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IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

FAITH A. GENSER and
FRANK P. MATIS,

Petitioners,

vs.

BUTLER COUNTY BOARD OF
ELECTIONS,

Respondent,

vs.

REPUBLICAN NATIONAL COMMITTEE
and REPUBLICAN PARTY OF
PENNSYLVANIA,

Respondents/Intervenors,

vs.

PENNSYLVANIA DEMOCRATIC PARTY,

Intervenor.

: CIVIL DIVISION

: Civil Action No. MSD-2024-40116

: ELECTION APPEAL

: Hon. Dr. S. Michael Yeager

: THE PENNSYLVANIA
: DEMOCRATIC PARTY'S
: BRIEF IN SUPPORT OF
: PETITIONERS' PETITION FOR
: REVIEW IN THE NATURE OF
: A STATUTORY APPEAL

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ELECTION APPEAL

**BRIEF OF THE PENNSYLVANIA DEMOCRATIC PARTY
IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW
IN THE NATURE OF A STATUTORY APPEAL**

Intervenor, the Pennsylvania Democratic Party (the "PDP"), submits this Brief in Support of the Petition for Review in the Nature of a Statutory Appeal of Faith Genser and Frank Matis.

I. INTRODUCTION

This action arises from the decision of the Butler County Board of Elections (the "Board") to disenfranchise Petitioners Faith Genser and Frank Matis by refusing to count their votes in the April 23, 2024 Primary Election ("Primary"). Petitioners—who were registered and

qualified to vote in the Primary—each submitted a mail ballot for the Primary that was missing the required, inner “secrecy” envelope. Petitioners each received an automatic email notice from the Department of State which stated that their mail ballots had been cancelled for the lack of a secrecy envelope and directed them to vote provisionally on election day. Three days after the Primary, the Board considered and refused to count Petitioners’ provisional ballots, solely because Petitioners’ mail ballots lacked the required secrecy envelope. The Board’s refusal to count Petitioners’ provisional ballots violated both the Free and Equal Elections Clause of the Pennsylvania Constitution and the Pennsylvania Election Code.

With this statutory appeal, Petitioners ask this Court to prevent the Board from denying them any vote in the Primary and to direct the Board to count their provisional votes—and only their provisional votes. The Pennsylvania Constitution and Election Code require that relief, and the PDP asks this Court to grant it.

II. FACTUAL BACKGROUND

A. Steps Of The Vote-By-Mail Process

The Election Code provides all Pennsylvanians who are registered to vote the right to vote by mail. To exercise that right, voters must complete several steps. *See generally* 25 P.S. §§ 3150.1 *et seq.* After receiving and filling out a mail ballot, a voter must place it into a secrecy envelope, seal that envelope, and then place the sealed secrecy envelope into the outer envelope. *Id.* § 3150.16. After sealing the outer envelope, the voter must sign and date a declaration on that envelope. *Id.* Voters must return their completed ballots to their county board of elections, either by taking their ballots to a board-prescribed location or by mailing them. *Id.*

In carrying out this multistep process, voters occasionally make errors with the inner “secrecy” envelopes and/or with the outer “declaration” envelopes. (Tr. 22:10-13 (McCurdy); Pet. ¶ 24). Ballots submitted without the secrecy envelope are sometimes called “naked” ballots.

The Pennsylvania Supreme Court has stated that naked ballots are void and cannot be counted as a matter of statutory interpretation. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020).

Upon receipt, county boards of elections scan mail ballots into the Statewide Uniform Registry of Electors (“SURE”) System and record certain information regarding the ballots. *See* 25 P.S. § 3150.17. The SURE System provides each voter with a unique identification bar code, which is used to track whether the particular voter’s mail ballot has been accepted or cancelled. The Secretary of the Commonwealth (“Secretary”) administers the SURE System and provides codes for county boards of elections to input into the SURE System to identify how a ballot has been treated (e.g., accepted, cancelled for declaration envelope error or for lack of a secrecy envelope). The SURE System transmits that information to the voter. (Tr. 46:4-14 (McCurdy); Resp’t Intervenor Republican Party Ex. 2).

B. Provisional Ballots Ensure That The Votes Of Eligible Voters Count

Both federal and Pennsylvania law require that provisional ballots be available as a fail-safe mechanism to prevent the disenfranchisement of eligible voters who seek to cast ballots. In 2002, Congress enacted the Help America Vote Act (“HAVA”), 52 U.S.C. §§ 20901 *et seq.*, to ensure that all states “afford each registered and eligible voter an equal opportunity to vote and have that vote counted,” *id.* § 20981(a)(3) (emphasis added). As the Pennsylvania Supreme Court has recognized, HAVA was enacted in direct response to the significant number of eligible voters who were denied their right to vote in the 2000 presidential election due to various procedural errors. *See Banfield v. Cortes*, 110 A.3d 155, 160 (Pa. 2015).

HAVA mandates that states provide voters with the opportunity to vote provisionally. *See* 52 U.S.C. § 21082. Provisional ballots are intended to provide “a fail-safe mechanism for voting on election day,” even when voters themselves make an error. 148 CONG. REC. S10, 496

(2002) (statement of Sen. Durbin). A House report that accompanied HAVA explained that states must implement provisional ballots as a “**minimum standard**” because “provisional voting is **necessary** to the administration of a fair, democratic, and effective election system, and represents the ultimate safeguard to ensuring a person’s right to vote.” H.R. REP. NO. 107-329(I), at 37-38 (2001) (emphasis added).

Following HAVA’s enactment, the General Assembly amended the Election Code in 2004 to provide for the use of provisional ballots in Pennsylvania. 25 P.S. § 3050. Voters are entitled to vote provisionally at their polling places on election day if they are unable to produce identification to vote in-person or if their mail or absentee ballots were not timely accepted by their county boards of elections. *See id.* § 3050(a.2), (a.4)(5)(i).

Voting provisionally is distinct from “curing” a defective mail ballot, although provisional voting and notice-and-cure processes share the purpose of minimizing disenfranchisement of eligible voters who seek to vote. The Election Code mandates that boards of election provide voters with an opportunity to vote provisionally (which was not at issue in *Pennsylvania Democratic Party*). The Election Code and HAVA, require all boards of election to count the provisional ballots of any qualified voters who have not previously cast a ballot in that election. 25 P.S. § 3050(a.4)(5)(i). Boards of election do not have the discretion to discard provisional ballots of otherwise qualified voters who have only voted once.

In contrast, the Pennsylvania Supreme Court held in *Pennsylvania Democratic Party* that the Election Code **does not** mandate that boards of election must notify voters that their mail or absentee ballots are defective or provide a procedure for voters to cure a defect (by appearing in person at their board of election). The Court found no statutory basis for that specific cure mandate. *Pennsylvania Democratic Party*, 238 A.3d at 374 (Election Code “does not provide for

the ‘notice and opportunity to cure’ procedure sought by Petitioner.”). Rather, under the Election Code, 25 P.S. section 2642, each board of election may decide whether (and if so, how) to assist voters in curing defective mail or absentee ballots. *See, e.g., Republican Nat’l Comm. v. Chapman*, 2022 WL 16754061 (Pa. Commw. Ct. Sept. 29, 2022), *aff’d by an equally divided court*, 284 A.3d 207 (Pa. 2022); *Keohane v. Delaware County Board of Elections*, No. 2023-004458 (Pa. Ct. Com. Pl. Sept. 21, 2023). The Board’s discretion to adopt a notice and cure policy does not include the discretion to reject otherwise valid provisional ballots.

C. Butler County’s Curing Policy

The Board adopted a written notice-and-cure policy, the Butler County Curing Policy (“Policy”), which provides a mechanism for registered voters “to cure immaterial deficiencies on their absentee or mail ballot declaration envelopes.” (Respondent Intervenor Republican Party Ex. 1). To cure a defect under the Policy, voters must appear in person at the Board before 8:00 p.m. on election day and sign an “Attestation” correcting the deficiency. (*Id.* § III(E)). The Policy states that this opportunity to “cure” a ballot by appearing in person does not modify procedures regarding provisional voting with the exception that a provisional ballot may be counted for a voter who is unable to appear at the Board but can go to their polling place on election day. (*Id.* § III(H)). Respondent Intervenor, the Republican National Committee and the Republican Party of Pennsylvania (“Respondent Intervenor”), likewise recognize that the Policy preserves the distinction between curing defects with a mail ballot and voting provisionally. (*See* Respondent Intervenor’s Pet. for Leave to Intervene ¶ 14).

A few days after election day, as the Election Code requires, the Board evaluates provisional ballots cast during the election. (Tr. 75:6-11 (McCurdy)). Under the Policy, a provisional ballot cast where an otherwise-eligible voter previously submitted a mail ballot with a deficiency on the outer envelope (e.g., leaving the declaration undated or unsigned) is counted.

(Tr. 80:13-81:3 (McCurdy)). Provisional ballots cast where an otherwise-eligible voter previously submitted a mail ballot with any other deficiency—e.g., a ballot without a secrecy envelope—are not counted. (Tr. 81:4-9 (McCurdy)).

D. The Board's Refusal To Count Petitioners' Ballots

This appeal arises from the Board's decision to disenfranchise Petitioners Faith Genser and Frank Matis by refusing to count the provisional ballots that they timely cast on the day of the Primary. Both Petitioners were qualified to vote in the Primary. (Pet. ¶¶ 10, 13). Both Petitioners requested, received and submitted mail ballots for the Primary. (Tr. 60:5-7 (McCurdy)). Upon the Board's receipt of Petitioners' mail ballots (which occurred before the Primary), election officials ran their ballots, along with the other mail ballots, through a machine that measures the outer envelope's dimensions to ensure that it is an official election envelope, with all the required materials inside. (Tr. 33:11-34:18 (McCurdy)). Because the machine enabled the election officials to determine that Petitioners' ballots had anomalous dimensions, Petitioners' ballots were separated and individually assessed. When the election officials determined that Petitioners had submitted naked ballots, they logged Petitioners' ballots into the SURE System using the code for "cancel, no secrecy envelope." (Tr. 47:21-48:4). Petitioners' ballots were two of 40 mail ballots submitted in Butler County in the Primary without a secrecy envelope. (Tr. 22:10-13).¹

After election officials entered Petitioners' ballots into the SURE System and cancelled the ballots, Petitioners each received an automatic email from the Department of State which

¹ In Butler County, mail ballots are initially processed by a machine, which can identify ballots returned without a secrecy envelope because the absence of a secrecy envelope measurably changes the thickness and/or weight of the outer envelope and its contents. (Tr. 33:11-34:18 (McCurdy)). Ballots identified as lacking a secrecy envelope are deposited into a bin for election officials' further consideration, without the outer envelope being opened. (*Id.*).

notified them that “[y]our ballot will not be counted because it was not returned in a secrecy envelope.” (Tr. 48:9-11; Pets.’ Ex. B. to Declaration of Faith Genser). The emails directed Petitioners to request a new ballot (if time permitted). If the deadline for requesting a new ballot had passed, the email stated that “you can go to your polling place on election day and cast a provisional ballot.” (Tr. 48:8-16 (McCurdy), 143:10-144:8 (Genser), 87:4-9 (Matis); Pets.’ Ex. D). Ms. Genser and Mr. Matis both called the Board, and the Board advised each that they could vote provisionally, providing each with instructions as to how to cast a provisional ballot. (Tr. 147:6-16 (Genser), 87:24-88:13 (Matis)). Following the Board’s directions, both Petitioners cast provisional ballots at their polling places on the day of the Primary. (Tr. 60:11-13 (McCurdy), 88:6-7 (Matis), 147:20-23 (Genser)). Mr. Matis believed that his provisional ballot would count; Ms. Genser expressed the hope that hers would. (Tr. 89:25-90:14 (Matis), 168:24-169:18 (Genser)).

The Board did not open the outer envelopes of Petitioners’ mail ballots until April 26—three days after the Primary. (Tr. 21:22-23 (McCurdy)). At that time, the Board confirmed that each Petitioner had omitted the secrecy envelope. (Tr. 49:18-22 (McCurdy)). The Board did not count Petitioners’ naked ballots and has preserved the secrecy of those ballots at all times. (Tr. 60:5-10; 65:9-13 (McCurdy)). Although the Board had directed both Ms. Genser and Mr. Matis to cast provisional ballots, the Board refused to count Petitioners’ provisional ballots solely because their mail ballots had been received without a secrecy envelope and not because of any defect with their provisional ballots. (Tr. 60:14-16 (McCurdy)).

At the May 7, 2024 hearing before this Court, the Board’s only witness, Chantell McCurdy, the Director of Elections for the Butler County Bureau of Elections, described how the Board treats mail ballots upon receipt. Although Director McCurdy testified that she was not

involved in the Board's decision not to count Ms. Gesner's and Mr. Matis's provisional ballots, she was not aware of any instance where the Board has counted a provisional ballot cast by a voter who submitted a naked mail ballot. (Tr. 74:24-75:15 (McCurdy)).

III. ARGUMENT

When Petitioners submitted naked ballots, the Board directed them to vote provisionally. Yet, the Board refused to count Petitioners' provisional ballots, despite counting the provisional ballots of other Butler County voters, including some who made errors on their mail ballots. The Board's disparate treatment of Petitioners' provisional ballots denied Petitioners the same opportunity to vote provisionally, which the Election Code guarantees and which the Board provided to other Butler County voters. The Board's failure to count Petitioners' votes violated both the Election Code and the Free and Equal Elections Clause, in Article I, Section 5 of the Pennsylvania Constitution, which expressly guarantees the fundamental right to vote. The Board's inconsistent treatment of provisional ballots also fails to comply with the rules of statutory construction and leads to both absurd and unconstitutional results. To remedy these violations, the Board should be directed to count Petitioners' provisional ballots.

A. Under The Pennsylvania Constitution's Free And Equal Elections Clause, Petitioners' Provisional Ballots Must Be Counted

The Free and Equal Elections Clause of the Pennsylvania Constitution expressly guarantees the fundamental right to vote: "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." PA. CONST. art. I, § 5. The right to vote is a "sacred right" codified in Article I, the Pennsylvania Declaration of Rights. *Page v. Allen*, 58 Pa. 338, 347 (1868); *see also League of Women Voters v. Commonwealth*, 178 A.3d 737, 803 (Pa. 2018) ("[Article I] is an enumeration of the fundamental individual human rights possessed by the people of this Commonwealth that are

specifically exempted from the powers of Commonwealth government to diminish”); PA. CONST. art. I, § 25 (“Everything in [Article I] is excepted out of the general powers of government and shall forever remain inviolate.”). The Pennsylvania Constitution’s Free and Equal Elections Clause “has no federal counterpart.” *League of Women Voters*, 178 A.3d at 802.

The text of the Free and Equal Clause is sweeping and unqualified. It “mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be ‘free and equal.’”. *Id.* at 804. This expansive text evinces “the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.” *Id.*

I. The Board Lacked Any Compelling Reason For Rejecting Petitioners’ Provisional Ballots

The Pennsylvania Supreme Court analyzes claims under the Free and Equal Elections Clause by weighing the alleged “violation of] the fundamental right to vote” or alleged “disparate treatment of any group of voters” against the state interest that the challenged regulation supposedly advances. *Banfield*, 110 A.3d at 178. The magnitude of the state interest required to uphold a challenged regulation depends on the severity of the burden it places on citizens’ exercise of the franchise. On one end of the spectrum, “[w]hen a statute significantly interferes with the exercise of [the] fundamental right” to vote, it must be narrowly tailored to promote a compelling state purpose. *Id.* at 176 n.15; *accord Appeal of Norwood*, 116 A.2d 552, 554 (Pa. 1955). When an election regulation “do[es] not severely restrict the right to vote,” however, the Supreme Court has been more deferential—so long as the regulation genuinely advances the Commonwealth’s interest in ensuring “honest and fair elections.” *Pennsylvania*

Democratic Party, 238 A.3d at 369-70 (quoting *Banfield*, 110 A.3d at 176-77). The Pennsylvania Supreme Court has held repeatedly that disqualifying ballots “significantly interferes with the exercise of [the] fundamental right” to vote, and that a disqualification can “be upheld only if it is necessary to promote a compelling state interest and is narrowly tailored to effectuate that state purpose.” *Banfield*, 110 A.3d at 176 n.15 (quoting *Khan v. State Bd. of Auctioneer Exam’rs*, 842 A.2d 936, 947 (Pa. 2004)).

The Board’s decision here to disqualify Petitioners’ provisional ballots triggers strict scrutiny. Even where the Pennsylvania Supreme Court did not expressly mention the Free and Equal Clause in its opinion, the Court has, in the election context, again and again referred to the need for a compelling state interest to justify the disqualification of ballots. In *Appeal of Norwood*, for example, the Court reversed a county board’s disqualification of a ballot that was not marked in compliance with state law, holding that “the power to throw out . . . ballot[s] for minor irregularities,” whether the ballots of “an individual voter or a group of voters,” is not to be “exercised . . . at an election except for compelling reasons.” 116 A.3d at 555. Similarly, in reversing the disqualification of ballots in *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945), the Court reiterated that voters are not to be disenfranchised “at an election except for compelling reasons.”

The Board’s decision not to count Petitioners’ provisional ballots violates the Free and Equal Elections Clause. The Board has counted the votes of other Butler County voters who timely submitted provisional ballots, while denying Petitioners their right to have their provisional ballots counted. Without any adequate reason, let alone a compelling reason, the Board counted the provisional ballots of certain qualified, registered voters—voters who mailed ballots that were cancelled because of defects on the outer declaration envelope. Yet, the Board

refused to count Petitioners' provisional ballots, simply because their mail ballots had been cancelled due to the absence of a secrecy envelope. This cannot satisfy any level of scrutiny, let alone strict scrutiny.

2. Because The Board Counted The Provisional Ballots Of Other Voters Who Had Submitted Defective Mail Ballots, But Not Those Of The Petitioners, The Board Did Not Treat All Provisional Ballots Equally

Selectively discarding provisional ballots only from voters who sent “naked” mail or absentee ballots, while counting the provisional ballots of voters who made other errors with their mail or absentee ballots (for instance, undated or misdated ballot-return envelopes) violates the constitutional guarantee that the Commonwealth’s elections be administered equally. The Pennsylvania Supreme Court repeatedly explained that inherent in the guaranteed right to vote under the Pennsylvania Constitution is the right to have the same voting opportunities as all other voters. Quoting its decision in *Winston v. Moore*, 91 A. 520 (Pa. 1914), the Court reaffirmed in *League of Women Voters* that:

[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

178 A.3d at 810 (emphasis added) (quoting *Winston*, 91 A. at 523); see also *Patterson v. Barlow*, 60 Pa. 54, 75 (1869) (“How shall elections be made equal? Clearly by laws which shall arrange all the qualified electors into suitable districts, and **make their votes equally potent in the election[.]**” (emphasis added)).

The Board’s differing treatment of the provisional ballots of voters whose mail ballots were defective because of errors with respect to the secrecy envelopes, as opposed to errors on

the declaration envelope, was arbitrary and capricious. The Board unjustifiably prevented Petitioners from availing themselves of the Election Code's fail-safe mechanism, while permitting other Butler County voters to enjoy the opportunity to meaningfully cast a provisional vote.² The Board's disparate treatment of Petitioners' provisional votes thus violates the Free and Equal Elections Clause.

B. The Election Code Must Be Construed In Favor Of Counting Petitioners' Provisional Votes

The Election Code provides that the county board of elections “**shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election.**” 25 P.S. § 3050(a.4)(5)(i) (emphasis added). This provision expressly requires every board to count each provisional ballot from an eligible voter has not “cast any other ballot” in that election. *Id.* (emphasis added). In this case, the Board has relied entirely on this provision to support its refusal to count Petitioners' mail ballots. (See Tr. 41:15-24; 74:24-75:15 (McCurdy)). Although the Board has no formal policy, historically, it has refused to count provisional ballots, where a voter has submitted a naked mail ballot, on the basis that the voter already has “cast” a ballot. (*Id.*).

This position is wrong. Because Petitioners' cancelled mail ballots were never “cast,” the Election Code does not provide the Board any basis to refuse to count Petitioners' provisional ballots.

² The Board's failure to offer any plausible basis for its disparate treatment of provisional ballots of voters who submitted naked ballots and of voters who made other mail ballot errors is discussed in Section III(C), *infra*.

1. Where A Voter's Naked Ballot Has Been Cancelled, It Has Not Been "Cast"

Pennsylvania Democratic Party forecloses the Board's assertion that Petitioners' mail ballots had been "cast." In that case, the Pennsylvania Supreme Court held that "a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be **disqualified**." 238 A.3d at 380 (emphasis added). The framing of that decision is critical: the Court held that the "naked ballot" itself must be disqualified—not that the voter who made the mistake is disqualified. Consistent with this decision, this Court observed during the hearing that naked ballots are "void," "invalid," and "can't be counted," (Tr. 121:4-6, 13-14), and the Board's treatment of these ballots reflects that. The Board does not open, let alone count, naked ballots in the County's vote tabulation. The Board's construction of § 3050(a.4)(5)(ii)(F), which would treat these naked ballots as if they had been "cast," is entirely inconsistent. It would disenfranchise a voter for mistakenly omitting the secrecy envelope rather than disqualifying the cancelled ballot itself.

A ballot has been "cast" under 25 P.S. § 3050 only when the submitted ballot has been included in the county's vote tabulation. Only this interpretation furthers both objectives of this Code provision: (1) ensuring that every registered and eligible voter can cast a ballot and have it counted; and (2) ensuring that no voter can have **more than one** ballot counted in any election. The Board's refusal to count provisional ballots of voters whose mail ballots were cancelled because the ballots were not enclosed in a secrecy envelope—and therefore could not have been counted—does not further either objective. Discarding Petitioners' ballots undermined the first objective because it blocked qualified, registered voters, who timely voted provisionally, from having **any** ballot counted in the Primary. Discarding the ballots did not further the second

objective because the Board knew that Petitioners' mail ballots had been cancelled, meaning that counting their provisional ballots could not result in a second vote being counted for either voter.

The Board's suggestion that a cancelled mail ballot has been "cast" is at odds with the Election Code's use of the term. The Election Code frequently uses "cast" to refer to ballots that are, in fact, counted. For example, the Election Code distinguishes void, cancelled ballots from "cast" ballots, requiring a clerk, "in each case of a return from a district in which ballots were used, [to] read therefrom the number of ballots . . . issued, spoiled and cancelled, **and cast**, respectively." *Id.* § 3154(c) (emphasis added). This provision also supports the clear reading of the statute that "cancelled" ballots have not been "cast." The Code also sets the threshold for an automatic recount at "one-half of a percent or less of the votes **cast** for the office." 25 P.S. § 3154(g)(i) (emphasis added). Under the Board's position, any mail ballots that a board cancelled (like Petitioners') **would** count toward a recount threshold.

Similarly, the Election Code directs the Secretary, after tabulating returns in certain elections, to "prepare a statement from the said returns, showing the total number of votes **cast** in the State and in each congressional district of the State for each political party for nomination as President of the United States." 25 P.S. § 3162 (emphasis added). The Board's construction of this provision would lead to an absurd result; the Secretary would report on ballots that were received, but not counted. The Election Code further requires the Secretary to "tabulate, compute and canvas the votes **cast** for all candidates." *Id.* § 3159 (emphasis added). If the Board's position were correct, the Secretary would have to engage in the meaningless exercise of tabulating void ballots.

As the Board conceded, its proposed construction of "cast" would also produce absurd results. For instance, a mail ballot could be treated as "cast" simply because the Board received

an **empty** outer envelope. (Tr. 63:6-8, 16-25-64:1-8). The Board also took the position that if a voter submits a mail ballot without a secrecy envelope, and then votes provisionally, and the mail ballot arrives after election day and not before election day, the provisional ballot must be counted. (Tr. 64:9-65:8 (McCurdy)). That simply cannot be the correct result.

Because the Board cancelled Petitioners' naked ballots, and thus voided them under *Pennsylvania Democratic Party*, those ballots were not "cast." The Board must therefore count Petitioners' provisional ballots. It is undisputed that Petitioners are qualified, registered voters, who attempted, but **failed**, to submit a vote by mail. When their mail ballot envelopes were logged into the SURE System, the system detected and election officials confirmed, that their ballots were defective for a lack of a secrecy envelope. Through the SURE System coding, Petitioners were notified that their mail ballots had been cancelled, and the notification directed them to vote provisionally. (Tr. 87:1-7, 87:24-88:7 (Matis), 140:11-13, 144:3-18, 146:7-19 (Genser)). Because the Board cancelled the defective mail ballots, Petitioners did not "cast" their mail ballots. When they cast their provisional ballots, Petitioners swore, as required, "that this is the only ballot that I cast in this election." (Tr. 41:20-22 (McCurdy)). Petitioners' cancelled mail ballots have clearly not been "cast."

2. Any Perceived Ambiguity Regarding "Cast" Must Be Resolved To Avoid Disenfranchising Voters

Because the Free and Equal Elections Clause guarantees the fundamental right to vote, the Pennsylvania Supreme Court has long held that election laws must be construed in favor of enfranchisement. In *Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954), for instance, the Court explained that "[a]ll statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat

the exercise of the right of suffrage.” In *Perles v. County Return Board of Northumberland County*, 202 A.2d 538 (Pa. 1964) the Court reasoned that because “[t]he disfranchisement of even one person validly exercising his right to vote is an extremely serious matter[,] . . . [e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Id.* at 540 (quoting *Appeal of Norwood*, 116 A.2d at 554).

Election laws are construed in favor of the franchise for several related reasons. First, “the right of suffrage is the most treasured prerogative of citizenship.” *Appeal of Norwood*, 116 A.2d at 553-54, and hence cannot be denied lightly. Second, ballot errors are often “not willful errors,” *In re Petitions to Open Ballot Boxes*, 188 A.2d 254, 256 (Pa. 1963), meaning that disenfranchising voters for their mistakes cannot serve a deterrent function. Third, if the government could reject ballots for minor irregularities, the consequence would be mass disenfranchisement. *Appeal of Gallagher*, 41 A.2d at 632.

Applying the Pennsylvania Supreme Court’s canon to liberally construe the Election Code in favor of enfranchising voters means that any ambiguity in § 3050’s use of “cast” must be resolved in Petitioners’ favor because doing so protects the right to vote. The Board’s interpretation, by contrast, promotes disenfranchisement. For these reasons, it must be rejected. Because Petitioners never “cast” a prior ballot in the Primary, the Election Code does not provide the Board with any basis to reject Petitioners’ provisional ballots. The Board should be directed to count Petitioners’ votes.

C. The Respondent/Intervenors’ Arguments Needlessly Foster Disenfranchisement Of Eligible Voters

Before this Court, the Board and the Respondents/Intervenors sought to hamstring the canvassing efforts of boards of elections by arguing that a board of elections cannot make any efforts, before election day, to determine whether a mail ballot is missing a secrecy envelope.

They assert that even determining whether a ballot is naked constitutes impermissible “pre-canvassing” of ballots and would violate the right to a secret ballot. (See Tr. 115:16-116:18). The record in this case demonstrates why their reading of the Election Code is incorrect.

Director McCurdy testified that, when the Board received Petitioners’ mail ballots, it used a machine to determine—without opening the envelopes—that Petitioners had not included the secrecy envelope. (Tr. 47:21-48:4 (McCurdy)). The Board accordingly marked the ballots as cancelled, and put them in a bin, without opening any of the cancelled ballots’ envelopes. The Board only opened Petitioners’ cancelled ballots three days after the Primary. (Tr. 21:22-23, 65:14-16 (McCurdy)). None of these activities constitutes impermissible pre-canvassing and none violates the right to a secret ballot.

The Election Code defines “pre-canvassing” as “the inspection **and** opening of all envelopes containing official absentee or mail ballots, the removal of such ballots from the envelopes **and** the counting, computing and tallying of the votes reflected on the ballots.” 25 P.S. § 2602(q.1) (emphasis added). Because of the General Assembly’s use of “and,” pre-canvassing occurs only when **all** of the listed activities have been undertaken. The Board’s conduct here—reviewing, inspecting and sorting mail ballots before election day **without** opening outer envelopes and **without** counting ballots—is not pre-canvassing and, more importantly, fulfills other Election Code requirements.

For example, the Election Code requires boards of elections to handle and log return envelopes upon receipt. Boards **must** review and process mail ballots upon receipt and they **must** log those ballots into the SURE System. 25 P.S. § 1222(c); 4 Pa. Code § 183.4(b). Before election day, the boards **must also** prepare district registers identifying those electors “who have received and voted mail ballots.” 25 P.S. § 3150.16(b)(1) (mail ballots); *accord id.* § 3146(b)(1)

(absentee ballots). The only way that the election judges at the various polling places (or election districts) can identify the electors who have received and voted mail or absentee ballots is for the boards to review, inspect, and sort the ballots returned before election day. Assessing whether a still-sealed ballot return envelope includes a secrecy envelope does not violate the right to a secret ballot for the same reasons.

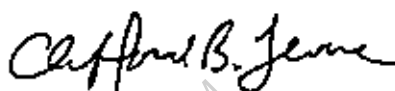
The Board's process correctly determined here that Petitioners (and 38 others in Butler County) had submitted naked ballots, without opening any of the envelopes. The Board's process was validated when administrators opened Petitioners' ballots on April 26—three days after the Primary. (Tr. at 49:18-22). No step in the ballot scanning and sorting process compromises the secrecy of the ballots. Although missing the inner secrecy envelope, Petitioners' mail ballots have remained secret at all times. (Tr. at 65:9-13). Ultimately, counting Petitioners' provisional ballots is consistent with Pennsylvania law and would ensure that each Petitioner is allowed one vote. The Board's refusal to count Petitioners' only vote in the Primary violates both the Free and Equal Clause of the Pennsylvania Constitution and the Pennsylvania Election Code.

IV. CONCLUSION

The Board's refusal to count the one and only valid ballot that Petitioners' cast in the Primary violates the Free and Equal Elections Clause and the Election Code. The Petition should be granted and the Board should be directed to count Petitioners' provisional ballots.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Brief of The Pennsylvania Democratic Party in Support of Petitioners' Petition for Review was served via email and U.S. mail, on the 28th day of June, 2024, on the following:

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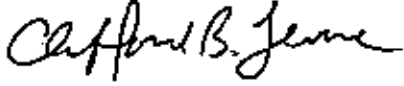


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CERTIFICATE OF COMPLIANCE

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

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