mails in an outer envelope containing a properly sealed but empty secrecy envelope, the Board would consider the voter to have submitted a “mail-in ballot” for purposes of § 3050(a.4)(5)(ii)(F), even though the Board had received no ballot at all. *See* Tr. 63:4-64:8 9 (McCurdy). These absurd results are avoided when § 3050(a.4)(5)(ii)(F)’s terminology of “timely received” “mail-in ballot” is interpreted to mean a timely received ballot that is not rejected and is legally permitted to be counted and included in the county’s vote totals.

The affidavit the voter signs at the polling place for a provisional ballot supports this interpretation. The individual affirms that “this is the only ballot that I cast in this election.” 25 P.S. § 3050(a.4)(2). A voter who receives a notification that her naked mail-in ballot will not be counted, and that she can request a new ballot or “cast a provisional ballot,” has a good-faith belief that she has not “cast” a ballot in the election. That is because the commonsense and plain reading of this section of the Election Code obligates the Board to count a properly submitted provisional ballot after the Board has segregated and canceled the voter’s defective mail-in ballot.

Petitioners’ mail-in ballot status is similar to that of a Butler County elector at a polling place who makes a mistake on her ballot. For example, in Butler County, when an in-person voter selects too many candidates (an “overvote”) and then inserts her ballot into the scanning machine, the machine detects the mistake, informs the voter, and gives the voter the option to

either confirm the submission or to take the ballot back. Tr. 62:9-18 (McCurdy). If the voter takes back the ballot, she may give it to poll workers so they can spoil it and give her a replacement ballot. Tr. 62:18-63:3 (McCurdy). In other words, the attempt to “cast” a ballot, even in-person, is not complete until it is irretrievably deposited into the scanner. Likewise, a mail-in ballot should not be considered “cast” until it is irretrievably deposited into the scanner for tabulation. When the Board has decided not to tabulate Petitioners' mail-in ballots, those ballots cannot be considered “cast.”

**C. The Relevant Election Code Sections Are Readily Harmonized.**

The obvious, commonsense purpose of § 3050(a.4)(5)(i) and § 3050(a.4)(5)(ii)(F) is to prevent double voting. If a voter's legally sufficient mail-in ballot arrives at the Board by the deadline, and the voter also submits a provisional ballot at the polling place, then the provisional ballot must not be counted, because that would constitute double voting. Counting provisional ballots from voters whose mail-in ballots are rejected, like Petitioners, is standard practice in most Pennsylvania counties and introduces no risk of double voting. See *Keohane* at ¶ 10 (“[T]he Board has safeguards in place to prevent double voting in this situation.”).

Should there be any ambiguity in the interplay of those two provisions, Pennsylvania law demands that they should be read harmoniously to give effect to both provisions and should be construed in a way that does not nullify or exclude another provision. The *Keohane* court followed this principle, analyzing the two Election Code provisions that relate to “casting a provisional ballot following an unsuccessful attempt to cast a mail-in” ballot. *Keohane* at ¶ 5. The court held that to the extent there is any ambiguity between § 3050(a.4)(5)(i) and § 3050(a.4)(5)(ii)(F), Pennsylvania law “demands that statutory provisions be read harmoniously to give effect to both . . .” *Id.* ¶ 7 (citing *In re Borough of Downingtown*, 161 A.3d 844, 871 (Pa. 2017) (noting that when two statutory provisions can be read as harmonious or in conflict, courts

should construe them as in harmony with each other)); *see also Commonwealth v. Office of Open Records*, 103 A.3d 1276, 1284 (Pa. 2014) (noting that “the principle of construing statutory parts harmoniously is one which is fundamental to our methodology of statutory construction”); *Cozzone v. Workers’ Comp. Appeal Bd.*, 73 A.3d 526, 536 (Pa. 2013) (holding “as a fundamental principle” that statutory parts “are not to be construed as if one part operates to nullify, exclude or cancel the other . . . . ‘[I]f they can be made to stand together[,] effect should be given to both as far as possible.’” (citations omitted)).

The mandatory counting provision of § 3050(a.4)(5)(i) is easily harmonized with § 3050(a.4)(5)(ii)(F): if the Board receives and rejects or cancels a defective mail-in ballot package, no “mail-in ballot” legally capable of being counted has been “timely received” by the Board, and no ballot has yet been “cast” by the voter. To be “timely received” and “cast,” a “mail-in ballot” must be eligible for counting. *Cf., e.g., State ex rel. Colvin v. Brunner*, 896 N.E.2d 979, 989 (Ohio 2008) (“[A]n elector who submits an absentee ballot does not actually vote at an election until the ballot is tabulated on election day.”), *abrogated on other grounds by TWISM Enters., L.L.C. v. St. Bd. of Registration for Prof’l Eng’rs & Surveyors*, 223 N.E.3d 371 (Ohio 2022).

This construction is also consistent with the provisions of the Election Code that allow for provisional voting by a citizen who has requested a mail-in ballot but not returned it by 8:00 PM on Election Day. For example, if a voter obtains a mail-in ballot, fills it out, and drops it in a mailbox on the Monday before Election Day, he may reasonably fear that the Postal Service might not deliver his mail-in ballot to the Board until Wednesday. In this circumstance, if he goes his polling place on Election Day, the district register (*i.e.*, pollbook) will show that he is ineligible to vote using an ordinary in-person ballot and scanner, because he has been sent a

mail-in ballot that might be timely received by the Board. He would be allowed to fill out a provisional ballot instead. 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 [§ 3050(a.4)(1)].”); *id.* § 3146.6(b)(2) (similar language for absentee ballots).

Under Petitioners’ (and *Keohane’s*) interpretation of the Election Code, this voter’s mail-in ballot would count if it arrived at the Board by 8:00 PM on Election Day and complied with all the rules; if not, his provisional ballot would count. Under the Board’s more bizarre interpretation of the Election Code, if the voter sent in a naked mail-in ballot that arrived by the deadline, neither the mail-in nor the provisional ballot would count, but if the naked ballot arrived on Wednesday, the provisional ballot would count. *Tr.* at 64:9-65:8 (McCurdy). A table illustrates the absurdity of the Board’s theory about counting a mail-in ballot (“MIB”):

Petitioners: Which Ballot Counts?

	<i>MIB arrives Tuesday</i>	<i>MIB arrives Wednesday</i>
<i>MIB has secrecy envelope</i>	MIB	Provisional
<i>MIB is naked</i>	Provisional	Provisional

Board: Which Ballot Counts?

	<i>MIB arrives Tuesday</i>	<i>MIB arrives Wednesday</i>
<i>MIB has secrecy envelope</i>	MIB	Provisional
<i>MIB is naked</i>	Neither	Provisional

In other words: under the Board’s theory, if a voter submits a mail-in ballot that is naked but on time, he may not cast a provisional ballot; but if a voter makes **two** mistakes by sending in a naked ballot **and** doing so tardily, he may cast a provisional ballot. *See generally* 1 Pa.C.S. § 1922(1) (statutory construction presumption “[t]hat the General Assembly does not intend a result that is absurd”); *In re Nomination Papers of Lahr*, 842 A.2d 327, 333 (Pa. 2004) (noting that courts should be “mindful of the requirements of liberal construction of the [Election] Code, and the duty to avoid unreasonable or absurd constructions”).

Finally, it is worth noting that there is no practical reason, from an election administration perspective, for adopting the Board's strained reading of the relevant Election Code provisions. As Judge Whelan confirmed in *Keohane*, rejecting both the mail-in ballot and the provisional ballot in these circumstances is not necessary to prevent double voting, as the Delaware County Board in that case had "safeguards in place to prevent double voting in this situation." *Keohane* at ¶ 10. The Butler County Board has similar procedural safeguards to ensure that neither Ms. Genser nor Mr. Matis had more than one vote counted in the election including protocols to (1) examine the mail-in ballots for defects and notify the affected individuals (Tr. at 48:3-16 (McCurdy); Petitioners' Exhibit D (Attached as Attachment 2)), (2) segregate defective mail-in ballots and not count them (Tr. at 21:6-23 (McCurdy); *id.* Tr. at 22:10-16 (McCurdy)), and (3) adjudicate provisional ballots by confirming whether the individual has successfully submitted another vote in the election and had that ballot counted (Tr. at 60:17-61:10 (McCurdy); *id.* at 50:13-21 (McCurdy)). Indeed, Butler County's election director Ms. McCurdy confirmed that the office has procedures in place to guarantee that no voter "accidentally has two different votes counted" in the same election. Tr. 61:5-10.

**D. This Court Should Liberally Construe the Election Code to Save Petitioners' Votes.**

Here, there is no conflict between the statutory provisions when read in context, but to the extent any question remains about the meaning of various parts of § 3050(a.4)(5), this Court must construe them liberally in favor of the constitutional right to vote. As *Keohane* stated in ordering the Delaware County Board to count the petitioners' provisional ballots:

It is the longstanding and overriding policy in this Commonwealth to protect the elective franchise. The Election Code must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice. It is therefore a well-settled principle of Pennsylvania election law that every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.



*Keohane* at ¶ 8 (quoting *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1071 (Pa. 2020)). And as the Pennsylvania Supreme Court held in *League of Women Voters of Pennsylvania v. Commonwealth*:

In accordance with the plain and expansive sweep of the words “free and equal,” we view them as indicative of the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.

178 A.3d 737, 804 (Pa. 2018) (discussing the Free and Equal Elections Clause, Pa. Const. Art. I, § 5). Consistent with this fundamental right, the Pennsylvania Supreme Court has long held that “[t]he disfranchisement of even one person validly exercising his right to vote is an extremely serious matter. . . [E]ither an individual voter or group of voters are not to be disenfranchised at an election except for compelling reasons.” *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964) (internal quotation marks omitted).

Following principles firmly established by controlling opinions of the Commonwealth’s highest court, if the Election Code lends itself to two possible interpretations, courts must choose the one that enfranchises voters rather than disenfranchises them. “In construing election laws . . . [o]ur goal must be to enfranchise and not to disenfranchise.” *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972); *see also, e.g., Shambach v. Bickhart*, 845 A.2d 793, 798-802 (Pa. 2004); *Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954) (“Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage.”).

Ms. Genser and Mr. Matis are well-meaning citizens who tried but failed to exercise their right to vote by mail. After the Board notified them that their defective mail-in ballots would not count, they cast provisional ballots. There is no risk of double counting and no conceivable harm

to the voting process. The only harm here is to Ms. Genser's and Mr. Matis' constitutional right to vote. In such circumstances, the constitutional imperative is to interpret the Election Code in favor of enfranchising voters. *See Shambach*, 845 A.2d at 802-03 (noting that, where the procedure does "not undermine the efficiency of the voting system or make it possible for voters to cast more than one vote," the statute should be "liberally construed" in favor of the voter).

**E. No Case Law Stands in the Way of Counting Petitioners' Provisional Ballots.**

Respondent Butler County Board of Elections and Republican Party Intervenors have pointed to two cases that they mischaracterize as controlling. One of these cases, *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) ("*PDP*"), addressed a completely different issue and is not relevant to the disposition of this case. The other, *In re Allegheny County Provisional Ballots in the 2020 General Election*, 1161 CD 2020, 2020 WL 6867946 (Pa. Commw. Ct. Nov. 20, 2020), is an unreported opinion that this Court need not and should not follow.

**1. *Pennsylvania Democratic Party v. Boockvar* Is Inapposite.**

In *PDP*, the Pennsylvania Supreme Court held that county boards of elections are "not required to implement a 'notice and opportunity to cure' procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly," because the Election Code is silent on such procedures. 238 A.3d at 374. *PDP* did not consider whether the *statutory* provisions for provisional ballots require counties to count provisional ballots cast by voters who submitted mail-in ballots with errors, such as a missing secrecy envelope. That is the issue now before this Court. In contrast to the legislative silence about curing mail-in ballots themselves, the General Assembly has unambiguously spoken about casting provisional ballots. *PDP*, therefore, is inapposite.

**2. *In re Allegheny County* is Nonprecedential and Wrongly Decided.**

*In re Allegheny County* does not bind this Court or the Board because it is not precedential by the Commonwealth Court's own rules. The heading above the opinion's caption states that it is an "Unpublished Disposition" and that it is not reported. 2020 WL 6867946, at \*1. It is "well-settled that unpublished decisions from [the Commonwealth] Court are not binding." *DeGrossi v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing*, 174 A.3d 1187, 1191 (Pa. Commw. Ct. 2017); accord Internal Operating Procedures of the Commonwealth Court Of Pennsylvania, at § 69.414(a) (providing that unreported panel decisions of the Commonwealth Court may be cited for "persuasive value, but not as binding precedent"). Thus, while the litigants themselves in the *In re Allegheny County* action were bound to follow the Commonwealth Court's decision, that decision has no precedential effect elsewhere, the issuing court's rules preclude future parties from citing it as binding precedent, and neither the Board nor this Court need follow its ruling.<sup>9</sup>

Nor does *In re Allegheny County*'s cursory review of the provisional ballot issue hold significant persuasive value. In that case, the Commonwealth Court engaged chiefly with two other questions concerning provisional ballots, and mentioned the question at issue in this case in only one short paragraph, in which it noted that a "small number of provisional ballots" implicated this question. 2020 WL 6867946 at \*4. The panel's reasoning is reproduced here in full:

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<sup>9</sup> No inference can be drawn from the Pennsylvania Supreme Court's denial of the petition for allowance of appeal with respect to *In re Allegheny County*, see 242 A.3d 307 (Pa. 2020) (Table), since there are any number of reasons why the Supreme Court may decide not to take up a discretionary appeal. See, e.g., *Salazar v. Allstate Ins. Co.*, 702 A.2d 1038, 1043 n.10 (Pa. 1997) (noting that "the fact that this court denied allowance of appeal in [lower court cases] is no indication of our endorsement of the reasoning used by the [lower] Court in those matters").

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

*Id.* The panel ignored that § 3050(a.4)(5)(i) requires that a provisional ballot be counted if “the individual did not cast any other ballot, including an absentee ballot, in the election.” The panel did not explain how receipt of a defective ballot package could constitute “timely” receipt of a valid “mail-in ballot.” Nor did the panel explain how the defective mail-in ballot package could not constitute a “ballot” for purposes of being counted while counting as a timely received “ballot” for purposes of depriving the voters of their right to cast a provisional ballot.

There is no conflict between the relevant portions of § 3050, and as Petitioners have explained *supra*, there is no difficulty in harmonizing these two provisions to protect the franchise. The court in *In re Allegheny County* made no attempt to reconcile these provisions. The purpose of § 3050 is to allow election boards to count provisional ballots as long as they do not result in double voting. The provisional ballot is a failsafe option for voters who might otherwise have no vote counted at all. *See, e.g.*, 25 P.S. § 3050(a.2) (permitting provisional ballots where the voter cannot produce proof of identification or where that proof is challenged). This Court should construe the Election Code in accordance with the General Assembly’s obvious intent to prevent double voting and allow Petitioners’ ballots to be counted.

Finally, *In re Allegheny County* is flawed for the additional reason that it failed to give due weight to the constitutional imperative to uphold the right to vote. As Petitioners have discussed, courts must construe any ambiguity in the Election Code to enfranchise not disenfranchise. *See, e.g., Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954) (“Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed

as to insure rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.” (quotation marks and citation omitted)).

**F. In the Alternative, the Court Should Rule for the Petitioners on State Constitutional Grounds.**

This case can and should be decided as a matter of statutory interpretation. However, if the Court does not find for Petitioners on statutory grounds, it should rule in their favor under Article I, Section 5 of the Pennsylvania Constitution, which guarantees that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Under this guarantee,

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

*League of Women Voters*, 178 A.3d at 804.

The Pennsylvania Constitution requires the Board to demonstrate a compelling interest to justify its policy to not count provisional ballots intended to cure mail-in ballots missing a secrecy envelope, because such action will disenfranchise voters. *See Perles*, 202 A.2d at 540 (“[E]ither an individual voter or a group of voters are not to be disenfranchised at an election except for compelling reasons.”); *see also Shambach*, 845 A.2d at 801-02 (the Pennsylvania Election Code “must be liberally construed to protect voters’ right to vote”). Pennsylvania constitutional law forbids boards of elections from restricting the right to vote when a regulation denies the franchise or “make[s] it so difficult as to amount to a denial.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914); *see also DeWalt v. Bartley*, 24 A. 185, 186 (Pa. 1892) (“The test is

whether such legislation denies the franchise, or renders its exercise so difficult and inconvenient as to amount to a denial”); *In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) (noting that “the right to vote” is “fundamental”), *overruled on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016).

As set forth above, the Board has not and cannot demonstrate a compelling interest to justify disenfranchising Petitioners and similarly situated voters, especially since the Board follows the Pennsylvania Election Code and already has an adequate solution—the existing provisional ballot process—that would protect their fundamental right to vote. In particular, the Board’s Policy that mail-in voters can cure a mail-in ballot for missing a signature or date, but not for missing a secrecy envelope, is unnecessary and arbitrary, and therefore it unconstitutionally burdens Petitioners’ fundamental rights to vote guaranteed by the Pennsylvania Constitution.

#### **IV. CONCLUSION**

For the reasons set forth above, Petitioners respectfully request that the Court enter an order reversing the decision of the Butler County Board of Elections, declaring that the Pennsylvania Election Code, or in the alternative the Pennsylvania Constitution, requires the Board to count Petitioners’ provisional ballots cast in the Primary Election on April 23, 2024, and ordering the Butler County Board of Elections to file an amended vote count with the Pennsylvania Department of State.

Respectfully submitted,

Dated: June 28, 2024

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**CERTIFICATE OF COMPLIANCE**

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.

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**CERTIFICATE OF SERVICE**

I hereby certify that I am serving upon counsel listed below a true and correct copy of  
this **PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF ELECTION APPEAL**  
in the above-captioned matter this 28th day of June, 2024, by electronic mail:

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