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IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

FAITH A. GENSER and FRANK P. MATIS,

CIVIL DIVISION

Petitioners,

A.D. No. 2024-40116

v.

BUTLER COUNTY BOARD OF ELECTIONS,

Respondent.

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**RESPONDENT'S MEMORANDUM IN
OPPOSITION TO PETITION FOR
REVIEW IN THE NATURE OF A
STATUTORY APPEAL**

Filed on behalf of Respondent,

BUTLER COUNTY BOARD OF ELECTIONS

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FAITH A. GENSER and FRANK P. MATIS, CIVIL DIVISION

Petitioners, A.D. No. 2024-40116

v.

BUTLER COUNTY BOARD OF ELECTIONS,

Respondent.

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

The April 29, 2024, Petition for Review in the Nature of Statutory Appeal filed on behalf of Petitioners Faith A. Genser and Frank P. Matis (the "Petition") against the Butler County Board of Elections (the "Board") seeks sweeping declaratory relief in an attempt to manufacture a post-primary ballot curing policy without official Board action. This retroactive, unwritten, and unadopted ballot curing policy does not exist in the Pennsylvania Election Code, nor is it required by Pennsylvania Supreme Court precedent.

Despite the Petition's broad demand for declaratory relief, Petitioners' standing before this Court is limited to the canvassing of their respective provisional ballots during the computation of the April 23, 2024, primary election. Accordingly, any effort to supplant the Board's statutory authority or circumvent its legislative process to ask this Court to retroactively declare what the Board's ballot curing policy must have included is beyond the statutory scope under which the Petition was filed. Under § 3157, this Court may consider only whether the Board abused its discretion or committed an error of law relative to the provisional ballots cast by Ms. Genser and Mr. Matis after each returned a verified mail-in ballot. As the record demonstrates that the Board's designated Computation Board acted in compliance with the

Election Code at all times during the computation and canvassing of the vote from the April 23, 2024, primary, and there was no challenge made to the Computation Board's decisions concerning Petitioner's provisional ballots during the canvassing that the Board could make any decision or order upon, the Court must deny the relief sought in the Petition.

I. Procedural History

This matter comes before the Court by Petition filed pursuant to 25 P.S. § 3157 which permits "[a]ny person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election . . . [to] appeal therefore within two days after such order or decision shall have been made, whether then reduced to writing or not, to the court specified in this subsection, setting forth why he feels that an injustice has been done, and praying for such order as will give him relief. . . ." *Id.* (emph. added). The Petition was filed after the Computation Board completed its canvass. The Court ordered the Board to show cause why the relief requested in the Petition should not be granted and a hearing was held May 7, 2024.

During the May 7, 2024, hearing, the Court granted leave for the Republican National Committee, the Republican Party of Pennsylvania and the Pennsylvania Democratic Party to intervene as Respondents to the Petition. Now pending before the Court is the Order to Show Cause.

II. FACTUAL BACKGROUND

A. The Butler County Board of Elections is charged with administering Primaries and Elections within the County.

The Butler County Board of Elections is responsible for administering elections in accordance with the Election Code. 25 P.S. 2641(a) (county boards have "jurisdiction over the conduct of primaries and elections in such count(ies) in accordance with the provisions of the

[Election Code].”). The Board is comprised of the elected members of the Butler County Commissioners (McCurdy 18:20-25).

To implement mail-in voting for every eligible voter in Pennsylvania, the General Assembly amended the Election Code in 2019 and set forth the parameters by which the county boards of election must administer the mail-in process. P.L. 552, No. 77 § 8; *see* 25 P.S. § 3150.11(a). The Board of Elections is responsible for reviewing and processing applications for absentee and mail-in ballots. 25 P.S. § 3146.2b, 3150.12b; confirming an absentee applicant’s qualifications by verifying their proof of identification and comparing the information on the application with information contained in the voter’s record. 25 P.S. §§ 3146.2b, 3150.12b; *see* also *id.* § 3146.8(g)(4); sending a mail-ballot package that contains a ballot, a “Secrecy Envelope” marked with the words “Official Election Ballot,” and a pre-addressed outer return envelope, on which a voter declaration form is printed (the “Declaration Envelope”). *Id.* §§ 3146.6(a), 3150.16(a). The Board also maintains poll books to track which voters have requested mail ballots and which have returned them. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3).

In order to conduct the computation of the vote, each member of the Board appoints one individual to a Computation Board to canvass and count the votes following each election. (McCurdy 19:2-11). The Computation Board is comprised of two individuals registered as members of the Democratic Party and one individual registered as a member of the Republican Party. (McCurdy 19:18-23). In accordance with the mandate of the Election Code, all returned mail-in ballots are kept in sealed or locked containers until they are canvassed by the Computation Board, which is responsible for pre-canvassing and canvassing mail-in ballots, including examining the voter declaration. 25 P.S. §§ 3146.8(a); 3146.8(g).

B. Voting by Mail Ballot

Under the Pennsylvania Election code, registered voters choosing to vote by absentee and mail-in ballots (collectively “mail-in ballots”) must first complete an application providing the voter’s name, address of registration, and proof of identification. 25 P.S. §§ 3146.6(a), 3150.16(a). As part of the application process, voters provide all the information necessary for the Board to verify that they are qualified to vote in Pennsylvania. 25 P.S. § 3146.2(b). After the application is submitted, the Board confirms the applicant’s qualifications by verifying proof of identification and comparing the information on the application with information contained in the elector’s record. (McCurdy 37:20-38:7); 25 P.S. §§ 3146.2(b), 3150.12(b); see also id. § 3146.8(g)(4).

The Board then provides to the voter an envelope containing an appropriate ballot, a yellow inner envelope labeled “Official Election Ballot” (the “Secrecy Envelope”), a second white envelope with a purple border containing a voter declaration (“Declaration Envelope”), and instructions written by the Pennsylvania Department of State on how to complete and return the ballot to ensure it will be counted. (McCurdy 38:20-39:10). In order to vote the mail ballot, the elector completes the ballot and places it in the Secrecy Envelope marked Official Election Ballot which then must be placed into the Declaration Envelope. The elector then must fill out, date and sign the declaration printed on the Declaration Envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). Although the Election Code only requires the Board to keep poll books showing which voters requested mail ballots and which have returned mail in ballots, the Board also inputs that information into the Department of State’s Statewide Uniform Registry of Electors (“SURE”) system. (McCurdy 37:20-38:7); 25 P.S. §§ 3146.6(b)(3), 3150.16(b)(3).

If a voter applies for a mail-in ballot and later changes his or her mind and decides to vote in person on election day, there are two ways that the voter is permitted to cast a ballot at the polling location. (McCurdy 40:10-41:24). First, if the voter brings the mail-in ballot and the Declaration Envelope, the voter can sign a “surrender form” stating the voter no longer wishes to have the active mail-in ballot. *Id.* The Judge of Elections also signs the surrender form, accepts the mail-in ballot and Declaration Envelope, and keeps all of those materials in a separate envelope for such surrendered mail-in ballots. *Id.*

If the voter does not bring the mail-in ballot and Declaration Envelope to the polling location, the voter may complete a provisional ballot, attesting that the voter is eligible to vote in Butler County, is registered, and has not submitted a ballot in any other way. *Id.* This provisional ballot is then evaluated by the Computation Board during the canvass to ensure the voter did not submit the mail-in ballot or any other ballot(s) during the election. (McCurdy 42:15-43:5). If the Computation Board finds that any other ballot has been cast by the voter, it determines which ballot was cast first and disregards any later ballots to prevent “two bites at the apple.” *Id.*; 25 P.S. § 3050(a.4)(5)(ii)(F) (“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.”).

C. The “Ballot Curing Policy” Adopted and Amended by the Board

Pursuant to its authority to, *inter alia*, “make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors”, the Board issued a Ballot Curing Policy specific to the Declaration Envelope. 25 P.S. § 2642. When the Board determines a policy is necessary or desirable such policy is voted on in a public meeting. (McCurdy 77:11-20). The Ballot Curing Policy adopted by the Board following a public meeting on May 2, 2023, is

consistent with the permissive authority granted by the Pennsylvania General Assembly that permits the Board to cure mail-in ballots under certain narrow circumstances: “[f]or those absentee or mail-in ballots for which proof of identification has not been received or could not be verified.” 25 P.S. § 3146.8(g)(7)(h); (McCurdy 76:4-25); see Respondent Intervenor Republican Party Exh. 1, (the “Curing Policy”). The Curing Policy was amended on February 14, 2024, following another public meeting. (McCurdy 77:1-4).

Contrary to the specific limited relief available in a § 3157 statutory appeal to challenge a canvassing or computation decision, the Petition explicitly purports to challenge the Butler County Ballot Curing Policy. See Petition, ¶ 3 (“The Board published the **challenged policy** at issue on its website prior to the election.”) (*emphasis added*). Prior to the April 23, 2024, primary, the Solicitor of Butler County and the Director of the Butler County Bureau of Elections Chantall McCurdy were lobbied by lawyers from the American Civil Liberties Union (the “ACLU”—the organization that also represents Petitioners in this matter) regarding other parts of the Curing Policy. Counsel for the Petitioners, on behalf of the ACLU, contacted the Director of the Butler County Bureau of Elections, and discussed with Director McCurdy and Butler County Solicitor Julie Graham certain issues relating to voters’ “Designated Agents” under the Board’s adopted Curing Policy. (McCurdy 27:10-29:6). The day after the April 23, 2024, primary, these lawyers again approached the Butler County Bureau of Elections and County Solicitor regarding the Curing Policy, this time requesting a directive to the Computation Board to count provisional ballots cast by voters who had returned mail-in ballots without the required Secrecy Envelope. (McCurdy 29:7-31:7).

These lawyers requested the County Solicitor and the Director of Elections to instruct the Board to pre-determine how the Computation Board would count provisional ballots in the event

that the voter had also cast a mail-in ballot without a secrecy envelope. *Id.* Director McCurdy and Solicitor Graham advised counsel for the ACLU that the Computation Board evaluates all provisional ballots cast to determine whether they should be counted. Historically any ballot that did not contain a Secrecy Envelope was not counted. (McCurdy 29:7-31:7). The Board of Elections does not direct the decisions of the Computation Board, but rather defers entirely to its decisions regarding the canvass and computation of votes. (McCurdy 31:4-24).

D. Pre-Canvass Receipt and Handling of Mail-in Ballots.

In advance of the April primary certain information relating to the external appearance of mail-in ballots was recorded in the Department of State's SURE system. A machine called Agilis Falcon sorted mail-in ballots received before election day for the purpose of organizing them in accordance with their respective precincts. (McCurdy 33:2-36:6). During this machine sorting, the Agilis Falcon measured the ballots' weight and dimensions. Those ballots identified by machine as having irregularities with respect to weight and dimensions were segregated. *Id.*

Common issues detected by the Agilis Falcon included mail-in ballots returned to the incorrect county (the counties determine the dimensions of the envelopes they use); and whether the mail-in ballot was not thick enough or too thick. (McCurdy 33:2-36:6). The Bureau of Elections assessed the "irregular" mail-in ballots individually and manually scanned in the barcodes on the Declaration Envelopes into the SURE system. *Id.* In recording irregularities detected by Agilis Falcon, Bureau of Elections employees used their best judgment to choose from a list of options provided within the SURE system to record the potential issue. (McCurdy 33:2-36:6). In the event the Bureau of Elections found a ballot meant for another county, it undertook best efforts to forward the ballot to the proper county. *Id.*

Mail-in ballots cannot lawfully be opened until the date of the primary or election, so the Computation Board could not know with any certainty if an irregularity detected by the Agilis Falcon was a defect that would result in the mail-in ballot not being counted. *Id.* Further, even when the Agilis Falcon had not detected any irregularity with a mail-in ballot and there was no obvious defect on the outside of the Declaration Envelope, the Board had opened mail-in ballots on election day to find that the inner contents were defective and could not be counted (such as when a voter included folded medical records roughly the same size and weight as a ballot). *Id.*

E. Recent Changes to the SURE System Generated Automatic Emails from the Department of State to Mail-in Voters.

Although the Petition makes repeated allegations that “the Board” notified Petitioners prior to the primary election that it “rejected their ballots” and would not count their votes because of a missing “Secrecy Envelope,” the record evidence does not support those allegations. *See* Petition ¶¶ 16, 27, 35. The Board could not verify whether any mail-in ballot was missing a Secrecy Envelope until after it was permitted by law to open the Declaration Envelopes on the day of the primary. (McCurdy 21:12-22:6, 45:4-48:6). No notifications were sent to Petitioners by or on behalf of the Board.

During the April 23, 2024, primary cycle, voters who returned mail-in ballots received automatically generated emails from the Pennsylvania Department of State resulting from information recorded in the SURE system. (McCurdy 45:4-48:6). If mail-in voters supplied their email addresses, the Department of State sent “status update” emails related to returned mail-in ballots. *Id.* For example, on April 11, 2024, Petitioner Genser received an email from RA-voterregstatcert@certstate.pa.us advising her that her ballot would not be counted because it was not returned in a Secrecy Envelope. The email further advised “[i]f 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.” The email also directed Petitioner Genser to contact Butler County if she had questions or needed more information. See Petitioners’ Exhibit D.

In the case of irregularities detected by the Agilis Falcon machine in Butler County, the Board employees input their “best guess” into the SURE system about whether or not the mail-in ballots included the required Secrecy Envelope. *Id.* If that recorded “best guess” was “cancel, no Secrecy Envelope” the voter received an email automatically generated by the Department of State telling the voter that the county identified that their mail-in ballot was lacking a Secrecy Envelope and instructing the voter to contact the county for a replacement ballot or go to the voter’s polling place to cast a provisional ballot. (McCurdy 48:8-49:3). The Department of State did not verify with the Board whether or not its instruction was consistent with the Board’s Curing Policy. *Id.*

During the May 7, 2024, hearing, Petitioner Genser testified that she understood before she had cast a provisional ballot that the provisional ballot would not remedy the lack of a Secrecy Envelope in her returned mail-in ballot. (Genser 148:1-2). Petitioner Genser testified that she contacted the Bureau of Elections on April 11, and again April 15, (the day before the April 16 deadline to request a new mail-in ballot as referenced in the April 11, 2024, email she received) and consequently understood that a provisional ballot would likely not be counted. (Genser 150:12-19).

F. The Canvass and Count

On April 26, 2024, the Computation Board publicly commenced the computation and canvassing of the primary returns. (McCurdy 19:24-21:8). Petitioners’ legal counsel Richard T. Ting was present for the canvassing as a watcher. *Id.* The Computation Board first selected its

officers and then took up the canvassing of absentee and mail-in ballots, followed by provisional ballots and write-in votes, in that order. *Id.* At the time the Computation Board convened, no Declaration Envelopes or Secrecy Envelopes had been opened. (McCurdy 21:12-22:6). To protect voter privacy, the Declaration Envelopes and Secrecy Envelopes were manually opened by the Director and Vice Director of the Bureau of Elections in front of the Board employees in the presence of the Computation Board. *Id.*

During the canvass, the Computation Board determined that 40 mail-in ballots were missing a Secrecy Envelope marked "Official Election Ballot". (McCurdy 22:10-17). To protect the privacy of voters, the Computation Board never discloses the names of any voters to protect the secrecy of the voter—so the names of the voters who failed to return a ballot inside the Secrecy Envelope were not announced or discussed during the canvass. (McCurdy 26:14-24).

Upon review of the 74 provisional ballots, only three were determined to have been completed by voters who had previously submitted a mail-in ballot missing the Secrecy Envelope marked "Official Election Ballot." (McCurdy 24:23-26:13). The three members of the Computation Board, without discussion or debate, unanimously decided to not count these three provisional ballots. (McCurdy 26:25-27:9). Mr. Ting nor any other individual made a challenge to these three unanimous determinations of the Computation Board. Had a challenge been made, the Board would have been required to convene a hearing at which the Board could have taken testimony, heard evidence, and rendered a decision on the provisional ballots. 25 P.S. § 3050(a.4)(4).

The Computation Board rejected an additional 17 provisional ballots because the voter was registered to the wrong party for the ballot cast, 12 were rejected per the Ballot Curing Policy, and two were rejected because the voters were not registered in Butler County.

(McCurdy 25:2-21). The only matters before this Court are the unanimous decisions of the Computation Board not to count two of the “three provisional ballots rejected on the basis that these voters had cast a provisional ballot when they had already turned in an absentee or mail-in ballot that lacked a secrecy envelope.” *Id.*

III. LEGAL STANDARD

Under a § 3157 statutory appeal, the Court may only reverse the Board’s decisions concerning Petitioners’ provisional ballots if it finds an abuse of discretion or error of law. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1070 (Pa. 2020). This Court must evaluate the Computation Board’s decision in accordance with the well-established interpretive principle that where the language of a statute is unambiguous, the language must control. 1 Pa.C.S. § 1921(b). If the Court finds an ambiguity in the language of the statute, it must ascertain the legislative intent. *In re Canvass*, 241 A.3d at 1062. In election cases, the Court must consider the principle that the Election Code should be construed to not deprive electors of their right to elect a candidate of their choice but must also adhere to the principles imbedded in the Election Code that the General Assembly intended to protect voter privacy, prevent fraud, and to otherwise ensure the integrity of the voting process. *Id.* at 1062; 1071.

Here, there is no evidence in the record before this Court or allegation in the Petition that the Computation Board acting under the authority of the Board abused its discretion. The Petition only improperly challenges the Board’s authority to implement a curing policy that does not address the lack of a mail-in voter’s Secrecy Envelope. The specific challenge to the limits of the Ballot Curing Policy is outside the scope of relief available under § 3157. The Board’s authority is expressly granted by the General Assembly in the Election Code and its authority in

this regard is a settled matter. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (“Upon review, we conclude that the [county] Boards are not required to implement a “notice and opportunity to cure” procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly.”); *Republic National Committee (RNC) v. Chapman*, 2022 WL 16754061, *16-17 (Pa. Commw. Ct. Sept. 29, 2022) (finding that the Pennsylvania Supreme Court in *Boockvar* neither required nor prohibited county boards of election to implement appropriate curing procedures consistent with the Election Code) (aff’d by equally divided Pennsylvania Supreme Court, *RNC v. Chapman*, 284 A.3d 207 (Pa. 2022)).

IV. ARGUMENT

A. A § 3157 Statutory Appeal Cannot Seek Declaratory Relief

25 P.S. § 3157 allows Petitioners only to seek the Court’s review of the Computation Board’s decision to not count their respective provisional ballots, but it is not a vehicle to have the Court impose the sweeping declaratory relief sought by the Petition. The Petition seeks an order from this Court “reversing the decision of [the Board]; **declaring that Pennsylvania Supreme Court precedent, the Pennsylvania Election Code, and the Pennsylvania Constitution require the Board to count Petitioners’ provisional ballots[.]”** Petition, “Wherefore clause”, p. 19. The broad, declaratory relief the Petition seeks is essentially a mandatory imposition of a post hoc, Court-imposed curing policy in line with the ACLU’s post-primary lobbying efforts. Such declaratory relief cannot be granted via a § 3157 appeal.¹

§ 3157 allows the Court to address only the two votes at issue for the April 23, 2024, primary election in which the Petitioners provisional ballots were cast. Even the third provisional ballot excluded by the Computation Board under substantially identical

¹ The Petition is not brought pursuant to the Pennsylvania Declaratory Judgments Act, 42 Pa.C.S.A. § 7531 *et seq.* which is the vehicle by which a party can seek a declaration of “rights, status, and other legal relations” from a court within its proper exercise of jurisdiction.

circumstances is not before the Court in this appeal. *See Lewis v. Phila Cty. Bd. Of Elections*, 71 Pa. D. & C. 5th 181 (Ct. Com. Pl. 2018). To obtain the relief available under § 3157, the “person aggrieved” must present facts supporting his or her position that the county board’s decision was in error. *Id.* In fact, the Court could examine the facts presented by each Petitioner in this action and determine that the Board’s decision should be upheld for one and reversed for the other—but what the Court cannot do is declare what the Board’s Curing Policy must include.

B. The Petition Incorrectly Challenges the Substance of the Board’s Curing Policy

The Petition makes plain that there is no argument that the Computation Board did not apply the duly-adopted and duly-amended Ballot Curing Policy in accordance with its terms. Rather, the Petition seeks to have the Court redraft the Ballot Curing Policy to address circumstances far beyond its scope which is to “allow registered voters the opportunity to cure immaterial deficiencies on their absentee or mail-in ballot declaration envelopes.” Ballot Curing Policy, Respondent Intervenor Republican Party Exh. 1. This requested redraft is only within the authority of the Pennsylvania General Assembly to mandate or for the Board to adopt following a public meeting. Because the General Assembly has not mandated such a policy in the Election Code, the Petition cannot demand that the Court unilaterally amend the Ballot Curing Policy through this § 3157 statutory appeal.

1. The Board’s Curing Policy is Consistent with the Election Code

The Pennsylvania General Assembly expressly authorizes county boards of election to “cure” a defective mail-in ballot in one narrow circumstance. 25 P.S. § 3146.8(h). By a provision first added to the Election Code in a 2012 amendment, the Board must consider challenges, with no requirement that a statutory appeal be filed, to “mail-in ballots for which proof of identification has not been received or could not be verified[,]” if the elector can provide

proof of identification that can be verified by the [Board] by the sixth calendar day following the election[.]” *Id.*; P.L. 195, No. 18, § 7 (enacted March 14, 2012). This provision is all that the Election Code requires. While maintaining the Election Code’s mandate that only duly registered voters cast ballots in a manner maintaining voter privacy, the Board’s Ballot Curing Policy allows notification to voters having submitted mail-in ballots with immaterial deficiencies on the Declaration Envelope of its inability to properly verify their proof of identification and informs those voters of the procedures to “cure” the immaterial deficiency by providing sufficient proof of identification. See Ballot Curing Policy, Respondent Intervenor Republican Party Exh. 1.

Moreover, it is well-settled that this notice of opportunity to cure immaterial deficiencies on absentee or mail-in Declaration Envelopes is not required by the Election Code. *Boockvar*, 238 A.3d at 374 (“[T]he decision to provide a ‘notice and opportunity to cure’ procedure to alleviate [the risk of minor errors made by the voter in contravention of the mail-in ballot requirements] is one best suited for the Legislature.”) It is also well-settled that the Election Code permits the Board’s policy as written. *RNC v. Chapman*, 2022 WL 16754061, *16-17 (Pa. Commw. Ct. Sept. 29, 2022) (finding that the Pennsylvania Supreme Court in *Boockvar* neither required nor prohibited county boards of election to implement appropriate curing procedures consistent with the Election Code) (aff’d by equally divided Court, *RNC v. Chapman*, 284 A.3d 207 (Pa. 2022)).

In *Boockvar*, the Pennsylvania Democratic Party filed a petition under the Declaratory Judgments Act seeking, *inter alia*, an order requiring county boards of election to implement a “cure” procedure for mail-in voters who returned ballots without the required Secrecy Envelope marked Official Election Ballot. *Id.* at 374 (“Petitioner seeks a declaration that under Act 77, the

[county boards] must ‘clothe and count naked ballots,’ *i.e.*, place ballots that were returned without the secrecy envelope into a proper envelope and count them, rather than invalidate them.”) The Pennsylvania Supreme Court rejected the petition in *Boockvar*, relying on the “General Assembly’s intention that, during the collection and canvassing processes, when the outer envelope in which the ballot arrived is unsealed and the sealed ballot removed, it should not be readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted.” *Id.* at 378. Finding that the Secrecy Envelope maintains an imperative policy imbedded in the Election Code—that voters remain anonymous—the Court held that “clothing and counting the naked ballots” would violate that policy. *Id.* at 379 (“It is clear that the Legislature believed that an orderly canvass of mail-in ballots required the completion of two discrete steps before critical identifying information on the ballot could be revealed. The omission of a secrecy envelope defeats this intention. . . . the Legislature signaled beyond cavil that ballot confidentiality up to a certain point in the process is so essential as to require disqualification.”)

In *RNC v. Chapman*, the Republican National Committee filed a Declaratory Judgments Act petition seeking, *inter alia*, “a declaratory judgment that the [county boards of election] are prohibited under Pennsylvania law from developing and implementing notice and opportunity to cure procedures with respect to mail-in ballots unless such procedure offers only the narrow opportunity to cure included within the Election Code for mail-in voters to provide proof-of-identification within six days. 2022 WL 16754061 *5-6; 25 P.S. § 3146.8(h). The Commonwealth Court held that neither the Election Code nor precedent prohibits the county boards from developing and implementing appropriate notice-and-cure procedures and denied the petition. *Id.* *21-22.

2. The Board's Curing Policy is Identical to the Relief Granted in Keohane.

The Petition rests its reasoning on the decision of the Delaware County Court of Common Pleas in a matter entitled *Keohane v. Del. Co. Bd. Of Elections*, No. 2023-004458. However, the issue presented in *Keohane* resulted from a provisional ballot challenge hearing in which the Delaware County Board of Elections had voted not to count three provisional ballots after considering evidence that the respective three voters had returned mail-in ballots with certain deficiencies on the Declaration Envelope, had not requested replacement ballots, nor appeared before the Delaware County Bureau of Elections to correct the mail-in ballots. None of the petitioners in *Keohane* returned a mail-in ballot without a Secrecy Envelope. The very relief granted by the court in *Keohane*—to count the petitioners' provisional ballots because they provided the requisite proof of identification entitling them to vote that could not be ascertained from their returned mail-in ballots on the Declaration Envelopes—goes no further than what is already permitted under the Butler County Ballot Curing Policy.

Given the authority of the Board to craft its Curing Policy established by the Election Code and these precedents, this Court must reject the Petition's insistence that it be amended to include a procedure by which a mail-in voter can cure a mail-in ballot returned to the Bureau of Elections without a Secrecy Envelope that has never been required by the Election Code or legal precedent.

D. The Board Did Not Abuse Its Discretion or Commit Any Error of Law.

This Court is limited to deciding whether the record before it shows that the Board abused its discretion or committed an error of law. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1070 (Pa. 2020). The Petition alleges no abuse of discretion by the Board, and none can be found in the record. In fact, in side-stepping the

procedures delineated in the Election Code to challenge the canvassing decision concerning any provisional ballot and instead electing to file this statutory appeal, Petitioners denied the Board any opportunity to exercise discretion over the decision of the Computation Board, let alone abuse it. *See* 25 P.S. § 3050(a.1)(4)(1)(4) (during the canvass, anyone may challenge whether a provisional ballot should be counted; the provisional ballot must be marked and set aside and the county board must provide notice of the challenge to all interested parties and hold a hearing within seven days).

The Delaware County Board in *Keohane* held a public hearing after the petitioners properly challenged the decisions regarding their votes during the canvass. During this hearing, the Delaware County Board heard evidence and argument and announced that it could not count the challenged provisional votes based on its understanding of the decision in *In re: Allegheny Co. Provisional Ballots in the 2020 Election*, 241 A.3d 695 (Pa. Commw. 2020) (evaluating decisions of county board concerning provisional ballots missing required signatures on envelopes). Unlike the Petition before this Court, the Court of Common Pleas in *Keohane* had something to review—decisions made by the Delaware County Board at a public hearing following a challenge to provisional votes during the canvass.

All alleged errors in the Petition are made “upon information and belief” and nothing within the record establishes any error was committed at all. *See* Petition ¶ 7 (“Upon information and belief, the Board’s decision to implement the [Curing Policy] and to reject Petitioners’ provisional ballots was based on a mistaken interpretation of the Pennsylvania Supreme Court’s decision in [*Boockvar*] . . .”; ¶ 57 (same); ¶ 61 (“Upon information and belief, the Board also based its decision on a misreading of the Pennsylvania Election Code.”)).

The record before this Court clearly establishes the following:

- On May 2, 2023, the Board adopted a Ballot Curing Policy after a public meeting;
- On February 14, 2024, this Ballot Curing Policy was amended following a public meeting;
- The Ballot Curing Policy addresses only deficiencies with mail-in votes that the Bureau of Elections is unable to verify as returned by a registered voter due to immaterial proof-of-identification errors on the Declaration Envelope;
- The Board has not adopted a policy relating to mail-in ballot Secrecy Envelopes;
- On April 26, 2024, Petitioners' mail-in ballots were not counted due to the lack of a Secrecy Envelope marked Official Election Ballot;
- On April 26, 2024, the Computation Board rejected Petitioners' provisional ballots consistent with the terms of 25 P.S. § 3050(a.4)(5)(ii)(F) ("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 Board has committed no error of law and the decisions of the Computation Board with respect to Petitioners' provisional ballots should be upheld. Unlike the court in *Keohane* which considered the record of a public hearing in which even a county board member expressed that it was a "travesty of justice" that the board believed it was constrained to follow, the record before this Court shows adherence to the express terms of the Election Code consistent with all applicable binding precedent. See Exhibit A, *Keohane* Petition, ¶¶ 58-60.

The Petition repeatedly alleges that the Board "notified" Petitioners that it had rejected their mail-in ballots prior to the primary and instructed that they could cast provisional ballots instead, but the record is clear that those notifications were sent by the Department of State. Petitioners' Exhibit D, 4/11/24 Email. The Petition seeks to imply that Petitioners were misled by the emails from the Department of State and directives of an option to cast a provisional ballot. Department of State guidance and communications to voters based on its SURE system does not circumvent the Pennsylvania General Assembly's authority to determine the mandates

of the Election Code. *See Boockvar*, 238 A.3d at 374. Likewise, such confusion created by communications originating from the Department of State cannot override the Board's authority to administer elections in accordance with the Election Code.

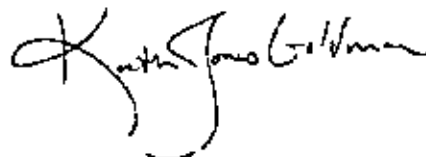
V. CONCLUSION

The record before this Court reveals that the Petition is not seeking to have the Court correct any mistake made by the Computation Board during the canvassing of votes in the primary. Rather, the Petition is asking this Court to require the Board to implement a policy nullifying 25 P.S. § 3050(a.4)(5)(ii)(F) (“[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.”) There is no requirement that the Board adopt any notice-and-cure policy or procedure concerning mail-in ballot deficiencies and the Court cannot order that the Board do so in response to this § 3157 statutory appeal.

Dated: June 28, 2024

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY PC



By: _____

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EXHIBIT A

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IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA

SONJA KEOHANE, RICHARD
KEOHANE, and BARBARA WELSH,

Petitioners,

v.

DELAWARE COUNTY BOARD OF
ELECTIONS,

Respondent:

CIVIL DIVISION

No. CU-2023-004458

ELECTION APPEAL

PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL

Petitioners Sonja Keohane, Richard Keohane, and Barbara Welsh, qualified registered electors of Delaware County, by and through their undersigned counsel, American Civil Liberties Union of Pennsylvania and the Public Interest Law Center, appeal pursuant to 25 P.S.

§ 3157 from the decision of the Delaware County Board of Elections (“Board”) on May 23, 2023, to not count their provisional ballots voted in the 2023 municipal primary,¹ and aver as follows:

INTRODUCTION

1. “Voting is the cornerstone of our democracy and the fundamental right upon which all our civil liberties rest.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). It includes the right of eligible voters both to cast their ballots and to have them counted.

2. This appeal concerns the decision of the Delaware County Board of Elections (the “Board”) to disenfranchise Petitioners, who each voted a provisional ballot at his or her polling place on May 16, 2023, after the Board had canceled the mail-in ballots they had previously submitted, because of purported defects on the outer envelope or a missing inner secrecy envelope.

3. Sometime prior to the May 16 primary, the Board established and implemented a policy of allowing voters to cure defects in mail ballots, but only if the voter followed a novel procedure found nowhere in state law, requiring the voter either to (a) obtain and complete a replacement ballot in person at the office of the Bureau of Elections (the “Bureau”) in Media, PA, or (b) request that the Bureau mail a replacement ballot to the voter in advance of election day. See <https://delcnpa.gov/publicrelations/releases/2023/flawedvotebymailenvelopes.html> (last visited May 25, 2023). Meanwhile, guidance from the Pennsylvania Department of State

¹ Petitioners are all voters in Pennsylvania House District 168. As Petitioners do not seek a recount or canvass under sections 1701, 1702 or 1703 of the Election Code, and no race in their election district is close enough for the affected voters’ provisional ballots to potentially impact any outcomes, there is no need for the Court or the Board to suspend certification of any race in District 168, or in any other election district. Rather, Petitioners seek an order declaring the Board’s decision unlawful and requiring the Board to amend the final vote count to include Petitioners’ provisional ballots.

provided that a voter could obtain a provisional ballot at the polling place if, among other reasons, the voter “returned a completed absentee or mail-in ballot that was rejected by the county board of elections...” <https://www.vote.pa.gov/Voting-in-PA/Pages/Voting-by-Provisional-Ballot.aspx> (last visited May 25, 2023).

4. Petitioners did not complete the Board’s unique “cure” process, but instead went to their polling places on Election Day and completed provisional ballots after learning that the county had canceled their mail ballots, in order to ensure that they would get to have their votes counted in the primary election.

5. The Board itself has acknowledged that, in fairness, Petitioners’ provisional ballots should be counted in light of its previous decision to cancel their mail ballots, but the Board nevertheless decided on May 23, 2023 not to count six provisional ballots. The Board based this decision on a mistaken interpretation of the Election Code.

6. Petitioners are aggrieved by this order and decision and hereby appeal from it.

JURISDICTION

7. The Court has jurisdiction over this statutory appeal pursuant to 25 P.S. §3157(a).

PARTIES

8. Petitioner Sonja Keohane is an 80-year-old longtime qualified registered voter who resides in Delaware County and attempted to vote by mail ballot in the municipal primary. The Board notified Mrs. Keohane that it had canceled her ballot on May 10, 2023. *See* May 25, 2023 Declaration of S. Keohane (“SK Decl.”)² at ¶ 10. Mrs. Keohane completed and submitted a provisional ballot in person at her polling place on May 16, 2023. *Id.* ¶ 13.

² A true and correct copy of Sonja Keohane’s Declaration is attached hereto at Exhibit A.

9. Petitioner Richard Keohane is an 81-year-old longtime qualified registered voter who resides in Delaware County and attempted to vote by mail ballot in the municipal primary. Prior to Election Day, the Board notified Mr. Keohane that it had canceled his ballot. See May 25, 2023 Declaration of R. Keohane ("RK Decl.")³ at ¶ 8. Despite serious physical challenges in getting to his polling place, Mr. Keohane completed and submitted a provisional ballot in person at his polling place on May 16, 2023, to ensure his participation in the primary election. *Id.* ¶ 10.

10. Petitioner Barbara Welsh is a 79-year-old longtime qualified registered voter and trained poll worker, who resides in Delaware County and attempted to vote by mail ballot in the municipal primary. The Delaware County Board of Elections notified Ms. Welsh that it had canceled her ballot on May 11, 2023. See May 24, 2023 Declaration of B. Welsh ("BW Decl.")⁴ at ¶ 10. Ms. Welsh completed and submitted a provisional ballot in person at her polling place on May 16, 2023. *Id.* ¶ 12.

11. Respondent, the Delaware County Board of Elections, is a local government agency responsible for overseeing the conduct of all elections in Delaware County, including adjudicating and deciding whether to count provisional ballots in accordance with the Election Code. See 25 P.S. § 2642 (powers and duties of boards of elections); *id.* § 3050(a.4) (adjudication of provisional ballots); see also Delaware County Home Rule Charter § 421.

DECISION OF THE BOARD AT ISSUE

12. Petitioners appeal from the decision of the Board not to count Petitioners' provisional ballots, which these impacted voters completed after the Board had notified those

³ A true and correct copy of Richard Keohane's Declaration is attached hereto at Exhibit B.

⁴ A true and correct copy of Barbara Welsh's Declaration is attached hereto at Exhibit C.

same voters that it had canceled – and therefore would not count – their previously submitted mail ballots because of purported defects involving the ballot envelopes.

13. The Board announced its decision orally at a public hearing on the disposition of provisional ballots on May 23, 2023. *See* 5/23/23 Tr. (Ex. E hereto) at 59:19 to 60:10.

FACTUAL BACKGROUND

Voting by Mail in Pennsylvania

14. The Pennsylvania Election Code permits registered voters to vote by mail, either as an “absentee elector,” if the voter satisfies prescribed conditions, such as current military service, disability that prevents attendance at polling place, or absence from municipality on Election Day, *see* 25 P.S. § 3146.1, or as a “mail-in” elector if the voter applies for a mail ballot by the deadline, without any requirement that the voter provide a reason for voting by mail instead of in person, *see id.* § 3150.11.

15. Under Pennsylvania law, identical procedures govern how voters apply for, complete, and return both absentee and mail-in ballots.⁵ Pennsylvania mail ballot applications require the voter to provide his or her name, address of registration, and proof of identification, 25 P.S. §§ 3146.2, 3150.12. Proof of identification includes either a Pennsylvania driver’s license number or the last 4 digits of the voter’s Social Security number. 25 P.S. § 2602(z.5)(3).

Once the county board of elections verifies the voter’s identity and eligibility, it sends the voter a mailing that contains: 1) the ballot; 2) a “secrecy envelope” marked with the words “Official Election Ballot”; and 3) a pre-addressed outer return envelope that contains the voter declaration prescribed by law, which the voter must sign and date. The packet also contains instructions to the voter for properly marking and submitting the ballot.

⁵ We refer herein to both types of ballots simply as “mail-in” or “mail” ballots.

16. A mail-ballot voter is supposed to mark the ballot, place it in the secrecy envelope, and then place the secrecy envelope in the outer return envelope. *Id.* §§ 3146.6(a), 3150.16(a). The outer envelope includes a printed declaration that the voter “shall then fill out, date and sign.” *Id.* The voter delivers the entire package by mail or by hand to the county board of elections, and delivery is timely if made by 8:00 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c).

17. Widespread voting by mail ballot in Pennsylvania is relatively new, having been adopted by the Pennsylvania Legislature in 2019 for implementation in May 2020. Act of Oct. 31, 2019, P.L. 552, No. 77, § 8. Clerical mistakes by mail voters are not uncommon. In the November 2022 general election, more than 16,000 mail in ballots in Pennsylvania were set aside because they lacked secrecy envelopes, proper signatures, or dates. See <https://apnews.com/article/2022-midterm-elections-pennsylvania-united-states-government-a1e75e9efc2f1bfea21ac4a4cbfe60f0>.

The Board Canceled Petitioners' Mail Ballots

18. Petitioners, and three other qualified voters, timely submitted their mail ballots prior to the May 16, 2023 primary election day, but the Board determined that their submissions could not be opened and counted because of mistakes in how these voters completed their mail ballot package. Either they forgot to sign the outer envelope, omitted the date or wrote an incorrect date, or forgot to insert the ballot into the secrecy envelope.

19. Upon information and belief, all of the impacted voters were otherwise qualified electors who were registered to vote, who validly requested and returned their mail ballots, and who properly completed and submitted provisional ballots at their polling places on May 16, 2023.

20. Upon receipt of the mail ballots at issue here, the Board reviewed the envelopes and determined that the voters had made errors that would prevent the Board from counting the ballots under Pennsylvania law.

21. Each of the Petitioners received notice by email that the Board had canceled their mail ballots and would not count them.

Conflicting Guidance for Curing Cancelled Mail Ballots

22. The Board posted guidance on flawed mail ballots on its website. *See Delaware County, Delaware County Bureau of Elections Issues Final Guidance Regarding Flawed Vote-by-Mail Envelopes (May 6, 2023), available at <https://delcopa.gov/publicrelations/releases/2023/flawedvotebymailenvelopes.html>.* This web page (the “Guidance”) identified “flawed ballots” as “those that are damaged, unsigned, undated, improperly dated, unsealed, or not placed in the “secrecy envelope” before being placed in the larger “Ballot Return Envelope.”

23. The Guidance instructed voters to cure their mail ballots in a process that is not provided under the Election Code, stating as follows: “Voters who receive notice that the ballot envelope is flawed must correct the ballot in-person at the Voter Service Center, located on the 1st floor of the Government Center Building, at 201 W. Front St., in Media, PA. If time permits, the voter can ask for a replacement ballot to be mailed. Voters will have the opportunity to receive a replacement ballot and complete and return their ballot during the same visit. Voter’s valid ID is required.”

24. In addition to the notice from the Pennsylvania Department of State, the Board also sent an email and a mailed a letter to Petitioners with instructions on how to “cure” the defect in the ballot.

25. The Guidance does not mention provisional ballot voting at all. Nor does the Guidance warn voters that if they cast a provisional ballot after submitting a defective mail ballot, the Board will not count the provisional ballot.

26. The instructions also did not advise voters that if they requested a replacement ballot in writing and did not return it, they could vote a provisional ballot and that ballot would be counted.

27. However, guidance from the Department of State instructed that voters could obtain a provisional ballot at their polling place if, among other reasons, the voter “returned a completed absentee or mail-in ballot that was rejected by the county board of elections....” <https://www.vote.pa.gov/Voting-in-PA/Pages/Voting-by-Provisional-Ballot.aspx>.

28. Upon information and belief, the Board’s email notice and the letter sent to voters also contained instructions to voters about how to correct their canceled ballot. The instructions did not mention provisional voting, nor warn that if the voter voted a provisional ballot, no ballot from the voter would not be counted.

29. Meanwhile, at least one Petitioner who contacted the Bureau of Elections in the days preceding the May 16, 2023 primary was instructed by the Bureau to cast a provisional ballot at her polling place. See SK Decl. at ¶ 11.

30. Upon information and belief, at the same May 23 meeting when the Board decided not to count the provisional ballots at issue in this appeal, it also decided to count at least five provisional ballots from voters who were very similarly situated to Petitioners. Like Petitioners, these voters had submitted defective mail ballots and then submitted provisional ballots at their polling places on Election Day.⁶

⁶ Petitioners do not challenge the Board’s decision to count these provisional ballots.

31. The Board did not advise voters through any ballot instructions, email or mail notice, or in the Guidance, that if they requested a replacement ballot in writing and did not return it, they could then vote a provisional ballot and that ballot would be counted.

Petitioners' Efforts to Vote

32. Although the Board notified each of the Petitioners that it had canceled their ballots and informed them they could correct their ballots in-person at the office in Media or request for a replacement ballot to be mailed to them, none of the Petitioners was able to go to Media in person, nor did time permit any of the Petitioners to have a replacement ballot mailed to them or for them to return it to the Board by the deadline.

33. All of the petitioners appeared in person at their polling places on May 16 and completed and submitted provisional ballots.

34. These provisional ballots were otherwise valid and acceptable for counting.

35. Each of the Petitioners had every reason to believe that they could go to their polling place and cast a provisional ballot, which would be counted.

36. Indeed, the Board's policy is to permit voters whose mail ballots were canceled to complete and submit a provisional ballot at the polls. In fact, Delaware County specifically trained poll workers (including Petitioner Welsh) to allow such voters to cast a provisional ballot. See Election Day Guide for Poll Workers, Primary election, May 16, 2023 at 51, available at [https://dclcopa.gov/vote/pdf/2023/ElectionDayGuideforPollWorkers\(May2023\).pdf](https://dclcopa.gov/vote/pdf/2023/ElectionDayGuideforPollWorkers(May2023).pdf)

Petitioners Sonja and Richard Keohane:

37. Petitioners Sonja and Richard Keohane are 80 and 81 years old respectively and vote in nearly every general and primary election. SK Decl. ¶ 5; RK Decl. ¶ 5.

38. On May 10, the Board sent Mr. and Mrs. Keohane emails letting them know that their mail ballots were canceled. SK Decl. ¶ 10; RK Decl. ¶ 8.

39. Mrs. Keohane called the Delaware County Bureau of Elections on speaker phone with her husband present. The woman who answered the phone told Mrs. Keohane that she would have to go to Media and fill out a new ballot. When Mrs. Keohane explained that she and her husband could not because of health and mobility concerns, the woman offered to mail replacement ballots but did not think they would arrive in time. The woman then told Mr. and Mrs. Keohane they could vote on a provisional ballot. SK Decl. ¶ 11; RK Decl. ¶ 9.

40. Mr. and Mrs. Keohane were not able to go to Media to fill out new mail ballots. Mr. Keohane uses a walker and has a catheter, Mrs. Keohane has bad knees, and they were concerned that they would not be able to find parking and walk to the building. SK Decl. ¶ 7; RK Decl. ¶ 9. Even getting to their polling place and voting a provisional ballot was difficult for Mr. Keohane. RK Declaration ¶ 13.

41. Voting is very important to Mrs. Keohane and is the only meaningful way she can let the government know what she thinks. SK Decl. ¶ 6. She believes her vote should count and is part of this lawsuit for herself and all the people who are not able to challenge a ruling like this. *Id.* ¶ 21

42. Likewise, voting is very important to Mr. Keohane. He was in the Navy and believes voting is part of his civic duty. Having served our country, Mr. Keohane has felt compelled to vote ever since leaving the service. RK Decl. ¶ 5. Mr. Keohane is very frustrated that somebody can simply throw out his vote. *Id.* ¶ 13

Petitioner Barbara Welsh:

43. Petitioner Barbara Welsh is 79 years old, a member of the League of Women Voters, and a trained poll worker. BW Decl. ¶ 6.

44. The Board notified Ms. Welsh by email on May 11, and by a letter she received on May 15, that the Board had canceled her mail ballot. *Id.* ¶ 10. There was not sufficient time to request a replacement ballot be mailed to her, and Ms. Welsh was unable to go in person to correct her ballot in Media on May 15. *Id.* ¶¶ 10-11.

45. However, Ms. Welsh is very familiar with voting by provisional ballot, both from her poll worker trainings in Media and working at the polls as a clerk in the November 2022 general election and in the May 2023 primary election *Id.* ¶ 7. Ms. Welsh thought it would not be a problem to account for any issues with her mail ballot by voting a provisional ballot on Election Day. *Id.* ¶ 10. Accordingly, after working the polls on May 16, Ms. Welsh went to her precinct and cast a provisional ballot. *Id.* ¶ 12.

46. As someone who has voted in nearly every general and primary election and who believes in the importance of voting in a democracy, Ms. Welsh was shocked and disappointed to be disenfranchised. She never imagined she would be denied the right to vote. *Id.* ¶¶ 3, 5, 15.

The Board's Decision to Disenfranchise Petitioners

47. The Board, through its designated provisional ballot review board, began review of the provisional ballots on May 17, 2023.

48. On May 18, 2023, at 9:00 a.m. the provisional ballot board held an "exhibition" session during which it disclosed its recommendations for counting or not counting provisional ballots.

49. The Board did not notify Petitioners of the exhibition or of the provisional ballot review board's recommended disposition, and Petitioners remained unaware of these events until after the exhibition session had already concluded.

50. The Board permitted representatives of candidates and political parties to review Board's recommendation but did not permit any voter or any other person to attend the exhibition of provisional ballot recommendations.

51. At the exhibition, the Board permitted representatives of parties and candidates to lodge challenges to the Board's recommended disposition of provisional ballots.

52. It is the Board's policy and practice to consider challenges thus lodged at a public hearing, and not to consider any other disputes over the disposition of provisional ballots.

53. Upon information and belief, an attorney or representative of a political party initially challenged the recommendation not to count the ballots at issue here, but then withdrew the challenge, and did not complete the process of "lodging" such a challenge.

54. Upon information and belief, the Board adopted the policy of not counting provisional ballots voted to cure flawed mail ballots because of its perception that such ballots "were vulnerable to being rejected by the courts."

55. On May 23, 2023, the Board considered the recommended disposition of the provisional ballots at a public hearing.

56. Upon unanimous vote, the Board decided not to count the ballots at issue in this appeal, despite various Board members' commentary acknowledging the unjust nature of this result. Tr: 11:13-21, 12:15-13:9, 38:14-39:15, 40:1-41:11.

GROUND FOR APPEAL

The Board Misapplied the Election Code

57. The Board based its decision on a misreading of the Election Code, relying solely on an unpublished and nonprecedential Commonwealth Court decision, *In Re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election*, No.1161 C.D. 2020,2020 WL 6867946 (Pa. Commw. Ct. 2020). That decision did not fully engage with the question presented here and should not be applied in this case.

58. Although the Board felt bound by this unpublished and nonprecedential Commonwealth Court decision, Board members repeatedly stated on the record that they were troubled by the result and hoped the courts would reconsider. See, e.g., Tr. at 11:13-21 (stating "it poses an unreasonable burden on folks where casting provisional ballot should be as good as coming into Media and curing a ballot. And so I do hope the courts have an opportunity to reconsider this question in the future."); Tr. 12:18-24 (stating "I do think that a voter that comes in and cast a provisional ballot, that that court opinion should be reconsidered. And while we're here as a Board to follow the election law, which usually in most cases favors the voter, I think that this one is also an undue burden.").

59. One Board member even called the outcome a "travesty of justice." Tr. 41:101-11.

60. In *In Re Allegheny County Provisional Ballots*, the Commonwealth Court construed the Pennsylvania Election Code to prohibit the counting of provisional ballots 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).

61. The Commonwealth Court's decision ignored and did not address the preceding section in the statute, which states:

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

25 P.S. § 3050(a.4)(5)(i) (emphasis added). This section reflects the goal of provisional ballots, namely, to preserve the fundamental right to vote.

62. The General Assembly added subsection (F) to the Election Code as part of Act 77, see 2019, Oct. 31, P.L. 552, No. 77, § 3.2. The *In re Allegheny County* decision read this subsection in a way that makes it inconsistent with § 3050(a.4)(5)(i)'s requirement that the Board must count provisional ballots upon confirming that the individual did not cast any other ballot in the election. When two separate statutory provisions can be read either as harmonious or as in conflict, courts should construe them as in harmony with each other. See, e.g., *In re Borough of Downingtown*, 161 A.3d 844, 871 (Pa. 2017); 1 Pa.C.S. §§ 1922(1)-(2), 1933.

63. Here, subsections 3050(a.4)(5)(i) and 3050(a.4)(5)(ii)(F) are readily harmonized. If a mail ballot is canceled and cannot be counted because of a defect on the envelope, and the voter does not cure that defect by 8:00 p.m. on election day, the mail ballot was not "timely received," nor was it "cast," because it is not a ballot that can be tabulated. Therefore, subsection 3050(a.4)(5)(ii)(F) does not bar the Board from counting the provisional ballot, and subsection 3050(a.4)(5)(i) requires the Board to count the provisional ballot.

64. This reading of the Election Code gives meaning to the General Assembly's intent. The General Assembly prohibited counting provisional ballots when the county has

received a voter's absentee or mail ballot exists to prevent double voting. And the General Assembly gave voters the fallback option of casting a provisional ballot to ensure that voters would have a safety net to protect them from disenfranchisement.

65. Because the provisional ballot is reviewed and adjudicated after Election Day, the Board will be able to determine whether the voter's mail ballot contained a fatal defect and count the provisional ballot. Alternatively, if the mail ballot was counted, then the Board will not count the provisional ballot.

66. This process is consistent with existing Pennsylvania Department of State ("DOS") Guidance regarding the use of provisional ballots as way of curing defects in mail ballots. The DOS website lists the reasons for which a person may be issued a provisional ballot, and includes a voter who "returned a completed absentee or mail-in ballot that was rejected by the county board of elections" and who believes they are otherwise eligible to vote. See Pa. Dep't of State, *Voting by Provisional Ballot*, <https://www.vote.pa.gov/Voting-in-PA/Pages/Voting-by-Provisional-Ballot.aspx>

67. This DOS guidance is an authoritative and correct reading of the Election Code, and an unreported, nonprecedential opinion does not render it invalid.

68. The Board's unique cure process creates an unacceptably high risk that voters will be disenfranchised because many will be unable to travel to Media on short notice, even though they may have been able to appear in person at their local polling place to vote provisionally.

69. The Board's policy of not counting provisional ballots that voters cast to cure canceled, deficient mail-in ballots frustrates the policy underlying the enactment of the Help America Vote Act ("HAVA"). 52 U.S.C. § 21082.

70. Section 3050(a.4) implements HAVA for Pennsylvania. And it goes further than HAVA, by ensuring the availability of provisional ballots in non-federal elections, such as this month's election. A voter's right to cast a provisional ballot under HAVA is mandatory and unambiguous: *See, e.g., Common Cause Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1292–93 (N.D. Ga. 2018) (citing *Fla. Democratic Party v. Hood*, 342 F.Supp.2d 1073, 1079 (N.D. Fla. 2004)) (“The purpose of HAVA’s provisional voting section is to ensure that voters are allowed to vote (and to have their votes counted) when they appear at the proper polling place and are otherwise eligible to vote.”).

71. The Election Code instruction to counties to count provisional ballots cast by eligible voters who appear at their correct polling place and who are found not to have cast any other ballot in the election, is the implementation of policy to avoid disenfranchisement. 25 P.S. § 3050(a.4)(5)(i).

The Board’s Decision to Not Count Petitioners’ Provisional Ballots Violated Their Fundamental Right to Vote

72. Article I, Section 5 of the Pennsylvania Constitution guarantees that “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.” Under this guarantee,

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.

League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 804 (Pa. 2018).

73. The Pennsylvania constitution requires the Board to demonstrate a compelling interest to justify its policy of not counting provisional ballots voted to cure flawed mail ballots because such action will most assuredly disenfranchise voters. *See Perles v. Cty. Return Bd. of*

Northumberland Cty., 202 A.2d 538, 540 (Pa. 1964) (“[E]ither an individual voter or a group of voters are not to be disenfranchised at an election except for compelling reasons.”); *see also Shambach v. Bickhart*, 845 A.2d 793, 801-02 (Pa. 2004) (the Election Code “must be liberally construed to protect voters’ right to vote”).

74. The Board cannot demonstrate a compelling interest that justifies its complete disenfranchisement of voters, especially when a procedure already exists to prevent the loss of the fundamental right to vote.

75. The Board’s requirement that a voter submit a request for a replacement ballot in writing before being entitled to cast a provisional ballot unconstitutionally burdens the fundamental right to vote. *See, e.g., In re Nailer*, 858 A.2d 1167, 1181 (Pa. 2004) (noting that “the right to vote” is “fundamental”), *overruled on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016). Pennsylvania law forbids counties from imposing rules applicable to the right to vote when such regulation denies the franchise, or “make[s] it so difficult as to amount to a denial.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914); *see also DeWalt v. Bartley*, 24 A. 185 (Pa. 1892) (“The test is whether legislation denies the franchise, or renders its exercise so difficult and inconvenient as to amount to a denial”).

76. The Board’s insistence that a voter who submitted a defective mail ballot must request a replacement ballot before being entitled to cast a provisional ballot is unnecessary and arbitrary, because the Board had already canceled the voter’s mail ballot and already determined that the ballot will not count. The request for a replacement ballot has no bearing on that and serves only to disenfranchise voters.

WHEREFORE, Petitioners respectfully request this Honorable Court to enter an order reversing the decision of the Delaware County Board of Elections, declaring that the Election

Code and Pennsylvania Constitution require the counting of Petitioners' ballots, directing the Board to count the provisional ballots cast by Petitioners in the May 16, 2023 election, and enter such other and further relief as provided by the Pennsylvania Election Code or as this Court deems just and appropriate.

Dated: May 25, 2023

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Memorandum in Opposition to Petition for Review in the Nature of a Statutory Appeal, via email, to the counsel listed below this 28th day of June, 2024.

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CERTIFICATE OF COMPLIANCE

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

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