IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

FAITH A. GENSER and FRANK P. MATIS,	:	**CIVIL DIVISION**
	:	**MsD. No. 2024-40116**
Petitioners,	:	
	:	
v.	:	
	:	
BUTLER COUNTY BOARD OF ELECTIONS,	:	
	:	
Respondent,	:	
	:	
v.	:	
	:	
REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PARTY OF PENNSYLVANIA, AND THE PENNSYLVANIA DEMOCRATIC PARTY,	:	
	:	
Intervenors.	:	

Yeager, P. J. **August 16, 2024**

MEMORANDUM OPINION

Before the court for disposition is Petitioners', Faith A. Genser and Frank P. Matis, *Petition for Review in the Nature of a Statutory Appeal.* After a hearing and subsequent briefing in this matter, the *Petition* is ripe for decision.

A. Background Facts

This matter arises from Petitioners' *Petition for Review in the Nature of a Statutory Appeal* relative to the decision of the Respondent's, the Butler County Bureau of Elections (hereinafter, "Board" or "Board of Elections"), to reject Petitioners' respective provisional ballots cast in the April 23, 2024, Primary Election.

By way of background,[1] each Petitioner is a resident of Butler County, Pennsylvania. Each of the Petitioners requested a mail-in ballot for his or her respective voting district to vote in the April 23, 2024, Primary Election. Each of the Petitioners marked their mail-in ballots with their chosen candidate(s), placed their ballots directly into the provided Declaration Envelopes, signed and dated their respective Declaration Envelopes, and mailed the Declaration Envelopes to the Butler County Board of Elections. Each of the Petitioners failed to place his or her ballot into the secrecy envelope as required by law. The Board of Elections received both Declaration Envelopes prior to the deadline for receipt of mail-in ballots. Subsequently, each Petitioner was advised via the Statewide Uniform Registry of Electors (hereinafter, "SURE") system that the Board rejected his or her mail-in ballot for lack of a secrecy envelope. The notification additionally stated that if he or she did not have time to request a new ballot before April 16, 2024, each Petitioner could proceed to his or her polling place on Election Day and cast a provisional ballot. Upon learning her mail-in ballot was rejected, Petitioner Genser telephoned the Board of Elections and was advised by an employee that she could complete a provisional ballot at her polling place on Election Day, but the provisional ballot would not be counted. Each of the Petitioners proceeded to his or her designated polling place on Election Day and cast a provisional ballot. Each of the Petitioners was subsequently informed that his or her provisional ballot was rejected.

The Butler County, Pennsylvania, Board of Elections has adopted a curing policy relative to mail-in ballots that permits those mail-in electors whose Declaration Envelopes have facial defects, e.g., lack of signature or date, or incorrect date, to cure these defects by

[1] The facts of this case are not in dispute; therefore, except where necessary to a disputed issue, the court will summarize the testimony given by the three (3) witnesses, who are Petitioners, Frank P. Matis and Faith A. Genser, and Chantel McCurdy, the Butler County, Pennsylvania, Director of Elections, without reference to the record.

either appearing personally at the Bureau and correcting same, or casting a provisional ballot at their respective polling locations. The County did not, however, include in this policy any "cure" for mail-in ballots deemed defective for lack of the required secrecy envelope. Thus, the current controversy does not concern whether Petitioners' initial mail-in ballots should have been counted despite the lack of secrecy envelopes; rather, the question presented is whether, after mailing in a ballot lacking the secrecy envelope, Petitioners had the right to vote provisionally at their respective polling places on Election Day and have the votes thereon counted in the official tabulation results.

In their *Petition*, Petitioners proffer three arguments in support of their requested relief.[2] First, Petitioners argue the Butler County Board of Elections misinterpreted *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) when it drafted its Curing Policy. However, despite alleging this "misinterpretation" entitles them to relief, Petitioners appear to utilize the *Boockvar* case only as a tool to develop their arguments relative to their other asserted bases for relief. As such, the court will not address *Boockvar* as a ground for relief in and of itself. Second, Petitioners argue the Board's rejection of their provisional ballots violates the Pennsylvania Election Code, 25 P.S. § 3050(a.4)(5)(i) and (ii)(F). Third, and finally, Petitioners argue the Board's rejection of their provisional ballots violates their right to vote as guaranteed by the Pennsylvania Constitution.

A hearing was held on Petitioners' *Petition for Review* on May 7, 2024. Prior to the hearing, also on May 7, 2024, the Court granted Intervenor Status to the Republican National Committee, the Republican Party of Pennsylvania, and the Pennsylvania Democratic Party.

[2] Although a discussion was held during the hearing on whether the policy violated the Constitution of the United States, Petitioners did not brief the issue in their subsequently submitted Memorandum of Law. Therefore, to the extent it was raised, the court finds said issue has been abandoned, and will not address it herein.

Following the hearing, Respondent and Intervenors requested the opportunity to submit briefs relative to the legal issues raised by Petitioners. Said request was granted, and all parties agreed to a deadline of June 28, 2024, to submit their respective briefs. All such briefs were timely submitted.

B. Standard of Review

Regarding this court's standard of review, 25 P.S. § 3157, Appeals to court from decisions of the county board, provides:

> (a) Any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election ... may appeal therefrom 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.... Upon the payment to the prothonotary of a fee for filing such appeal, a judge of the court shall fix a time and place for hearing the matter in dispute within three days thereafter, of which due notice shall be served, with a copy of such appeal, by the appellant upon a member of the county board whose action is complained of and upon every attorney, watcher or candidate who opposed the contention of the appellant before the county board, and upon any other person that the judge shall direct, at least two days before the matter shall be reviewed by the court. Proof of such notice or the waiver thereof must be filed therein before any appeal is sustained.

25 P.S. § 3157. Pursuant to this section, this court can reverse the Butler County Board of Election's decision "only for an abuse of discretion or error of law." *In re Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election,* 241 A.3d 1058, 1070 (Pa. 2020).

C. Discussion

A brief recitation of the relevant mail-in ballot election procedures follows.

Chantell McCurdy is the Director of Elections for the Butler County, Pennsylvania, Board of Elections (hereinafter, "Board'); her role on Election Day is to tally votes in conjunction with the Computation / Canvassing Board (hereinafter, "Computation Board") that meets the Friday after Election Day to evaluate any provisional ballots, write-ins, and absentee or mail-in ballots with which there may be issues. (Hr'g Tr., McCurdy, 18:3-10; 25 P.S. § 2642(a)). The Board of is comprised of the three County Commissioners. (Hr'g Tr., McCurdy, 18:23-25). Each of the Commissioners appoints an individual to serve on the Computation Board. (Hr'g Tr., McCurdy, 18:25-19:2). The Computation Board is comprised of two (2) Democratic members and one (1) Republican member. (Hr'g Tr., McCurdy, 19:18-23). These individuals evaluate the totals of the election and manage write-ins, any issues involving provisional ballots, and any absentee and mail-in ballots that need to be evaluated for quality purposes to determine whether they can be counted. (Hr'g Tr., McCurdy, 19:2-7).

With regard to mail-in voting, when a mail-in ballot is requested by a qualified elector (hereinafter, "voter" or "elector"), the Board notes in the SURE system that the mail-in ballot has been requested. (Hr'g Tr., McCurdy, 39:11-14). Once the Board sends the voting packet to the elector, the Board updates the ballot's status in the SURE system as "ballot sent." (Hr'g Tr., McCurdy, 39:15-17). The voting packet sent to the voter includes the ballot for the voter's respective precinct, a secrecy envelope in which to enclose the ballot, the declaration envelope, and instructions. ((Hr'g Tr., McCurdy, 38:25-39:10; 25 P.S. § 3150.14(c)). Each declaration envelope has a label affixed to it with a barcode "that is uniquely identifiable to an individual voter and their assigned voter ID number." (Hr'g Tr., McCurdy, 32:21-33:1). Pending the Board's receipt of a returned declaration envelope and its contents (hereinafter, "Declaration Envelope") the status of the ballot is denoted in the SURE System as "pending

not yet returned." (Hr'g Tr., McCurdy, 33:2-6). The Department of State provides step-by-step instructions to the county Boards on how to record absentee and mail-in ballots into the SURE system once they received. (Hr'g Tr., McCurdy, 45:4-12; Rep. Party Resp. Inter. Ex. 2). The Department of State provided new recording options on March 11, 2024. (Hr'g Tr., McCurdy, 45:17-18). The Department added "pending" options and changed the language in a variety of responses; additionally, it changed the manner in which the Boards are to record responses. (Hr'g Tr., McCurdy, 45:22-15; Rep. Party Resp. Inter. Ex. 2).

Procedurally, once the Board receives a returned Declaration Envelope, it is placed into a machine called the Agilis Falcon. The Agilis Falcon sorts the Declaration Envelopes by precinct and evaluates their dimensions, including length, height, and weight, to ensure any submitted envelope is, in fact, an official election envelope. (Hr'g Tr., McCurdy, 33:19-34:3). If the machine detects a possible issue with a Declaration Envelope, for example, if it is too thick, not thick enough, or from the wrong county, the machine separates those Declaration Envelopes from Declaration Envelopes without suspected issues. Once they are sorted, all Declaration Envelopes without suspected issues are automatically updated in the SURE system with a status of "record ballot returned." (Hr'g Tr., McCurdy, 34:4-9, 45:15-18). However, the Board must manually update the status of any Declaration Envelopes flagged as possibly having defects, with the Board being required to choose one of a number of predetermined options. (Hr'g Tr., McCurdy, 47:25-48:7; Rep. Party Resp. Inter. Ex. 2). Once the Board selects the most applicable option, an E-mail communication is sent to the voter, with the language of the E-mail depending on the option selected. (Hr'g Tr., McCurdy, 46:4-14; Rep. Party Resp. Inter. Ex. 2).

As mentioned, the Butler County Board of Elections has adopted a curing policy that permits a voter to cure deficiencies on the outer, Declaration Envelope. (Rep. Party Resp. Inter. Ex. 1). The policy permits an elector to cure these deficiencies by either attestation in the Board's office or by voting "via provisional ballot acting as the attestation at the polling place." (Hr'g Tr., McCurdy, 50:15-21; Rep. Party Resp. Inter. Ex. 1). Since Butler County has a curing policy for these defects, when manually updating the status for one of these Declaration Envelopes, the Board is to select one of the newer options in the SURE system: "pending no signature" or "pending no date." (Hr'g Tr., McCurdy, 51:7-13; Rep. Party Resp. Inter. Ex. 2, pp. 8-9). Once selected, an automatic follow-up E-mail is sent to the elector, which informs them, "their county has a curing policy that allows them to correct the issue; to contact their Bureau of Elections or go to their polling place on Election Day and cast a provisional ballot." (Hr'g Tr., McCurdy, 51:13-17; Rep. Party Resp. Inter. Ex. 2). However, because the Board does not offer a curing opportunity for mail-in ballots lacking secrecy envelopes, when the Agilis Falcon identifies a Declaration Envelope as possibly lacking a secrecy envelope, the only option for the Board to select in the SURE system is "cancelled no secrecy envelope." (Hr'g Tr., McCurdy, 67:24-68:14; Rep. Party Resp. Inter. Ex. 2, pp. 6-11). When the Board selects "cancelled no secrecy envelope," the voter receives an automatic E-mail from the Department of State informing the elector the county has determined the elector's mail-in ballot may be lacking a secrecy envelope, the elector's ballot has been cancelled, and the elector may contact their county for a replacement ballot or, if the elector cannot do so or if it is too late to request a new one, the voter can go to his or her polling place on Election Day and vote provisionally. (Hr'g Tr., McCurdy, 48:8-16; Rep. Party Resp. Inter. Ex. 2, p. 9). Despite the E-mail stating such, the elector's ballot has not been rejected or

cancelled; if the Declaration Envelope is opened on the date of computation and it is found to contain a secrecy envelope, the ballot is valid and will be counted. (Hr'g Tr., McCurdy, 68:16-23). Additionally, the Butler County Curing Policy does not permit an elector whose mail-in ballot containing such a defect to request a replacement or to cure this deficiency by voting provisionally at their polling location. (Rep. Party Resp. Inter. Ex. 1).

In the instance an elector requests and receives a mail-in ballot, but decides to vote at the polls instead of mailing in their ballot, he or she may vote at their precinct polling station; however, *how* they get to vote depends on two things. (Hr'g Tr., McCurdy, 40:10-15). If the elector brings his or her ballot *and* declaration envelope to the polling station, the elector can surrender the ballot by signing a form stating the elector no longer wishes to have this active mail-in ballot and wishes to surrender it. (Hr'g Tr., McCurdy, 40:16-22, 41:10-22). The Judge of Elections also signs the surrender form. (Hr'g Tr., McCurdy, 40:19-20). The voter may then sign the poll book and cast a regular ballot at the polling station. (Hr'g Tr., McCurdy, 40:22-24; 25 P.S. § 3150.16(b)(3)). In this scenario, the Board does not update the SURE system to reflect the status of the surrendered ballot. (Hr'g Tr., McCurdy, 40:25-41:4). If the voter does not have his or her ballot *and* declaration envelope, the voter may only cast a provisional ballot. (Hr'g Tr., McCurdy, 41:10-14; 25 P.S. §3150.16(b)(2)). Prior to casting a provisional ballot, the elector must attest they have not cast another ballot. (Hr'g Tr., McCurdy, 41:15-24; 25 P.S. §3050(a.4)(2)). However, whether elector mailed a mail-in ballot without a secrecy envelope has no bearing on whether that voter may vote provisionally at the polling station. (Hr'g Tr., McCurdy, 41:25-42:16). Any elector may fill in a provisional ballot at the polling place; "We never want to deny them that opportunity." (Hr'g Tr., McCurdy, 42:15-18). If the issuance of a mail-in ballot is the reason the elector was

required to vote provisionally, once the provisional ballots are returned to the office, the Board must look up each of these electors in the SURE system to verify if a ballot was returned from them. (Hr'g Tr., McCurdy, 42:18-22). If the elector has timely returned their mail-in ballot, their provisional ballot is ineligible to be counted, as the standard practice of the Computation Board is to treat a timely received mail-in ballot as the elector's official ballot. (Hr'g Tr., McCurdy, 43:2-5; 25 P.S. 3050(a.4)(5)(i) and (ii)(F)).

With regard to the counting of mail-in and provisional ballots, the Computation Board meets the Friday after the election, in this case, April 26, 2024, and meets for two to three days to evaluate those mail-in ballots with possible issues, as well as provisional ballots and write-ins. (Hr'g Tr., McCurdy, 19:8-10, 20:1-5). The Computation Board is required to submit its information to the Department of State the Tuesday after the election. (Hr'g Tr., McCurdy, 19:10-11). Upon meeting on April 26, 2024, the Computation Board elected to first evaluate all absentee and mail-in ballots that may have issues, followed by provisional ballots, and then write-ins. (Hr'g Tr., McCurdy, 21:5-8). Prior to this time, these mail-in ballots were locked in a cabinet in the back room. (Hr'g Tr., McCurdy, 21:14-15; 25 P.S. §3146.8(a)). Declaration Envelopes are first permitted to be opened on Election Day during the pre-canvass. (Hr'g Tr., McCurdy, 49:23-50:2; 25 P.S. § 3146.8(g)(1.1)). Until the pre-canvass, though, no conclusion can be made regarding the presence or absence of a secrecy envelope. (Hr'g Tr., McCurdy, 50:3-5). Any information gathered in the pre-canvass as to whether a secrecy envelope is missing is prohibited from being disseminated. (Hr'g Tr., McCurdy, 50:6-12). The mail-in ballots at issue here were first opened on Friday, April 26, 2024, in front of the Computation Board; this is the first time the seals are broken (McCurdy,

22:7-9), and the first instance the Board is able to officially and concretely determine whether a mail-in ballot lacks a secrecy envelope. (Hr'g Tr., McCurdy, 21:19-23; 49:18-22).

On cross-examination, Director McCurdy testified that if, when opening the Declaration and secrecy envelopes on the Friday after the election, the Computation Board finds an empty secrecy envelope, no mail-in ballot would be counted for that voter because there is no eligible ballot. (Hr'g Tr., McCurdy, 63:4-19). If that voter also completed a provisional ballot at the polling station on Election Day, the Computation Board would not count the provisional ballot because the voter was deemed to have remitted a mail-in ballot. (Hr'g Tr., McCurdy, 63:20-25). The Board's policy is to count, as any mail-in elector's official ballot, the timely received Declaration Envelope marked in the SURE system, even if the elector omitted to enclose any actual ballot. (Hr'g Tr., McCurdy, 63:4-25). She additionally testified that if a voter places a mail-in ballot into the mail the day before the election and the Board does not receive it prior to the deadline, if that elector also casts a provisional ballot, the Computation Board would count the elector s provisional ballot as their official ballot, as in this case, the provisional ballot is the first one received. (Hr'g Tr., McCurdy, 64:9-24). The tardy mail-in ballot would be ineligible because it arrived after the deadline. (Hr'g Tr., McCurdy, 65:3-6). Thus, if the Board timely receives an elector's naked ballot, and the elector learns on or before Election Day that they have done so, there is nothing the voter can do to have a vote counted in that election. (Hr'g Tr., McCurdy, 65:17-22). It is in the discretion of the Computation Board in each individual instance whether to count provisional ballots submitted by voters whose naked, mail-in ballots were timely received. (Hr'g Tr., McCurdy, 75:6-10). Historically, the Computation Board does not count any ballot that lacks a secrecy envelope where one is required, and she is not aware of any

instance when the Computation Board has counted a provisional ballot cast by a voter after receiving that voter's naked ballot. (Hr'g Tr., McCurdy, 75:10-15). Finally, Director McCurdy confirmed the Board has enacted a process to ensure no voter double-votes. (Hr'g Tr., McCurdy, 61:4-10).

a. **"Rejecting Petitioners' Provisional Ballots Violated the Pennsylvania Election Code."**

In their first ground for appeal, Petitioners argue the Board misinterpreted the relevant provisions of 25 P.S. § 3050(a.4)(5). Petitioners assert that because they sent naked, and therefore invalid, ballots to the Board, for purposes of subsection (a.4)(5)(ii)(F), the Board did not "timely receive[]" a mail-in ballot capable of being canvassed or counted by either of the Petitioners. Therefore, they assert they do not fall into the subsection (a.4)(5)(ii)(F) exception to subsection (a.4)(5)(i). Additionally, they reason that because they submitted invalid ballots to the Board, they never "cast" their mail-in ballots for purposes of subsection (a.4)(5)(i). Thus, because their "mail-in ballot submissions were rejected, their first attempts to vote by mail were nullified, and they retained the right to cast a provisional ballot at their polling places on Election Day." (Pet'rs'. Mem. of Law, p. 9). Petitioners additionally maintain the Board unfairly treats mail-in ballots with deficiencies in the outer Declaration Envelopes as having not yet been "received" when the Postal Service delivers them to the Board, yet treats mail-in ballots lacking secrecy envelopes as having been immediately "received" when the Postal Service delivers them to the Board. (Pet'rs'. Mem. of Law, p. 12). Petitioners argue that to the extent sections (a.4)(5)(i) and (ii)(F) of the statute are ambiguous, they are to be read harmoniously to give effect to both, stating, "if the Board receives and rejects or cancels a defective mail-in ballot package, no 'mail-in ballot' legally capable of

being counted has been 'timely received' by the Board, and no ballot has yet been 'cast' by the voter. To be 'timely received' and 'cast,' a 'mail-in ballot' must be eligible for counting." (Pet'rs' Mem. of Law, p. 14). Petitioners argue the Election Code should be construed liberally in favor of the constitutional right to vote.

Intervenor, the Pennsylvania Democratic Party, emphasizes both federal and Pennsylvania law require that voters be provided the opportunity to vote provisionally as a "fail-safe mechanism for voting on election day," citing the Help America Vote Act ("HAVA"), 52 U.S.C. §§ 20901 et seq. (Pa.Dem.Pty. Brief, p.3). Said Intervenor argues provisional ballots must be available to voters who themselves make an error. (Pa.Dem.Pty. Brief, p. 3). The Party argues voting provisionally is distinct from "curing" a defective mail-in ballot, the Election Code must be construed in favor of counting Petitioners' provisional ballots, and a ballot cancelled for lack of a secrecy envelope cannot be said to have been "cast" for purposes of 25 P.S. § 3050(a.4)(5)(i).

Respondent, the Butler County Board of Elections, asserts the court's review is limited in appeals brought under 25 P.S. § 3157. Respondent maintains the court may only address whether the Board abused its discretion or committed an error of law in its decisions not to count Petitioners' provisional ballots, claiming the relief sought by Petitioners exceeds this limit by seeking sweeping declaratory judgment to invalidate the Butler County Curing Policy. Respondent argues the court cannot grant Petitioners such relief. Further, Respondent defends its actions, asserting its Curing Policy is consistent with the Election Code, and that it did not abuse its discretion or commit any error of law in its decisions.

Intervenors, the Republican National Committee and Republican Party of Pennsylvania, argue the case of *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345

(Pa. 2020) forecloses Petitioners' appeal. They further assert the Election Code prohibits Petitioners from curing *any* defect by provisional ballot.[3] These Intervenors argue Petitioners misconstrue the Election Code, as 25 P.S. § 3050(a.4)(5)(ii)(F) clearly states a provisional ballot shall not be counted if the elector's mail-in ballot is timely received. They also argue Petitioners' misconstrue the word "cast" in 25 P.S. § 3050(a.4)(5)(i); "casting a ballot," they argue, is an action performed by the elector, not the Board.

First, addressing Respondent's concerns for the sweeping declaratory relief apparently sought by Petitioners under 25 P.S. § 3157, and their assertion the court may consider only whether the Board abused its discretion or committed an error of law in its decisions relative to Petitioners' provisional ballots, the court agrees. However, the court finds the Petitioners' assertion that the Computation Board violated statutory and constitutional law when it failed to count Petitioners' provisional ballots falls within the limited scope of this court's jurisdiction under Section 3157. Although these assertions tangentially involve the Butler County Curing Policy, yet they invoke the actions of the Board and the computation, or lack thereof, of Petitioners' provisional ballots.

Next, considering the issue of whether Petitioners' provisional ballots should have been included in the official tabulation of votes under 25 P.S. § 3050(a.4)(5)(i), the rules of statutory interpretation provide:

> The purpose of statutory interpretation is to ascertain the General Assembly's intent and give it effect. 1 Pa.C.S. § 1921(a). In discerning that intent, the court first resorts to the language of the statute itself. If the language of the statute clearly and unambiguously sets forth the legislative intent, it is the duty of the court to apply that intent to the case at hand and not look beyond the statutory language to ascertain its meaning. See 1 Pa.C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of

[3] This argument is outside the scope of any issue raised in the *Petition*. As such, the court will not address it.

pursuing its spirit."). "Relatedly, it is well established that resort to the rules of statutory construction is to be made only when there is an ambiguity in the provision." Oliver v. City of Pittsburgh, 608 Pa. 386, 11 A.3d 960, 965 (2011) (citations omitted).

Mohamed v. Com., Dep't of Transp., Bureau of Motor Vehicles, 40 A.3d 1186, 1193 (Pa. 2012).

The relevant statutory provisions related to this issue are as follows. First, regarding mail-in ballots, 25 P.S. § 3150.16 states in part:

> (b) Eligibility.--
>
> (1) Any elector who receives and votes a mail-in ballot under section 1301-D1 shall not be eligible to vote at a polling place on election day. The district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place.
>
> **(2) An elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot under section 1210(a.4)(1).**
>
> (3) Notwithstanding paragraph (2), an elector who requests a mail-in ballot and who is not shown on the district register as having voted the ballot may vote at the polling place if the elector remits the ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and the elector signs a statement subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) which shall be in substantially the following form:
>
> I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.
> (Date)
> (Signature of Elector) ..... (Address of Elector)
> (Local Judge of Elections)
>
> (c) Deadline.--Except as provided under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot), a completed mail-in ballot must be received in the

> office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

25 P.S. § 3150.16(b) and (c) (emphasis added). Further, 25 P.S. § 3150.13(e) holds:

> (e) Notice.--The official mail-in voter ballot shall state that a voter who receives a mail-in ballot under section 1301-D3 and whose voted mail-in ballot is not timely received may only vote on election day by provisional ballot unless the elector brings the elector's mail-in ballot to the elector's polling place, remits the ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and signs a statement subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) to the same effect.

25 P.S. § 3150.13. As referenced in 25 P.S. §3150.16(b)(2), section 1210(a.4)(1), codified at 25 P.S. § 3050(a.4)(5)(i), 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.
>
> (ii) A provisional ballot shall not be counted if:
>
> ...
>
> (F) the elector's absentee ballot or mail-in ballot is timely received by a county board of elections.

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

Presently, there was no testimony or evidence as to whether the Petitioners were shown on the register as having voted their mail-in ballot, as referenced in 25 P.S. § 3150.16(b). Regardless, there is no dispute the Petitioners did not remit their mail-in ballots and envelopes to the election officials at their polling stations, did, in fact, submit their declaration envelopes and mail-in ballots to the Board through the Postal Service, and thereafter cast provisional ballots at their respective polling stations. Turning to 25 P.S. §

3050(a.4)(5)(i), the language in the first part of this sentence is clear. Subsection (a.4)(5)(i) provides the rule for counting provisional ballots *only if* an exception set forth in subsection (a.4)(5)(ii) is not applicable. Subsection (a.4)(5)(ii)(F) is also clear, and states a provisional ballot shall not be counted if the elector's mail-in ballot is timely received by a county board of elections. Petitioners' argument that in order to be "timely received" a mail-in ballot must be eligible for counting is simply not persuasive.

To submit a mail-in ballot that qualifies for inclusion in the official vote tabulation, the elector must take certain enumerated steps set forth in 25 P.S. § 3150.16(a). First, the elector must complete the ballot.[4] Next, they must place the completed ballot into the secrecy envelope. Then, they are to place the secrecy envelope into the outer envelope (Declaration Envelope). The elector must fill out, date, and sign the declaration printed on the Declaration Envelope. Finally, the elector must securely seal the Declaration Envelope and either mail or hand deliver it to the county Board of Election by 8:00 o'clock P.M. on the date of election.[5] Title 25 P.S. 3150.16(c) provides that a completed mail-in ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.[6]

[4] The term "complete," as used in this sentence, refers to filling in those sections of the ballot on which the voter wishes to cast his or her vote, as undervotes, leaving sections blank, and even leaving the entire ballot blank as a form of protest vote are, of course, permissible as being the will of the voter.

[5] *See* 25 P.S. § 3150.16(a) ("General rule.--At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election").

[6] 25 P.S. § 3150.16(c) provides, "Deadline.--Except as provided under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot), a completed mail-in ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election."

As set forth above, an elector must submit a trifecta of documents for a valid, countable mail-in ballot to exist. One of the parameters for submitting a valid, countable mail-in ballot is that it *must* be enclosed within the designated Declaration Envelope. The very earliest Declaration Envelopes may be opened is during the pre-canvass[7]; however, Declaration Envelopes continue to be opened after the deadline for receipt of mail-in ballots.[8] Until such time as the Declaration and secrecy envelopes are physically opened, the absence or presence of a secrecy envelope, as well as the absence or presence of other defects in the contents within the secrecy envelope, cannot be conclusively determined. As Director McCurdy testified, any Declaration Envelopes flagged as having possible issues are segregated from those not so flagged, and are taken up specially with other types of ballots by the Computation Board the third day following the close of the polls. This is the first time these ballots, which included Petitioners' mail-in ballots, are evaluated. Under Petitioners' proposed interpretation of the statute, a mail-in ballot would not be "received" until it is opened, the secrecy envelope confirmed to be present, and the document therein confirmed to be a valid, filled-in ballot. However, such a practice would result in any *valid* mail-in ballot not included in the pre-canvass, including those arriving at 7:59 P.M. on election night or those ballots with a suspected but no actual defect, among others, being automatically

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[7] *See* 25 P.S. § 3146.8(a) ("The county boards of election, upon receipt of official ... mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections") and 25 P.S. § 3146.8(g)(1.1) ("The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting").

[8] Title 25 P.S. § 3146.8(g)(2) states, "The county board of elections shall meet no earlier than the close of polls on the day of the election and no later than the third day following the election to begin canvassing absentee ballots and mail-in ballots not included in the pre-canvass meeting. The meeting under this paragraph shall continue until all absentee ballots and mail-in ballots received prior to the close of the polls have been canvassed"). Additionally, 25 P.S. § 3146.8(g)(ii) provides, "[A] mail-in ballot cast by a mail-in elector shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election."

invalidated as untimely. Any such ballot would not be opened and confirmed, and therefore, "received," until after the voting deadline, and the otherwise valid ballot would not be included in the official tabulation of votes. An argument could be made that a mail-in ballot opened after the deadline that is found to be valid would "relate back" to the actual timely date of receipt; however, this argument highlights the extent to which the court would have to twist otherwise plain statutory language in order for Petitioners' proposed interpretation to work without producing the unfortunate result of disenfranchising numerous voters.

The correspondence sent to Petitioner Genser by the Department confirms that her ballot had been received by the Board. Said correspondence states, "After you ballot was *received* by BUTLER County, it received a new *status*." (Pet. for Rev., Ex. 2) (emphasis added). The court also notes Petitioners repeatedly admit in their Memorandum of Law that their mail-in ballots were "received" by the Board, but thereafter inject wording into the statute in order for their reading to produce their desired results. For example, they state:

> Likewise, the Board did not "timely receive[]" a "mail-in ballot" *that was capable of being canvassed or counted* from either Petitioner because Petitioners' *submitted ballots* were ineligible to be counted."

(Pet'rs'. Mem. of Law, p. 9) (emphasis added). Additionally, they state,

> The Board's error in failing to count petitioners' provisional ballots because of the *timely received, but uncountable*, naked ballots....

(Pet'rs'. Mem. of Law, p. 11) (emphasis added), and

> [I]f the Board *receives* and rejects or cancels a defective mail-in ballot package, no "mail-in ballot" *legally capable of being counted* has been "timely received" by the Board.

(Pet'rs'. Mem. of Law, p. 14) (emphasis added). Subsection (a.4)(ii)(F) *does not* state a provisional ballot shall not be counted if a mail-in ballot *legally capable of being counted* is timely received.

Regarding Petitioners' argument that the Board unfairly treats mail-in ballots with deficiencies in the outer declaration envelopes as having not yet been "received" when the Postal Service delivers it to the Board, yet treats mail-in ballots with defects involving inner secrecy envelopes as having been immediately "received" when the Postal Service delivers it to the Board, the court does not find any evidence for such an assertion. There was no testimony or other evidence the Board does not deem Declaration Envelopes with signature or date defects as not having been "received" when they are placed under the control of the Board; rather, the Board has adopted a curing policy that permits these voters to correct these deficiencies *despite* them having been received by the Board. Petitioners' arguments in this regard appear to arise from the wording utilized by the Secretary of the Commonwealth in the SURE system, not the actual practice of the Board. Although some of the options for recording the status of ballots into the SURE system may utilize the word "pending," and "cancelled," this language is not under the control of the Board, is not reflected in its Curing Policy, and is not referenced anywhere in the Election Code. Where the Election Code does not give the Board the discretion of determining whether or when a Declaration Envelope is "received," and does not give the Board discretion to "cancel" a "ballot" for lack of a secrecy envelope prior to it being opened and confirmed lacking, the Secretary of the Commonwealth cannot unilaterally develop such a practice. *See In re Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election,* 241 A.3d 1058, 1073 (Pa. 2020) (explaining the Election Code does not require Declaration Envelopes to include handwritten names or addresses, and that the decision to include spaces on the Declaration Envelope for handwritten names and addresses was made solely by the Secretary of the Commonwealth, not the General Assembly; therefore, a voter's failure to fill in that part of the Declaration Envelope was "at

best, a 'minor irregularity' and, at worst, entirely immaterial"). Consequently, the Secretary's designation of certain ballots as "pending" in the SURE system for those counties with curing policies, or "cancelled" when the Agilis Falcon *suspects* a secrecy envelope is missing and the county does not provide a curing procedure, does not represent a legislatively-approved, or actual, ballot status.[9] Consequently, when a mail-in voter purports to send their mail-in ballot to the Board by mailing their Declaration Envelope, and this Declaration Envelope is received by the Board, that elector's "mail-in ballot" has been "received," regardless of any errors or omissions made by the elector, and regardless of the language utilized by the Secretary in the E-mailed responses to the elector. Thus, the Board's treatment of the Petitioners' mail-in ballots as "received" when the Declaration Envelopes were delivered to the Board accords with 25 P.S. § 3050(a.4)(5)(i) and (ii)(F).

Petitioners further challenge the Board's decision to treat as the official ballot of any particular voter (except those who sent defective Declaration Envelopes that may be cured under the policy), the first "ballot" received by the Board for that voter. Petitioners note that under this policy, a voter who mails a timely but empty Declaration Envelope who then casts a provisional ballot will be treated as having "cast" their mail-in ballot if that empty, mailed-in Declaration Envelope is received by the Board prior to the close of polls even though no actual ballot was in the Declaration Envelope, resulting in the properly filled in provisional ballot not being counted. The court will note neither of the Petitioners submitted empty envelopes such that the above scenario has been invoked; however, as the Board utilized the

[9] Petitioners, of course, cannot be faulted for believing their mail-in ballots had been "cancelled" at the time of the E-mail, as this is exactly what they were informed; nor is the Board to blame for the confusion surrounding the status of Petitioners' mail-in ballots. The court additionally recognizes the Secretary of the Commonwealth is attempting to distil into a relatively few number of canned responses the curing policies, or lack thereof, of sixty-seven (67) different Commonwealth counties, which cannot be alleged to be an easy feat. However, the current wording in the pre-programmed responses is apparently causing confusion for electors.

"first come, first counted" approach to Petitioners' ballots, which ostensibly involves the discretion of the Board, the court will address the argument.

First, the court understands the abstract absurdity of the outcome of the posed hypothetical above; however, when a mail-in elector (here, the Petitioners), sends to the Board their Declaration Envelope, that is, the official envelope prescribed by the Secretary of the Commonwealth for the return of ballots, labeled with that elector's unique voter identification number, and purporting to contain that elector's official mail-in ballot, the Board must designate that elector's ballot as having been received without first ensuring the voter has actually included all necessary paperwork within. As discussed above, a valid mail-in ballot must be enclosed within the designated Declaration Envelope, and it is a violation of law for any mail-in Declaration Envelope to be opened prior to the pre-canvass. Thus, under the current the statutory scheme, the Board *must* treat a received Declaration Envelopes as that voter's return of their ballot, even if that Declaration Envelope is empty. As the Petitioners' mail-in ballots were timely received by the Board, Sections 25 P.S. 3050(a.4)(i) and (ii)(F) *direct* the Board *not* to count Petitioners' provisional ballots. Therefore, the Board did not abuse its discretion when it adhered to the mandates of 25 P.S. 3050(a.4)(i) and (ii)(F).

The Petitioners here seek to shift to the Board the burden of the duties and responsibilities placed by the legislature upon the Petitioners. The legislature has placed on the elector the burden of correctly filling in, enclosing, signing, and timely submitting a mail-in ballot. The legislature directs the mail-in voter to take specific steps to ensure their mail-in ballot will be included in the official tabulation, again, directing:

> At any time after receiving an official mail-in ballot, **but on or before eight o'clock P.M.** the day of the primary or election, **the mail-in elector shall,** in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball

> point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election").

25 P.S. § 3150.16(a) General rule (emphasis added). Thus, it is the voter's burden is to ensure they have completed the steps necessary for their mail-in ballot to be included in the tabulation. Petitioners are attempting to shift these burdens to the Board by imposing upon it a duty to review all mail-ballots for compliance with vote-casting procedures prior to designating these ballots as having been received by the Board, thereby relieving Petitioners of these burdens and granting them a second chance to vote. However, the Board's only duty regarding compliance with vote-casting procedures is to review during the pre-canvass and canvass the trifecta of documents submitted by the elector (Declaration Envelope, secrecy envelope, mail-in ballot) to determine whether the votes cast on the ballot therein will be included in the official tabulation. Therefore, as the Petitioners' mail-in ballot return statuses clearly fell within the exception set forth in 25 P.S. § 3050(a.4)(5)(ii)(F), no analysis under 25 P.S. § 3050(a.4)(5)(i), including whether Petitioners "cast" a ballot, is necessary.

The court additionally notes that had the legislature intended the Petitioners' proposed interpretation, it could easily have provided that a mail-in voter who is informed they have or may have submitted an invalid or void mail-in ballot may cast a provisional ballot on Election Day and have that provisional ballot counted if, in fact, their initial ballot was defective and not counted. As noted by Respondent-Intervenors, the Pennsylvania Supreme Court has determined the current Election Code does not mandate a cure procedure for defective mail-in

ballots. *See Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) ("As noted herein, although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the "notice and opportunity to cure" procedure sought by Petitioner").

Finally, this holding does not run afoul of the purpose of the Help America Vote Act, as argued by Intervenor, The Pennsylvania Democratic Party. That Act ensures all voters are given the *opportunity* to vote, with the determination of whether the provisional ballot will be counted to occur in accordance with State Law.[10] Consistent with the Act, both Petitioners

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[10] Title 52 U.S.C.A. § 21082. Provisional voting and voting information requirements, states in part,

> (a) Provisional voting requirements.
> If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:
>
> (1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.
> (2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is--
>
> (A) a registered voter in the jurisdiction in which the individual desires to vote; and
> (B) eligible to vote in that election.
>
> (3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).
> (4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, **the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.**
> (5)(A) At the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.
>
> (B) The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.
>
> States described in section 20503(b) of this title may meet the requirements of this subsection using voter registration procedures established under applicable State law. The appropriate State or local

were provided with and took advantage of the right to cast a provisional ballot. However, whether their provisional ballots were to be included in the official tabulation depends on the applicable provisions in 25 P.S. § 3050(a.4)(5)(i) and (ii)(F), as discussed above.

For all the above reasons, the court concludes the Butler County Computation Board did not commit an error of law or abuse its discretion when it declined to count Petitioners' provisional ballots, as its actions are in accord with 25 P.S. § 3050(a.4)(5)(i) and (ii)(F).

***b.* "Rejecting Petitioners' Provisional Ballots Violated Their Right to Vote Guaranteed by the Pennsylvania Constitution"**

Regarding Petitioners' argument that the Board's decision not to count their provisional ballots violates the Free and Equal Clause of the Pennsylvania Constitution, Petitioners argue, "The Pennsylvania Constitution requires the Board to demonstrate a compelling argument to justify its policy not to count provisional ballots intended to cure mail-in ballots missing a secrecy envelope because such an action will disenfranchise voters." (Pet. for Rev. ¶ 76). Petitioners argue the Pennsylvania Constitution forbids counties from restricting the right to vote when a regulation denies the franchise or "make[s] it so difficult as to amount to a denial." (*Id.* at ¶ 77). Petitioners argue *Boockvar* does not foreclose Petitioners' right to cast provisional ballots and have those ballots counted. (Pet'rs.' Mem. of Law, p. 18).

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official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under paragraph (5)(B). Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.

52 U.S.C.A. § 21082(a) (West).

Respondent, the Butler County Board of Elections, again argues Petitioners lack standing to attack the County's curing policy, and that its procedures are consistent with the Election Code.

Intervenors, the Republican National Committee and Republican Party of Pennsylvania, argue the holding in *Pennsylvania Democratic Party v. Boockvar,* 238 A.3d 345 (Pa. 2020) forecloses Petitioners' argument that they must be permitted to cure their defective ballots via provisional vote. Intervenors assert that because the current ballot-casting rules do not violate the Free and Equal Clause, and because there is no constitutional right to cure a defective ballot, the omission of a curing opportunity cannot violate the Free and Equal Clause.

Intervenor, The Pennsylvania Democratic Party, argues the Board lacked any compelling reason for rejecting Petitioners' provisional ballots, permitted other mail-in electors who submitted deficient ballots to cure their ballots, and therefore, did not treat all voters equally. Intervenor argues the Board's decision was arbitrary and capricious.

The Free and Equal Clause of the Pennsylvania Constitution provides:

> 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 Pennsylvania Supreme Court engaged in an intensive and extensive analysis of said clause in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), which the court will not duplicate in full here. However, that Court summarized the underpinnings the clause as follows:

> [T]his provision must be understood then as a salutary effort by the learned delegates to the 1790 convention to end, once and for all, the primary cause of popular dissatisfaction which undermined the governance of Pennsylvania: namely, the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs

> based on considerations of the region of the state in which they lived, and the religious and political beliefs to which they adhered.

League of Women Voters v. Commonwealth, 178 A.3d 737, 808–09 (Pa. 2018). The Court went on to state,

> In accordance with the plain and expansive sweep of the words "free and equal," we view them as indicative of 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. Thus, Article I, Section 5 guarantees our citizens an equal right, on par with every other citizen, to elect their representatives. Stated another way, the actual and plain language of Section 5 mandates that all voters have an equal opportunity to translate their votes into representation.
>
> ...
>
> [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.

League of Women Voters v. Commonwealth, 178 A.3d 737, 804, 810 (Pa. 2018) (internal citations and quotations omitted). The Pennsylvania Supreme Court has clarified, "the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner." *Pennsylvania Democratic Party v. Boockvar,* 238 A.3d 345, 369–70 (Pa. 2020) (citing *Banfield v. Cortes*, 110 A.3d 155, 176–77 (Pa. 2015) (internal citation and quotation marks omitted).

This court determined above that a voter's mail-in ballot is received by the Bureau when the Declaration Envelope is delivered thereto, regardless of whether the votes on the

ballot inside can or will be included in the official tabulation. Consequently, any chance to correct a deficient ballot received by the Bureau, including by casting a provisional vote, constitutes a "cure." Petitioners do not allege, and indeed, there is no evidence, they were not provided with an equal opportunity to submit a valid ballot. Thus, the Petitioners' current displeasure does not implicate the equal opportunity to vote, but rather, the equal opportunity to correct a mistake. The evils the Free and Equal Clause is designed to protect against, i.e., the denial of the equal right and opportunity to vote, and the dilution of votes through crafty redistricting, do not extend to opportunities to "cure" deficiencies with certain mail-in ballots but not others.

To the extent further discussion is warranted, the court also finds that deficiencies in the outer Declaration Envelope and those arising from lack of a secrecy envelope implicate distinct and substantively different voting concerns. The defects the Board has deemed "curable" are readily and conclusively apparent on the face of the Declaration Envelope upon receipt. These defects are discovered as the Declaration Envelopes are received by the Board without the need to open any envelope and without compromising secrecy in voting, whereas the failure to include a secrecy envelope can only be determined when the Declaration Envelopes are opened, which occurs during the official pre-canvass or canvass of the election returns, and which does, in fact, implicate secrecy in voting concerns. The Pennsylvania Constitution states,

> All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.

Pa. Const. art. VII, § 4. As discussed above, there exist distinct differences between the types of defects involved, where they are located, when and how they are discovered, and the voting interests they invoke.

Further, these curing opportunities or lack thereof are equally applied to every mail-in elector according to the category of their defect. *All* mail-in electors submitting Declaration Envelopes lacking signatures or having an incorrect or no date are provided two methods by which to cure these deficiencies. Conversely, *no* mail-in elector submitting a ballot without a secrecy envelope is permitted to cure this defect. Currently, in-person electors who submit an overvote are notified via message on the machine utilized at the polling stations that they have done so, and are provided the opportunity to correct that overvote. Conversely, in-person electors who submit an undervote in one or more categories are not given that opportunity. The policy makes sense in light of the harms to be avoided; an overvote will invalidate a ballot, whereas an undervote will not. Here, one set of defects does not implicate secrecy in voting concerns and one does. To accept Intervenor's, The Pennsylvania Democratic Party, argument that secrecy in voting was upheld in this instance because the election officials "didn't look" at the votes cast on Petitioners' naked ballots, would be an injudicious holding paving a path for pernicious legislation, and does not warrant further comment.

Finally, Petitioners' argument the Curing Policy makes the franchise so difficult that it denies the franchise itself is misplaced. Only vote-casting regulations are in the position to cause difficulty in the vote-casting process; a cure provision that springs into applicability only after a ballot has been submitted cannot sensibly be said to affect the process of submitting the ballot itself. Consequently, the court finds the actions of the Board of Election of Butler County, Pennsylvania, did not violate the Free and Equal Clause of the Pennsylvania Constitution.

D. **Conclusion**

The court is not unsympathetic to the Petitioners. Unlike many other qualified electors, Petitioners endeavored to exercise their right to vote so as to participate as fully as possible in their governance. The court understands their frustration, and additionally, that of persons who deposit their ballot into the mail only to return home to find the secrecy envelope on a table, yet, despite knowing with certainty their secrecy envelope was not included in their return, may do nothing to have their vote counted in the election. However, as stated by the Court in *Boockvar*, this is a task for the legislature, not the courts, given the attendant issues that must be addressed. The court would urge the legislature to consider the situation of the Petitioners, to develop and implement a procedure for those who return defective ballots to correct same to ensure as full participation as possible in the voting franchise. However, the actions of the Board in adopting a narrow cure policy that applies in such a way as to uphold voting deadlines and ensure secrecy in voting is maintained, but that allows electors the greatest possible chance of having their vote counted, does not violate either the Election Code or the Free and Equal clause of the Pennsylvania Constitution.

Accordingly, we enter the following.

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

FAITH A. GENSER and FRANK P. MATIS,	:	**CIVIL DIVISION**
	:	**MsD. No. 2024-40116**
Petitioners,	:	
	:	
v.	:	
	:	
BUTLER COUNTY BOARD OF ELECTIONS,	:	
	:	
Respondent,	:	
	:	
v.	:	
	:	
REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PARTY OF PENNSYLVANIA, AND THE PENNSYLVANIA DEMOCRATIC PARTY,	:	
	:	
Intervenors.	:	

Yeager, P. J. **August 16, 2024**

ORDER OF COURT

AND NOW, this 16th day of August, 2024, at the time set for hearing on May 7, 2024, on the Petitioners', Faith A. Genser and Frank P. Matis, *Petition for Review in the Nature of a Statutory Appeal*, Benjamin D. Geffen, Esquire, and Kate Steiker-Ginzberg, Esquire, appeared on behalf of said Petitioners. Kathleen Jones Goldman, Esquire, appeared on behalf of Respondent, Butler County Board of Elections. Kathleen A. Gallagher, Esquire, and Thomas W. King, III, Esquire, appeared on behalf of the Intervenors, the Republican National Committee and the Republican Party of Pennsylvania. Clifford B. Levine, Esquire, appeared on behalf of the Intervenor, the Pennsylvania Democratic Party.

Upon consideration of Petitioners', Faith A. Genser and Frank P. Matis, *Petition for Review in the Nature of a Statutory Appeal* and *Petitioners' Memorandum of Law in Support of Election Appeal*; Respondent's, the Butler County Board of Elections, *Board of Elections Answer to Petition for Review in the Nature of a Statutory Appeal* and *Memorandum in Opposition to Petition for Review in the Nature of a Statutory Appeal*; Intervenor's, the Pennsylvania Democratic Party, *The Pennsylvania Democratic Party's Brief in Support of Petitioners' Petition for Review in the Nature of a Statutory Appeal*; and the Intervenor-Respondents', Republican National Committee and Republican Party of Pennsylvania joint *Brief in Opposition to Petition for Review in the Nature of a Statutory Appeal*, and following hearing thereon, in accordance with the above *Memorandum Opinion*, the Petitioners', Petition for Review in the Nature of a Statutory Appeal is DISMISSED.

BY THE COURT,

S. MICHAEL YEAGER
PRESIDENT JUDGE

FAITH GENSER, FRANK MATIS

VS.

BUTLER COUNTY BOARD OF ELECTIONS, REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PARTY OF PENNSYLVANIA, THE PENNSYLVANIA DEMOCRATIC PARTY

IN THE COURT OF COMMON PLEAS
OF BUTLER COUNTY, PA
CIVIL DIVISION
50TH JUDICIAL DISTRICT

CASE NUMBER
MSD-2024-40116

CERTIFICATION

I hereby certify:

RULE 236 NOTICE THE PROTHONOTARY OF BUTLER COUNTY, PENNSYLVANIA HEREBY CERTIFIES THAT A COPY OF THE FOREGOING ORDER WAS MAILED TO: AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION; BUCHANAN INGERSOLL & ROONEY PC; DENTONS COHEN & GRISBY PC; DMKC&G LLP; PUBLIC INTERSET LAW CENTER; DECHERT LLP; THE GALLAGHER FIRM LLC; JONES DAY ON 8/16/24, BY FIRST CLASS MAIL, POSTAGE PREPAID.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal of the Said Court, this August 16, 2024.

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