

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA

FAITH GENSER and FRANK MATIS,	:	CIVIL DIVISION
	:	
Petitioners,	:	No. 24-40116
	:	
v.	:	<i>ELECTION APPEAL</i>
	:	
BUTLER COUNTY BOARD OF	:	
ELECTIONS,	:	
	:	
Respondent.	:	

**BRIEF IN OPPOSITION TO PETITION
FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL**

INTRODUCTION

At its core, this matter is nothing more than an attempt by Petitioners to have this Court do what the Pennsylvania Supreme Court has said it cannot do; mandate that a county board of elections permit a voter to cure a mail ballot that the voter failed to place in a secrecy envelope. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (hereinafter "*Pa. Dems.*").¹ In fact, granting Petitioners' requested relief would require the Court to disregard *two* controlling holdings of the Pennsylvania Supreme Court.

First, the Pennsylvania Supreme Court has held that the secrecy envelope requirement is "mandatory" such that a voter's failure to comply with it "renders the ballot invalid." *Id.* at 380. This holding flows from the plain text of the Election Code, which mandates that a voter who votes by mail "shall ... enclose and securely seal the" completed ballot in the secrecy envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). This secrecy envelope requirement implements the Pennsylvania Constitution's directive that "secrecy in voting be preserved," Pa. Const. art. VII § 4, and

¹ This Brief uses "mail ballot" to refer to both absentee ballots, see 25 P.S. § 3146.6, and mail-in ballots, see *id.* § 3150.16.

contributes to the integrity of Pennsylvania's elections by guaranteeing that election officials who open mail ballots will not be able to discern "who the [voter] is, with what party he or she affiliates, or for whom the [voter] has voted," *Pa. Dems.*, 238 A.3d at 378.

Second, the Pennsylvania Supreme Court has also held that a voter has no constitutional, statutory, or legal right to cure a defective mail ballot. *See id.* at 372-74. Indeed, neither the Free and Equal Elections Clause (Pa. Const. art. I, § 5) nor the Election Code confers such a right. *See id.* at 374. To the contrary, the decision whether and in what form to allow curing presents "open policy questions," including "what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots." *Id.* Thus, the Pennsylvania Supreme Court has held that any decision to mandate curing for mail ballot defects is "for the Legislature," not Pennsylvania courts. *Id.* The General Assembly has not mandated curing for mail ballot defects, let alone for secrecy envelope defects, *see id.* at 372-80, so this Court may not either, *see id.* at 374.

Pennsylvania law is therefore clear: Petitioners' ballots are "invalid" because Petitioners failed to place them in secrecy envelopes, and this Court lacks authority to order the Butler County Board of Elections ("the Board") to permit Petitioners to cure that failure. *See id.* at 374, 380. Petitioners' various efforts to avoid this result misconstrue the Election Code, the Pennsylvania Constitution, and—belatedly now as well—the U.S. Constitution. For all of these reasons, and as explained more fully below, the Court should dismiss Petitioners' appeal and enter judgment against Petitioners.

FACTUAL AND PROCEDURAL BACKGROUND

Following *Pa. Dems.*, many county boards of elections have declined to permit curing for mail ballot defects, while other county boards have decided to permit curing.² The Board adopted a curing policy (“the Policy,” attached as **Exhibit A**) for the 2024 primary elections. See Hr’g Tr. 48:24-53:11. The Policy permits voters to cure defects on the “Declaration Envelope”—the outer envelope into which the Election Code directs voters to place the sealed secrecy envelope containing the completed mail ballot. See Exhibit A Part III; see also 25 P.S. §§ 3146.6(a), 3150.16(a). The voter is required to “fill out, date, and sign” the declaration on the Declaration Envelope, 25 P.S. §§ 3146.6(a), 3150.16(a), so it is “deficiencies” in filling out, dating, and signing the Declaration Envelope that the Policy permits voters to cure, see Exhibit A Part III. The Policy does not permit voters to cure secrecy envelope defects, including failure to include a secrecy envelope. See Exhibit A, Part III; Hr’g Tr. 50:13-51:22.

Because Declaration Envelope deficiencies are obvious from the face of the Declaration Envelope, election officials can discover them merely by looking at it; they do not need to open the Declaration Envelope to discover them. See 25 P.S. §§ 3146.6(a), 3150.16(a); Exhibit A, Part III; Hr’g Tr. 50:13-51:22. Thus, there is no risk that election officials reviewing Declaration Envelopes for deficiencies will be able to associate the voter with the voter’s ballot. See 25 P.S. §§ 3146.6(a), 3150.16(a); Exhibit A, Part III; Hr’g Tr. 50:13-51:22. In other words, election officials can review Declaration Envelopes for deficiencies without invading “secrecy in voting,” Pa. Const. art. VII § 4, or discerning “who the [voter] is, with what party he or she affiliates, or for whom the [voter] has voted,” *Pa. Dems.*, 238 A.3d at 378.

² Intervenor-Respondents do not concede that county boards of elections have authority to permit voters to cure mail ballot defects. That question is not implicated here given the narrow issues before the Court.

By contrast, secrecy envelope deficiencies can be confirmed only by opening the Declaration Envelope to determine whether the secrecy envelope is present. *See, e.g.*, 25 P.S. §§ 3146.6(a), 3150.16(a). *See also* Hr'g Tr., 21:12-22:9, 25:22-26:3, 34:19-36:6, 49:17-51:22. But where a Declaration Envelope is opened and no secrecy envelope is present, election officials have in hand only two documents: a Declaration Envelope displaying the voter's name (and other information) and a ballot (called a "naked ballot" because it was not contained in a secrecy envelope, *see* Pet. ¶ 2 n.2). *See, e.g.*, 25 P.S. §§ 3146.6(a), 3150.16(a). Elections officials therefore can discern "who the [voter] is [and] or for whom the [voter] has voted," *Pa. Dems.*, 238 A.3d at 378, and "secrecy in voting" has not been "preserved," Pa. Const. art. VII § 4; *see* Hr'g Tr. 26:14-20, 36:3-6.

The Election Code prohibits election officials from opening Declaration Envelopes until 7 a.m. on Election Day. *See* 25 P.S. §§ 3146.8(g)(1.1); 3146.8(g)(4)(i)-(iii); *see also id.* § 2602(q.1). Prior to that time, election officials may not even "inspect" mail ballots they have received from voters. *See id.* § 2602(q.1). Instead, they have only one task with respect to such ballots: they "shall safely keep the ballots in sealed or locked containers." *Id.* § 3146.8(a).

Petitioners Faith Genser and Frank Matis ("Petitioners") cast mail ballots for the 2024 primary elections but admit that they did not place them in secrecy envelopes. *See* Pet., ¶ 2. They later attempted to cure this defect by casting provisional ballots in person. *See id.* The Board declined to count those ballots consistent with the Policy. *See id.*

On April 29, 2024, Petitioners filed their Petition for Review in the Nature of a Statutory Appeal in this Court, seeking to overturn the Board's decision not to count their provisional ballots. *See* Pet., ¶¶ 2-3. Petitioners cast their provisional ballots *after* they cast their mail ballots and *after* the Board received those ballots. They were prompted to cast provisional ballots by an automated

email notice from the Pennsylvania Department of State. See Pet., Ex. 1 (Genser Dec.), at ¶¶ 8-12; Ex. 2 (Matis Dec.), at ¶¶ 8-11. That automated notice informed them that their mail ballots will not be counted because of the missing secrecy envelope, and—contrary to the Policy—stated that they could cure this defect by casting a provisional ballot. See Pet., Ex. 1 (Genser Dec.), at ¶¶ 8-12; Ex. 2 (Matis Dec.), at ¶¶ 8-11; Hr’g Tr. 48:-49:16.

At the time the email was sent, however, the Board had not opened Petitioners’ Declaration Envelopes. Hr’g Tr., 48:24-53:11. Instead, the Board used a machine that analyzes the thickness of returned Declaration Envelopes to predict whether they contained a secrecy envelope. Hr’g Tr., 33:10-36:6. This method thus provided no *actual* confirmation that a secrecy envelope was missing. See Hr’g Tr., 21:12-22:9, 25:22-26:3, 34:19-36:6, 48:24-53:11.³

The Court granted Intervenor-Respondents the Republican National Committee and the Republican Party of Pennsylvania (collectively, “Republican Committees”) intervention on May 7, 2024. That same day, the Court held a hearing, at which both Petitioners, as well as Chantell McCurdy, the Director of Elections for the Butler County Bureau of Elections, testified. See Hr’g Tr., *generally*. Following the hearing, the Court requested cross-briefing from the parties on the Petition for Review.

³ Use of a machine (see Hr’g Tr. 33:19-34:18) or a window on a Declaration Envelope to predict whether a secrecy envelope may be missing prior to opening the Declaration Envelope is, itself, a violation of the Election Code. Indeed, any action undertaken to predict whether a secrecy envelope is present prior to opening the Declaration Envelope constitutes an unlawful pre-canvass “inspection” of the mail ballot. 25 P.S. § 2602(q.1); see *id.* §§ 3146.8(g)(1.1); 3146.8(g)(4)(i)-(iii). Moreover, disclosure of any prediction that a secrecy envelope is present or missing—including by notice to the voter—is a disclosure of “the result of any portion of any pre-canvass prior to the close of the polls,” which the Election Code expressly prohibits. *Id.* § 3146.8(g)(ii)(1.1); see also Hr’g Tr. 50:3-12. The Court need not resolve these issues to decide this case, but Intervenor-Respondents expressly preserve their position on them.

LEGAL STANDARD

The standard for reversing a decision of a county board of elections is a strict one: the county board may be reversed “only for an abuse of discretion or error of law.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1070 (Pa. 2020) (citing *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952)); see also 25 P.S. § 3157(b) (confining Court of Common Pleas’ review of decision of board of elections to matters involving “fraud or error”). In reviewing the decision of a board of elections, “[i]t is not the function of [the trial] court to substitute its judgment for that of the board’s. . . [the trial court is] bound to uphold the decision of the board unless it is in violation of the law.” *Lower Saucon Twp. v. Election Bd. of Northampton Cty.*, 27 Pa. D. & C.3d 387, 393 (Northampton C.P. 1983).

ARGUMENT

For three critical and independent reasons, Petitioners failed to carry their heavy burden of showing that the Board committed an abuse of discretion or error of law when it enforced the Policy and declined to permit Petitioners to cure their admitted secrecy envelope defects.

First, Petitioners’ admitted secrecy envelope defect rendered their mail ballots “invalid,” and Pennsylvania law does not grant them a right to cure that defect. See *Pa. Dems.*, 238 A.3d at 372-80. This Court lacks the authority to order the Board to permit Petitioners to cure their mail ballots. See *id.* at 374.

Second, Petitioners’ attempt to read a right to cure via provisional ballot into the Election Code contravenes the Code’s plain text and the authoritative precedents construing it.

Third, the Pennsylvania Constitution and the U.S. Constitution foreclose Petitioners’ claim to a right to cure not provided by the General Assembly.

Thus, as explained more fully below, Petitioners' statutory appeal fails and should be dismissed.

A. The Pennsylvania Supreme Court's Decision In *Pa. Dems.* Forecloses Petitioners' Claim.

The Pennsylvania Supreme Court's decision in *Pa. Dems.* conclusively forecloses Petitioners' appeal from the Board's action. The petitioner in *Pa. Dems.* asserted both that the Election Code's secrecy envelope rule is not mandatory and that the Pennsylvania Constitution and the Election Code grant voters a right to cure defective mail ballots. *See* 238 A.3d at 372-80. The Pennsylvania Supreme Court rejected both assertions—and, in so doing, clarified that only “the Legislature,” not Pennsylvania courts, may mandate that county boards of elections permit curing of defective mail ballots and the terms of any curing policies. *Id.* at 374.

First, the *Pa. Dems.* petitioner argued that the General Assembly's secrecy envelope rule was not mandatory, but instead that the Pennsylvania Constitution and the Election Code require county boards to “count” rather than “invalidate” naked ballots. *Id.* at 374. The petitioner asserted that because there is no express provision in the Election Code “authorizing [county boards] to discard” a naked ballot, county boards are prohibited from doing so. *Id.* at 375. It further argued that discarding naked ballots violates “the right of electors to have their votes counted under the Free and Equal Elections Clause.” *Id.* at 376.

The Pennsylvania Supreme Court rejected those arguments. *See id.* at 378-80. It determined that the General Assembly's use of the term “shall” in describing the voter's obligation to use a secrecy envelope rendered the secrecy envelope requirement “mandatory.” *Id.* at 378. It also declined to hold that the secrecy envelope requirement violates the Pennsylvania Constitution. *See id.* at 378-80. It therefore confirmed that a failure to comply with the requirement “renders the ballot invalid” such that it may not be counted. *Id.* at 380.

Second, the *Pa. Dems.* petitioner sought “to require [county boards] to contact qualified [voters] whose [mail] ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail, and provide them an opportunity to cure those defects.” *Id.* at 372. The petitioner rested this claim “on its assertion that the multi-stepped process for voting by [mail] ballot inevitably leads to what it describes as minor errors” by voters who fail to comply with all of the requirements. *Id.* The petitioner argued that the Free and Equal Elections Clause confers a right to cure on mail voters. *See id.*

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

The Pennsylvania Supreme Court again rejected the petitioner’s claim. *See id.* at 373-74. The court pointed out that there is “no constitutional or statutory basis” to require county boards to permit curing of defective mail ballots. *Id.* at 374. It further reasoned that “[w]hile the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.” *Id.* Thus, it was left to the Legislature to decide whether to invalidate mail ballots based on “minor errors made in contravention of th[e] requirements” for completing them or to provide a right to cure such errors. *Id.*

The Pennsylvania Supreme Court thought this holding was “particularly” appropriate “in light of the open policy questions attendant to that decision, including what the precise contours

of the [curing] procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots.” *Id.* Those questions “are best left to the legislative branch of Pennsylvania’s government”—so Pennsylvania courts may not mandate that county boards offer curing or set the parameters of boards’ curing policies. *Id.*; see also Hr’g Tr. 46:17-47:9.

Pa. Dems. is dispositive here: Petitioners’ naked ballots are “invalid,” they have no “constitutional or statutory” right to cure those ballots, and the Court lacks authority to order the Board to permit them to cure the ballots. *Id.* at 374, 380. For this reason alone, the Court should dismiss Petitioners’ appeal and enter judgment against them. *See id.*

Petitioners agree that *Pa. Dems.* “means” that the Board “cannot count a naked ballot.” Pet. ¶ 60. However, they attempt to get around *Pa. Dems.* by arguing that it did not hold that “voters who return naked mail[] ballots are forbidden to cure the error.” *Id.* ¶ 59. But even if that were true, it is beside the point: regardless of whether curing is *forbidden*, *Pa. Dems.* makes clear that voters have no *right* to cure and, thus, that Pennsylvania courts cannot *order* county boards to permit them to cure. *See* 238 A.3d at 373-74; *see also* *Republican Nat’l Comm. v. Chapman*, No. 447 M.D. 2022, 2022 WL 16754061, at *4, 21 (Pa. Commw. Ct. Sept. 29, 2022) (suggesting, in the absence of legislative action mandating curing procedures, county boards, not state courts, have discretion to craft curing policies); Hr’g Tr. 46:17-47:9. Accordingly, the Board committed no “abuse of discretion or error of law” in declining to permit Petitioners to cure their naked ballots. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d at 1070; *see also* 25 P.S. § 3157(b). That is the end of Petitioners’ appeal.

B. The Election Code Prohibits Petitioners from Curing by Provisional Ballot.

This Court may not “ignore the clear mandates of the Election Code.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004) (citing *In re Nomination Petition of Gallagher*, 359 A.2d 791, 792 (Pa. 1976)) (“[W]e cannot permit a resort to sophistry in an effort to avoid the clear mandates of the Election Code.”); *see also Ball v. Chapman*, 289 A.3d 1, 26 (Pa. 2023). “When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. C.S. § 1921(b).

The Election Code’s “clear mandate,” *In re Canvass of Absentee Ballots of Nov. 4, 2023 Gen. Election*, 843 A.2d at 1231, is that Petitioners have no right to cure their naked ballots *at all*, let alone by provisional ballot, *Pa. Dems.*, 238 A.3d at 374. Petitioners’ various attempts to read a right to cure by provisional ballot into the Election Code all fail.

1. The Election Code Does Not Permit Petitioners to Cure by Provisional Ballot.

When the General Assembly has wanted to authorize use of provisional voting, it has expressly identified the circumstances for such use in the Election Code. But the General Assembly has not authorized the use of provisional voting to cure mail ballot defects, including secrecy envelope defects. *See Pa. Dems.*, 238 A.3d at 373-74. Its silence is dispositive: provisional voting may not be used to cure mail 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).

The Election Code authorizes the use of provisional voting in only limited circumstances, none of which applies here. *See, e.g.*, 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); *Pa. Dems.*, 238 A.3d at 375 n.28. Curing a defect in a mail ballot is *not* one of those circumstances. *See, e.g.*, 25 P.S. §§ 3050(a.2), 3050(a.4)(1). 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.” *Pa. Dems.*, 238 A.3d at 373-74. Therefore, this Court may not order the Board to count Petitioners’ provisional ballots, and Petitioners’ appeal fails. *See id.*; *see also Discovery Charter Sch.*, 166 A.3d at 321.

Moreover, to the extent the Election Code permits a voter who requested a mail ballot to vote by provisional ballot, that permission is of no help to voters who, like Petitioners, submit naked ballots which are timely received by the county board. The Commonwealth Court so held when it was presented with the precise question raised in this case: whether mail voters may cure secrecy envelope defects via a provisional ballot. *In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 (table), 2020 WL 6867946, at *4 (Pa. Commw. Ct. 2020). In particular, the Election Code provides that a would-be mail voter “may vote by provisional ballot” in the narrow circumstance where the voter “requests a [mail] ballot [but] is not shown on the district register as having voted.” 25 P.S. §§ 3146.6(b)(2), 3150.16(b)(2); *see also id.* §§ 3146.6(b)(1); 3150.16(b)(1) (“The district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place.”). This could occur, for example, if the voter never received the mail ballot after requesting it or never completed or returned it to election officials. *See, e.g., id.* §§ 3146.6(b)(2), 3150.16(b)(2).

At the same time, the Election Code (in subclause (ii) of § 3050(a.4)(5)) declares that a provisional ballot “shall not be counted” in any circumstance where the voter’s mail ballot “is

timely received by the county board of elections.” *Id.* § 3050(a.4)(5)(ii)(F); Pet. ¶ 62. This language is “unambiguous.” *In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election*, 2020 WL 6867946, at *4. Thus, the Commonwealth Court held that a provisional ballot submitted by a voter whose naked mail ballot is timely received “shall not be counted.” *Id.*

Like the Commonwealth Court, this Court is “not at liberty to disregard the clear statutory mandate that the provisional ballots to which this language applies must not be counted.” *Id.* Even Petitioners acknowledge that, under subclause (ii) of § 3050(a.4)(5), “the law prohibits counting provisional ballots if ‘the [voter’s] absentee ballot or mail-in ballot is timely received by the county board of elections.’” Pet. ¶ 62 (quoting 25 P.S. § 3050(a.4)(5)(ii)(F)). Petitioners’ own declarations, moreover, confirm that their ballots were timely received by the Board because Petitioners received the Secretary’s automated email notice prior to 8 p.m. on Election Day. *See* Pet., Ex. 1 (Genser Dec.) ¶ 11; Ex. 2 (Matis Dec.) ¶ 9; *see also* 25 P.S. §§ 3146.06(c), 3150.16(c). Petitioners’ provisional ballots, therefore, “shall not be counted.” 25 P.S. § 3050(a.4)(5)(ii). For this reason as well, Petitioners’ appeal fails.

2. Petitioners’ Proposed Construction of the Election Code is Erroneous.

Petitioners propose a two-step alternative construction of the Election Code, *see* Pet. ¶¶ 62-66, but it fails at each step. At the first step, *see id.* ¶ 63, Petitioners point to subclause (i) of 25 P.S. § 3050(a.4)(5), which states:

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

25 P.S. § 3050(a.4)(5)(i) (emphasis added). Invoking this subclause, Petitioners argue that *every* voter who has not “cast any other ballot” is entitled to cast a provisional ballot and have that provisional ballot counted. *See* Pet. ¶¶ 63-66.

Petitioners build upon this premise at their second step, where they argue that their mail ballots were not “cast” within the meaning of subclause (i) or “timely received” because, in their view, a naked ballot is “not a ballot that can be tabulated.” Pet. ¶ 64. In other words, Petitioners contend that subclause (i) authorizes every voter who requests a mail ballot to vote by provisional ballot unless the county board of elections previously received a “*valid*” mail ballot from that individual. *Id.* ¶ 66 (emphasis added).

For at least five reasons, Petitioners’ proposed two-step construction fails. *First*, Petitioners ignore the express exception in the first six words of subclause (i). That exception specifies that even in the narrow circumstances subclause (i) addresses, it applies only “[e]xcept as provided in subclause (ii).” 25 P.S. § 3050(a.4)(5)(i). Subclause (ii), in turn, is the provision discussed above declaring that, in all events, “[a] provisional ballot shall not be counted if the elector’s absentee or mail-in ballot is timely received by a county board of elections.” *Id.* § 3050(a.4)(5)(ii)(F) (emphasis added). Petitioners have acknowledged the validity of subclause (ii)’s prohibition on counting provisional ballots. *See* Pet. ¶ 62.

Petitioners are thus entirely correct that subclauses (i) and (ii) are “readily harmonized,” *id.* ¶ 64, but they strike exactly the wrong harmony for the relief that Petitioners seek. By its plain terms, subclause (i) has no application where subclause (ii) applies. *See* 25 P.S. § 3050(a.4)(5)(i). Here, because Petitioners’ mail ballots were “timely received” by the Board, subclause (ii) directs that they “shall not be counted,” regardless of anything in subclause (i). *Id.* § 3050(a.4)(5)(ii); *see*

also, Hr'g Tr. 42:9-43:5. Petitioners may try to run, but they cannot hide from the plain text of the subclause they cite.

Second, Petitioners are also incorrect when they suggest that subclause (i) permits *every* voter who has not “cast any other ballot” to cast a provisional ballot and have that ballot counted. See Pet. ¶¶ 63-66. Section 3050—of which subclause (i) is part—authorizes provisional voting in narrow circumstances that have nothing to do with mail voting at all, let alone with curing mail ballot defects. See 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). So even if subclause (ii) did not overrule subclause (i), subclause (i) would still be inapplicable to Petitioners, who claim a right to cure their naked ballots through provisional voting not recognized in the Election Code, § 3050, or subclause (i) itself. Indeed, no provision of the Election Code authorizes provisional voting in Petitioners’ circumstances, and this Court may not either. See, e.g., *Pa. Dems.*, 238 A.3d at 374; *In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election*, 2020 WL 6867946, at *4; see also *Discovery Charter Sch.*, 166 A.3d at 321.

Third, even if Petitioners had offered a defensible reading of subclause (i), they are wrong when they contend that their naked ballots were not “cast” or “timely received” because those ballots were not “valid.” Pet. ¶¶ 64-66. The Election Code makes clear that “casting” the ballot is done *by the voter*, while “receiving” the ballot and then canvassing it to determine whether it is valid are done *by the county board*. The Election Code further establishes that a voter “casting” a ballot occurs separate from—*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 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 cast 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 ballots specify that a board may not determine mail ballots’ 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 Election Code establishes a three-step sequence for mail voting: (1) first, the voter casts his or her ballot; (2) next, the county board receives the ballot; and (3) finally, the board canvasses the ballot to determine its validity and whether to count it. *See id.* § 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 at 1067 (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”). Petitioners’ suggestion that a mail ballot is not “cast” unless and until the board determines it is valid is irreconcilable with the Election Code’s plain text and should be rejected for that reason alone. *See* 1 Pa. C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all its provisions.”); 1 Pa. C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”).

The Pennsylvania Supreme Court’s decision in *Pa. Dems.* underscores that “casting” 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, the Pennsylvania Supreme 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” before election officials receive it and determine its invalidity (and even before its invalidity existed). See, e.g., 238 A.3d at 375. And when it addressed the secrecy envelope requirement, the Pennsylvania Supreme Court 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, fn. 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); compare 52 U.S.C. § 10101(e) (listing “casting a ballot” and “having such ballot counted” as distinct “steps”).

The Election Code’s plain text and other authorities thus make clear that Petitioners “cast” their mail ballots by sending those ballots to the Board, and that the Board timely received their ballots prior to Election Day—*regardless* of whether those ballots were “valid.” Pet. ¶ 66. Petitioners’ appeal therefore fails.

Fourth, Petitioners’ lone cited case, *Koehane v. Delaware County Board of Election*, No. CV-2023-004458 (Del. Cnty. Ct. Common Pleas Sept. 21, 2023), see Pet. ¶ 70; Pet. Ex. 3, is unpersuasive and inapposite. For one thing, Judge Whelan believed there is “ambiguity” between subclauses (i) and (ii), Pet. Ex. 3 at 3 ¶ 7, but no such ambiguity exists due to subclause (i)’s express

exception, *see supra* p. 13. For another, Judge Whelan concluded that subclause (i) provides a right to cure a mail ballot defect by provisional ballot, *see* Pet. Ex. 3 at 2 ¶ 5, but that, too, is incorrect, *see supra* pp. 10-11. Thus, Judge Whelan's conclusion that defective mail ballots that were timely received had not been "cast," Pet. Ex. 3 at 3 ¶ 9, was incorrect and irreconcilable with the plain terms of the Election Code and the authorities noted above, *see supra* pp. 14-15. And Judge Whelan rested his decision at least in part on the fact that the Delaware County Board's policy allows voters to cure for the defects in the mail ballots at issue in that case, *see* Pet. Ex. 3 at 3-4 ¶¶ 11-13, but here the Board's Policy does *not* permit *any* curing for secrecy envelope defects, *see* Exhibit A Part III.

Finally, the Secretary's automated email notice and online guidance stating that voters have a right to cure mail ballot defects, *see* Pet. ¶ 67; May 7 Hr'g, Pet'rs' Ex. D, are of no moment. "[T]he Secretary has no authority to definitively interpret the provisions of the Election Code." *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d at 1078 n.6; Hr'g Tr. 55:12-14. The Secretary obviously has no authority to *change* the law—and, thus, lacks authority to announce a right to cure mail ballot defects when the Pennsylvania Supreme Court has determined that no such "constitutional or statutory" right exists. *Pa. Dems.*, 238 A.3d at 374.

Moreover, the Election Code vests authority to administer elections and to determine whether to count ballots in county boards of elections, not the Secretary. *Compare* 25 P.S. § 2642 (setting out county boards' expansive powers), *with id.* § 2621 (setting out Secretary's limited powers). Indeed, the "Secretary does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely on the County Boards." *Republican Nat'l Comm. v. Schmidt*, No. 447 M.D. 2022, slip op. at 20 (Pa. Commw. Ct. Mar. 23, 2023) (attached as **Exhibit B**).

Accordingly, “under Pennsylvania law, the Secretary’s pre-election guidance is just that—guidance. County boards of election ultimately determine what ballots to count or not count in the first instance.” *Zicarelli v. Allegheny Cnty. Bd. of Elections*, 2:20-cv-1831-NR, 2021 WL 101683, at *5 n.6 (W.D. Pa. Jan. 12, 2021); see also *Republican Nat’l Comm.*, Exhibit B at 13-14, 18-22; Hr’g Tr., 53:13–55:14 (establishing that Secretary’s guidance is not binding upon county boards). Indeed, the Secretary has *admitted* to lacking authority to direct county boards in their administration of elections, to direct boards to follow guidance from the Secretary, or even to direct boards to comply with a court order. See *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *10 (Pa. Commw. Ct. Aug. 19, 2022) (Secretary acknowledging that he “does not have authority to direct the Boards to comply with [a court order]”); Pa. House of Representatives, State Gov’t Comm. Hearing, *In re: Election Oversight Pennsylvania Department of State’s Election Guidance*, (Jan. 21, 2021), at 23-25 (previous Secretary acknowledging that a Secretary’s guidance is not binding), available at <https://tinurl.com/4wxjvd4c>.

The Secretary’s automated email notice and guidance therefore cannot, and do not, change the law, much less create a right to cure mail ballot defects by provisional ballot where no such right exists under Pennsylvania law. The Board’s decision not to count Petitioners’ provisional ballots was lawful, and Petitioners’ statutory appeal fails.

C. There is No Proper Pennsylvania or Federal Constitutional Basis for Petitioners’ Statutory Appeal.

As an apparent failsafe, Petitioners argue that the Policy violates the Free and Equal Elections Clause, see Pet. ¶¶ 75-78, and—belatedly at the hearing—the Equal Protection Clause of the U.S. Constitution. See Hr’g Tr., 134:10–135:1. Both arguments are unavailing.

1. The Policy Does Not Violate the Free and Equal Elections Clause.

Petitioners' effort to shoehorn their appeal into the Free and Equal Elections Clause, *see* Pet. ¶¶ 75-78, fails. Petitioners have made clear that they "do not challenge the decision of the Board not to count their original naked mail-in ballots, but" instead only "the decision not to count the provisional ballots." Hr'g Tr., 7:11-17. Yet Petitioners never explain *how* they could have a right to cure their secrecy envelope defects through provisional voting in light of *Pa. Dems.* and the General Assembly's decision not to create any such right. *See* Pet. ¶¶ 75-78; *Pa. Dems.*, 238 A.3d at 373-74.

Nor could they, had they tried. *Pa. Dems.* forecloses Petitioners' contention that the Board's decision violates the Free and Equal Elections Clause. After all, the Pennsylvania Supreme Court declined to invalidate the secrecy envelope rule under the Clause, *see* 238 A.3d at 376-80, and expressly held that the Clause does not confer a right to cure mail ballot defects, *see id.* at 372-74; *see also supra* pp. 7-9. And it did not end there: the Pennsylvania Supreme Court made clear that "[w]hile the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate to the Legislature," not the Judiciary. *Pa. Dems.*, 238 A.3d at 374.

Accordingly, the decision whether, and on what terms, to mandate curing of mail ballot defects is "left to the legislative branch of government." *Id.* This Court, therefore, may not wield the Free and Equal Elections Clause to mandate that the Board provide *any* curing not enacted by the General Assembly, including the curing Petitioners seek here. *See id.* at 373 (The Free and Equal Elections Clause "cannot create statutory language that the General Assembly chose not to provide"); *id.* (Clause "does not enable courts to rewrite the Election Code to align with a litigant's notion of good election policy").

This holding flows from the Clause's plain text and history, as well as the authoritative precedent construing it. The Clause's mandate that "[e]lections shall be free and equal," Pa. Const. art. I § 5, serves an important but cabined role. The Clause guarantees that all Pennsylvania voters "have the same free and equal *opportunity* to select [their] representatives." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018) (emphasis added). This equal *opportunity* guarantee does not guarantee that all voters will *avail* themselves of the opportunity. It therefore does not *exempt* voters from having to comply with the neutral ballot-casting rules the General Assembly enacts to govern how voters complete and cast their ballots, such as the secrecy envelope requirement, curing rules, or provisional voting rules. *See id.*; *see also Pa. Dems.*, 238 A.3d at 372-80. Instead, it guarantees that all voters will be *subject to* the same ballot-casting rules and will enjoy "equally effective power to select the representatives of [their] choice" so long as they "follow[]" those rules. *Pa. Dems.*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809).

The Policy therefore comports with the Free and Equal Elections Clause. It grants every Butler County voter "the same free and equal opportunity to select his or her representatives." *League of Women Voters*, 178 A.3d at 814. The Policy allows *all* Butler County voters to cure Declaration Envelope defects, and *no* Butler County voters to cure secrecy envelope defects. *See* Exhibit A Part III. It therefore guarantees all Butler County voters will enjoy "equally effective power to select the representatives of [their] choice" so long as they follow the General Assembly's ballot-casting rules for completing and casting their ballots. *Pa. Dems.*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809); *Mixon v. Com.*, 759 A.2d 442, 449 (Pa. Commw. Ct. 2000) ("Legislation may be enacted which regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself.") (quoting *Winston v. Moore*, 91 A.

520 (Pa. 1914)); *see also Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 133-34 (3d Cir. 2024) (holding that a neutral mail-in ballot requirement did not “den[y] . . . the right to vote”).

Indeed, the Pennsylvania Supreme Court has *never* invalidated any of the General Assembly’s ballot-casting rules under the Free and Equal Elections Clause. And none of the three narrow circumstances in which the Pennsylvania Supreme Court has held that the Clause may operate to invalidate a voting rule is applicable to the Policy.

First, the Clause prohibits arbitrary voter-qualification rules that disqualify *classes* of citizens from voting, *League of Women Voters*, 178 A.3d at 807 (Clause achieves “universal suffrage” by “prohibiting exclusion from the election process of those without property or financial means”), but the Policy does not pertain to voter qualifications.

Second, the Clause prohibits intentional discrimination against voters based on social or economic status, geography of residence, or religious or political beliefs, *id.* at 807-09, but the Policy does not do that either.

Third, the Clause invalidates a rule that “makes it so difficult [to vote] as to amount to a denial” of “the franchise,” *id.* at 810, but the Policy also does not do that. *A fortiori*, because the secrecy envelope rule is mandatory and valid (as Petitioners do not challenge, *see Hr’g Tr.*, 7:11-17 and as held by the Supreme Court in *Pa. Dems.*), then so, too, is the Policy. After all, the secrecy envelope rule itself does not “make[] it so difficult [to vote] as to amount to a denial” of “the franchise,” *League of Women Voters*, 178 A.3d at 810, so the Policy’s enforcement of that rule without an opportunity to cure does not do so either. Indeed, if a ballot-casting rule *itself* does not violate the Free and Equal Elections Clause, then, logically, a failure to permit a cure for not following that rule does not violate the Clause. *See id.*; *see also Pa. Dems.*, 238 A.3d at 373-74.

Petitioners' various suggestions that the Policy violates the Clause are unavailing. For example, they suggest the Policy violates the Clause by "disenfranchis[ing]" them because their ballots will not be counted. Pet. ¶ 76. But a rule does not violate the Free and Equal Elections Clause merely because it results in a ballot not being counted. Otherwise, the Pennsylvania Supreme Court could not have upheld the secrecy envelope rule itself in *Pa. Dems.* See 238 A.3d at 373-74. Moreover, application of mandatory ballot-casting rules to decline to count noncompliant ballots does not "disenfranchise" anyone. See, e.g., *Winston*, 91 A. at 522; ("Legislation may be enacted which regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself."); *Mixon*, 759 A.2d at 449 (same); see also *Rosario v. Rockefeller*, 410 U.S. 752, 757-78 (1973) (neutral rules regulating how voters register and cast their ballots do not "disenfranchise[]" anyone, even when they result in ballots not being counted).

Petitioners' own cited cases do not establish otherwise. In one, the Pennsylvania Supreme Court recognized that election officials must decline to count ballots that are "invalid" under state law—and that "disenfranchise[ment]" occurs only when election officials do not count ballots that "have not been shown to be invalid." *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (1964) (cited at Pet. ¶ 76). The other is a statutory construction case, not a constitutional case, so it says nothing about application of the Free and Equal Elections Clause to the Policy. See *Shambach v. Bickhart*, 845 A.2d 793, 801-02 (Pa. 2004) (cited at Pet. ¶ 76). And neither says *anything* about a "compelling interest," much less that the Board must demonstrate such an interest here. See Pet. ¶ 76.

Finally, to the extent Petitioners suggest the Policy is "arbitrary" because it permits curing for Declaration Envelope defects but not secrecy envelope defects, see Pet. ¶ 78, that suggestion is of no moment under the Free and Equal Elections Clause. After all, the Policy and its various

rules apply equally to *all* Butler County voters, so it accords all Butler County voters “the same free and equal opportunity to select [their] representatives”—which is all the Clause guarantees. *League of Women Voters*, 178 A.3d at 814. And, as explained below, *see infra* Part C.2, Petitioners are wrong because the Policy is not arbitrary. The Court should deny Petitioners’ appeal.

2. The Policy Does Not Violate Equal Protection Clause of the U.S. Constitution.

Petitioners did not mention the Equal Protection Clause in their Petition, *see* Pet., but they invoked it at the hearing, *see* Hr’g Tr., 134:10–135:1. This invocation fails as well because the Policy complies with the Equal Protection Clause.

“The Equal Protection Clause does not forbid classifications,” but rather “keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike”). Thus, there is no Equal Protection violation if the differential treatment occurs between groups of persons who are not “alike in all relevant aspects.” *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3d Cir. 2008) (internal quotation marks and citation omitted). Accordingly, “[t]o prevail on [their] equal protection claim, [Petitioners] must show that the Government has treated it differently from a *similarly* situated party *and* that the Government’s explanation for the differing treatment does *not* satisfy the relevant level of scrutiny.” *Real Alts., Inc. v. Sec’y Dep’t of Health & Hum. Servs.*, 867 F.3d 338, 348 (3d Cir. 2017) (emphasis in original).

The Policy is neutral on its face and applies equally to all Butler County voters. *See* Exhibit A Part III. It permits *all* Butler County voters to correct Declaration Envelope defects, and *no*

Butler County voters to correct secrecy envelope defects. *See id.* It therefore does not treat Butler County voters “differently” from each other. *Nordlinger*, 505 U.S. at 10.

Petitioners’ argument that the neutral, evenhanded Policy somehow violates Equal Protection fails for two main reasons. *First*, Petitioners have failed to show that the Policy “treat[s] differently persons who are in all relevant aspects alike.” *Id.* Voters like Petitioners who fail to include a secrecy envelope are not “similarly situated” to voters who make an error on a Declaration Envelope. *Real Alts., Inc.*, 867 F.3d at 348. Secrecy envelope defects and Declaration Envelope defects are fundamentally different, not similar. Those defects involve different parts of the ballot. A secrecy envelope defect allows election officials to discern “who the [voter] is, with what party he or she affiliates, or for whom the [voter] has voted,” *Pa. Dems.*, 238 A.3d at 378, and therefore infringes “secrecy in voting” in contravention of the Pennsylvania Constitution, Pa. Const. art. VII § 4. By contrast, a Declaration Envelope defect is evident from the face of the Declaration Envelope, does not permit election officials to discern who the voter is and who they voted for, and therefore does not jeopardize secrecy in voting. Voters who commit secrecy envelope errors and voters who commit Declaration Envelope errors therefore are not “alike in all relevant aspects,” and Petitioners’ Equal Protection argument fails. *Startzell*, 533 F.3d at 203.⁴

Second, even if Petitioners were correct that voters who commit secrecy envelope errors and voters who commit Declaration Envelope errors are similarly situated, the Policy “satisf[ies]

⁴ Nor are mail voters—including voters who commit secrecy envelope errors—similarly situated to in-person voters who commit “overvote[s]” that can be corrected at the polling place, as Petitioners suggested at the hearing. Hr’g Tr. 136-37. “Absentee voting” and mail voting are “a fundamentally different process from in-person voting, and [are] governed by procedures entirely distinct from in-person voting procedures.” *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) (citations omitted). Indeed, the Policy applies *only* to voters who vote by mail, not to in-person voters. That in-person and mail voters are subject to different rules reflects precisely that they are *not* similarly situated. *See, e.g., id.* Indeed, even federal law draws a distinction between in-person voting and mail voting: the Help America Vote Act (HAVA) directs that in-person voting systems shall “provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted,” but includes no such requirement for absentee or mail voting. 52 U.S.C. § 21081(a)(1)(ii) (emphasis added).

the relevant level of scrutiny.” *Real Ads.*, 867 F.3d at 348. The U.S. Supreme Court has reserved heightened scrutiny (such as strict scrutiny) for laws that draw classifications between two groups of similarly situated persons for two scenarios: the alleged classification “categorizes on the basis of an inherently suspect characteristic” or “jeopardizes exercise of a fundamental right.” *Nordlinger*, 505 U.S. at 10. Neither applies to the Policy, so rational basis scrutiny governs.

In the first place, voters who commit secrecy envelope errors are not a “suspect class.” *Biener v. Calio*, 361 F.3d 206, 214-15 (3d Cir. 2004). Suspect classes involve such factors as “race, alienage, or national origin,” “gender,” or “illegitimacy”—factors that “generally provide[] no sensible ground for differential treatment” or “reflect prejudice and antipathy.” *City of Cleburne*, 437 U.S. at 440-41. Mail voters who commit secrecy envelope errors simply do not fit the bill because the Policy does not treat them differently based upon any suspect factor. Indeed, such voters are not a “‘discrete and insular’ group . . . in need of ‘extraordinary protection from the majoritarian political process,’” *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 1938)), so heightened scrutiny cannot be justified on that basis.

In the second place, regulations on absentee and mail voting, such as the Policy, do not implicate “fundamental rights.” *Biener*, 361 F.3d at 214-15. Of course, the right to vote is fundamental. Pennsylvania law guarantees that fundamental right because it allows all voters to vote in person—and all Butler County voters can vote in person without implicating the Policy. *See, e.g.*, 25 P.S. § 2811. But there is no fundamental right to vote by mail, and no fundamental right to cure a defective mail ballot. *See, e.g., Pa. Dems.*, 238 A.3d at 373-74. If there were, then the Pennsylvania Supreme Court would have been *required* to mandate curing in *Pa. Dems.*, not to leave that issue “for the Legislature.” *Id.* at 374.

Indeed, courts construing the Equal Protection Clause have made clear that “there is no constitutional right to an absentee ballot” or to mail voting. *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-05 (5th Cir. 2020). Instead, absentee and mail voting are conveniences “designed to make voting more available to some groups who cannot easily get to the polls” and, thus, “do not themselves deny . . . the exercise of the franchise.” *McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802, 807-08 (1969). After all, if there were a fundamental right to vote by mail, then Pennsylvania was in material breach of the Equal Protection Clause until 2019, when the General Assembly first enacted universal mail voting in Act 77. Merely to state that proposition is to prove the conclusion.

The Policy applies only to mail ballots—and, on Petitioners’ theory, only to mail voters who instead could have chosen to vote in person—and therefore does not implicate a fundamental constitutional right. *See id.*; *Mays*, 951 F.3d at 792; *Tex. Democratic Party*, 961 F.3d at 403-05. And “[t]hat a law or state action imposes some burden on the right to vote does not make it subject to strict scrutiny.” *Donatelli v. Mitchell*, 2 F.3d 508, 513 (3d Cir. 1993) (citing relevant U.S. Supreme Court precedent); *accord Burdick v. Takushi*, 504 U.S. 428, 433-34 (applying rational basis review to Hawaii’s prohibition on right in voting); *In the Matter of Nomination Petition of Berg*, 712 A.2d 340, 342-43 (Pa. Commw. Ct. 1998) (applying rational basis review). Thus, at most, rational basis scrutiny applies to the Policy. *See Nordlinger*, 505 U.S. at 10.

The Policy passes rational basis scrutiny with flying colors. Rational basis review “is [a] highly deferential standard of review” and “the challenged classification must be upheld ‘if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” *Donatelli*, 2 F.3d at 513 (quoting *FCC v. Beach Communications, Inc.*, 113 S.Ct. 2101 (1983)). “As the Supreme Court [] has emphasized, rational-basis review under the Equal

Protection Clause 'is not a license for courts to judge the wisdom, fairness or logic of legislative choices.'" *Id.* at 515. "The state decision-makers need not actually articulate the purpose or rationale supporting the classification; nor does the state have any obligation to produce evidence to sustain the rationality of its decision." *Id.*

Rational basis review accords a "strong presumption of validity" to the challenged action. *Id.* A challenger thus "bears the heavy burden of overcoming the presumption that there exists a rational relationship between the statute and a legitimate governmental interest." *Berg*, 712 A.2d at 342.

The ultimate question here, therefore, is whether the Policy's treatment of secrecy envelope defects "rationally further[s] a legitimate state interest." *Norrlinger*, 505 U.S. at 11. It clearly does: as explained, the decision not to allow curing for secrecy envelope defects preserves "secrecy in voting" as required by the Pennsylvania Constitution, Pa. Const. art. VII § 4, because it ensures that election officials do not determine the validity of a ballot with knowledge of "who the [voter] is [and] for whom the [voter] has voted." *Pa. Dems.*, 238 A.3d at 378. Declaration Envelope defects do not present the same risk of election officials making validity determinations with such knowledge and, thus, permitting curing of such defects does not jeopardize "secrecy in voting." Pa. Const. art. VII § 4; *see also* Hr'g Tr. 26:14-20. Petitioners cannot prove that the Policy's differential treatment of secrecy envelope defects and Declaration Envelope defects "is wholly irrational." *Brian B. ex rel. Lois B. v. Pa. Dep't of Educ.*, 230 F.3d 582, 586 (3d Cir. 2000). Their federal Equal Protection argument fails.

CONCLUSION

The Court should dismiss Petitioners' appeal and enter judgment against Petitioners.

Dated: June 28, 2024

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

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

Dated: June 28, 2024

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