

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 C.D. 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 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

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).

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

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.

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 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 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

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

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

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.

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).

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.*;

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.

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 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 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

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.

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.

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.

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 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 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.

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

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 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

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.

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

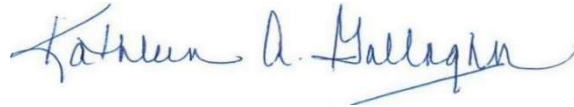
The Commonwealth Court’s Memorandum Opinion flies in the face of this Court’s binding precedent in *Pa. Dems.* and improperly writes new provisions into the Election Code, amounting to improperly legislating from the bench. In conjunction with the Secretary’s non-statutory, non-regulatory authorized 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.

September 8, 2024

Respectfully submitted,



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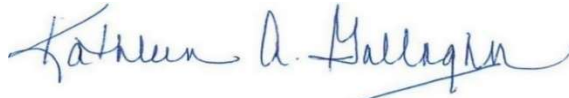
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CERTIFICATION OF WORD COUNT

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

Kathleen A. Gallagher

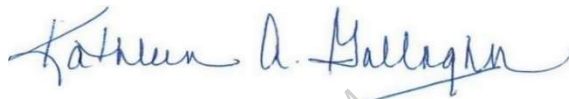
Counsel for Petitioners

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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

Kathleen A. Gallagher

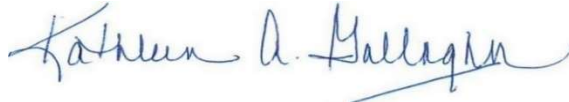
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CERTIFICATE OF SERVICE

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

Kathleen A. Gallagher

Counsel for Petitioners

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