

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

Nos. 26 WAP 2024 and 27 WAP 2024

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

Petitioners/Appellees,

v.

BUTLER COUNTY BOARD OF ELECTIONS

Respondents/Appellants,

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

Intervenors/Appellants.

PRINCIPAL BRIEF OF APPELLANTS

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

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STATEMENT OF JURISDICTION

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

ORDER IN QUESTION

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

SCOPE OF REVIEW AND STANDARD OF REVIEW

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

STATEMENT OF THE QUESTIONS INVOLVED

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

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

SUGGESTED ANSWER: Yes.

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

SUGGESTED ANSWER: Yes.

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Procedural Background

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The Court should reverse.

Dated: September 24, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

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CERTIFICATION OF WORD COUNT

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

THE GALLAGHER FIRM LLC

Dated: September 24, 2024

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

Counsel for Appellants

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CERTIFICATE OF COMPLIANCE

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

THE GALLAGHER FIRM LLC

Dated: September 24, 2024

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APPENDIX

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EXHIBIT A

**SEPTEMBER 5, 2024
MEMORANDUM OPINION BY
JUDGE WOLF IN THE
COMMONWEALTH COURT OF
PENNSYLVANIA**

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Faith Genser and Frank Matis, : **CASES CONSOLIDATED**
Appellants :
 :
v. :
 :
 :
Butler County Board of Elections, :
Republican National Committee, : Trial Ct. No. MSD-2024-40116
Republican Party of Pennsylvania, and :
The Pennsylvania Democratic Party : No. 1074 C.D. 2024

Faith Genser and Frank Matis, :
 :
v. :
 :
 :
Butler County Board of Elections, :
Republican National Committee, :
Republican Party of Pennsylvania, and :
The Pennsylvania Democratic Party :
 :
Appeal of: The Pennsylvania : No. 1085 C.D. 2024
Democratic Party : Submitted: August 28, 2024

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE LORI A. DUMAS, Judge
HONORABLE MATTHEW S. WOLF, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE WOLF

FILED: September 5, 2024

The Pennsylvania Election Code allows mail-in and absentee voters to vote provisionally under some circumstances. In this case, two Pennsylvania voters—Faith Genser and Frank Matis (Electors)—tried to vote by mail in the 2024

Primary Election. Their mail-in ballots were fatally defective and were not counted. Electors also went to their polling places on Primary Election Day, April 23, 2024, and submitted provisional ballots. Those ballots also were not counted. Thus, neither Elector has had any vote counted in the 2024 Primary Election.

The question in this appeal is whether the Election Code prohibits counting Electors' provisional ballots because their fatally flawed mail-in ballots were timely received by Election Day. Importantly, that is a question about provisional voting and counting provisional ballots, which is distinct from the question whether an elector can cure a defect in a mail-in ballot. The Court of Common Pleas of Butler County (Trial Court) held, in an August 16, 2024 decision, that the provisional ballots cannot be counted pursuant to the Pennsylvania Election Code (Election Code or Code),¹ in part because that would amount to ballot curing. We reject that view. We hold that the Election Code, properly construed, does not prohibit counting Electors' provisional ballots. Accordingly, we reverse the Trial Court's order and direct the Butler County Board of Elections (Board) to count them.

I. BACKGROUND

The facts are not in dispute. Electors are registered voters residing in Butler County, Pennsylvania (County). They sought to vote in the 2024 Primary Election by mail-in vote. Both Electors received their mail-in ballot materials from the Board, marked their mail-in ballots with their candidates of choice, deposited the ballots directly into the declaration envelopes, and mailed the declaration envelopes to the Board. The Board received Electors' declaration envelopes well in advance

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591. To promote clarity, and because the Trial Court and the parties in this case refer to the various provisions of the Election Code by their unofficial Purdon's citations, so do we.

of the Election Code’s statutory deadline,² and upon receipt placed them into a machine called the Agilis Falcon. The Agilis Falcon detected that Electors failed to place their mail-in ballots in secrecy envelopes before depositing them in the declaration envelopes, as required by 25 P.S. § 3150.16(a).³ As a result, the Board updated the status of Electors’ mail-in ballots in the Statewide Uniform Registry of Electors (SURE) System, and they received an automatic email notice advising as follows:

After your ballot was received by BUTLER County, it received a new status.

Your ballot will not be counted because it was not returned in a secrecy envelope. If you do not have time to request a new ballot before April 16, 2024, or if the deadline has passed, **you can go to your polling place on election day and cast a provisional ballot.**

Petition for Review in the Nature of a Statutory Appeal, Ex. 1 (Declaration of Faith Genser, Ex. B); Ex. 2 (Declaration of Frank Matis ¶ 9) (emphasis added).

Electors appeared at their respective polling places on April 23, 2024—the day of the 2024 Primary Election—and cast provisional ballots. They were subsequently informed that their provisional ballots were rejected.

Electors filed a Petition for Review in the Nature of a Statutory Appeal (Petition) with the Trial Court. Therein, Electors argued they were disenfranchised when the “Board rejected [Electors’] mail-in ballots due to lack of an inner secrecy envelope, but then refused to count the provisional ballots [Electors] cast on Election

² The Code requires that mail-in ballots must be received “on or before eight o’clock P.M. the day of the primary or election.” 25 P.S. § 3150.16(a).

³ Absentee ballots are also required to be placed in a secrecy envelope. *See* 25 P.S. § 3146.6(a), added by Section 11 of the Act of March 6, 1951, P.L. 3. Absentee and mail-in ballots that are returned without a secrecy envelope are often referred to as “naked ballots.”

Day.” Pet. ¶ 2.⁴ Specifically, they argued that the Board’s decision to reject their provisional ballots violates the Election Code, is based on a misinterpretation of Pennsylvania Supreme Court precedent,⁵ and violates Electors’ right to vote guaranteed by the free and equal elections clause of the Pennsylvania Constitution, PA. CONST. art. I, § 5. The Trial Court granted intervention to the Republican National Committee and the Republican Party of Pennsylvania (collectively, Republican Party, and with the Board, Appellees) and the Pennsylvania Democratic Party (Democratic Party, and with Electors, Appellants). On May 7, 2024, the Trial Court held a hearing on Electors’ Petition.

Chantell McCurdy, Director of Elections for the Board (Director McCurdy), and Electors testified. Director McCurdy testified at length about the tracking of mail-in votes through the SURE System, the Board’s procedures in canvassing mail-in and provisional ballots, and the Board’s notice and cure policy.

In regard to electors who wish to vote by mail, Director McCurdy explained that the SURE System begins tracking a mail-in ballot at the moment a qualified elector requests one. Hearing Transcript, May 7, 2024 (Hr’g Tr.) at 39. Once the mail-in ballot materials have been sent to the elector, the status in the SURE System is changed to “ballot sent.” *Id.* Those materials include (1) the ballot for that elector’s precinct, (2) a secrecy envelope, (3) the declaration envelope, and (4) instructions. *Id.* at 38. Each declaration envelope has a label affixed to it containing a barcode that identifies the voter by his or her voter identification number. *Id.* at

⁴ Notably, Electors do not challenge the Board’s decision to reject their mail-in ballots for lack of a secrecy envelope. They challenge solely the Board’s decision not to count their provisional ballots.

⁵ Specifically, Electors argued the Board misinterpreted *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (*Boockvar*), to conclude that electors who return naked mail-in ballots are forbidden to cure the error.

32-33. Pending the Board's receipt of a returned declaration envelope, the SURE System status indicates the ballot is "pending not yet returned." *Id.* at 33.

Director McCurdy testified that the Department of State communicates internally with county boards of elections to advise how to record mail-in ballots into the SURE System once those ballots are received. Hr'g Tr. at 45. She explained that

[w]hen we receive a ballot back in the office, we are to as quickly as possible in order to timely release the information to the Department of State record those ballots in. What I mean by record is I had mentioned earlier on the declaration envelope there is a label. That label contains a barcode that is uniquely identifiable to an individual voter and their assigned voter ID number once they are registered as a registered voter in Butler County. We scan those in, and the way we scan them in determines how it's relayed to the Department of State. So the standard response for a ballot before it's returned is pending not yet returned. When we record it in as received, it is, record ballot returned.

Id. at 32-33. However, not all declaration envelopes received by the County are entered into the SURE System as "record ballot returned." Director McCurdy explained that other statuses may be entered manually into the SURE System if a defect on the declaration envelope is detected:

[County's Counsel]: Now, how does—how does that happen? What is sort of the magic of how that information is collated? We discussed earlier that these ballots haven't been opened. []

[Director McCurdy]: Correct.

[County's Counsel]: How is any of the information disseminated?

[Director McCurdy]: So I guess first it relates to how the

ballots are recorded in.

[County's Counsel]: Okay.

[Director McCurdy]: In which case the Butler County Office has a machine called—it's an Agilis Falcon, and all of the ballots that come in through the mail are placed in this machine. It sorts them. It also evaluates the dimensions of the envelope, specifically the length, height, to make sure that this is in fact an official election envelope with the required materials inside. As long as it does, it goes through, sorts by precinct. That information is exported onto a USB that I then import myself on my computer into the SURE [S]ystem as record ballot returned.

If there are any ballots that it finds any sort of an issue with in that process, meaning it isn't thick enough, it's too thick, one of those two, or we've gotten envelopes for other counties; theirs are slightly longer or taller, it also ends up in the first bin. That bin then has to be evaluated by our office to record in individually.

When we record them in individually, we record them in to the best of our ability as to what we think is possibly wrong with the issue. If it's another county's ballot, we do our best to get that ballot to the county. If it is our ballot, we record it in given the best possible response from the Department of State options. When we scan in the barcode, there is a list of options that it gives us that we're able to chose from, and we chose the most likely based on the scenario.

[County's Counsel]: But you're guessing? Is that a fair—

[Director McCurdy]: Yes.

[County's Counsel]: —way to summarize what you're doing is you're guessing what's wrong with it?

[Director McCurdy]: Correct.

[County's Counsel]: And, you know, you could open up

the envelope on the day of the canvass and realize that somebody has put something that has nothing to do with the election in the envelope?

[Director McCurdy]: Yes. And that did happen.

[County's Counsel]: And can you explain to the Court, you know, that circumstance, just by way of illustration?

[Director McCurdy]: Yes. So the machine evaluated an envelope as correct. It recorded it in as ballot returned. On Election Day, during the—in the morning when we're starting to open our envelopes, we have envelope openers that do it. They open the outside envelope, separate the inner secrecy envelope, all to preserve voter secrecy. That's very paramount for us.

Then they open the internal envelopes. The internal secrecy envelopes for this individual, the one envelope we opened, and it contained a copy of medical records for a person. But the way that it was folded in such, it matched the width dimensions of what the machine thought would be a ballot.

[County's Counsel]: So you can't know then with any degree of certainty whether or not somebody has included the secrecy envelope or included their medical records or their kid's report card until your Computation Board has assembled to open those envelopes? Is that a fair summary?

[Director McCurdy]: That's correct. . . .

Hr'g Tr. 33-35. Because the Election Code forbids mail-in ballots to be opened before seven o'clock A.M. on Election Day,⁶ unless the defect is obvious from the face of the declaration envelope, the status listed in the SURE System is nothing more than a guess. *Id.*

⁶ 25 P.S. § 3146.8(a), (g)(1.1).

For defects that are readily detectable on the face of a declaration envelope, Director McCurdy testified that the County has instituted a notice and cure policy (Curing Policy or Policy).⁷ She explained that the Curing Policy permits electors to cure deficiencies on the declaration envelope by signing an attestation at the Board's office, "or by voting via provisional ballot acting as the attestation at the polling place." Hr'g Tr. at 50. Therefore, if an elector, for example, fails to sign the declaration envelope, he or she has two ways to fix that problem and have the vote count. *Id.* at 60-61. Director McCurdy testified that while defects to the declaration envelope are curable pursuant to the Policy, the County did not adopt any curing procedures for naked ballots. When questioned about the automated email advising Electors that they could vote by provisional ballot because their mail-in votes would not count, Director McCurdy agreed that the SURE System's automated email provided Electors with false directions:

[County's Counsel]: Okay. So Butler County was not offering [Electors] the opportunity to come in and cast a provisional ballot in the event they didn't have—their secrecy envelope was missing. But, as I understand what you're saying now, the [Department] of State website automatically advised these folks that they could vote by provisional ballot?

[Director McCurdy]: That's correct.

Id. at 48-49. Director McCurdy was also questioned about how the Board would treat a timely received declaration envelope that contained a secrecy envelope but omitted the actual mail-in ballot. *Id.* at 63-64.

[Electors' Counsel]: Okay. I want to ask some questions also about—going back to mail-in balloting, when you opened the envelopes on the Friday after the election for

⁷ The Curing Policy can be found in the Original Record, Item No. 25, Ex. 1.

mail-in ballots, what would happen if you received one that had a secrecy envelope inside, but not the actual ballot inside?

[Director McCurdy]: I'm not sure I understand. So during the Computation Board?

[Electors' Counsel]: Correct. Computation Board, they open the envelopes they find—they open the outer envelope; inside there's a secrecy envelope. They open the secrecy envelope; it's empty.

[Director McCurdy]: Okay.

[Electors' Counsel]: What would happen in that situation? Would there be a mail-in vote—there would not be a mail-in vote counted for that voter? Right?

[Director McCurdy]: Correct, because there is no eligible ballot.

[Electors' Counsel]: Right. What if that voter had also completed a provisional ballot at the polling place on Election Day? Would the Computation Board count that provisional ballot?

[Director McCurdy]: No.

[Electors' Counsel]: And why not?

[Director McCurdy]: Because they've already turned in a ballot.

[Electors' Counsel]: What ballot did they already turn in?

[Director McCurdy]: The one that was marked in the SURE [S]ystem, record ballot returned.

[Electors' Counsel]: Okay. So, in other words, even if the voter didn't send in a ballot because they sent in the outer envelope and the secrecy envelope, [the County] still marks that as a ballot returned in the SURE [S]ystem?

[Director McCurdy]: Yes.

Id.

Finally, Director McCurdy testified about electors who intend to vote by mail but are concerned that their ballots may not be timely received and therefore also appear on Election Day and complete a provisional ballot. Hr’g Tr. at 64. She explained that where the Board has an elector’s provisional ballot and also receives that elector’s mail-in ballot past the statutory deadline, it will count the elector’s provisional ballot. *Id.* at 64-65. The elector’s tardy mail-in ballot is deemed ineligible because it was received after the statutory deadline. *Id.* at 65.

Electors also testified. Mr. Matis testified that after he received the email from the Department of State that his mail-in vote would not be counted, he called the Bureau of Elections and was advised that he “had to do a provisional ballot” and “could not come in and fix [his] ballot.” Hr’g Tr. at 88. Ms. Genser also testified that she called the Bureau of Elections after receiving the email from the Department of State that her mail-in vote would not be counted. *Id.* at 144-45. Ms. Genser explained that she was upset by the response to her questions about her mail-in ballot, and ultimately believed that her provisional ballot would not count. *Id.* at 146, 150; Pet., Ex. 1 ¶¶ 15-17. She chose to cast a provisional ballot anyway. *Id.* at 169.

On August 16, 2024, the Trial Court issued a memorandum opinion and order (Trial Court Opinion) dismissing Electors’ Petition and affirming the Board’s decision not to count Electors’ provisional ballots. The Trial Court found the Board did not commit an error of law or abuse its discretion when it rejected Electors’ provisional ballots, as its actions were in accord with 25 P.S. § 3050(a.4)(5)(i) and (ii)(F), which it read to foreclose the counting of provisional ballots cast by electors who had timely submitted mail-in ballots, even if those electors’ timely submitted

mail-in ballots were previously rejected. The Trial Court also found Electors' constitutional challenges without merit. Appellants appealed the Trial Court's order to this Court.^{8, 9}

II. STATUTORY FRAMEWORK

As it is critical to our analysis, we first discuss the relevant provisions of the Election Code. Voting by qualified mail-in electors is addressed in Article XIII-D of the Election Code, 25 P.S. §§ 3150.11-3150.17.¹⁰

25 P.S. § 3150.16, titled "Voting by mail-in electors," provides:

(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.

.....

(b) Eligibility.--

⁸ By Order dated August 22, 2024, this Court consolidated Appellants' appeals.

⁹ This appeal requires this Court to interpret provisions of the Election Code, which, as a question of law, is subject to a de novo standard of review and a plenary scope of review. *Banfield v. Cortes*, 110 A.3d 155, 166 (Pa. 2015).

¹⁰ Article XIII-D of the Code was added by the legislation commonly called Act 77, Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

(1) Any elector who receives and votes a mail-in ballot under [25 P.S. § 3150.11] 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 [25 P.S. § 3050(a.4)(1)].

....

(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 (emphasis added). Pursuant to subsection(b)(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 25 P.S. § 3050(a.4)(1). This subsection will be hereinafter referred to as the “Having Voted Clause.”

As cross-referenced in the Having Voted Clause, 25 P.S. § 3050 discusses voting by provisional ballot. Relevant here are subsections (a.4)(5)(i), which we refer to as the “Casting Clause,” and (a.4)(5)(ii)(F), which we refer to as the “Timely Received Clause.” Together, the Casting Clause and the Timely Received Clause direct when provisional ballots shall and shall not be counted. They provide:

(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), (ii)(F). The parties' arguments advance competing interpretations of the Having Voted, Casting, and Timely Received Clauses, and at various times, rely on other Election Code provisions to support their arguments. Other Election Code provisions, where necessary, will be discussed and set forth *infra*.

III. ARGUMENTS

A. Parties' Arguments

1. Appellants

Appellants¹¹ argue that the plain language of the Election Code, properly construed, requires the Board to count the provisional ballots. To support their proffered construction, they review the history and purpose of provisional voting, which they stress is intended to prevent disenfranchisement. They explain that the 2002 Help America Vote Act (HAVA), in part, required states to implement provisional-voting regimes for federal elections. 52 U.S.C. § 21082 (*formerly* 42 U.S.C. § 15482). The General Assembly added 25 P.S. § 3050(a.4) to the Code to

¹¹ We present Appellants' arguments together because they are substantially aligned. We note differences between their arguments where appropriate. We take the same approach with Appellees' arguments in Part III.A.2, *infra*.

fulfill HAVA's mandate. The purpose of provisional voting is to act as a fail-safe to ensure that voters can vote exactly once—not zero times and not twice. Determinations about whether a provisional ballot can be counted are routinely and necessarily made after canvassing has begun, and the Board considers whether the voter has already cast a valid ballot to prevent double voting. Appellants point out that the Election Code specifically authorizes provisional voting by electors who request mail-in or absentee ballots but do not vote those ballots. 25 P.S. §§ 3150.16(b)(2), 3146.6(b)(2).

Appellants focus on two phrases in 25 P.S. § 3050(a.4)(5), which directs the Board to count, or not count, certain provisional ballots that have been cast. They argue these two clauses are ambiguous when read together because they could simultaneously require and prohibit counting of a given provisional ballot. First, the Board must count a provisional ballot if the voter “did not cast any other ballot.” *Id.* § 3050(a.4)(5)(i). Second, the Board must *not* count the provisional ballot if “the absentee or mail-in ballot is timely received.” *Id.* § 3050(a.4)(5)(ii)(F). In support they cite *Keohane v. Delaware County Board of Elections* (Del. Cnty. Ct. Com. Pl., No. CV-2023-4458, filed Sept. 21, 2023), where the Delaware County Court of Common Pleas held that a provisional ballot must be counted if an earlier mail-in ballot is rejected as defective, even if it was also received—the opposite of the statutory interpretation the Trial Court reached here.

Regarding the Casting Clause, Appellants essentially argue that *cast* is a term of art, implying a formal submission of a ballot that will be processed and counted in order to register the elector's choice. They argue that, as the trial court held in *Keohane*, voters who have *tried to* cast mail-in ballots, but did not successfully do so because those ballots were later cancelled as defective, cannot be

said to have *cast* a ballot under the Casting Clause. Thus, they claim the Casting Clause requires the Board to count the provisional ballots because the earlier mail-in ballots were never actually cast. They point to the affidavit voters must sign to vote provisionally under 25 P.S. § 3050(a.4)(2), stating that the provisional ballot is the “only ballot [the voter] cast in this election.”

Further, Appellants argue the Timely Received Clause does not prohibit counting the provisional ballots. The “ballot” that triggers that clause once timely received must also be a *valid* ballot—one that is not later cancelled, rejected, or otherwise not given effect. If it is not a valid ballot, it is not “a . . . ballot,” so there is no ballot that was “timely received.” Thus, timeliness is only one aspect of the Timely Received Clause, and timely receipt comes into play only if there is a valid ballot submitted. Appellants disagree with the construction Appellees propound and the Trial Court adopted: that the Code requires “the Board [to] treat a received *Declaration Envelopes* [sic] as that voter’s return of their ballot, *even if that Declaration Envelope is empty.*” Trial Court Op. at 21 (emphasis added). This, they argue, conflates “ballot”—the word the statute actually uses—with “envelope.” It cannot be, they argue, that timely receipt of *any* declaration envelope purporting to contain a ballot—even a naked ballot, a blank ballot, or no “ballot” at all—can mean that a “*ballot* [was] timely received,” as the Timely Received Clause requires. They point out that the empty-envelope hypothetical was precisely Director McCurdy’s testimony and that the Trial Court acknowledged the abstract absurdity of that construction. *See* Trial Court Op. at 21.

Appellants ask us to resolve the ambiguity in the clauses to require Electors’ provisional ballots to be counted. They argue that under their proposed interpretation, the Casting and Timely Received Clauses can be harmonized—and

critically, can be construed consistently with the Code's other provisional voting sections. For the Casting Clause, they propose that *cast* refers to ballots that are or will be counted. It does not include those that have been submitted and which might later be found to contain—or have already been found to contain— fatal defects and not be counted. For the Timely Received Clause, they argue that a *ballot* is not received unless it is a validly cast ballot, regardless of whether the envelope purporting to contain the ballot is physically received by the Board. Appellants argue resolving the ambiguity in this way favors enfranchisement, effectuates the purpose of provisional voting to ensure that each elector can vote exactly once (not zero times), and is more consistent with a commonsense reading of the Code's provisions as a whole.

Appellants argue that caselaw on which Appellees rely is either distinguishable or not persuasive. In *Boockvar*, the Supreme Court held that counties are not required under the Code to allow curing of defective mail-in ballots. 238 A.3d at 374. Electors specifically distinguish *Boockvar* because it addressed only ballot curing, not the distinct issue raised here—whether a board of elections must count a provisional ballot. Second, Appellants would reject our decision in *In re Allegheny County Provisional Ballots in the 2020 General Election* (Pa. Cmwlth., No. 1161 C.D. 2020, filed November 20, 2020) (*Allegheny County*), *appeal denied*, 242 A.3d 307 (Pa. 2020),¹² as nonbinding and unpersuasive. In *Allegheny County*, this Court held that the Timely Received Clause in 25 P.S. § 3050(a.4)(5)(ii)(F) is unambiguous and prohibits counting provisional ballots if an earlier mail-in or absentee ballot is timely received. *Allegheny County*, slip op. at 8. Appellants point

¹² Unreported decisions of this Court issued after January 15, 2008, are not binding precedent. Section 414(a) of the Commonwealth Court's Internal Operating Procedures, 210 Pa. Code § 69.414(a).

out, however, that *Allegheny County* did not consider the ambiguity that arises when that clause is read together with, instead of in isolation from, the Casting Clause in 25 P.S. § 3050(a.4)(5)(i), and it made no attempt to reconcile those provisions. Nor did the *Allegheny County* Court consider the argument presented here: that only *valid* ballots that will *count* can trigger the Timely Received Clause. Appellants also argue *Allegheny County* was wrongly decided because it failed to give due weight to the presumption in favor of constructions that expand the franchise.

Appellants distinguish the issue of counting their provisional ballots from *curing* their defective mail-in ballots. They claim the Trial Court erred in conflating those issues. *See, e.g.*, Trial Court Op. at 22-23 (citing *Boockvar*, 238 A.3d at 361, for the proposition that the Election Code does not require a curing process for defective mail-in ballots); *id.* at 27 (“[A]ny chance to correct a deficient ballot . . . , including by casting a provisional vote, constitutes a ‘cure.’”). Although the Election Code is silent on ballot curing, leaving that choice up to each county, Appellants argue the Election Code requires that their provisional ballots be counted, regardless of any notification about or curing of defects in their mail-in ballots.

Finally, Appellants argue that adopting the Board’s construction would cause the Election Code to violate the free and equal elections clause of the Pennsylvania Constitution. First, rejecting the provisional ballots, when the earlier mail-in ballots were also cancelled, amounts to a restriction on voting that must be tied to a compelling reason, which the Board has failed to articulate. Second, the Board’s construction would be an unreasonable restriction on the franchise, and the Constitution requires that *any* restriction on voting—whether a ballot casting rule or a ballot counting rule—must be reasonable and nondiscriminatory. Appellants

invite us to avoid these constitutional problems by construing the Code as they propose.

2. *Appellees*

Appellees argue the Election Code—specifically the Timely Received Clause found in 25 P.S. § 3050(a.4)(5)(ii)(F)—prohibits the Board from counting Electors’ provisional ballots. They claim that the Timely Received Clause is not in conflict with the Casting Clause in 25 P.S. § 3050(a.4)(5)(i) because the latter expressly says it applies “except as provided in subclause (ii).” Thus, they argue because the exception—the Timely Received Clause—is triggered, the general rule does not apply and there is nothing left for the Court to interpret. Appellees argue all that is necessary for a ballot to count as “timely received” for purposes of 25 P.S. § 3050(a.4)(5)(ii)(F) is for the elector to mail a declaration envelope to the Board and for the Board to receive the envelope timely. This is true, they argue, independent of what the declaration envelope contains, whether a ballot or anything else. Appellants argue this Court reached precisely that holding in *Allegheny County*.

Appellees claim that Appellants’ proffered construction misunderstands the word “received” in the Timely Received Clause. In their view, receipt means actual receipt, and they argue that the voting equipment’s designation of a mail-in ballot as “pending” or “cancelled” is legally irrelevant to whether the Timely Received Clause prohibits counting a provisional ballot. Similarly, they argue, receipt cannot depend on opening the declaration envelope to verify that the ballot was properly and validly cast, since that does not occur until votes are being canvassed. Similarly, Appellees argue that “casting” is distinct from “receiving”—the former is done by an elector, while the latter is done by the Board. Both of those

acts occur before the ballot is canvassed, so neither can depend on whether the vote is valid (which, in the case of non-facial defects, is not known with certainty until the ballot is canvassed).

In response to Appellants' insistence on the connection between mail-in voting and the need for provisional ballots, Appellees stress that provisional ballots have nothing to do with mail-in voting. Relatedly, they dismiss the SURE System notification provided to Electors, which invited them to cast provisional ballots because their mail-in ballots were invalid, as "legally unfounded," nonauthoritative guidance from the Secretary of the Commonwealth (Secretary). Republican Party's Br. at 29. In support, they cite *Boockvar* for the proposition that the Secretary cannot compel counties to allow cure of defective mail-in ballots, arguing that this, in turn, implies the Secretary cannot tell voters when they are permitted to cast provisional ballots.

Throughout their arguments, Appellees contend that the Board's counting the provisional ballots would have effectively been a "cure" of Electors' defective mail-in ballots via provisional voting. The Board specifically argues that Appellants' proffered construction is an attempt at declaratory or injunctive relief requiring counties to implement notice and cure policies via provisional voting. This, it argues, would violate the Election Code which, as construed in *Boockvar*, does not require counties to implement notice and cure procedures for mail-in or absentee ballots.

Finally, the Republican Party responds to Appellants' constitutional arguments emphasizing the equality of opportunity afforded to Electors, on the basis that they *could have cast* valid mail-in ballots just as every other voter could have done. It argues this settles the constitutional issue because the free and equal

elections clause limits only voter-qualification rules and rules amounting to a denial of the franchise, not ballot casting rules like those Electors failed to follow here.

B. Arguments of *Amici Curiae*

The Department of State and the Secretary have filed a joint brief as *amici curiae*.¹³ The Secretary begins by clarifying that, in his view, the Trial Court and Appellees have wrongly conflated ballot curing with provisional voting. This case, he argues, is not about ballot curing at all. The only question is whether Electors' provisional ballots must be counted under the Election Code, which provides separately for provisional voting. Unlike for ballot curing, which is discretionary, all county boards of elections must follow the Code's provisional voting sections.

The Secretary argues that the two Code clauses that control provisional ballot counting are ambiguous, but the ambiguity should be resolved to require the Board to count the provisional ballots. As a preface to that argument, the Secretary emphasizes that HAVA created provisional voting to ensure that “a ballot would be submitted on election day but counted if and only if the person was later determined to have been entitled to vote.” *Sandusky Cnty. Dem. Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004). The Secretary describes the process of voting provisionally and points out that the Timely Received Clause is just one among many bases on which a provisional ballot might not be counted, even if the voter is eligible to vote. Other reasons include failure to comply with rules for submitting the provisional ballot. *See* 25 P.S. § 3050(a.4)(5)(ii)(A)-(F).

Given that context, the Secretary argues that the Election Code, when considering all its provisional voting sections, is ambiguous regarding how

¹³ We refer to these arguments as the Secretary's because the Secretary is the head of the Department of State.

provisional ballots should be treated. He first cites the instructions given to voters on mail-in and absentee ballots themselves: that they may cast a provisional ballot if their “**voted** ballot is not timely received.” 25 P.S. § 3146.3(e)¹⁴ (for absentee ballots); *accord id.* § 3150.13(e) (for mail-in ballots) (emphasis added). Critically, he explains, the General Assembly added the word *voted* to those instructions by amendment in 2020; they had previously only referred to a “ballot” or “mail ballot” without the concept of a “**voted** ballot.” *See* Secretary’s Br. at 12 (citing Section 9 and 12.1 of the Act of Mar. 27, 2020, P.L. 41, No. 12). And in Act 77 of 2019, the word *voted* was also added when authorizing mail-in voters to vote by provisional ballot. By statute, the district register lists only voters whose earlier ballot has been “received **and voted**” as having voted. 25 P.S. § 3150.16(b)(1) (for mail-in ballots); *see also id.* § 3146.6(b)(1) (same, for absentee ballots). Also by statute, if an absentee or mail-in voter’s name is not listed on the district register as having “**voted** the [mail-in or absentee] ballot,” then that voter “may vote by provisional ballot.” *Id.* § 3146.6(b)(2); *accord id.* § 3150.16(b)(3). The Secretary explains that the Trial Court construed the Timely Received Clause in isolation, and its reading cannot be consistent with these other amendments to the Code. These provisions clearly require that one’s right to vote by provisional ballot is not contingent on the Board’s bare receipt of a ballot, but on having already **voted**. *See* Secretary’s Br. at 25-26.

The Secretary insists that we must resolve these ambiguities to avoid unreasonable results by construing *in pari materia* the terms *timely received* and *voted* to refer only to an earlier ballot that will be counted because it was successfully voted and is valid. In other words, a ballot that is invalid, cancelled, or not properly cast cannot trigger the Timely Received Clause. The Secretary urges us to resolve

¹⁴ Added by Section 11 of the Act of March 6, 1951, P.L. 3.

the ambiguity in favor of counting ballots and expanding the franchise, rather than disenfranchising Electors.

IV. DISCUSSION

We begin with the principles of statutory construction set forth by our Supreme Court:

When presented with matters of statutory construction, [we are] guided by Pennsylvania’s Statutory Construction Act [of 1972], 1 Pa.C.S. § 1501-1991. Under this Act, “the object of all statutory construction is to ascertain and effectuate the General Assembly’s intention.” *Sternlicht v. Sternlicht*, [] 876 A.2d 904, 909 ([Pa.] 2005) (citing 1 Pa.C.S. § 1921(a) (“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly[.]”)). When the words of a statute are clear and unambiguous, “the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). However, when the words of a statute are not explicit, the General Assembly’s intent is to be ascertained by consulting a comprehensive list of specific factors set forth in 1 Pa.C.S. § 1921(c). *See also* [Pa.] *Associated Builders & Contractors, Inc. v. Dep’t of Gen. Servs.*, [] 932 A.2d 1271, 1278 ([Pa.] 2007) (recognizing that when the “words of the statute are not explicit, the General Assembly’s intent is to be ascertained by considering matters other than statutory language, like the occasion and necessity for the statute; the circumstances of its enactment; the object it seeks to attain; the mischief to be remedied; former laws; consequences of a particular interpretation; contemporaneous legislative history; and legislative and administrative interpretations”).

....

[The Supreme] Court has previously observed that the purpose and objective of the Election Code . . . is “[t]o obtain freedom of choice, a fair election and an honest election return[.]” *Perles v. Hoffman*, [] 213 A.2d 781, 783

([Pa.] 1965). To that end, the Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice. *Id.* at 784.

Boockvar, 238 A.3d at 355-56 (some citations omitted).

Because Appellants and the Secretary urge us to find the Election Code ambiguous, the following principles are especially important. We find ambiguity when multiple interpretations of a statute are reasonable, including competing interpretations proffered by the parties. *Id.* at 360. Divergent judicial interpretations of a statute can also signal that multiple interpretations are reasonable, and thus that the statute is not clear. *See Bold v. Dep’t of Transp., Bureau of Driver Licensing*, ___ A.3d ___, 2024 WL 3869082, (Pa., No. 36 MAP 2023, filed Aug. 20, 2024), slip op. at 11-12. Ambiguity can be textual, but it can also be contextual, arising from multiple parts of a statute considered and construed together when they must be. *See id.* at 390 (Wecht, J., concurring); *King v. Burwell*, 576 U.S. 473, 474-75 (2015) (“[O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’”) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). When searching for clear meaning, as at every other time, this Court “must always read the words of a statute in context, not in isolation.” *Gavin v. Loeffelbein*, 205 A.3d 1209, 1221 (Pa. 2019).

A. The Casting Clause and Timely Received Clause Are Ambiguous When Considered Together With the Having Voted Clause

The parties dispute whether the Casting Clause and Timely Received Clause are ambiguous. In *Allegheny County*, we considered the Timely Received Clause in isolation and opined that it is unambiguous. Slip op. at 8. But we did not

consider the Casting Clause because we were not asked to. And we did not consider the Having Voted Clause. We agree with the Secretary that these three clauses must be construed together in the Code’s statutory scheme, and not in isolation. *Gavin*, 205 A.3d at 1221.

The Having Voted Clause specifically authorizes a mail-in voter to “*vote* by provisional ballot” so long as he “is not shown on the district register as having *voted*.” 25 P.S. § 3150.16(b)(2) (emphasis added). The Timely Received Clause uses a different term: the Board must not count the ballot if “the elector’s absentee ballot or mail-in ballot is timely *received*.” *Id.* § 3050(a.4)(5)(ii)(F) (emphasis added). Finally, and only if the Timely Received Clause is not triggered,¹⁵ the Casting Clause comes into play. It requires that, absent any other ground to not count the ballot under subsection (a.4)(5)(ii), the Board must count the provisional ballot “if . . . the individual did not *cast* any other ballot, including an absentee ballot, in the election.” *Id.* § 3050(a.4)(5)(i). Among other important issues, we are required to consider the meaning of *vote*, *voted*, *timely received*, *cast*, and *ballot*.¹⁶ The Election Code does not define these words for purposes of the provisions at issue here.¹⁷ Nor does the Statutory Construction Act supply default definitions. *See* 1 Pa.C.S. § 1991.

¹⁵ We agree with Appellees that the Casting Clause becomes controlling if, and only if, no part of subsection (a.4)(5)(ii)—including the Timely Received Clause—is triggered. This is obvious: the paragraph containing the Casting Clause applies by its terms “[e]xcept as provided in subclause (ii).” 25 P.S. § 3050(a.4)(5)(i).

¹⁶ There is no congruence across the language of these clauses. They use different verbs (sometimes used adjectivally as past participles). *Vote* or having *voted* is not *received* is not *cast*. All three sections refer to the noun *ballot* but none defines it. This lack of congruence is apparent here where Electors’ ballots were timely received, but they had not voted.

¹⁷ *Ballot* is the only one of these words defined anywhere in the Election Code. It is defined in 25 P.S. § 3031.1 as follows:

(Footnote continued on next page...)

In order to faithfully effectuate the language of the legislature, we look to the way these terms are used in the Code for context. A voter can *cast* a ballot merely by filling it out without ever submitting it. *See* 25 P.S. § 3050(a.4)(3) (“After the provisional ballot has been *cast*, the individual shall place it in a secrecy envelope.”). Other uses of *cast* obviously refer to delivery to a location, not filling out. *See id.* § 3050(a.4)(5)(i) (describing a voter “registered and entitled to vote at the election district where the ballot was *cast*”). Still other uses refer to a *vote*, rather than a ballot, being *cast*. *See id.* § 3050(a.4)(4)(vii) (“[T]he votes *cast* upon the challenged official provisional ballots shall be added to the other votes *cast* within the county.”). Thus, even in parts of the Code not at issue here, the word *cast* is used in different senses.

Perhaps the most important tension is between *voting* and the other terms. The Secretary convincingly argues that the Code’s provisional voting sections have been recently amended—in 2019 and 2020—to tether the statutory right to vote by provisional ballot to not just the receipt of a mail-in or absentee ballot, but also to whether that ballot was *voted*. *See* 25 P.S. §§ 3146.6(b)(1)-(2) (absentee ballots); 3150.16(b)(1)-(2) (mail-in ballots).¹⁸ Both of those provisions use *voted* not just with respect to a ballot, but also more generally—a person is not

“Ballot” means ballot cards or paper ballots upon which a voter registers or records his vote or the apparatus by which the voter registers his vote electronically and shall include any ballot envelope, paper or other material on which a vote is recorded for persons whose names do not appear on the ballot labels.

But that definition is not controlling because, by its terms, it applies only “as used in [that] article [, i.e., Article XI-A of the Code, 25 P.S. §§ 3031.1-3031.22],” which we are not construing here.

¹⁸ Although only mail-in ballots are at issue here, we, like the Secretary, believe that the parallel absentee ballot provisions are also useful in construing terms like *voted*, because they closely mirror the language of the mail-in ballot provisions and were amended at nearly the same time.

entitled to cast a provisional ballot at their polling place on Election Day if the district register shows they have already *voted*. That language is in tension with Appellees’ proffered construction of the Timely Received Clause. They claim all that is relevant is receipt of a ballot by the Board, regardless whether that ballot has been *voted* or whether the elector has already *voted*. And they go further, claiming that *ballot* in the Timely Received Clause refers not to a ballot but to the **declaration envelope** which, once received, prevents counting a provisional ballot, even if the received envelope is found to be empty. As the Secretary points out, there is an alternative plausible meaning—considering the Code as a whole, the Timely Received Clause is triggered once a ballot is received timely, but only if that ballot is and remains *valid* and *will be counted*, such that that elector has already *voted*. If the ballot is cancelled or invalid, it should not be considered to trigger the Timely Received Clause, because the elector has not already voted. Thus, when viewing the terms *voted*, *received*, and *cast* in the Code’s broader scheme, they are contextually ambiguous.

We can resort to dictionaries for plain meaning, but they give no clarity in this case. A *ballot* was historically “a small colored ball *placed in a container to register* a secret vote,” and since refers “by extension [to] a ticket, paper, etc., *so used*.”¹⁹ This sense, which bakes in the concept of *use* or *placing in*, differs from the way *ballot* is defined for Article XI-A of the Code (which is, again, not controlling here) which refers to paper on which a voter “records” or “registers” his vote, without reference to use. The ambiguity is highlighted by what *is* clear in the

¹⁹ *Ballot*, OXFORD ENGLISH DICTIONARY (OED), https://www.oed.com/dictionary/ballot_n1?tab=meaning_and_use#28858985 (last visited Aug. 31, 2024); *accord Ballot*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“An instrument, such as a paper or ball, *used for casting a vote*.” (emphasis added)).

Code’s language: regardless of what *ballot* means, it certainly does not mean an empty declaration envelope, as the Trial Court concluded and as Appellees argue. Though an envelope is not enough, it is not clear what is enough to be a mail-in or absentee *ballot*—must it be completed, or voted, or valid, or is a blank ballot sufficient? Dictionaries do not tell us.

The words *cast* and *voted* may be roughly synonymous. *Cast* means “[t]o deposit (a voting paper or ticket); to give (a vote).”²⁰ *Voted* as an adjective or participle means “[e]stablished or assigned by vote.”²¹ But the verb *vote* means “[t]o give or register a vote; to exercise the right of suffrage; to express a choice or preference by ballot or other approved means.”²² But which of these meanings applies in the Code is not clear. For a ballot to be *cast* may mean merely that it was “deposited,” but it may also entail “giv[ing] a vote,” which implies that the vote itself—not just the paper that records it—is validly cast. And for a ballot to be *voted* may entail not just completion or transmission, but that the elector has actually “exercise[d] the right of suffrage” through voting the ballot. Finally, *received* obviously means “to take into . . . possession (something offered or given by another)” or “to take delivery of (something) from another.”²³ But though that word

²⁰ *Cast*, OED (transitive verb sense I.1.f), https://www.oed.com/dictionary/cast_v?tab=meaning_and_use&tl=true#10038401 (last visited Aug. 31, 2024); see also *Cast*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“To formally deposit (a ballot) or signal one’s choice (in a vote).”).

²¹ *Voted*, OED (adjective sense 2), https://www.oed.com/dictionary/voted_adj?tab=meaning_and_use#15491584, (last visited Aug. 31, 2024).

²² *Vote*, OED (intransitive verb sense II.3.a) (emphasis added), https://www.oed.com/dictionary/vote_v?tab=meaning_and_use#15490698 (last visited Aug. 31, 2024); see also *Vote*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining the noun *vote* as “the expression of one’s preference . . . in . . . an election”).

²³ *Receive*, OED (transitive verb sense III.9.a), https://www.oed.com/dictionary/receive_v?tab=meaning_and_use#26542154 (last visited Aug. 31, 2024).

is clear, the meaning of the thing that is to be received—the *ballot*—is not, so the Timely Received Clause remains murky.

The Timely Received Clause, considered with its companion clauses, uses nonuniform and undefined terminology, the meaning of which is not plain in context. This—together with the competing interpretations offered by the parties and divergent decisions accompanied by opinion from at least three courts of common pleas²⁴—leads us to conclude that “the words of the [Code] are not explicit.” 1 Pa.C.S. § 1921(c).

B. Resolving the Election Code’s Ambiguity

Having determined the words of the Having Voted, Casting, and Timely Received Clauses are ambiguous, we are now tasked with resolving such ambiguity. In so doing, we are guided by the following principles.

Once ambiguity is found, we look beyond the words of the statute so that it can have a meaning, and thus have effect, as the General Assembly intended.²⁵ We faithfully resolve the ambiguity in favor of the legislature’s object, using the interpretive tools set forth in Section 1921(c) of the Statutory Construction Act. 1 Pa.C.S. § 1921(c). Section 1921(c) permits the court to ascertain the intention of the General Assembly by considering, *inter alia*, the object to be attained, and the consequences of a particular interpretation. *Id.* § 1921(c)(4), (6). Notably, when

²⁴ Compare Trial Court Opinion, with *Ctr. for Coalfield Justice v. Wash. Cnty. Bd. of Elections* (Wash. Cnty. Ct. Com. Pl. No. 2024-3953, filed Aug. 23, 2024), slip op. at 25-27 (holding that the Timely Received Clause is ambiguous and construing it in favor of counting provisional ballots); *Keohane*, slip op. at 5 (ordering provisional ballots under these same circumstances to be counted).

²⁵ Notably, we engage in this analysis only and precisely because we have concluded that the Code is ambiguous. *Cf. In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1082 (Pa. 2020) (Wecht, J., concurring and dissenting) (observing that we have “only one juridical presumption *when faced with unambiguous language*: that the legislature meant what it said” (emphasis added)).

resolving ambiguity in election cases, we must also consider the imperative to protect the elective franchise. *See Boockvar*, 238 A.3d at 360-61. Thus, we resolve any ambiguity in favor of protecting the franchise and to avoid discarding an elector's vote. *Boockvar*, 238 A.3d at 361; *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972). In that enterprise, “[w]ords and phrases which may be necessary to the proper interpretation of a statute and which do not conflict with its obvious purpose and intent, nor in any way affect its scope and operation, may be added in the construction thereof.” 1 Pa.C.S. § 1923; *id.* § 1928 (requiring statutes to be “liberally construed to effect their objects and to promote justice”).

Applying these tools, we first look to the object to be attained by the Election Code, which includes Act 77's addition of the Having Voted Clause, and amendments to the Casting and Timely Received Clauses. As observed by our Supreme Court in *Boockvar*, “the purpose and objective of the Election Code, which contains Act 77, is ‘to obtain freedom of choice, a fair election and an honest election return.’” *Boockvar*, 238 A.3d at 356 (quoting *Perles*, 213 A.2d at 783). This objective is advanced by ensuring that each qualified elector has the opportunity to vote **exactly once** in each primary or election. Not zero times, which would deprive an elector of the freedom of choice, and not twice, which would prevent an honest election return.

In 2019, the General Assembly amended the Code by passing Act 77, which established universal mail-in voting in the Commonwealth, the object of which is to make voting more convenient for qualified electors. In enacting 25 P.S. § 3150.16, the General Assembly included the Having Voted Clause. Despite its use of ambiguous terms as described above, the General Assembly clearly included the Having Voted Clause to give mail-in electors the opportunity to vote

provisionally so long as they are “not shown on the district register as having voted” by mail. Indeed, a mail-in elector can *only* vote provisionally if the district register so shows.²⁶ Appellees’ proffered construction of the Clauses at issue fails to make voting more convenient for qualified mail-in electors, the object of Act 77, and in actuality, renders it impossible for them to have voted. In other words, by adopting Appellees’ proffered construction, Electors wind up with exactly zero votes in the 2024 Primary. This falls short of the object the General Assembly sought to attain by enacting Act 77 and the Election Code as a whole. This construction disenfranchises Electors. Appellants’ and the Secretary’s proffered construction, however, comports with the objects of the Election Code, including Act 77, by permitting Electors to vote exactly once in the 2024 Primary Election. Their reading resolves the noted ambiguities reasonably in favor of protecting the franchise and avoids depriving Electors of their vote. *Boockvar*, 238 A.3d at 361.

When considering the consequences of the parties’ competing interpretations, 1 Pa.C.S. § 1921(c)(6), it becomes even more clear that Appellants’ reading achieves the General Assembly’s intention while Appellees’ reading does not. *See Boockvar*, 238 A.3d at 380 (citing 1 Pa.C.S. § 1922(1)) (“[W]e must in all instances assume the General Assembly does not intend a statute to be interpreted in a way that leads to an absurd or unreasonable result.”). Here, Electors were notified that their vote “would not count” in advance of the 2024 Primary. They appeared at their respective polling places on the day of the 2024 Primary and were permitted to cast a provisional ballot. Under Appellees’ construction, Electors’ provisional voting was an exercise in futility, as Electors’ provisional vote, under no

²⁶ While there is no testimony here regarding whether Electors were “shown on the district register as having voted,” we presume the County followed the Code and only permitted Electors to vote provisionally because the district register did not reflect that they had “voted.”

circumstances, would be counted. Appellees assert Electors are foreclosed from voting entirely because the Board timely received their declaration envelope. Under Appellees' construction, they had "already voted"—despite that their mail-in ballots will not be counted.

Other concerns about consequences were conceded by the Trial Court and borne out by Director McCurdy's testimony. *See supra* pp. 8-10.²⁷ Under Appellees' proffered construction, an elector could omit his mail-in ballot altogether but return the secrecy and declaration envelopes to the Board, and still be unable to vote provisionally. A commonsense reading of the Code, of course, would permit this mail-in elector to cast a provisional ballot because no "voted" ballot was timely received by the Board, and thus the voter cannot be marked as having "voted" on the district register. 25 P.S. §§ 3146.6(b)(1), 3150.16(b)(1). However, Appellees' position would result in the Board denying that elector's provisional ballot even though he never submitted a mail-in ballot. This would render the Having Voted Clause, which authorizes voting by provisional ballot, without any effect. What can be the effect of casting a provisional ballot that, as a matter of certain statutory operation, could never be counted?

That construction of the Code would not just create surplusage. It would also be unfair and misleading to the electorate because it would invite electors to cast dummy ballots that were nullities before they were ever cast. By Appellees' construction, the provisional ballot's status as not countable is locked in amber at the moment the Board receives a mail-in elector's declaration envelope, without regard to whether the enclosed ballot is later determined to be invalid, or not to be a ballot at all. Appellees' construction would reduce the statutory right to cast a

²⁷ Director McCurdy could not reconcile what constitutes a "ballot" in the above hypothetical. Hr'g Tr. at 63-64. This underscores the ambiguities in the Code.

provisional ballot as a failsafe for exercising the right to vote, just in case, to a meaningless exercise in paperwork. Such a provisional ballot would be “provisional” only euphemistically. In Appellees’ view, it really never had a chance.²⁸

Thankfully, we need not construe the Election Code to yield that result. Because its language is ambiguous on this point, we can and must construe the Code to give effect to the legislature’s intent. The General Assembly obviously *did* intend that mail-in and absentee voters can vote by provisional ballot if they have not already voted an earlier ballot, as 25 P.S. §§ 3146.6(b)(2) and 3150.16(b)(2) provide. This entails the proposition that the provisional ballots so authorized could be counted under some circumstances. The General Assembly *did not* intend for those authorized provisional ballots to be rendered meaningless, essentially void *ab initio*, whenever the elector has made an earlier but unsuccessful *attempt* to cast or vote a ballot. 1 Pa.C.S. § 1922(2) (the Court presumes the General Assembly intended the statute to be effective and certain).

We reject Appellees’ argument that reaching this result would effectively write a mandatory ballot-curing procedure into the Code—a proposition our Supreme Court considered and rejected in *Boockvar* when it held that “[b]oards

²⁸ Appellees position also rewards less-diligent mail-in electors while simultaneously punishing more-diligent ones. Electors in this case mailed their declaration envelopes to the Board well in advance of the 2024 Primary. Accepting Appellees’ construction would require us to hold that Electors forfeited their right to vote in the 2024 Primary as of the Board’s receipt of their declaration envelopes—no vote could ever be counted. Now consider a mail-in elector who mails his declaration envelope to the Board on the eve of the 2024 Primary Election. Realizing that the mail system may not deliver his ballot to the Board in time, that mail-in voter also appears at his polling place on the day of the 2024 Primary and casts a provisional ballot. If the mail-in elector’s ballot was indeed tardy, the Board would count his provisional ballot. The lackadaisical mail-in elector winds up with one vote; the diligent elector winds up with none.

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.” 238 A.3d at 374. The County has a ballot curing policy, but the Code independently authorizes electors to vote by provisional ballot, and, when properly construed, it requires the County to count the provisional ballots here. That does not depend on any ballot curing process, whether optional or mandatory. The provisional ballot is a separate ballot, not a cured initial ballot. The *Boockvar* Court only tangentially discussed provisional voting—the phrase appears only in a single sentence of that opinion. *See Boockvar*, 238 A.3d at 375 n.28 & accompanying text. To conclude, as the Trial Court did, that “any chance to . . . cast[] a provisional vote[] constitutes a ‘cure’” is to both overread *Boockvar* and to read the provisional voting sections out of the Code. Trial Court Op. at 27. This was legal error.

Finally, we agree with Appellants and the Secretary that *Allegheny County* does not compel a different result. That unreported panel decision was reached in a different matter and is thus not binding. More importantly, the Court there was not presented with developed arguments on the issue now before us. The Court did not cite or discuss the Casting Clause in 25 P.S. § 3050(a.4)(5)(i) or attempt to reconcile it with the Timely Received Clause in 25 P.S. § 3050(a.4)(5)(ii)(F) that the Court found unambiguous. Perhaps because the parties in that case did not argue that the Code’s provisions are ambiguous when taken together, the Court did not analyze that question, and we reach a conclusion here with the benefit of those arguments.²⁹

²⁹ Given our construction of the Code, we do not consider Appellants’ constitutional arguments.

V. CONCLUSION

For the foregoing reasons, we conclude that (1) Electors did not cast any other ballot within the meaning of 25 P.S. § 3050(a.4)(5)(i), and (2) 25 P.S. § 3050(a.4)(5)(ii)(F) does not prohibit the Board from counting Electors' provisional ballots. Accordingly, because the record does not indicate any other basis under subsection (a.4)(5)(ii) on which the Board could have declined to count the provisional ballots, we reverse the Trial Court's decision and order the Board to count Electors' provisional ballots.

/s/ Matthew S. Wolf

MATTHEW S. WOLF, Judge

Judge Dumas dissents.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Faith Genser and Frank Matis, : **CASES CONSOLIDATED**
Appellants :
 :
v. :
 :
Butler County Board of Elections, :
Republican National Committee, : Trial Ct. No. MSD-2024-40116
Republican Party of Pennsylvania, and :
The Pennsylvania Democratic Party : No. 1074 C.D. 2024

Faith Genser and Frank Matis, :
 :
v. :
 :
Butler County Board of Elections, :
Republican National Committee, :
Republican Party of Pennsylvania, and :
The Pennsylvania Democratic Party :
 :
Appeal of: The Pennsylvania :
Democratic Party : No. 1085 C.D. 2024

ORDER

AND NOW, this 5th day of September, 2024, the order of the Court of Common Pleas of Butler County is REVERSED. The Butler County Board of Elections is ORDERED to count the provisional ballots cast by Appellants Faith Genser and Frank Matis in the April 23, 2024 Primary Election.

/s/ Matthew S. Wolf

MATTHEW S. WOLF, Judge

EXHIBIT B

AUGUST 16, 2024

**OPINION BY JUDGE YEAGER IN
THE COURT OF COMMON PLEAS
OF BUTLER COUNTY,
PENNSYLVANIA**

**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. | : | |

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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-canvass⁷; 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

⁷See 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

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).

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,

Petitioners,

v.

BUTLER COUNTY BOARD OF
ELECTIONS,

Respondent,

v.

REPUBLICAN NATIONAL COMMITTEE,
REPUBLICAN PARTY OF
PENNSYLVANIA, AND THE
PENNSYLVANIA DEMOCRATIC PARTY,

Intervenors.

CIVIL DIVISION
MsD. No. 2024-40116

PROthonotary's
OFFICE-BUTLER CO.
ENTERED & FILED
22 AUG 16 P 2: 29

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

received
8/11/2019

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.

Attorney for the Plaintiff

PUBLIC INTEREST LAW CENTER
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SUITE 802
PHILADELPHIA, PA 19102



Kelly Ferrari
Butler County Prothonotary

Attorney for the Defendant

BUCHANAN, INGERSOLL & ROONEY, P.C.
UNION TRUST BUILDING
501 GRANT STREET SUITE 200
PITTSBURGH, PA 15219-1410

EXHIBIT C

MAY 7, 2024

HEARING TRANSCRIPT

HELD BEFORE THE HONORABLE

DR. S. MICHAEL YEAGER

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IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, PENNSYLVANIA

FAITH A. GENSER and : CIVIL DIVISION
FRANK P. MATIS, :
Petitioners, :
 :
vs. : Ms.D. No. 2024-40116
 :
BUTLER COUNTY BOARD OF :
ELECTIONS, :
Respondent, :
 :
vs. :
 :
REPUBLICAN NATIONAL COMMITTEE :
and REPUBLICAN PARTY of :
PENNSYLVANIA, :
Respondent/Intervenor, :
 :
vs. :
 :
PENNSYLVANIA DEMOCRATIC PARTY, :
Respondent/Intervenor. :

Petition for Review in the Nature of a
Statutory Appeal

Motion to Dismiss Petition for Review in
the Nature of a Statutory Appeal

Held Before The

HONORABLE DR. S. MICHAEL YEAGER

May 7, 2024

* * *

Nancy C. Natale, RPR
Official Court Reporter

APPEARANCES:

For Petitioners: Benjamin D. Geffen, Esquire
Kate Steiker-Ginzberg, Esquire
Richard T. Ting, Esquire

For Respondent: Kathleen Jones Goldman, Esquire

For County of Butler: Julie M. Graham, Esquire

For Respondent/Intervenor
Republican National Committee
and Republican Party of
Pennsylvania: Kathleen A. Gallagher, Esquire
Thomas W. King, III, Esquire
Brian M. Adrian, Esquire

For Respondent/Intervenor
The Pennsylvania Democratic
Party: David F. Russey, Esquire
Christian J. Meyers, Esquire

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1 P R O C E E D I N G S

2 May 7, 2024
3 Courtroom No. 3
4 Butler County, Pennsylvania

5 * * *

6 THE COURT: Good morning.

7 Mr. Geffen.

8 MR. GEFFEN: Yes, Your Honor. Good morning.

9 My name is Benjamin Geffen. I'm an attorney at the Public
10 Interest Law Center representing the Petitioners. I'm joined
11 at counsel table by Kate Steiker-Ginzberg from the American
12 Civil Liberties Union of Pennsylvania. Also in the Courtroom
13 is Rich Ting, also from the American Civil Liberties Union of
14 Pennsylvania.

15 THE COURT: Just for clarification purposes,
16 this is an Ms.D. number, not an A.D. number. So it's Ms.D.
17 No. 2024-40116. Thank you.

18 Would you like to proceed?

19 MR. GEFFEN: Yes, Your Honor. Thank you. If
20 it's all right with the Court, we would like to begin by
21 briefly describing the legal issues that are present in this
22 case, and then to proceed to call as witnesses the two
23 Petitioners in this case.

24 THE COURT: Very well.

25 MR. GEFFEN: Would Your Honor prefer I stand
here or come up?

1 THE COURT: Wherever you are most comfortable.

2 MR. GEFFEN: Okay. I will stay here.

3 THE COURT: You don't have to stand if you don't
4 want to.

5 MR. GEFFEN: So, Your Honor, this is a case
6 about naked ballots. That's a term that we're going to hear
7 a lot this morning, and that refers to a type of error that
8 voters sometimes make when sending in an absentee or mail-in
9 ballot, and I'm going to use the term mail ballot to refer
10 both to absentee and the newer type of optional mail ballots
11 that are available in Pennsylvania. Part of the process for
12 a voter to complete one is to fill out the ballot, then
13 insert that ballot into what's called a secrecy envelope, and
14 then insert that into an outer envelope and mail in that
15 entire packet or to return it in person to the Board of
16 Elections.

17 The Pennsylvania Supreme Court held four years ago that
18 when a voter fails to include the inner secrecy envelope, or
19 in other words sends in a naked ballot, that this ballot is
20 invalid and cannot be counted. So what to do in that
21 situation? And that is exactly what happened with the two
22 Petitioners in this case, Faith Genser and Frank Matis. They
23 both sent in -- requested a mail-in ballot, received it, sent
24 it back, and it was naked.

25 What to do in that situation depends on which county

1 you're in currently in Pennsylvania. There are two different
2 ways that a voter can cure that mistake in some counties. In
3 some counties the voter can cure the ballot by curing the
4 original mail-in ballot by going in person to the Board of
5 Elections and fixing the mistake there, and in so doing, the
6 voter will ensure that that original mail-in ballot that they
7 sent will be counted. The Pennsylvania Supreme Court held in
8 a case called Pennsylvania Democratic Party versus Boockvar
9 in 2020 that counties are not obligated to offer that type of
10 curing at the Board of Elections. But some counties do it,
11 and the Commonwealth Court has affirmed that counties retain
12 the option under the Election Code to offer that type of
13 curing.

14 The second way a voter can cure that mistake is by casting
15 what's called a provisional ballot. Provisional ballots have
16 been part of the law in Pennsylvania for some 20 years, and
17 it enables a voter who arrives at the polling place and who's
18 for one reason or another unable to complete a vote on the
19 regular balloting system there to fill out a ballot, again,
20 similar to a mail-in ballot, then sealed inside a couple of
21 envelopes, and there is a signature on the outer envelope.
22 And this is a fail-safe mechanism that the Election Code
23 provides so the voters in that situation have the chance to
24 make their selection on the day of the election, and the
25 Board of Elections can later adjudicate which provisional

1 ballots will be tabulated and which won't. And there are a
2 number of different situations and you may hear about some
3 today in which that process may be implicated.

4 And what you're going to hear from Ms. Genser and Mr.
5 Matis today is that they completed their -- they mailed in
6 their naked ballots. They learned prior to the Election Day
7 that there was a problem with their ballot, and so they went
8 in -- or with their mail-in ballot. And so they went into
9 their polling place on Election Day and completed a
10 provisional ballot.

11 The reason we're in Court today is that the Butler County
12 Board of Elections decided not to count their provisional
13 ballots. We do not challenge the decision of the Board not
14 to count their original naked mail-in ballots, but we do
15 challenge the decision not to count the provisional ballots.
16 This is an issue that implicates a section of the Election
17 Code that appears at 25 P.S. Section 3050, and I hope that
18 we'll have the chance to -- the parties will have the chance
19 to file briefing to address this issue, but if Your Honor
20 wants to hear legal argument today, I'm certainly happy to
21 get into the statutory interpretation issues.

22 Essentially it comes down to two subparts of Section 3050,
23 Section 3050(a.4) (5) (i) and Section 3050(a.4) (5) (ii) (F).

24 THE COURT: Give me those two again, please.

25 MR. GEFFEN: Sure. They're both in 25 P.S.

1 Section 3050. The first is (a.4) (5) (i). The second is
2 Section 3050 (a.4) (5) (ii) (F).

3 There has been a previous case that dealt with very
4 similar issues to this case, and that was in the Delaware
5 County Court of Common Pleas last year, a case called
6 Keohane, which is attached as Exhibit 3 to the petition for
7 review in this matter. In that case Judge Whelan considered
8 the interplay of these two statutory provisions. We believe
9 he reached the correct decision. We would urge the Court to
10 find likewise in this case.

11 Essentially, what it comes down to is the term cast, and
12 in the first of those two subparts of Section 3050, statute
13 says that a County Board of Elections shall count a
14 provisional ballot if the Board confirms that the individual
15 did not cast any other ballot including an absentee ballot in
16 the election. So the legal question here is whether Ms.
17 Genser and Mr. Matis cast a mail-in ballot when they sent in
18 a naked ballot that the Board had to reject. Our position is
19 they did not. Judge Whelan agreed with that legal
20 interpretation.

21 The second subpart that I mentioned in Section 3050 says
22 that a provisional ballot shall not be counted if the
23 elector's absentee ballot or mail-in ballot is timely
24 received by a County Board of Elections. This really
25 implicates the same question. When Ms. Genser and Mr. Matis

1 sent a naked ballot in -- and I think everyone will agree
2 that it did arrive on or before the day of the election, the
3 question is had they -- had the County Board of Elections
4 received a mail-in ballot from them when what they received
5 was a packet of papers that couldn't be tabulated as a
6 ballot. And, again, Judge Whelan said no, they had not, and
7 this makes sense for a few reasons. I think first is a
8 statutory construction rule that different parts of a statute
9 should be read harmoniously.

10 The way to harmonize these two parts of the Election Code
11 is to conclude that a provisional ballot provides a fail-safe
12 mechanism for a voter whose mail-in ballot is ineligible to
13 be counted, as is the case here. Other readings of it leave
14 the provisional ballot section as something of a formality
15 without any substance behind it. It lets the voter come in
16 and fill out a piece of paper and have no chance of actually
17 having that paper counted.

18 Part of the right to vote -- the Pennsylvania Supreme
19 Court recognized this over for over a century. Part of the
20 right to vote is the right to -- not only to get to cast a
21 ballot, but to have your ballot counted. And so this brings
22 me to the second issue, which is that there's a principle of
23 statutory interpretation repeatedly affirmed by the Supreme
24 Court and the Commonwealth Court that in election matters,
25 courts should liberally construe the Election Code with an

1 aim at saving the ballot.

2 So what that means in this instance is should there be any
3 ambiguity -- we don't believe there is, but should there be
4 any ambiguity in how to read these two parts of Section 3050,
5 they should be read in a way that saves the ballot. They
6 should be read in a way that lets Petitioners have their
7 votes counted. And really the way to do that is to read this
8 saying the Petitioners didn't cast a mail-in ballot, and the
9 Elections Board didn't receive a mail-in ballot when what
10 they sent in was a packet of papers -- it was essentially the
11 same as if they had forgotten to put the ballot in the
12 envelope. They sent in a packet of papers; it was ineligible
13 to be tabulated as any kind of vote.

14 Finally I would like to note that in this situation there
15 is no risk of double voting. I believe we're going to hear
16 testimony today from the Director of Elections in Butler
17 County who can explain in depth how the County adjudicates
18 provisional ballots because there are steps in place to make
19 sure that no voter has two different votes counted, and no
20 voter should have two different votes counted. If you voted
21 on the machine or you voted by mail or absentee ballot and
22 that vote has been recorded, your provisional ballot
23 shouldn't also be counted, and there are steps in place that
24 do a good job of preventing that from happening. And I don't
25 think there is going to be any dispute that in this instance

1 there was no risk that counting a provisional ballot for Ms.
2 Genser or for Mr. Matis would mean that either of them got to
3 have two votes counted at the April 23rd primary.

4 And finally I'd note that although our petition for review
5 is primarily a statutory construction argument, we also make
6 an Article 1, Section 5 argument. That's the section of the
7 Pennsylvania Constitution that guarantees that elections
8 shall remain free and equal. It's really the most basic
9 axiom of our system of government in Pennsylvania is that we
10 are a government of and by the people, and that elections --
11 that the right to vote is a fundamental prerogative of
12 citizenship that every eligible elector in Pennsylvania
13 enjoys.

14 And in this case the Board of Elections cannot demonstrate
15 a compelling reason, cannot demonstrate any reason not to
16 count my clients' ballots. And with that, I would like to
17 call as a witness Frank Matis who is one of the Petitioners
18 in this matter.

19 MR. KING: Excuse me, Your Honor.

20 THE COURT: Yes, Mr. King.

21 MR. KING: May it please the Court, I didn't
22 want to interrupt because counsel's argument is -- it
23 constitutes an opening, so to speak. But it seems to me that
24 the process -- this is a certification process that has --
25 that we're all involved in, and so it seems to me that the

1 certification process should be done differently. It seems
2 to me that the Board of Elections should go first and
3 establish the record of what happened, and then the challenge
4 both from the challengers and the motion to dismiss should be
5 heard.

6 But I think the burden is on the Board of Elections to
7 proceed to make the record of what actually happened before
8 you get to the testimony from the witnesses.

9 MR. GEFFEN: I mean we're the Petitioners in
10 this action, and typically we get to testify first. I'm
11 happy to proceed as Your Honor prefers. If Your Honor would
12 prefer to hear from the voters first, we can do that. If
13 Your Honor would prefer to hear first from the --

14 MR. KING: It's not the -- that's not the case.
15 The case is this is a certification procedure, and so in a
16 certification procedure the Board of Elections goes first and
17 sets up what happened, and then the challenges could follow.
18 But otherwise we're going -- it's going to be out of order.

19 MS. GOLDMAN: And, if I may, Your Honor --

20 THE COURT: You are?

21 MS. GOLDMAN: I'm Kathleen Jones Goldman. I'm
22 here on behalf of the Board of Elections.

23 So, to be frank, the Court's Order that has us all here
24 today was an Order for a Rule to Show Cause. So that's the
25 way we were anticipating we would proceed, and, again -- of

1 course, this is your Courtroom. So however you want to get
2 the information, we're more than happy to oblige. So we'll
3 take your direction, but it's the assumption that on an Order
4 for a Rule to Show Cause that the Respondent is the show
5 causee. So --

6 THE COURT: Go ahead.

7 MS. GOLDMAN: Your Honor, and I -- we can
8 address opening statements or we can save it for the end. I
9 mean the truth of -- the truth is, and I would just, you
10 know, give you a little bit of argument here, but I'm not
11 going to belabor --

12 THE COURT: Give me an opening.

13 MS. GOLDMAN: Pardon me?

14 THE COURT: Give me an opening.

15 MS. GOLDMAN: Okay.

16 So, Your Honor, look, this is a very narrow issue. I
17 think that there are certain policy arguments that counsel
18 for the Petitioners and the organizations that they are
19 affiliated with want to advance. They certainly tried to
20 advance those prior to the election with the Board directly.
21 And when they were not given the assurances that the -- for
22 want of a better word, the advice or directives that they
23 were trying to impose, we ended up in a lawsuit. And you'll
24 hear about all of that, but that's not really what this is
25 about.

1 This is only about this Court circumventing the decision
2 of the canvassing board that it made with respect to two of
3 three provisional ballots, and that's all this is.
4 Everything else is sort of noise around and contextual, you
5 know, issues that are part of a political argument, and there
6 may be a time and place for that argument, but, respectfully,
7 it's not here and it's not today.

8 So we are prepared to call Ms. McCurdy to come and speak
9 about what occurred during the canvass of the vote, and,
10 again, that's really all that you need to be considering
11 today.

12 THE COURT: By the way, on another matter, the
13 Motion to Dismiss Petition for Review and the Brief as filed
14 by the Republican Intervenors, is that your motion --

15 MS. GALLAGHER: Yes.

16 THE COURT: -- for leave to intervene did
17 not include -- the original did not include the Petition for
18 Review, the Brief in support.

19 MS. GALLAGHER: I'm sorry, sir; I didn't --

20 THE COURT: Your original -- your original
21 pleading in the Petition for Leave to Intervene did not,
22 according to the Prothonotary's office, when it went down --

23 MR. KING: It was filed yesterday. Our Petition
24 to Intervene was filed at the Prothonotary. Here's the
25 time-stamped copy.

1 THE COURT: I'm not questioning that. What
2 they're telling me down there is the Brief in Support of
3 Motion to Dismiss Petition for Review in the Nature of a
4 Statutory Appeal was not included in your original motion.

5 MR. KING: And the reason for that -- the reason
6 for that is, Your Honor, we needed to be -- we needed to be
7 allowed to intervene before we filed the original of it.

8 MS. GALLAGHER: And so it should -- well, I
9 believe what the Court is saying is it was not attached, and
10 it should have --

11 THE COURT: You referenced it in your --

12 MS. GALLAGHER: Correct. And it should have
13 been attached, Your Honor --

14 THE COURT: Yes.

15 MS. GALLAGHER: -- with the request for -- upon
16 the granting of that.

17 THE COURT: So do you have that document?

18 MR. KING: Yes.

19 MS. GALLAGHER: Yes, we do.

20 MR. ADRIAN: Kathy, do you want the originals?
21 Because we have --

22 THE COURT: I want the originals so it can be
23 filed.

24 MS. GOLDMAN: And, Your Honor, we have no
25 objection to you taking that matter up first, obviously --

1 THE COURT: Well, again, it's just a
2 housekeeping matter.

3 MS. GOLDMAN: That deals with the entirety of
4 the -- well, since it's dispositive of whether or not we
5 would go forward, I think it makes sense to take that up
6 first.

7 THE COURT: I just want -- again, they're saying
8 that it was not -- it's referenced in the Petition to
9 Intervene that these documents are attached to the original
10 and were not attached. So I want there to be --

11 MR. KING: Thank you very much.

12 MS. GOLDMAN: And I appreciate that, Your Honor,
13 but in -- just so it's clear for the record, we would prefer
14 that if there is a dispositive motion pending relative to the
15 entirety of the proceedings or the Court taking up the issue
16 of --

17 THE COURT: I'm not taking up the issue now,
18 ma'am. What I'm --

19 MS. GOLDMAN: Okay. I appreciate that.

20 THE COURT: I'm doing what I said I was doing.
21 It's a housekeeping matter. It referenced those documents in
22 the Petition for Leave to Intervene, and they were not
23 attached.

24 MS. GOLDMAN: Understood.

25 THE COURT: That's all.

1 MS. GOLDMAN: Okay.

2 MR. KING: Thank you. They're now a part of the
3 record.

4 THE COURT: They're now. They will be filed.

5 MR. KING: Thank you very much.

6 MS. GOLDMAN: Okay.

7 So, if I may, may I call Chantell McCurdy to the stand,
8 please.

9 THE COURT: If you would raise your right hand,
10 please.

11

* * *

12

CHANTELL MCCURDY,

13

Being first duly sworn according to

14

law by the Court, testified as

15

follows:

16

THE COURT: Thank you very much. You may have a
17 seat over there in the jury box, please.

18

Thank you.

19

MS. GOLDMAN: And, Your Honor, is it okay if I
20 stand here, or would you --

21

THE COURT: Sure. Wherever you would like.

22

MS. GOLDMAN: Thank you.

23

DIRECT EXAMINATION

24

BY MS. GOLDMAN:

25

Q Ms. McCurdy, could you introduce yourself to the

1 Court and advise the Court as to what your role is with
2 respect to the administration of elections in Butler County.

3 A Yes. My name is Chantell McCurdy; C-H-A-N-T-E-L-L,
4 McCurdy, M-C-C-U-R-D-Y. I am the Director of Elections for
5 the Butler County Bureau of Elections. And I guess my role
6 in this is to tally votes on Election Day in conjunction with
7 the computation or also known as the canvassing board that
8 meets on the Friday after election to evaluate any
9 provisional ballots, any write-ins, and any absentee or
10 mail-in ballots that there may be issues with.

11 Q And can you just provide by just some brief
12 background, about how many years have you served in this
13 capacity?

14 A I've been with the Bureau of Elections in some
15 capacity since 2016. I've only been the Director of
16 Elections since November of '22, I believe.

17 Q Okay. And you understand that we're here today
18 regarding the April 23rd Primary Election? Is that correct?

19 A That's correct.

20 Q And can you explain just sort of in a broad brush how
21 it is that the Board of Elections comes to certify the
22 results of that primary?

23 A Yes. The Board of Elections has -- each of them,
24 there are three members of the Board of Elections. In our
25 county those do constitute the Commissioners as well. They

1 have an appointed member for each of them that resides on the
2 Computation Board. Those individuals are the ones that
3 evaluate the totals of the election as well as the
4 aforementioned issues of provisional ballots, write-ins, and
5 any absentee and mail-in ballots that they may need to
6 evaluate for quality purposes to see whether or not they can
7 be counted.

8 They do that on the Friday after the election, and they
9 evaluate all said issues. They usually run two days,
10 possibly three. They're required to submit their information
11 the Tuesday after the election to the Department of State.

12 Q And how is the Computation Board selected?

13 A Each of the members of the Board of Elections,
14 they -- each individual one appoints an individual member on
15 their behalf to sit on this board. In this case these
16 individuals have been with us at least the last three years,
17 but I think possibly five.

18 Q And would you happen to know what the party breakdown
19 is for the individuals who serve on the Computation Board?

20 A I do.

21 Q And can you tell the Court what that is?

22 A We have two Democratic members and one Republican
23 member.

24 Q Okay. So by way of what -- your testimony then, am I
25 correct in understanding that the canvassing board or

1 Computation Board convened then on the 26th of April? Is
2 that correct?

3 A That's correct.

4 Q What time?

5 A 9:00 a.m.

6 Q Okay. And who all was present for that convening of
7 the Computation Board?

8 A The Prothonotary, Kelly Ferrari, for the County
9 swears in the individuals. So she was present.

10 Q Does she stay?

11 A No.

12 Q Okay.

13 A The three members of the Computation Board were
14 present, myself, the Solicitor for the County, Julie Graham,
15 and the Assistant Director for the Board of Elections, Jade
16 Bowers.

17 Q Okay. Was anyone else present?

18 A Yes. We had observers.

19 Q Okay. And do you recognize any of the observers in
20 this Courtroom today?

21 A We did have one observer there who is in the
22 Courtroom. Mr. Richard Ting from the ACLU.

23 Q Okay. So can you describe for the Court sort of the
24 menu of events or agenda of events in the morning of the
25 26th? How did things unfold?

1 A Certainly. Once all members had arrived and were
2 sworn in, the first order that they do is they elected a
3 president of the Computation Board, a secretary, and then a
4 de facto third member, and they signed papers to reflect
5 that. Then they decide the order that they want to evaluate
6 the items. They chose to evaluate all absentee and mail-in
7 ballots that may have issues first, followed by provisionals,
8 and then close out with write-ins.

9 Q Okay. So let's walk through that. So they take up
10 the absentee mail-in ballots first? Correct?

11 A Correct.

12 Q All right. Where were those ballots before the
13 Computation Board took up the canvassing of those?

14 A They're in a locked cabinet in our back room where we
15 evaluate and open ballots on Election Day.

16 Q Okay. So nobody had evaluated those ballots yet?
17 Correct?

18 A Correct.

19 Q And when is the first time that you would know what's
20 inside those envelopes containing -- that ostensibly
21 contained those ballots?

22 A We open the envelopes that need to be opened on that
23 Friday, the 26th, in front of the Computation Board.

24 Q Okay. And can you describe for the Court how those
25 ballots are opened?

1 A Yes. Letter openers. Manually.

2 Q Okay. And do you do it?

3 A I was a joint effort to show that one person wasn't
4 handling the ballots by themselves. The outside envelope was
5 opened by the Assistant Director, Jade Bowers. The internal
6 envelope was opened by myself in the presence of the board.

7 Q Okay. And that's the first time that the seal is
8 broken? Correct?

9 A Correct.

10 Q Okay. Now, do you have a recollection of how many of
11 those ballots that you opened on the 26th were missing a
12 secrecy envelope?

13 A 40.

14 THE COURT: I'm sorry?

15 THE WITNESS: 40.

16 THE COURT: 40?

17 THE WITNESS: Yes.

18 BY MS. GOLDMAN:

19 Q And just to be clear for the record, what is a
20 secrecy envelope?

21 A The secrecy envelope is the interior envelope
22 included in the mailing packet that goes out to the voter.
23 So we are required to mail out the exterior envelope, which
24 is the declaration envelope for the voters to mail back, and
25 an interior secrecy envelope, as well as instructions and a

1 ballot to every voter. The secrecy envelope in this election
2 was obviously missing for those 40.

3 Q Okay. And what color is the secrecy envelope?

4 A It's newly yellow.

5 Q Okay. And the outer envelope, you called it the
6 declaration?

7 A The declaration envelope that the voter signs and
8 dates --

9 Q Yes.

10 A -- it is white and newly for this election has a
11 purple border in Butler County.

12 Q Okay. And that envelope, that's the one where you
13 put the date and that type of information? Is that correct?

14 A Correct. It also contains a label containing the
15 voter's information.

16 Q Now, how is it that the Board of Elections determines
17 eligibility in order to vote?

18 A In response to those 40, or in general?

19 Q In general.

20 A Okay.

21 Q Yes.

22 A So an individual in Butler County must be a
23 registered voter in Butler County. Their voter registration
24 must be current, meaning not canceled, and it is printed in a
25 district register that goes out to the polling places on

1 Election Day, as well as an itemized kind of street list of
2 every eligible voter that has turned in paperwork. They must
3 verify in the state of Pennsylvania an address that can be
4 precinctable, as well as birthday, and either the last four
5 of their Social or a driver's license number in order to
6 verify they are who they say they are.

7 Q And, just to be clear, what does precinctable mean?

8 A It's part of the SURE system. It works in
9 cooperation with block ranges that we put in. We work with
10 our County's GIS department and mapping department. It
11 assigns a precinct to every voter so that they can vote in
12 that location on Election Day, or if they're issued an
13 absentee or mail-in ballot before, they get a ballot for that
14 particular location based on their residential address.

15 Q Okay. And so when somebody comes to the polls on
16 Election Day and checks in, I mean there's a book present?
17 Correct?

18 A Correct.

19 Q And so the eligibility to be able to vote on the
20 machine would then be reflected by the entry in the book? Is
21 that right?

22 A Correct.

23 Q Now, what do you recall about the -- how many
24 provisional ballots were accepted on the 26th?

25 A 74 were accepted.

1 Q Okay. And how many were rejected?

2 A 34 were rejected.

3 Q And do you have recollection of what the breakdown of
4 the reasons why the Computation Board rejected the 34?

5 A Yes. There were four different categories that those
6 34 ballots fell into.

7 Q Okay. What are they?

8 A The first, there were 17 that were the wrong party,
9 which is -- in a primary only that the voter shows up, the
10 poll book states they are registered one particular party, or
11 they're not in the poll book because they're not registered a
12 major affiliation, and in Pennsylvania it's a closed primary,
13 in which case they're directed to fill out a provisional so
14 they can vote on the ballot of the party of their choice, but
15 that's not how they're reflected in the book.

16 The second is there were 12 reflecting the curing policy.
17 There were three reflecting -- or, sorry; two reflecting
18 individuals that were not registered in Butler County. And
19 there were three that they had cast a provisional ballot when
20 they had already turned in an absentee or mail-in ballot that
21 lacked a secrecy envelope.

22 Q Okay. And so from the Board of Elections' viewpoint,
23 when did you know that there was no secrecy envelope with
24 respect to those three ballots?

25 A With certainty, when we opened them on that Friday in

1 front of the Computation Board.

2 Q Right. Because they weren't opened before?

3 A That's correct.

4 Q All right. Now, related to those 34 ballots that you
5 just indicated were rejected for the four reasons that you
6 just outlined, were there questions that were posed to you by
7 the Computation Board about, you know, what they should do
8 with respect to those ballots?

9 A No.

10 Q And just to put a finer point on it, were there
11 questions related to what you were supposed to do with
12 respect to those three ballots?

13 A No.

14 Q All right. When you -- focusing now just on those
15 three ballots that were lacking the secrecy envelope on the
16 original mail-in, were the names of the voters announced?

17 A No.

18 Q Okay. And why wouldn't they be?

19 A We don't disclose the names of any of our voters when
20 evaluating ballots for secrecy for the voter.

21 Q Okay. And so the Petitioners, Ms. Genser and Mr.
22 Matis, they weren't identified by name during this
23 proceeding? Correct?

24 A No.

25 Q Now, what did the Computation Board do -- what was

1 the breakdown in the decision of the Computation Board with
2 respect to those three ballots?

3 A It was unanimous in all three separate instances to
4 not count.

5 Q And was there any discussion related to -- to, you
6 know, lobbying each other to get to a unanimous vote or
7 anything like that?

8 A No. Their decisions were very brief. They just said
9 no.

10 Q So I'm going to back up a little bit. You were
11 contacted by a number of lawyers prior to the Primary
12 Election representing themselves to be affiliated with the
13 ACLU? Is that correct?

14 A Yes.

15 Q And what do you recall about the first time that you
16 were contacted prior to the election?

17 A The first conversation that myself and Solicitor
18 Julie Graham had was on the 19th, I believe, with Kate
19 Ginzberg of the ACLU.

20 Q Okay. And what do you recall she said to you during
21 this conversation?

22 A It was a brief conversation. It was centered around
23 not this particular issue, but around our designated agent
24 form that we have as part of our curing policy. Their
25 concern was that we were having the designated agent come to

1 the office three separate times. First to pick up the form,
2 take it back to the voter, have the voter sign it, bring it
3 back, then take the attestation to the voter, fill it out and
4 bring it back. They felt that was unnecessary.

5 We discussed it and obliged them by saying as long as we
6 could verify with the voter over the phone their information
7 so we could verify it against their voter record, as well as
8 who they were having come as their designated agent, I would
9 pre-type that information into the form to save the
10 individual a trip, and therefore allowing them to take the
11 designated agent and the attestation at once rather than in
12 two separate trips. So total they would come to the office
13 twice, once to pick up the forms and once to return, rather
14 than three.

15 Q Okay. So relative to that conversation with
16 Ms. Ginzberg, your concern was in making sure that the person
17 who cast the vote was actually the person who -- or the
18 person who was casting the vote was indeed the person who was
19 casting the vote, not the person delivering the vote?
20 Correct?

21 A Yeah. And making sure that they were aware that this
22 was being done, and they wanted this individual to do it on
23 their behalf. We wanted to make sure we spoke to the voter
24 first.

25 Q So you obliged Ms. Ginzberg's request in that

1 regard?

2 A Yes.

3 Q Okay. Did she raise any other concerns or agendas
4 with you at that time with respect to the operation of the
5 election for the primary?

6 A No.

7 Q Okay. When was the next time that you had
8 communication with Ms. Ginzberg or any of her colleagues?

9 A The -- I guess we received an email -- and I say we,
10 myself and Solicitor Julie Graham, received an email after
11 hours on April 24th. Sometime around 5:30 is when I believe
12 it came in to me, which prompted us -- we had a phone call
13 with Miss Ginzberg, as well as -- I believe his name --
14 apologies if it's mispronounced -- Wit Walczak of the ACLU.
15 We had a phone call with them on the 25th.

16 Q Okay. And so you got a communication on the 24th in
17 an email. What -- did that email contain anything?

18 A It contained an attachment that I deferred to the
19 Solicitor; I did not read.

20 Q Okay. Was it a letter that was copied to you?

21 A It was, yes. That was actually how I got it. My
22 email said, apologies for sending it twice. I realize I
23 didn't attach me the first time.

24 Q Okay.

25 A And that was from Mr. Walczak. I guess the first

1 time he had just emailed Miss Graham and felt the need to
2 follow it up to make sure I was cc'd on it as well.

3 Q Okay. And so you received it -- received this on the
4 24th, and then you obliged to have a phone call on the 25th?
5 Is that correct? Regarding the subject matter of the letter?

6 A Correct.

7 Q Okay. And so what occurred during that conversation
8 on the 25th?

9 A It was a phone conversation in Ms. Graham's office.
10 We went over -- they had some concerns about provisional
11 ballots. They had asked specifically whether or not we were
12 going to count provisionals for individuals whose ballots had
13 turned into the office not containing a secrecy envelope.

14 I believe Ms. Graham took the lead in the conversation
15 with just interjections from me when necessary. But it was
16 relayed back to them that the Computation Board evaluates all
17 of those, that they do it on Friday the 26th, but that
18 historically any ballot that did not contain a secrecy
19 envelope was not counted.

20 Q So were they trying to direct, I guess, you to direct
21 the Computation Board as to how they were to take up the
22 canvass of the vote on the 26th?

23 A They asked specifically whether or not we had -- and
24 I forget the exact wording, but it was something along the
25 lines of not quite the authority, but whether we could or

1 could not do -- whether there was an option of whether we
2 could do it. And that's when Ms. Graham told them the
3 Computation Board does it on Friday.

4 Q Okay. And is it the Board of Elections' pattern and
5 practice to defer to the Computation Board with respect to
6 its decision?

7 A Yes.

8 Q And that's been your experience since you've been
9 involved with the Bureau of Elections since 2016? Is that
10 correct?

11 A Yes.

12 Q So the Board of Elections doesn't tell the canvassing
13 board, when you get a vote that looks like X, you're supposed
14 to do Y with that vote? Correct?

15 A Absolutely not.

16 Q In your tenure have you ever known the Board of
17 Elections to circumvent the discretion of the canvassing
18 board?

19 A No. And I guess for clarification they are not
20 present. The Board of Elections is not even present during
21 the Computation Board. They are not involved in any of the
22 evaluation, and the Computation Board signs off on it, not
23 the Board. So they I guess are not involved in any way in
24 that. They defer that entirely to the Computation Board.

25 Q Thank you. I appreciate that.

1 Now, you were present in the Courtroom when Mr. Geffen
2 gave his opening argument? Correct?

3 A Yes.

4 Q And you understood that he referenced both Ms. Genser
5 and Mr. Matis who are the Petitioners that we're all here
6 today about?

7 A Yes.

8 Q And we've discussed that their names did not come up
9 during the canvassing of the vote? Correct?

10 A That's correct.

11 Q Now, did their names come up during this conversation
12 that you had with Ms. Ginzberg and Mr. Walczak?

13 A I do not believe so. No.

14 Q Okay. Now, what information is sent to -- prior to
15 the primary, or prior to the 23rd, April 23rd, what
16 information was sent to the Secretary of the Commonwealth
17 regarding ballots that had been received?

18 A Okay. When we receive a ballot back in the office,
19 we are to as quickly as possible in order to timely release
20 the information to the Department of State record those
21 ballots in. What I mean by record is I had mentioned earlier
22 on the declaration envelope there is a label. That label
23 contains a barcode that is uniquely identifiable to an
24 individual voter and their assigned voter ID number once they
25 are in the district register as a registered voter in Butler

1 County.

2 We scan those in, and the way we scan them in determines
3 how it's relayed to the Department of State. So the standard
4 response for a ballot before it's returned is, pending not
5 yet returned. When we record it in as received, it is,
6 record ballot returned.

7 Q Okay. And that's referencing the SURE system that
8 you heard Mr. Geffen talking about?

9 A That's correct.

10 Q Correct? All right.

11 Now, how does -- how does that happen? What is sort of
12 the magic of how that information is collated? We discussed
13 earlier that these ballots haven't been opened. You know --

14 A Correct.

15 Q How is any of the information disseminated?

16 A So I guess first it relates to how the ballots are
17 recorded in.

18 Q Okay.

19 A In which case the Butler County office has a machine
20 called -- it's an Agilis Falcon, and all of the ballots that
21 come in through the mail are placed in this machine. It
22 sorts them. It also evaluates the dimensions of the
23 envelope, specifically with length, height, to make sure that
24 this is in fact an official election envelope with the
25 required materials inside. As long as it does, it goes

1 through, sorts by precinct. That information is exported
2 onto a USB that I then import myself on my computer into the
3 SURE system as record ballot returned.

4 If there are any ballots that it finds any sort of an
5 issue with in that process, meaning it isn't thick enough,
6 it's too thick, one of those two, or we've gotten envelopes
7 for other counties; theirs are slightly longer or taller, it
8 also ends up in the first bin. That bin then has to be
9 evaluated by our office to record in individually.

10 When we record them in individually, we record them in to
11 the best of our ability as to what we think is possibly wrong
12 with the issue. If it's another county's ballot, we do our
13 best to get that ballot to the county. If it is our ballot,
14 we record it in given the best possible response from the
15 Department of State options. When we scan in the barcode,
16 there is a list of options that it gives us that we're able
17 to choose from, and we choose the most likely based on the
18 scenario.

19 Q But you're guessing? Is that a fair --

20 A Yes.

21 Q -- way to summarize what you're doing is you're
22 guessing what's wrong with it?

23 A Correct.

24 Q And, you know, you could open up the envelope on the
25 day of the canvass and realize that somebody has put

1 something that has nothing to do with the election in the
2 envelope?

3 A Yes. And that did happen.

4 Q And can you explain to the Court, you know, that
5 circumstance, just by way of illustration?

6 A Yes. So the machine evaluated an envelope as
7 correct. It recorded it in as ballot returned. On Election
8 Day during the -- in the morning when we're starting to open
9 our envelopes, we have envelope openers that do it. They
10 open the outside envelope, separate the inner secrecy
11 envelope, all to preserve voter secrecy. That's very
12 paramount for us.

13 Then they open the internal envelopes. The internal
14 secrecy envelopes for this individual, the one envelope we
15 opened, and it contained a copy of medical records for a
16 person. But the way that it was folded in such, it matched
17 the width dimensions of what the machine thought would be a
18 ballot.

19 Q So you can't know then with any degree of certainty
20 whether or not somebody has included the secrecy envelope or
21 included their medical records or their kid's report card
22 until your Computation Board has assembled to open those
23 envelopes? Is that a fair summary?

24 A That's correct. We open them all individually in
25 front of them. And then we open the interior envelope like a

1 book basically so that they're the first ones to see whether
2 or not there is an interior envelope inside. I guess I
3 misspoke. The envelope itself is opened like a book so that
4 the Computation Board can evaluate what is inside. If it's
5 lacking a secrecy envelope, it's lacking a ballot, whatever
6 the instance may be.

7 MS. GOLDMAN: That's all I have. Thank you.

8 THE COURT: Who would like to do cross first?

9 MS. GALLAGHER: Yes, sir.

10 THE COURT: You are, ma'am?

11 MS. GALLAGHER: Excuse me. Kathy Gallagher.

12 THE COURT: You are?

13 MS. GALLAGHER: Kathleen Gallagher, counsel for
14 the Republican Party of Pennsylvania and the Republican
15 National Committee.

16 And may I stand here, Your Honor, so I can --

17 THE COURT: Wherever you are most comfortable.

18 MS. GALLAGHER: Thank you.

19 BY MS. GALLAGHER:

20 Q Hi, Miss McCurdy. My name is Kathleen Gallagher, and
21 I represent the Republican National Committee and the
22 Republican Party of Pennsylvania. I have some questions I
23 wanted to walk you through to get a better understanding not
24 only of what happened that day, but the procedures which the
25 Board is currently following.

1 I believe, if I heard your testimony correctly, you've
2 been employed with the Board of Elections since 2016 and
3 director since 2022? Is that correct?

4 A Yes.

5 Q Okay. So it's fair to say then that over those eight
6 years, you've -- you were part of the transition from only
7 absentee by -- you know, excused absentee balloting to
8 mail-in non-excused balloting? Is that correct?

9 A Yes.

10 Q Okay. Did you become familiar with the provisions of
11 Election Code with respect to then the processing and the
12 entire election process with respect to mail-in ballots, to
13 the best of your ability?

14 A As much as one can without being a lawyer, yes.

15 Q Okay. And I'm not sure how well lawyers can do it
16 either sometimes. If we can just walk through a ballot, you
17 know, when I was a kid in school in the dark ages, it was how
18 Mr. Bill becomes -- you know, goes to the Hill and becomes a
19 bill.

20 Let's talk about how a ballot goes from a request, a
21 mail-in ballot, to being counted or not or disposed of.
22 Okay? So could you tell us about that process, please.

23 A Sure. So all individuals in order to receive a
24 ballot in the state of Pennsylvania must apply to do so.
25 Whether it's on an absentee application or a mail-in ballot

1 application. The differences between the two applications
2 are very minimal. But they must provide certain information
3 that when it's received in our office either via mail,
4 electronic because they do come through electronically from
5 the Department of State's website, or in person, we then have
6 to input that information into the SURE system and match it
7 to a voter record.

8 Q Okay. Could we stop right there?

9 A Yes.

10 Q Could you, for the record, tell us what is the SURE
11 system?

12 A The SURE system is the, quite honestly, antiquated
13 computer system that the Department of State has been using
14 statewide as kind of a very large digital version of a
15 district register for all registered voter across all 67
16 counties in the state of Pennsylvania.

17 Q And how is the SURE system used with respect to
18 mail-in voting, or was that what you're going to get to?
19 Okay.

20 A So, one, the application must be matched to an
21 active -- and by active I guess I should clarify. I mean
22 registered because there is a difference there. To a
23 registered voter in our county in order to be processed. We
24 have to scan it into the record, process it.

25 By processing, it prints a label. That label contains a

1 barcode with that voter's unique identifying information. So
2 their voter ID number. In a primary it also prints their
3 party, their name, and their registered voting address. That
4 information goes on that label and must be affixed to a
5 declaration envelope for the voter.

6 We then have to put a secrecy envelope, instructions which
7 were newly worded to be mandated by the Department of State
8 in a specific way on specific paper, and a ballot in the
9 envelope to mail out to a voter or to give them at the
10 counter if they come in.

11 Q Okay. Let's stop right there. So the ballot goes
12 out. So you mark in the SURE system first the ballot is
13 requested?

14 A Correct.

15 Q Okay. The ballot is requested. The next part, you
16 send it out, and it's marked, ballot sent?

17 A Correct.

18 Q Okay. And the impact of that marking, ballot sent,
19 if I may, has two applications, right? Sometimes is it fair
20 to say that people request a mail-in ballot and don't vote
21 mail-in ballot? They want to go to the poll and vote?

22 A Oh, absolutely.

23 Q Okay. So let's talk about then, does -- that takes
24 us into provisional ballots a little bit. I get my ballot.
25 I think I'm going to be -- I applied for a ballot. I get it.

1 I think I may be out of town. I don't know yet. Election
2 Day comes. Because I have up until 8:00 p.m. on the date of
3 election to get that ballot to you, correct, if I'm a Butler
4 County voter?

5 A That's correct.

6 Q Okay. Five to eight, 7:59, I walk in, you have to
7 accept that ballot? Correct?

8 A Absolutely.

9 Q Okay. I'll come back to that later.

10 But I decide I'm going to go to vote at the polls. I walk
11 into the polls, and they look up my number and they say,
12 well, wait a minute; you received an absentee ballot. Do I
13 get to vote there?

14 A That depends on two things. Well, I guess the short
15 answer is yes, but how you get to vote depends on two things.

16 One, if you have your ballot and the balloting materials
17 is what it's called. So the ballot itself and the
18 declaration envelope with you, you can then sign what's
19 called a surrender form, surrender it. The judge of
20 elections also signs that surrender form, stating you no
21 longer wish to have this active absentee or mail-in ballot.
22 You wish to surrender it. And then you may sign the poll
23 book and vote on a ballot at the precinct and put that ballot
24 through the scanner.

25 Q Okay. Let's stop right there. Is the SURE system

1 marked as to what happens to that surrendered ballot?

2 A You mean after --

3 Q After the election?

4 A No.

5 Q But it's surrendered. It's now in the possession of
6 the poll worker, and I can go vote on the machine?

7 A Correct. They have an envelope for surrendered
8 ballots that they're required to keep them in.

9 Q What if I don't have my ballot with me?

10 A If you do not have your ballot and your declaration
11 envelope -- and that part is very important because you must
12 have both. If you do not have both, then they will direct
13 you that you must complete a provisional ballot and submit it
14 in a provisional envelope.

15 Q Let's talk about a provisional ballot. Is there
16 anything that I would as the voter have to attest to in order
17 to cast that ballot, the provisional ballot?

18 A Yes.

19 Q And what is that?

20 A You have to attest that you are eligible to vote in
21 Butler County. So you're a registered voter. And that you
22 have not submitted a ballot in any other way.

23 Q I haven't cast another ballot.

24 A Yes, the exact wording is cast.

25 Q Correct. So if I had already sent a ballot in, all

1 right, and that ballot lacked a secrecy envelope, all right,
2 and I go in to sign -- I want to vote provisionally. The
3 issue then is, is my ballot cast? Is that what -- would you
4 agree?

5 MR. GEFFEN: Objection. This calls for a legal
6 conclusion.

7 MS. GALLAGHER: No, I don't think it does. I
8 think it --

9 Your Honor, if I may, I apologize. I didn't mean to
10 answer Mr. Geffen. I believe I'm trying to have the witness
11 establish for the Court a record of what actually happened
12 with respect to the casting of a ballot and what the voter
13 must attest to.

14 THE COURT: Go ahead.

15 A So in the nature of what happens at the polling
16 place, it has no bearing. Any voter is always welcome to
17 fill out a provisional ballot at a polling place. We never
18 want to deny them that opportunity. After those provisional
19 ballots come back to our office, we are required to look each
20 of those voters up in the SURE system and to look to see if a
21 ballot was returned for them if that's the reason they're
22 voting provisionally.

23 Q In other words, you don't get two bites at the apple?
24 Correct?

25 A Correct. Yes. If they had already turned in a

1 ballot, then it is ineligible.

2 Q What if someone has voted provisionally and has also
3 sent in a mail-in ballot? Which one do you choose?

4 A The standard practice of the Computation Board has
5 been they always go with the first cast ballot.

6 Q Okay. So that just goes if I'm going to the polls.
7 Now, my ballot is sent in, and it's received by your office.
8 I go -- you know, the voter decided to vote. You receive it.
9 And I believe there was some testimony to Ms. Goldman as to
10 what that process is that you entered the -- entered into the
11 SURE system. Has the process with respect to the SURE system
12 changed and the information requested in the SURE system
13 changed since you first were hired at the Board of Elections?

14 A Oh, yes, many times.

15 Q Okay. Could you walk us through that, please?

16 A Well, most recently, I think, because each change it
17 really kind of goes over the ones previous. So the most
18 recent change was enacted by the Department of State this
19 year. They released --

20 Q Do you recall when?

21 A Yes. Actually I looked it up. The release notes for
22 that are March 11 of this year was the official distribution
23 date.

24 Q And what was distributed?

25 A It was distributed to the office, the new options for

1 recording in an absentee or mail-in ballot.

2 Q What -- that came from the Department of State? From
3 the Secretary of the Commonwealth?

4 A Correct.

5 Q Were these instructions?

6 A Yes.

7 Q Are you familiar with the term guidance?

8 A Yes.

9 Q Okay. Was this a guidance, or was it a directive?

10 A Hold on one second because I do believe I brought it
11 with me. I did not bring it with me. I apologize. It is --

12 MS. GALLAGHER: If I may, for the record, Your
13 Honor, we would ask because I have not seen the document that
14 the witness is talking about, if that could be produced to
15 counsel for these purposes? It is referenced throughout the
16 petition, or referenced part to the document. If that could
17 be ordered to be produced?

18 THE COURT: Very well.

19 MS. GALLAGHER: It will be produced?

20 THE COURT: Yes.

21 MS. GALLAGHER: Thank you.

22 MR. GEFFEN: Your Honor, if the reference, I
23 believe, is to a document, which I can hold up for the
24 witness to see, this is --

25 THE WITNESS: That's not it.

1 MR. GEFFEN: Not this?

2 THE WITNESS: No.

3 MR. GEFFEN: Okay.

4 A That is the provisional guidance that is available on
5 the Department of State's website. I'm talking about
6 internal communication from the Department of State to
7 election officials. It is -- it includes screenshots of the
8 SURE system, which is why it is not available on the
9 Department of State's website. And I do not have a copy with
10 me. I apologize. But it is step-by-step instructions of how
11 to record in a ballot regarding each of these individual new
12 options.

13 So the standard, as I had already mentioned, each ballot
14 before it gets back to the office is labeled as, pending not
15 yet returned. The standard option when it does come in is,
16 record ballot returned. But there were also other options
17 that were there. In addition to that they added new options
18 in that March 11 deployment.

19 Q And what was added?

20 A Pending options.

21 Q Okay. Was anything else added?

22 A The language was changed in a variety of the
23 responses. So the responses weren't newly added to the other
24 ones, but the way you were supposed to record them in in
25 regards to your county was.

1 Q Okay. Could you explain, please?

2 A Yes. So the new pending responses were to be used in
3 the event that your county has a curing policy.

4 The email goes out to the voter. If there's an email
5 address attached to their application, that email goes
6 directly from the Department of State, and it tells them kind
7 of a status update on their ballot. So if it is record
8 ballot returned, it tells them that.

9 Then there is a following email. If anything is
10 determined by the Bureau of Elections to be an issue --
11 lacking signature, lacking date, no secrecy envelope -- a
12 followup email communication is sent to the voter. Depending
13 on how we record it in depends on the language in the email
14 that's sent to the voter.

15 Q And that's automatic?

16 A Correct.

17 Q Okay. And if I heard you correctly, is there a
18 difference -- are you -- is the County asked, do you have a
19 curing policy or do you not have a curing policy? Is that --

20 A They are not asked. Instead the Department -- well,
21 because the Department of State's stance on this has been to
22 this point it is up to each county individually as to whether
23 they have one and how they enact it with their county
24 solicitor.

25 Q Now, I believe you said, if I can just ask a

1 question -- I didn't mean to interrupt -- up to this point.

2 A Correct.

3 Q Has something changed?

4 A Oh, no, but it always does.

5 Q So it was your understanding, I believe, from what
6 you just said, that it was the Department of State's position
7 that it's up to the county to determine whether or not they
8 wanted to have a curing policy?

9 A Correct.

10 Q Okay. And that information would then be reflected
11 in what the voter receives? Is that correct?

12 A Yes. So it prompts an automatic email to the voter,
13 if there is an email in the application, but it also does
14 another thing. It gives that information to the Department
15 of State so it updates their ballot tracker website for the
16 voter to check their information, as well as that information
17 goes into the state database, which is also -- there is a new
18 function this election that individuals can request that
19 information to see the status of ballots in a particular
20 county or statewide, I guess.

21 Q Okay. So in the case of the Petitioners here, how
22 would their information that you had that date, all right,
23 with the process you've described about the machine that was
24 used been entered?

25 A So they have to be hand-recorded in since the machine

1 recognizes that there may be an issue with the dimensions of
2 the envelope. So they're hand-recorded in with our best
3 options. For these two individuals it was, cancel, no
4 secrecy envelope.

5 Q And, again, I believe, as Miss Goldman asked you,
6 that was on the best information of the machine?

7 A Correct.

8 Q That the machine took. And then what happens?

9 A In this instance, the voters get an automatic email
10 from the Department of State, in which case that email
11 contains several information. The first tells them your --
12 the county has identified that your ballot is lacking a
13 secrecy envelope. You can contact your county to get a
14 replacement ballot. If you cannot or if it's after the
15 deadline, you can go to your polling place and vote
16 provisionally.

17 Q Let's stop right there. Is that a curing process
18 that the Secretary of State is offering to a voter, to these
19 voters, in your view?

20 A It is --

21 MR. GEFFEN: Objection; this calls for a legal
22 conclusion.

23 THE COURT: Sustained.

24 Q Could you tell us, please, what -- did Butler
25 County's curing policy for 2024 allow curing for secrecy

1 ballots?

2 A No.

3 Q Okay. So Butler County was not offering the
4 Petitioners the opportunity to come in and cast a provisional
5 ballot in the event they didn't have -- their secrecy
6 envelope was missing. But, as I understand what you're
7 saying now, the Secretary of State website automatically
8 advised these folks that they could vote by provisional
9 ballot?

10 A That is correct.

11 Q Okay. But it's also your understanding that up
12 until -- or now that it was up to the Board to decide whether
13 or not it wanted to have a curing policy?

14 A Correct.

15 Q Okay. Let's talk about your curing policy a little
16 bit.

17 MS. GALLAGHER: Or strike that. Let me go back.

18 Q When did you know for sure -- I believe, just to be
19 sure, Miss Goldman asked you, and I believe I heard you say
20 you didn't know that there was actually a secrecy envelope in
21 the Petitioners' envelopes or not until when?

22 A When we opened the envelopes on the 26th of April.

23 Q And when are those envelopes first permitted to be
24 opened?

25 A On Election Day.

1 Q Okay. And is that during the pre-canvass?

2 A Yes.

3 Q So until the pre-canvass anything with respect to a
4 secrecy envelope is the machine's best guess?

5 A Yes.

6 Q Can any information that's opened during the
7 pre-canvass, whether or not there's a secrecy envelope or
8 not, is that information given out?

9 A No.

10 Q And is that because the Board is prohibited from
11 giving out results of the pre-canvass?

12 A Correct.

13 Q The Board did have a policy for this year. Could you
14 tell us what the Board was allowing to be cured?

15 A Sure. The Board of Elections enacted a curing
16 policy. They have a curing policy currently that allows
17 specific language for a deficiency on the declaration
18 envelope to be corrected, or in this case cured, to use that
19 language, via an attestation in the office, or by voting via
20 provisional ballot acting as the attestation at the polling
21 place.

22 Q And if I can just ask a couple -- so let's talk about
23 where those deficiencies would be found. Is that on the
24 ballot, the actual envelope that gets sent to the Board?
25 Correct?

1 A Yes. That is on the white declaration envelope with
2 the purple border.

3 Q So from the face or the back actually of the envelope
4 itself, you can see that ballot is deficient?

5 A Yes. We can absolute with certainty see that it is
6 lacking a signature or part of a date or an incorrect date.

7 Q And you would agree then -- and that information then
8 gets entered into the SURE system, and a notice is given to
9 the voter through the SURE system, correct, that their ballot
10 was lacking?

11 A Correct. Via one of the new issues of pending, an
12 email for those when it's sent to the voter, it's pending no
13 signature or pending no date, the voter gets an email stating
14 that their county has a curing policy that allows them to
15 correct the issue; to contact their Bureau of Elections or go
16 to their polling place on Election Day and cast a provisional
17 ballot.

18 Q Is it -- but there's a distinct difference then
19 between allowing a cure on what you can see on the outside of
20 the ballot and allowing a cure on what you can only find out
21 once the ballot is opened? Would you agree?

22 A Yes.

23 Q Is it fair to say that Butler County's curing policy
24 with respect to secrecy envelopes was predicated upon
25 compliance with the pre-canvass provisions that those ballots

1 can only be opened during the course -- before the
2 pre-canvass? Not until the pre-canvass. Excuse me.

3 A I'm sorry; could you repeat that?

4 Q Yes, I confused myself. I apologize.

5 A Okay.

6 Q Is it fair to say that Butler County's curing policy
7 with respect to secrecy ballots is rooted in the fact or the
8 Election Code provision that those ballots cannot be opened
9 until the pre-canvass, which starts on Election Day?

10 MR. GEFFEN: Objection; foundation. I don't
11 know that -- well, objection; foundation.

12 MS. GALLAGHER: I believe she testified, Your
13 Honor, that as the elections official she has had to
14 familiarize herself and become aware of the provisions of the
15 Election Code.

16 MR. GEFFEN: I'm concerned that this is a
17 question about the reason for the existence of a policy here
18 that she didn't create.

19 THE COURT: Yes.

20 MS. GALLAGHER: I can, Judge, try to establish
21 then.

22 BY MS. GALLAGHER:

23 Q Were you involved in the creation of the curing
24 policy?

25 A I was not.

1 Q Do you understand, though, the Election Code
2 provision with respect to, I believe you stated, when a
3 secrecy ballot can be opened?

4 A Oh, yes.

5 Q But for the Secretary's website and the changes to
6 the SURE system, would any -- would the Petitioners have
7 received any information from the County Board of Elections
8 that they could come in and cast a provisional ballot with
9 respect to their lack of secrecy envelope?

10 A If they had not gotten the email from the Department
11 of State, no.

12 MS. GALLAGHER: Just one second, Your Honor.

13 BY MS. GALLAGHER:

14 Q Could you tell us, please -- I asked you earlier the
15 difference between -- well, let's talk about the Secretary's
16 guidances. Do they change?

17 A Often.

18 Q Okay. Is it true that in 2020 at one point the
19 Secretary -- in fact, it was Deputy Secretary Jonathan Marks
20 issued a guidance that said you don't have to have a secrecy
21 envelope? Do you recall that?

22 A Correct.

23 Q Okay. And that was when -- that was then changed?
24 Is that correct?

25 A Yes.

1 Q Okay. Do you recall when that was changed?

2 A At the very least, it would have been after the
3 Supreme Court decision in 2020 that said that it was required
4 per election law.

5 Q Okay. And was there previously a guidance that said
6 ballots don't have to have a date on them, on the --

7 A Yes.

8 Q -- outer -- okay. And was that changed?

9 A Yes.

10 Q Could you tell us what a guidance is, if you know?

11 A The best of my understanding, a guidance in this
12 instance is a proposed order and rule from the Department of
13 State given to election officials. So that would be boards
14 of elections, directors, bureau of elections. And if it is a
15 public guidance, it's posted on their website for the voters
16 regarding a particular topic and how it should be handled.

17 Q Okay. Are you aware of a recent voter guidance that
18 says do I get -- questions about curing secrecy ballots and
19 the Secretary's guidance on that point? No, you don't get to
20 cure your secrecy ballot; just fill it out correctly and send
21 everything in together?

22 A Yes.

23 Q Okay. And has that changed?

24 A Yes.

25 Q Okay. And can you tell the Court how that has

1 changed?

2 A Yes. So I believe you're talking about the most
3 recent provisional guidance that was handed as a directive
4 from the Department of State. That was also done this year.
5 I believe that was in January is when it was first released.

6 That does not really address the secrecy envelopes in it.
7 It specifically does talk about a voter's eligibility, and it
8 steps through the provisional process. So what constitutes a
9 provisional ballot, how the Board is to handle it. If there
10 is an objection to a provisional ballot, how that is handled,
11 and so forth.

12 Q Are you bound to follow a guidance? Is a board of
13 elections required to follow a guidance?

14 A No.

15 Q And is that distinct from a directive?

16 A Yes.

17 Q Okay. And could you explain for the Court, please,
18 what a directive is?

19 A A directive is possibly presented in a similar way,
20 but it comes from the Department of State's lawyers, and it
21 is directly to us and our solicitors and the boards of
22 elections of -- this is usually the result of a lawsuit that
23 says this must be -- or a new act, this must be followed.
24 For instance, we received several directives regarding Act 77
25 in 2020, which were to be taken as, pardon my language, but

1 like the rule of law.

2 Q And that would be that you didn't need a secrecy
3 envelope?

4 A That was one of them, yes.

5 Q And that would be that ballots didn't have to be
6 dated?

7 A That was another one, yes.

8 Q Were those guidances later withdrawn?

9 A Yes.

10 MR. GEFFEN: Objection: motion to strike. The
11 question was about a guidance or about a directive?

12 THE COURT: I thought the answer should be the
13 directive was withdrawn.

14 MS. GALLAGHER: She -- I believe her testimony
15 said she took them as a directive, but I believe they were
16 guidances. We can go back and check.

17 A Yes. So the specific -- in regards to the specific
18 one regarding secrecy envelopes, yes, it was withdrawn and
19 replaced by the new Department of State guidance on
20 provisional ballots.

21 Q Okay. And as an election official for Butler County,
22 do you advise the Board or make determinations as to a
23 guidance -- to tell the Board, this is a guidance versus this
24 is a directive? Is that within your --

25 A No.

1 Q Okay. Are you aware of who has authority in the
2 Commonwealth of Pennsylvania for the manner in which
3 elections are conducted?

4 A Yes.

5 Q And who is that?

6 A The --

7 MR. GEFFEN: Objection. This calls for a legal
8 conclusion.

9 MS. GALLAGHER: I don't --

10 THE COURT: Overruled.

11 A Each county conducts their own elections under their
12 Board of Elections in respect to the Election Code.

13 Q Are you familiar with the Butler County curing
14 policy?

15 A Yes.

16 Q Okay. And I'll show you what we'll mark as Exhibit
17 1.

18 MS. GALLAGHER: May I approach, Your Honor?

19 Q Is that the policy which the Board adopted?

20 A Yes.

21 THE COURT: Could you have it marked, please?

22 MS. GALLAGHER: I'm sorry?

23 THE COURT: Could you have it marked, please.

24 (Respondent Intervenor Republican Party
25 Exhibit 1 marked for identification.)

1 THE COURT: That has been marked as what,
2 please?

3 MS. GALLAGHER: Intervenor 1.

4 THE COURT: Respondent Intervenor Republican
5 Party --

6 MS. GALLAGHER: 1, yes.

7 THE COURT: -- 1.

8 BY MS. GALLAGHER:

9 Q And, again, just to make sure, is that the policy
10 which the Board adopted?

11 A Correct.

12 MS. GALLAGHER: Your Honor, I would ask that
13 the --

14 THE COURT: Is that document entitled Butler
15 County Ballot Curing Policy?

16 THE WITNESS: Correct.

17 MS. GALLAGHER: And I apologize. I didn't have
18 another copy. We would ask that the Intervenor Respondent's
19 Exhibit 1 --

20 THE COURT: Again, I have it as Exhibit No. 1 is
21 Respondent Intervenor Republican Party.

22 MS. GALLAGHER: -- be admitted.

23 THE COURT: Has all the counsel seen this?

24 MS. GOLDMAN: Yes.

25 MR. GEFFEN: Yes, Your Honor.

1 THE COURT: Any objection?

2 MR. GEFFEN: No, Your Honor.

3 MS. GOLDMAN: No, Your Honor.

4 THE COURT: Exhibit No. 1 Respondent Intervenor
5 Republican Party is admitted.

6 (Respondent Intervenor Republican Party
7 Exhibit 1 admitted in evidence.)

8 MS. GALLAGHER: Your Honor, I have no further
9 questions of the witness, but I would like to reserve the
10 right to recall her or continue it once we receive a copy of
11 the policy which -- the changes to the SURE system which the
12 Court has ordered the County to produce.

13 THE COURT: Very well.

14 MS. GALLAGHER: Perhaps we could do that this
15 afternoon -- I don't know if this is the time to break. I
16 would be glad to review that now.

17 THE COURT: Well, let's continue for a little
18 while longer.

19 Who would like to proceed next? Democratic Party or
20 Petitioner?

21 CROSS-EXAMINATION

22 BY MR. GEFFEN:

23 Q Good afternoon, Ms. McCurdy. My name is Ben Geffen.
24 Once again, I'm an attorney representing the Petitioners in
25 this action, and I appreciate your taking the time to be here

1 today.

2 You're aware that the Petitioners in this lawsuit are
3 Faith Genser and Frank Matis? Correct?

4 A That's correct.

5 Q And are you aware that they both submitted naked
6 mail-in ballots at the April -- for the April 23rd primary?

7 A That's correct.

8 Q And you're aware that the -- that those ballots were
9 not counted?

10 A That's correct.

11 Q And you're aware that they also both completed
12 provisional ballots at their polling places on April 23rd?

13 A Correct.

14 Q And do you agree that those ballots, those
15 provisional ballots were ultimately not counted?

16 A Correct.

17 Q Am I right that if a voter sends in -- I think you
18 testified about this before, but just to make sure I
19 understand this right, if a voter sends in a mail ballot and
20 fails to sign the outer envelope, that the voter has -- am I
21 right that the voter has two ways to fix that problem? One
22 is by coming in person to the Board of Elections on or before
23 Election Day to sign an attestation, and the other is by
24 completing a provisional ballot at the polling place on
25 Election Day? Do I have that right?

1 A That's correct.

2 Q Okay. So either of those circumstances the voter
3 would ultimately have a vote counted for that election?

4 A Correct.

5 Q Okay. And based on your description of the process
6 used for -- that you used on April 26th, it's my
7 understanding that you have steps in place to make sure that
8 no voter accidentally has two different votes counted by that
9 same voter? Is that correct?

10 A Yes.

11 Q For in-person voting I believe you testified that
12 Butler County uses an optical scan system? Is that correct?
13 And by that I mean -- sorry.

14 In some counties there's a touch screen based system for
15 voting in person. But my understanding is that in Butler
16 County a voter fills out a -- who is voting a regular
17 in-person ballot fills out a paper ballot which then goes
18 into a scanning machine? Do I have that right?

19 A That's correct.

20 Q Okay. Are you familiar with the term overvoting?

21 A Yes.

22 Q Okay. And do you understand that term to mean -- for
23 example, if there's a primary for a state senate seat and
24 there are three candidates in the Republican primary, and a
25 voter marks two different candidates, that would be

1 overvoting because the voter is not actually entitled to vote
2 for more than one of those people? Is that right?

3 A As long as the race stipulates it's a vote for one,
4 correct.

5 Q Right. So, for example, for a state senate race --

6 A Yes.

7 Q -- that would be a vote for one race?

8 A Correct.

9 Q Okay. If a voter goes in person on Election Day,
10 overvotes for a state senate race and inserts that ballot
11 into the scanner, what will the scanner do?

12 A We currently have them programmed to have a message
13 pop up on the screen to alert the voter, you have overvoted
14 in the following categories.

15 Q Okay.

16 A Do you wish to proceed? In which case they can hit
17 yes, or they can hit reject, in which case the ballot will be
18 returned to them. They then have to have that ballot
19 spoiled, and then they're given another ballot by a poll
20 worker.

21 Q Okay. And when you say spoiled, what do you mean?

22 A We draw lines through all of the timing marks. The
23 voter has the option, to preserve voter secrecy, to fill in
24 all ovals so that when they hand it over to the election
25 official, no one can see what they voted on. And then it is

1 marked in very large wording diagonally across the page,
2 Spoiled, and placed in an envelope that is kept by the judge
3 of elections.

4 Q Okay. I want to ask some questions also about --
5 going back to mail-in balloting, when you opened the
6 envelopes on the Friday after the election for mail-in
7 ballots, what would happen if you received one that had a
8 secrecy envelope inside, but not the actual ballot inside?

9 A I'm not sure I understand. So you're saying the
10 Friday after the election. So during the Computation Board?

11 Q Correct. Computation Board, they open the envelopes
12 they find -- they open the outer envelope; inside there's a
13 secrecy envelope. They open the secrecy envelope; it's
14 empty.

15 A Okay.

16 Q What would happen in that situation? Would there be
17 a mail-in vote -- there would not be a mail-in vote counted
18 for that voter? Right?

19 A Correct, because there is no eligible ballot.

20 Q Right. What if that voter had also completed a
21 provisional ballot at the polling place on Election Day?
22 Would the Computation Board count that provisional ballot?

23 A No.

24 Q And why not?

25 A Because they've already turned in a ballot.

1 Q What ballot did they already turn in?

2 A The one that was marked in the SURE system, record
3 ballot returned.

4 Q Okay. So, in other words, even if the voter didn't
5 send in a ballot because they sent in the outer envelope and
6 the secrecy envelope, Butler still marks that as a ballot
7 returned in the SURE system?

8 A Correct.

9 Q Okay. Another mail-in ballot scenario I would like
10 to ask you about, if a voter drops a mail-in ballot into the
11 mail on Monday afternoon, the day before the election, and is
12 concerned that USPS may not get it to your office by 8:00
13 p.m. the next day, and the voter goes to the polling place on
14 Tuesday, and the voter casts a provisional ballot, I would
15 like to ask what would happen next. So suppose that indeed
16 the USPS did not deliver that ballot by 8:00 p.m. Tuesday.
17 The ballot arrives on Wednesday, the mail-in ballot.

18 The Computation Board would count the voter's provisional
19 ballot, but not that tardy mail-in ballot? Do I have that
20 right?

21 A Yes. They would count the ballot that arrived first
22 at our office.

23 Q And that would be the provisional ballot?

24 A Correct.

25 Q Okay. And if the -- in that scenario, if the tardy

1 mail ballot were a naked ballot, would you count the
2 provisional ballot?

3 A They would count the ballot that arrived first at our
4 office. So the provisional ballot, regardless of whether the
5 other ballot had a secrecy envelope, it's ineligible; it came
6 after the deadline.

7 Q So that's a yes.

8 A Yes.

9 Q Okay. Just to confirm, the naked ballots that Ms.
10 Genser and Mr. Matis submitted in this election, those
11 ballots have always remained and remain secret? Am I right?
12 Nobody looked at them to see who they voted for?

13 A Correct.

14 Q Okay. Where are those ballots right now?

15 A They're locked in a cabinet in the room that we open
16 all the ballots.

17 Q Okay. If a voter mails in a naked ballot and learns
18 on or before Election Day that that -- that they have done
19 so, am I right that in Butler County there is nothing the
20 voter can do to get a vote counted in that election?

21 A That's correct. They have already turned in a
22 ballot.

23 Q Switching gears a little, can you tell me what is the
24 role of the Board of Elections in certifying the results of
25 the April 23rd primary?

1 A They have designated the Computation Board to do that
2 on their behalf.

3 Q Okay. How will the -- just mechanically, the
4 certification will occur? Will there be some -- is this like
5 submitted electronically to the Pennsylvania Department of
6 State, or is this some paper that goes to the Department of
7 State? How does it work mechanically?

8 A It's twofold. So the first -- well, I guess
9 technically threefold. The first is the unofficial returns
10 which are submitted to the Department of State. The second
11 is a first signing is what it's called. The first signing is
12 Computation Board signs as soon as they are finished with
13 write-ins, provisionals, and absentee and mail-in ballots.
14 The language in that first signing stipulates five days for
15 any objections. At the point if there are none, or at the
16 conclusion of those objections, a second signing is done.

17 Q Okay. And if I can just rewind it a little there,
18 the first one, you said that it's submitted -- the unofficial
19 is submitted to the Department of State. Who makes that
20 submission and -- who makes that submission?

21 A I do.

22 Q Okay. And is that electronically, or on paper, or
23 what?

24 A It is -- it's a paper form that is signed and then
25 it's uploaded to a secure site called an extranet.

1 Q Okay. So you sign the paper and scan it and upload
2 it?

3 A I do not sign it. The Computation Board signs it.

4 Q Okay. So are there three lines on it for signatures?

5 A Yes.

6 Q Okay. And the second one, who -- is that submitted
7 the same way, to the Department of State?

8 A Yes.

9 Q And who signs that?

10 A The Computation Board.

11 Q And the third one, is it the same answer?

12 A Correct.

13 Q Okay.

14 A On the first and second signing, though, just for
15 clarification, there are two additional lines for
16 attestation, in which myself and the Assistant Director also
17 sign.

18 Q Okay. You mentioned that the -- that a voter -- that
19 voters will sometimes receive -- I think you used the term
20 status update emails from the Department of State prior to
21 the election. Is that -- do you know what I'm talking about
22 when I say that?

23 A Yes.

24 Q Okay. And that there is one type of email that a
25 voter -- well, let me ask you this way. You mentioned that

1 for ballots that the Agilis Falcon indicates may have some
2 sort of problem and that you then review by hand, that in
3 some instances you may come to believe prior to Election Day
4 that the envelopes -- the outer envelope is likely -- doesn't
5 have a secrecy envelope inside? Is that right?

6 A Correct.

7 Q And when that happens, you enter a code into the SURE
8 system about that -- about that envelope? Is that right?

9 A Yes. It's a barcode that gets scanned in.

10 Q Okay. What would be the code that you would assign
11 to a ballot in that scenario?

12 A We only have one option. If we do not allow it to be
13 cured, which in case they cannot, so it is, canceled no
14 secrecy envelope.

15 Q Okay. And if a ballot is marked canceled in SURE,
16 does that mean that the ballot won't be counted?

17 A Not in all instances, no.

18 Q Okay. And so one exception would be that if you
19 later open the envelope on the date of computation and you
20 find that, oops, there actually was a secrecy envelope
21 inside, this was a valid ballot after all, then that ballot
22 would be counted? Right?

23 A Correct.

24 Q Is there any other scenario in which that ballot
25 would be counted?

1 A That any ballot that was recorded as canceled would
2 be counted at a later date?

3 Q Well, let's start there. Yes.

4 A Yes.

5 Q What, for example?

6 A Well, we have to record them in as canceled when
7 they're undeliverable. And if a voter comes into our office
8 and is able to provide identification, we are able to hand
9 that ballot over to them, in which case the ballot may very
10 well be counted should they turn it in.

11 Q Okay. Any others?

12 A Off the top of my head, not that I can recall.

13 Q Okay. So when you mark a ballot as -- in SURE,
14 canceled, no secrecy envelope, it's your understanding that
15 the voter will then -- assuming that DOS has an email address
16 on file for that voter, that the voter will receive an
17 automated email from DOS in response to your entry into SURE?
18 Is that right?

19 A That's correct, if there's an email attached to the
20 application.

21 Q Okay. And have you seen the text of the email that
22 DOS sends to voters in that situation?

23 A I have.

24 MR. GEFFEN: Okay. I'd like to show a document
25 to be marked as Petitioners' Exhibit 1. Should I hand a

1 copy --

2 THE COURT: Petitioners' Exhibit A, please.

3 MR. GEFFEN: A? Okay. Should I hand this to
4 you?

5 THE COURT: Yes.

6 MR. GEFFEN: And may I hand a copy to the
7 witness?

8 THE COURT: Just wait.

9 MR. GEFFEN: Okay.

10 (Petitioners' Exhibit A marked for identification.)

11 THE COURT: Give that one to the witness.

12 MR. GEFFEN: Okay. And I have one for the
13 Judge, if you would like.

14 THE COURT: Thank you.

15 MR. GEFFEN: Thanks.

16 BY MR. GEFFEN:

17 Q This document that has been marked as Petitioners'
18 Exhibit A, is this a document you've seen before?

19 A Yes.

20 Q And you understand this to be a guidance issued by
21 Pennsylvania Department of State?

22 A Yes.

23 Q And it's dated March 11, 2024?

24 A Correct.

25 Q And did you become aware of this document on or

1 shortly after March 11th of this year?

2 A Yes.

3 Q Okay. And it's your understanding that this is a
4 guidance, not a directive, from the Department of State?

5 A Correct.

6 Q Okay.

7 MR. KING: Your Honor, I want to make an
8 objection, just for the record, that this is guidance. This
9 is not mandatory. The Department of State, the Secretary of
10 State, have no ability to impose this on anyone. So this is
11 merely guidance.

12 If it's just for background information and for the
13 Court's elucidation, why that's fine, but this is not
14 relevant to the ultimate determination of this case. Even I
15 would point out to the Court on Page 4 of the guidance,
16 you'll see conflicting decisions in the footnote, one of
17 which we believe, the case that's really telling, is In Re
18 Allegheny County, which is the -- which was a state senate
19 election, I believe.

20 And so my point on making the objection is this is --
21 there is nothing mandatory about this. So if it's background
22 information, I would understand the Court's listening to it,
23 but it has no bearing on the ultimate determination here
24 because the Secretary has absolutely no authority to impose
25 this on any county in Pennsylvania.

1 THE COURT: What are you trying to get, counsel?

2 MR. GEFFEN: I am trying to get confirmation
3 from the witness that there is a portion of this guidance
4 that states one course of action, and that the Butler County
5 Board of Elections takes a different course of action in that
6 situation.

7 MR. KING: And that's exactly what -- I'm sorry.
8 I didn't mean to interrupt.

9 MR. GEFFEN: And I'm not -- I'm not going to ask
10 this witness to testify that this has mandatory effect and
11 that the County is obligated to follow it. I'm just going to
12 confirm that the witness -- that the County Board of
13 Elections in Butler follows a different practice from the
14 practice that's described in this.

15 I think there's a legal debate that could be held later if
16 necessary about what the significance of that discrepancy is,
17 but all I'm asking for as a factual matter, whether they do
18 things in -- the Butler Board of Elections the same way that
19 that DOS guidance --

20 THE COURT: Ask your question.

21 BY MR. GEFFEN:

22 Q All right. If I could ask you to look at Page 4 of 7
23 of this document, there's some bullet points there. The
24 fourth bullet point, which I can read out loud, it says, if a
25 voter's mail-in or absentee ballot was rejected for a reason

1 unrelated to the voter's qualifications and the voter
2 submitted a provisional ballot that meets other provisional
3 ballot requirements, the provisional ballot shall be counted
4 if the county determines that the voter is eligible to vote.

5 You're aware that DOS has given guidance to the counties
6 to this effect?

7 A Yes.

8 Q Okay. And am I correct that the Butler County Board
9 of Elections applies a different practice in this scenario?

10 A No. We determined that the voters were ineligible.

11 Q Okay. And when you -- did you determine that Frank
12 Matis and Faith Genser were ineligible to vote in the April
13 23rd election?

14 A They were ineligible --

15 MS. GALLAGHER: Objection.

16 MS. GOLDMAN: Yes.

17 MS. GALLAGHER: It was a mischaracterization of
18 her testimony.

19 MS. GOLDMAN: Her testimony about who
20 actually -- the body who makes the call.

21 MR. GEFFEN: Okay. Okay.

22 BY MR. GEFFEN:

23 Q Who determined -- did somebody in Butler County
24 determine that Frank Matis and Faith Genser were ineligible
25 to vote?

1 MS. GALLAGHER: And, Your Honor, I've lodged an
2 objection to the question. I believe it's a
3 mischaracterization of the facts. Perhaps if counsel --

4 THE COURT: Rephrase the question.

5 MR. GEFFEN: Okay.

6 MS. GOLDMAN: And I'll just note that she did
7 testify to this issue during direct. So this is a
8 mischaracterization of that previous testimony.

9 MR. GEFFEN: Okay.

10 BY MR. GEFFEN:

11 Q Is it your testimony that Butler County's practice is
12 consistent with this bullet point of DOS's guidance?

13 MS. GOLDMAN: I'm going to lodge the same
14 objection because there was no policy. She outlined exactly
15 what took place during the canvass.

16 THE COURT: I think she's already answered the
17 question. She said the Butler County policy is the same as
18 what's in Bullet Point No. 4.

19 MR. GEFFEN: Okay. Thank you.

20 THE COURT: Is that correct?

21 THE WITNESS: Yes.

22 MR. GEFFEN: Okay.

23 BY MR. GEFFEN:

24 Q Why didn't Butler County count Faith Genser's
25 provisional ballot?

1 A I cannot answer that question as I am not a
2 Computation Board member. We did not count them because the
3 computation members told us not to.

4 Q Okay. Did they tell you why?

5 A No.

6 Q Is it your understanding that a -- that the
7 Computation Board will not count provisional ballots
8 submitted by voters who had previously sent in naked ballots?

9 A It is up to their discretion in each individual
10 instance. I would say historically they do not count any
11 ballot that lacks a secrecy envelope.

12 Q Okay. Are you aware of any time when the Computation
13 Board has counted a provisional ballot that a voter cast
14 after sending in a naked ballot?

15 A No.

16 MR. GEFFEN: Okay. I have no further questions
17 for this witness.

18 MR. RUSSEY: No questions, Your Honor.

19 MS. GOLDMAN: Your Honor, I have just a very
20 short amount of redirect, if I may. Is that okay?

21 THE COURT: Yes.

22 MS. GOLDMAN: Thank you.

23 REDIRECT EXAMINATION

24 BY MS. GOLDMAN:

25 Q Ms. McCurdy, you during Mr. Geffen's questioning

1 answered a number of questions regarding the cure policy. Do
2 you recall that?

3 A Correct.

4 Q And, in fact, you have a copy of the cure policy in
5 front of you that was marked for identification as --

6 MS. GOLDMAN: And I want to make sure I get this
7 right. Republican Respondent Intervenor No. 1? Is that --
8 did I mess that up?

9 THE COURT: Respondent Intervenor Republican
10 Party Exhibit No. 1.

11 MS. GOLDMAN: Okay.

12 THE COURT: I took it from exactly what was said
13 the first time.

14 MS. GOLDMAN: Okay.

15 BY MS. GOLDMAN:

16 Q And that policy is in front of you currently?
17 Correct?

18 A Yes.

19 Q Okay. Now, on the back of that policy there is an
20 indication of when the policy was passed. Is that -- do you
21 see that?

22 A Yes.

23 Q And can you tell the Court when the policy was
24 initially passed?

25 A May 2, 2023.

1 Q Okay. And was the policy ever amended?

2 A Yes.

3 Q And when was the policy amended?

4 A February 14, 2024.

5 Q Okay. And next to that amendment of the policy, does
6 it indicate the individuals who in fact amended the policy?

7 A Yes.

8 Q And who are those individuals?

9 A Board of Elections; Leslie Osche, Chairman, Kimberly
10 Geyer, and Kevin Boozel.

11 Q Okay. And can you explain to the Court how it is
12 then that a policy relating to how a ballot, you know, error
13 of whatever kind can be cured? How does that go into effect
14 in Butler County?

15 A The Board of Elections voted on adopting it at a
16 public meeting.

17 Q Okay. And, to your knowledge, has there been any
18 type of public meeting convened to address an amendment of
19 the current cure policy?

20 A No.

21 Q Okay. Now, if you look at that current cure policy,
22 do you see anything in the introduction that references the
23 secrecy envelope?

24 A No.

25 Q Okay. And what envelope does the introduction

1 reference?

2 A Declaration envelope.

3 Q Okay. And in the definition section, is there any
4 definition involving the secrecy envelope?

5 A No.

6 Q What envelope is referenced?

7 A The declaration envelope.

8 Q Okay. And so am I correct that there is nothing in
9 that policy, to the best of your knowledge, and your
10 understanding as the director of the elections, that there is
11 nothing that anticipates currently a policy which would
12 provide for the type of scenario that you heard Mr. Geffen
13 arguing about earlier today?

14 A Correct.

15 Q Now, are you familiar with -- and I'm going to ask
16 you to put that exhibit down now. Petitioner's Exhibit A,
17 you had that in front of you --

18 A Yes.

19 Q -- earlier? Okay.

20 Now, if you turn to Page 4, there's a footnote, No. 2. Do
21 you see that?

22 A I do.

23 Q Okay. And it references a Keohane versus Delaware
24 County Board of Elections case?

25 A Correct.

1 Q Are you aware whether that case had anything to do
2 with a secrecy envelope?

3 A I'm aware of the case. To the best of my knowledge,
4 it does not address secrecy envelopes.

5 Q And that, like the cure policy in Butler County,
6 addressed the declaration envelope? Is that right?

7 A And signatures and dates. Correct.

8 MS. GOLDMAN: Okay. That's all I have. Thank
9 you.

10 MR. GEFFEN: Your Honor, if I could recross very
11 briefly on just one topic that --

12 THE COURT: Just one question. Excuse me. One
13 minute.

14 Counsel? Do you have any --

15 MS. GALLAGHER: No, Your Honor.

16 THE COURT: No?

17 MS. GALLAGHER: Your Honor, if I just may, may
18 I -- one question.

19 BY MS. GALLAGHER:

20 Q I was just handed an 18-page document that I
21 understand is --

22 MS. GALLAGHER: And I want to get the name
23 right. This will be Republican Party Intervenor Respondent
24 2.

25 THE COURT: All right. So this is not -- this

1 is not recross? This is continuing with your direct?

2 MS. GALLAGHER: Correct.

3 THE COURT: Well, let's finish up at this point.

4 Let Mr. Geffen go with his recross.

5 MS. GALLAGHER: Okay.

6 MR. GEFFEN: Thank you, Your Honor.

7 RECROSS-EXAMINATION

8 BY MR. GEFFEN:

9 Q Republican -- I would like to ask you briefly about
10 the document that Ms. Goldman just asked you about on
11 redirect, the Republican Intervenor Respondent Exhibit 1.

12 A Yes.

13 Q I'm looking at Page 2, at the bottom of the page,
14 Point H. This references that -- if I understand it right,
15 this means that a -- that the Butler County Board of
16 Election's policy is that a voter's -- a voter who completes
17 a provisional ballot on Election Day to cure a deficiency on
18 their declaration envelope will have their ballot counted?
19 Do I understand that right?

20 A Can you repeat that?

21 Q Sorry. I was stumbling over words there.

22 My understanding of Section 3H here -- tell me whether I'm
23 correct -- is that the Butler Board of Elections policy is
24 that a voter who submits a mail ballot with a deficiency on
25 the declaration envelope and then completes a provisional

1 ballot at their polling place will have a vote counted? Do I
2 have that right?

3 A Correct.

4 Q Okay. Is there any other -- does the Board of
5 Elections have any policy about whether a voter can complete
6 a provisional ballot on Election Day and have a ballot
7 counted if they had a problem with their mail-in ballot other
8 than a deficiency on the declaration envelope?

9 A No.

10 MR. GEFFEN: Thank you.

11 MS. GALLAGHER: I'm not going to do anything.

12 MS. GOLDMAN: Your Honor --

13 THE COURT: Just one second.

14 MS. GOLDMAN: Okay.

15 THE COURT: Mr. Levine, anything?

16 MR. RUSSEY: I'm Mr. Russey, but no questions,
17 Your Honor.

18 THE COURT: Ms. Goldman, you wanted to say
19 something?

20 MS. GOLDMAN: Only that we have nothing further
21 for this witness and ask that she be --

22 THE COURT: I think that --

23 MS. GALLAGHER: No, Your Honor, I have nothing
24 further.

25 THE COURT: You're not going to go into that?

1 MS. GALLAGHER: I have nothing further for the
2 witness.

3 THE COURT: Anything further for this witness?

4 MR. GEFFEN: No, Your Honor.

5 THE COURT: Thank you. You may step down.

6 (Witness excused.)

7 MS. GOLDMAN: And, Your Honor, we're not going
8 to call any further witnesses related to your Order to Show
9 Cause.

10 MR. KING: May it please the Court --

11 THE COURT: Just one second.

12 You rest?

13 MS. GOLDMAN: Yes, Your Honor. And only request
14 just the Court's direction on whether or not we may reserve
15 some time for argument after --

16 THE COURT: Sure.

17 MS. GOLDMAN: -- anybody else. Thank you.

18 THE COURT: Mr. King.

19 MR. KING: Your Honor, I was going to suggest in
20 light of the County's resting that perhaps the Court would
21 entertain -- this is just a suggestion -- the next matter
22 being the motion to dismiss filed by the Republican
23 Intervenors. And the reason for that is, and it's in our
24 papers, Your Honor. There is -- the Rules of Civil Procedure
25 do not apply, as you know, to statutory appeals. So normally

1 in a civil case we would file preliminary objections. We've
2 cited the case to you in our papers and in the brief that
3 stands for the proposition that what you file instead of
4 preliminary objections is a motion, and in the nature of a
5 motion to dismiss. And so that challenges the legal
6 sufficiency of the filing by the Petitioners in this case.

7 So, of course it's up to the Court how we proceed, but it
8 would seem logical to me that we would then argue now on the
9 face of what has been presented by the County and on the
10 Petition whether the Petition is legally sufficient or
11 deficient such that the Court could rule on what would
12 otherwise have been preliminary objections.

13 MR. GEFFEN: Your Honor, I would like to respond
14 by requesting that the Court next hear testimony from the two
15 Petitioners, and I'll make just a couple practical points
16 about that.

17 One is I don't anticipate that their testimony will take
18 very long. The other is that one of the Petitioners, Mr.
19 Matis, has a doctor's appointment later this afternoon and
20 has let me know that he would be very grateful if he could be
21 on his way out of here no later than 2:30, and I would hope
22 that there's a way to accommodate him.

23 MR. KING: Judge, we don't have any problem with
24 taking Mr. Matis out of order, but it would seem logical to
25 me that nonetheless the procedure should be -- and I'm fine

1 with respecting someone's needs in the schedule, but the
2 procedure nonetheless should be to address the motion to
3 dismiss in light of the testimony that was offered, not the
4 subsequent testimony.

5 MR. GEFFEN: And, Your Honor, if I could respond
6 as well to that, the motion to dismiss was filed yesterday.
7 None of the other participants in this case have had an
8 opportunity to file any briefs in response to the memorandum
9 of law and would appreciate the chance to do so if that would
10 help the Court.

11 In addition, we would request that no matter what else
12 that there be an opportunity today to make a complete factual
13 record in the event that this case goes up on appeal so that
14 there will be a full record of the testimony from the
15 Petitioners, whatever else the Court may do today.

16 MR. KING: Well, I would just say that would
17 depend on the Court's ruling on the motion to dismiss. Would
18 it ever get to that subsequent -- and I understand if
19 somebody wants to make a record to take it up to a higher
20 court, but whether you ever get to that point or not is
21 entirely in Your Honor's purview.

22 THE COURT: About how long do you think Mr.
23 Matis' testimony will be?

24 MR. GEFFEN: Five to ten minutes, Your Honor.

25 THE COURT: Let him give his testimony.

1 MR. KING: Thank you.

2 MR. GEFFEN: Okay. Petitioners call Frank
3 Matis.

4 MR. KING: This is out of order of course, Your
5 Honor.

6 THE COURT: It's out of order.

7 MR. KING: Thank you.

8 THE COURT: Please raise your right hand, sir.

9 * * *

10 FRANK P. MATIS,

11 Being first duly sworn according to
12 law by the Court, testified as
13 follows:

14 THE COURT: Thank you very much. You may have a
15 seat over there, please.

16 DIRECT EXAMINATION

17 BY MR. GEFFEN:

18 Q Good afternoon, Mr. Matis.

19 A Good afternoon.

20 Q To begin, could you please just state and spell your
21 name for the benefit of the court reporter.

22 A It's Frank, F-R-A-N-K, Matis, M-A-T-I-S.

23 THE COURT: Middle initial is P? Correct?

24 THE WITNESS: P, yes.

25 Q Mr. Matis, what's your address?

1 A 103a, Blossom Drive, Butler, Pennsylvania.

2 Q How long have you lived there?

3 A About 17 years.

4 Q Okay. Thank you. And I understand you're retired?

5 Is that right?

6 A I am retired.

7 Q Very briefly, what did you do when you were working?

8 A I am retired from Butler County. I was Director of
9 Emergency Services for Butler County from 1996 until 2012.

10 Q Thank you, sir. Speaking just very roughly, can you
11 tell me about how long you have been a registered voter in
12 Butler County?

13 A I've been registered since I was 21 years old.

14 Q Okay. And how old are you now, if I may ask?

15 A I am 67.

16 Q Okay. And how often do you vote?

17 A I vote in every election.

18 Q Okay. And it's my understanding that you voted --
19 that you received a mail ballot for the April 2024 primary?

20 A I did.

21 Q Okay. And did you fill out that ballot?

22 A I did. Yes.

23 Q Did you mail it back to the Butler County elections
24 office?

25 A I sent it in by US Postal Service. Yes.

1 Q Okay. And at some point did you learn that there
2 might be some problem with that, with what you mailed in?

3 A I did.

4 Q What did you learn might be a problem?

5 A I received an email from the Department of State
6 stating that there was a problem with my ballot, with the
7 secrecy envelope.

8 Q And did you receive that email prior to April 23rd?

9 A Yes.

10 Q Okay. Can you tell us what you did on Election Day,
11 April 23rd?

12 A Yeah. I went to the polling place, my polling place,
13 and filed a provisional ballot.

14 Q Okay. And I believe there was testimony earlier
15 today that you probably heard about how mechanically it works
16 to complete your provisional ballot; that it's filled out and
17 placed into an envelope and signed and given to the poll
18 worker and so on.

19 Did you hear all that this morning?

20 A I did that, yes.

21 Q And that is consistent with what you did?

22 A Yes.

23 Q Okay. I'd like to -- okay.

24 At some point did you call the County Board of Elections?

25 A Back when I received the email from the Department of

1 State, I called the Bureau of Elections. I spoke to a
2 gentleman there who told me that the only way -- well, he
3 just told me I had to do a provisional ballot. I could not
4 come in and fix my ballot.

5 Q Okay.

6 A So that's what I did. I went to the polling place
7 and did a provisional ballot.

8 Q Do you recall the name of the person who said that?

9 A I do not recall that name.

10 Q Okay.

11 A I know that when I was speaking to him, he was
12 speaking to somebody else in the background, but who that
13 was, I do not know.

14 Q Okay. Are you aware of a way that the Pennsylvania
15 Department of State lets voters track the status of their
16 provisional ballot?

17 A I believe there is a website that you can go to and
18 look and it will give you the status of your ballot.

19 Q And you've looked at your ballot status on that
20 website?

21 A I have looked at that, yes.

22 MR. GEFFEN: I'd like to mark this as
23 Petitioners' Exhibit B.

24 (Petitioners' Exhibit B marked for
25 identification.)

1 MR. GEFFEN: Copy for the Judge.

2 Q I've just shown you a document marked as Exhibit B.
3 Are you familiar with this document?

4 A Yes. I've seen something similar to this, yes.

5 Q Is this a printout of what you saw on that website
6 that the Department of State provides?

7 A Yes.

8 Q And you're aware that at the bottom it says, status
9 rejected?

10 A Yes.

11 Q And then it says, reason, voted by conventional
12 alternative or absentee, slash, mail-in?

13 A Yes.

14 Q Okay. When you went to the polling place on Election
15 Day, was there anything that gave you difficulty in showing
16 up in person?

17 A You mean physically?

18 Q Yes.

19 A Yes. I had previously had surgery on my foot, and I
20 was on crutches for several weeks before that, and I had just
21 gotten off crutches and was still wearing a surgical shoe
22 that day.

23 Q Okay.

24 A But I still went in to vote.

25 Q And why did you take that extra effort to go in

1 person on April 23rd?

2 A I was under the impression the only way that I
3 could -- that my vote would count was to go and file a
4 provisional ballot at the polling place. So that's why I did
5 that.

6 Q Okay. And that was important to you?

7 A Absolutely. It's very important to me to vote.

8 Q Okay. Can you just briefly describe -- and then I'm
9 going to be done. Could you just briefly describe for the
10 Court why you filed this lawsuit?

11 A I just -- I was surprised when my ballot wasn't
12 counted, and I just think that my ballot should count because
13 I have always voted. I believe it's the right thing to do,
14 and I would like my vote to be counted.

15 MR. GEFFEN: Thank you. I have no further
16 questions for this witness.

17 THE COURT: Ms. Goldman.

18 CROSS-EXAMINATION

19 BY MS. GOLDMAN:

20 Q Mr. Matis, how did you learn that the Computation
21 Board did not count your vote?

22 A I received a call from the ACLU.

23 Q Who called you?

24 MR. GEFFEN: Objection; calls for
25 attorney/client communication.

1 MS. GOLDMAN: Not until he's retained.

2 Q Who called you?

3 A Kate.

4 Q Okay. And so what did -- what did Kate tell you?

5 MR. GEFFEN: Objection. Any conversation that
6 happened at this point was in anticipation of a potential
7 attorney/client relationship and it's covered by the
8 privilege.

9 MR. KING: No, that's not right.

10 MS. GOLDMAN: Solicitation, first of all. So --

11 THE COURT: Answer the question.

12 A I'm sorry? What was the question?

13 Q What were you told by the -- by Kate when she called
14 you?

15 A She just told me, are you aware that your ballot
16 wasn't accepted.

17 Q Okay. And did she say anything else?

18 A Well, we had a lot of -- long discussion. I asked
19 why. And it was because of the -- because the County
20 wouldn't accept it because of the secrecy envelope.

21 Q Okay. And I don't want to get into anything that
22 happened after you signed in for -- you know, consented to
23 hire Kate or any of her colleagues. But prior to that, what
24 other -- what other parts of that conversation occurred?

25 MR. GEFFEN: I'm going to object again, and this

1 is getting into discussions about representation that are --

2 MS. GOLDMAN: And I don't want --

3 MR. GEFFEN: -- covered by privilege.

4 MS. GOLDMAN: -- him to talk about that.

5 THE COURT: Let's stay away from this. I think
6 we've gone far enough.

7 MS. GOLDMAN: Okay.

8 BY MS. GOLDMAN:

9 Q What time did that call take place?

10 A What time?

11 Q Yes.

12 A I think it was in the middle of the afternoon. I
13 don't know what time it was.

14 Q And that call took place on the 26th, according to
15 your affidavit? Is that right?

16 A That sounds correct. Yes.

17 Q Okay. So sometime in the afternoon on the 26th you
18 got that call?

19 A Yes.

20 MS. GOLDMAN: Okay. Thank you. That's all I
21 have.

22 BY MS. GALLAGHER:

23 Q Just to --

24 THE COURT: Ms. Gallagher.

25

1 BY MS. GALLAGHER:

2 Q You're a registered voter; correct? And obviously a
3 registered voter for a long time?

4 A I am, yes.

5 Q And I believe you said you were emergency services
6 for Butler?

7 A Correct.

8 Q Okay. Did that -- what type of emergency services?

9 A That was -- I was the -- I was in charge of the
10 County's 911 center, emergency management.

11 Q What's your party affiliation, sir?

12 A Democrat.

13 Q Okay. And you voted by mail-in ballot before?

14 A Yes.

15 Q Okay. Is that since the enactment of mail-in
16 ballots --

17 A Pretty much, yes.

18 Q Okay. Let me -- I have to ask the question. If I
19 may just finish. Sorry. I apologize.

20 A I'm sorry.

21 Q Since the enactment of no excuse mail-in voting, have
22 you voted at the polls?

23 A I don't believe so. Other than this last time
24 whenever I went to do a provisional.

25 Q Okay.

1 A And I'm -- I can't say 100 percent, but I don't
2 believe I have.

3 Q Okay. In the previous times that you voted by
4 absentee ballot -- or mail-in ballot, by absentee mail-in
5 ballot, were you aware of what you had to do to have the
6 ballot count?

7 A Yes.

8 Q Okay. And what had to be done in order to have your
9 ballot count?

10 A Vote, fill out the ballot, fold it, put it in the
11 secrecy envelope and put it in the envelope and sign it and
12 date it and send it back.

13 Q So for purposes of the 2024 primary, you were aware
14 what the rules were?

15 A I was aware. I made a mistake. I just didn't -- I
16 wholeheartedly admit that I didn't put it in the secrecy
17 envelope.

18 Q Okay. I just wanted to make sure you knew what the
19 rules were.

20 A I absolutely know. I'm well aware of it.

21 Q And when did you first learn -- or, excuse me.

22 You mailed your ballot in. Do you recall when you
23 received the email from the Department of State?

24 A I don't. I went back and tried to find it, and I --
25 I don't know when that was.

1 Q Okay. So do you recall receiving it?

2 A Oh, absolutely. Yes.

3 Q Okay. And what steps -- I just want to make sure --
4 did you take once that occurred?

5 A I called the Bureau of Elections.

6 Q Okay. And when you received the email, what did --
7 did you have an understanding of what you could do?

8 A No.

9 Q All right. It didn't tell you you could vote
10 provisionally?

11 A No, I don't -- I don't remember seeing that. I think
12 the only thing that I recall was it said to contact the
13 Bureau of Elections.

14 Q Okay. And you did that?

15 A I did that.

16 Q Okay. And, as we understand, then you went and voted
17 provisionally subsequently, cast a provisional ballot?

18 A Yes.

19 Q Now, how is it you found out that your provisional
20 ballot was not counted? That's what I couldn't hear. I
21 apologize.

22 A I received a call from the ACLU.

23 Q Are you a member of the ACLU?

24 A Nope.

25 Q Had you reached out to counsel -- you didn't -- with

1 respect to your provisional ballot?

2 A No.

3 Q Okay. Are you here today in this lawsuit, sir,
4 because the ACLU contacted you?

5 A Yes.

6 MS. GALLAGHER: Excuse me one second.

7 BY MS. GALLAGHER:

8 Q And, Mr. Matis, just one -- who was it who contacted
9 you from the ACLU?

10 A Kate. The attorney sitting there.

11 Q Could you -- and you're referring to counsel?

12 A Yes.

13 MS. GALLAGHER: Your Honor, we would ask that
14 the record reflect that Mr. Matis has pointed to -- I want to
15 get her name correct -- Kate Ginzberg as the person by whom
16 he was contacted.

17 Nothing further.

18 MR. GEFFEN: Your Honor, if I may redirect --

19 THE COURT: Just one second.

20 MR. GEFFEN: Sorry.

21 THE COURT: Mr. Russey?

22 MR. RUSSEY: No questions, Your Honor.

23 THE COURT: Redirect.

24

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REDIRECT EXAMINATION

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BY MR. GEFFEN:

Q Mr. Matis, are you paying anybody any money for legal services in this matter?

A I am not.

Q Is it your understanding that you will receive any financial compensation as a result of the outcome of this lawsuit?

A I will not.

Q Before you spoke with any attorney was it your understanding that your -- did you have an understanding about whether your provisional ballot would be counted?

A I assumed it would. I -- you know, from the conversation I had with the gentleman at the Bureau of Elections, I assumed that by me doing the provisional ballot at my polling place that my vote would be counted.

MR. GEFFEN: No further questions, sir.

THE COURT: One second. One second, please.

RE-CROSS-EXAMINATION

BY MS. GALLAGHER:

Q Mr. Matis, I have a couple questions --

THE COURT: Just one second, please.

MS. GALLAGHER: I'm sorry. I apologize.

THE COURT: Okay. Go ahead, counsel.

MS. GALLAGHER: I apologize. Thank you, Your

1 Honor.

2 BY MS. GALLAGHER:

3 Q Just a couple of questions, Mr. Matis, because it may
4 be my confusion. When you spoke to the Bureau -- I believe
5 that you testified that you did call the Bureau of Elections,
6 Butler County Bureau of Elections?

7 A I did.

8 Q Did you ask them about a provisional ballot?

9 A No. They told me to go to the polling place and cast
10 a provisional ballot.

11 Q Did you ask anyone if that provisional ballot could
12 be counted or would be counted?

13 A No. I never asked them. I just made the assumption
14 that it would be.

15 Q Okay. And do you know to whom you spoke?

16 A I do not know. I didn't ask his name.

17 Q Okay. You stated that you received a call from Ms.
18 Ginzberg, and I want to carefully ask this because as I ask
19 the question there may be objections. So I don't want you to
20 answer until all of that is finished.

21 As you sit here today, is Miss Ginzberg your counsel in
22 this matter, to your understanding? Is she your lawyer, sir?
23 Or Mr. Geffen?

24 A Yes.

25 Q Okay. And you don't receive any money, and you're

1 not paying anything for it. Prior to the time -- when you
2 first received the call from Miss Ginzberg, I believe you
3 testified -- please correct me if I'm wrong -- that she
4 advised you that your ballot had not been counted?

5 MR. GEFFEN: Objection.

6 Q Your provisional ballot had --

7 MR. GEFFEN: The question asks for advice from a
8 lawyer.

9 MS. GALLAGHER: No.

10 MS. GOLDMAN: No.

11 THE COURT: He's already answered the question
12 previously.

13 MS. GALLAGHER: Excuse me?

14 THE COURT: He already answered the question.

15 MS. GALLAGHER: I just wanted --

16 BY MS. GALLAGHER:

17 Q Did she advise you -- I have one question -- as to --
18 and this was before you had been engaged? Correct? Or you
19 were doing the lawsuit? Is that correct?

20 A Yes.

21 Q Okay. Did Miss Ginzberg tell you how she knew that
22 your ballot had not been counted?

23 MR. GEFFEN: Objection; calls for --

24 Q Your provisional ballot?

25 MR. GEFFEN: Objection; calls for

1 attorney/client communication.

2 MS. GALLAGHER: I don't believe so, Your Honor,
3 because I believe this is prior to the time that the
4 relation -- it's a solicitation, first of all, on the basis
5 of information that we don't know yet where it came from, all
6 right.

7 THE COURT: Sir, would you answer this question
8 based upon your perception of whether an attorney/client
9 privilege had been established?

10 A I'm sorry. You've got me confused here now. What's
11 the question?

12 BY MS. GALLAGHER:

13 Q When --

14 THE COURT: Ask your question.

15 Q When Ms. Ginzberg called you and told you that your
16 ballot had not been counted, all right, had you ever met Kate
17 Ginzberg before?

18 A No.

19 Q Okay. Did she tell you, sir, how she knew your
20 provisional ballot had not been counted?

21 MR. GEFFEN: Objection; calls for --

22 THE COURT: Now my question to you is this, sir.
23 If you're going to answer -- if you know the answer to this
24 question, are you answering the question after you felt an
25 attorney/client relationship with Ms. Ginzberg had been

1 established?

2 THE WITNESS: No.

3 THE COURT: No attorney/client relationship had
4 been established?

5 THE WITNESS: No.

6 THE COURT: Answer the question.

7 A I'm -- ask me the question again. I'm -- you got
8 me --

9 BY MS. GALLAGHER:

10 Q I'm sorry. I apologize.

11 Did Ms. Ginzberg tell you how she knew your provisional
12 ballot had not been counted?

13 A I don't know if I can answer that. I don't --

14 Q You don't --

15 A I don't know. I don't know how to answer that
16 question.

17 Q Do you recall her --

18 A I know at some point in the conversation it was
19 mentioned that they had -- they being the ACLU, had somebody
20 when they were opening the provisional ballots. There was a
21 witness or observer or something there. I believe that's
22 how -- how they found out.

23 Q So fair to say your understanding is that the ACLU
24 had someone there who heard your name specifically stated
25 that your ballot wasn't counted?

1 A I believe so. Yes.

2 MS. GALLAGHER: Okay. Nothing further.

3 THE COURT: Any other questions?

4 May this witness be excused?

5 MR. GEFFEN: Yes, we're done with this witness,
6 Your Honor.

7 THE COURT: No objection to this witness being
8 excused?

9 MR. GEFFEN: Well, actually, Your Honor, before
10 he's excused I just wanted to make sure to move to enter into
11 the record the exhibit that we marked for Mr. Matis.

12 THE COURT: You have two exhibits that you have
13 not moved into evidence.

14 MR. GEFFEN: Yes, both of them. Both of them.

15 THE COURT: You have Petitioners' Exhibit A,
16 which is the Pennsylvania Provisional Voting Guidance. I
17 believe that you were asking --

18 MR. GEFFEN: Yes, that is --

19 THE COURT: -- Ms. McCurdy relative to that
20 document. Are you moving --

21 MR. KING: That was over our objection, Your
22 Honor.

23 THE COURT: Are you moving for the admission of
24 that document?

25 MR. GEFFEN: Yes, Your Honor.

1 THE COURT: Any objection?

2 MR. KING: Yes. I think I previously stated,
3 Your Honor, that's merely guidance. It's not mandatory in
4 Butler County or any other county in Pennsylvania. It is
5 merely someone's opinion at the Department of State, and the
6 Secretary of State has absolutely no control over the Butler
7 County Computation Board, nor the Butler County Board of
8 Elections. Every county in this state is independent of the
9 Secretary of State with respect to these issues.

10 MR. GEFFEN: Your Honor, that's a legal issue
11 that can be discussed in briefing or argument, but her -- the
12 witness' testimony did -- the document helps to clarify the
13 witness' testimony about the policy in Butler County, and it
14 is factually probative in that way, regardless of whether the
15 guidance is mandatory or --

16 MR. KING: I beg your pardon. I would invite
17 the Court to take a look -- perhaps if we're taking a break,
18 take a look at County of Fulton versus Secretary Boockvar and
19 look at Judge Leavitt's discussion of the authority of the
20 County Board of Elections versus the Secretary of the
21 Commonwealth. The Fulton County case clearly set forth the
22 power of a Board of Elections versus the power of the
23 Secretary of the Commonwealth. And so this guidance, while
24 it may be interesting to talk about and maybe somebody looked
25 at it, it has no bearing on this Court's ultimate decision.

1 THE COURT: I'll sustain the objection.

2 MR. KING: Thank you.

3 THE COURT: Moving on to Petitioners' Exhibit B,
4 which is the provisional ballot search relative to this
5 witness, Mr. Matis, are you offering that -- you're
6 proffering that into evidence?

7 MR. GEFFEN: Yes, Your Honor.

8 THE COURT: Any objection?

9 MS. GOLDMAN: Your Honor, I'll only object
10 inasmuch as it doesn't show any time stamp as to when that
11 information was present. It's just a screenshot, and so, you
12 know, there is no -- there is no context for it other than --

13 THE COURT: I understand. I will admit
14 Petitioners' Exhibit B.

15 (Petitioners' Exhibit B admitted in
16 evidence.)

17 THE COURT: May this witness now be excused?

18 MR. GEFFEN: Yes.

19 THE COURT: Thank you.

20 (Witness excused.)

21 THE COURT: How many more witnesses will we have
22 today?

23 MR. GEFFEN: One more witness for the
24 Petitioners.

25 MS. GALLAGHER: Your Honor, we would like to

1 call an additional witness. We don't have -- I don't have a
2 subpoena with me here today, and I may need one. We would
3 like to call Mr. Ting.

4 THE COURT: Mr. Ting is present? Correct?

5 MR. TING: Yes.

6 THE COURT: Any other witnesses other than the
7 possible two witnesses?

8 MS. GOLDMAN: Not -- we've rested.

9 THE COURT: Yes.

10 MR. RUSSEY: No witnesses.

11 THE COURT: All right.

12 We'll take a -- we'll be back by 2 o'clock, please.

13 Do we have Exhibit 1 and Petitioners' Exhibit B?

14 Before you leave, I need Respondent's Exhibit 1.

15 MR. KING: Can we leave our things in the
16 Courtroom, Your Honor?

17 THE COURT: Yes.

18 And I need Petitioners' Exhibit B.

19 MR. KING: Judge, while everybody is still here,
20 I'm not sure the party of the second petitioner, but assuming
21 she's a Democrat also -- I'm not sure about that.

22 MR. GEFFEN: Actually I haven't asked her.

23 MR. KING: Pardon?

24 MR. GEFFEN: I haven't asked her either.

25 MR. KING: Well, the reason I raise this is

1 sometimes in these cases -- I've been involved in quite a few
2 around the state, but sometimes in these cases we allow --
3 the parties by agreement allow some part of the certification
4 to go forward even if the rest of the certification is in
5 question. So we have a particular issue. The Democratic
6 Party in Butler County elects their committee people to
7 four-year terms. So they weren't up this past year, but all
8 the Republicans were.

9 Absent the certification of this election, as to the
10 Republican committee people, we can't have a reorganization
11 meeting of the Republican Committee. So I would ask counsel
12 to consider at least consenting to the certification of the
13 Republican committee people. And if both of the Petitioners
14 are Democrats, it couldn't -- and I don't know that.

15 MR. GEFFEN: Ms. Genser, are you Democrat or
16 Republican?

17 MS. GENSER: Democrat.

18 MR. GEFFEN: Democrat.

19 MR. KING: So they're both Democrats, so it
20 wouldn't have any effect. They couldn't have possibly voted
21 for anybody. So if you consider that, perhaps when we return
22 from lunch, we could stipulate. I'll ask if people would
23 stipulate to that to at least get the Republican committee
24 people certified. The rest of this we can fight about.

25 MR. GEFFEN: Sounds reasonable, Your Honor.

1 MR. KING: Thanks.

2 (Whereupon, Court recessed at 1:10 p.m.)

3 (Whereupon, Court resumed at 2:00 p.m.)

4 MR. KING: Judge, we have one matter, if you
5 don't mind.

6 MS. GALLAGHER: Your Honor, we have -- with
7 counsel have a stipulated exhibit. It's a stipulation as to
8 authenticity. It will be marked as Republican Party
9 Respondent Intervenor's Exhibit 2. It is the document to
10 which -- regarding which Ms. McCurdy testified as to changes
11 in the SURE system and you ordered to be produced.

12 (Respondent Intervenor Republican Party
13 Exhibit 2 marked for identification and
14 admitted in evidence.)

15 THE COURT: Go ahead.

16 MR. KING: I believe counsel consents --

17 MR. GEFFEN: That's right.

18 THE COURT: Go ahead.

19 MR. KING: Your Honor, I was just going to say I
20 believe counsel consented to the introduction of this
21 document.

22 MR. GEFFEN: Yes, Your Honor.

23 THE COURT: Mr. King, I believe you have a
24 motion to dismiss?

25 MS. GALLAGHER: May I approach?

1 Your Honor, Kathleen Gallagher on behalf of the Republican
2 Party of Pennsylvania and the Republican National Committee.
3 We have filed in this case a motion to dismiss which was
4 served along with this brief to the Court we believe
5 yesterday afternoon.

6 The case -- there is very little doubt, and I would
7 imagine that all of my colleagues, and it's a small Bar that
8 does this work, that everybody would have a wish list as to
9 how they would like mail-in voting to occur. But the reality
10 of the situation is, and the Pennsylvania Supreme Court has
11 already ruled on that in Pennsylvania Democratic Party versus
12 Boockvar, the only ones that can change Act 77 with respect
13 to notice and curing procedures is the Legislature.

14 In fact, in great depth in PA Dems, as the case is
15 referred to, the Court went into an in-depth analysis as to
16 why they could not grant the relief requested. Curiously in
17 that case and in her filings and as found by the Court, the
18 Secretary of State agreed with that and agreed that the
19 county -- no one has the authority absent the legislative
20 action to order curing to take place, and the reason is a lot
21 of what we've seen here today.

22 We heard Ms. McCurdy's testimony that Butler County
23 chooses to have a curing procedure as to those defects which
24 are facially on the envelope when it comes in. It has not
25 chosen to have a curing procedure as to deficiencies which

1 can only be determined once that ballot is opened. And,
2 according to Miss McCurdy, and according to law, as pointed
3 out in our brief, that can only occur during the pre-canvass,
4 and the results of that determination cannot be made public.

5 Justice Wecht concurred fully in the Opinion. Justice
6 Donohue concurred in the Opinion. It was a unanimous Opinion
7 by the Pennsylvania Supreme Court. They could not order
8 curing. They were not equipped, and the Secretary agreed to
9 deal with the nuanced vagary -- nuances that would occur in
10 trying to set that up.

11 This is not redrawing the redistricting map with an
12 expert. This would be about addressing issues -- as we heard
13 Ms. McCurdy say, ballots can come into until 7:59 p.m. If
14 that ballot is in, there is no way to notify that individual
15 that he or she, hypothetically, didn't include a secrecy
16 ballot.

17 So while I -- while Mr. Geffen may talk about and has
18 talked about, well, there seems to be two different types of
19 availability to cures, depending upon -- within the same
20 franchise by the same election official depending upon what
21 the deficiency is. However, the way that the Code is written
22 right now someone within may not have -- may have missed a
23 date, but if the ballot gets in too late, but is still within
24 the deadline, there's no opportunity to cure either.

25 What you're being asked to do here, Your Honor, is what

1 the Pennsylvania Supreme Court said it cannot do. It cannot
2 rewrite legislation. Only Butler County has the right to
3 choose whether or not, under the state of the law right now,
4 whether or not it will have a curing policy. It has made
5 that choice. It has been made a legally sustainable and
6 rationally based one.

7 One cannot cure a defect which cannot be determined until
8 the pre-canvass when the ballot is actually opened and those
9 results, despite what may be happening anywhere else, cannot
10 be disclosed, and that's what this county has chosen to do.
11 Petitioners are basically coming in and saying well, that's
12 not enough. That is what the law allows at this point, and
13 unless and until -- as imperfect as it may be from various
14 perspectives, unless and until the Legislature changes it, or
15 potentially the Pennsylvania Supreme Court changes its mind,
16 this Court is bound not only by the decision in PA Dems, but
17 by all the rules of statutory construction and the cases
18 which we cite in our brief with respect to the Court's
19 authority to edit a statute.

20 And I would be glad to answer any questions for the Court.

21 THE COURT: The County also allows, or there was
22 also a procedure, there's an in-person voting, and the person
23 marks two state senators rather than one. That person has a
24 right to re-vote? Correct? When the scanner takes it back
25 out.

1 MS. GALLAGHER: That's what we heard today.

2 THE COURT: Yes. If there's a deficiency in the
3 declaration envelope, that person has the right to cure that
4 defect.

5 MS. GALLAGHER: Correct.

6 THE COURT: The only time that a person doesn't
7 have a right to cure the defect is with a secrecy envelope.

8 MS. GALLAGHER: You mean in Butler County
9 itself?

10 THE COURT: Yes.

11 MS. GALLAGHER: Correct.

12 THE COURT: Because that's Butler County's
13 policy. That's the policy that has been --

14 MS. GALLAGHER: Well, it's not just Butler
15 County policy. It's also the state of the law, and in fact
16 if you look at the Secretary's -- I understand --

17 THE COURT: But the state of the law is that if
18 Butler County wanted to adopt a policy to cure secrecy
19 envelopes, they could do that because they're -- in all of
20 these cases they're material defects.

21 MS. GALLAGHER: And that was exactly the case
22 that was in front of the PA Supreme Court in PA Dems versus
23 Boockvar.

24 THE COURT: And they allowed counties to adopt
25 their own curing policies.

1 MS. GALLAGHER: Correct.

2 THE COURT: So why is this not an equal
3 protection question?

4 MS. GALLAGHER: Oh, because the Court has
5 already addressed that issue. In the case of -- and I don't
6 mean to turn my back on the Court, but it is -- Judge Ranjan
7 looked at this exact issue, and he looked at that issue with
8 respect to -- in Trump versus -- I believe it's 393 F.Supp.
9 474. I will get you the cite. And in that case the
10 Plaintiffs therein, President Trump, raised the issue of
11 whether from county to county, Judge, all right, if one
12 county has a curing policy and another county does not, all
13 right --

14 THE COURT: I'm not looking county to county.
15 I'm looking within the --

16 MS. GALLAGHER: But even with --

17 THE COURT: Within the --

18 MS. GALLAGHER: Within the franchise. I
19 understand that.

20 THE COURT: Intracounty.

21 MS. GALLAGHER: Intra -- it is not an equal
22 protection clause, an equal protection question.

23 THE COURT: Why?

24 MS. GALLAGHER: The Court ruled that it did not
25 have the authority, all right, in that case, to override what

1 the Pennsylvania Supreme Court said and rewrite -- if I may,
2 to create an equal protection case -- Bush v. Gore, the
3 technical default, all right, with respect to equal
4 protection clauses is not as simple as -- and I don't mean
5 that the Court is taking a simplistic approach. But the
6 Courts have repeatedly held that the creation of an equal
7 protection clause is not -- each -- let me say it correctly.

8 There is a difference in the franchise. Different issues
9 have different curing. What overrides with respect to the
10 secrecy ballot, as the Court has stated, Your Honor, it is
11 illegal, illegal, to say whether or not there is a secrecy
12 envelope in there. There is a rational basis which meets the
13 scrutiny test, and we cite in our brief, all right, the very
14 provisions of the Election Code which prohibit the results of
15 the pre-canvass.

16 But for the fact that Butler County has a machine that
17 scans these envelopes, all right, to determine whether
18 ostensibly that envelope -- that ballot contains a secrecy
19 envelope, we would not be here. If -- because the ballot --
20 and you've heard the testimony. There is no finality as to
21 whether or not a secrecy envelope is present until that
22 envelope is actually opened, all right?

23 That's what's different in the two issues. One is on the
24 face. What comes in, and it is legal -- a legally consistent
25 policy for just that reason. One is on the face of the

1 envelope. Whoever can look at it and say, all right, there
2 is no date, there is no date, there is no signature, and
3 cure.

4 It is our position that to force Butler County to adopt a
5 curing policy on the basis of -- to allow a defect which it
6 cannot determine until the pre-canvass, the morning of
7 Election Day, and which it is prohibited, the results of
8 which, regardless of what other counties are doing, all
9 right --

10 THE COURT: Well, wasn't this determined prior
11 to the morning of Election Day because the emails that
12 Mr. Matis received --

13 MS. GALLAGHER: And, your Honor, that's --

14 THE COURT: That he received or the other
15 Petitioner received were before the morning of Election Day.

16 MS. GALLAGHER: And that's the problem, all
17 right? And, as I said, but for that. It was not determined.
18 It was believed that there was no secrecy envelope.

19 THE COURT: So what's the harm in allowing a
20 provisional vote if it's perceived that there was -- it was
21 perceived there's a defect, what's the problem in allowing a
22 provisional vote and then going and opening the mail-in
23 ballot to determine whether or not there is actually a
24 defect?

25 MS. GALLAGHER: Opening the mail-in ballot

1 during pre-canvass?

2 THE COURT: And then a provisional vote is not
3 counted.

4 MR. KING: Can I address the harm? Do you mind
5 if I address the harm issue?

6 First of all, with regard to the equal protection issue, I
7 believe the Supreme Court has already decided, but if you
8 think of Butler County on the same topic, in the same county,
9 all voters are treated the same, on the same topic being the
10 secrecy envelope. Every voter in Butler County, Republican,
11 Democrat, Independent, whatever, are treated the same. So
12 you have to get to different topics in order to try to apply
13 an equal protection argument. As to this topic, which is --
14 which is secrecy envelopes, every voter in Butler County is
15 treated the same.

16 Secondly, with respect to opening these envelopes to
17 see -- the outer envelope to see, it's illegal. And the
18 reason it is, is because the Pennsylvania Constitution, and
19 the Supreme Court has reaffirmed this numerous times, secrecy
20 is of the utmost importance. And so you heard even Chantell
21 testify here today about these things getting locked up, and
22 no one can see them because we don't want to open -- I don't
23 want anyone to open my ballot, my outer envelope, to see my
24 ballot, believing that I didn't put it in a secrecy envelope.

25 That's my ballot. It is a secret vote, and that's in the

1 Pennsylvania Constitution. So I have a constitutional right
2 to secrecy in voting. They would have to open this up, in
3 which event someone would see my vote, and that's why when
4 this happens in the pre-canvass, this -- the Election Code
5 strictly prohibits -- everyone has to take an oath when they
6 participate.

7 They have to take an oath that they won't disclose what
8 they see in the pre-canvass. Think about it. If people
9 could disclose, you know, that the Democrats were ahead by
10 100 votes, the Republicans would run out and get another 100
11 voters to offset that difference.

12 You're by oath required not to disclose what happens in
13 the pre-canvass, but you cannot open those ballots. You
14 cannot look and see, in this case, how Frank Matis voted.
15 You would have to open that thing up and look, and you would
16 see a naked ballot in there, and then someone would know how
17 Frank Matis voted, and that's against the Constitution of
18 Pennsylvania. That is illegal.

19 I'm sorry to interrupt, but I just wanted to add that.

20 MS. GALLAGHER: Your Honor, if I may finish,
21 that's what I was trying to say.

22 MR. KING: Sorry.

23 MS. GALLAGHER: There is a distinction between
24 what is seen on the face of the envelope, all right, what is
25 perceived, but what cannot be determined with finality until

1 the pre-canvass, and at that point it is prohibited to
2 disclose those results. That is, as Mr. King pointed out,
3 across the board.

4 Bush v. Gore, as I was apparently not going quickly enough
5 to get back to, was when voters within the same franchise,
6 all right, under the same election official are treated
7 differently, all right. That's not what's happening here.
8 Every mail-in voter within the mail-in voting franchise --
9 and we have to be careful of comparing voting on the machine
10 and voting in mail. I mean they are really two different
11 types of franchises. So you look within the franchise, all
12 right, and within that franchise everyone is treated equally.
13 That's Bush v. Gore, equal protection.

14 What Judge Ranjan averred to is even applying that to
15 different counties because there is law in Pennsylvania which
16 we have argued that there is -- that fair and equal elections
17 require uniform procedures, all right. Ostensibly applying
18 that principle and the theory of equal protection, it would
19 seem why would a voter in a county without a curing policy
20 have a chance at -- a second chance, and if you're in a
21 county does that does not allow curing, you don't get that
22 second chance. Judge Ranjan found that was not an equal
23 protection argument.

24 And, as I believe Mr. Geffen has heard you say, argued
25 earlier, the Courts have allowed the counties to determine

1 their own procedures. All Butler County has done is chosen
2 to follow the law. It's very clear that disseminating -- you
3 can't open it until pre-canvass. You can't say what happened
4 or what the status of the vote is. And especially if you
5 look at Footnote 27 in *Pennsylvania versus Dems*, the Court,
6 to Mr. King's point, went through a very detailed analysis,
7 very detailed, as to the importance of that secrecy envelope,
8 and that's the -- part of the reason why the pre-canvass
9 keeps it quiet.

10 Another issue that the Court looked at as to why courts
11 cannot mandate -- because that's what they're asking you to
12 do, mandate. And they raised all these arguments before in
13 front of the Pennsylvania Supreme Court. And even the
14 Secretary said it can't happen. If it's chaotic -- the chaos
15 that arises, all right, and how all of these issues get
16 addressed can only be left to the Legislature.

17 Again, Your Honor, what about the voter -- asking your
18 question, all right, well, they just didn't have a secrecy
19 envelope. The voter whose ballot comes in too late on
20 Election Day but is legally cast in time does not have a
21 chance to cure anything. If it comes in at five to eight, if
22 that ballot is defective, that ballot is not going to count
23 with no chance to cure. That's not a problem -- that's not
24 an equal protection problem. It's a problem with the system,
25 and that is one of the reasons why everyone from the

1 Secretary to each of the Justices of the Supreme Court ruled
2 this can only be done by the Legislature.

3 Overruling -- granting this request punishes Butler County
4 for following the law, for going as far as it could to
5 enfranchise every voter without breaking the -- violating the
6 Election Code. They were in compliance. Everyone gets
7 treated the same.

8 And, in fact, in PA Dems, there was -- the Court wrote,
9 well, according to the Secretary, this risk of
10 disenfranchisement, as long as the voter follows the rules,
11 they're going to be just fine. Mistakes happen. Someone may
12 get a chance to have their overvote caught. What about an
13 undervote in a secrecy ballot? There's no way to fix that,
14 if someone just skips a race.

15 People make mistakes. That doesn't mean elections don't
16 have rules. Disenfranchisement is a very emotional term, all
17 right, and disenfranchisement, suppression, all of these
18 issues. What disenfranchisement can never mean is election
19 without rules. There have to be rules. The rules have to be
20 enacted by the Legislature and passed on by the Court.

21 The rules in this case are very clear. There must be a
22 secrecy ballot, and the envelopes cannot be opened until
23 pre-canvass, and once opened, the information cannot be
24 disseminated. If that is problematic, that has to be taken
25 up by the Legislature or until the Supreme Court overrules

1 it.

2 THE COURT: Thank you.

3 Ms. Goldman.

4 MS. GOLDMAN: Your Honor, this is not our
5 motion, but I'm going to just weigh in only to focus the
6 Court's -- inasmuch as to focus the Court's attention on the
7 fact that the PA Dems case ruled that a lack of a secrecy
8 envelope is a material defect; that having a secrecy envelope
9 is mandatory. And when the Court was asking Ms. Gallagher
10 about the other cure avenues, the curing avenues, including
11 the curing policy, are for non-material defects. So you can
12 cure the outer envelope. That is not a fatal flaw because
13 that's why that -- but the security, the secrecy envelope is
14 a -- in PA Dems that's fatal.

15 THE COURT: Haven't they stated that failure to
16 sign or date the declaration of that envelope, of the
17 declaration envelope is an invalid vote?

18 MS. GOLDMAN: But they can cure that because
19 these are -- these are not something that the Pennsylvania
20 Supreme Court ruled on, said that that would be a fatal --
21 like a -- you know, that that can't be fixed.

22 THE COURT: Isn't the secrecy envelope -- the
23 failure to include the secrecy envelope makes it a void vote.

24 MS. GOLDMAN: I don't know that that's -- you
25 know, it's --

1 THE COURT: Which is --

2 MS. GOLDMAN: It is a vote that cannot be
3 counted.

4 THE COURT: It's a void vote. I think the
5 language was actually void vote, which equals an invalid
6 vote.

7 MS. GOLDMAN: But it's been voted. Right. So
8 once it's voted, it is voted. It is pregnant with a vote.

9 THE COURT: A vote that is invalid, void.

10 MS. GOLDMAN: A vote that cannot be counted.

11 THE COURT: Yes, same with the failure on the
12 declaration envelope. There's a failure there, and if it's
13 not corrected or cured, it's an invalid vote. It can't be
14 counted.

15 MS. GOLDMAN: Correct.

16 THE COURT: They're the same.

17 MS. GOLDMAN: But there are opportunities where
18 the Courts have corrected that vote based on the lack of
19 materiality. That is not the case with the secrecy envelope.

20 THE COURT: They haven't said that in vote cases
21 those are material defects?

22 MS. GOLDMAN: They have said that the secrecy
23 envelope goes to the very heart of whether or not there could
24 be a potential for voter fraud. That's what the secrecy
25 envelope goes to.

1 THE COURT: What about Ball --

2 MS. GOLDMAN: And you can cure that -- excuse
3 me.

4 THE COURT: Ball versus Chapman.

5 MS. GOLDMAN: Right. But you can cure -- you
6 can't cure that.

7 You can cure -- and you heard Ms. McCurdy's testimony
8 today when she said that she can have somebody call in if --
9 in order to say, yes, I do authorize somebody to deliver my
10 vote, that you can sign an attestation. That there were
11 opportunities for them to do that check, right. And so that
12 is not what's available with respect to the lack of a secrecy
13 envelope because there has been no avenue that has been
14 provided to that.

15 But to segue from that, the issue is this Court cannot
16 unilaterally rewrite the curing policy that has to be voted
17 on by the Commissioners and then -- you know, and then voted
18 on at a hearing that is open to the public. And that's where
19 the policies are created, and we've heard that testimony
20 today, and we've -- you know, to the extent that there is a
21 democratic process related to that policy, that takes place
22 at public meeting and it's voted on by the Commissioners.

23 THE COURT: I'd be interested in knowing what
24 the Federal -- I'm sorry, Judge?

25 MS. GALLAGHER: Ranjan.

1 THE COURT: Yes. Yes, I'm interested in knowing
2 what that case says.

3 MS. GALLAGHER: Yes, sir. I'm sorry.

4 THE COURT: Well, I'm going to give you all an
5 opportunity to brief this because I want --

6 MR. KING: This is --

7 THE COURT: That's the rub to me.

8 MR. KING: It's the Zicarelli case, Your Honor.

9 THE COURT: That's the rub to me.

10 MR. KING: It's the Trump case, sorry. But
11 there is the Zicarelli case too where in Westmoreland County
12 they did not count undated ballots, and in Allegheny County
13 they did count undated ballots, and that wasn't equal
14 protection either. Zicarelli lost those results.

15 MS. GALLAGHER: Your Honor, if I can make --
16 just address your question, if it's helpful on undated
17 ballots, all right.

18 You are correct. The Court did in Ball, the PA Supreme
19 Court ruled that the secrecy -- or, excuse me, the date is a
20 fatal defect, all right. And I think that's where it gets
21 confusing. We have to separate out the defect from the
22 curability, right, for both an undated ballot -- I don't
23 think anyone disagreed at this point. An undated ballot or a
24 ballot that lacks a secrecy envelope, those are in and of
25 themselves fatal defects.

1 The issue before the Court is the ability or the
2 requirement to cure those defects, all right. And it is in
3 there, in that issue, that -- and especially now Ball, the
4 Supreme Court split on materiality issue in Ball. They held
5 firm on the state court. We then defended the cases, Mr.
6 Gore and I and Mr. King, in Federal Court.

7 MR. KING: Ball is my client.

8 MS. GALLAGHER: In Federal Court.

9 Judge Baxter granted Summary Judgment in favor of the
10 Plaintiffs in that case, went to the Third Circuit, Third
11 Circuit reversed, and on April 22nd, I believe it was, they
12 denied the Rehearing En Banc, all right. That's the status.

13 So we now know that in Pennsylvania, as of today, a ballot
14 which is not dated bears an incurable defect both under
15 Pennsylvania law and Federal materiality, all right. And the
16 law has been since Boockvar if there's no secrecy ballot,
17 that's a fatal defect. Curing is different, all right.
18 Curing is the ability to fix that defect, all right.

19 So on multiple levels, right, we then start with 2020 and
20 PA Dems, in this case which decided all these issues, along
21 with the extension of the received by date, poll watchers, et
22 cetera. They were asked to cure. The Pennsylvania
23 Democratic Party filed that case, and they wanted the Court
24 to mandate curing.

25 So the Court went through the analysis of all these

1 different issues. It has to be a secrecy ballot, and, again,
2 on that one, to Mr. King's point, in-depth analysis of why
3 that is so important to have. In fact, it is actually in the
4 Pennsylvania Constitution that an elector -- and certainly
5 our founders didn't envision mail-in balloting or electronic
6 vote. It must be cast in secret, all right.

7 As they got past that, it was the issue of curing. And,
8 interestingly, the Secretary of the Commonwealth at that
9 time, Kathleen Boockvar, split from the Democratic Party on
10 that issue. And, again, in the Opinion, as we cite, went
11 into great analysis as to why it was a disaster. And when we
12 brief this, Your Honor, you will see that same testimony --
13 you will see it in testimony before Chairman Grove, Seth
14 Grove of the Pennsylvania House.

15 The House had hearings post 2020 to look at how things
16 could be done better. And there Secretary Boockvar -- two
17 things she testified to. She testified to her limited
18 authority, which she has pled everywhere over the counties,
19 all right. She has no authority to tell them to cure, all
20 right.

21 And she has testified to it there and in front of Chairman
22 Grove, and in that again says I would like to work with the
23 Legislature to develop curing amendments, and that was done
24 in 2021. Governor Shapiro vetoed it. There was legislation
25 which was passed to cure.

1 So what is our default, as every one of these 68
2 fiefdoms -- 68 fiefdoms exist under our Election Code.
3 Well --

4 THE COURT: 67.

5 MS. GALLAGHER: 67, excuse me. I said 68. They
6 are autonomous.

7 THE COURT: True, but --

8 MS. GALLAGHER: They are autonomous --

9 THE COURT: But Butler County has -- in
10 their Butler County Ballot Curing Policy under III.H. they
11 have given the declaration envelope failure or fault, two
12 different ways to cure that problem.

13 MS. GALLAGHER: Correct, because it can be seen
14 from the outside. Right? They can look at that ballot when
15 it comes in and see it.

16 The problem in this case, Judge, lies with the Secretary
17 of the Commonwealth because one of the issues, regardless of
18 who takes this up on appeal, is that the Secretary of the
19 Commonwealth has no authority, no authority. That's why that
20 document you -- we just put in that was produced here is
21 important. No authority to advise a voter that he or she can
22 vote provisionally. I mean, over one's skis is not even an
23 axiom. She has no authority to make that determination.

24 THE COURT: So let me show you this document.

25 MS. GALLAGHER: Sure.

1 THE COURT: Counsel, I think you gave me more
2 than one.

3 MS. GALLAGHER: I've seen this. This is the
4 guidance on the website.

5 MR. GEFFEN: Yes, I've seen it.

6 MR. KING: Is this your ballot, Your Honor?

7 MS. GALLAGHER: No, this is from -- this is from
8 the website. This is a poster which the Secretary puts up,
9 all right. So -- and you can see in here what was your --
10 that the ballot was rejected by the County Board of
11 Elections.

12 Your Honor, I can't disclose privilege. Our view is this
13 is illegal. She doesn't have the authority. And when you
14 read the testimony, what she submitted not only in
15 Pennsylvania Democratic Party versus Boockvar, what she
16 submitted in the Ranjan case, the Trump case, which we'll
17 provide to you, what the Secretary argued in front of Judge
18 Baxter, as to why -- it was then he -- he should not be a
19 defendant in that case, because he has no authority over the
20 counties. The same thing that was argued in the curing case,
21 when standing was denied -- when the case was thrown out on
22 standing, was that the Secretary can't be sued because she
23 has no authority in curing. It was she then. The Secretary
24 doesn't have the authority to do this.

25 All of that aside, while the Secretary and the

1 Commonwealth may have created this problem to achieve their
2 political end -- which you will read the Secretary's
3 testimony. She wants curing. The Supreme Court can't force
4 a county to cure. The Secretary can't go in the back door
5 and try to create a curing issue by telling the voter you can
6 vote provisionally, and that --

7 THE COURT: Why?

8 MS. GALLAGHER: Go ahead.

9 THE COURT: Why was -- and, again, I'm going
10 here. We have heard this testimony of Mr. Matis that was out
11 of order, but why was Mr. Matis told go to the polling place
12 and vote a provisional ballot?

13 MS. GALLAGHER: Because she was -- because the
14 Secretary --

15 THE COURT: No, no, no. He called the -- his
16 testimony was he called the Bureau of Elections and was told
17 by that person there to go vote a provisional ballot.

18 MS. GOLDMAN: I can't speak for the Board of
19 Elections, but what I was trying to say was the Secretary of
20 the Commonwealth has said that. He was not told --

21 THE COURT: That's not -- I understand that's
22 what you're saying about the Secretary of the Commonwealth,
23 but this is now going to the local election bureau.

24 MS. GALLAGHER: Your Honor, I can't speak for
25 that person, but I don't know what --

1 THE COURT: If I believe what Mr. Matis told me,
2 and that's what's in his petition --

3 MS. GALLAGHER: No, no, no. I don't know why --

4 THE COURT: That he was told go vote.

5 MS. GALLAGHER: But I don't know who that
6 individual is.

7 THE COURT: I understand that.

8 MS. GALLAGHER: That's his testimony. I mean
9 I'm not saying you should disbelieve him. But what we do
10 know from Miss McCurdy is that those ballots were not going
11 to count because the determination as to whether or not there
12 was a secrecy envelope, all right, wasn't going to be made
13 until -- until the date that the vote was taken by the board,
14 all right.

15 Rules matter. I understand and actually have argued
16 exactly what the Court said, your point, and was repeatedly
17 told there is no equal protection claim because within the
18 franchise everybody is treated the same. That's Judge
19 Ranjan's opinion.

20 THE COURT: Within the franchise of the --
21 within the franchise of the secrecy envelope problem?

22 MS. GALLAGHER: No, within the franchise of
23 mail-in voting. Okay?

24 THE COURT: Totally.

25 MS. GALLAGHER: Everybody is treated the same

1 in --

2 THE COURT: Within the franchise of mail-in
3 voting, everyone is not treated equally in Butler County.

4 MS. GALLAGHER: Sure they -- respectfully, I
5 disagree.

6 If it is something that can be seen on the face of the
7 envelope, they can cure. If it is something that could only
8 be determined within the pre-canvass, all right, when the
9 ballot is opened, and there is a prohibition of disseminating
10 those results, all right, everybody is treated the same.

11 MR. KING: Judge, on behalf of the Republican
12 Party of Pennsylvania, I just want to say, we don't think
13 that -- regardless of whether it's in the pre-canvass or when
14 it is, you can't open that envelope and see my naked ballot.
15 You're not -- that violates the Constitution, it violates
16 your constitutional rights, and it can't be done. It can't
17 be cured at all. That's our position.

18 THE COURT: I understand.

19 MR. KING: And the only way that this could get
20 changed is by the Legislature.

21 THE COURT: I understand.

22 Mr. Geffen.

23 MR. GEFFEN: Thank you, Your Honor.

24 Let me begin by talking about the PA Dems case and
25 hopefully to unwind some -- some of the ways that maybe we're

1 getting mixed up talking about it. I think there's a simpler
2 way to look at that case. The PA Dems case was about what --
3 as I said in my opening remarks, there are two different
4 ways, two different families of ways, that a voter who has
5 sent in a mail ballot that can't be counted for one reason or
6 another to cure that problem. There are two ways.

7 The PA Dems case is about the first set of ways. That is
8 when you go into the County Board of Elections in person on
9 or before Election Day to take steps so that that ballot that
10 you put in that first envelope, the mail-in ballot, that
11 ballot will be counted. That's what the PA Dems case was
12 about, and what that case held was that the Election Code
13 does not require counties to offer that kind of cure process.

14 There was a later decision by Judge Ceisler I believe in
15 2022 in the Commonwealth Court, an unreported decision, that
16 went further and said that counties are neither required nor
17 forbidden to offer that cure process. So as a result we have
18 a system around Pennsylvania, which Judge Ranjan from the
19 Western District did address under a 14th Amendment question,
20 and under this system some counties offer that in-person
21 curing option to fix that original mail-in ballot, and some
22 don't.

23 So, for example, in Philadelphia County if you are --
24 receive that email saying you sent in a naked ballot, you can
25 go to City Hall in Philadelphia and say, I would like to fix

1 that problem, and they will void your original mail-in ballot
2 in the system. They will produce a new mail-in ballot packet
3 for you on the spot with the ballot and the two envelopes and
4 so on. And then you can fill it out --

5 THE COURT: And this is a secrecy envelope
6 problem.

7 MR. GEFFEN: Right, a secrecy envelope problem.
8 You can fill it out right there in City Hall, hand it back
9 in, and that is the ballot that will be counted. Butler
10 County does not offer that cure process, nor do they have to
11 under PA Dems case. They don't have to offer that if they
12 don't want to.

13 There is a different type of cure process, provisional
14 balloting. And a provisional ballot is a type of cure
15 process that takes place at the polling place. You can't do
16 it at the Board of Elections. You can't do it before
17 Election Day. It works only on Election Day, and it's a cure
18 process that involves getting not your original mail-in
19 ballot counted, but this new ballot that you fill out at the
20 polling place on Election Day. That's the one that you'll
21 get counted.

22 THE COURT: The provisional ballot?

23 MR. GEFFEN: Right. That type of curing is not
24 an issue in PA Dems. That's the type of curing that's at
25 issue in this case.

1 Ms. Gallagher noted that the PA Dems decision emphasized
2 that it's up to the Legislature whether to offer a cure
3 process. I agree. And the Legislature has offered that
4 provisional ballot cure process. That's 25 P.S. Section 3050
5 which I read in my opening statement.

6 So the Legislature already has weighed in on this some 20
7 years ago and have said that that cure process is available.
8 It's not a county-by-county thing; it's everywhere. Now, as
9 a practical matter, let me explain something that I think
10 maybe is lurking beneath the surface here but that may be
11 informative, which is that for a lot of groups that are --
12 whether they're political parties, non-profit organizations
13 that are doing get-out-the-vote work and trying to make sure
14 that voters vote and that their ballots get counted, for them
15 it's much preferable to have that first option available.

16 I think they would tell you that a lot of voters may not
17 be able to go to their polling place on Election Day, whether
18 it's because of something that would have made them eligible
19 for an absentee ballot under the old system, like they would
20 be out of town on Election Day, or for a reason like -- that
21 would not have previously made them eligible for absentee
22 balloting. Maybe they have work or child care duties that
23 preclude them from going there on Election Day. So it would
24 be preferable for many of those voters to have the option to
25 go in to the board of elections prior to the Election Day and

1 to fix the problem there.

2 Nonetheless, PA Dems case says that counties don't have to
3 give them that opportunity. So the fail-safe mechanism, and
4 it's an imperfect one, but it's one that Mr. Matis and Ms.
5 Genser attempted to avail themselves of, is the one that's
6 provided for by the Legislature in Section 3050, and that's
7 the option of curing not to fix your original mail-in ballot,
8 but instead to cure your mistake by filling out a new ballot,
9 a provisional ballot, and having that one counted.

10 I want to respond also to -- you know, Your Honor brought
11 up and I think very astutely the idea that there may be an
12 equal protection issue in that -- an intracounty equal
13 protection issue insofar as --

14 THE COURT: Spell that.

15 MR. GEFFEN: I-N-T-R-A.

16 THE COURT: Okay.

17 MR. GEFFEN: C-O-U-N-T-Y.

18 THE COURT: So we're talking now simply about
19 Butler County?

20 MR. GEFFEN: Correct. Within Butler County
21 there are different tranches of ballots, different categories
22 of voters, treated differently. Voters who made a mistake by
23 failing to sign the outer envelope have one or two options to
24 fix the mistake. A voter who sends in a naked ballot has
25 zero options. That may indeed raise an equal protection

1 problem.

2 I'll note for the Court that we -- to the extent this case
3 asserts a Constitutional cause of action, that cause of
4 action sounds in Article 1, Section 5 of the Pennsylvania
5 Constitution, free and equal elections clause. The US
6 Constitution is, of course, what you need to cite if you're
7 filing a case in Federal Court, and Judge Ranjan in the
8 Western District was hearing a 14th Amendment case, among
9 other things. But this case arises under what is an even
10 more protected provision.

11 Interestingly, the US Constitution does not contain an
12 express affirmative right to vote. It's not in there. There
13 are various negatives. You can't be denied the right to vote
14 because of race or sex or failure to pay poll tax, et cetera.
15 But it doesn't articulate an affirmative express right to
16 vote.

17 Our state Constitution does, and that's in Article 1,
18 Section 5. In fact, every state Constitution does. And that
19 is an even stronger right than the equal protection right in
20 many instances in election law. And it has significance both
21 in terms of being the foundation for a claim of a
22 Constitutional violation, but it also informs how a court
23 should apply the rules of statutory construction.

24 Here there is -- to the extent there is some tension
25 between two different provisions of Section 3050, the general

1 rules, like the Statutory Construction Act, would counsel the
2 Court needs to read them harmoniously and to avoid surplusage
3 and so on. But there's an additional rule applicable
4 specifically in election matters thanks to Article 1, Section
5 5, the free and equal elections clause, which says that any
6 ambiguity in the Election Code should be construed with an
7 aim to save the vote.

8 So to the extent that there's an ambiguity here, and
9 there's a lot of ambiguity in the County's practices, the
10 Court should construe it in a way to save the vote. And I'll
11 just highlight some of those oddities of the County's
12 practices. We heard testimony today from Ms. McCurdy that if
13 a voter goes in person to the polling place, fills out a
14 ballot, overvotes for an election, feeds the ballot into the
15 scanner --

16 THE COURT: It kicks it back out and they can
17 vote again.

18 MR. GEFFEN: Kicks it back out. So even at the
19 moment when you have -- according to the County, even at the
20 moment when you have inserted your ballot into the scanner,
21 you still haven't cast it, yet when you -- and when you mail
22 in a ballot that lacks an envelope signature on the outer
23 envelope, their position appears to be you haven't yet cast
24 it. Yet when you send in a naked ballot, even though it
25 exists in this Schrodinger's Cat superposition, where no one

1 yet is totally sure whether or not there's a secrecy envelope
2 inside --

3 THE COURT: It's cast.

4 MR. GEFFEN: -- it's cast. And that is a
5 reading of Section 3050 that has a lot of internal tension,
6 and it's not consistent with the Statutory Construction Act,
7 and it's certainly not consistent with Article 1, Section 5.

8 Counsel also mentioned that certain defects are fatal,
9 others are non-fatal. This is not based on anything I'm
10 aware of in the Pennsylvania Democrats decision. And,
11 indeed, in many counties supposedly fatal defects can be
12 fixed even at the Board of Elections by that first time of
13 curing.

14 I heard a reference to Bush v. Gore. I would just remind
15 the Court that even the US Supreme Court in that decision
16 counseled that that case was to be restricted to its facts.
17 I also would like to note that -- I think it was mentioned
18 that Petitioners were asking the Court to rewrite the Board's
19 policy. All we're asking for is that the Board follow the
20 Election Code and that -- and in addition, we would note that
21 there is certain inconsistency about what the Board's policy
22 or practice may be. On the one hand we've seen --

23 THE COURT: It's inconsistent to the point that
24 we have someone -- if you believe Mr. Matis, you have someone
25 telling him from the Election Bureau, go file a -- go vote a

1 provisional ballot.

2 MR. GEFFEN: That's exactly -- that's exactly
3 right, Your Honor. And I think when Ms. Genser testifies,
4 you will hear even -- even more extensively with some
5 additional evidence about the inconsistent advice that voters
6 receive when calling the County Board of Elections.

7 THE COURT: I'm going to deny the motion to
8 dismiss. I want to hear the rest of the testimony. I want
9 to give you an opportunity to brief it, and we'll go from
10 there.

11 MR. GEFFEN: Thank you, Your Honor.
12 And if it's our turn now, I could call Ms. Genser.

13

* * *

14

FAITH A. GENSER,

15

Being first duly sworn according to

16

law by the Court, testified as

17

follows:

18

DIRECT EXAMINATION

19 BY MR. GEFFEN:

20 Q Good afternoon, Ms. Genser. It's nice to see you.

21 How are you?

22 A I'm fine. Thank you.

23 Q Ms. Genser, to begin, can you please just state your
24 name and spell your last name for the court reporter?

25 A It's Faith Ann Genser. My last name is spelled

1 G-E-N-S-E-R.

2 Q Thank you. And what's your address?

3 A 329 East Grandview Avenue, Zellenople, 16063.

4 Q And about how long have you lived at that address?

5 A 2016. Mid 2016.

6 Q Okay. And have you been registered to vote since
7 about then at that address?

8 A Yes.

9 Q Okay. Would you say that you voted rarely, or some
10 elections, or most elections, or all elections?

11 A Some to most elections. Yes.

12 Q Okay. And for the April 2024 primary I believe you
13 received a mail ballot?

14 A Yes.

15 Q Okay. And I would like to show you a document --

16 MR. GEFFEN: And I believe we're up to
17 Petitioners' Exhibit 3?

18 THE COURT REPORTER: C.

19 MR. GEFFEN: C. Thank you. We're doing
20 letters.

21 (Petitioners' Exhibit C marked for
22 identification.)

23 Q Do you recognize this document?

24 A Oh, yes. Uh-huh.

25 Q And could you please -- if I'm not mistaken, this

1 looks like an email that you received on March 27th?

2 A Yes.

3 Q And was this shortly after you had -- or is it
4 shortly before rather that you received your mail-in ballot
5 that you got this email?

6 A Correct. Uh-huh.

7 MR. GEFFEN: I'd like to move Petitioners'
8 Exhibit C for admission into the record.

9 THE COURT: Who did you receive this from,
10 ma'am?

11 THE WITNESS: It came from the State of
12 Pennsylvania. I'm signed up for those types of alerts. If
13 you see the from, you can see the email address.

14 THE COURT: Any objection?

15 MS. GALLAGHER: Yes, Your Honor. I mean I can
16 reserve and we can argue it later once I get to cross-examine
17 the witness, or we can do it now.

18 THE COURT: Do it now, please.

19 BY MS. GALLAGHER:

20 Q Ms. Genser, at the top of it there's two --

21 MS. GALLAGHER: First of all, we would object to
22 anything redacted being entered without the full document
23 being entered at least with -- subject to protective order.
24 If I may --

25 THE COURT: I'm going to -- already I'm going

1 to -- I want to see the full document.

2 MR. GEFFEN: Okay. We can provide it, Your
3 Honor. The portion that's redacted --

4 THE COURT: Do you have the full document?

5 MR. GEFFEN: We can provide that. I can provide
6 it in electric form today. We can print that out and mail it
7 to the Court as soon as we have access to a printer. I don't
8 have a hard copy.

9 The only part that's redacted is her email address.

10 MS. GALLAGHER: That was the basis of our
11 objection, Your Honor.

12 MR. GEFFEN: The original email was sent by the
13 Department of State to her. We've redacted the email
14 address. And then she forwarded it just for printing
15 purposes to Kate at my right. And, again, we redacted out
16 Ms. Genser's email address. That's what's under the black
17 boxes. But we can --

18 THE COURT: Anything else, counsel?

19 MS. GALLAGHER: No, that's -- that was my
20 question, Your Honor.

21 THE COURT: Subject to having an unredacted
22 document provided --

23 MR. GEFFEN: Yes, Your Honor. Would Your Honor
24 prefer that we mail that to the Prothonotary's office?

25 THE COURT: You can. That's fine.

1 MR. GEFFEN: Okay. We'll do so. Thank you,
2 Your Honor.

3 And there's going to be one other exhibit I'm going to
4 offer in just a moment that has the exact same issue. So we
5 can do the same thing for that one.

6 THE COURT: Very well.

7 MS. GALLAGHER: Is this C?

8 MR. GEFFEN: Yes, C.

9 BY MR. GEFFEN:

10 Q Ms. Genser, so you at some point prior to April 23rd
11 received a packet that included the mail-in ballot and the
12 envelopes from the Butler Board of Elections? Is that right?

13 A Yes.

14 Q Okay. And did you fill out that ballot?

15 A I did.

16 Q And how did you get it back? Did you mail it or did
17 you hand-deliver it?

18 A I mailed it.

19 Q Okay. I would like to show you another exhibit.

20 MR. GEFFEN: I'll ask for it to be marked as
21 Petitioners' D. And, again, this is the one that has the
22 same email redaction which we will address afterward in the
23 same way.

24 (Petitioners' Exhibit D marked for
25 identification.)

1 THE COURT: So if I'm understanding right,
2 there's no objection to Petitioners' Exhibit C as long as an
3 unredacted copy --

4 MS. GALLAGHER: Unredacted copy, yes, sir.

5 THE COURT: So I will admit Petitioners' Exhibit
6 C with that qualification.

7 (Petitioners' Exhibit C admitted in
8 evidence.)

9 BY MR. GEFFEN:

10 Q Ms. Genser, are you familiar with this document?

11 A Oh, yes.

12 Q And this appears to be for -- the original email
13 appears to be one dated April 11th? Do you see that?

14 A Correct. Yes.

15 Q And it comes from that same email address, from
16 state.pa.us? Do you see that?

17 A Yes.

18 Q And this is an email that you indeed received on
19 April 11th?

20 A Yes.

21 Q And do you see in this email the second paragraph
22 where it says, your ballot will not be counted because it was
23 not returned in a secrecy envelope?

24 A Yes.

25 Q Was that the first -- reading this email, was that

1 the first you had heard about this problem?

2 A Yes.

3 Q Okay. And you see that second sentence that says, if
4 you do not have time to request a new ballot before April 16,
5 2024, or if the deadline has passed, you can go to your
6 polling place on Election Day and cast a provisional ballot?
7 Do you see that?

8 A Yes.

9 Q Tell me how you -- what you did after you received
10 this email.

11 A So my first thought was that's unusual for me to --
12 like, Faith, what did you do, did you really do this. And I
13 was thinking about I will need to rectify this, but I
14 first -- I'm someone who calls and to find out and to
15 check --

16 THE COURT: Called who?

17 THE WITNESS: The Butler County number here,
18 724-264 -- 284-5308.

19 A And the gentleman picked up the phone, and I asked
20 the gentleman to double-check as to whether or not I had or
21 had not included my vote in a secrecy envelope because I had
22 just received this email. And I remember I was at work. So
23 I took time off to call, to make that call.

24 And he asked my name, and I waited, and he came back to
25 me, and he said, yeah, you did not. Yours does not have a

1 secrecy envelope. And I --

2 MS. GALLAGHER: Your Honor, if I may, I'm going
3 to object to the hearsay nature of the testimony and ask for
4 a continuing objection so I don't have to keep objecting.

5 THE COURT: Just state what you did as a
6 result --

7 MR. GEFFEN: And, Your Honor, in response to
8 that objection, I would just note that I'm not offering --
9 I'm not -- this testimony won't be offered for the proof of
10 the matters asserted -- the truth of the matter asserted.
11 That I will have different evidence to substantiate that her
12 ballot was naked, for example. This is testimony that goes
13 to its effect on Ms. Genser.

14 MS. GALLAGHER: Your Honor, if I may respond to
15 that, that's -- while that may be well and good, and I
16 understand that, but to the Court's own questions earlier,
17 the Court asked -- questioned about well, she was told by
18 Butler County to do what -- Mr. Matis was told by Butler
19 County to do X.

20 So to that extent, not only is this hearsay --

21 THE COURT: Just -- again, if you will, tell us
22 what you did in response to the call to the Election Bureau,
23 not what the Election Bureau person told you. Tell us what
24 you did in response to that call.

25 A So --

1 THE COURT: As a result of talking to that
2 person, what do you do?

3 THE WITNESS: Well, then you don't want me to
4 talk about the questions that I asked? The gentleman?

5 THE COURT: I want you to tell me what you did
6 in response to the call.

7 A I asked him questions, and we had a conversation. I
8 received information from the questions that I asked which
9 upset me, and -- I actually must have just hung up the phone.
10 I was upset, and I didn't know what to do. And I actually
11 phoned and left a message at the Pennsylvania State Attorney
12 General's office. And then -- that's what I did.

13 Q I'm not asking you what this person may have said to
14 you in response, but I'll just ask what you asked. Did you
15 ask whether you could come down to Butler to the elections
16 office to do something to fix it?

17 A Yes.

18 Q Did you ask whether you could cast a provisional
19 ballot on Election Day at your polling place?

20 A Yes.

21 Q Okay. Thank you. Did you catch the name of this
22 person you spoke with?

23 A I subsequently learned that this individual's name --

24 Q Well, let me just ask, in that call did the person
25 give a name?

1 A Not in that call.

2 Q Okay. Did you ever talk to that -- did you ever call
3 this office again after that first conversation?

4 A Yes.

5 Q And what prompted you to make a second call?

6 A Well, honestly, there was an organization -- I
7 actually do not know their name. It was a voting rights
8 organization that was monitoring the ballots that were --
9 that there -- that issues were presented to them. And this
10 individual, she called me. She was -- is a volunteer. And
11 we talked about what had happened, and I was very grateful I
12 had someone to talk to about it.

13 So she advised me -- she said, I would think it would be
14 wonderful for you, even given the information that you've
15 told me, I really encourage you to go and cast a provisional
16 ballot on the day of regardless.

17 MS. GALLAGHER: Your Honor, I'm going to object
18 to the hearsay nature, again, of this testimony. We have an
19 unidentified person. We don't know who it is.

20 THE COURT: Again, ma'am, all I want you to tell
21 me is what you did in response to the call.

22 A I went and cast a provisional ballot, and I called
23 the Butler County election office.

24 Q Thank you. And let me ask you the second part first.
25 You called the Butler County election office. Was that

1 before or after you did the provisional ballot?

2 A Before.

3 Q Okay. And did you ask whether -- did you ask again
4 whether you could count a provisional ballot when you called?

5 A Yes. Yes.

6 Q And did you learn -- did you talk to the same person
7 that second time?

8 A Yes.

9 Q Did you learn the person's name during that second
10 call?

11 A Yes.

12 Q And what was the person's name?

13 A A Thomas Baker.

14 Q Okay. Thank you. So then on April 23rd, Election
15 Day, what did you do that day?

16 A Well, I went first thing in the morning to cast the
17 vote.

18 Q You went to your regular polling place?

19 A Yes.

20 Q Okay. And I think you were in the Courtroom earlier
21 today when we heard testimony from Ms. McCurdy about the
22 process for filling out and handing in a provisional ballot
23 at the polling place. Did you hear her talk about that
24 earlier today?

25 A Yes.

1 Q And is that consistent with your experience that day
2 at the polling place?

3 A Yes.

4 Q Okay. Ms. Genser, are you familiar with a
5 department -- Pennsylvania Department of State website that
6 lets people check the status of their provisional ballots?

7 A Yes.

8 Q And did you look at that website this morning?

9 A Yes.

10 MR. GEFFEN: I have a document I would like to
11 mark as Petitioners' Exhibit E.

12 (Petitioners' Exhibit E marked for
13 identification.)

14 Q Ms. Genser, is this familiar to you, this document?

15 A Yes.

16 Q And is this a printout of what you saw this morning
17 when you checked that website?

18 A Yes.

19 Q And that's your correct name and date of birth?
20 Correct?

21 A Yes.

22 Q And at the bottom where it says, provisional ballot
23 search results, do you see where it says, status rejected?

24 A Yes.

25 Q And do you see where it says, reason, voted by

1 conventional --

2 THE COURT REPORTER: Excuse me. Could you
3 please repeat that.

4 MR. GEFFEN: Sorry. I went too fast.

5 Q At the bottom it says, reasons, voted by conventional
6 alternative or absentee, slash, mail-in? Do you see that?
7 At the very bottom?

8 A Oh, I do. I'm sorry. I thought you were --

9 Q Okay.

10 A So sorry.

11 Q Okay. Thank you.

12 Did you expect when you went in on the morning of April
13 23rd and completed a provisional ballot, did you expect that
14 that ballot would ultimately get counted?

15 A No.

16 Q Okay.

17 THE COURT: Why not, ma'am?

18 THE WITNESS: Based on the information I learned
19 from the individual at the Butler County election office.

20 Q Ms. Genser, can I ask just why you filed this
21 lawsuit?

22 A Actually I'm privileged to be here because I am
23 eligible to vote. I made a mistake, and I should be able to
24 fix that mistake. And also I want other people who make that
25 same mistake to be able to fix their mistakes in the future.

1 I know now -- I'm scared. I will go in person all the
2 time now to vote, and I -- I'm here today. I'm privileged
3 that they took my case, and I'm privileged that -- to be here
4 because this right seems to be under duress here, if that's
5 the right word, or it's -- rights are being taken away, and
6 so many women before me fought for this right to vote. I'm
7 doing it in honor of them. And I'm doing it in honor of the
8 people who vote who make a mistake, a human error, and I
9 guess it's as simple as that.

10 So I mean I took the day off of work. I put a lot of
11 extra time into this, and I'm grateful that you're here.

12 MR. GEFFEN: Thank you very much. I have no
13 more questions at this time.

14 CROSS-EXAMINATION

15 BY MS. GOLDMAN:

16 Q Ms. Genser, I'm a little confused by the timeline of
17 events set forth in your direct. So I just want to kind of
18 get these dates laid out.

19 A Sure.

20 Q So in your affidavit that you signed that was
21 attached to the petition, now, you signed that on the 28th?
22 Is that correct?

23 A I don't have a copy of it here, but if you say so,
24 yes.

25 Q That was -- you signed it on Sunday? Does that --

1 A A Sunday.

2 Q In your recollection?

3 A Uh-huh.

4 Q Okay. And that was the 28th? All right.

5 So you sent over -- you had Petitioner E and -- no, excuse
6 me, C and D, which were these emails that you talked about
7 earlier?

8 A Uh-huh.

9 Q Those were sent over to Ms. Ginzberg on the 24th?
10 Correct?

11 A Correct.

12 Q And you're the one who sent them from your redacted
13 email address? Correct?

14 A Correct.

15 Q Okay. And do you -- and we'll find out when we get
16 the originals, but are these -- your redacted email
17 addresses, are they the same one?

18 A Yes.

19 Q Did you use different email addresses --

20 A It's --

21 Q -- for the receiving and the sending?

22 A Yes.

23 Q You did use different ones?

24 A No, I did not use different ones. It was the same.
25 They are the same.

1 Q Okay. So then you sent those over on the 24th. Now
2 you had a conversation with someone at the Bureau of
3 Elections on the 11th? Is that correct? Because your
4 testimony was that you called them the same day --

5 A Yes.

6 Q -- you got this email?

7 A Uh-huh.

8 Q Is that right?

9 A The same day I got the email, the first -- yes, that
10 would be that day. Uh-huh.

11 Q Okay. And you didn't know the name of the individual
12 who you talked to? At that time? Is that correct?

13 A At that time, no.

14 Q Okay. Did you ask for the individual's name?

15 A Not at that time.

16 Q Okay. And then you called -- talked to someone else,
17 and you don't know what organization that individual was
18 with? Some person who told you --

19 A It was a voting rights group.

20 Q Okay. Who was it?

21 A I do not remember the name of the organization.

22 Q Okay. Did they call you?

23 A Yes.

24 Q Okay. How did they get your number?

25 A They are monitoring -- her field of, you know,

1 monitoring is the state of Pennsylvania. So they were
2 monitoring votes that were kicked out for some reason.

3 Q You hadn't voted yet? I mean the election hadn't
4 taken place yet? Nobody had counted --

5 A My mail-in ballot was kicked out.

6 Q Okay.

7 A They're monitoring, so, this voting rights group.

8 Q And they called your cell phone?

9 A Yes.

10 Q Okay.

11 A I have one number. Uh-huh.

12 Q Okay. And so you don't recall this person's name, do
13 you?

14 A Sue. Susan.

15 Q Susan what?

16 A I don't recall her last name at the moment.

17 Q Okay. Did you keep her number?

18 A Yeah. Uh-huh.

19 Q Okay. Have you talked to her since that call?

20 A Yes. Uh-huh.

21 Q When did you last talk to her?

22 A The day -- I think it was a text, and I believe it
23 was after I went and cast in that day and did a provisional
24 vote. I went in.

25 Q Okay. So after you voted on the 23rd?

1 A Yes.

2 Q So you talked to -- or you texted with Susan, whose
3 last name you don't know?

4 A No, I don't know her last name.

5 Q Okay. And whose organization you don't know either?

6 A No. I do not know.

7 Q Okay. And then -- let me back up. So we kind of
8 fast-forwarded a little bit there to the Election Day.

9 You had two conversations with the Bureau of Elections?
10 Correct?

11 A Yes.

12 Q So the first was on April 11th. The second was, am I
13 correct, April 15th?

14 A I believe that was -- yeah.

15 Q Pardon me?

16 A I believe that was the date, although I don't have my
17 narrative in front of me.

18 Q Well, this narrative was a sworn affidavit. So
19 everything you put in here would have been correct? Is that
20 right?

21 A Yes.

22 Q Okay.

23 A I don't have it in front of me to reference the date.

24 Q Okay. So you talked with Butler County Bureau of
25 Elections, and it's your testimony that at that time you

1 learned the individual's name who you had talked to
2 previously on the 11th?

3 A Yes.

4 Q Now, he -- you didn't learn his last name during that
5 call, did you?

6 A Yes.

7 Q So it's -- are you sure about that?

8 A I have Thomas Baker written down on a piece of paper.

9 Q Okay.

10 A Whether or not that that was -- I misheard it,
11 then --

12 Q Okay. Susan didn't tell you his last name?

13 A Susan?

14 Q Well, the person you're texting with?

15 A No.

16 Q Okay. And so he gave you a full name, Thomas? Is
17 that --

18 A Tom Baker he said was his name.

19 Q Okay. And then you spoke -- just so it's clear for
20 the record, your conversation with this Susan woman took
21 place on what day?

22 A There were several conversations, and I -- I don't --
23 I may have listed them in the narrative, and I don't recall
24 what dates there were off the top of my head.

25 Q Did you type up this narrative?

1 A I reviewed it, yes. And I -- and I typed it -- I
2 reviewed it and wrote it and changed -- changed things that
3 weren't exactly correct.

4 Q Okay.

5 A But I don't remember because I'm nervous, and I don't
6 have the narrative in front of me.

7 Q No, no, that's okay. I'm just trying to figure --

8 THE COURT: Do you have an extra copy of the
9 narrative?

10 MS. GOLDMAN: It's attached to the petition.

11 THE COURT: Yes, I know it is. Do you have an
12 extra copy that you could present to the -- give to the
13 witness?

14 Q I'm handing you the declaration which has your
15 signature on it dated the 28th?

16 A Right.

17 Q Maybe if you could take a quick moment and review
18 that and let me know if you related any information regarding
19 Susan or the organization that cold-called you on your cell
20 phone.

21 A Okay. So what is your question exactly? Date? You
22 want to know a date?

23 Q Well, first I'm going to ask you, is there any
24 reference to Susan in your declaration that you signed on the
25 28th?

1 A No.

2 Q Okay. What's the reason that you didn't include that
3 in your declaration?

4 MR. GEFFEN: I'm going to object to the extent
5 this calls for attorney/client communication.

6 MS. GOLDMAN: I'm asking why she didn't put it
7 in her declaration.

8 MR. GEFFEN: And I'm objecting insofar as that
9 is inquiry into communication between a client and an
10 attorney.

11 THE COURT: Sustained.

12 BY MS. GOLDMAN:

13 Q Does this document refresh your recollection as to
14 the timeline of events relating to your calls with Susan?
15 Like can you tell by virtue of the other dates that you've
16 included in here when it was that you spoke with her?

17 A So it was between the time my ballot status has
18 changed up until the text that I told her I successfully went
19 and did my provisional ballot today, which would have been on
20 the 23rd, I think, of April. Right?

21 Q So sometime between the 11th and the 23rd you had a
22 conversation with her?

23 A Conversations.

24 Q Okay. So how many days of conversation? Do you
25 know?

1 A I don't know offhand. Maybe --

2 Q Is it still in your phone? The text messages?

3 A It was mostly all telephone. I may have given her
4 one text message on April 23rd.

5 Q But would it be in your phone? Like if you looked at
6 your phone, would you be able to tell?

7 A With some time, yes. Yes.

8 Q Okay. Well, I can rest for now, and then if you, you
9 know, take a look at your phone -- your phone is here?
10 Right?

11 A Yes.

12 Q Okay. And you can look and then answer the question?

13 MR. GEFFEN: I'm going to object that this is an
14 inquiry of something of no relevance.

15 THE COURT: Yes, my --

16 MS. GOLDMAN: The relevance is, Your Honor,
17 the -- issues were being raised about wanting to find
18 individuals to effect a policy change prior to the election,
19 and -- I mean weeks prior, the testimony was from Ms. McCurdy
20 that --

21 THE COURT: Well, she's already testified that
22 she doesn't know where this Susan was from, what organization
23 she was from.

24 MS. GOLDMAN: Well, I mean, the cell phone
25 number -- I mean the number would tell us.

1 THE COURT: Are you going to call Susan by this
2 telephone number?

3 MS. GOLDMAN: You can look it up. I mean that's
4 not going to be hard to do.

5 THE WITNESS: She's a volunteer.

6 MR. GEFFEN: I'm going to again object that
7 there is no relevance to this -- the telephone number of
8 somebody who called Ms. Genser.

9 MS. GOLDMAN: The date. I mean we'd like to
10 know the date that the call took place because the issue is
11 that this is a -- as I indicated earlier, an effort to change
12 the cure policy.

13 THE COURT: Well, you already know that it took
14 place between -- before the election. It was between April
15 the 11th, and she said the last phone call was on the date of
16 the primary election, the 23rd. So you know that the contact
17 was made before the election.

18 MS. GOLDMAN: All right. Fair enough. I don't
19 have anything else.

20 MS. GALLAGHER: Just a few.

21 BY MS. GALLAGHER:

22 Q Kathy Gallagher. Just a couple of questions.

23 You voted in the primary and the general in 2020?

24 Correct?

25 A To the best of my recollection, yes.

1 Q And you voted by mail?

2 A Yes.

3 Q Okay. And you voted in the primary and the general
4 in 2022? Is that right?

5 A To the best of my recollections.

6 Q And you voted by mail?

7 A Yes. Uh-huh.

8 Q And you voted in the general election in 2023?

9 Correct?

10 A Yes, to the best of my recollection.

11 Q And you voted by mail?

12 A Yes.

13 Q Is it fair to say that you knew what the rules were?

14 A Yes. Uh-huh.

15 Q Okay. Did you know that your secrecy ballot had to
16 be in the envelope?

17 A Yes, I knew that.

18 Q I'm sorry?

19 A Yes, I knew that. Uh-huh.

20 Q Okay. And just so I understand -- it's actually a
21 little bit hard to hear, and we didn't want to interrupt.

22 It's your testimony that you didn't know your secrecy
23 ballot was in the envelope -- was not in the envelope until
24 you received an email?

25 A Correct.

1 Q Okay.

2 A Correct.

3 Q Is it also fair to say -- and I couldn't tell -- that
4 it was your understanding when you cast your provisional
5 ballot that you did not think it would be accepted or you
6 were told it probably wouldn't be accepted?

7 A I guess you could say -- say those two again. Are
8 they two different questions or the same question?

9 Q It's one question.

10 A Okay.

11 Q It really goes to what I could hear.

12 A Okay.

13 Q All right? Okay. Was it your testimony that when
14 you cast your provisional ballot, all right, that you didn't
15 believe it would be accepted or counted, or you were told it
16 wouldn't be counted?

17 MR. GEFFEN: I'd object to the compound nature
18 of this question.

19 MS. GALLAGHER: I'm trying to -- I'll try to ask
20 again. I don't want to ask for hearsay. That's the problem,
21 Judge.

22 Q At the time that you cast your provisional ballot did
23 you believe it would be counted?

24 A No.

25 Q Okay. So you had no expectation that it would be

1 counted when you cast it? Correct?

2 A Correct.

3 Q Okay. And that would be consistent; right? Because
4 apparently you knew in -- twice in 2020 and twice in '22 and
5 at least once -- and once in 2023 that if that ballot wasn't
6 in there -- excuse me. The secrecy envelope wasn't in there,
7 your ballot wouldn't count? Correct?

8 A I made a mistake this time.

9 Q Ma'am, that's not what I'm asking you. Please, I
10 understand we all make mistakes. I get that. Okay? But
11 this is about understanding the ramifications of the rules --

12 A Uh-huh.

13 Q -- and this was no surprise to you, was it? Not --
14 when you found out when your ballot wouldn't be counted if it
15 didn't have a secrecy envelope or because it didn't? You
16 knew that was the rule? Correct?

17 A Yes.

18 Q Okay. And when you chose to vote by mail-in ballot
19 as opposed to going to the polls, you knew you had to have a
20 secrecy envelope? Correct?

21 A Yes.

22 Q Just asking. And if you choose to go to the polls,
23 there are certain rules there you have to follow as well?
24 Correct?

25 A Correct.

1 Q Okay. And if you don't follow those rules, your
2 ballot doesn't get counted, or you may not even have the
3 chance to vote? Is that fair to say?

4 A Correct.

5 Q In fact, you know you have to be registered? Right?
6 To vote?

7 A Correct.

8 Q Okay. And if you move to a different district, you
9 have to redo your registration? Correct?

10 A Correct.

11 Q Okay. And if you forget to register in time to vote,
12 you don't get to vote, do you?

13 A Correct.

14 Q And even if that's a mistake, an unintended human
15 error that you failed to re-register, you know when that
16 happens, you can't vote?

17 A Correct.

18 Q Correct?

19 A Correct.

20 Q Correct. Okay. So you get a notice from the
21 Department of State, and then you received a phone call. Was
22 that from a 313 or a 913 number?

23 A I don't believe so. No.

24 Q Excuse me?

25 A No. I don't believe so.

1 Q How about a 913?

2 A I don't believe so.

3 Q Okay. Did you ever call the number back? I'm just
4 curious?

5 A I believe I did.

6 Q And my questions are not how -- about your receiving
7 the calls. I'm trying to figure out how somebody got your --
8 your private voter information. And this was after you had
9 received from the department -- your notice from the
10 Department of State or before?

11 A It was after.

12 Q Okay. And you also -- you said you called the
13 Attorney General's office? Correct?

14 A I left a message.

15 Q Okay. Why did you call the AG's office?

16 A Well, I don't think I said this, but I was extremely
17 confused. I got an email saying -- that told me what the
18 mistake was, told me what I could do. So why -- if I can do
19 that, then I should be allowed to do that and to cast a valid
20 vote. But with the information that I received, I was told
21 that that wouldn't matter. So it would be an impossible
22 exercise in futility which did not make sense. So I didn't
23 quite understand the disconnect between State of PA email,
24 Butler County information.

25 Q Right. And if you had never received that email from

1 the Department of State, would you have -- and had just
2 received an email or been advised that your secrecy envelope
3 was missing, you made a mistake, your ballot did not count,
4 and that would have been it with no you may go vote
5 provisionally, all right, what -- would you have taken any
6 steps?

7 MR. GEFFEN: Objection; calls for a
8 hypothetical.

9 MS. GALLAGHER: No, I think it goes to -- she's
10 talked about a lot of actions she's taken.

11 THE COURT: What would you have done, ma'am?

12 THE WITNESS: I -- again, it's hypothetical. I
13 don't know what --

14 A State the email to me.

15 Q Excuse me?

16 A Tell me what you would -- tell me the email. If you
17 tell me what exactly --

18 Q If you were just advised that your ballot did not
19 contain a secrecy envelope. Therefore, it did not count.

20 A I might call the number on there or send an email
21 because that's just the nature of who I am. I want to
22 understand why --

23 Q Sure.

24 A -- and then go from there.

25 Q But you already knew, fair to say, you know, that if

1 you didn't have -- you had to have the secrecy envelope and
2 the ballot at least seven other times prior to this election?

3 A Yes. Yes.

4 Q Okay. So that wouldn't have been a surprise to you
5 that your ballot didn't count?

6 A That one, yes. Yes, I --

7 Q Okay.

8 A That wouldn't be a surprise, but --

9 Q But when you received this email from the Secretary
10 of the Commonwealth that said go vote provisionally, did that
11 then cause you to think, hey, I can fix this?

12 A Obviously, yes.

13 Q Right. But that wasn't from Butler County, was it?

14 A Well, it's from the State of PA.

15 Q Was it from Butler County?

16 A No.

17 Q And you vote in Butler County?

18 A Yes.

19 Q Okay. And then after you received the email, then
20 you received a phone call from an organization? Correct?

21 A Yes.

22 Q Okay. And did you reach out -- are you a member of
23 the ACLU?

24 A No.

25 Q Did you reach out to Ms. Ginzberg or Mr. Geffen or

1 did someone reach out to you?

2 A The voting rights organization after several phone
3 calls --

4 Q I'm sorry. Which rights?

5 A The voting rights, voters rights organization, after
6 X number of phone calls, they asked me if I wanted to speak
7 to someone at the Pennsylvania State ACLU, and I said yes.

8 Q For the purpose of litigation?

9 A Yes.

10 Q So not only was this organization calling to tell you
11 that they had your voting records? Right? They --

12 A Uh-huh.

13 Q They were telling you, do you want to do something
14 about it as well? Just trying to understand.

15 A Yeah. I was very grateful. Yes. They did.

16 Q Understood.

17 MS. GALLAGHER: Thank you. I think I have what
18 I need.

19 MR. RUSSEY: No questions. Please go ahead.

20 MR. GEFFEN: Brief redirect, Your Honor, if
21 that's all right.

22 REDIRECT EXAMINATION

23 BY MR. GEFFEN:

24 Q Just reviewing a couple of the things that you were
25 asked about just now, when you went in to vote on April 23rd,

1 to fill out the provisional ballot, was it your understanding
2 that there might be some way that your provisional ballot
3 could get counted in the end?

4 A I guess I had a vague hope that it would be, but I
5 wasn't counting on it. But I wanted to go and do it anyway.

6 Q Okay. Great. I guess to put it another way, why did
7 you bother? Why did you bother going in on the 23rd if you
8 thought there -- if you weren't sure it would be counted or
9 not?

10 A Well, it's -- it's my right to vote and have my vote
11 counted, and everything else around this is just, you know,
12 noise to me. And I thought it important to get up and go.
13 My parents did. You know, my ancestors couldn't. They
14 weren't from here, my grandparents.

15 So I think it's important for every -- and if I can do
16 something here to effect some sort of a change to have like
17 someone like Mr. Matis' vote count, and that's -- that's why
18 I went.

19 Q Okay.

20 A It's the right thing to do.

21 Q Ms. Gallagher asked you some questions about the
22 significance of following rules when it comes to voting.
23 When you received this email which is Petitioners' Exhibit D
24 from the Department of State on April 11th --

25 A Uh-huh.

1 Q -- and it said, among other things, that you can go
2 to your polling place on Election Day and cast a provisional
3 ballot?

4 A Yes.

5 Q At that time did you think that you could go to your
6 polling place on Election Day and cast a provisional ballot?

7 A Yeah, absolutely.

8 Q And would you have been surprised to learn on that
9 date that you would have no options whatsoever to fix the
10 mistake of omitting the secrecy envelope?

11 A Not after I got the email. But after the phone call.

12 Q Okay. Understood. Thank you.

13 Are you paying your lawyers to represent you in this case?

14 A No.

15 Q Is your expectation that you or your lawyers are
16 going to get any money depending on what happens in this
17 case?

18 A No. I had to quickly get the day off work for this.

19 MR. GEFFEN: Okay. I have no further questions
20 for this witness.

21 MS. GALLAGHER: Nothing further.

22 THE COURT: Ms. Goldman?

23 MS. GOLDMAN: Nothing.

24 THE COURT: Any other questions for this
25 witness?

1 MR. RUSSEY: No.

2 MS. GOLDMAN: No.

3 THE COURT: You may step down, ma'am. Thank
4 you.

5 THE WITNESS: Thank you.

6 (Witness excused.)

7 MR. GEFFEN: Your Honor, Petitioners rest.

8 THE COURT: Mr. Geffen --

9 MR. GEFFEN: I'm sorry. I failed -- actually
10 before I rest let me move into evidence the last few
11 exhibits. I believe we moved into evidence Exhibits --

12 THE COURT: You moved in C.

13 MR. GEFFEN: C and D?

14 THE COURT: No.

15 MR. GEFFEN: No, not D? Okay. I would like to
16 move in, first of all, Exhibit D, subject to --

17 THE COURT: An unredacted copy.

18 MR. GEFFEN: Yeah. We will be submitting that
19 to the Prothonotary's office and counsel.

20 MS. GALLAGHER: I don't have D.

21 MR. GEFFEN: D is this --

22 THE COURT: That's the email.

23 MS. GALLAGHER: I have D, but not E.

24 MR. GEFFEN: Okay. And E is this printout of
25 the provisional ballot tracker.

1 THE COURT: Any objection to Petitioners'
2 Exhibit D with an unredacted copy being admitted?

3 MS. GALLAGHER: That would be corrected.

4 THE COURT: No objection?

5 It will be admitted.

6 (Petitioners' Exhibit D admitted in
7 evidence.)

8 MR. GEFFEN: And then I would like to move in
9 Exhibit E, which is this printout of provisional ballot
10 search.

11 THE COURT: Any objection to Petitioners'
12 Exhibit E?

13 MS. GALLAGHER: No objection.

14 THE COURT: Petitioner's Exhibit E is admitted.
15 (Petitioners' Exhibit E admitted in
16 evidence.)

17 THE COURT: May I have those documents, the ones
18 that have been marked, please.

19 MR. GEFFEN: Yes.

20 Didn't you grab those? Sure.

21 This is somebody's copy of the declaration. And then I
22 have C, D, and E right here.

23 THE COURT: Thank you.

24 Petitioners rest?

25 MR. GEFFEN: Yes, Your Honor.

1 THE COURT: Miss Goldman, any more witnesses?

2 MS. GOLDMAN: No, Your Honor.

3 THE COURT: You had mentioned before that you
4 may want to call --

5 MS. GOLDMAN: That was Miss Gallagher.

6 MS. GALLAGHER: No further witnesses, Your
7 Honor. We resolved it by stipulation.

8 THE COURT: Okay.

9 No further testimony from any of the parties?

10 MS. GRAHAM: One moment.

11 MR. KING: May we have one moment?

12 Do you mind if we go out in the hall for a minute?

13 THE COURT: No. Go ahead.

14 (Discussion off the record.)

15 MS. GALLAGHER: I do have one more witness.

16 Recall --

17 THE COURT: Just one second, please.

18 MS. GALLAGHER: I'm sorry.

19 THE COURT: I don't have that you ever rested
20 your case.

21 MS. GALLAGHER: I'm sorry, Your Honor?

22 THE COURT: I don't have that you ever rested.

23 MS. GALLAGHER: No, I have not.

24 We call Chantell McCurdy.

25 MR. KING: As on cross.

1 MS. GALLAGHER: As on cross.

2 THE COURT: I remind you, you are continuing
3 under oath, please.

4 * * *

5 CHANTELL McCURDY, recalled,

6 DIRECT EXAMINATION

7 BY MS. GALLAGHER:

8 Q Ms. McCurdy, just a few questions. Were you present
9 in the Courtroom today when Mr. Matis testified?

10 A I was.

11 Q And were you present --

12 THE COURT: Just for the record, this is --
13 you're calling her as if on cross?

14 MS. GALLAGHER: Yes, sir.

15 THE COURT: Go ahead. Thank you.

16 BY MS. GALLAGHER:

17 Q And you were present in the Courtroom when Ms. Genser
18 testified?

19 A Yes.

20 Q Okay. Did you hear Mr. Matis' testimony that he
21 called -- that when he called the Bureau after he received
22 his notification from the Department of State, that he was
23 told he could vote provisionally?

24 A Yes.

25 Q Okay. Is that a policy or does the Bureau have a

1 policy with respect to telling voters to vote provisionally?

2 A We have no formal policy.

3 Q Do you have a practice or a procedure that's
4 followed?

5 A Yes. As the longest serving person in our office,
6 I've trained every member of the staff at the Election
7 Bureau. And the training that they received is the same
8 training that I received when I started in the Election
9 Bureau in 2016, in that any person who calls the office is
10 allowed to go to a polling place anywhere in the county and
11 fill out a provisional ballot, regardless of reason.

12 Q And is that to encourage enfranchisement and to
13 encourage voting and allow --

14 MR. GEFFEN: Objection.

15 MS. GALLAGHER: Go ahead. I'm sorry.

16 MR. GEFFEN: Objection; foundation.

17 MS. GALLAGHER: She testified -- I was asking
18 her the basis for the -- she said this is how she trains
19 them, and I was asking her the basis for it.

20 BY MS. GALLAGHER:

21 Q Is that to encourage voting and make -- allow as many
22 individuals as possible to avail themselves of the
23 opportunity to vote?

24 A Yes.

25 Q But that doesn't change the rules of voting?

1 Correct?

2 A Correct.

3 Q Okay. So, in other words, let's say someone called
4 you and said, I don't know if my registration is -- would you
5 check the registration, and if you told them, I'm sorry,
6 you're not registered, and they tell you, I believe I am,
7 what would you tell them to do?

8 A Go to a polling place and vote provisional ballot.

9 Q But that doesn't -- that doesn't have the ability to
10 change that -- if they're not registered, their vote doesn't
11 count? Correct?

12 A That's correct. We had two provisionals in this
13 election with that exact issue.

14 Q So then what Mr. Matis was told would not have been
15 any different than anyone else who called with a voting
16 problem, how -- when they had already cast a ballot, at
17 least, that you would -- that you would tell them to do?
18 Fair enough?

19 A Yes.

20 Q Okay. There was some testimony by Ms. Genser about a
21 Susan that called her -- well, first of all, did you ever
22 talk to Ms. Genser?

23 A I did not talk to Ms. Genser.

24 Q Okay. Did you talk to a Susan from a voting rights
25 organization?

1 A I did. She's from Bonner Springs, Kansas.

2 Q Excuse me? Go ahead.

3 A I said I did. She's from Bonner Springs, Kansas.

4 Q Okay. And do you still have her phone number?

5 A I do.

6 Q So if we requested the Court to order Ms. Genser to
7 search this number, we would be able to tell if that was the
8 same organization that you received a call from? Would that
9 be correct?

10 A If it was the same phone number, yes.

11 Q Okay. Do you recall the number?

12 A I recall it being a 913 area code.

13 Q Okay. And you have a record of it if you were asked
14 to produce it?

15 A Absolutely.

16 Q Okay. Does 913-303 --

17 THE COURT REPORTER: Excuse me. Could you
18 please repeat that?

19 MS. GALLAGHER: I'm sorry.

20 Q Does 913-303-1565 sound familiar?

21 A Yes.

22 Q Okay. And how -- when this individual called you,
23 how did she identify herself?

24 A She said her name was Susan, and she was calling from
25 a voting rights organization regarding provisionals and

1 whether or not they would be counted if a voter had already
2 turned in an absentee or mail-in ballot with no secrecy
3 envelope.

4 MR. GEFFEN: I would move to strike that as
5 hearsay.

6 MS. GALLAGHER: Well, I'm going to ask her --
7 she's giving the advice. This is someone calling in for
8 information. She's receiving it.

9 THE COURT: Go ahead.

10 BY MS. GALLAGHER:

11 Q What was your response?

12 A I told her that they are welcome to go to a polling
13 place and cast a provisional ballot. And she asked pointedly
14 whether it would be counted. And I told her it would be up
15 to the Computation Board which convenes on the Friday after
16 election.

17 She pressed again if it would be counted. And I said
18 historically the Computation Board has not counted any ballot
19 that lacks a secrecy envelope.

20 MS. GALLAGHER: Nothing further.

21 THE COURT: One second, please.

22 BY MS. GALLAGHER:

23 Q Ms. McCurdy, we would ask that you produce the actual
24 phone number from the woman from whom you received the call
25 that you just testified to. Thank you.

1 A We will get that from the County.

2 MS. GALLAGHER: Your Honor, we would then seek
3 to be able to supplement the record with that information
4 once it's received with the Court.

5 MR. GEFFEN: And I would object on grounds of
6 relevance. I don't know what the relevance is of somebody
7 calling and talking to her.

8 MS. GALLAGHER: The relevance is, as the Court
9 has asked, that because of what the Secretary did in the
10 calls to state, the two -- excuse me; to Butler County, that
11 there was an impression -- perhaps an impression created that
12 people could cure this deficiency simply by casting a
13 provisional ballot. We know from Ms. Genser and the
14 testimony that she knew her ballot would probably not be
15 counted, depending upon who she talked to. She also talked
16 to -- that she was told by someone else to call the -- by
17 Susan, my recollection, to call this and go and vote
18 provisionally.

19 Those expectations are not being created, and that's what
20 this goes to, to the County, but perhaps by some other
21 individuals.

22 MR. GEFFEN: I believe Ms. Genser's testimony
23 was that she was in a state of uncertainty. She received
24 conflicting advice from different directions, including from
25 the Pennsylvania Department of State, about what her options

1 were after submitting a naked ballot. And I believe her
2 testimony was that she voted a provisional ballot on Election
3 Day, doubtful but not certain about whether it would be
4 counted. And I don't know what any additional information
5 about callers from Kansas is going to add to that picture.

6 THE COURT: I'm really not -- my decision in
7 this case wouldn't be based upon any reliance that someone
8 may have received from a telephone call.

9 MS. GALLAGHER: Okay. Fair enough. Just trying
10 to address your question of earlier.

11 THE COURT: Any further questions for this
12 witness?

13 MR. GEFFEN: No, Your Honor.

14 THE COURT: Mr. Russey?

15 MR. RUSSEY: No, Your Honor.

16 THE COURT: Thank you. You may step down.

17 (Witness excused.)

18 THE COURT: Any other witnesses?

19 MS. GALLAGHER: Nothing further, Your Honor. We
20 rest.

21 THE COURT: Republican Party rests?

22 MS. GALLAGHER: Yes.

23 THE COURT: Mr. Russey, just for the record,
24 does the Democratic Party have anything? Any witnesses they
25 want to present?

1 MR. RUSSEY: We don't have any witnesses to
2 present, Your Honor.

3 THE COURT: I would like to go over the exhibits
4 to make sure that I have them all.

5 First was Exhibit No. 1, which is Respondent Intervenor
6 Republican Party, Butler County Ballot Curing Policy.

7 Second offered and admitted was Petitioners' Exhibit B,
8 provisional ballot search relative to Mr. Matis.

9 Next is Respondent's Republican Party, and it's actually
10 the stipulated changes to the SURE VR and PA Voter Services
11 as of March 11, 2024. That was stipulated.

12 Next would be Petitioners' Exhibit C, which you will
13 provide an unredacted copy of.

14 And then it would be Petitioners' Exhibit D, same thing,
15 provide an unredacted copy of that.

16 And lastly is Petitioners' Exhibit E which is the
17 provisional ballot search of Ms. Genser.

18 Do I have them all?

19 MS. GALLAGHER: Yes, sir.

20 THE COURT: I'm not going to ask you for
21 closings. I am going to ask you to brief it, please.

22 Mr. Geffen, how much time do you need?

23 MR. GEFFEN: If I may have one moment to confer
24 with co-counsel.

25 MS. GOLDMAN: Your Honor, if I may just bring up

1 a housekeeping issue with respect to timing, fortunately for
2 me, and unfortunately for the timing, I'm going to be out of
3 the country starting on Friday for two weeks. So I'm happy
4 to get right back to work, but --

5 THE COURT: Let's --

6 MS. GOLDMAN: I didn't know that this action was
7 going to be filed when it was. So --

8 MR. GEFFEN: And it would be also helpful if we
9 knew how quickly we could obtain a copy of the transcript
10 from today in aid of preparing the brief.

11 THE COURT REPORTER: End of week.

12 MR. GEFFEN: End of this week? Okay.

13 May I take out my phone and consult my calendar for a
14 moment, Your Honor?

15 MR. KING: Judge, we know from experience too
16 that the lack of a certification in Butler County --

17 THE COURT: Oh.

18 MR. KING: -- will result in no certification of
19 the state.

20 THE COURT: Yes. Can you agree upon allowing
21 the election to be certified?

22 MR. GEFFEN: I believe there was discussion, and
23 I'm not sure, Your Honor, who was present in the Courtroom at
24 the time, about the -- the most time-sensitive thing is on
25 the Republican side of the race, and neither of the

1 Petitioners voted a Republican ballot.

2 And so I think that we can certainly agree to allowing
3 certification of the Republican committee people to proceed,
4 and really anything on the Republican side of the ticket
5 because neither of the Petitioners' ballots will --

6 MR. KING: That would be great for us if we
7 could get the Republican --

8 THE COURT: No matter the decision, their votes
9 aren't going to make a difference.

10 MR. GEFFEN: There is no race that turns on two
11 ballots.

12 THE COURT: So is it okay to certify the entire
13 election?

14 MR. GEFFEN: Assuming that there is later an
15 opportunity to amend the certification if the result of this
16 case is that a couple of ballots need to be adjusted. Is
17 that --

18 MS. GRAHAM: We cannot partially certify an
19 election.

20 MR. GEFFEN: Is it possible to amend after -- I
21 believe that's what happened in the Keohane case in Delaware
22 County. The Delaware County Board of Elections amended the
23 certification after the Court's decision.

24 MS. GOLDMAN: We would have to take a look at
25 that.

1 MS. GRAHAM: I wouldn't be able to say for sure
2 right now.

3 MR. KING: We've actually done things similar to
4 that in the past.

5 MS. GRAHAM: To amend?

6 MR. KING: Yes.

7 THE COURT: Subject to amendment? Can we
8 certify it subject to amendment?

9 MR. KING: We were ordered months -- I
10 represented Fayette County when there was -- I think Kathleen
11 might have been counsel in that case too. We had four
12 counties that were outstanding we certified. Later it was
13 amended, and --

14 MS. GALLAGHER: I understand it can be amended.

15 MR. GEFFEN: I mean, that's fine with us if
16 the -- if the races are all certified. Our clients' interest
17 is in having their ballots ultimately counted, and if that
18 means that a week or a month or a year down the line an
19 amended certification --

20 MS. GALLAGHER: I think that's different.

21 MR. GEFFEN: -- is filed that could adjust it by
22 two votes, or whatever the case may be, that is -- that would
23 be agreeable to us.

24 MS. GALLAGHER: I think, Mr. Geffen -- this
25 might clear it up. It would be a certification. It would be

1 certified as it is at the moment. If there was a reason to
2 amend it later, that would happen as a matter of operation of
3 law. I mean it would have to be some --

4 MR. KING: It wouldn't end this proceeding.

5 MR. GEFFEN: Right.

6 MR. KING: It wouldn't end this proceeding.

7 MR. GEFFEN: Right.

8 MR. KING: We're not asking to certify and then
9 moot out your argument, but I think the certification of the
10 election benefits everybody.

11 MR. GEFFEN: I agree. I just want to make sure
12 that my clients have a right to -- have a possibility of
13 seeing their numbers ultimately added to the total, if that's
14 how this case ultimately resolves. An amendment would
15 satisfy that.

16 MR. KING: Well, you have -- because, Your
17 Honor, we have a race for US Senate, we have a race for
18 Congress.

19 THE COURT: Let's certify the election.

20 MS. GOLDMAN: I think that Delaware --

21 MR. RUSSEY: It doesn't change the result of any
22 of the races at issue, Your Honor.

23 MS. GRAHAM: Just to be clear, because once --
24 as I understand it, once Chantell presses the send button to
25 the Department of State, we lose control of the matter.

1 MR. GEFFEN: But then would it be possible later
2 to submit an amendment saying we're going to adjust these
3 vote totals by two?

4 MS. GOLDMAN: You can amend -- in the Delaware
5 case the order was to amend the official vote count from the
6 primary.

7 MR. KING: We've done it in Commonwealth Court a
8 number of times.

9 MR. GEFFEN: That would be -- that would be very
10 satisfactory here, Your Honor.

11 MS. GOLDMAN: I don't know what that does to the
12 certification, but --

13 MR. GEFFEN: In Delaware the --

14 MS. GOLDMAN: The amended vote count is what the
15 Court --

16 MR. GEFFEN: And that would be fine. They had
17 already long ago certified in Delaware at the point that that
18 order came down.

19 MS. GALLAGHER: And that's what -- and, Your
20 Honor, that -- right. And part of the issue with that
21 because, if I recall correctly, those ballots which were
22 ordered to be counted were undated, right. There were no
23 secrecy ballots involved in that. So the status of the law,
24 it was consistent with where they were allowed to do the
25 cure, and that was part of the amendment, why the amendment

1 went through. So why I had to ask.

2 THE COURT: So let's certify the election.

3 MR. GEFFEN: Yes.

4 THE COURT: Mr. Geffen, when would you submit
5 your brief?

6 MR. GEFFEN: I'm sorry, you said you're leaving
7 after Friday of next week?

8 MS. GOLDMAN: Friday this week.

9 MR. GEFFEN: This week? This Friday?

10 MS. GOLDMAN: This Friday I'm leaving.

11 MR. GEFFEN: Okay. And we won't even have the
12 transcript until --

13 MS. GOLDMAN: Next week. So it would be -- so
14 yours would be -- just depending on the order of the
15 briefing, it should be fine then? Right? Because --

16 MR. GEFFEN: Right. I don't want to jam you up
17 on vacation.

18 MS. GOLDMAN: I don't want to be jammed at all
19 on vacation. So, yes.

20 THE COURT: You'll be back on the 24th?

21 MS. GOLDMAN: Pardon me, Your Honor?

22 THE COURT: You'll be back to work on the 28th?

23 MS. GOLDMAN: I will be back on the 28th. I
24 have -- yes. Correct.

25 MR. GEFFEN: Okay. Let me just --

1 MS. GALLAGHER: Do you want to just submit
2 simultaneously?

3 MS. GOLDMAN: Technically I'll be in
4 Commonwealth Court.

5 MS. GALLAGHER: Your Honor, we would agree to
6 submitting simultaneously. Maybe by the middle of June then.
7 Do you want to do that?

8 THE COURT: When do you want yours submitted by?

9 MS. GALLAGHER: Rather than you go, us, you go.
10 I mean just to speed -- look, my suggestion would be if this
11 case is going up, I don't think your reading our brief, our
12 reading your brief, you know, is going to -- then maybe with
13 the ability to reply within five days?

14 THE COURT: I'm sure one way or the other this
15 case is going to go up.

16 MS. GALLAGHER: So that's what I'm saying.
17 Let's just get there. No offense, Judge.

18 THE COURT: I wholeheartedly agree.

19 MR. GEFFEN: I think simultaneous briefing is
20 fine. And did you have a specific date in mind?

21 MR. KING: November 15th.

22 MS. GALLAGHER: Remember the goal here is
23 Thanksgiving with our families.

24 MR. GEFFEN: Our goal is to have this case --

25 MS. GALLAGHER: How about June 15th?

1 MS. GOLDMAN: That's a Saturday.

2 MS. GALLAGHER: Okay. The 17th?

3 MR. GEFFEN: Let's go with -- can we go with the
4 14th?

5 MS. GALLAGHER: That's Flag Day.

6 MR. GEFFEN: It's also my daughter's birthday.
7 It's the last day of school.

8 THE COURT: The Courthouse is closed that day.

9 MR. GEFFEN: Can we go with June 13th?

10 THE COURT: No. How about -- how about
11 June 28th?

12 MR. GEFFEN: June 28th.

13 MS. GOLDMAN: Okay.

14 MR. KING: Works for us.

15 THE COURT: Everyone's brief is due by
16 June 28th.

17 MS. GOLDMAN: Thank you, Your Honor.

18 MR. GEFFEN: Thank you, Your Honor.

19 (Discussion off the record.)

20 THE COURT: Relative to Petitioners' Exhibit C
21 and Petitioners' Exhibit D, if you will just submit the
22 unredacted copy among counsel, and then send an email to
23 Andrea that each of you are saying or consenting to the
24 admission of the redacted copies that have been marked as
25 Petitioners' Exhibit C and D, that is what I'll make as part

1 of the record.

2 MS. GOLDMAN: Okay.

3 MR. GEFFEN: Excellent. Thank you.

4 (Whereupon, the Proceedings adjourned.)

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C E R T I F I C A T I O N

I, Nancy C. Natale, do hereby certify that I took the foregoing proceedings in stenotype at the time and place hereinbefore set forth and thereafter reduced the same to typewritten form, and that the foregoing is a true, full and correct transcript of my said stenotype notes.

Nancy C. Natale, RPR
Nancy C. Natale, RPR
Official Court Reporter

EXHIBIT 1

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BUTLER COUNTY BALLOT CURING POLICY

I. Introduction

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

II. Definitions

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

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

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

Bureau: The Butler County Bureau of Elections.

County: Butler County.

County Board: Butler County Board of Elections.

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

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

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

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

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

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

III. Cure Procedure

- A. Upon identifying a Deficiency on a Declaration Envelope submitted by a Voter, the Bureau will segregate said Declaration Envelope and place the Voter's name and contact information (including phone number, if one is provided) on a list.
- B. During a Primary Election, the list of Voters who submitted Deficient Declaration Envelopes shall be made available to the Party Committees once a day upon request of the Party Committee.
- C. The Party Committees may contact the Voter who submitted a Declaration Envelope with a Deficiency to advise that there is a Deficiency with their Declaration Envelope and that the Voter is permitted to appear at the Bureau to remedy such Deficiency by means of an Attestation.
- D. During a General Election, in addition to Party Committees, the list of Voters who submitted Declaration Envelopes with Deficiencies will be made available to any duly authorized representative of any recognized political party other than the Party Committees which have a candidate on the Ballot.

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

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

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

- F. The Bureau shall not perform any remedy on behalf of the Voter but will only provide the opportunity for the Voter to remedy the defect.
- G. The Bureau shall not send the Ballot back to the Voter or issue the Voter a new Ballot due to the Deficiency.
- H. This Policy shall not modify any procedures regarding Provisional Ballots with the exception of allowing a Provisional Ballot to be counted for a Voter who cannot come into the Bureau to remedy a Deficiency on the Ballot envelope but is able to go to their polling place on Election Day.

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

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

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EXHIBIT 2

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

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

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SURE VR

Ballot Response Type Updates

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

Below are the new 'Pending' Status Reasons:

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

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

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



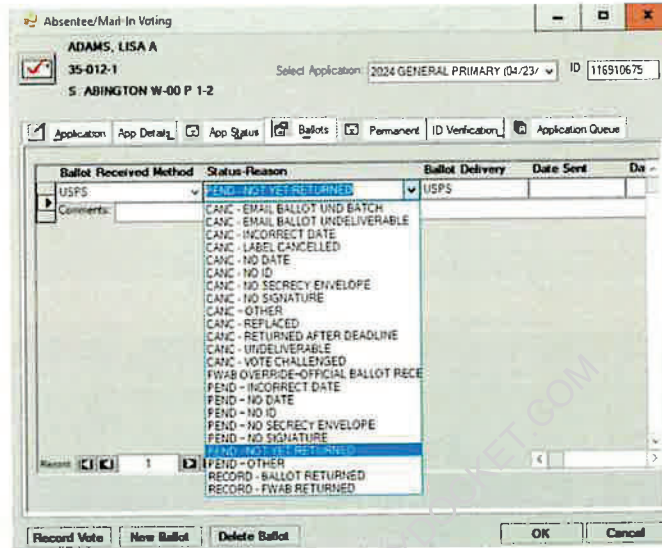
The response types are available in the following areas within the SURE VR system:

- Record Mailings Screen

- Bulk Ballot Response Utility Screen



- *Ballots* tab on the **Absentee/Mail-In Voting** screen



Please Note: Although changes were made to include the new response types under the *Ballots* tab of the **Absentee/Mail-In Voting** screen, the Department of State strongly recommends if a Status Reason update is needed, that the change should be made by utilizing the **Record Mailings** or **Bulk Ballot Response Utility** screens.

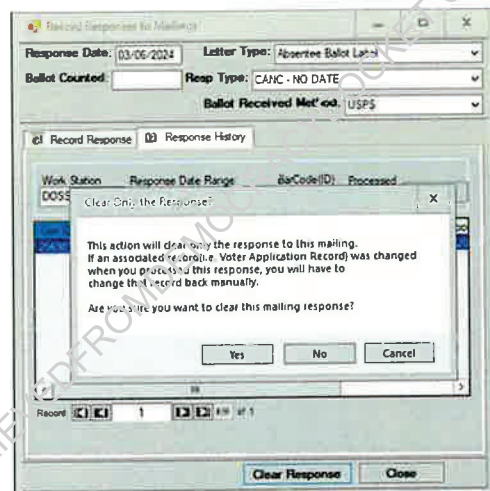
RETRIEVED FROM DEMOCRACY



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

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

Please reference the “Clearing an Absentee Ballot Label Response” in the Absentee Processing User Guide for detailed steps to clear a response.



Additionally, the response type of ‘CANC-VOTE CANCELLED’ has been removed as a drop-down selection. Any previous ballot applications associated with this status will not be affected for historical purposes.



Ballot Response Email Verbiage Updates

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

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

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



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



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



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



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



| | | |
|--|---|--|
| | overrides the Federal Write In Absentee Ballot previously recorded. | |
|--|---|--|

Sample Emails:

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

Subject Line: Your Ballot Has Been Received

Email Body:

Dear [ApplicantName],

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

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

If you have questions about your ballot, please contact [CountyName] County at [CountyContact].

Thank you.

To read this information in Spanish, go to [ballot tracker URL] - In Spanish

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

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

FWAB Ballots

Subject Line: Your Ballot Has Been Received

Email Body:

Dear [ApplicantName],

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

If you have questions about your ballot, please contact [CountyName] County at [CountyContact].

Thank you.

To read this information in Spanish, go to [ballot tracker URL] - In Spanish

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



TLP:AMBER+STRICT

Department of State
Statewide Uniform Registry of Electors (SURE) Project
B 23.9.0_County Release Notes
March 11, 2024

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

Your Ballot Status Has Changed

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

Subject Line: Your Ballot Status Has Changed – Check for Updates

Email Body:

Dear [ApplicantName],

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

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

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

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

To read this information in Spanish, go to [ballot tracker URL] - In Spanish

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

Thank you.

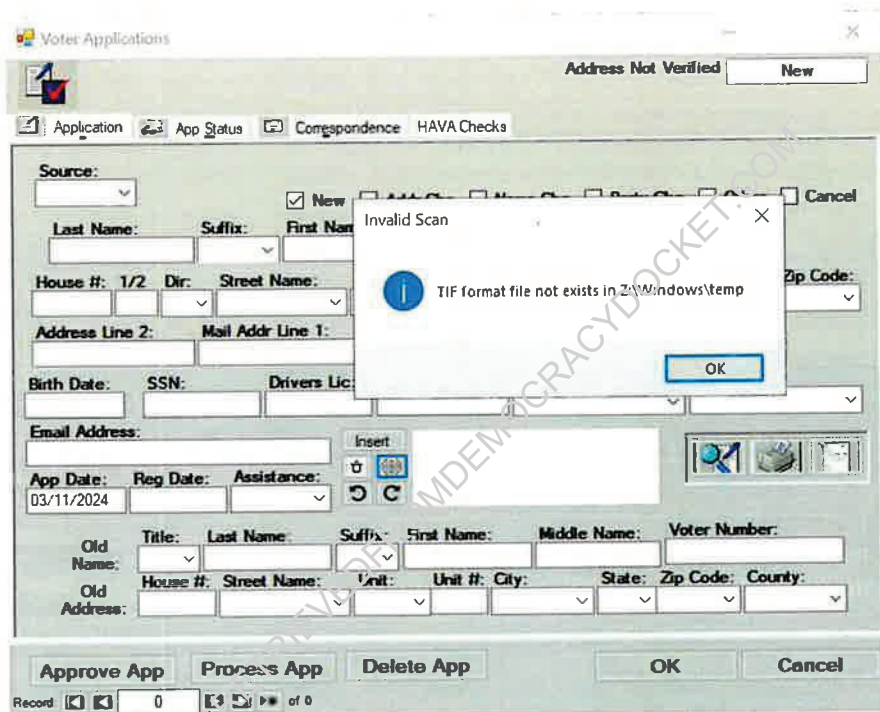
****Please do not reply to this email.****



SURE VR Disconnects

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

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





PA VOTER SERVICES

Election Ballot Status Tracker

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

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

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

Please see the screenshots below:

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

First Name (as it appeared on your application)

Last Name (as it appeared on your application)

Date of Birth (mm/dd/yyyy)

County

Your Ballot Status Result(s)

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

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

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

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

Column Descriptions

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

RETRIEVED FROM DEMOCRACY DOCUMENTS



Estado de la boleta electoral

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

Nombre (tal y como aparecía en su solicitud)
 Lee

Apellido (tal y como aparecía en su solicitud)
 Johnson

Fecha de Nacimiento (MM/DD/YYYY)
 08/26/1963

Condado
 LACKAWANNA

Enviar

Resultado(s) del estado de su boleta

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

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

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

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

Descripciones de las columnas

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



選票狀態

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

名字 (如申請上所示)

Lee

姓氏 (如申請上所示)

Johnson

出生日期 (月/日/年)

08/26/1963

縣

LACKAWANNA

提交

您的選票狀態結果

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

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

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

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

欄說明：

選票類型 - 缺席還是郵寄

選舉 - 申請的選票用於此選舉。

申請接收日期 - 您的縣收到您申請的日期。

申請處理日期 - 您的縣處理您申請的日期。

選票郵寄日期 - 您的縣將您的選票寄到您申請地址的日期。

縣收到選票日期 - 您的縣收到您投票選票的日期。

狀態 - 您選票申請的狀態是您選票申請最近的已知狀態。



Election Ballot Status

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

First Name (as it appeared on your application)

Jeff

Last Name (as it appeared on your application)

Penndot

Date of Birth (mm/dd/yyyy)

10/03/1965

County

LACKAWANNA

Submit

Your Ballot Status Result(s)

| Ballot Type | Election | Application Received | Application Processed | Ballot Mailed On | Ballot Received | Status |
|---|----------------------|----------------------|-----------------------|------------------|-----------------|-------------------------|
| Mail-In | 2024 GENERAL PRIMARY | 03/06/2024 | 03/06/2024 | | | PEND - NOT YET RETURNED |
| Your ballot has not yet been returned to LACKAWANNA county. The status of your ballot will be updated once the county receives your ballot. | | | | | | |
| Absentee | 2024 GENERAL PRIMARY | 02/20/2024 | 02/20/2024 | | | CANC - OTHER |

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

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

EXHIBIT A

RETRIEVEDFROMDEMOCRACYDOCKET.COM



Pennsylvania Provisional Voting Guidance

Date: March 11, 2024

Version: 2.1

Background

This revised guidance addresses the issuance, voting, and examination of provisional ballots under the Election Code. Provisional ballots were originally mandated by section 302 of the Help America Vote Act of 2002 (HAVA).

Generally, under the applicable statutes, if a voter is not eligible to be issued a regular ballot, that voter is entitled to submit a provisional ballot at the polling place. Provisional ballots may be issued at the polling place until the close of polls on Election Day absent a court order extending voting hours.

Using Provisional Ballots

Provisional ballots are utilized when a voter believes that they are eligible to vote, but the poll worker is unable to confirm the voter's eligibility. Provisional ballots permit the voter to submit a ballot, although the ballot is initially segregated from the regular ballots returned by voters whose eligibility was confirmed at the polls on Election Day. After Election Day, the county board of elections must adjudicate the provisional ballot voter's eligibility to vote. If the board determines that the voter is eligible and did not already vote in that election, then the provisional ballot is counted or partially counted, if applicable.

Voters are entitled to a provisional ballot when their eligibility to vote is uncertain. A poll worker must inform voters that they have a right to use a provisional ballot if their eligibility is uncertain. The circumstances which would create a situation where a voter may be issued a provisional ballot include, but are not necessarily limited to:

- Voter's name was not in the poll book or supplemental poll book.
 - For example, the voter reported to the wrong precinct, or
 - The voter did not report a recent change in residence to the county election office.
- Voter is required to show ID but cannot do so.
- Voter eligibility was challenged by an election official.
- Voter was issued an absentee or mail-in ballot but believes that they did not successfully vote the ballot, and the ballot and outer return envelope were not surrendered at the polling place to be spoiled.
- Voter returned a completed absentee or mail-in ballot that will be rejected by the county board of elections, and the voter believes they are eligible to vote.
- A special court order was issued with respect to the voter's status.
- A special court order was issued related to extending the hours of voting.

- Voter claims they are registered in a political party with which they are not affiliated (for primary elections only).

Process for the Voter

Any voter who intends to submit a provisional ballot shall follow these steps:

- 1) Before receiving a provisional ballot, the voter must complete the sections on the provisional ballot envelope labeled Voter Information, Voter Affidavit for Provisional Ballot, and Current Address in front of election officials.
- 2) Upon completion of the above sections of the provisional ballot envelope, the voter must mark their provisional ballot.
- 3) After the voter marks their provisional ballot, they must seal their ballot in the secrecy envelope and then place the secrecy envelope in the provisional ballot envelope.
- 4) The voter must fill out the Voter Signature Section on the provisional ballot envelope in front of the Judge of Elections and the Minority Inspector.
- 5) The voter must sign both the Voter Affidavit for Provisional Ballot and the front of the provisional ballot envelope.
- 6) The Judge of Elections and the Minority Inspector will then sign the affidavit after noting the reason for the provisional ballot.

Voters can check the status of their provisional ballot after the election by calling their county board of elections, checking the PA Voter Services website, or calling the PA Department of State.

Note: The online provisional ballot search will return results only for the active election and cannot be used to search provisional ballots from previous elections.

Voters will need to provide their provisional ballot number or their full name and date of birth to check the status of their provisional ballot.

- Voters can find the phone number for their county election office online at vote.pa.gov/county.
- The website for PA Voter Services is vote.pa.gov/provisional.
- The phone number for the PA Department of State is 1-877-VOTESPA (1-877-868-3772), option 6.

Process for Poll Workers

Voters who requested an absentee or mail-in ballot may arrive at their polling place on Election Day seeking to vote. Poll workers should follow the instructions below for these voters.

- 1) For voters who were issued an absentee or mail-in ballot but **did not** successfully return their ballot to the board of elections:
 - a. These voters' names will be found in section 1 of the poll book, and the signature line will say either "Remit Absentee Ballot or Vote Provisionally" or "Remit Mail-in Ballot or Vote Provisionally."
 - i. Option A. If the voter has their unvoted absentee or mail-in ballot and outer envelope with them, the poll worker shall permit the voter to surrender their mail ballot and envelope and sign the Elector's Declaration to Surrender their Mail Ballot form (see **Appendix A**). After the voter does this, the poll worker shall allow the voter to vote by regular ballot the same as any other voter.
 - ii. Option B. If the voter is designated in the poll book as having been issued an absentee or mail-in ballot but the voter does not have their absentee or mail-in ballot and outer envelope with them, the voter may submit only a provisional ballot, and the poll worker shall offer them this option.
- 2) For voters who **did** successfully return their absentee or mail-in ballot:
 - a. If a voter was issued an absentee or mail-in ballot and successfully returned their ballot, their name will be found in section 2 of the poll book, and the signature line will say either "Absentee – Ballot Cast/Not Eligible" or "Mail-in – Ballot Cast/Not Eligible."
 - b. If a voter listed in section 2 of the poll book believes that they have not successfully voted their absentee or mail-in ballot or otherwise contests their ballot status, the poll worker must provide the voter a provisional ballot.

For **everyone** receiving a provisional ballot, poll workers must ensure that, before the provisional ballot is issued, the Voter Information, Voter Affidavit for Provisional Ballot, and Current Address sections on the provisional ballot envelope are completed by the voter. Again, the voter must sign **both** the Voter Affidavit for Provisional Ballot **and** the front of the provisional ballot envelope.

Poll workers must ensure that the voter signs their name in the presence of both the Judge of Elections and the Minority Inspector. Poll workers must also ensure that both the Judge of Elections and Minority Inspector sign the affidavit.

If polling place hours are extended beyond 8:00 p.m. on Election Day by court order, all votes submitted after 8:00 p.m. shall be submitted via provisional ballot only.

Process for County Elections Officials

Within seven days after the election, the county board of elections must review and make a determination for each provisional ballot cast on Election Day.

Counties should notify parties and the public a week in advance of the date that election officials will meet to examine and reconcile provisional ballots during the post-election official count. Under no circumstance should the county board of elections schedule the meeting without providing the notice required by the Sunshine Act¹ for public meetings.

Parameters for canvassing provisional ballots

- When determining whether to count a provisional ballot, the county board of elections must reconcile provisional ballots with ballots cast in person on Election Day and with returned absentee and mail-in ballots. If a voter cast an Election Day ballot or successfully voted an absentee or mail-in ballot, the provisional ballot shall not be counted.
- A county board of elections can approve a provisional ballot for counting only if the voter is qualified and eligible to vote in the election.
- When researching provisional ballots during the canvassing period, the county election staff should enter the voter's provisional voting information from the provisional envelope into the SURE system to maintain an accounting of the number of provisional ballots issued for the election.
- If a voter's mail-in or absentee ballot was rejected for a reason unrelated to the voter's qualifications, and the voter submitted a provisional ballot and meets other provisional ballot requirements, the provisional ballot shall be counted if the county determines that the voter is eligible to vote.²
- Counties are prohibited from counting a provisional ballot submitted by a qualified registered voter of another county.
- During the canvass, the county board of elections must determine, for each provisional ballot, whether:
 - The provisional ballot should be counted in full (i.e., all contests on the ballot are counted);
 - The provisional ballot should be partially counted (i.e., some contests but not all contests on the ballot are counted) and the reason(s) for the partial counting;

¹ 65 Pa.C.S. § 701, *et seq.*

² The Department agrees with the analysis of the Delaware County Court of Common Pleas in *Keohane v. Delaware County Board of Elections*, No. 2023-004458 (Sept. 21, 2023); *but see In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 (Pa. Commw. Ct. 2020) (unpublished).

- The provisional ballot is invalid because the voter successfully submitted another ballot; or
- The provisional ballot should be rejected for another reason(s) and the reason(s) for the rejection.

Hearings for provisional ballots challenged during the canvass

If a provisional ballot is challenged during the canvass, the county board of elections must schedule a hearing within seven days of the challenge to consider the challenge and determine the disposition of the ballot. Additionally, notice shall be given where possible to the challenged provisional voter and to the attorney, watcher, or candidate who made the challenge.

- It is recommended that counties notify parties and the public of the hearing a week in advance of the date, noting that election officials will meet to examine and reconcile provisional ballots during the post-election official count. Under no circumstance should the county board of elections schedule the meeting without providing the notice required by the Sunshine Act³ for public meetings.
- During the hearing, the county board of elections must decide whether to uphold or dismiss the challenge. The county board is not bound by the Pennsylvania Rules of Evidence. Any testimony presented must be stenographically recorded.

###

| Version | Date | Description |
|---------|------------|--|
| 1.0 | 3.5.2020 | Initial document release |
| 1.1 | 10.21.2020 | Updated per Act 12 of 2020 |
| 2.0 | 10.12.2023 | Updated to reflect judicial guidance |
| 2.1 | 3.11.2024 | Updated to implement clarifying edits and modified affidavit form. |

³ 65 Pa.C.S. § 701, *et seq.*

Elector's Declaration to Surrender Their Mail Ballot**For the Voter:**

I hereby declare that I am a qualified registered elector who was issued an absentee or mail-in ballot for this election, but that I have not mailed or cast an absentee or mail-in ballot in this election. Instead, I am hereby remitting my absentee or mail-in ballot and its declaration envelope to the judge of elections at my polling place to be spoiled. I request that my absentee or mail-in ballot be voided, and that I be permitted to sign the poll book and vote a regular ballot.

I verify that the statements made in this declaration are true and correct to the best of my knowledge and belief. I understand that false statements made herein are subject to the criminal penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

(Printed Name of Elector)

(Signature of Elector)

(Address of Elector)

For Election Officials Only:

I hereby declare I have received the voter's ballot and envelope containing the voter's declaration from the voter and I am spoiling it and permitting the voter to sign the poll book and vote a regular ballot.

(Printed Name of Judge of Elections)

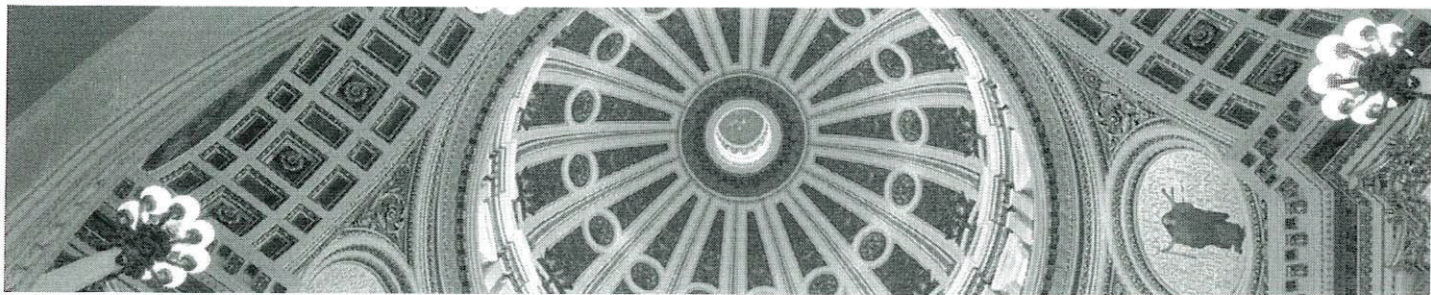
(Judge of Elections Signature)

(Precinct)

Instructions after completion: This form should be attached to the voter's surrendered balloting material and returned in the [container] [bag] designated for spoiled ballots. Do not forget to check the "BALLOT REMITTED?" option next to the voter's name in the poll book.

EXHIBIT B

RETRIEVEDFROMDEMOCRACYDOCKET.COM



Provisional Ballot Search

By Provisional Ballot Number

Provisional Ballot Number:

Provisional Ballot Number

OR

By Voter Information

Last Name:

Matis

First Name:

Frank

Date of Birth:(mm/dd/yyyy)

11/06/1956

Retrieve

Provisional Ballot Search Result

Status:

Rejected

Reason(s):

- Voted by conventional alternative or absentee/mail-in

This website is compatible with the following browsers:



A-294-110101 B

EXHIBIT C

RETRIEVEDFROMDEMOCRACYDOCKET.COM

Fwd: Your Ballot Is on the Way

1 message

f. ann genser <f.anngenser@gmail.com>
To: ksteiker-ginzberg@aclupa.org

Wed, Apr 24, 2024 at 10:04 AM

Begin forwarded message:

From: RA-voterregstatcert@state.pa.us
Date: March 27, 2024 at 11:19:45 EDT
To: f.anngenser@gmail.com
Subject: Your Ballot Is on the Way

Dear FAITH ANN GENSER,

Your ballot is almost ready, and it is being prepared for mailing. If you do not receive your ballot within 7 days, please contact your county election office.

If you have questions concerning your ballot, please contact BUTLER County at (724) 284-5308.

Thank you

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

RETRIEVEDFROMDEMOCRACYDOCKET.COM

EXHIBIT D

RETRIEVEDFROMDEMOCRACYDOCKET.COM

Fwd: Your Ballot Status Has Changed – Check for Updates

f. ann genser <f.anngenser@gmail.com>
To: ksteiker-ginzberg@aclupa.org

Wed, Apr 24, 2024 at 9:43 AM

From: RA-voterregstatcert@state.pa.us
Date: April 11, 2024 at 13:36:23 EDT
To: f.anngenser@gmail.com
Subject: Your Ballot Status Has Changed – Check for Updates

Dear FAITH ANN GENSER,

After your ballot was received by BUTLER County, it received a new status.

Your ballot will not be counted because it was not returned in a secrecy envelope. If you do not have time to request a new ballot before April 16, 2024, or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.

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

If you have questions or need more information after checking your ballot's status, please contact BUTLER County at (724) 284-5308.

Para leer esta información en español, vaya a <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

要閱讀此資訊的中文版, 請造訪 <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

Thank you.

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