IN THE

Supreme Court of the United States

BUTLER COUNTY BOARD OF ELECTIONS,
REPUBLICAN NATIONAL COMMITTEE, AND
REPUBLICAN PARTY OF PENNSYLVANIA,

Applicants,

v.

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

Respondents.

ON APPLICATION FOR A STAY OF THE JUDGMENT
ISSUED BY THE SUPREME COURT OF PENNSYLVANIA

**PENNSYLVANIA DEMOCRATIC PARTY'S
OPPOSITION TO EMERGENCY APPLICATION FOR STAY**

CLIFFORD B. LEVINE
ALICE B. MITINGER
DAVID F. RUSSEY
DENTONS COHEN &
   GRIGSBY P.C.
625 Liberty Avenue
Pittsburgh, PA 15222

NICHOLAS WERLE
WILMER CUTLER PICKERING
   HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, N.Y. 10007

SETH P. WAXMAN
   Counsel of Record
CHRISTOPHER E. BABBITT
DANIEL S. VOLCHOK
JOSEPH M. MEYER
ANN E. HIMES
WILMER CUTLER PICKERING
   HALE AND DORR LLP
2100 Pennsylvania Avenue N.W.
Washington, D.C. 20037
(202) 663-6000
seth.waxman@wilmerhale.com

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INTRODUCTION

This case arose out of two voters' challenge to the Butler County Board of Elections' refusal to count their provisional ballots in the April 2024 Democratic primary—ballots the Commonwealth of Pennsylvania told them they could cast after their mail ballots were revealed to contain disqualifying errors. Based on principles embodied in a state statute (the Statutory Construction Act, or SCA), the Pennsylvania Supreme Court correctly held that the board's refusal to count their provisional ballots violated Pennsylvania's Election Code. In fact, the court explained, that holding "flows directly from the text of the Election Code." Appl. App. 27a. The holding also "effectuate[s] the intention of the General Assembly," 1 Pa. Cons. Stat. §1921(a), pursuant to the state legislature's instructions for statutory interpretation, as no "honest voting principle is violated" by "counting ... an elector's provisional ballot when the elector's mail ballot is a nullity," Appl. App. 44a. The court thus appropriately ordered the board to count the two ballots at issue.

Applicants offer no sound reason to stay or otherwise interfere with that state-court judgment straightforwardly applying state law. To start, multiple threshold issues defeat the requisite "reasonable probability" of certiorari and "fair prospect" of reversal, *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). Applicants do not have standing, as this case arose out of a *Democratic* primary in which applicants (*Republican* party organizations) did not participate and have no legally protectable interest, such that they lack an injury-in-fact, let alone a redressable one. Moreover, neither federal argument applicants raise here—first that the decision below violates the U.S. Constitution's Electors and Elections Clause, and second that it violates the principle

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that lower federal courts should not enjoin state election laws shortly before an election, *Purcell* v. *Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam)—was preserved in the state courts. Indeed, the Pennsylvania Supreme Court expressly noted in its decision that it had declined to take up applicants' federal constitutional claim because that claim had not been properly presented, Appl. App. 16a n.18—an adequate and independent state ground that deprives this Court of jurisdiction. As to *Purcell*, applicants failed to invoke it until their stay application to the state high court. That failure precludes review under this Court's established practice of refusing to hear federal issues not properly raised in the state courts.

Even if these threshold issues could be overcome, applicants cannot succeed on the merits of their federal constitutional claim, because the Pennsylvania Supreme Court did not remotely "transgress the ordinary bounds of judicial review," *Moore* v. *Harper*, 600 U.S. 1, 36 (2023). The court instead faithfully executed its responsibility under Pennsylvania's SCA to determine the meaning of the Election Code in a manner that effectuates the intent of the General Assembly. As a concurring opinion explained, the court, by providing a "cogent" response to "a state statutory interpretation question duly raised by the litigants in a case on [its] normal appellate docket," was simply doing its "job." Appl. App. 47a. The state high court's decision was indeed "cogent," *id.*—indeed, it was plainly correct in light of "the text of the Election Code," the SCA's text, and applicable state precedent. Appl. App. 27a (majority opinion).

Nor was the outcome at all surprising. Numerous other Pennsylvania courts to have considered the question had already answered it the same way the Pennsylvania Supreme Court did in this case. *See Genser* v. *Butler County Board of Elections*, No.

1074 C.D. 2024 (Pa. Commw. Ct. Sept. 5, 2024); *Center for Coalfield Justice* v. *Washington County Board of Elections*, No. 1172 CD 2024 (Pa. Commw. Ct. Sept. 10, 2024); *Center for Coalfield Justice* v. *Washington County Board of Elections*, No. 2024-3953 (Pa. Ct. C.P. Wash. Cnty. Aug. 23, 2024); *Keohane* v. *Delaware County Board of Elections*, No. CV-2023-4458 (Pa. Ct. C.P. Del. Cnty. Sept. 21, 2023). So had numerous Pennsylvania's county boards of elections. *See* County Officials Br. 2-3, *Genser* v. *Butler County Board of Elections*, Nos. 26 WAP 2024, 27 WAP 2024 (Pa. Sept. 26, 2024) (hereafter County Officials' *Genser* Br.) (attached as Appendix A). Put simply, the Pennsylvania Supreme Court's holding that a voter whose mail ballot is not counted may exercise her statutory right to vote provisionally (rather than being disenfranchised altogether) was a straightforward and correct interpretation of Pennsylvania law. It is miles away from the type of extreme departure from the norms of judicial decision-making that could implicate Electors or Elections Clause concerns.[1]

Applicants are likewise wrong to argue that the *Purcell* line of cases warrants staying the state court's order. *Purcell* is a federalism-based limit on *federal* courts; it does not even apply to state courts. That aside, the Pennsylvania Supreme Court's decision prevents rather than engenders the voter confusion *Purcell* seeks to avoid, both by definitively interpreting Pennsylvania's Election Code to ensure uniformity across the Commonwealth and by rejecting a board of elections' irregular practice of refusing to

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[1] Not even the Butler County Board of Elections interprets the Election Code as applicants do, i.e., as precluding the counting of *any* provisional ballot cast by a voter whose mail-ballot packet was timely submitted but defective. Rather, that board routinely provides the opportunity to cast provisional ballots to voters whose mail-ballot packets were defective for reasons *other than* the one here (i.e., the lack of a secrecy envelope).

count provisional ballots that voters are entitled to cast, based (without statutory basis) on the *type* of disqualifying error voters make with their mail ballots, *see supra* n.1.

The equities also weigh decisively against a stay. The extraordinary relief applicants seek would "wholly disenfranchise" voters seeking to cast a provisional ballot "for no discernible purpose." Appl. App. 41a. Applicants, by contrast, will suffer no irreparable harm if a stay is denied. As noted, this case arose out of a Democratic primary, which ended months ago; applicants have not even attempted to articulate how they are harmed by the counting of votes in *that* election. Nor would applicants' request for this Court's review be mooted (as they claim, *see* Appl. 32) by the occurrence of a different election (the upcoming election). Applicants simply dislike the *precedential effect* of the Pennsylvania Supreme Court's decision. That is not cognizable, let alone irreparable, harm.

Finally, this Court should reject applicants' alternative request for an order imposing ballot-segregation procedures on every county elections board in the Commonwealth. Leaving aside the merits, such a sweeping order is unavailable here, because 66 of the Commonwealth's 67 county boards of elections are not parties to this case and thus cannot be enjoined. In any event, such an order is unnecessary, as Pennsylvania law already provides that provisional ballots are segregated for days after the election, and thereafter may be challenged by applicants or their designees.

The stay application should be swiftly denied.

STATEMENT

A.   Statutory Background

Pennsylvania's Election Code prescribes how mail ballots are to be completed and submitted by voters, when a voter may vote provisionally on election day, and how county boards of elections canvass and count mail and provisional ballots.

A person voting by mail submits a packet containing a ballot and two envelopes: an inner "secrecy" envelope meant to preserve "secrecy in voting" as required by the Pennsylvania Constitution, art. VII, §4, and an outer "declaration" envelope that a voter must sign and date, 25 Pa. Stat. §3150.16(a). To vote by mail, a Pennsylvania voter must fill out her ballot, place it within the secrecy envelope, seal the secrecy envelope, place the secrecy envelope within the declaration envelope, and return the packet to the county board of elections by 8:00 p.m. on election day. *Id.* §3150.16(a), (c).

When a county board receives a mail-ballot packet, county officials review it for compliance with the signature, date, and secrecy envelope requirements, with any non-compliant packets set aside. Officials then log the packet into the Statewide Uniform Registry of Electors ("SURE"), which is Pennsylvania's "single, uniform integrated computer system" that county boards use to track registered voters and their ballots, 25 Pa. Cons. Stat. §1222(a), (c). In logging a packet into SURE, officials apply one of 23 available codes. *See* Appl. App. B, Pennsylvania Department of State, *Changes to SURE VR and PA Voter Services as of March 11, 2024*, at 6-10 (hereafter *SURE Guidance*) (attached as Appendix B). The codes allow voters to follow the status of their ballots on the Department of State's ballot-tracking website. *See* Pennsylvania Department of State, *Election Ballot Status*, https://www.pavoterservices.pa.gov/Pages/Ballot

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Tracking.aspx. A specific code may also trigger an automatic email to the voter from the Department of State explaining that the packet will not be counted due to error, along with instructions as to what the voter can do to make sure she can cast her vote in the election. For example, such an email may (as here) inform a voter that she "can go to [her] polling place on Election Day and cast a provisional ballot." Appl. App. 5a.

Pennsylvania's Election Code provides for provisional ballots as a fail-safe, to preserve access to the right to vote. Appl. App. 26a. A person who has requested a mail ballot but "is not shown on the district register as having voted may vote by provisional ballot" at her polling place on election day. 25 Pa. Stat. §3150.16(b)(2). County boards must canvass provisional ballots within seven days of the election, *id.* §3050(a.4)(4), but no earlier than 9:00 a.m. on the Friday after election day, *id.* §3154(a). During canvass, a county board of elections to which a provisional ballot is submitted "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." *Id.* §3050(a.4)(5)(i). "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). The Pennsylvania Supreme Court, the Pennsylvania Commonwealth Court, courts of common pleas in Delaware and Washington Counties, the Secretary of the Commonwealth, and many county boards of elections across Pennsylvania have concluded that the Election Code requires county boards to count provisional ballots submitted by voters who made disqualifying mistakes on their mail-ballot packets. *See supra* pp.2-3.

Although the Election Code specifically authorizes provisional voting (Appl. App. 26a), it does not expressly establish a system of so-called "notice and cure," wherein

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voters are notified of problems with their mail-ballot packets so that they can fix those and have their *mail ballots* counted. As the decision below explains, Appl. App. 27a, "curing" is distinct from provisional voting. Whether a voter can *cure* a deficient return packet is left to the discretion of her county board. *See Pennsylvania Democratic Party* v. *Boockvar*, 238 A.3d 345, 374 (Pa. 2020); Appl. App. 26a. Casting a provisional ballot and having that ballot counted if the voter's mail-ballot packet is voided, by contrast, "is a statutory right." Appl. App. 28a. Consistent with that statutory right, "[n]umerous" counties "have routinely allowed voters to cast provisional ballots in exactly the scenarios at issue in this litigation." County Officials' *Genser* Br. 2-3 (App. A).

B. Factual Background

The underlying facts are not in dispute. Appl. App. 3a. Respondents Faith Genser and Frank Matis were each qualified and registered to vote in Pennsylvania's April 2024 Democratic primary. Each timely submitted a mail ballot in the required outer envelope, which each voter signed and dated as state law requires. 25 Pa. Stat. §3150.16(a). The voters, however, did not place their mail ballots in the required secrecy envelope before placing them in the outer envelope. Butler County election officials detected that the voters' packets did not include the secrecy envelope by running them through a machine that measures a packet's dimensions and thickness to confirm, among other things, whether it contains the secrecy envelope. Appl. App. 3a. The Butler County board accordingly coded each packet as "CANC[ELED] – NO SECRECY ENVELOPE" in the SURE system. Appl. App. 4a. Genser and Matis then received an email from the Pennsylvania Department of State (triggered by the code the Butler County board entered, as discussed above) stating: "Your ballot will not be counted because it was not

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returned in a secrecy envelope." *Id.* The email further advised the voters to "go to your polling place on election day and cast a provisional ballot." Appl. App. 5a. Following these instructions, Genser and Matis each visited their respective polling place on primary day and duly submitted a provisional ballot. *Id.*

Even though Genser's and Matis's mail ballots were void because they were returned without a secrecy envelope, the Butler County board refused to count either voter's provisional ballot (despite identifying no deficiency with those ballots), thereby depriving each voter of their right to vote in the primary. This refusal flowed from the board's written policy (attached as Appendix C), which purported to address when Butler County voters may cast provisional ballots that will be counted—even though provisional voting is controlled by Pennsylvania's Election Code. The board's policy provided that a voter who made a mistake on the *declaration* envelope (for example, by forgetting to sign or date that envelope) *can* vote provisionally at her polling place on election day, but that a voter who made a mistake with the *secrecy* envelope cannot. In other words, Butler County allowed voters who make certain technical mistakes in completing their mail-ballot packets to vote by provisional ballot while denying the same to voters who make other mistakes. The record contains no evidence that other counties follow this unusual practice.

C.   **Procedural Background**

On October 23, 2024, the Pennsylvania Supreme Court issued an opinion affirming the court below in holding, as a matter of Pennsylvania statutory law, that the Butler County Board of Elections was required to count the provisional ballots Genser and Matis submitted in the 2024 Democratic primary election. *See* Appl. App. A.

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First, the court explained that its prior decision in *Pennsylvania Democratic Party* did not resolve the issues presented in this case because that case applied to notice and cure, not provisional voting. Appl. App. 26a. The court confirmed that "the casting of a provisional ballot is specifically authorized in the Election Code, wholly unlike the amorphous proposed notice and cure policy discussed in *Pa. Democratic Party*." Appl. App. 26a. There is no "analogy to be drawn from *Pa. Democratic Party*" to this case, the court went on, because "no ballot is cured when a provisional ballot is counted after a mail ballot is rejected due to a fatal defect in the Return Packet"; "[t]he propriety of counting a provisional ballot is a question of statutory interpretation that, unlike the proposed curing policies at issue in *Pa. Democratic Party*, flows directly from the text of the Election Code." Appl. App. 27a.

Second, the court interpreted the provisional-ballot provisions in 25 Pa. Stat. §3050(a.4) in accordance with its holding in *Pennsylvania Democratic Party*, concluding that "the failure to follow the mandatory requirements for voting by mail [e.g., by failing to enclose a ballot in a secrecy envelope] nullifies the attempt to vote by mail and the ballot." Appl. App. 33a. Because Genser's and Matis's mail-ballot packets were each missing a secrecy envelope, the court explained, they had to "be set aside and declared void" under *Pennsylvania Democratic Party*. Appl. App. 35a. Thus, Genser's and Matis's mail-ballot packets could not "be afforded legal effect," such that Genser and Matis each "failed to cast a ballot" for statutory purposes. Appl. App. 35a.

Third, the court addressed 25 Pa. Stat. §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." The court explained that "[j]ust as a void

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ballot cannot be given legal effect in Subsection (a.4)(5)(i), it cannot be given effect in Subsection (a.4)(5)(ii)(F)." Appl. App. 37a. The court emphasized that this reading is in harmony with the canvassing process, during which county boards "definitively determine whether [a] Return Packet contains the required Secrecy Envelope clothing the ballot." Appl. App. 39a. In contrast, the court characterized applicants as "engaging in wordplay to confuse the Code and reach an absurd result whereby a void mail-in ballot renders a provisional ballot uncountable as well." Appl. App. 39a. Applicants, in the court's telling,

> fail to offer any explanation as to how their interpretation of Subsection (a.4)(5) is in any way designed to prevent double voting, and they also fail to explain how their interpretation furthers the broader goal of the Election Code to enfranchise, rather than disenfranchise, voters. Instead, [applicants'] interpretation ignores the availability of provisional voting and manufactures an absurdity whereby we must accept that the General Assembly intended to wholly disenfranchise a voter on account of a mistake with their Return Packet for no discernable purpose.

Appl. App. 41a.

Finally, the court emphasized that its interpretation of the Election Code's provisional-ballot provisions is compelled by the SCA's requirement that courts "presum[e]" both "[t]hat the General Assembly does not intend a result that is absurd … or unreasonable" and "[t]hat the General Assembly does not intend to violate the [Pennsylvania] Constitution," 1 Pa. C.S. §1922(1), (3); *see* Appl. App. 41a, 43a. And since the General Assembly "designed" the Election Code's "[p]rovisional balloting procedures … to assure access to the right to vote while also preventing double voting," Appl. App. 44a, the court concluded that applicants' construction was untenable because it "manufactures an absurdity" by "disenfranch[ing]" voters "for no discernible purpose,"

Appl. App. 41a. Applicants' reading of the Election Code, the court further explained, "is not reconcilable with the right of franchise" recognized throughout the state high court's decisions construing the Election Code and derived from the Pennsylvania Constitution's Free and Equal Elections Clause, art. I, §5. Appl. App. 44a.

Applicants sought an emergency stay from the Pennsylvania Supreme Court. The court denied that application over only one noted dissent. Order, *Genser* v. *Butler County Board of Elections*, Nos. 26 WAP 2024, 27 WAP 2024 (Pa. Oct. 28, 2024). In other words, even two of the three justices who dissented from the court's October 23 decision evidently agreed that there was no sound basis for a stay.

ARGUMENT

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers); *accord, e.g., Williams* v. *Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers); *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). When considering a stay request, this Court considers whether there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," whether there is "a fair prospect that a majority of the Court will vote to reverse the judgment below," and whether "a likelihood of irreparable harm will result from the denial of a stay." *Hollingsworth*, 558 U.S. at 190.

Applicants utterly fail to establish the requisite extraordinary circumstances here.

I. **THERE IS NO "REASONABLE PROBABILITY" OF CERTIORARI OR "FAIR PROSPECT" OF REVERSAL**

    A. **Multiple Jurisdictional And Other Threshold Barriers Preclude This Court From Even Reaching The Merits Of Applicants' Challenges**

1. *Applicants Lack Standing*

A litigant seeking to invoke federal jurisdiction must establish Article III standing at every stage in the litigation, and each federal court has an obligation to independently determine their subject-matter jurisdiction before ruling on the merits of a dispute. *See Virginia House of Delegates* v. *Bethune-Hill*, 587 U.S. 658, 662 (2019). Here, applicants lack standing because they have not suffered an "injury in fact" that could be "redressed by a favorable decision" in this case, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). This case arises from a *Democratic* primary in which applicants—the *Republican* National Committee and the *Republican* Party of Pennsylvania—did not participate and have no legally protectable interest. *See* 25 Pa. Stat. §299 (providing for closed primaries). Applicants therefore did not "participate in an illegally structured competitive environment," which "unequally favor[ed] supporters of other political parties." *Mecinas* v. *Hobbs*, 30 F.4th 890, 898 (9th Cir. 2022) (quotation marks omitted). The Butler County Board of Elections—the party with standing—has *not* sought a stay. Since applicants had no relationship to the election that gave rise to this appeal, they suffered no injury that "affect[ed] the[m] … in a personal and individual way," *Lujan*, 504 U.S. at 560 n.1, as required for this Court to have jurisdiction.

2. *The Federal Issues Were Not Preserved*

Applicants cannot succeed either on their argument under the Elections and Electors Clauses of the U.S. Constitution (art. I, §4, cl. 1; art. II, §1, cl. 2), or on their *Purcell* argument because procedural bars preclude this Court from considering either.

a. The Pennsylvania Supreme Court expressly stated in the decision below that it denied allowance of appeal on applicants' argument under the Elections and Electors Clauses because that argument was "not developed within [applicants'] petition for allowance of appeal." Appl. App. 16a n.18. Indeed, applicants did not even *mention* the issue in their briefs before either the trial court or the Pennsylvania Commonwealth Court. The Pennsylvania Rules of Appellate Procedure unequivocally provide that "[i]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal." Pa.R.A.P.302(a). Despite this clear rule, applicants' petition for allowance of appeal to the Pennsylvania Supreme Court mentioned the issue only in a footnote promising to "set forth [the argument in their] principal brief," Appl. App. C, Petition for Allowance of Appeal 19 n.5, *Genser* v. *Butler County Board of Elections*, Nos. 240 WAL 2024, 241 WAL 2024 (Pa. Sept. 8, 2024) (attached as Appendix D). Under Pennsylvania law, however, "arguments raised only in brief footnotes [are] too undeveloped for review." *Madison Construction Co.* v. *Harleysville Mutual Insurance Co.*, 735 A.2d 100, 109 n.8 (Pa. 1999). The argument was thus waived twice over, and the Pennsylvania Supreme Court properly concluded it had been waived as a matter of Pennsylvania law. *See* 210 Pa. Code §63.6(B).

That unambiguous waiver ruling is an adequate and independent state ground for the state-court judgment, which deprives this Court of jurisdiction. *See, e.g., Herb* v.

Pitcairn, 324 U.S. 117, 125 (1945); *Michigan* v. *Long*, 463 U.S. 1032, 1041-1042 (1983); *Mata* v. *Baker*, 74 F.4th 480, 486 (7th Cir. 2023) (deeming waiver an adequate and independent state ground); *Hutchison* v. *Bell*, 303 F.3d 720, 738 (6th Cir. 2002) (same). State procedural rules are an adequate and independent state ground where they are "strictly or regularly followed." *Johnson* v. *Mississippi*, 486 U.S. 578, 587 (1988). Applicants do not even argue that the Pennsylvania Supreme Court fails to routinely enforce the state-law procedural rules regarding waiver and the scope of appellate review, no doubt because, in reality, that court "has taken a strict[] approach to waiver," *Schmidt* v. *Boardman Co.*, 11 A.3d 924, 942 (Pa. 2011).

Disputing this, a single dissenting justice below cited *HTR Restaurants, Inc.* v. *Erie Insurance Exchange*, 307 A.3d 49 (Pa. 2023), for the proposition (Appl. App. 51a n.4) that applicants had no obligation to preserve their federal constitutional argument because they were the respondents and appellees in the lower state courts. But that exception to Pennsylvania's ordinary waiver rules applies only where lower-court respondents or appellees raised the relevant argument as soon as they "ha[d] an opportunity to" do so, *HTR Restaurants*, 307 A.3d at 61 n.38. In *HTR Restaurants*, for example, the Pennsylvania Supreme Court found no waiver because the lower-court appellees' "opportunity" to raise the relevant argument arose "[o]nly when" the lower-court appellants raised the argument to which the appellees' new argument was responsive, at which point the appellees "did so." *Id.* Indeed, it is established Pennsylvania law that an issue is "preserved for appellate review" *only* where it was raised at a party's "first opportunity to raise the[] issue." *Cagnoli* v. *Bonnell*, 611 A.2d 1194, 1196 (Pa. 1992); *accord Abramovich* v. *Pennsylvania Liquor Control Board*, 416

A.2d 474, 476 n.3 (Pa. 1980). Here, applicants could have raised their federal constitutional argument when they first intervened in the trial court, or on intermediate appeal in the Commonwealth Court. "[B]ecause [they] had a prior opportunity to" raise the issue, their "failure to do so resulted in waiver." *Commonwealth* v. *Allen*, 107 A.3d 709, 711 (Pa. 2014).

  b. Applicants failed to raise *Purcell* until their application to the Pennsylvania Supreme Court for a stay of that court's final judgment—presumably because applicants were simultaneously asking the same court to shut down cure policies in place in over 40 Pennsylvania counties, *see New PA Project Education Fund* v. *Schmidt*, 2024 Pa. LEXIS 1476 (Pa. Oct. 5, 2024) (per curiam). The state high court accordingly never addressed the issue. That is independently fatal to applicants' request for review by this Court, because this Court "almost unfailingly refuse[s] to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision," *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (per curiam). "[T]he circumstances here justify no exception" to this Court's near-uniform practice of denying review in this situation, *id.* at 446.

B. Applicants' Federal Arguments Fail On The Merits

  If this Court could reach the merits of applicants' claim, applicants would still have no likelihood of success on the merits. Their constitutional argument fails because the Pennsylvania Supreme Court's statutory construction was well within "the ordinary bounds of judicial review," *Moore*, 600 U.S. at 36. And neither *Purcell* nor its animating concerns applies to a state-court decision that prevents (not engenders) voter confusion.

1. *Electors And Elections Clauses*

Applicants' constitutional claims will not succeed on the merits because the Pennsylvania Supreme Court cannot credibly be deemed to have "transgress[ed] the ordinary bounds of judicial review," *Moore*, 600 U.S. at 36. To the contrary, the court acted well within its authority in construing the Pennsylvania Election Code—following the method of statutory interpretation prescribed by the General Assembly in the Statutory Construction Act. As the court stated, "[t]he propriety of counting a provisional ballot is a question of statutory interpretation that … flows directly from the text of the Election Code." Appl. App. 27a.

In particular, the court determined the validity of Genser's and Matis's provisional ballots by interpreting provisions of the Election Code that had divided the lower courts and Pennsylvania counties. The disagreement followed from the court's 2020 ruling that "the failure to follow [certain] requirements for voting by mail nullifies the attempt to vote by mail and the ballot." Appl. App. 33a (citing *Pennsylvania Democratic Party*, 238 A.3d 345). After that 2020 ruling, county boards and lower state courts disagreed about whether the Election Code permitted voters whose mail-ballot packets had been disqualified (for not meeting those requirements) to cast provisional ballots so that they would not be disenfranchised altogether.

As the Pennsylvania Supreme Court explained in resolving that disagreement, the Election Code includes three relevant statutory provisions. *See* Appl. App. 28a-29a. First, a registered voter "who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot." 25 Pa. Stat. §3150.16(b)(2). Second, "the county board of elections … shall count the [provisional]

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ballot if [it] confirms that the individual did not cast any other ballot, including an absentee ballot, in the election." *Id.* §3050(a.4)(5)(i)). Third, 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). While the intermediate appellate court had concluded here that these "provisions read together … are ambiguous" (and then relied on principles of statutory construction to resolve the ambiguity in favor of counting the ballots), the Pennsylvania Supreme Court harmonized the provisions by "focus[ing] … specifically on the term 'ballot' which is used in both provisions" of section 3050(a.4)(5). Appl. App. 29a-30a. As the court noted, "the term[] … 'ballot' in these provisions" is not "defined within the Election Code or the Statutory Construction Act." Appl. App. 9a. To define "ballot," then, the court looked directly to *Pennsylvania Democratic Party*, the precedent that all parties agreed was controlling.

Pennsylvania Democratic Party rejected the argument that the Election Code's secrecy provision was "merely directory" and instead held that it "is ***mandatory*** and the mail-in elector's failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid." 238 A.3d at 379-380. Under longstanding Pennsylvania principles of statutory interpretation, a "'mandatory provision is one [for which] the failure to follow … renders the proceeding to which it relates illegal and **void**.'" Appl. App. 30a (alterations and omission in original) (quoting *In re Nomination Papers of American Labor Party*, 44 A.2d 48, 49 (Pa. 1945)). The high court accordingly concluded here that "[t]o construe a void ballot as a 'ballot … in this election' is to give it legal effect, in direct contravention of [its] holding in *Pa. Democratic Party* that a mail ballot lacking a Secrecy Envelope is void." Appl. App. 36a. Therefore, "once the Board

confirmed that [the Voters] ballots were void, … the Board was required to count [the Voters' provisional] ballots," because a void vote is, as a matter of state law, no vote at all. Appl. App. 36a. (The state high court thus was not importing the word "void" into the Election Code, as applicants suggest (Appl. 25), but rather applying an established principle of state law.)

Applicants come nowhere close to showing that the foregoing meets the extremely high standard for an Elections or Electors Clause violation. Their argument focuses on a single sentence in the Election Code: "[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 Pa. Stat. §3050(a.4)(5)(ii)(F). *See* Appl. 1, 23. But as the Pennsylvania Supreme Court explained (construing state law), a mail ballot that cannot be counted because of a defect in the mail-ballot packet is not a "ballot … timely received" within the meaning of section 3050(a.4)(5)(ii)(F). Appl. App. 42a. As the court recognized, the mail-ballot deadline itself establishes as much, requiring a "completed mail-in ballot" to be received by the close of polls on election day. 25 Pa. Stat. §3150.16(c). Because a mail-ballot packet "that is not 'completed' does not satisfy the 'deadline' requirement of §3150.16(c)," it "cannot be timely received." App.42a. To hold otherwise would disqualify a voter for returning a mail-ballot packet that is not complete, will not be processed, and may not even contain a ballot at all. That cannot be the law because "[t]he text of the provision plainly refers to a 'ballot,' not an envelope," and the Election Code "conclusively establish[es] that the General Assembly knows the distinction between envelopes and ballots." Appl. App. 38a. Applicants' interpretation ignores all this.

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Applicants' additional argument—that their interpretation is compelled by the Election Code's requirements for provisional-ballot voters to affirm that their provisional ballot "is the only ballot that [they] cast in this election" and for county boards to "confirm[] that the individual did not cast any other ballot," Appl. 23-24 (quoting 25 Pa. Stat. §3050(a.4)(2), (5)(i)—fail because, as just explained, "a void ballot is not a 'ballot'" within the meaning of these provisions, Appl. App. 42a. Notably, not even the Butler County Board of Elections embraces applicants' extreme interpretation, as its practice is to count the provisional ballots of voters whose mail ballots are rejected for outer-envelope defects (i.e., no signature or no correct date). *See* Appl. App. 22a; *supra* n.1.

Applicants' interpretation, the Pennsylvania Supreme Court further explained, "manufactures an absurdity" and does nothing to effectuate the Election Code's purpose "to prevent double voting." Appl. App. 41a. In accordance with the Statutory Construction Act—which is among "the rules set by the [Pennsylvania] General Assembly," Appl. 3, and which instructs courts to "ascertain and effectuate the intention of the General Assembly," 1 Pa. Cons. Stat. §1921(a)—the Pennsylvania Supreme Court ascertained that "[t]he procedures for counting provisional ballots cast by putative mail in voters are designed to preclude double voting." Appl. App. 40a. Indeed, "[n]o party has identified any other purpose." Appl. App. 40a. The state high court's decision "effectuate[s]" that intent, while applicants' interpretation defeats it.

Applicants' argument also wrongly conflates provisional voting with curing defective mail ballots. *See* Appl. 13, 27. As the Pennsylvania Supreme Court explained, "the casting of a provisional ballot is specifically authorized in the Election Code, wholly unlike the amorphous proposed notice and [post-election] cure policy discussed in *Pa.*

Democratic Party." Appl. App. 26a. The right to cast a provisional ballot when a mail ballot is voided "is a *statutory* right not contemplated in *Pa. Democratic Party*." Appl. App. 28a (emphasis added). This case is thus not about whether the Pennsylvania Supreme Court has the authority to judicially mandate state-wide notice and cure, which was the issue in *Pennsylvania Democratic Party*; it is about the Election Code's distinct provisional-ballot provisions, i.e., the provisions enacted by the General Assembly whose authority applicants purport to want to vindicate.

Applicants provide no sound reason for this Court to second-guess either a state high court's construction of the state statutes it has been interpreting for generations or a state high court's interpretation of its own precedent. In short, applicants do not come close to establishing that this Court "transgress[ed] the ordinary bounds of judicial review," as would be required to obtain U.S. Supreme Court review, *Moore*, 600 U.S. at 36.

As noted, most Pennsylvania courts—and county boards of elections across the Commonwealth—that have considered this issue have reached the same conclusion as the decision below. *See supra* pp.2-3. That underscores that the decision of the Pennsylvania Supreme Court here is well within the bounds of ordinary statutory interpretation. Apart from the trial court below, applicants identify only one other Pennsylvania decision supporting their view: a nonprecedential Commonwealth Court decision from 2020, *In Re Allegheny County Provisional Ballots in the 2020 General Election*, 241 A.3d 695 (Pa. Commw. Ct. 2020), which the same court in this case declined to follow because *Allegheny County* "improperly analyzed [section 3050(a.4)(5)(ii)(F)] in isolation, without addressing

the other relevant provisions," Appl. App. 9a n.14. That improper analysis does nothing to show that the decision below satisfies the demanding standard for relief under *Moore*.

2.   Purcell

Purcell and its progeny—under which "*federal* courts should ordinarily not alter the election rules on the eve of an election," *Republican National Committee* v. *Democratic National Committee*, 589 U.S. 423, 424 (2020) (per curiam) (emphasis added) (collecting cases)—do not support a stay here. If anything, *Purcell* and its progeny counsel *against* a stay.

To start, *Purcell* by its terms is a prudential, equitable limit on federal courts, not a creature of positive federal law that binds state courts. That is consistent with *Purcell*'s substantial grounding in considerations of federalism, *see, e.g.*, *Democratic National Committee* v. *Wisconsin State Legislature*, 141 S.Ct. 28, 28 (2020) (Roberts, C.J., concurring) (a case about "the authority of *state* courts to apply their own constitutions to election regulations" raises "different issues than" a case where "a [federal] District Court intervened in the thick of election season to enjoin enforcement of a State's laws," as the latter "involves federal intrusion on state lawmaking processes" (emphasis added)). As Justice Kavanaugh has noted, "[i]t is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election." *Merrill* v. *Milligan*, 142 S.Ct. 879, 881 (2022) (concurring opinion).   Applicants conspicuously ignore this federalism underpinning when purporting to discuss "the rationales behind *Purcell*," Appl. 17.

That aside, *Purcell*'s animating concerns do not apply here because the Pennsylvania Supreme Court's judgment in no way invites "voter confusion," Appl. 18 (citing *Purcell*, 549 U.S. at 4-5), by not preserving the "status quo," Appl. 17. The status quo was disuniformity across the Commonwealth's 67 county boards of elections regarding the validity of provisional ballots cast after a voter failed to successfully vote by mail or absentee ballot. As explained by an amicus brief filed below by county officials, "[n]umerous" counties "have routinely allowed voters to cast provisional ballots in exactly the scenarios at issue in this litigation," such that "[c]ounting provisional ballots in such circumstances already takes place in many locations." County Officials' *Genser* Br. 2-3 (App. A). Indeed, applicants themselves described the practice they challenge here as "common." Appellant's Br., *Republican National Committee* v. *Chapman* (No. 100 MAP 2022), 2022 WL 17298488, *40 (Oct. 5, 2022). They are thus in no position to describe the Pennsylvania Supreme Court's decision as effectuating a departure from the status quo.

In any event, in the nearly two months since the Commonwealth Court issued its decision holding that the Butler County board must count Genser's and Matis's provisional ballots, Pennsylvania voters have been able to rely on that holding. For example, voters may have foregone trying to cure a deficient mail ballot on their understanding that they could vote provisionally at their polling place on election day and have that vote count. Now that the Pennsylvania Supreme Court has affirmed the Commonwealth Court's ruling, to undo the Commonwealth-wide status quo mere days before the election when it may now be too late or even impossible for voters to cure their deficient mail ballots would surely cause not only voter confusion, but also voter

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disenfranchisement. If anything, then, the state high court's decision *prevents* the confusion among voters and election administrators that could result from continued disuniformity across the Commonwealth, and it is *granting* a stay—not denying one— that would leave county officials "scrambling," Appl. 19.

Indeed, it is the Butler County Board of Elections' now-rejected practice that invited voter confusion. As the Pennsylvania Supreme Court recognized (Appl. App. 22a, 34a), that practice was to refuse to count provisional ballots submitted by voters whose mail-ballot packets were defective due to lack of an *inner* envelope, even though (1) the board *would* count provisional ballots submitted by voters whose packets were defective for other routine errors on the *outer* envelope, and (2) the voters whose provisional ballots the board refused to count were specifically notified that they *could* "go to [their] polling place on election day and cast a provisional ballot," *SURE Guidance* at 8-9 (App. B). By rejecting that affirmatively misleading approach, the Pennsylvania Supreme Court's decision prevents, not engenders, confusion.

II. A STAY WOULD CAUSE, NOT PREVENT, IRREPARABLE HARM

Applicants assert (Appl. 34) that "a stay would not significantly harm any party." But as the Pennsylvania Supreme Court recognized (Appl. App. 41a), allowing Butler County's practice to stand would "wholly disenfranchise" voters "for no discernible purpose." Disenfranchisement is plainly a harm of enormous consequence. As this Court has long recognized, "[n]o right is more precious" than the right to cast a ballot and have it counted, *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964), because voting is "preservative of all rights," *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 667 (1966). Any deprivation of that right is irreparable, moreover, because "once the election occurs,

there can be no do-over and no redress," *League of Women Voters of North Carolina* v. *North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). Accordingly, courts consistently find that "[a] restriction on the fundamental right to vote … constitutes irreparable injury." *Obama for America* v. *Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *accord, e.g., Democratic National Committee* v. *Republican National Committee*, 2016 U.S. Dist. LEXIS 153755, at *53 (D.N.J. 2016) (collecting cases). Applicants have no response.

By contrast, the harm applicants claim would befall them is illusory. They contend (Appl. 33) that denying a stay would "cast[] a cloud upon … the legitimacy of the" pending election. But as the Pennsylvania Supreme Court stated, it was "at a loss to identify what honest voting principle is violated" by "counting … an elector's provisional ballot when the elector's mail ballot is a nullity." Appl. App. 44a. Applicants tellingly have nothing to say in response to this explanation. If anything, it is *granting* a stay that would cast a cloud over the pending elections, both by suggesting that boards of elections may (in the state high court's words) "wholly disenfranchise" voters "for no discernible purpose," Appl. App. 41a, and by perpetuating confusion among voters and election administrators engendered by disuniformity across the Commonwealth, *see supra* part I.B.2.

Finally, applicants are wrong that "without a stay or other relief, their request for certiorari will become moot," Appl. 32. As explained, this case arose out of a primary that took place in April. *See* Appl. App. 3a. This case, therefore, is and always has been *post*-election litigation, not (as applicants suggest) *pre*-election litigation. The occurrence of the *November* election has no bearing on whether this case is reviewable. Applicants may dislike the *precedential effect* this case may have on their ability to dispute particular results of the November election, but that does not render this post-election litigation

moot or create any equitable basis to perpetuate disuniformity and confusion about the Election Code's proper construction. Indeed, applicants do not cite a single case in which a court stayed a decision based solely on its precedential effect.

III.   APPLICANTS' ALTERNATIVE REQUEST IS UNAVAILABLE

Applicants' alternative request—that this Court "order[] that any provisional ballot cast by an individual whose mail ballot was timely received but defective" be "segregated" by Pennsylvania's "county boards" and "not … included in the official vote tally," Appl. 35-36—is unavailable here, and would be wholly inappropriate. The Pennsylvania Supreme Court's judgment was to "affirm the Commonwealth Court's order directing the [Butler County Board of Elections] to count Electors'," i.e., Faith Genser's and Frank Matis's, "provisional ballots," Appl. App. 45a. The judgment thus pertains to *two ballots*, cast in *a single county*, in an election that ended months ago—not to "*any* provisional ballot cast by an individual whose mail ballot was timely received but defective," Appl. 35. And it applies *to the Butler County Board of Elections*, not to the other 66 "county boards," Appl. 36, whose policies and practices were not at issue or a part of the record here. Hence, applicants' "minimum" request, Appl. 35, would expand the scope of this case beyond the existing parties, which this Court may not do.

Contrary to applicants' suggestion (Appl. 4, 16, 35), their requested relief finds no support in *Republican Party of Pennsylvania* v. *Boockvar*, 2020 WL 6536912 (U.S. Nov. 6, 2020) (Alito, J.). The judgment under review there was "in the form of declarations of law regarding Act 77," *Pa. Democratic Party*, 238 A.3d at 355, not an order respecting particular individuals' ballots. More importantly, "all 67 county election boards" were parties to that litigation. *Id*. at 352. As noted, that is not the situation here.

In any event, applicants' request is unnecessary because, contrary to their repeated assertion, Pennsylvania's county boards do not "start counting provisional ballots on Election Day," Appl. 12; *see also* Appl. 4, 32. Provisional ballots are processed within seven days after the election, 25 Pa. Stat. §3050(a.4)(4), but no earlier than 9:00 a.m. on the Friday after the election, *id.* §3154(a). In other words, those ballots are *already* "segregated" under state law. And when the counting of provisional ballots begins, any ballot may be objected to, with the objector having a statutory right to judicial review if that objection is overruled. *Id.* §3050(a.4)(4). Thus, no order from this Court is necessary to "preserve … Applicants' right to seek review" of the counting of any provisional ballot, Appl. 35.

CONCLUSION

The application should be denied.

October 30, 2024

Respectfully submitted,

/s/ Seth P. Waxman

CLIFFORD B. LEVINE
ALICE B. MITINGER
DAVID F. RUSSEY
DENTONS COHEN &
   GRIGSBY P.C.
625 Liberty Avenue
Pittsburgh, PA 15222

NICHOLAS WERLE
WILMER CUTLER PICKERING
   HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, N.Y. 10007

SETH P. WAXMAN
   Counsel of Record
CHRISTOPHER E. BABBITT
DANIEL S. VOLCHOK
JOSEPH M. MEYER
ANN E. HIMES
WILMER CUTLER PICKERING
   HALE AND DORR LLP
2100 Pennsylvania Avenue N.W.
Washington, D.C. 20037
(202) 663-6000
seth.waxman@wilmerhale.com

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I hereby certify that a copy of

Intervenor-Respondent's Opposition to Intervenor-Applicants' Emergency Application

for Stay Pending Disposition of a Petition for Writ of Certiorari in Genser v. Butler

County Board of Elections, No. 24A408, was served via overnight mail on all parties

required:

Marian K. Schneider
ACLU of Pennsylvania
P.O. Box 60173
Philadelphia, PA 19102
(215) 592-1513
mschneider@aclupa.org

Mary M. Mckenzie
Benjamin D. Geffen
Public Interest Law Center
1500 JFK Blvd.
Suite 802
Philadelphia, PA 19102
(267) 546-1319
mmckenzie@pubintlaw.org
bgeffen@pubintlaw.org

Witold J. Walczak
ACLU of Pennsylvania
P.O. Box 23058
Pittsburgh, PA 15222
(412) 681-7864
vwalczak@aclupa.org

Martin J. Black
Dechert LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-4000
martin.black@dechert.com

Counsel for Genser and Matis

Kathleen Jones
Buchanan Ingersoll & Rooney, PC
Union Trust Building
501 Grant Street, Suite 200
Pittsburgh, PA 15219
(412) 562-1401
kathleen.goldman@bipc.com

Counsel for Butler County Board of Elections

Kathleen A. Gallagher
The Gallagher Law Firm, LLC
436 Seventh Avenue, 30th Floor

John M. Gore
E. Stewart Crosland
Louis J. Capozzi III

Pittsburgh, PA 15219
(412) 308-5512

Thomas W. King, III
Thomas E. Breth
Dillon, McCandless, King, Coulter &
Graham, LLP
128 W. Cunningham Street
Butler, PA 16001
(724) 283-2200

Jones Day
51 Louisiana Avenue N.W.
Washington, D.C. 20001
(202) 879-3939
jmgore@jonesday.com

Counsel for Republican National Committee and Republican Party of Pennsylvania

I declare under penalty of perjury that the foregoing is true and correct.

Date: October 30, 2024

/s/ Seth P. Waxman
Seth P. Waxman

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA

No. 26 WAP 2024 and 27 WAP 2024

FAITH A. GENSER, FRANK MATTIS, AND THE PENNSYLVANIA
DEMOCRATIC PARTY,

Petitioners/Appellees,

v.

BUTLER COUNTY BOARD OF ELECTIONS
Respondents/Appellants,

THE REPUBLICAN NATIONAL COMMITTEE AND THE REPUBLICAN
PARTY OF PENNSYLVANIA,

Intervenors/Appellants.

AMICI CURIAE BRIEF OF COUNTY OFFICIALS IN SUPPORT OF APPELLEES

Joseph J. Khan
CURTIN & HEEFNER LLP
Pa. ID No. 86620
2005 S. Easton Road, Suite 100
Doylestown, PA 18901
Phone: (267) 898-0570
jjk@curtinheefner.com

Jonathan B. Miller*
Shannon Eddy*
PUBLIC RIGHTS PROJECT
490 43rd Street, Unit #115
Oakland, CA 94609
Phone: (510) 738-6788
jon@publicrightsproject.org
shannon@publicrightsproject.org
* On the brief

Counsel for Amici Curiae

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I. STATEMENT OF INTEREST

The undersigned *amici* ("County *Amici*") are elected Pennsylvania county commissioners, councilmembers, and election officials from both the Democratic and Republican parties.[1] Collectively, County *Amici* represent more than half of all Pennsylvanians. Boards of Elections in their counties are tasked with overseeing federal, state, and local elections, including in-person and mail-in voting procedures.[2] As officials deeply invested in the democratic process, County *Amici* have an interest in ensuring that all eligible electors in their counties can exercise the right to vote. As the officials responsible for the day-to-day administration of free and fair elections, county officials are experts in the practicalities of election administration. County *Amici* expend considerable time and resources to craft policies to ensure that polling places and mail-in and provisional ballot options are accessible to all constituents, and as necessary adjust those policies in response to

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[1] A list of all County *Amici* joining this brief is included at Appendix A. Most County *Amici* represent counties where the county commissioners constitute the Board of Elections. Those County *Amici* who represent home rule counties also support and oversee the administration of elections, albeit in more of a legislative capacity for some of them. No party or counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

[2] Pennsylvania law provides for two forms of mail voting: (1) certain voters who are in military service, overseas, or unable to vote in person can vote by absentee ballot, 25 P.S. §§ 3146.1-3146.9; and (2) for all elections after March 2020, any person eligible to vote in Pennsylvania can vote by mail-in ballot. 25 P.S. §§ 3150.11-3150.17. Because absentee and mail-in ballots are largely treated identically under the Election Code, they will be referred to together as "mail-in voting" or "mail-in ballots."

updated guidance and results of election litigation. County *Amici* also respond to electorate questions, educate the media and voters about election security, train poll workers extensively on procedures, and accurately canvas ballots, among the countless duties required to administer an election.

County *Amici* not only agree with the rationale behind the Commonwealth Court's decision, they are concerned that overturning it – and replacing the status quo with Appellants' proposed draconian statewide ban on counting certain provisional ballots – would make it more difficult for their constituents to vote. Numerous County *Amici* administer elections in counties that have routinely allowed voters to cast provisional ballots in exactly the scenarios at issue in this litigation. Using provisional ballots in this manner is not only safe, straightforward and reliable, it is a critical failsafe that helps county election officials protect the constitutional rights of voters. Overturning the Commonwealth Court's ruling would – in the middle of an election cycle – strip millions of County *Amici's* constituents of a trusted safeguard while risking confusion if not chaos across the Commonwealth. Below, County *Amici* explain their trust and reliance on provisional ballots in order to correct the mischaracterizations in the brief in support of Appellants submitted by *amici curiae* legislative leaders (hereinafter, the "Legislative *Amici*").

II. SUMMARY OF ARGUMENT

The Commonwealth Court correctly concluded that Butler County had erred in refusing to count provisional ballots from eligible electors who had ascertained fatal defects in their mail-in ballots. The decision below relies on the correct interpretation of various components of Pennsylvania law, ensures that the will of voters is protected, comports with the purpose of provisional ballots under federal law, and avoids any potential constitutional infirmity.

County *Amici* write separately here to offer their perspective and deep expertise as elected county officials and to counter the Legislative *Amici's* mischaracterization of voting in the counties. Counting provisional ballots in such circumstances already takes place in many locations, is not administratively burdensome, and reflects the best understanding of Pennsylvania law. Interpreting the Election Code to require the opposite result would, just weeks before mail-in voting begins, curtail the voting rights of millions of Pennsylvanians who have come to accept provisional ballots as a failsafe for errors with mail-in voting. Legislative *Amici* warn that "confusion" would arise from counting such provisional ballots but the opposite is true – widespread confusion would be caused by declaring this practice invalid, especially now that Election Day is little more than one month away. Accordingly, County *Amici* urge this Court to make clear that all counties

should and must allow electors to cast provisional ballots when they realize that their mail-in ballots cannot be a part of the count.

III.   ARGUMENT

A.   Legislative *Amici's* Predictions Are At Odds With The Experiences Of Counties That Already Count Provisional Ballots When An Elector's Mail-in Ballot Contains A Fatal Flaw

The underlying facts of this case are familiar to County *Amici* because, contrary to the Legislative *Amici's* apocalyptic predictions, they are fairly commonplace. Eligible electors submit mail-in ballots to county election administrators, and then a defect is detected. Many County *Amici* and their Boards of Elections have allowed electors to do exactly what Faith Genser and Frank Mattis attempted to do in Butler County – cast a provisional ballot that could be counted on Election Day.[3] This practice ensures a reasonable opportunity for voters to have their votes counted while falling in line with administrative processes established by the Commonwealth. Indeed, there is nothing unique about these circumstances that warrants, let alone requires, disqualification of the provisional ballots. Pennsylvanians vote by provisional ballot every year.[4] The process is neither

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[3] Some County *Amici* serve in counties that have not yet employed these practices and some County *Amici* serve in counties which have done so consistently since 2020. It is the view of all County *Amici* that all counties can and should allow voters to cast provisional ballots in cases such as this.

[4] For example, a report from Chester County's Voter Services Director notes that dozens of Chester electors were able to use the failsafe mechanism of casting a provisional ballot to be able to vote in the 2024 primary. *See* Chester County, *Voter Services Director's Report* (May 13, 2024),

onerous nor unusual. To the contrary, for many electors, election workers, and election boards, provisional ballots have been an essential tool in administering smooth and efficient elections under increasingly difficult circumstances.

Legislative *Amici's* fearmongering about counting such provisional ballots is squarely at odds with County *Amici's* experience. To begin, reviewing and counting provisional ballots is not a complicated or new burden for the Boards of Elections – it is a familiar process that already exists and already is mandatory. 25 P.S. § 3050(a.4)(4). Thus, Legislative *Amici's* claim that the Commonwealth Court's decision "mandate[d] a complicated process not enacted by the political branches of our government," Legislative Leaders *Amicus* at 2 ("Leg. *Amicus*"), is misplaced.

Legislative *Amici* claim that the Commonwealth Court's decision "complicates the canvassing process." *Id.* It does not. It is not difficult for election boards to determine whether a provisional ballot was cast by an elector whose mail-in ballot was previously counted because the outer markings of mail-in ballots enable the county to determine the identity of the elector without revealing the substance of the elector's vote. There are numerous safeguards to ascertain the appropriateness of the provisional ballot, including opportunities for representatives of each

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https://www.chesco.org/DocumentCenter/View/75903/2024_05_13-BoE-Directors-Report?bidId= (last visited Sept. 25, 2024).

candidate and political party to be present and to challenge the provisional ballots during the Boards of Elections' review process. 25 P.S. § 3050(a.4)(4).

The Legislative *Amici* warn that affirming the Commonwealth Court's decision will "delay the final vote tally." Leg. *Amicus* at 25. There is no basis for this forecast. There is already a seven-day period for counties to determine if the voter "was entitled to vote at the election district in the election." 25 P.S. § 3050(a.4)(4)(i)-(vii). This is the case not just for provisional ballots in these particular circumstances (*i.e.*, missing secrecy envelopes), but all provisional ballots cast for any reason at all. County *Amici* know that the Boards of Elections are capable of counting provisional ballots correctly and on time.

Legislative *Amici* claim that counting these provisional ballots "will lead to more double voting." Leg. *Amicus* at 24. It has not. Critically, a provisional ballot is only counted after the Board of Elections determines that the elector has not already successfully cast a valid vote.[5] Without any supporting evidence, Legislative *Amici*

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[5] The Department of State's guidance to counties on canvassing provisional ballots states: "When determining whether to count a provisional ballot, the county board of elections must reconcile provisional ballots with ballots cast in person on Election Day and with returned absentee and mail-in ballots. If a voter cast an Election Day ballot or successfully voted an absentee or mail-in ballot, the provisional ballot shall not be counted." Pennsylvania Department of State, *Pennsylvania Provisional Voting Guidance (Version 2.1)* (Mar. 11, 2024), https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-ProvisionalBallots-Guidance-2.1.pdf at 4. Counties do perform this reconciliation. *See also*, *e.g.*, Delaware County, *Frequently Asked Questions*, https://delcopa.gov/vote/faq.html (last visited Sept. 25, 2024) ("Provisional ballots are not counted on election day. Instead, they are returned to the Bureau of Elections and, as part of the Return Board process, each provisional ballot is reviewed to ensure that the individual had not voted by

predict that the Commonwealth Court's decision will "create an incentive for voters to submit multiple ballots." Leg. *Amicus* at 22. Yet County *Amici* know from experience that there is no incentive for voters, who choose the mail-in option out of convenience if not necessity, to needlessly wait in line at the polls after submitting a mail-in ballot. Nor is there any support, in either the law or in the experience of County *Amici,* for Legislative *Amici's* claim that counting provisional ballots "creates an unfair advantage for voters who are given a second chance to vote." *Id*. Simply put, it does not. Every qualified voter has the chance to have exactly one vote counted – no more, and hopefully, no less.

Finally, while Legislative *Amici* claim that election integrity and public confidence in elections would be endangered by affirming the Commonwealth Court's decision, the opposite is true. Voter participation is a vital part of the democratic process, and allowing minor errors to foreclose any possibility of casting a ballot on Election Day – as the Legislative *Amici* and Appellants ask the Court to do – is what would undermine confidence in elections. Granting relief to Appellants would weaken the integrity of elections by using a strained interpretation of the Election Code to strip away a safeguard away from millions of voters as they prepare to vote in the 2024 general election. There is simply no reason to do so.

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mail-in ballot, absentee ballot, or in-person at the polling place. If it is determined that no other ballot had been cast by the voter, the provisional ballot will be opened and counted.")

B. **The Commonwealth Court's Decision Is Correct Given The Strong Presumption In Favor Of Effectuating the Franchise**

Pennsylvania law requires county Boards of Elections to count provisional ballots cast by eligible, registered electors if the elector complies with the provisional ballot requirements and if the elector has not successfully cast another ballot in that election. The issue before this Court is how qualified electors may cast a ballot – not how Legislative *Amici's* standards for "finality" or "election integrity" may be met. As the Legislative *Amici* and Appellants assert the General Assembly's preeminence in the constitutional order of Pennsylvania elections, they diminish if not overlook the voting rights of County *Amici's* constituents, which must be protected above competing interests in election administration. County *Amici* each took an oath to "support, obey and defend" these rights. Pa. Const. art. VI, § 3 (Public Officers; oath of office). Accordingly, they understand that voting is not only a constitutional right, but also a foundational one. They also understand that, in interpreting an ambiguous statute, the Commonwealth Court was correctly guided by the directive to protect the electoral franchise rather than reading the Election Code in a way that would implicate grave constitutional concerns.

1. Adopting Appellants' interpretation of the Election Code would present serious constitutional questions and yield absurd outcomes for County *Amici's* constituents.

Protecting the right to vote is foundational, because that right "is fundamental and pervasive of other basic civil and political rights." *Banfield v. Cortes*, 110 A.3d 155, 176 (Pa. 2015) (citation omitted); *see also* Pa. Const. art. I, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."). It has been the "longstanding and overriding policy in this Commonwealth to protect the elective franchise." *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) (quoting *Petition of Cioppa*, 626 A.2d 146, 148 (Pa. 1993)). In fact, this policy has stood the test of time, spanning at least 75 years, across different partisan leadership, economic circumstances, and social movements. As this Court recently made clear, where the statute leaves room for ambiguity, the "concept that 'technicalities should not be used to make the right of the voter insecure,' [and] the interpretive principle that the Election Code is subject to a liberal construction in favor of the right to vote… are venerable and well established." *In re Canvass of Provisional Ballots in the 2024 Primary Election*, No. 55 MAP 2024, 2024 WL 4181584 at *5 (Pa. Sept. 13, 2024) (quoting *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954)); *see also Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) (the Election Code "should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate

of their choice."); *Appeal of James*, 105 A.2d 64, 65 (Pa. 1954) ("All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor.").

Adopting Appellants' position – that the Election Code forbids an elector from casting a valid provisional ballot on Election Day because he or she previously submitted a faulty envelope – may run afoul of Pennsylvania's Free and Equal Elections Clause, Pa. Const. art. I, § 5.[6] However, the Commonwealth Court was wise to avoid resolving the constitutional questions presented by such an interpretation, because, as explained below, the Election Code does not need to be read to require this result.[7] *Genser, et al. v. Butler Cnty. Bd. of Elections, et al.,* No. 1074 C.D. 2024, 2024 WL 4051375, at *16, n.29 (Pa. Commw. Ct. Sept. 5, 2024).

The Commonwealth Court's opinion included practical examples which illustrate the wisdom of this choice. Notably, the Commonwealth Court explained that under Butler County's interpretation of the Election Code, an elector who mailed back a secrecy envelope without an actual ballot would have been treated as

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[6] This provision of Article I of the Pennsylvania Constitution requires that regulations burdening the right to vote must be "reasonable, non-discriminatory regulations to ensure honest and fair elections that proceed in an orderly and efficient manner." *Banfield*, 110 A.3d at 176-77.

[7] Under the canon of constitutional avoidance, "when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," it is presumed that courts will adopt the view to avoid the question. *MCI WorldCom, Inc. v. Pennsylvania Pub. Util. Comm'n*, 844 A.2d 1239, 1249 (Pa. 2004).

having "voted" (and thus ineligible to cast a provisional ballot). *Genser* 2024 WL 4051375, at *15. While Appellants ridicule this example as a mere "hypothetical," Appellant Br. at 36, County *Amici* known that voters mistakenly return empty secrecy envelopes *in every election cycle*. For example, County *Amici* include county commissioners in Chester County, where, in each election since the implementation of Act 77, the Board of Elections has received multiple secrecy envelopes that were empty. The Board has also received secrecy envelopes containing misplaced items instead of ballots in each election. In the 2024 primary election, for example, one of these envelopes contained a personal check that was made out to the voter's church. Attempting to tithe is not the same thing as having voted, and a statute that said otherwise would be absurd.

While Appellants dismiss such outcomes as a "distraction" from their argument, Appellant Br. at 36, County *Amici* know and represent the very real Pennsylvanians who would be disenfranchised under Appellants' theory of voting rights. As explained by the Commonwealth Court, reading the Election Code to disqualify otherwise valid provisional ballots would be absurd and unreasonable,[8]

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[8] Courts "must in all instances assume the General Assembly does not intend a statute to be interpreted in a way that leads to an absurd or unreasonable result." *Pa. Democratic Party*, 238 A.3d at 380 (citing 1 P.S. § 1922(1)). Illustrating another absurd outcome that would result from Butler County's reading of the Election Code, the Commonwealth Court cited the example of electors who may have made the same mistakes as Genser and Mattis, but were tardy to the point that their declaration envelopes arrived after Election Day. Under Butler County's policy, if both sets of electors submitted provisional ballots, "[t]he lackadaisical mail-in elector winds up with one vote; the diligent elector winds up with none." *Genser*, 2024 WL 4051375 at *15, n.28.

running afoul of this Court's clear admonition that the "goal must be to enfranchise and not to disenfranchise [the electorate]." *Pa. Democratic Party*, 238 A.3d at 361 (quoting *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972)). The Commonwealth Court's interpretation of the Election Code is not only in line with the understanding of County *Amici*, it is correct under Pennsylvania law.

2. The Commonwealth Court was correct to resolve ambiguous language in the Election Code in favor of electors' rights.

While federal and state law make it clear that electors must be given the opportunity to cast provisional ballots, the Election Code has left it to the courts to resolve how Boards of Elections should count provisional ballots. Thus, the Commonwealth Court did not "usurp[]the power of the General Assembly" as alleged by the Legislative *Amici*, Leg. *Amicus* at 2, but rather resolved a statute that has generated disagreement since its enactment.[9]

Starting with the purpose of provisional ballots is crucial. The 2002 Help America Vote Act (HAVA) required states to implement provisional-voting regimes

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[9] While many parties, *amici*, and courts agree on this reasonable interpretation of the statute, the Appellees in this case (and some individual judges) do not, and "[a] statute is ambiguous when there are at least two reasonable interpretations of the text." *A.S. v. Pennsylvania State Police*, 143 A.3d 896, 905-06 (2016) (collecting cases) To *amici*, who rely on the judiciary to interpret the Election Code, the variance is an indicator that there is an ambiguity to resolve. Even if the Court concludes that Appellees' interpretation is also reasonable, then the statute is ambiguous, and the "venerable and well established" principle of applying "liberal construction in favor of the right to vote" certainly applies. *In re Canvass of Provisional Ballots*, 2024 WL 4181584 at *5. The Commonwealth Court was therefore correct in resolving that ambiguity in favor of counting the votes. *Genser*, 2024 WL 4051375 at *15 (citations omitted).

for federal elections (at a minimum). 52 U.S.C. § 21082 (*formerly* 42 U.S.C. § 15482).[10] The purpose of provisional voting is to "prevent on-the-spot denials of provisional ballots to voters," ensuring that eligible voters can vote exactly once. *See, e.g., Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004).

As the Commonwealth Court correctly observed, however, Pennsylvania statutes regarding the counting of provisional ballots are ambiguous. The county board "shall" count the provisional ballot if the voter "did not cast any other ballot," 25 P.S. § 3050(a.4)(5)(i), and "shall not" count the provisional ballot if a mail-in ballot was "timely received." *Id.* § 3050(a.4)(5)(ii)(F). Additionally, the Election Code authorizes provisional voting by electors who request mail-in ballots but do not "vote" those ballots. *Id*. §§ 3150.16(b)(2)[11], 3146.6(b)(2). However, crucially, the terms "cast" and "vote" are not defined, 25 P.S. § 2602, and many authorities have interpreted those terms to only apply to ballots that are being counted.

County *Amici* agree with the Secretary of the Commonwealth's reading as well as the ruling of the Commonwealth Court that a voter whose mail-in ballot is

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[10] Shortly after HAVA became law, the General Assembly amended the Election Code to incorporate HAVA's provisional ballot protections. *See* 25 P.S. § 3050.

[11] "An elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot under section 1210(a.4)(1) [25 P.S. § 3050]." 25 Pa. Stat. Ann. § 3150.16.

cancelled or invalid has not "cast any other ballot" or "voted." *Genser*, 2024 WL 4051375 at *13. The provision concerning whether a ballot is "timely received" arises "only if that ballot is and remains valid and will be counted, such that that elector has already voted." *Id*. Several other courts agree. *Amici* include county officials in Delaware County and Washington County; this year, the Butler County court's counterparts in these counties resolved this ambiguity by concluding that, under the Election Code, electors who have returned invalid ballots have not yet voted. *Keohane v. Delaware County Board of Elections*, No. 2023-004458 at *3 (Del. Cnty. Ct. Common Pleas, Sept. 21, 2023) (such voters "cannot be said to have 'cast' a ballot."); *Center for Coalfield Justice v. Washington County Board of Elections*, No. 2024-003953 at *26 (Wash. Cnty. Ct. Common Pleas, Aug. 23, 2024) ("It is clear that an elector whose mail-in packet is deemed to have a disqualifying error did not vote."). Days before the filing of this brief, a separate panel of the Commonwealth Court relied on the statutory analysis in the Commonwealth Court's decision in this case in order to uphold the Washington County trial court's decision. *Center for Coalfield Justice v. Washington County Board of Elections,* No. 1172 C.D. 2024 at *13 (Pa. Commw. Ct. Sept. 24, 2024).

This reading of the Election Code, independently reached by trial and appellate judges across the Commonwealth, is not only common sense, it also allows County *Amici* to continue to effectuate the purpose of a provisional ballot as a

failsafe mechanism to enable qualified voters to secure their fundamental right to vote. A contrary interpretation would not.

3. Any outcome other than affirming the Commonwealth Court would create unnecessary confusion.

Indeed, while Legislative *Amici* argue that affirming the Commonwealth Court would lead to confusion, the opposite is true; overturning this decision would cause widespread confusion among millions of County *Amici's* constituents. The Commonwealth Court's decision aligns with County *Amici's* understanding (and, for many, practice) of effectuating the electoral franchise under Pennsylvania law. The Commonwealth, like many County *Amici,* advises voters to cast provisional ballots under similar circumstances. Over the last four years, millions of voters in County *Amici's* counties have become familiar with this system, having been educated by election officials,[12] exposed to news articles reporting counties'

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[12] The Commonwealth's "Voter Support" website informs voters that they "may be issued a provisional ballot" if "[y]ou were issued an absentee or mail-in ballot but believe you did not successfully vote that ballot, and you do not surrender your ballot and outer return envelope at the polling place to be spoiled," or if "[y]ou returned a completed absentee or mail-in ballot that was rejected, or you believe will be rejected, by the county board of elections and you believe you are eligible to vote." Commonwealth of Pennsylvania, *Voting by Provisional Ballot*, https://www.pa.gov/en/agencies/vote/voter-support/provisional-ballot.html (last visited Sept. 25, 2024). Some counties' materials echo that guidance. For example, an educational video from Chester County instructs voters that they may cast a provisional ballot if "you were issued but did not successfully cast an absentee or mail-in ballot, and you did not surrender your ballot at the polling place to be voided." Chester County, *Chester County – Voting by Provisional Ballot*, YOUTUBE, https://youtu.be/5hWGbYKseqY at 0:41 (last visited Sept. 25, 2024) (cleaned up).

practices,[13] and repeatedly instructed in several consecutive election cycles to submit provisional ballots if their mail-in ballots are likely to be disqualified.[14] At least some counties have already begun training poll workers. For millions of Pennsylvanians, an affirmance of the Commonwealth Court's decision would only validate the status quo.

On the other hand, grating the relief sought by Appellants would create sudden confusion and would disenfranchise Pennsylvania electors. Stripping millions of electors of the right to cast a provisional ballot at this late stage in the election cycle, especially in those counties with a history of relying on this failsafe, would lead to voters making futile attempts to vote provisionally on Election Day. Such a change in the law would, operationally, cause several counties represented by County *Amici* to overhaul the substance and methods of their guidance to voters and poll workers,

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[13] Carter Walker, *Judge tells Delaware County to accept in-person votes from residents whose mail ballots were rejected*, SPOTLIGHT PA (Sept. 21, 2023), https://www.spotlightpa.org/news/2023/09/pennsylvania-mail-provisional-ballot-delaware-county-lawsuit/.

[14] For example, in Montgomery County, mail-in voters who forget to include a secrecy envelope are contacted via email and instructed that they may vote a provisional ballot at their polling place on Election Day. Some counties post a list of voters whose returned mail-in ballots have been determined to have a defect, including lack of a secrecy envelope; the list provides instructions on voting with a provisional ballot on Election Day. *See, e.g.,* Philadelphia City Commissioners, *2024 Primary - Ballots Returned as Undeliverable or Administratively Determined to Have No Secrecy Envelope, No Signature, No Date, or a Potentially Incorrect Date on Return Envelope* (Apr. 29, 2024), https://vote.phila.gov/news/2024/04/18/2024-primary-ballots-administratively-determined-to-have-no-secrecy-envelope-no-signature-no-date-or-a-potentially-incorrect-date-on-return-envelope/ (last visited Sept. 25, 2024). Other counties send individual notices to voters whose mail-in ballots have not been counted due to deficiencies, including a lack of secrecy envelope. *See, e.g., Exhibit 1* (providing an example of the letter that Chester County sent voters after the April 2024 primary, including instructions to cast a provisional ballot on Election Day).

a particularly onerous challenge given the timing as we approach the election. Even if County *Amici* are able to retrain poll workers and invest in last-minute education efforts, many of their constituents would face needless confusion, frustration, and disenfranchisement on Election Day.

By contrast, voters are already permitted to cast provisional ballots in all 67 counties. Affirmance with precedential effect would not require counties to alter the nature of their election administration operations but instead would require them, during the final tally, to count provisional ballots like those cast by Ms. Genser and Mr. Mattis as part of the provisional ballot process. Given the strong presumption in favor of counting ballots, *Pa. Democratic Party*, 238 A.3d at 360-61 (quoting *Shambach*, 845 A.2d at 798), the Commonwealth Court was correct in reading the Election Code to require such a result.

IV. CONCLUSION

For all of the foregoing reasons and for the reasons provided by Respondents as well as the Department of State, the judgment of the Commonwealth Court should be affirmed. Such a result not only vindicates the rights of Ms. Genser and Mr. Mattis, but of millions of County *Amici's* constituents. The Election Code exists to enfranchise, not disenfranchise, their constituents, and providing consistency on these points will benefit all Pennsylvania electors, not only in this year's election but in elections for years to come.

Dated: September 26, 2024

Respectfully submitted,

CURTIN & HEEFNER LLP

By:

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Joseph J. Khan, Esquire
Pa. ID No. 86620
2005 S. Easton Road, Suite 100
Doylestown, PA 18901
Phone: (267) 898-0570
jjk@curtinheefner.com

Jonathan B. Miller, Esquire*
Shannon Eddy, Esquire*
PUBLIC RIGHTS PROJECT
490 43rd Street, Unit #115
Oakland, CA 94609
Phone: (510) 738-6788
jon@publicrightsproject.org
shannon@publicrightsproject.org
On the brief

Counsel for Amici Curiae

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APPENDIX A - List of Amici Curiae

Pat Fabian
Commissioner, Armstrong County

Dante Santoni, Jr.
Commissioner, Berks County

Diane Ellis-Marseglia
Commissioner and Chair, Bucks County Board of Commissioners

Bob Harvie
Commissioner, Bucks County Chair, Bucks County Board of Elections

Amber Concepcion
Commissioner, Centre County

Mark Higgins
Commissioner, Centre County

Josh Maxwell
Commissioner-Chair, Chester County

Marian Moskowitz
Commissioner, Chester County

Angela Harding
Commissioner, Clinton County

Christoper Seeley
Commissioner, Crawford County

Justin Douglas
Commissioner, Dauphin County

Dr. Monica Taylor
Council Chair, Delaware County

Rock Copeland
Council Member, Erie County

Chris Drexel
Council Member, Erie County

Vince Vicites
Commissioner, Fayette County

Sherene Hess
Commissioner, Indiana County

Jo Ellen Litz
Commissioner, Lebanon County

Geoff Brace
Commissioner-Chair, Lehigh County

Patty Krushnowski
Council Member, Luzerne County

Jimmy Sabatino
Council Member, Luzerne County

Brittany Stephenson
Council Member, Luzerne County

Timothy McGonigle
Commissioner, Mercer County

Neil K. Makhija
Commissioner, Montgomery County
Chair, Montgomery County Board of Elections

Jamila H. Winder
Commissioner and Chair, Montgomery County Board of Commissioners

Lamont G. McClure
County Executive,
Northampton County

Seth Bluestein
City Commissioner,
City and County of Philadelphia

Lisa Deeley
Commissioner and Vice Chair,
City and County of Philadelphia

Omar Sabir
City Commissioner and Chairman, City and County of Philadelphia

Larry Maggi
Commissioner, Washington County

EXHIBIT 1

THE COUNTY OF CHESTER

BOARD OF ELECTIONS:
Josh Maxwell, Chair
Marian D. Moskowitz, Vice Chair
Eric M. Roe, Commissioner

CHESTER COUNTY VOTER SERVICES
Government Services Center
601 Westtown Road, Suite 150
P.O. Box 2747
West Chester, PA 19380-0990
(610) 344-6410   FAX: (610) 344-5682

Karen Barsoum
Director

Dear Voter,

During intake of your mail-in/absentee ballot envelope, we identified a deficiency which may prevent your ballot from being counted.

If you would like to cure this deficiency, please come to the Chester County Voter Services Office at **601 Westtown Road, Suite 171, West Chester between 8:30AM and 4:30PM, Monday-Friday**. You will need to verify your identity by showing either a state-issued ID, an employee ID, a utility bill with your name and address, or a government check, or you can verbally verify your driver's license number or last four digits of your social security number in person.

The last day to cure a deficiency is **Monday, April 22, 2024**.

If you are unable to come to the Voter Services office, you can go to your Polling Place and vote by casting a Provisional Ballot on Election Day (Tuesday, April 23, 2024). The elections staff at your Polling Place will assist you. As a reminder, the polls are open from 7AM to 8PM. To find your polling place, visit www.chesco.org/elections.

If you have any questions, you may contact the office at 610-344-6410 or via e-mail ballotinfo@chesco.org.

Sincerely,

Chester County, Voter Services

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CERTIFICATE OF WORD COUNT

I hereby certify that this brief contains 4,274 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this petition.

Dated: September 26, 2024

_____
Joseph Khan

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: September 26, 2024

Joseph Khan

APPENDIX B

Changes to SURE VR and PA Voter Services as of March 11, 2024

The following information outlines the additions and changes which will be deployed after the close of business on March 11, 2024, as part of the B 23.9.0 release. Please contact the SURE Help Desk for further information or with questions regarding any item(s) on the list provided below.

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SURE VR

Ballot Response Type Updates

As part of this release, modifications have been made within the SURE VR system to add 6 OPTIONAL 'Pending' Status Reasons when recording 'Response Types' for absentee and/or mail in ballot labels. These options may be used if a county offers ballot curing. If a county chooses to apply these Status Reasons and the voter's ballot application contains an email address, the system will then send an email to the voter which will provide them with information relating to the status of their ballot with a URL link to the Department of State website. Email details are provided later in this document.

Below are the new 'Pending' Status Reasons:

- PEND – INCORRECT DATE
- PEND – NO DATE
- PEND – NO SIGNATURE
- PEND – NO SECRECY ENVELOPE
- PEND – NO ID
- PEND – OTHER

The new response types are available for selection for each of the following ballot labels:

- Absentee Ballot Label
- Mail-In Ballot Label
- PA – Bedridden Veteran Ballot Label
- PA – Email – Bedridden Veteran Ballot Label
- PA – Email – Military and Civilian Overseas Ballot Label
- PA – Email – Remote/Isolated Bedridden Veteran Ballot Label
- PA – Email – Remote/Isolated Overseas Ballot Label
- PA – Military and Civilian Overseas Ballot Label
- PA – Remote/Isolated Bedridden Veteran Ballot Label
- PA – Remote/Isolated Overseas Ballot Label

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The response types are available in the following areas within the SURE VR system:

- **Record Mailings** Screen

- **Bulk Ballot Response Utility** Screen

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Statewide Uniform Registry of Electors (SURE) Project
B 23.9.0_County Release Notes
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- *Ballots* tab on the **Absentee/Mail-In Voting** screen
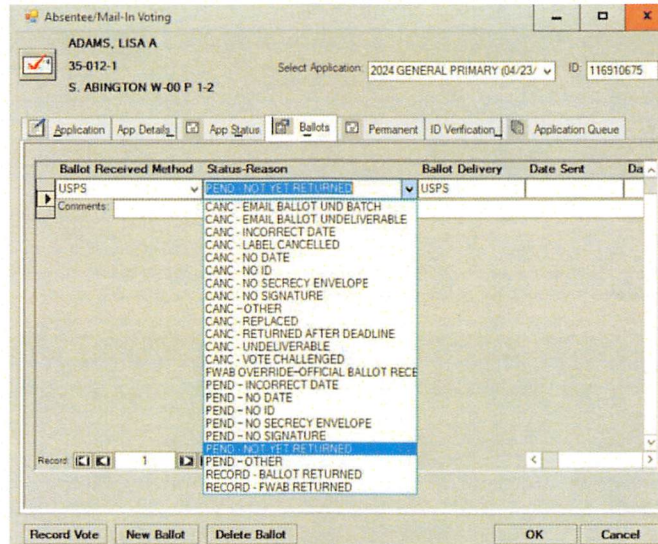
Please Note: Although changes were made to include the new response types under the *Ballots* tab of the **Absentee/Mail-In Voting** screen, the Department of State strongly recommends if a Status Reason update is needed, that the change should be made by utilizing the **Record Mailings** or **Bulk Ballot Response Utility** screens.

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By current design, changing the Status Reason from the **Absentee/Mail In Voting** screen, *Ballots* tab will not properly update the *Correspondence* tab on the voter record.

If using the **Record Mailings** screen, it will be necessary to access the *Response History* tab of the **Record Mailings** screen to clear the previous response before you can proceed to update the new response type.

Please reference the "Clearing an Absentee Ballot Label Response" in the Absentee Processing User Guide for detailed steps to clear a response.
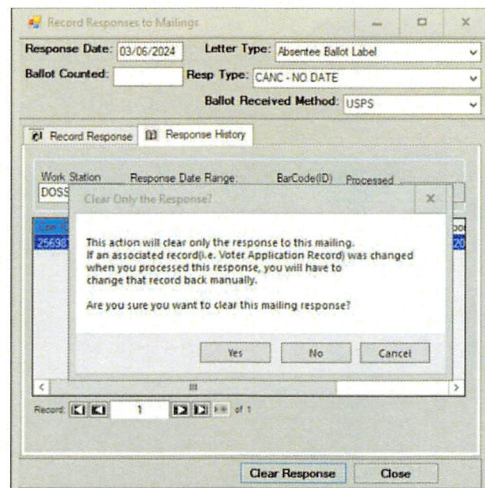
Additionally, the response type of 'CANC-VOTE CANCELLED' has been removed as a drop-down selection. Any previous ballot applications associated with this status will not be affected for historical purposes.

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Ballot Response Email Verbiage Updates

As part of this release, emails that are triggered upon recording a response have been updated to include the new pending Response Types and will provide the applicant with more information regarding their current ballot status. These apply when a change has been made to the ballot or when the ballot has been recorded as received,

The table below lists each of the 'Response Types' as well as the 'Business Reason' for which they apply. The 'Second Paragraph Email Verbiage' describes language that is associated to each Response Type and will appear as dynamic text in the second paragraph of the emails. This information will also appear on the PAVS Election Ballot Status Tracker updates described later below.

Response Type	Business Reason	Second Paragraph Email Verbiage
PEND – OTHER	To be used when a county offers the opportunity for voters to replace or correct a submission error, and the county has noticed a submission error.	The county has noticed an error with your ballot envelopes, which means your ballot may not be counted. If you cannot fix the errors in time, you can go to your polling place on election day and cast a provisional ballot.
PEND – INCORRECT DATE	To be used when a county offers the opportunity for voters to replace or correct a submission error, and the county has noticed that the voter used the wrong date.	Your mail ballot may not be counted because you did not correctly date the declaration on your ballot return envelope. If you do not have time to request a new ballot before [Ballot Application Deadline Date], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.
PEND – NO DATE	To be used when a county offers the opportunity for voters to replace or correct a submission error, and the county has noticed that the voter left	The county has noticed that you did not date your ballot return envelope. This means your ballot may not be counted. Your county offers you the opportunity to fix your ballot envelope, and you should go to https://www.vote.pa.gov/Voting-in-PA/Pages/Return-Ballot.aspx to get more information.

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	the ballot return envelope undated.	If you cannot fix your ballot return envelope in time, you can go to your polling place on election day and cast a provisional ballot.
PEND – NO SIGNATURE	To be used when a county offers the opportunity for voters to replace or correct a submission error, and the county has noticed that the voter left the ballot return envelope unsigned.	The county has noticed that you did not sign your ballot return envelope. This means your ballot may not be counted. Your county offers you the opportunity to fix your ballot return envelope, and you should go to https://www.vote.pa.gov/Voting-in-PA/Pages/Return-Ballot.aspx to get more information. If you cannot fix your ballot return envelope in time, you can go to your polling place on election day and cast a provisional ballot.
PEND – NO SECRECY ENVELOPE	To be used when a county offers the opportunity for voters to replace or correct a submission error, and the county has noticed that the voter returned the ballot without a secrecy envelope.	The county has noticed that when you returned your ballot, you placed it in the ballot return envelope without placing it into the secrecy envelope that says "OFFICIAL ELECTION BALLOT." This means your ballot may not be counted. Your county offers you the opportunity to fix your ballot envelopes, and you should go to https://www.vote.pa.gov/Voting-in-PA/Pages/Return-Ballot.aspx to get more information. If you cannot fix your ballot envelopes in time, you can go to your polling place on election day and cast a provisional ballot.
CANC – EMAIL BALLOT UND BATCH	This is used by SURE VR when an email ballot correspondence cannot be delivered to the absentee email address. Ballots with this type of response were automatically placed in an UND DEL absentee application batch.	Your ballot will not be counted because your emailed balloting materials have been returned as undeliverable.
CANC – EMAIL BALLOT UNDELIVERABLE	Cancels a ballot label that has been sent via email if the email has been returned as undeliverable.	Your email balloting materials were returned as undeliverable. Your county will send you a new paper ballot to the address on file.

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	Recording a ballot label as CANC- Email Ballot Undeliverable will automatically queue a paper ballot label for the voter.	
CANC – INCORRECT DATE	This cancels the ballot if it is returned to the county with an incorrect date on the ballot envelope. It should only be used when the county has made a final decision as to the ballot, or it does not offer the opportunity to cure.	Your mail ballot may not be counted because you did not correctly date the declaration on your ballot return envelope. If you do not have time to request a new ballot before [Ballot Application Deadline Date], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.
CANC – LABEL CANCELLED	Used if a ballot label is misplaced or damaged and is cancelled in order to create another one; also used to generate 2nd ballot labels.	Your ballot status has been updated to cancelled because your original ballot has been misplaced or damaged. A new ballot is being created and will be provided to you. No email generated.
PEND – NO ID	To be used by any county that has received a ballot for a voter who did not include the required ID, and who wants to alert the voter to this issue.	Your ballot application did not include valid identifying information, and your ballot was returned without the necessary ID. Your ballot will not be counted unless you bring valid identifying information to your county election official. You can find more information on the necessary ID here: https://www.vote.pa.gov/Voting-in-PA/Documents/DOS_Identification_for_absentee_voting.pdf.
CANC – NO DATE	Cancels the ballot if it is returned to the county with no date on the ballot envelope. It should only be used when the county has made a final decision as to	Your mail ballot may not be counted because you did not date the declaration on your ballot return envelope. If you do not have time to request a new ballot before [Ballot Application Deadline Date], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.

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	the ballot, or it does not offer the opportunity to cure.	
CANC – NO ID	Cancels ballot if absentee or mail-in requiring ID is not provided.	Your ballot will not be counted because you did not timely provide proof of identification.
CANC – NO SECRECY ENVELOPE	Cancels ballot if county receives ballot and it is not in the inner secrecy envelope. It should only be used when the county has made a final decision as to the ballot, or it does not offer the opportunity to cure.	Your ballot will not be counted because it was not returned in a secrecy envelope. If you do not have time to request a new ballot before [Ballot Application Deadline Date], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.
CANC – NO SIGNATURE	Cancels the ballot if it is returned to the county with no signature on the ballot envelope. It should only be used when the county has made a final decision as to the ballot, or it does not offer the opportunity to cure.	Your ballot will not be counted because you did not sign the declaration on your ballot return envelope. If you do not have time to request a new ballot before [Ballot Application Deadline Date] or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.
CANC – REPLACED	Used to cancel a lost ballot if a replacement is sent.	No email generated.
CANC – RETURNED AFTER DEADLINE	After Deadline Cancels the ballot if it is invalid due to being returned after the deadline.	Your ballot will not be counted because it was received after the deadline.
CANC – UNDELIVERABLE	Cancels the ballot if it is returned undeliverable by the Post Office.	Your ballot will not be counted because it was returned as undeliverable by the United States Postal Service (USPS). If you do not have time to request a new ballot before [Ballot Application Deadline Date], or if the deadline has passed, you

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		can go to your polling place on election day and cast a provisional ballot.
CANC – OTHER	The CANC– OTHER status reason should be used *only* when no other field more aptly applies. This may be for a secrecy envelope with disqualifying markings on it, or other issues that do not fall into another SURE categories. Do not use this code for any other cancellation reason.	The county has identified an error with your ballot envelope(s), and your ballot will not be counted. If you do not have time to request a new ballot before [Ballot Application Deadline Date], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.
CANC – VOTE CHALLENGED	Used if a ballot is not counted because of a successful challenge.	Your ballot will not be counted because of a successful challenge.
PEND – NOT YET RETURNED	Status the label is in after the ballot is sent and before it is returned.	No email generated.
RECORD – BALLOT RETURNED	Records the voter's ballot as returned prior to the deadline.	Your ballot has been received by [County Name] County as of [DateRecorded]. If your county election office identifies an issue with your ballot envelopes that prevents the ballot from being counted, you may receive another notification. Otherwise, you will not receive any further updates on the status of your ballot and you are no longer permitted to vote at your polling place location.
RECORD-FWAB RETURNED	Used to record a Federal Write In Ballot was received prior to the Official Ballot being returned.	Your ballot has been received by [CountyName] County as of [DateRecorded].
FWAB OVERRIDE-OFFICIAL BALLOT RECEIVED	Used to record an Official Ballot as returned and	Your ballot has been received by [CountyName] County as of [DateRecorded].

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	overrides the Federal Write In Absentee Ballot previously recorded.	

Sample Emails:

The email gives the voter notice that their ballot has been received and has additional language stating that the voter may receive further communication if an error is identified with their ballot.

Subject Line: Your Ballot Has Been Received
Email Body:
Dear [ApplicantName],

Your ballot has been received by [CountyName] County as of [DateRecorded].

Please note, if [CountyName] County observes an issue with your ballot envelopes, you may receive another email from this account with additional information. To get more information on your ballot's status, you can look it up at https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx.

If you have questions about your ballot, please contact [CountyName] County at [CountyContact].
Thank you.
To read this information in Spanish, go to [ballot tracker URL] – In Spanish
To read this information in Chinese, go to [ballot tracker URL] – In traditional Chinese
****Please do not reply to this email.****

FWAB Ballots

Subject Line: Your Ballot Has Been Received
Email Body:
Dear [ApplicantName],

Your ballot has been received by [CountyName] County as of [DateRecorded]. To get more information on your ballot's status, you can look it up at https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx.

If you have questions about your ballot, please contact [CountyName] County at [CountyContact].
Thank you.
To read this information in Spanish, go to [ballot tracker URL] – In Spanish
To read this information in Chinese, go to [ballot tracker URL] – In traditional Chinese

TLP:AMBER+STRICT

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****Please do not reply to this email.****

Your Ballot Status Has Changed

The email below is generated when certain cancel codes and pending codes are recorded in SURE VR. The second paragraph dynamic email language will be the same as shown in the table above.

Subject Line: Your Ballot Status Has Changed – Check for Updates
Email Body:
Dear [ApplicantName],

After your ballot was received by [CountyName] County, it received a new status.

(THE SECOND PARAGRAPH DYNAMIC EMAIL LANGUAGE WILL APPEAR HERE.)

You can get more information on your ballot's new status by going to https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx.

If you have questions or need more information after checking your ballot's status, please contact [CountyName] County at [CountyContact].

To read this information in Spanish, go to [ballot tracker URL] – In Spanish
To read this information in Chinese, go to [ballot tracker URL] – In traditional Chinese

Thank you.
****Please do not reply to this email.****

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SURE VR Disconnects

Modifications to the SURE VR system to address county reported issues with the 'Add Last Scan Document' and 'Add Last Scan' buttons, stemming from a discovered issue with system disconnects from the 'Z Drive'. Currently, users must select a map drive button in CITRIX when this issue occurs. This release will include systematic logic to reconnect the drive when the system detects a disconnect has occurred.

- The system will now give an updated error message when an incorrect file format is being used.

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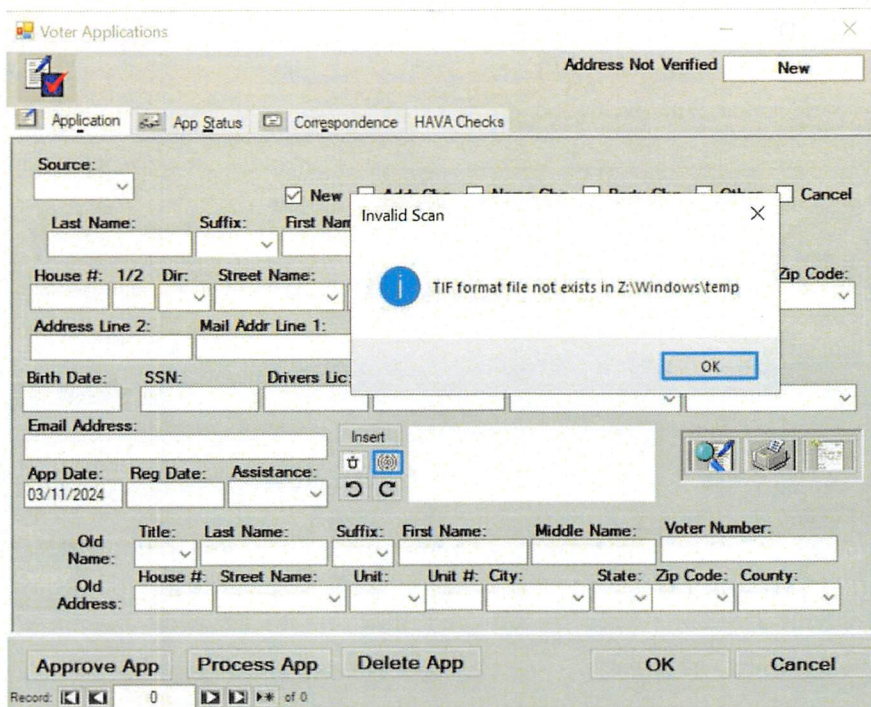
PA VOTER SERVICES

Election Ballot Status Tracker

In addition to the updates mentioned above, modifications have also been made to the PAVS Election Ballot Status Tracker for a voter wishing to view their ballot status for a ballot application as follows:

- The 'Ballot Type' column has been updated to display either "Absentee" or "Mail-In".
- The 'Status' column displays the Response Types associated to the ballot.
- Below each ballot line item will be a brief description of the status listed to give additional information to the voter.
- In the event multiple Response Types exist for an active election, then each of the ballot line items will be displayed along with the status of each ballot.

The tracker and all columns have been updated to appear in English, Spanish, and Traditional Chinese based on the selection made by the voter.

Please see the screenshots below:

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You cannot use the tracker to track the status of a ballot voted in person on Election Day.

First Name (as it appeared on your application)

Lee

Last Name (as it appeared on your application)

Johnson

Date of Birth (mm/dd/yyyy)

08/26/1963

County

LACKAWANNA

Submit

Your Ballot Status Result(s)

Ballot Type	Election	Application Received	Application Processed	Ballot Mailed On	Ballot Received	Status
Absentee	2024 GENERAL PRIMARY	02/16/2024	02/16/2024			CANC – OTHER

The county has identified an error with your ballot envelope(s), and your ballot will not be counted. If you do not have time to request a new ballot before [April 08, 2024], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.

The table above provides a summary of your application and ballot status. The columns will update as your county processes your application or ballot. The status column will read as "Vote Recorded" after your county has received your voted ballot.

If you have any questions about the status of your ballot, please contact LACKAWANNA County at (570) 963-6737 or visit www.vote.pa.gov/county for more information.

Column Descriptions:
Ballot Type - Absentee or Mail-In
Election - The requested ballot is for this election.
Application Received - The date when your county received your application.
Application Processed - The date when your county processed your application.
Ballot Mailed On - The date when your county mailed your ballot to the address on your application.
Ballot Received by County - The date when your county received your voted ballot.
Status - The status of your ballot request is the last known state of where your ballot request stands.

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Estado de la boleta electoral

Puede rastrear el estado de su **papeleta de voto por correo o en ausencia** completando los campos abajo. **No puede usar el rastreador para rastrear el estado de la papeleta que completó en persona el día de las elecciones.**

Nombre (tal y como aparecía en su solicitud)

Lee

Apellido (tal y como aparecía en su solicitud)

Johnson

Fecha de Nacimiento (MM/DD/YYYY)

08/26/1963

Condado

LACKAWANNA

Enviar

Resultado(s) del estado de su boleta

Tipo de boleta	Elección	Solicitud recibida	Solicitud procesada	Boleta enviada por correo	Boleta recibida	Estado
Absentee	2024 GENERAL PRIMARY	02/16/2024	02/16/2024			CANC – OTHER

El condado ha identificado un error en el (los) sobre(s) de su papeleta y su papeleta no será contada. Si no tiene tiempo para solicitar una nueva papeleta antes de la April 08, 2024 , o si la fecha límite ya pasó, puede ir a su lugar de votación el día de las elecciones y emitir una papeleta provisional.

El cuadro de arriba presenta un resumen de su solicitud y estado de boleta. Las columnas se actualizarán a medida que en su condado se procese su solicitud o boleta. En la columna de estado aparecerá "Vote Recorded" después de que su condado haya recibido su boleta de votación.

Si tiene alguna pregunta sobre el estado de su boleta, por favor comuníquese con el Condado de LACKAWANNA en (570) 963-6737 o visite www.vote.pa.gov/county para más información.

Descripciones de las columnas
Tipo de boleta - Ausente o por correo
Elección - La boleta solicitada es para esta elección.
Solicitud recibida - La fecha en la que su condado recibió su solicitud.
Solicitud procesada - La fecha en la que su condado procesó su solicitud.
Boleta enviada por correo - La fecha en la que su condado le envió su boleta a la dirección que figura en su solicitud.
Boleta recibida por el condado - La fecha en la que su condado recibió su boleta de votación.
Estado - El estado de su solicitud de boleta es el último estado conocido en el que se encuentra su solicitud de boleta.

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`TLP:AMBER+STRICT`

選票狀態

填寫下列欄位，即可追蹤您的**郵寄或缺席選票狀態。** 若選票是在選舉日當天由本人投入，**則您無法使用追蹤器進行追蹤。**

名字 (如申請上所示)

> Lee

姓氏 (如申請上所示)

> Johnson

出生日期 (月/日/年)

> 08/26/1963

縣

> LACKAWANNA

[提交]

您的選票狀態結果

選票類型	選舉	申請接收日期	申請處理日期	選票郵寄日期	選票已接收	狀態
Absentee	2024 GENERAL PRIMARY	02/16/2024	02/16/2024			CANC – OTHER

如果本縣發現您的選票信封有錯誤，您的選票將不予計數。如果您在 April 08, 2024 前沒有時間申請一張新選票，或如果截止日期已過，您可在選舉當日前往投票站投下一張臨時選票。

上表提供您申請與選票狀態的摘要。只要您的縣處理您的申請或選票，欄就會更新。縣收到您的投票選票之後，狀態欄就會變成「投票已記錄」。

若您對您的選票狀態有任何疑問，請聯絡 LACKAWANNA 縣 ((570) 963-6737)，或造訪 **www.vote.pa.gov/county** 以獲取更多資訊。

欄說明：
選票類型 - 缺席還是郵寄
選舉 - 申請的選票用於此選舉。
申請接收日期 - 您的縣收到申請的日期。
申請處理日期 - 您的縣處理您申請的日期。
選票郵寄日期 - 您的縣將您的選票寄到您申請地址的日期。
縣收到選票日期 - 您的縣收到您投票選票的日期。
狀態 - 您選票申請的狀態是您選票申請最近的已知狀態。

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| DEPARTMENT OF STATE | | | English | Español | 繁體中文 | 🏠 HOME | OTHER LINKS ▾ |

Election Ballot Status

Your **Mail-in or Absentee Ballot status** can be tracked by completing the fields below.
You cannot use the tracker to track the status of a ballot voted in person on Election Day.

First Name (as it appeared on your application)

Jeff

Last Name (as it appeared on your application)

Penndot

Date of Birth (mm/dd/yyyy)

10/03/1965

County

LACKAWANNA

[Submit]

Your Ballot Status Result(s)

Ballot Type	Election	Application Received	Application Processed	Ballot Mailed On	Ballot Received	Status
Mail-In	2024 GENERAL PRIMARY	03/06/2024	03/06/2024			PEND - NOT YET RETURNED

Your ballot has not yet been returned to LACKAWANNA county. The status of your ballot will be updated once the county receives your ballot.

| Absentee | 2024 GENERAL PRIMARY | 02/20/2024 | 02/20/2024 | | | CANC – OTHER |

The county has identified an error with your ballot envelope(s), and your ballot will not be counted. If you do not have time to request a new ballot before April 16, 2024, or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.

Note: The above shows multiple Response Types that are associated to the ballot.

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APPENDIX C

I.   Introduction

This ballot curing policy for Butler County is established to allow registered voters the opportunity to cure immaterial deficiencies on their absentee or mail-in ballot declaration envelopes.

II.   Definitions

As used herein, the following terms shall have the meanings indicated:

Attestation: The form at the Bureau which a Voter can correct information deemed as defective on the Declaration Envelope.

Ballot: An absentee or mail-in ballot which a Voter may use to cast a vote in an election.

Bureau: The Butler County Bureau of Elections.

County: Butler County.

County Board: Butler County Board of Elections.

Deficiency: A defect on the Declaration Envelope recognized by the Department of State as curable by applicable law, i.e. a lack of signature

Declaration Envelope: Pennsylvania law provides that two envelopes shall be mailed to each absentee or mail-in elector; the larger of these envelopes is referred to alternatively as the Declaration Envelope. This envelope contains a declaration which the Voter must sign.

Designated Agent: An individual which the Voter has authorized to transport the Attestation and witness the Voter's signature or mark upon said Attestation. The Designated Agent is **only** allowed to serve as a Designated Agent for **one** Voter, unless the additional voter(s) live in the same household and similarly require a Designated Agent due to a Disability.

Disability: A disability as defined in the Americans with Disabilities Act.

Party Committee: The Butler County Democratic Committee and the Butler County Republican Committee, as designated by their respective state organizations.

Voter: Any person who shall possess all the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth.

III.   Cure Procedure

A. Upon identifying a Deficiency on a Declaration Envelope submitted by a Voter, the Bureau will segregate said Declaration Envelope and place the Voter's name and contact information (including phone number, if one is provided) on a list.

B. During a Primary Election, the list of Voters who submitted Deficient Declaration Envelopes shall be made available to the Party Committees once a day upon request of the Party Committee.

C. The Party Committees may contact the Voter who submitted a Declaration Envelope with a Deficiency to advise that there is a Deficiency with their Declaration Envelope and that the Voter is permitted to appear at the Bureau to remedy such Deficiency by means of an Attestation.

D. During a General Election, in addition to Party Committees, the list of Voters who submitted Declaration Envelopes with Deficiencies will be made available to any duly authorized representative of any recognized political party other than the Party Committees which have a candidate on the Ballot.

It is acknowledged that Voters registered as Independent will not have a duly authorized party representative. The Bureau will publicize through its regular course that any Voter can check the status of their Ballots via the Department of State website and that cure procedures are available.

E. To effect a cure, a Voter must appear in person at the Bureau before 8:00 P.M. on Election Day and sign an Attestation that includes the Deficiency; which shall be recorded with their Ballot.

In such case as a Voter with a Disability as recognized by the American Disability Act may not be able to appear in person at the Bureau, a Witness Form shall be used to allow a Designated Agent to transport the Attestation to and from the Bureau in order to obtain a signature or mark from the Voter.

F. The Bureau shall not perform any remedy on behalf of the Voter but will only provide the opportunity for the Voter to remedy the defect.

G. The Bureau shall not send the Ballot back to the Voter or issue the Voter a new Ballot due to the Deficiency.

H. This Policy shall not modify any procedures regarding Provisional Ballots with the exception of allowing a Provisional Ballot to be counted for a Voter who cannot come into the Bureau to remedy a Deficiency on the Ballot envelope but is able to go to their polling place on Election Day.

Adopted by the Butler County Board of Elections on 5/2/2023.
Appointed Board of Elections: Michael English (Chairman), Patrick Casey, and Carol McCarthy

Modified by the Butler County Board of Elections on 2/14/24.
Board of Elections: Leslie Osche (Chairman), Kimberly Geyer, and Kevin Boozel

APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA

_____

No. ____ ____ 2024

_____

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

Respondents,

v.

BUTLER COUNTY BOARD OF ELECTIONS,

Respondent,

REPUBLICAN NATIONAL COMMITTEE; AND REPUBLICAN PARTY OF PENNSYLVANIA,

Petitioners.

_____

PETITION FOR ALLOWANCE OF APPEAL

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

_____

Kathleen A. Gallagher
(PA #37950)
THE GALLAGHER FIRM, LLC
436 7th Avenue, 30th Fl.
Pittsburgh, PA 15219
412.308.5512 (Phone)

John M. Gore*
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
202.879.3939 (Phone)

* *Pro Hac Vice*

Thomas W. King, III
(PA #21580)
Thomas E. Breth
(PA #66350)
DILLON, MCCANDLESS, KING, COULTER & GRAHAM, LLP
128 W. Cunningham St.
Butler, PA 16001
724.283.2200 (Phone)

Counsel for Petitioners

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Constitutional Provisions

Petitioners, Republican National Committee and Republican Party of Pennsylvania (collectively "Republican Petitioners"), by counsel, The Gallagher Firm and Jones Day, hereby petition this Honorable Court pursuant to Pa.R.A.P. § 1111 to allow an appeal from the September 5, 2024 Order of the Commonwealth Court reversing the Order of the Court of Common Pleas of Butler County dismissing the Petition for Review in the Nature of Statutory Appeal filed on behalf of Faith A. Genser and Frank P. Matis. As discussed herein, special and important reasons exist to allow the appeal under Pa.R.A.P. § 1114.

INTRODUCTION

With the 2024 General Election fast approaching, this case requires the Court's review and intervention. While the Commonwealth Court's Order facially applies to only two provisional ballots cast in Butler County in the 2024 Primary Election, its reasoning would apply much more broadly. As explained more fully below, the Commonwealth Court's Memorandum Opinion is incorrect as a matter of law, and the sweeping application of its rationale would effectuate an unconstitutional judicial revision of the Election Code. In direct contravention of the plain text and meaning of the Election Code, the Memorandum Opinion permits absentee and mail-in voters whose ballots lack a secrecy envelope to be fixed by submitting a second ballot in the election – a provisional ballot – a remedy that is

not authorized by the Election Code. This is an obvious and improper effort to circumvent this Court's binding decision in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372-74 (Pa. 2020) (hereinafter "*Pa. Dems.*") holding that <u>courts</u> **cannot** mandate notice and cure of defective absentee and mail-in ballots, a decision that is squarely within the purview of the General Assembly.

Contrary to the Commonwealth Court's Memorandum Opinion, *Pa. Dems.* is dispositive here: the naked ballots of Genser and Mathis ("Voter Respondents") are "invalid," there is no "constitutional or statutory" right to cure those ballots, and courts lack authority to order the Butler County Board of Elections ("Respondent Board") – or any county board – to permit the ballots to be cured, regardless of method. *Id.* at 374, 380. For this reason alone, this Court should hear this case. *See id.*

Additionally, to achieve its flawed result, the Commonwealth Court incorrectly read ambiguity into the relevant provisions of the Election Code where none exists. In doing so, the Commonwealth Court ignored both the statutory structure of 25 P.S. §§ 3050.11 through 3050.17 and the clear language of Section 3050.16(a), setting forth how to vote an absentee or mail-in ballot. That statutory structure and the clear language of Section 3050.16(a) wholly undermine the claimed ambiguity on which the Commonwealth Court's decision is founded. The Court

should accept this Petition to correctly evaluate, interpret, and apply the relevant sections of the Election Code before the 2024 General Election.

As discussed in the Reasons for Allowance of Appeal Section below, the Commonwealth Court's decision provides grounds for granting this Petition under, *inter alia*, Rule 1114(b)(2), (3), and/or (4).

OPINION BELOW

The unreported Memorandum Opinion of the Commonwealth Court was authored by Judge Wolf and joined by Judge Jubelirer. Judge Dumas dissented without opinion. A copy of the Memorandum Opinion and related Order are attached as Appendix Exhibit A.

The Memorandum Opinion and Order of Court of President Judge Yeager of the Court of Common Pleas of Butler County, which was reversed by the Commonwealth Court, are attached as Appendix Exhibit B.

ORDERS IN QUESTION

The text of the Commonwealth Court's Order, included as Appendix Exhibit A, states: "AND NOW this 5th day of September 2024, the order of the Court of Common Pleas of Butler County is REVERSED. The Butler County Board of Elections is ORDERED to count the provisional ballots cast by Appellants Faith Genser and Frank Mathis in the April 23, 2024 Primary Election."

QUESTIONS FOR REVIEW AND PRESERVATION BELOW

1.   Whether, contrary to this Court's binding precedent in *Pa. Dems.*, the Commonwealth Court improperly usurped the authority of the General Assembly by effectively rewriting the Election Code to engage in court-mandated curing when it held that a voter is entitled to submit a provisional ballot and have that provisional ballot counted in the election tally after the voter has timely submitted a defective absentee or mail-in ballot, which is contrary to the Election Code, and in violation of the separation of powers provisions of the Pennsylvania Constitution (Pa. Const. art. II, § 1) and the Elections and Electors Clauses of the United States Constitution (U.S. Const. art. I, § 4, cl.1, 2).

Substantively addressed and preserved in Republican Petitioners' trial court brief at pp. 6-7 and their Commonwealth Court brief at pp. 19-20; 25-27; 31-38. Ruled on in Republican Petitioners' favor in the Trial Court's August 16, 2024 Memorandum Opinion, attached hereto at Appendix Exhibit B, at pp. 22-24 (agreeing that the Pennsylvania. Supreme Court in *Pa. Dems.* determined that the Election Code does not mandate a cure procedure for defective absentee and mail-in ballots and that the Butler County Board did not commit an error based on 25 P.S. § 3050 (a.4)(5)(i) and (ii) (F)); rejected by the Commonwealth Court in its September 5, 2024 Memorandum Opinion, attached hereto at Appendix Exhibit A, at p. 32 (rejecting "Appellees' argument that reaching this result [counting a

provisional ballot] would effectively write a mandatory ballot-curing procedure into the Code – a proposition our Supreme Court considered and rejected in *Boockvar*…"); *see also* p. 33 ("To conclude, as the Trial Court did, that 'any chance to. . . cast [] a provisional vote [] constitutes a 'cure' is both to overread Boockvar and to read the provisional voting sections out of the code . . . This was legal error.").

2.   Whether the unauthorized manipulation of the SURE System by the Secretary of the Commonwealth to provide a voter notice of a suspected defective absentee or mail-in ballot, along with its recent Guidance on Provisional Voting, coupled with the Commonwealth Court's holding regarding a voter's purported entitlement to submit a provisional ballot, violates this Court's holding in *Pa. Dems.* and usurps the authority of the General Assembly.

Substantively addressed and preserved in Republican Petitioners' trial court brief at p. 4 and their Commonwealth Court brief at pp. 6; 14-21; 29; 31-38. Addressed by the trial court at p. 19 ("where the Election Code does not give the Board the discretion of determining whether or when a Declaration Envelope is 'received,' and does not give the Board discretion to 'cancel' a 'ballot' for lack of a secrecy envelope prior to it being opened and confirmed lacking, the Secretary of the Commonwealth cannot unilaterally develop such a practice."); addressed by the Commonwealth Court at pp. 30-31 (finding that where the "Electors were notified that their vote 'would not count' in advance of the 2024 Primary. They appeared at

their respective polling places on the day of the 2024 Primary and were permitted to cast a provisional ballot . . . A commonsense reading of the Code, of course, would permit this mail-in elector to cast a provisional ballot because no 'voted' ballot was timely received by the Board, and thus the voter cannot be marked as having 'voted' on the district register.").

3.   Whether the Commonwealth Court erred in holding that, despite the clear language in 25 P.S. § 3050(a.4)(5)(ii)(F),[1] the Election Code authorizes a voter who submits an absentee or mail-in ballot that is timely received by the county board of elections, but suspected of lacking the required secrecy envelope, to submit a provisional ballot and to have the provisional ballot counted in the election tally if the absentee or mail-in ballot is indeed defective.

Substantively addressed and preserved in Republican Petitioners' trial court brief at p. 7 and their Commonwealth Court brief at p. 20. Ruled on in Republican Petitioners' favor by the trial court at pp. 22, 23 ("[H]ad the legislature intended the [Voter Respondents'] proposed interpretation, it could easily have provided that a mail-in voter who is informed they have or may have submitted an invalid or void mail-in ballot may cast a provisional ballot on Election Day and have that

---

[1] (ii) A provisional ballot **shall not be counted** if:

   (F) the elector's absentee ballot or mail-in ballot is **timely received** by a county board of elections.

25 P.S. § 3050(a.4)(5)(i) and (ii)(F) (emphasis added).

provisional ballot counted if, in fact, their initial ballot was defective and not counted. As noted by Respondent-Intervenors, the Pennsylvania Supreme Court has determined the current Election Code does not mandate a cure procedure for defective mail-in ballots."); rejected by the Commonwealth Court at pp. 30-31 (quoted above).

4.   Whether the Commonwealth Court erred in departing from its prior opinion in *In re Allegheny County Provisional Ballots*, No. 1161 C.D. 2020, 2020 WL 6867946 (Pa. Commw. Nov. 20, 2020), finding purported ambiguities in the Election Code, including by failing to consider the totality of 25 P.S. §§ 3150.11 through 3150.17, as well as the title of 25 P.S. § 3150.16 (Voting by mail-in electors) and the express terms of subsection (a) of that Code provision that set forth what it means to vote by mail and what constitutes a mail-in ballot.

Substantively addressed and preserved in Republican Petitioners' trial court brief at p. 4 and their Commonwealth Court brief at p. 20. Ruled on in Republican Petitioners' favor by the trial court at pp. 11, 15-16 (providing an analysis of the statutes and finding "turning to 25 P.S. 3050(a.4)(5)(i), the language in the first part of this sentence is clear . . . Subsection (a.4)(5)(ii)(F) is also clear . . . [Voter Respondents'] argument that in order to be 'timely received' a mail-in ballot must be eligible for counting is simply not persuasive."); rejected by the Commonwealth Court at pp. 23-28 ("Having determined that the words of Having Voted, Casting,

and Timely Received Clauses are ambiguous, we are now tasked with resolving such ambiguity.").

Notably, the Commonwealth Court's Memorandum Opinion relies extensively on the *amicus* brief filed by the Secretary which contained arguments not raised in the trial court. Given the compressed briefing schedule in the Commonwealth Court, prohibition on filing Reply Briefs, and lack of oral argument, from a preservation standpoint, Republican Petitioners had no actual opportunity to address the Secretary's arguments that were ultimately relied on by the Commonwealth Court in a true and substantive way.

STATEMENT OF THE CASE

A. **The Butler County Board of Elections' Procedures and Curing Policy for the 2024 Primary Election.**

Following this Court's holding in *Pa. Dems.*, Respondent Board adopted a curing policy for the 2024 Primary Election (the "Policy").[2] *See* May 7, 2024 Hearing Transcript (hereinafter, "Hrg. Tr."), attached hereto as Appendix Exhibit C (with exhibits thereto), at 48:24-53:11. The Policy, attached to Appendix Exhibit C as Exhibit 1, permitted voters to cure defects on the "Declaration Envelope"—the outer envelope into which the Election Code directs voters to place the sealed

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[2] Due to the expedited nature of this appeal, the Reproduced Record filed with the Commonwealth Court is not available. Accordingly, Petitioners will attach the documents referenced herein as an Appendix.

secrecy envelope containing the completed mail ballot. *Id*.; *see also* 25 P.S. §§ 3146.6(a), 3150.16(a). The voter must "fill out, date, and sign" the declaration contained on the outside of the Declaration Envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). The Policy permits voters to cure "deficiencies" in filling out, dating, and signing the Declaration Envelope. The Policy, however, did **not** permit voters to cure a voter's failure to insert their ballot inside the required secrecy envelope. Hrg. Tr. at 50:13-51:22, Appendix Exh. C, Exh. 1.

The Director of Elections for the Board, Chantell McCurdy ("Director McCurdy"), testified that her office's role is to tally votes in conjunction with the Computation Board that meets the Friday after Election Day and, as part of the canvass, to evaluate provisional ballots, write-ins, and absentee or mail-in ballots that may have potential defects which prevent them from being counted. *See* Hrg. Tr. at 18:3-10. The Board is comprised of three County Commissioners, each of whom appoints an individual to serve on the Computation Board. Hrg. Tr. at 18:23-19:2. At present, the Computation Board is made up of two Democratic members and one Republican member. Hrg. Tr. at 19:18-23. The Computation Board computes the totals of the election and accounts for write-ins, as well as resolves issues involving provisional ballots and any absentee or mail-in ballots that need to be evaluated in order to determine whether they can be counted. Hrg. Tr. at 19:2-7.

B. The Statewide Uniform Registry of Electors (SURE) System and Provisional Ballots.

Under the Election Code, the Department of State ("Department") is responsible for the creation and implementation of the SURE System, which is intended to be used by county boards of elections ("County Boards") as a single, uniform integrated computer system **for maintaining registration records.** *See* Hrg. Tr. at 38:10-16; *see also* 25 Pa. C.S.A. § 1222.[3] In implementing the SURE System, the Department created different options for County Boards to input when acting on a voter's request for a mail-in or absentee ballot. The Department provides step-by-step instructions to the County Boards regarding how to record absentee and mail-in ballots into the SURE System, including when they are requested and received. Hrg. Tr. at 45:4-12.

When a mail-in ballot is requested by a voter, the Board inserts a code in the SURE System noting that request. *See* Hrg. Tr. at 39:11-14. After the Board processes the mail-in ballot request and forwards a voting packet to the voter, the Board updates the ballot's status in the SURE System as being "ballot sent." Hrg. Tr. at 39: 15-17. Director McCurdy explained that the packet sent to voters includes the ballot, a secrecy envelope in which to place the ballot, a Declaration Envelope, and instructions for completing and returning the ballot. Hrg. Tr. at 38:25-39:10; 25 P.S. § 3150.14(c). The Declaration Envelope bears a barcode which is uniquely

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

identifiable to the individual voter and their assigned voter ID number. Hrg. Tr. at 32:21-33:1. Until the Board receives a returned Declaration Envelope from the voter, the status of the ballot in the SURE System is "pending not yet returned." Hrg. Tr. at 33:2-6.

In Butler County, when a mail-in ballot is returned to the Board by a voter, the Declaration Envelope is placed into an Agilis Falcon machine which sorts the envelopes by precinct and evaluates the envelope's dimensions, including length, height, and weight to ensure that submitted envelopes are election envelopes. Hrg. Tr. 33:19-34:3. The Agilis Falcon flags envelopes with potential irregularities, including dimensions outside the range expected of a compliant election envelope from Butler County, for further evaluation by the Board. If the envelopes are not flagged as being potentially irregular, the Board enters the default option of "record ballot returned" into the SURE System. Hrg. Tr. at 45:15-16. The flagged envelopes are evaluated individually by the Board to determine potential irregularities which may indicate a defective ballot. Hrg. Tr. at 34:4-18. The Board then manually updates the status of such mail-in ballots by entering one of the options provided by the Department in the SURE System. Hrg. Tr. at 47:25-48:7. Based on that selection, an auto-generated email is sent to the voter by the SURE System, which updates the current status of the ballot. Hrg. Tr. at 45:26-46:16.

In March 2024, in a clear effort to provide notice of mail-in ballot defects, the Department made changes to the SURE System: new options for logging the return of mail-in ballots, including "pending" options, and changing the language used in the auto-generated emails. Hrg. Tr. at 45:17-18; 45:22-46:16; *see also* the March 2024 update (hereinafter "2024 SURE Instructions") attached to the Hearing Transcript (Appendix Exhibit C) at Exhibit 2. As noted above, the 2024 SURE Instructions contain auto-generated emails which contain the exact language that will be sent to voters for each option that the County Board can select regarding the ballot status. *Id.*, pp. 6-10. Per the 2024 SURE Instructions, the Department intended counties which permit curing to use the "Pending" options, while it advised counties which do not permit curing to utilize the "Cancelled" options. *Id.*, pp. 2, 6-10.

For a County Board like the Butler County Board, which does **not** permit curing of mail-in ballots which lack a secrecy envelope, the 2024 SURE Instructions and Department Release Notes each instruct the Board to use the "CANC- NO SECRECY ENVELOPE" option. *Id.*, p. 9; Hrg. Tr. at 67:24-68:14. The 2024 SURE Instructions provide the following explanation for this code:

> Cancels ballot if county receives ballot and it is not in the inner secrecy envelope. It should only be used when the county has made a final decision as to the ballot, or it does not offer the opportunity to cure.

App. Exh. C, Exh. 2, p. 9. If this option is selected, the Department advises that the following auto-generated email will be sent to the voter:

> Your ballot will not be counted because it was not returned in a secrecy envelope. If you do not have time to request a new ballot before [Ballot Application Deadline Day], or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.

Id.; *see also* Hrg. Tr. at 48:8-16. Director McCurdy testified that this email is sent to voters when the ballot is received, and *before* it is conclusively established that the secrecy envelope is in fact missing, so if it is found that there is a secrecy envelope when the ballot is later opened, the ballot would be counted. Hrg. Tr. at 67:24-68:23.

Critically, the content of the auto-generated email is inaccurate, since the voter's ballot **has not yet actually been rejected or cancelled at the time such email is sent.** Hrg. Tr. at 68:16-23. The email is also inaccurate and misleading because it implies that the Board will permit a defective ballot missing its secrecy envelope to be cured via provisional ballot, which the Policy does not allow. Indeed, Judge Yeager highlighted in his Opinion that while it is understandable that there will be some difficulty in distilling explanations for how ballots are to be disposed of into a relatively small number of canned responses, "the current wording in the pre-programmed responses is apparently causing confusion for electors." Appendix Exh. B, p. 20, n. 9.

In effect, the Secretary has co-opted the SURE System into a mechanism for providing "notice" to voters of a defective mail-in ballot using automatic emails which are not authorized under the Election Code, despite this Court's prior holding that voters have no constitutional, statutory, or legal right to be provided such notice. *Pa. Dems.* 238 A.3d at 372-74. In doing so, as the Commonwealth Court acknowledged, the Secretary's emails "provide Electors with false directions." Appendix Exh. A, p. 8. It is these "false directions" issued by the Secretary – as opposed to some improper action by the Board – that results in "dummy [provisional] ballots" as the Commonwealth Court characterizes them. Appendix, Exh. C, Exh. 2, at 31.

Under the Election Code, in the event a voter requests and receives a mail-in ballot but decides to vote in-person instead of by their mail-in ballot, the voter is permitted to do so by either surrendering their mail-in ballot at the polling location or submitting a provisional ballot. Hrg. Tr. at 40:10-15. The first option is only available if the voter brings their ballot and declaration envelope to the polling location, and surrenders them, signing a form which states that they no longer wish to vote via mail-in ballot. Hrg. Tr. at 40:16-22; 41:10-22. If this is done, the Judge of Elections signs the surrender form, and the voter is permitted to sign the poll book and cast a <u>regular in-person ballot</u>. Hrg. Tr. at 40:19-24; 25 P.S. § 3150.l6(b)(3). If

this occurs, the Board does not update the SURE System to reflect the surrendered ballot. Hrg. Tr. at 40:25-41:4.

The second option, filing a provisional ballot, is available if the voter does not have their ballot and declaration envelope. Hrg. Tr. at 41:10-14; 25 P.S. § 3150.16(b)(2). Voters are permitted to cast a provisional ballot if they request one, regardless of whether they have already returned a mail-in ballot, as Director McCurdy testified that the Board does not want to deny voters that opportunity. Hrg. Tr. at 42:15-18.[4] In essence, any voter who asks to submit a provisional ballot, regardless of whether they are legally qualified to do so, is permitted to do so. *Id.*

C. The Pre-Canvass and Canvass

Once mail-in ballots are received and scanned using the Agilis Falcon machine and the Board enters the appropriate code noting their receipt, they are secured in a locked cabinet. Hrg. Tr. at 21:14-15; 25 P.S. § 3146.8(a). Under the Election Code, the Board is not permitted to open mail-in ballot declaration envelopes until the pre-canvass, which begins at 7:00 a.m. on Election Day. Hrg. Tr. at 49:23-50:2; 25 P.S. § 3146.8(g)(1.1). As such, until the pre-canvass begins, no definite conclusion can be made regarding whether a secrecy envelope was correctly used. Hrg. Tr. at 50:3-5. Further, under the clear terms of the Election Code, any

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[4] This testimony renders inaccurate the unsupported assumption made by the Commonwealth Court in note 26 of its Memorandum Opinion that the County "permitted Electors to vote provisionally because the district register did not reflect that they had 'voted.'" *See* Appendix Exh. A at 30, n. 26.

information gathered during the pre-canvass is not permitted to be disseminated, including whether a secrecy envelope is missing. Hrg. Tr. at 50:6-12.; 25 P.S. § 3146.8(g)(1.1).

Director McCurdy testified that when the mail-in ballot declaration envelopes were opened, if the Computation Board found a secrecy envelope which did not contain a ballot, no vote could be counted, as there was no eligible ballot. Hrg. Tr. 63:4-19. This remained true even if the voter had proceeded to also cast a provisional ballot on Election Day, because the voter had already turned in a mail-in ballot which was timely received. Hrg. Tr. at 63:20-25. If, however, the voter submitted a mail-in ballot which was not received prior to the 8 p.m. Election Day deadline, and the voter cast a provisional ballot on Election Day, the Computation Board would count the voter's provisional ballot, as that was the first one the Board received. Hrg. Tr. at 64:9-24. In that case, the voter's provisional ballot was counted because the voter's mail-in ballot was ineligible to be canvassed, having arrived after the deadline for such ballots. Hrg. Tr. at 65:3-6.

While the Computation Board has the ultimate discretion to determine whether to count provisional ballots submitted in each unique circumstance, historically the Computation Board has not counted ballots which lack a secrecy envelope, and where a provisional ballot was subsequently cast by the same voter. Hrg. Tr. at 75:6-15. In other words, if the Board receives a voter's naked ballot, and

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the elector learns on or before Election Day that they have failed to include the secrecy envelope, <u>there is nothing they can do to cure such defect</u>. Hrg. Tr. at 65:17-22.

D.   Voter Respondents.

Voter Respondents applied for and submitted mail-in ballots. Appendix Exhibit B, p 2. Each neglected to enclose their ballot in the required secrecy envelope. *Id*. After their ballots were coded by Butler County as "CANC- NO SECRECY ENVELOPE," they received auto-generated emails from the Department, advising them that they could vote a provisional ballot on Election Day, ostensibly to "cure" their defectively cast mail ballot. *Id.* Voter Respondents did so – each traveled to their polling location and submitted a provisional ballot. *Id.* However, pursuant to the pre-canvass procedure for secrecy of received mail-in ballots, the Voter Respondents' mail-in ballots were not opened until Friday, April 26, 2024, when the Computation Board met to conduct the canvass. Hrg. Tr. at 22:7-9. This was the first opportunity for the Board to confirm whether the mail-in ballots lacked a secrecy envelope. Hrg. Tr. at 21:19-23; 49:18-22. When the Computation Board met to canvass the Voter Respondents' ballots, it voted not to count their mail-in ballots, as they were submitted without a secrecy envelope. Hrg. Tr. at 24:23-25:21; 26:14-27:9. Because their mail-in ballots were timely received and eligible for canvass, Voter Respondents' provisional ballots were not counted.

E.   Procedural Background

On April 29, 2024, Voter Respondents filed their Petition for Review in the Nature of a Statutory Appeal in the Court of Common Pleas of Butler County, appealing the Board's decision to not count their provisional ballots in the 2024 Primary Election pursuant to Section 3050 of the Election Code. Pet. at p. 2; 25 P.S. § 3050(a.4)(5)(i) and (ii)(F).   Shortly thereafter, on May 6, 2024, Republican National Committee and Republican Party of Pennsylvania filed a Petition for Leave to Intervene on behalf of Respondent. On May 7, 2024, a hearing on the Petition was held in front of the Honorable Judge Yeager, at which time the Respondent Pennsylvania Democratic Party ("Respondent PDP") similarly filed a Petition to Intervene on Behalf of Voter Respondents. Both Petitions to Intervene were granted. *See* May 7, 2024 Trial Court Order.

On June 28, 2024, Voter Respondents and Respondent PDP each filed a Memorandum of Law in Support of the Petition, and the Respondent Board and Republican Petitioners filed briefs in opposition to the same. The Trial Court issued a Memorandum Opinion and Order on August 16, 2024, dismissing the Petition and holding that the Board did "not violate either the Election Code or the Free and Equal clause of the Pennsylvania Constitution." *See* Appendix Exh. B, at 29.

Voter Respondents filed a Notice of Appeal on August 20, 2024 (Docket No. 1074 CD 2024), and Respondent PDP filed a separate Notice of Appeal on

August 22, 2024 (Docket No. 1085 CD 2024). Those appeals were consolidated by

Order of Court dated August 22, 2024. Voter Respondents and Respondent PDP

each filed a Statement of Issues on August 22, 2024. On August 23, 2024, each of

the parties filed their respective merits briefs. The Department of State and the

Secretary of the Commonwealth, Al Schmidt, filed an Amicus Brief on August 23,

2024. On August 28, 2024, Respondent PDP filed a Notice of Supplemental

Authority. The Commonwealth Court issued its Opinion and Order (Appendix Exh.

A) on September 5, 2024.

REASONS FOR ALLOWANCE OF APPEAL

A. **The Commonwealth Court's Opinion is in Conflict with this Court's Ruling in *Pa. Dems.* and its own prior Ruling in *In re Allegheny County* (Rule 1114(b)(1), (2) and (4)).[5]**

This Court has expressly held that that a voter has no constitutional, statutory,

or legal right to be provided notice of and an opportunity to cure a defective mail-in

ballot. *Pa. Dems*. 238 A.3d at 372-74. "To the extent that a voter is at risk of having

his or her ballot rejected" due to their failure to comply with the Election Code's

requirements for mail-in ballots, "the decision to provide a 'notice and opportunity

to cure' procedure to alleviate that risk is one best suited for the Legislature." *Id.*;

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[5] As will be set forth in Republican Petitioners' principal brief, the Commonwealth Court's Opinion likewise improperly usurped the authority of the General Assembly in violation of the separation of powers provisions of the Pennsylvania Constitution (Pa. Const. art. II, § 1) and the Elections and Electors Clauses of the United States Constitution (U.S. Const. art. I, § 4, cl.1, 2) to effectively rewrite the Election Code to engage in court-mandated curing.

accord Pa. State Conf. of NAACP Branches v. Sec'y Pa., 97 F.4th 120, 133-35 (3d. Cir. 2024) ("*NAACP*") ("[A] voter who fails to abide by state rules prescribing how to make a vote effective is not 'denied the right to vote'" or disenfranchised "when his ballot is not counted.") (quoting *Ritter v. Migliori*, 142 S.Ct. 1824 (2022) (Alito, J., dissental)). In reaching its decision in *Pa. Dems.*, this Court recognized longstanding precedent that, "[t]he power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government." *Id.* at 366 (internal citations omitted).

The Commonwealth Court claims that it does not offend this binding precedent because the Memorandum Opinion "rejects [the] view" that allowing a voter to submit a provisional ballot after they have voted a defective mail-in ballot "amount[s] to ballot curing." Appendix Exh. A. at 2; *id*. at 32-33 ("The provisional ballot is a separate ballot, not a cured initial ballot"). Such a finding creates distinction without difference.

Indisputably, the voters here filled out and returned mail-in ballots with fatal defects (no secrecy envelope); despite this, the Memorandum Opinion permits them to remedy those defects by casting a second (provisional) ballot – a provisional ballot that, as explained below, is not authorized by the Election Code. Regardless of the Commonwealth Court's semantic gymnastics – and consistent with President Judge Yeager's opinion at the trial court level (*see* Appendix Exh. B, pp. 22-23, 26-27) –

that is curing, which this Court held cannot be mandated under *Pa. Dems.* Despite

this, the Commonwealth Court mandated it anyway.

Further, the Commonwealth Court has contradicted its prior holding and

interpretation of the Election Code on this exact issue. In *In re Allegheny County*

Provisional Ballots, the Commonwealth Court held that:

> With regard to the small number of provisional ballots cast by a voter whose
> mail-in ballots were timely received, […] Section 1204(a.4)(5)(ii)(F) plainly
> provides that a provisional ballot shall not be counted if 'the elector's absentee
> ballot or mail-in ballot is timely received by a county board of elections.' 25
> P.S. § 3050(a.4)(5)(ii)(F). Like the language relating to the requisite
> signatures, this provision is unambiguous. We are not at liberty to disregard
> the clear statutory mandate that the provisional ballots to which this language
> applies must not be counted.

2020 WL 6867946, at *4. The relevant facts that the Commonwealth Court reviewed

in *Allegheny County* are the same as here: provisional ballots were submitted by

voters who had already submitted a mail-in ballot that was timely received by the

county board. Despite the Commonwealth Court's recent reversal of course, 25 P.S.

§ 3050(a.4)(5)(ii)(F) is unambiguous and the Order and Opinion on appeal create a

clear conflict between two Commonwealth Court opinions that this Court should

resolve.

The Commonwealth Court has improperly weighed in on the political policy

judgments regarding the administration of elections, which rests solely within the

province of the General Assembly and the local boards of elections. In doing so, it

has effectively rewritten the Election Code to attempt to bring into existence, via

judicial fiat, their preferred election scheme. That is at odds with *Pa Dems.* To address this clear conflict between the Memorandum Opinion and this Court's holding in *Pa. Dems.* and its own holding in *In re Allegheny County*, the Court should grant this Petition.

B.   The Commonwealth Court Rewrote or Added Provisions to the Election Code by Finding Purported Ambiguities in the Code Where None Exist (Rule 1114(b)(3) and (4)).

Based on its finding of purported statutory ambiguities, the Commonwealth Court reversed the trial court, concluding that "(1) Electors did not cast any other ballot within the meaning of 25 P.S. § 3050(a.4)(1), and (2) 25 P.S. § 3050(a.4)(5)(ii)(F) does not prohibit the Board from counting Elector's provisional ballots." The Commonwealth Court equates a voted but fatally defective mail-in ballot that was timely received by the Board, with having never completed a mail-in ballot at all, through incorrectly reading ambiguity into the Election Code. The Commonwealth Court's analysis is intentionally flawed to accomplish a desired result, when there is simply no ambiguity in the relevant sections of the Election Code.

The Commonwealth Court focused on three provisions of the Election Code – 25 P.S. § 3050.16(B)(2), the "Having Voted Clause"; 25 P.S. § 3050(a.4)(1), the

"Casting Clause," and 25 P.S. § 3050(a.4)(5)(ii)(F), the "Timely Received Clause."[6]

While evaluating the purported statutory ambiguity of 25 P.S. § 3150.16 (Voting by mail-in electors), the Commonwealth Court did not discuss 25 P.S. § 3150.16(a), which sets forth the step-by-step process for voting by mail – the most relevant statutory subsection for this determination. Nor did it discuss the statutory structure and sequencing of 25 P.S. §§ 3150.11 through 3150.17, the parts of the Election Code addressing mail-in voting, as part of its analysis. When a proper analysis is done, there is no ambiguity. President Judge Yeager was correct that the General Assembly has not authorized use of a provisional ballot by a voter who has submitted a defective mail-in ballot, and any such provisional ballot cast by a voter who has submitted a defective mail-in ballot that was "timely received" by the board of elections cannot be counted under 25 P.S. § 3050(a.4)(5)(ii)(F). *See* Appendix Exh. B., p. 22. The Commonwealth Court's Memorandum Opinion is erroneous.

1. 25 P.S. § 3050(a.4)(1) (the Opinion's Casting Clause) and 25 P.S. § 3050(a.4)(5)(ii)(F) (the Opinion's Timely Received Clause) Do Not and Cannot Conflict.

A conflict between or ambiguity as to 25 P.S. § 3050(a.4)(1) (the Opinion's Casting Clause) and 25 P.S. § 3050(a.4)(5)(ii)(F) (the Opinion's Timely Received Clause) is not possible. These provisions read as follows:

(5)(i) **Except as provided in subclause (ii)**, if it is determined

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[6] Pursuant to Rule 1115(a)(8) copies of cited sections of the Election Code and other statues are set forth in full at Appendix Exhibit C.

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

(ii) A provisional ballot **shall not be counted** if:

(F) the elector's absentee ballot or mail-in ballot is **timely received** by a county board of elections.

25 P.S. § 3050(a.4)(5)(i) and (ii)(F) (emphasis added). On its face, Section 3050(a.4)(5)(i) does not apply if subclause (ii) applies. Subclause (ii)(F) unambiguously states that "[a] provisional ballot shall not be counted if the elector's absentee or mail-in ballot is timely received by a county board of elections," *i.e.,* received before 8 p.m. on Election Day. 25 P.S. § 3050(a.4)(5)(ii)(F). It is undisputed that the Voter-Respondents' mail-in ballots were timely received. Appendix Exh. B. at 18.

Section 3050(a.4)(5)(ii)(F) is an express exception to the general rule set forth in Section 3050(a.4)(5)(i), and by its plain terms, subclause (i) has no application where subclause (ii) applies. *See* 25 P.S. § 3050(a.4)(5)(i). As an exception to its rule, Section 3050(a.4)(5)(ii)(F) *per se* **cannot** conflict with Section 3050(a.4)(5)(i). Accordingly, as Judge Yeager found, and as the Commonwealth Court disregarded, there is no ambiguity or conflict in these sections of the Code, and therefore there is

nothing for the court to interpret.

2. <u>No Claimed Ambiguities Relied on By the Commonwealth Court Exist When the Mail-in Voting Provisions of the Election Code are Analyzed in Totality</u>.

Undeterred by this clear lack of conflict or ambiguity between the Casting Clause and the Timely Received Clause, the Commonwealth Court searched for another possible source of purported ambiguity and landed on 25 P.S. § 3150.16(B)(2) (the Opinion's Having Voted Clause). This section of the Election Code provides, "[a]n elector who requests a mail-in ballot and who is not shown on the district register as having **voted** may vote by provisional ballot under Section [3050(a.4)(1)]." 25 P.S. § 3150.16(B)(2) (emphasis added). The Commonwealth Court found, *inter alia*, that the Election Code did not define "voted" or "vote" as used in Section 3050.16(B)(2). Appendix Exh. A., p. 24, 25. The Commonwealth Court then used this proclaimed lack of a definition to find "when viewing the terms *voted, received,* and *cast* in the Code's broader scheme, they are contextually ambiguous" and "the most important tension is between *voting* and the other terms." *Id.* pp. 25, 26 (emphasis in original). It then used that proclaimed ambiguity to rule against Republican Petitioners and reverse Judge Yeager. *Id.* pp. 28-33. This is both contrived and wrong.

While emphasizing that a statutory scheme must be read collectively and not in isolation (*id.* p. 24), the Commonwealth Court never examined the full statutory

scheme for mail-in voting set forth by the General Assembly in 25 P.S. §§ 3150.11

through 3150.17. These provisions proceed in a clear, logical sequence, starting with

qualifications for a mail-in elector (§ 3150.11), application for a mail-in ballot

(§§ 3150.12 and 3150.12a) and approval for same (§ 3150.12b), prescribing the

official mail-in elector ballots and envelopes(§ 3150.13 and 3150.14), setting forth

the process for delivering or mailing ballots to voters by the board (§ 3150.15),

delineating the specific process to vote by mail (§ 3150.16), and finally, defining

what becomes public records in relation to mail-in ballots (§ 3150.17). These

Sections of the Election Code thus set forth the entire process for mail-in voting,

including Section 3150.16, titled "**Voting** by mail-in electors" (emphasis added).

The full series of statutory provisions provide the "context" needed to ensure that a

statute is not read in "isolation," a standard that the Commonwealth Court

acknowledged (Appendix Exh. A, p. 22) and promptly ignored.

Unsurprisingly, under Section 3150.16 (**Voting** by mail-in electors),

Subsection (a) – **which the Commonwealth Court does not address at all** –

describes in detail, step-by-step, how an elector votes by mail. In the context of the

statutory scheme and consistent with the title of Section 3150.16 (**Voting** by mail-in

electors), the steps listed in subsection (a), which include how to complete and

deliver a ballot (by mail or in person) to the Board, clearly define what it means to

"vote" by mail. There is no ambiguity. Here, there is no doubt that each Voter

Respondent "voted" under Section 3150.16(a) – although each made a mistake in failing to use the secrecy envelope, each filled out the ballot as proscribed in Section 3150.16(a) and delivered it to the Board. *See* Appendix Exh. A, pp. 2-3. By the plain terms of Section 3150.16(a), which plain terms the Commonwealth Court ignored, both Voter Respondents voted.

The Commonwealth Court's claimed ambiguity over the term "ballot" is also unfounded once the entire statutory scheme is analyzed. Section 3150.13, which is not discussed by the Commonwealth Court, describes exactly what the "official mail-in elector ballots" are and, along with Section 3150.16(a), requires that those ballots will arrive at the board of elections in the Declaration Envelopes prescribed by Section 3150.14.[7] There is nothing "murky" here –"ballot" is the ballot described in Section 3150.13. *See* Appendix Exh. A, p. 28. And there simply is no confusion or ambiguity in what is meant by "timely" or "received" as used in Section 3050(a.4)(5)(ii)(F) – "received" is common sense[8] and refers to the ballot being delivered by mail or in-person to the board (*see* Section 3150.16(a)) and, when read in conjunction with Section 3150.16(c), "timely" clearly means before 8 p.m. on Election Day. These terms on their face and in context bear no ambiguity.

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[7] This case is not about a law school exam-type hypothetical where a voter sends an empty Declaration Envelope. Neither Ms. Genser nor Mr. Matis did that. President Judge Yeager correctly disregarded the hypothetical posed. Appendix Exh. B, p. 21. The Commonwealth Court, on the other hand, made this hypothetical a foundation for its conclusions. Appendix Exh. A. at 8-10, 15, 26-27, 31.

[8] The Commonwealth Court agrees. Appendix Exh. A., p. 27.

Reviewing the Commonwealth Court's conclusions considering the above highlights their incorrectness. The Memorandum Opinion (Appendix Exh. A, pp. 25-26, 29-33) hinges on the term "voted" in Section 3150.16(b)(2) being ambiguous: "[a]n elector who requests a mail-in ballot and who is not shown on the district register as having **voted** may vote by provisional ballot under Section [3050(a.4)(1)]." 25 P.S. § 3150.16(B)(2) (emphasis added). But, what "voted" means is defined in the immediately preceding Section 3150.16(a), which must be read *in pari materia* with the same parts of the very same statutory section (1 Pa.C.S. § 1932(a)) and is further demonstrated by the title of the full statutory Section, **Voting** by mail in electors. *See* 1 Pa.C.S. § 1924 ("The Title and preamble of a statute may be considered in the construction thereof).

As the electors here had "voted" as set forth in Section 3150.16, they were not eligible to submit a provisional ballot per the **express** terms of Section 3150.16(b)(2). Further, any such provisional ballot could not be counted under the **express** terms of Section 3050(a.4)(5)(ii)(F) because the electors' mail-in ballots (as "ballots" is defined in Section 3150.13 which, by further clear statutory instruction, are contained in the Declaration Envelopes sent to the elector by the board under Section 3150.14 when they are returned to the board by the elector and received by the board) were "timely received." And, because Section 3050(a.4)(5)(ii)(F) applies, as the Commonwealth Court agrees in note 15

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of the Opinion, Section 3050(a.4)(5)(1) (the "Casting Provision") is simply inapplicable. This renders any purported ambiguity over the word "cast" moot.[9]

President Judge Yeager was correct and the Commonwealth Court – in a Memorandum Opinion that may have broad implications for the upcoming 2024 General Election – was wrong. Because there is no ambiguity, "the letter of [the Election Code sections at issue] is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). This Court should hear this appeal to overturn the Commonwealth Court's inappropriate judicial activism in the conduct of elections and reset the terms of the Election Code regarding mail-in and provisional ballots.

    3. <u>The Commonwealth Court's Opinion is Contrary to Other Provisions of The Election Code, Including Provisions Cited in the Memorandum Opinion, and this Court's Holdings in *Pa. Dems*</u>.

        a. <u>Other Provisions of the Election Code.</u>

Other authority relied upon by the Commonwealth Court reinforces the lack of ambiguity. On pages 21 (quoting 25 P.S. §3150.13(e)) and 25-26, the Commonwealth Court discusses instructions provided to mail-in voters that indicate that voters are informed that they may vote a provisional ballot if their "**voted** ballot is not timely received." Appendix Exh. A, pp. 21 (emphasis in original), 25-26. This "voted ballot is not timely received" language clearly indicates that the act of voting a mail-in ballot is **different than and independent of** its receipt and actual counting.

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

For example, a "voted ballot" that was lost in the mail is not timely received and, therefore, a voter can submit a provisional ballot.

This clear "voted ballot is not timely received" language is directly contrary to the Commonwealth Court's holding that "the Timely Received Clause is triggered once a ballot is received timely, but only if that ballot is and remains *valid* and *will be counted*, such that the elector has already *voted*." *See* Appendix Exh. A, p. 26) (emphasis in original). In essence, the Commonwealth Court's holding molds voting, receipt, and counting into a single operative event. If a ballot can only be deemed voted after it is received and determined to be valid, as the Commonwealth Court erroneously holds, then the above statutory language ("voted ballot is not timely received") – which the Commonwealth Court itself cites – is semantically null.

Similarly, in defining how to vote by mail, Section 3150.16(a) makes no reference to counting or recording particular votes. The Election Code does not contain any provision that a ballot must be counted for an elector to be deemed to have voted by mail. Rather, it is nothing but a creation of the Commonwealth Court as it improperly legislates from the bench.

Further, the Election Code **prohibits** opening a mail-in ballot to determine if it does or does not in fact lack a secrecy envelope until, at the earliest, during the

pre-canvass on Election Day (*see* 25 P.S. § 3146.8(a)).[10] But, under the Commonwealth Court's logic, no mail-in ballot is timely received until the mail ballots are opened and their validity determined. Thus, under the Commonwealth Court's logic, **every** mail-in voter is entitled to submit a provisional ballot because it will not be known with certainty if mail-in ballots will or will not be included in the election tally until after the close of the polls. Such abuse of provisional ballots is most certainly not the law as set forth in the Election Code.

If "voted" and "counted" are synonymous as the Commonwealth Court indicates, then poll books could never reflect whether a mail-in elector "voted" because a vote is not officially counted until after the polls close. Yet, the Code expressly requires that poll books "shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place." 25 P.S. § 3150.16(b)(1).

The Election Code simply does not support the twisted construction utilized by the Commonwealth Court to hold that a mail-in ballot is not voted or timely received unless it is included in the election tally. *See* Appendix Exh. B., pp. 17-18. Rather, the Election Code establishes and codifies a three-step sequence for mail voting: (1) first, the voter casts/votes his or her ballot; (2) next, the county board

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[10] Given this fact, contrary to the Commonwealth Court's assertion, the mail-in ballots were not "previously rejected" but rather "the status listed in the SURE System is nothing more than a guess." Appendix Exh. A., p. 7, 11.

receives the ballot; and (3) finally, the board canvasses the ballot to determine its

validity and whether to count it. *See* 25 § 3146.8(g)(1)(i)-(ii); *see also In re Canvass*

of Absentee & Mail- in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1067

(Pa. 2020) (laying out that voters "cast their ballots . . . by absentee or no-excuse

mail-in ballots," the board "receiv[es]" the ballots, and "[t]he pre-canvassing or

canvassing of absentee and mail-in ballots then proceeds.").

The Election Code makes clear that "casting" (i.e., voting) the ballot is done

by the voter, while "receiving" the ballot and then canvassing it to determine whether

it is valid and can be counted in the election tally are done *by the county board*. *See*

25 P.S. § 3146.8(g)(1)(i)-(ii). This use of "cast" is also consistent with the dictionary

definition cited by the Commonwealth Court – "to deposit (a voting paper or ticket)

(Appendix Exh. A, p. 27). Here, the voter deposits their mail-in ballot as placed in

the Declaration Envelope and returned to the board.

Contrary to the Commonwealth Court's holding, the Election Code further

establishes that a voter's "casting" a ballot occurs separate from—and *prior to*—the

board "receiving" it, which in turn occurs separate from and prior to the board

"canvassing" the ballot to determine whether it is valid:

> An absentee ballot *cast by any absentee elector*… or a mail-in
> ballot *cast by a mail-in elector* shall be *canvassed* in accordance
> with this subsection if the absentee ballot or mail-in ballot is
> *received in the office of the county board of elections* no later than
> eight o'clock P.M. on the day of the primary or election.

25 P.S. § 3146.8(g)(1)(i)-(ii) (emphases added); *see also id.* § 3146.8(g)(i) (referring to certain absentee ballots being "cast, submitted and received").

Other provisions of the Election Code confirm this construction. For example, the Election Code mandates that mail-in ballots "must be received in the office of the county board of elections no later than eight o'clock P.M." on Election Day. *Id.* §§ 3146.6(c); 3150.16(c). Mail ballots necessarily *must* be voted by voters before that deadline. *See id.* §§ 3146.6(c); 3150.16(c). And the Election Code's instructions regarding when and how a county board opens and counts mail-in ballots specify that a board may not determine a mail-in ballot's validity until the "pre-canvass" or "canvass," which occur *after* the ballots are "received" by the board. *Id.* § 3146.8(g)(ii)(1.1), (2).

Thus, the Commonwealth Court's holding that a mail-in ballot is not voted or "timely received" unless and until the board determines it can be included in the election tally is irreconcilable with the Election Code's plain text and must be rejected. *See* 1 Pa.C.S. § 1921(a)-(b).

b. *Pa. Dems.* is Contrary to the Commonwealth Court's Holding

This Court's decision in *Pa. Dems.* further underscores that "casting" or voting a mail ballot is an action a voter takes no later than when the voter relinquishes control over the ballot and sends it to the county board, and that "receiving" the ballot and determining its validity are distinct actions the board takes sequentially thereafter.

As one example, this Court noted that "[t]he Act directs that mail-in ballots cast by electors who died prior to Election Day shall be rejected and not counted"—or, in other words, that such a ballot is "cast" or voted before election officials receive it and determine its invalidity (and even before its invalidity arose). *See, e.g.*, 238 A.3d at 375. And when this Court addressed the secrecy envelope requirement, it noted that "naked ballots" were "*cast by*" mail voters *before* county boards "refus[ed] to count and canvass" them. *Id.* at 376 (emphasis added); *see also id.* at 374 (Election Code "provides the procedures for casting *and* counting a vote by mail") (emphasis added); *Meixell v. Borough Council of Hellertown,* 88 A.2d 594 (Pa. 1952) (illegal votes were still "cast"); *Ziccarelli v. Allegheny Cnty. Bd. of Elections,* No. 2:20-CV-1831-NR, 2021 WL 101683, at *4, n. 4 (W.D. Pa. Jan. 12, 2021) ("[T]his case concerns ballots *cast* by lawful voters who wished to vote… but simply failed to comply with a technical requirement of the election code.") (emphasis added).

c. The Election Code Establishes Only Very Limited Circumstances for Proper Use of a Provisional Ballot.

When the General Assembly has wanted to authorize use of provisional voting, it has expressly identified the limited circumstances for such use in the Election Code. Contrary to the Commonwealth Court's holding, the General Assembly has **not** authorized the use of provisional voting to cure mail-in ballot defects. *See generally Pa. Dems.*, 238 A.3d at 373-74. Its silence is dispositive:

provisional voting may not be used to cure mail-in ballot defects. *See id.*; *see also*

Discovery Charter Sch. v. Sch. Dist. of Phila., 166 A.3d 304, 321 (Pa. 2017)

("[W]hen interpreting a statute, we must listen attentively to what the statute says,

but also to what it does not say.") (internal quotes omitted).

This is particularly true given that the Code's express provisions in

Section 3150.16(b)(2) prohibit a provisional vote if the elector has already submitted

their mail-in ballot. Indeed, there is no statutory or constitutional provision

authorizing use of provisional voting because the voter committed an error that

requires the voter's mail ballot to be rejected. *See Pa. Dems.*, 238 A.3d at 373-74.

The Commonwealth Court's holding to the contrary is erroneous. *See id.*; *see also*

Discovery Charter Sch., 166 A.3d at 321.

Finally, contrary to the Commonwealth Court's holding, provisional ballots

are not intended to provide a voter a second chance to have their vote included in the

election tally. For example, if an in-person voter hits "Vote" on a voting machine or

scans in their paper ballot, they cannot then go ask to vote a provisional ballot

because they may have made a mistake. With mail voting, delivering the Declaration

Envelope containing the ballot to the Board is the functional equivalent of hitting

"Vote" or scanning the ballot. Once a voter does that, they do not get a second bite

at the apple. In fact, all the provisions of the Election Code that expressly authorize

provisional voting, are giving an elector only a <u>first</u> bite at the apple: 25 P.S.

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§§ 3050(a.2) (voter cannot produce required identification at the polling place); 3050(a.4)(1) (registration of individual who appears at the polling place cannot be verified); 3150.16(b)(2) (mail-in ballot never reached the board). The Commonwealth Court's Memorandum Opinion runs counter to this "first bite" principle.

In short, the Election Code's plain text and other authorities – contrary to the contrived holding of the Commonwealth Court – make clear that the electors here voted their mail-in ballots by sending those ballots to the Board in the Declaration Envelopes, and that the Board timely received their ballots prior to Election Day— *regardless* of whether those ballots were ultimately counted in the election tally. The Commonwealth Court's Memorandum Opinion and the reasoning underlying it cannot stand. Given the above and the vital importance of the correct interpretation of the Election Code being confirmed ahead of the General Election, this Court should hear this appeal to clarify and reemphasize the terms of the Election Code when it comes to mail-in ballots and provisional ballots.
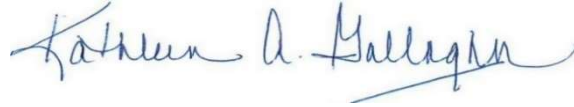
CONCLUSION

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

System auto-emails that provide notice of mail-in ballot defects and "provide Electors with false directions" (Appendix Exh. A, p. 8), the Commonwealth Court's opinion amounts to court-ordered notice and curing in direct contravention of this Court's holding in *Pa. Dems*.

In order to function properly, elections must have rules, including neutral ballot-casting rules such as set forth in 25 P.S. § 3150.16(a). The judiciary may not disregard those rules, rewrite them, or declare them unconstitutional simply because a voter failed to follow them and, accordingly, had their ballot rejected or because the court might have a different preferred election policy or scheme to the rule implemented by the General Assembly. *See, e.g.*, *Ins. Fed'n of Pa., Inc. v. Commonwealth, Ins. Dep't*, 970 A.2d 1108, 1122 n.15 (Pa. 2009). But that is exactly what the Commonwealth Court did. The Court should grant allowance of appeal so that the rules and procedures governing Pennsylvania elections are appropriately determined by this Court before the 2024 General Election is upon us.

September 8, 2024   Respectfully submitted,

[signature: Kathleen A. Gallagher]

THE GALLAGHER FIRM, LLC
Kathleen A. Gallagher (PA #37950)
kag@gallagherlawllc.com
Brian M. Adrian (PA #81461)
bma@gallagherlawllc.com
436 Seventh Avenue, 30th Floor
Pittsburgh, PA 15219
412.308.5512 (Phone)

DILLON, MCCANDLESS, KING,
COULTER & GRAHAM, LLP
Thomas W. King, III (PA #21580)
tking@dmkcg.com
Thomas E. Breth (PA #66350)
tbreth@dmkcg.com
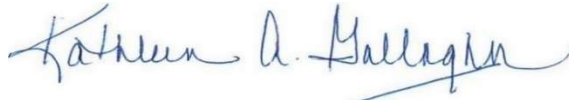128 W. Cunningham Street
Butler, PA 16001
724.283.2200 (Phone)

JONES DAY
John M. Gore*
jmgore@jonesday.com
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
202.879.3939 (Phone)
Pro Hac Vice

Counsel for Petitioners

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Petition for Allowance of Appeal contains 8987 words, exclusive of the supplementary matter as defined by Pa. R.A.P. 2135(b).
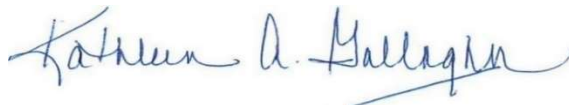
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Kathleen A. Gallagher

Counsel for Petitioners

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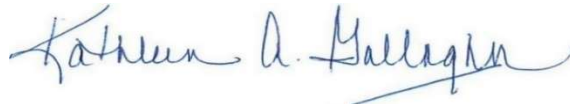
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Kathleen A. Gallagher

Counsel for Petitioners

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I hereby certify that on September 8, 2024, I caused a true and correct copy

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THE GALLAGHER FIRM, LLC

Dated: September 8, 2024

Kathleen A. Gallagher

Counsel for Petitioners