

IN THE
Supreme Court of Pennsylvania
WESTERN DISTRICT

No. _____, 2024

FAITH A. GENSER and FRANK P. MATIS

v.

**BUTLER COUNTY BOARD OF ELECTIONS, REPUBLICAN NATIONAL
COMMITTEE, and REPUBLICAN PARTY OF PENNSYLVANIA,**

And

THE PENNSYLVANIA DEMOCRATIC PARTY

PETITION FOR ALLOWANCE OF APPEAL

**Petition for Allowance of Appeal from the Order, dated and entered
September 5, 2024, in the Commonwealth Court of Pennsylvania,
at No. 1085 C.D. 2024 and No. 1074 C.D. 2024, reversing the Order dated and
entered August 16, 2024, in the Court of Common Pleas of Butler County,
at Trial Ct. No. MsD. No. 2024-40116 (Election Matter)**

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AND NOW, comes the Petitioner, Butler County Board of Elections, by its counsel, Buchanan Ingersoll & Rooney, PC and hereby petitions this Honorable Court pursuant to Pa.R.A.P. § 1111, *et seq.* to allow an appeal from the Order of Commonwealth Court of Pennsylvania filed September 5, 2024, reversing the Order of the Court of Common Pleas of Butler County dismissing the Petition for Review in the Nature of Statutory Appeal filed on behalf of Faith A. Genser and Frank P. Matis. Special and important reasons exist to allow the appeal under Pa. R.A.P. § 1114 in that:

- This case presents a question of first impression regarding the scope of relief permitted under a Petition for Review in the Nature of Statutory Appeal under 25 P.S. § 3157.
- 25 P.S. § 3157 does not permit review into the merits of a challenge only whether the findings of the Butler County Board of Elections are supported by competent evidence and to correct any conclusions of law erroneously made. *In re Reading Sch. Bd. Election*, 535 Pa. 32, 634 A.2d 170 (1993); *In re Recanvassing of Certain Voting Machines*, 504 Pa. 593, 475 A.2d 1325 (1984).
- The Commonwealth Court decision conflicts with this Court's binding decision in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372-74 (Pa. 2020).

I. REFERENCE TO OPINIONS BELOW

The opinions below are not officially published. The September 5, 2024, Memorandum Opinion of the Commonwealth Court (Wolf, J., joined by Cohn Jubelirer, J., with Dumas, J. dissenting). The Memorandum Opinion of August 16,

2024, of the Court of Common Pleas of Butler County (Yeager, J.). Copies of both are appended to this petition as Appendix Exhibits A and B, respectively.

II. TEXT OF THE ORDERS IN QUESTION

A. BY THE COMMONWEALTH COURT

AND NOW, this fifth 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

B. BY THE COURT OF COMMON PLEAS

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 Interveners, 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 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 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/ S. Michael Yeager

S. MICHAEL YEAGER

PRESIDENT JUDGE

III. QUESTION PRESENTED

Is the Declaratory relief requested under a Petition of Review in the Nature of Statutory Appeal Pursuant to 25 P.S. § 3157(a) a means by which a curing policy for fatally defective mail-in ballots may be imposed on county boards of elections?

Substantively addressed and preserved in the Board’s brief before the Court of Common Pleas of Butler County at pp. 13-20 and in its Commonwealth Court brief at pp. 16-24. Ruled on in the Boards’s favor by the Trial Court in its Memorandum Opinion at Appendix B at p. 13 and pp. 20-24 and reversed by the Commonwealth Court in its Opinion at pp. 32-33.

IV. CONCISE STATEMENT OF THE CASE

On April 29, 2024, a Petition for Review in the Nature of a Statutory Appeal pursuant to 25 P.S. § 3157 (the “Petition”) was filed on behalf of Faith A. Genser and Frank P. Matis, (“Petitioner Voters”). At issue was the undisputed fact that Petitioner Voters had cast fatally defective mail-in ballots in the 2024 Primary Election. Petition at ¶¶ 11, 13 p. 5 and ¶ 25 p. 8. Both of the Petitioner Voters failed to place his or her ballot into the secrecy envelope of their mail-in ballots as required by law. *Id.* The Butler County Bureau of Elections received both declaration envelopes prior to the deadline for receipt of mail-in ballots. *See* Petition at ¶ 6 p. 4. Petitioner Voters additionally went to their polling places on Primary Election Day, April 23, 2024, and cast provisional ballots. *Id.*

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

May 7, 2024, Hearing regarding the Petition before the Court of Common Pleas of Butler County, Chantell McCurdy, Director of the Butler County Bureau of Elections (“Director McCurdy”), testified regarding the events leading up to and surrounding the canvassing of the vote from the 2024 Primary Election and she also testified regarding the practices of the Butler County Bureau of Elections and the single policy of the Butler County Board of Elections.

Relative to the Petitioner Voters’ provisional ballots, Director McCurdy testified that to conduct the computation of the vote in Butler County, each of the three members of the Butler County Board of Elections (the “Board”) appoints one individual to a Computation Board to canvass and count the votes following each election. *See* May 7, 2024, Hearing Transcript (hereinafter, “Hr’g. Tr.”), at 18:3-10; 18:23-25 and 19:2.

Director McCurdy testified that on April 26, 2024, the Computation Board publicly commenced the computation and canvassing of the primary returns. Hr’g. Tr at 19:24-21:8. The Computation Board first selected its officers and then started the canvassing of absentee and mail-in ballots, followed by provisional ballots and write-in votes, in that order. *Id.* At the time the Computation Board convened, no Declaration Envelopes or Secrecy Envelopes had been opened. Hr’g. Tr at 21:12-22:6. Prior to this time, these mail-in ballots were locked in a cabinet in a back room of the Election Bureau. Hr’g Tr. 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. 21:14-15, 49:23-50:2; 25 P.S. §3446.8(g)(1.1). However, any information gathered in the pre-canvass relating to whether a secrecy envelope is missing is prohibited from being disseminated. Hr’g Tr. 50:6-12.

The seals of the mail-in ballots were first opened on Friday, April 26, 2024, in front of the Computation Board. Hr’g Tr. 22:7-9. To protect voter privacy, the declaration envelopes and secrecy envelopes were manually opened by the Director and Vice Director of the Bureau of Elections in front of the Board employees in the presence of the Computation Board. *Id.* Upon review of seventy-four provisional ballots, three provisional ballots were determined to have been completed by voters who had previously submitted a mail-in ballot missing the secrecy envelope marked “Official Election Ballot.” Hr’g Tr. at 24:23-26:13. The three members of the Computation Board, without discussion or debate, unanimously decided to not count these three provisional ballots. Hr’g. Tr. at 26:25-27:9.

The Petition falsely alleges that the Board “notified” Petitioner Voters that it had rejected their mail-in ballots prior to the Primary Election and instructed them that they could cast provisional ballots. *See* Petition at ¶ 35 p. 10; and Answer thereto at ¶ 35. p. 7. The record instead established that all communications to the Petitioner Voters relating to their mail-in ballots were from the Department of State and an unknown “voting rights group” *See* Hr’g. Tr. at 46:4-14; 153:16- 154:22. Two days

prior to the canvassing of the vote (April 24, 2024), Lawyers for the Petitioner Voters approached the Butler County Bureau of Elections and the Butler County Solicitor regarding its Curing Policy, specifically requesting a directive to the Computation Board to count provisional ballots cast by voters who had returned mail-in ballots without the required Secrecy Envelope. Hr'g. Tr. at 29:7-31:7. The Board of Elections does not direct the decisions of the Computation Board, but rather defers entirely to its decisions regarding the canvass and computation of votes. Hr'g. Tr. at 31:4-24. Petitioner Voters' legal counsel was present for this canvassing as a watcher. Hr'g. Tr at 20:13-22. However, no challenge was made to these three unanimous determinations of the Computation Board not to count the three provisional ballots. Had a challenge been made, the Board would have been required to convene a hearing at which the Board could have taken testimony, heard evidence, and rendered a decision on the provisional ballots. 25 P.S. § 3050(a.4)(4).

Rather than challenge the unanimous decision of the Computation Board and obtain a necessary decision of the Board as required by 25 P.S. § 3050 (a.1)(4)(1)(4), the Petitioner Voters filed a Petition for Review in the Nature of Statutory Appeal ("Voter's Petition") before the Court of Common Pleas of Butler County seeking an order reversing the decision of the Board, when none had been made, and a declaration that "Pennsylvania Supreme Court precedent, the Pennsylvania Election Code and the Pennsylvania Constitution require the Board to count the Petitioners'

provisional ballots cast in the Primary Election on April 23, 2024.” *See* Petition in the Nature of Statutory Appeal p. 19.

The Voter’s Petition also sought to expand the scope of the Curing Policy which exists only for curing immaterial deficiencies on the declaration envelope. *See* Petition in the Nature of Statutory Appeal at ¶¶ 3-5 at p. 3. This Curing Policy was adopted, following public meetings on May 2, 2023, and is consistent with the permissive authority granted by the Pennsylvania General Assembly permitting the Board to cure mail-in ballots under certain narrow circumstances: “[f]or those absentee or mail-in ballots for which proof of identification has not been received or could not be verified.” 25 P.S. § 3146.8 (g)(7)(h). On February 14, 2024, the Curing Policy was legislatively amended by the Board following the public meeting. Hr’g. Tr. at 76:16-77:16.

On August 16, 2024, the Trial Court issued its Memorandum Opinion and Order holding that the Petitioner Voters admitted failure to use a secrecy envelope rendered their mail-in ballots “invalid” and Pennsylvania law does not grant them a constitutional right to cure that defect via provisional ballot. The Trial Court correctly rejected the Petitioner Voters’ attempt to read a right to cure via provisional ballot into the Election Code as such a reading contravenes the Code’s plain text and authoritative precedent. The Trial Court dismissed the Petition holding that the Board did “not violate either the Election Code or the Free and Equal clause of the

Pennsylvania Constitution.” Appendix Ex. B at p. 29. Importantly, the Trial Court recognized that it may only consider whether the Board had abused its discretion or committed an error of law in its decision relative to Petitioners original ballots under 25 P.S. § 3157. Appendix Ex. B. at p. 13. Apparently excusing the failure of Petitioner Voters to obtain an order of the Board pursuant to 25 P.S. § 3050(a.4)(4), the Trial Court evaluated whether the Board’s duly appointed Computation Board had violated statutory and constitutional law when it declined to count Petitioner Voters provisional ballots. Specifically, the Trial Court reviewed the language of 25 P.S § 3050 (a.4)(5)(i) of the Election Code in conjunction with 25 P.S. § 3050 (a.4)(5)(ii) and rejected the argument that these provisions would require the Board to count Petitioners post mail-in ballot provisional ballots. Appendix Ex. B at p. 16.

In reversing the Trial Court, the Commonwealth Court determined a constitutional analysis was unnecessary as the matter could be addressed through analysis of the construction of the Election Code alone. Appendix Ex. A at pp. 25-26, 29-33. In so doing, the Commonwealth Court deemed the words “cast” in P.S. 25 § 3050 (a.4)(5)(i) and “timely received” in 25 P.S. § 3050 (a.4)(5)(ii)(F), “voted” in 25 P.S. § 3150.16(b)(2) and “ballot” in § 3150.13 as “ambiguous” and thereby requiring “resolution.” *Id.* The Commonwealth Court, like the Trial Court ignored the Petitioner Voter’s failure to adhere to the procedures mandated by 25 P.S. § 3050(a.4)(4) and focused instead on the declaratory relief demanded in the Petition.

The “resolution” of the Election Code constructed by the Commonwealth Court results in a mandate to all county boards of election that provisional ballots must cure returned ballots lacking a secrecy envelope.

The Board now seeks further review of that aspect of the Commonwealth Court decision, which amounts to a reversal of the Common Pleas Court’s decision.

V. CONCISE STATEMENT OF REASONS TO ALLOW APPEAL

This Honorable Court should review the final order of the Commonwealth Court because the Commonwealth Court’s decision expands the Board’s legislatively implemented Curing Policy which is far outside the scope of relief available under 25 P.S. § 3157. The broad, declaratory relief imposed by the decision of the Commonwealth Court is essentially a mandatory imposition of a post Primary Election, court-imposed, Commonwealth wide curing policy. Such declaratory relief is not available via a 25 P.S. § 3157 statutory appeal. The issues presented in the Petition for Review in the Nature of Statutory Appeal were not brought pursuant to the Pennsylvania Declaratory Judgments Act, 42 Pa.C.S.A. § 7531 et seq. which is the vehicle by which a party can seek a declaration of “rights, status, and other legal relations” from a court within its proper exercise of jurisdiction.

Moreover, there is no dispute that the mail-in ballots were timely received by the Board. *See* Appendix Ex. B at p. 2. Notwithstanding the plain language of 25

P.S. § 3050 (a.4)(5)(i) and (a.4)(5)(i)(F) the Commonwealth Court has interpreted these sections as prohibiting the recognition the first ballot received by the Bureau of Elections (in this case the returned mail-in ballot) as the “official ballot.”

In *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 347 (Pa. 2020), this Honorable Court addressed the request for a **declaration** that under Act 77, Boards of Election must “clothe and count naked ballots, *i.e.*, place ballots that were returned without the secrecy envelope into the proper envelope and count them, rather than invalidate them.” *Id.* at p. 42. The current litigation seeks the same **declaration** already rejected by this Court.

A ballot curing policy is not required by the Election Code. The curing policy articulated in the Opinion can only be accomplished within the authority of the Pennsylvania General Assembly or legislatively adopted by the Board following a public meeting. As such, this Court has already determined that the relief requested by the Petitioners is not available and there is no requirement that Butler County or any county adopt any notice to cure policy or procedure concerning fatal mail-in ballot deficiencies.

VI. CONCLUSION

For the foregoing reasons, Butler County Board of Elections requests that this Honorable Court GRANT this PETITION FOR ALLOWANCE OF APPEAL.

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COMBINED CERTIFICATES OF COMPLIANCE

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

2. I further certify that according to the word count feature of the word processing program used to prepare it, this brief contains 2606 words, excluding those supplementary matters that are exempted. This document was prepared using Microsoft Word using Times New Roman font in 14 point.

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PROOF OF SERVICE

I hereby certify that on this 8th day of September, 2024 a true and correct copy of the foregoing document was electronically filed using the PACFile system, which will send notification of such filing to all counsel of record , which service satisfies the requirements of Pa.R.A.P. 121.

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APPENDIX EXHIBIT A

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APPENDIX EXHIBIT A

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

APPENDIX EXHIBIT B

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APPENDIX EXHIBIT B

**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 Intervenor 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

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ENTERED & FILED

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
8/14/2019