

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

Nos. 26 WAP 2024 and 27 WAP 2024

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

Petitioners/Appellees,

v.

BUTLER COUNTY BOARD OF ELECTIONS

Respondents/Appellants,

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

Intervenors/Appellants.

PRINCIPAL BRIEF OF APPELLANTS

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

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STATEMENT OF JURISDICTION

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

ORDER IN QUESTION

The Commonwealth Court's order states: "AND NOW this 5th day of September 2024, the order of the Court of Common Pleas of Butler County is REVERSED. The Butler County Board of Elections is ORDERED to count the provisional ballots cast by Appellants Faith Genser and Frank Matis in the April 23, 2024 Primary Election." Appendix ("App.") Ex. A at A.36.

SCOPE OF REVIEW AND STANDARD OF REVIEW

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

STATEMENT OF THE QUESTIONS INVOLVED

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

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

SUGGESTED ANSWER: Yes.

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

SUGGESTED ANSWER: Yes.

STATEMENT OF THE CASE

A. The Election Code's Requirements For Mail Ballots And Provisional Ballots

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

The Election Code further requires that a mail voter seal the secrecy envelope in an outer envelope and “fill out, date, and sign the declaration printed on” the outer envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). There is no dispute that the signature requirement is mandatory, and this Court has upheld the date requirement as mandatory. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2022); *Pa. Democratic Party*, 238

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

A.3d at 372-74; *see also Black Political Empowerment Project v. Schmidt*, No. 68 MAP 2024 (Pa. Sept. 13, 2024, Sept. 19, 2024); *Pa. State Conf. of NAACP Branches v. Sec’y*, 97 F.4th 120 (3d Cir. 2024). For a mail ballot to be counted, the voter must return the completed mail-ballot package—consisting of a ballot sealed in a secrecy envelope, inside an outer envelope with a completed declaration—in time for it to “be received in the office of the county board of elections no later than 8 o’clock P.M. on the day of the primary or election.” *Id.* §§ 3146.6(c), 3150.16(c).

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

The Election Code also does not confer a general right on voters to cast a provisional ballot and have it counted. Rather, Pennsylvania law confers a right to cast a provisional ballot and have it counted in only limited circumstances. *See Pa. Democratic Party*, 238 A.3d at 375 n.28. Those circumstances include, for example, a voter who is unable to produce required identification at the polling place, *see, e.g.*, 25 P.S. § 3050(a.2), or whose registration to vote cannot be verified, *id.*

§ 3050(a.4)(1). They also include the scenario where a voter “request[s] a [mail] ballot [but] is not shown on the district register as having voted,” such as because the voter never returned their mail-ballot package to the county board. *Id.* §§ 3146.6(b)(2), 3150.16(b)(2). The Election Code, however, unambiguously directs: “A provisional ballot shall not be counted if the elector’s absentee or mail-in ballot is timely received by a county board of elections.” *Id.* § 3050(a.4)(g)(5)(ii)(F).

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

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

The Department has programmed SURE to permit county boards to track voters’ mail-ballot requests, to document the sending of mail-ballot materials in response to those requests, and to log mail-ballot packages received back from voters. Until commencement of the pre-canvass no earlier than 7 a.m. on Election

Day, *see* 25 P.S. § 3146.8(g)(1.1), the only actions the Election Code authorizes county boards to perform with respect to received mail-ballot packages are to scan and log them in SURE, 25 Pa. C.S. § 1222(c)(20)-(21), and to “safely keep [them] in sealed and locked containers until they are to be canvassed by the county boards of elections,” 25 P.S. § 3146.8(a).

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

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

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

Nonetheless, the March Instruction laid out “PEND” and “CANC” logging codes for various potential defects, including “INCORRECT DATE,” “NO DATE,” “NO SIGNATURE,” or “NO SECRECY ENVELOPE.” App. Ex. C at A.268; A.272-A.277. The March Instruction directed county boards to use the “PEND” logging codes when a county board determines that a mail ballot may have a defect that the county board permits the voter to cure. *See id.* at A.272-A.277. It directed county boards to use “CANC” logging codes when a county board makes a disposition that a mail ballot may have a defect that the county board does not permit the voter to cure. *See id.*

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

Thus, during the 2024 Primary Election, the Department told voters whose mail-ballot packages were logged as “PEND” (and whose county boards permitted them to cure the suspected defect) and voters whose packages were logged as “CANC” (and whose county boards did not permit them to cure the suspected defect) that they had a right to cast a provisional ballot. *See id.* In other words, the Department notified *all* voters whose mail-ballot packages were timely received but logged as potentially defective of a purported right to cast a provisional ballot—*regardless* of whether the voter’s county board permits curing at all or permits curing by provisional ballot. *See id.*³

SURE also provides another logging code, “Record – Ballot Returned.” *See id.* at A.276. The March Instruction contemplates use of this code for any mail ballot that the county board does not believe is defective. *See id.* However, a county board that uses the “Record – Ballot Returned” code for any ballot, including one it believes to be defective, has complied with the Election Code. *See* 25 Pa. C.S. § 1222(c)(20)-(21); Trial Court Op., App. Ex. B at A.56-A.57. The automated email

³ The Department also issued its Pennsylvania Provisional Voting Guidance 2.1 on March 11, 2024. The Guidance states that a voter is entitled to cast a provisional ballot if the voter “returned a completed absentee or mail-in ballot that will be rejected by the county board of elections, and the voter believes they are eligible to vote.” Pennsylvania Provisional Voting Guidance 2.1 at 1 (Mar. 11, 2024). The Guidance was posted, and remains available, on the Department’s website. *See* <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-ProvisionalBallots-Guidance-2.1.pdf> (last visited Sept. 22, 2024).

triggered by the “Record – Ballot Returned” code makes no representation that the voter has a right to cure or to cast a provisional ballot. *See* March Instruction, App. Ex. C at A.276. To the contrary, that email expressly states “you are no longer permitted to vote at your polling place location.” *Id.*⁴

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

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

The Board conducts a preliminary scan of a mail-ballot package received from a voter by placing it into an Agilis Falcon machine. *See* Trial Court Op., App. Ex. B

⁴ In August 2024, months after the 2024 Primary Election at issue in this case, the Department issued another instruction to county boards (“August Instruction”). Under the August Instruction, the Department’s automated emails continue to advise all voters in the Commonwealth whose mail-ballot packages are logged under a PEND or CANC code that they have a right to cure by casting a provisional ballot, regardless of whether the voter’s county board offers curing. *See* Petitioners’ Application For The Exercise Of King’s Bench Power 15, No. 108 MM 2024 (Pa. filed Sept. 18, 2024).

at A.43. The Agilis Falcon sorts the package by precinct and evaluates the package's dimensions, including length, height, and weight, in an effort to ensure that it is, in fact, a completed Butler County mail-ballot package. Hrg. Tr., App. Ex. C at A.103-A.104. Any package that the Agilis Falcon does not flag for potential irregularities is automatically logged as "Record – Ballot Returned" in SURE. *Id.* at A.115.

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

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

currently made up of two Democratic members and one Republican member. *Id.*; Hrg. Tr., App. Ex. C at A.89.

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

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

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

mail-ballot package was timely received but had a secrecy-envelope defect or omitted the returned ballot. *Id.* at A.133.

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

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

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

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

As noted, the Department's automated emails are sent to voters when Board employees log the received mail-ballot package in SURE. *See* March Instruction,

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

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

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

Petitioners’ mail-ballot packages were not opened until Friday, April 26, 2024, three days after the 2024 Primary Election Day, when the Computation Board met to conduct the canvass. Hrg. Tr., App. Ex. C at A.92. The Computation Board confirmed that Petitioners’ mail ballots were not placed in secrecy envelopes. *Id.* at A.91, A.119. In accordance with the Policy, the Computation Board did not count Petitioners’ mail ballots or provisional ballots. *Id.* at A.94-A.97.

E. Procedural Background

On April 29, 2024, Petitioners filed their Petition for Review in the Nature of Statutory Appeal in the Court of Common Pleas of Butler County, appealing the Board’s decision not to count their provisional ballots in the 2024 Primary Election. The Court of Common Pleas later granted the Republican National Committee and

Republican Party of Pennsylvania intervention on the side of Respondent, and the Pennsylvania Democratic Party intervention on the side of Petitioners. *See* Trial Court Op., App. Ex. B at A.40.

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

Respondents appealed to the Commonwealth Court. A majority of a Commonwealth Court panel reversed over a dissent from Judge Dumas. The majority thought various Election Code provisions governing casting and counting of provisional ballots are "ambiguous." Maj. Op., App. Ex. A at A.24. Invoking that purported ambiguity, the majority departed from the Commonwealth Court's prior (unpublished) decision holding that the Election Code unambiguously forecloses a county board from counting a provisional ballot submitted by a voter whose mail-ballot package was timely received but defective. *See id.* at A.35 (discussing *In re Allegheny County Provisional Ballots In The 2020 General Election*, No. 1161 CD 2020, 2020 WL 6867946 (Pa. Commw. Ct. Nov. 20, 2020)). To the contrary, the majority concluded that "when properly construed, [the Election Code] requires the

[Board] to count the provisional ballots” submitted by voters, like Petitioners, whose mail ballots were timely received but lack a secrecy envelope. *Id.* at A.34. It therefore ordered the Board “to count [Petitioners’] provisional ballots.” *Id.* at A.35.

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

SUMMARY OF THE ARGUMENT

On its face, the Commonwealth Court majority’s mandate that the Board is “*require[d]*” to count provisional ballots cast by voters whose mail ballots the Board timely received, Maj. Op., App. Ex. A at A.34, is irreconcilable with the Election Code’s plain text: “A provisional ballot shall *not* be counted if the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.” 25 P.S. § 3050(a.4)(5)(ii)(F) (emphasis added). The majority arrived at its mandate only by departing from the Court’s controlling decision in *Pennsylvania Democratic Party*, usurping the General Assembly’s authority to set the rules for mail voting, disregarding the Election Code’s plain text, and pointing to purported statutory ambiguities that do not exist. And those were not the majority’s only legal errors: Its mandate runs afoul of the Election Code’s specific requirements for handling mail ballots and violates both the Pennsylvania and the U.S. Constitutions. The Court should reverse.

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

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

II. Regardless of whether the majority’s mandate constitutes “curing,” it contravenes the Election Code’s plain statutory text governing provisional voting. The Election Code unambiguously declares that “[a] provisional ballot shall not be counted if the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.” 25 P.S. § 3050(a.4)(5)(ii)(F). The Election Code also

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

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

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

envelope defect. And providing such notice and opportunity after county boards open mail-ballot packages would violate the Pennsylvania Constitution because “secrecy in voting” would not “be preserved,” Pa. Const. art. VII, § 4, as election officials would be able to discern “who the [voter] is, with what party he or she affiliates, or for whom the [voter] voted,” *Pa. Democratic Party*, 238 A.3d at 378.

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

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

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

ARGUMENT

The majority’s mandate that the Board must count Petitioners’ provisional ballots brushes aside this Court’s controlling precedent, contravenes the Election Code’s plain text, relies upon purported statutory ambiguities that do not exist, and

violates the Pennsylvania and U.S. Constitutions. The Court should uphold its own precedent and the General Assembly's plain statutory directives, protect Pennsylvania's voters from constitutional violations during the Commonwealth's elections, and reverse.

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

Under the Pennsylvania Constitution, "ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government." *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914); *McLinko v. Dep't of State*, 279 A.3d 539, 543 (Pa. 2022) ("[T]he power to regulate elections ... has been exercised by the General Assembly since the foundation of the government."). Indeed, "[w]hile the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate to the Legislature." *Pa. Democratic Party*, 238 A.3d at 374.

Thus, as this Court explained just four years ago in *Pennsylvania Democratic Party*, it belongs to the General Assembly to decide the rules "for casting and counting a vote by mail." *Id.* It also belongs to the General Assembly to prescribe the *consequences* for noncompliance with any of those rules. *See id.* Accordingly, the General Assembly may mandate that a mail ballot be rejected "due to" even "minor errors made in contravention of those requirements." *Id.* The General Assembly has mandated that mail ballots with errors in compliance with the

signature, dating, *see Ball*, 289 A.3d 1, and secrecy-envelope requirements, *see Pa. Democratic Party*, 238 A.3d at 380, are invalid and cannot be counted.

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

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

This Court rejected the petitioners’ claim. *See id.* at 373-74. The Court pointed out that there is “no constitutional or statutory basis” to require county boards to permit curing of mail-ballot defects. *Id.* Moreover, as this Court further

explained, the decision whether to provide a “‘notice and cure’ procedure” for mail-ballot defects “is one best suited to the Legislature.” *Id.* at 374. This makes perfect sense: That decision presents “open policy questions,” including “what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots.” *Id.* “[A]ll of” those questions “are best left to the legislative branch of Pennsylvania’s government.” *Id.*

Thus, only the General Assembly, and not Pennsylvania courts, may mandate curing for mail-ballot defects. *See id.* To date, the General Assembly has not done so. *See id.* In fact, since *Pennsylvania Democratic Party*, the General Assembly has extensively debated whether to create a curing procedure in the Election Code. *See, e.g.,* Legislative Journal at 1024 (June 22, 2024). In June 2021, both the House and the Senate passed a bill that would have created curing opportunities for all Pennsylvania voters statewide, but the Governor vetoed it. *See* House 1300, Regular Session 2021-2022.⁵ That the General Assembly believes legislation is necessary to authorize curing only underscores that courts may not mandate curing and that the decision whether, and under what “precise contours” to do so, “are best left to the legislative branch.” *Pa. Democratic Party*, 238 A.3d at 374.

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

The General Assembly's decision not to mandate (or even authorize) curing is binding on the Pennsylvania courts and dispositive in this case. *See id.* There is no dispute that Petitioners' mail ballots were invalid because they were not sealed in secrecy envelopes. *See id.* at 374-80; *see also* Trial Court Op., App. Ex. B at A-39. This secrecy-envelope requirement is "mandatory" such that a failure to comply "renders the ballot invalid" and ineligible to be counted. *Pa. Democratic Party*, 238 A.3d at 380. There is also "no constitutional or statutory basis" to permit Petitioners to cure that defect. *Id.* at 374. Therefore, the majority's mandate that the Board permit Petitioners to cure their mail-ballot defects by casting a provisional ballot contravened *Pennsylvania Democratic Party* and improperly usurped the General Assembly's authority *both* to impose the secrecy-envelope requirement and to decide whether to mandate curing. *See id.*

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

its holding “does not depend on any ballot curing process ... The provisional ballot is a separate ballot, not a cured initial ballot.”).

This *ipse dixit* is mere wordplay—a distinction without a difference. “Curing” refers to fixing and avoiding the consequence of the voter’s *error* on the mail ballot, not necessarily making any changes to the “initial ballot.” *Id.* at A.34. And counting a provisional ballot in these circumstances *remedies*—and therefore *cures*—the voter’s failure to comply with the General Assembly’s mandatory secrecy-envelope “procedures for casting and counting a vote by mail.” *Pa. Democratic Party*, 238 A.3d at 374; *see also id.* at 380. It permits a voter to have his ballot counted where the General Assembly directed that even the voter’s “minor errors” require “reject[ing]” the voter’s first (and only) ballot. *Id.* at 374, 380. The decision whether to permit voters to remedy a secrecy-envelope violation through provisional voting or some other “opportunity to cure” is “best left to the legislative branch.” *Id.* It is not one to be made by the courts or the majority below. *See id.* The Court should reverse.

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

Even if the majority were correct that its mandate on the Board does not effect “curing,” *Maj. Op.*, App. Ex. A at A.34, the mandate would still be unlawful and warrant reversal. The mandate “*requires*” the Board to count provisional ballots cast by voters whose mail-ballot packages were timely received, *id.* (emphasis added), in

direct contradiction of the Election Code’s express directive that such ballots “shall *not* be counted,” 25 P.S. § 3050(a.4)(5)(ii)(F) (emphasis added). The majority’s effort to avoid the plain statutory text by pointing to purported ambiguities fails because no such ambiguities exist.

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

Neither this Court nor the majority may “ignore the clear mandates of the Election Code.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Election*, 843 A.2d 1223, 1231 (Pa. 2004); *see also Ball*, 289 A.3d at 36. “When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. C.S. § 1921(b); *see also Commonwealth v. Coleman*, 285 A.3d 599, 605 (Pa. 2022) (“Generally, the best expression of the General Assembly’s intent ‘is found in the statute’s plain language.’”).

The General Assembly’s mandate here could not have been clearer: “A provisional ballot **shall not be counted if** the elector’s absentee ballot or mail-in ballot is **timely received** by a county board of elections.” 25 P.S. § 3050(a.4)(5)(ii)(F) (emphases added). Thus, a county board may *not* count *any* provisional ballot cast by a voter whose mail ballot the county board “timely received” before the deadline of 8 p.m. on Election Day. *Id.* Nothing in this plain text uses the terms, much less turns on whether, the voter’s mail ballot is “valid” and

will be “counted”; instead, the prohibition on counting a provisional ballot arises whenever the voter’s mail ballot has been “timely received.” *Id.* Accordingly, as the Commonwealth Court held before the majority flip-flopped, the Election Code is “unambiguous” on this point, and courts are “not at liberty to disregard the clear statutory mandate that the provisional ballots to which this language applies must not be counted,” even if the voter’s mail ballot is defective and also cannot be counted. *In re Allegheny Cnty. Provisional Ballots*, 2020 WL 6867946, at *4-5; *see also Pa. Democratic Party*, 238 A.3d at 374 (courts bound by the General Assembly’s rules for “casting *and counting* a vote by mail”) (emphasis added).

If more were somehow needed, there is more—much more. *First*, the Court “must listen attentively to what the [Election Code] says, but also to what it does not say.” *In re Canvassing Observation*, 241 A.3d 339, 349 (Pa. 2020). And “[i]t is a well established principle of statutory interpretation that [this Court] may not supply omissions in [a] statute when it appears that the matter may have been intentionally omitted.” *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 611 (Pa. 2020); *see also Frazier v. Workers’ Comp. Appeal Bd.*, 52 A.3d 241, 245 (Pa. 2012) (courts “should not insert words into [a statute] that are plainly not there”).

Pennsylvania law permits use of provisional ballots in only limited circumstances. *See Pa. Democratic Party*, 238 A.3d at 375 n.28. Those limited circumstances include, for example, a voter who is unable to produce required

identification at the polling place, *see, e.g.*, 25 P.S. § 3050(a.2), or whose registration to vote cannot be verified, *id.* § 3050(a.4)(1). They also include the scenario where a voter “request[s] a [mail] ballot [but] is not shown on the district register as having voted.” *Id.* §§ 3146.6(b)(2), 3150.16(b)(2); *see also id.* §§ 3146.6(b)(1), 3150.16(b)(1) (“The district register at each polling place shall clearly identify electors who have received and voted [mail] ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a [mail] ballot to vote at the polling place.”).

The General Assembly’s decision to authorize provisional voting for a class of would-be mail voters (those who did not return their mail ballots) underscores that the General Assembly was aware of mail voters and could have authorized mail voters whose ballots are timely received but defective, to vote by provisional ballot. Its omission of such voters from the list of those authorized to vote provisionally—and its direction to the contrary that provisional ballots submitted by such voters “shall not be counted,” 25 P.S. § 3050(a.4)(5)(ii)(F)—were obviously “intentional[.]” and binding on the courts, *In re Nov. 3, 2020 Gen. Election*, 240 A.3d at 611.

Second, another provision of the Election Code confirms that voters whose mail ballots have been timely received by the county board may not vote provisionally. Every voter who casts a provisional ballot must first sign an affidavit

that states:

I do solemnly swear or affirm that my name is _____, that my date of birth is _____, and at the time that I registered I resided at _____ in the municipality of _____ in _____ County of the Commonwealth of Pennsylvania and that **this is the only ballot that I cast in this election.**

25 P.S. § 3050(a.4)(2) (emphasis added). Therefore, every voter who seeks to cast a provisional ballot in order to cure a deficient mail ballot and signs this affidavit makes a false statement: Any such voter is attempting to vote provisionally *because they cast another ballot* in the election that is defective, not because they *did not* cast another ballot. *See id.*

Third, the Court's prior decisions make plain that election officials are bound by the General Assembly's rules "for casting and counting a vote by mail," as well as by its choice to require rejection, rather than to authorize provisional voting, when ballots are returned with "minor errors made in contravention of those requirements." *Pa. Democratic Party*, 238 A.3d at 374. Thus, the Court has held that mail ballots are ineligible to be counted when they fail to comply with the mandatory secrecy-envelope requirement, *see id.* at 374-80, and the mandatory date requirement, *see Ball*, 289 A.3d 1, even though the General Assembly has not authorized provisional voting by voters who commit either type of error. Indeed, the signature, dating, and secrecy-envelope requirements would not be mandatory as the General Assembly wrote and intended them if courts were free to mandate

counting of provisional ballots cast by voters whose noncompliant mail ballots are “timely received by the county board.” 25 P.S. § 3050(a.4)(5)(ii)(F). The fact that voters who fail to comply with the General Assembly’s mandatory requirements for mail ballots do not get a do-over is what makes those requirements mandatory.

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

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

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

“A provisional ballot shall not be counted if the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections **and is valid and will be counted by the board, such that the voter has already voted.”**

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

In particular, the majority thought it “plausible” to read this provision to say that a voter’s mail ballot is “timely received ... only if that ballot is and remains *valid and will be counted*, such that the elector has already *voted.*” Maj. Op., App.

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

Moreover, as the Court of Common Pleas explained, the conflation of whether a mail ballot was “timely received” with whether it is “valid” and “will be counted” leads to an absurd result: A large volume of mail ballots would be *invalid* and *not* eligible to be counted. *See* Trial Court Op., App. Ex. B at A.53-A.55. After all, the Election Code declares that mail ballots are timely received only if they arrive at the county board of elections by 8 p.m. on Election Day, *see* 25 P.S. §§ 3146.6(c), 3150.16(c), but county boards do not determine whether (hundreds of thousands of) mail ballots are “valid” and “will be counted” until the canvass *after* Election Day, *id.* § 3146.8(g)(ii)(2). Thus, if—as the majority reasoned—a mail ballot is “timely

received” only when the county board determines that it is “valid,” then any mail ballot whose validity is determined during the canvass can *never* be timely received and will *never* be counted. *See* Trial Court Op., App. Ex. B at A.53-A.55. Merely to point out this absurdity is to confirm that the majority’s construction is erroneous.

Unsurprisingly, the majority’s various attempts to buttress its atextual reading of Section 3050(a.4)(5)(ii)(F) upon alleged “ambiguities” in the Election Code, *see* Maj. Op., App. Ex. A at A.24-A.29, fail. *First*, the majority suggested that the Election Code is “ambiguous” because subclause (i) of Section 3050(a.4)(5) directs the county board to count a provisional ballot if it confirms that the voter “did not cast any other ballot, including an absentee ballot, in the election.” 25 P.S. § 3050(a.4)(5)(i); Maj. Op., App. Ex. A at A.25-A.28. That direction, however, creates no ambiguity. As subclause (i) expressly states, that direction applies “[e]xcept as provided in subclause (ii)” of Section 3050(a.4)(5). 25 P.S. § 3050(a.4)(5)(i). And subclause (ii) contains the General Assembly’s direction that “[a] provisional ballot shall not be counted if . . . the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.” *Id.* § 3050(a.4)(5)(ii)(F); *see also* Trial Court Op., App. Ex. B at A.52-A.53.

Thus, the Election Code unambiguously forecloses a county board from counting a provisional ballot submitted by a voter whose mail ballot it timely received, *regardless* of whether the voter previously “cast” a ballot in the election.

See 25 P.S. § 3050(a.4)(5)(i)-(ii). The majority’s efforts to find ambiguity in the term “cast,” *see* Maj. Op., App. Ex. A at A.25-A.28, are therefore beside the point.

And even if they were not, the various definitions of “cast” the majority reviewed do not tie whether a ballot was cast to whether it is valid and will be counted. Rather, those definitions focus on actions the voter takes—and at least one makes clear that a voter’s casting of a ballot alone does not make it valid or guarantee that it will be counted. *See id.* at A.26 (“A voter can *cast* a ballot merely by filling it out without ever submitting it.”) (emphasis original). Thus, the terms “cast” by a voter and “timely received” by a board can and should be read in harmony to give Section 3050(a.4) full force and effect as the General Assembly intended. *See* 1 Pa. C.S. § 1921(b); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Election*, 843 A.2d at 1231; *see also Ball*, 289 A.3d at 26.

Second, the majority posited that the Election Code is ambiguous because it uses the term “voted” in two pairs of sections related to provisional voting. Maj. Op., App. Ex. A at A.22-27. The first pair are the “having voted” sections noted above, *see supra* at 4, 26-27, which direct that a person is “not entitled to cast a provisional ballot at their polling place on Election Day if the district register shows they have already *voted*,” Maj. Op., App. Ex. A at A.26-A.27 (discussing 25 P.S. §§ 3146.6(b)(2), 3150.16(b)(2)) (emphasis original). The second pair are the Election Code’s description of the mail-ballot instructions, which contemplate

telling voters they may cast a provisional ballot if their “voted ballot is not timely received.” *Id.* at A.22 (citing 25 P.S. §§ 3146.3(e), 3150.13(e)).

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

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

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

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

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

officials could not make either determination until Election Day or later, when they conduct the pre-canvass and canvass and decide whether mail ballots are valid and will be counted. *See* Trial Court Op., App. Ex. B at A.53-A.55. Thus, the majority’s construction would leave the “having voted” and “voted ballot” sections with no “effect” or meaning. 1 Pa. C.S. § 1921(a) (“Every statute shall be construed ... to give effect to all its provisions.”).

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

The only way “to give effect” to that directive, the “having voted” sections, and the “voted ballot” sections is to construe “having voted” and “voted ballot” as satisfied when the voter’s mail ballot is timely received. 1 Pa. C.S. § 1921(a). This approach, moreover, harmonizes those sections with the Election Code’s provisions authorizing “Voting by absentee electors” and “Voting by mail-in electors,” which

make clear that a mail voter has completed voting if their mail-ballot package is timely “received in the office of the county board of elections no later than 8 o’clock P.M. on the day of the primary or election.” 25 P.S. §§ 3146.6(c) (prescribing timely receipt as final step in absentee voting); 3150.16(c) (same for mail voting).

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

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

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

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

A. The Majority's Mandate Is Irreconcilable With Numerous Provisions Of The Election Code And The Pennsylvania Constitution.

The General Assembly has not only directed that a provisional ballot cast by a voter whose mail ballot is timely received "shall not be counted," 25 P.S.

to *count* such ballots. In fact, 52 U.S.C. § 21082(a)(4) confirms such ballots can only be counted if they are valid "under State law." *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 571 (6th Cir. 2004) (explaining such ballots are only counted if "the person was indeed entitled to vote at that time and place" (cleaned up)); *id.* at 576 ("[T]he ultimate legality of the vote cast provisionally is generally a matter of state law."). Here, of course, the Election Code unambiguously prohibits counting provisional ballots where an individual's mail ballot was "timely received" by election officials. 25 P.S. § 3050(a.4)(5)(ii)(F). Federal law thus cannot save the majority's mandate.

§ 3050(a.4)(5)(ii)(F); it has also enacted several other provisions of the Election Code that *preclude* providing notice and an opportunity to cast a provisional ballot in that scenario.

Start with the Election Code’s restrictions on the actions county boards may take with respect to received mail-ballot packages. The Election Code mandates that “upon receipt,” county boards are not permitted to inspect or open a mail-ballot package. *Id.* § 3146.8(a). Instead, county boards may only log them in SURE (which they can do without triggering the Department’s automated emails notifying voters of a purported right to cast a provisional ballot, *see supra* at 8) and “safely keep the ballots in sealed or locked containers until they are to be canvassed.” *Id.* County boards are authorized to inspect and open mail-ballot packages in only two settings: the “pre-canvass” and the “canvass” of mail ballots. *See id.* §§ 3146.8(g)(ii)(1.1), (2); *id.* § 2602(q.1).

First, “no earlier than seven o’clock A.M. on election day,” county boards may convene “to pre-canvass all [mail] ballots received prior to” the pre-canvass. *Id.* § 3146.8(g)(ii)(1.1). The “pre-canvass shall mean the *inspection and opening* of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes, and the counting, computing and tallying of the votes reflected on the ballots.” *Id.* § 2602(q.1) (emphasis added). Thus, it is not

until Election Day at the earliest that county boards may “inspect[]” or “open[]” mail-ballot packages. *See id.*; *id.* § 3146.8(g)(ii)(1.1).

Moreover, the pre-canvass “does not include the recording or publishing of the votes reflected on the ballots.” *Id.* § 2602(q.1). In fact, “[n]o person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.” *Id.* § 3146.8(g)(ii)(1.1). Thus, no person—including any county board official or employee—may “disclose the result[]” of a county board’s preliminary disposition that a mail ballot is defective “prior to the close of the polls.” *Id.*

Second, “no earlier than the close of polls on the day of the election and no later than the third day following the election,” county boards meet to “canvass [mail] ballots ... not included in the pre-canvass.” *Id.* § 3146.8(g)(ii)(2). At the canvass, the boards “shall open the envelope of every unchallenged [mail] ballot” and “count, compute and tally the votes.” *Id.* § 3146.8(g)(4)(i)-(iii).

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

be confirmed until the mail-ballot envelope is opened, making the ballot's status before then "nothing more than a guess." Maj. Op., App. Ex. A at A.8.

Moreover, any pre-Election Day examination of mail-ballot packages for the presence of a secrecy envelope—whether through a hole in the outer envelope or a measurement of the ballot package's dimensions, *id.* at A.7—is a premature and unlawful "inspection," 25 P.S. §§ 2602(q.1), 3146.8(g)(ii)(1.1), 3146.8(g)(ii)(2). And either method of examination is inconsistent with the Election Code for other reasons. Punching a hole in the outer envelope is a premature and unlawful "opening" of the mail-ballot package prior to the pre-canvass on Election Day. *See id.* § 2602(q.1) ("pre-canvass shall mean the ... *opening* of [outer] envelopes") (emphasis added). Measuring the mail-ballot package cannot definitively confirm a secrecy-envelope defect, particularly a defect of identifying marks appearing on the secrecy envelope. *See id.* § 3146.8(g)(4)(ii) (requiring boards to discard any mail ballot in a secrecy envelope displaying identifying marks).

Further, because county boards cannot open and inspect mail-ballot packages for, or discover, secrecy-envelope defects until Election Day or thereafter, they cannot notify voters of those defects. As a practical matter, it is simply too late to provide notice and an opportunity to cast a provisional ballot if defects are discovered during the pre-canvass on Election Day—and, obviously, if defects are discovered during the canvass *after* Election Day. And notifying voters whose

ballots were inspected during the pre-canvass on Election Day (and who theoretically could attempt to travel to the polling place and cast a provisional ballot before the close of the polls) violates the Election Code's prohibition on "disclos[ing] ... prior to the close of the polls" the "result[] of any" inspection conducted or preliminary disposition made with regard to whether a ballot is defective. *Id.* § 3146.8(g)(ii)(1.1).

Finally, whenever county boards discover a secrecy-envelope defect *after* opening the outer envelope, they can discern "who the [voter] is ... [and] for whom the [voter] has voted." *Pa. Democratic Party*, 238 A.3d at 378. Providing notice and an opportunity to cast a provisional ballot at that point would *violate* the Pennsylvania Constitution because "secrecy in voting" would not have been "preserved." Pa. Const. art. VII, § 4. Thus, as this Court has already held, the secrecy-envelope requirement is mandatory, and secrecy-envelope defects require election officials to reject the ballot, not provide an unauthorized curing opportunity. *Pa. Democratic Party*, 238 A.3d at 374-80.

The majority's mandate thus cannot coexist alongside these strict requirements for handling, "confidentiality" and "counting of" mail ballots and addressing secrecy-envelope defects. *Id.* at 374. The majority's mandate contemplates that the Board will "inspect" mail ballots before the pre-canvass and canvass, and disclose the "results" of such an inspection prior to the close of the

polls. 25 P.S. §§ 2602(q.1), 3146.8(g)(ii)(1.1). Even then, whether a mail ballot is defective is “nothing more than a guess.” Maj. Op., App. Ex. A at A.8. And if the Board attempts to notify voters of secrecy-envelope defects after opening mail-ballot packages, it has violated the Pennsylvania Constitution. Pa. Const. art. VII, § 4. The majority’s mandate cannot stand and should be reversed.

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

The majority’s mandate also should be reversed because it violates the Pennsylvania Constitution, Pennsylvania law, and the U.S. Constitution in several ways. *First*, for the reasons explained, it usurps the General Assembly’s constitutional primacy over “ballot and election laws,” *Winston*, 91 A. at 522, and upends the Pennsylvania Constitution’s carefully calibrated separation of powers between the legislative and executive branches, *see* Pa. Const. art. II, § 1 (“The legislative power of this Commonwealth shall be vested in a General Assembly.”); *id.* art. IV, § 15 (recognizing the Governor’s veto power). The General Assembly’s primacy and power to establish the Commonwealth’s ballot and election laws would be reduced to no power at all if the courts can mandate whatever provisional-ballot rules they prefer—including rules that directly contradict the unambiguous rules the General Assembly has enacted.

Second, the Pennsylvania Constitution decrees that “[a]ll laws regulating the holding of elections ... shall be uniform throughout the State.” Pa. Const. art. VII,

§ 6. The Free and Equal Elections Clause’s mandate of “free and equal” elections, *id.* art. I, § 5, likewise prohibits discrimination against voters “based on considerations of the region of the state in which [voters] live[],” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 808 (Pa. 2018), and requires election rules to “treat[] all voters alike” and “in the same way under similar circumstances,” *Winston*, 91 A. at 523.

The Election Code, moreover, requires that elections be “uniformly conducted” throughout the Commonwealth. 25 P.S. § 2642(g). And the Equal Protection Clause of the U.S. Constitution forbids use, in any statewide or multi-county election, of “varying standards to determine what [is] a legal vote” from “county to county.” *Bush v. Gore*, 531 U.S. 98, 106-07 (2000).

The majority’s mandate that a single board count provisional ballots cast by voters whose mail ballots were timely received violates these principles because it creates *disuniformity* in ballot-validity determinations and disparate treatment of Pennsylvania voters based on where in the Commonwealth they live. If allowed to stand, the mandate would require the Board not to “uniformly conduct[]” elections with the rest of the Commonwealth, 25 P.S. § 2642(g), and not to treat Butler County voters “alike” or “in the same way” as similarly situated voters whose county boards do not count such ballots (including because they do not permit curing at all or through provisional voting), *Winston*, 91 A. at 523; *Kerns v. Kane*, 69 A.2d 388, 393

(Pa. 1949) (“To be uniform in the constitutional sense, such a law must treat all persons in the same circumstances alike.”); *see also League of Women Voters*, 178 A.3d at 808.

In addition, the majority’s mandate would require the Board to deploy a different “standard[] to determine what [i]s a legal vote” than the standard the General Assembly has mandated and other boards properly apply. *Bush*, 531 U.S. at 106-07; *see also League of Women Voters*, 178 A.3d at 808. This disparate-treatment problem actually runs even deeper because the majority’s mandate would also result in disparate treatment of similarly situated voters *within* Butler County.

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

determination of what constitutes a valid vote that may be counted in violation of the Pennsylvania Constitution, Pennsylvania law, and the U.S. Constitution. *See* Pa. Const. art. VII, § 6; *see also id.* art. I, § V; 25 P.S. § 2642(g); *Bush*, 531 U.S. at 106-07.

It is unsurprising that the majority's mandate results in this disuniformity. Because the Election Code provides no guidance on (and in fact forecloses) the majority's preferred use of provisional voting, there is no reason to expect that the majority's mandate against the single Board is universally followed by other county boards. In fact, it is *not* followed by any county board that does not permit curing. The only proper remedy for this disuniformity and disparate treatment of similarly situated voters is to reverse because the General Assembly has not authorized the counting of provisional ballots that the majority's mandate requires in Butler County. *See Pa. Democratic Party*, 238 A.3d at 372-74.

Finally, the majority's mandate violates the Elections and Electors Clauses of the U.S. Constitution. *See* U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. These two Clauses “expressly vest[] power to carry out [their] provisions” for setting the rules for federal elections “in ‘the Legislature’ of each State, a deliberate choice that [courts] must respect.” *Moore v. Harper*, 600 U.S. 1, 34 (2023). Thus, state courts reviewing election laws legislatures enact under the Elections and Electors Clauses may not “transgress the ordinary bounds of judicial review,” *id.* at 36, or

“impermissibly distort[.]” state law “beyond what a fair reading require[s],” *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); *accord Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring) (endorsing this standard); *id.* at 34-36 (holding that federal courts must review state courts’ treatment of election laws passed by state legislatures regulating federal elections).

The majority’s mandate “impermissibly distort[s]” both the Election Code and this Court’s prior decision in *Pennsylvania Democratic Party*, see 238 A.3d at 372-80, and, thus, violates the Elections and Electors Clauses, *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); *accord Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring); *id.* at 34, 36 (maj. op.).

CONCLUSION

The Court should reverse.

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Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum contains 11,075 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE

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

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