

DSCC and  
BOB CASEY FOR SENATE, INC.,  
Petitioners,

v.

BERKS COUNTY BOARD  
OF ELECTIONS,  
Respondent.

: IN THE COURT OF COMMON PLEAS OF  
: BERKS COUNTY, PENNSYLVANIA  
:  
: ELECTION APPEAL  
:  
: No. 24-17101  
:  
:  
: Assigned to: Madelyn S. Fudeman, J.

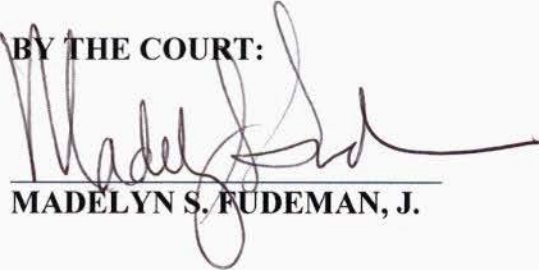
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**ORDER**

AND NOW, this 22<sup>nd</sup> day of November, 2024, upon consideration of Petitioners' Petition for Review in the Nature of a Statutory Appeal, the response of Respondent Berks County Board of Elections ("Board") thereto, and other matters of record, including the evidence and oral argument before the Court on Wednesday, November 20, 2024, it is hereby **ORDERED** that Petitioners' requested relief is **DENIED**. The Board's November 14, 2024 adjudication and decision to reject and not count the 145 provisional ballots challenged by Petitioners, which are missing at least one of the two required signatures or are missing the required secrecy envelope, is **AFFIRMED**. Accordingly, the Board may certify the results of the 2024 General Election to exclude the votes from those 145 challenged provisional ballots.

**IT IS SO ORDERED.**

**BY THE COURT:**

  
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**MADelyn S. FUDEMAN, J.**

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**MEMORANDUM DECISION AND ORDER**

In their Petition for Review in the Nature of a Statutory Appeal (“Petition”), petitioners DSCC and Bob Casey for Senate, Inc. (collectively, “Petitioners”) challenge the legality of the adjudication and decision by the Berks County Board of Elections (the “Board”) at the Board’s public hearing on Thursday, November 14, 2024, to reject and not count 145 provisional ballots by registered Berks County voters, 101 of which are missing at least one the two voter’s required signatures, and 44 of which are missing the required secrecy envelope. In its Answer and Brief in Opposition to the Petition, the Board responded that its adjudication and decision to reject and not count these 145 challenged provisional ballots is lawful and mandatory under the applicable provisions of the Pennsylvania Election Code, 25 Pa. Stat. § 3050(a.4)(5)(i) and (ii). After a hearing and oral argument on Wednesday, November 20, 2024, for the reasons set forth below, the Court denies Petitioners’ appeal and affirms the Board’s adjudication and decision to reject and not count the 145 challenged provisional ballots and enters an appropriate Order.

**History of Provisional Voting in Pennsylvania**

The impetus for allowing voting by provisional ballot provisions incorporated into Pennsylvania Election Code Section 3050(a.4)(1) *et seq.*, dates back to the 2020 United States

presidential election. See *Genser v. Butler County Bd. of Elections*, No. 26 WAP 2024, --- A.3d. ---, 2024 WL 4553285, at \*11 (Pa. Oct. 23, 2024).

In the wake of the Florida voting controversy in the 2020 U.S. presidential election that required the United States Supreme Court intervention, *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L.Ed.2d 388 (2000), there was overwhelming bipartisan support to prevent such controversies from recurring. *Id.* (citing Brian Kim, *Help America Vote Act*, 40 HARV. J. LEGIS. 579, 579-82 (2003)). Congress enacted the Help America Vote Act of 2002, which mandated statewide voter registration systems and provided funds to states to replace voting machines and train poll workers. *Id.* On October 29, 2002, President George W. Bush signed the “Help America Vote Act of 2002,” (“HAVA”), Pub. L. No. 107-252, 116 Stat. 1666 (2002) into law. HAVA is codified at 52 U.S.C. §§ 20901 to 21145. At the time, Pennsylvania’s Election Code did not provide for provisional voting. *Genser*, 2024 WL 4553285, at \*11.

HAVA establishes the framework and minimum requirements for provisional ballots. *Genser*, 2024 WL 4553285, at \*11. Under HAVA, if an individual voter declares she is registered to vote in the jurisdiction in which she desires to vote, and is eligible to vote in an election for federal office, but the individual’s name either does not appear on the eligible voter list, or an election official asserts that the voter is ineligible, “such individual shall be permitted to cast a provisional ballot” following the procedures set forth. *Id.* Moreover, state election officials must provide notice to specific voters regarding the availability of provisional ballots. *Id.* (citing 52 U.S.C. § 21082(a)(1) (providing that the election official “shall notify the individual that the individual may cast a provisional ballot in that election” where the official does not find the individual's name on the eligible voter list or asserts that the individual is not eligible)). To cast a provisional ballot, HAVA requires individuals to execute a written

affirmation of registration in the jurisdiction where they desire to vote and eligibility to vote in that election. *Id.* (citing 52 U.S.C. § 21082(a)(2)(A) & (B) (requiring affirmation that the individual is a registered voter in the jurisdiction where they desire to vote and that they are eligible to vote in that election)).

HAVA also provides that an election official at the polling place shall “transmit the ballot . . . or the voter information contained in the written affirmation . . . to an appropriate State or local election official for prompt verification under paragraph 4.” *Genser*, 2024 WL 4553285, at \*11 (citing 52 U.S.C. § 21082(a)(3)). Then, if the individual is deemed eligible under State law to vote, the provisional ballot “shall be counted as a vote in that election **in accordance with State law.**” *Id.* (citing 52 U.S.C. § 21082(a)(4) (emphasis added)). Therefore, “HAVA creates a right to **cast** a provisional ballot—but not to have it **counted.**” *Id.* (citing Orion de Nevers, *supra*, 110 Geo. L.J. Online at 186 (emphasis in original)). Whether a provisional ballot is counted depends entirely on its compliance with State law regulating casting provisional ballots. *Genser*, 2024 WL 4553285, at \*11 (footnote and citation therein omitted).

In December 2002, Pennsylvania amended its Election Code to accommodate HAVA’s provisional voting requirement. *Genser*, 2024 WL 4553285, at \*12 (citing Act of Dec. 9, 2002, No. 150, P.L. 1246, *as amended* 25 Pa. Stat. § 3050).<sup>1</sup> Section 3050 is an expansive provision, but the present challenge requires the Court to focus on Subsection (a.4), which introduced provisional voting into Pennsylvania’s Election Code. *Id.* (citing 25 P.S. § 3050(a.4)).

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<sup>1</sup> Section 3050 of the Election Code, which in its previous form already enshrined (as titled) the “Manner of Applying to Vote; Persons Entitled to Vote; Voter’s Certificates; Entries to Be Made in District Register; Numbered Lists of Voters; Challenges,” was augmented to include the new provisional ballot as required by HAVA, though the original language and title were retained. *Id.*

## Pennsylvania's Post-HAVA Election Code Provides Rules for Provisional Voting

Post-HAVA, the Pennsylvania Legislature amended the Election Code to specifically provide for casting of provisional ballots as a fail-safe to preserve access to the right to vote. *Genser*, 2024 WL 4553285, at \*13. The propriety of counting—or not counting—a provisional ballot is a question of statutory interpretation that flows directly from the text of the Election Code. *Id.* (citing 25 Pa. Stat. §§ 3050(a.4)(1) (providing for casting provisional ballots); 3050(a.4)(5)(i) (requiring the counting of provisional ballots); *see also* 25 Pa. Stat. § 3050(a.4)(5)(ii) (providing six separate exceptions to the counting of provisional ballots under subsection (a.4)(5)(i)).

Section 3050(a.4)(5)(i) of the Pennsylvania Election Code states:

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

25 Pa. Stat. § 3050(a.4)(5)(i) (emphasis added). Section 3050(a.4)(5)(i) mandates counting provisional ballots that comply with its requirements, **unless** one of the six specific exceptions expressly set forth in Section 3050(a.4)(5)(ii) applies.

Section 3050(a.4)(5)(ii) of the Pennsylvania Election Code states:

(ii) A provisional ballot shall not be counted if:

(A) either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual;

(B) the signature required under clause (3) and the signature required under clause (2) are either not genuine or are not executed by the same individual;

(C) a provisional ballot envelope does not contain a secrecy envelope;

(D) in the case of a provisional ballot that was cast under subsection (a.2)(1)(i), within six calendar days following the election the elector fails to appear before the county board of elections to execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot and that the elector is indigent and unable to obtain proof of identification without the payment of a fee;

(E) in the case of a provisional ballot that was cast under subsection (a.2)(1)(ii), within six calendar days following the election, the elector fails to appear before the county board of elections to present proof of identification and execute an affirmation or the county board of elections does not receive an electronic, facsimile or paper copy of the proof of identification and an affirmation affirming, under penalty of perjury, that the elector is the same individual who personally appeared before the district election board on the day of the election and cast a provisional ballot; or

(F) the elector's absentee ballot or mail-in ballot is timely received by a county board of elections.

25 Pa. Stat. § 3050(a.4)(5)(ii).

Under Section 3050(a.4)(5)(ii)(A) above, the failure of a voter to include **both** required signatures on the provisional ballot—the signature on the voter's provisional ballot envelope and the signature on the voter affidavit—is one of the six specific exceptions to counting that provisional ballot. Similarly, under Section 3050(a.4)(5)(ii)(C), the failure of a voter to place provisional ballot in the required secrecy envelope is another one of the six specific exceptions to counting that provisional ballot.

### **Petitioners' Challenge to the Board's Provisional Ballot Decisions**

Petitioners sole basis for their appeal and challenge of the 101 provisional ballots that are missing one or both required signatures and the 44 ballots without a secrecy envelope, is that the Board of Elections should ignore the above enumerated exceptions in Section 3050(a.4)(5)(ii)(A) and (C) to the mandatory requirement to count provisional ballots under Section 3050(a.4)(5)(i).

Sections 3050(a.4)(5)(i) states a provisional ballot “**shall be counted**” if it satisfies the requirements of clause (i), “[e]xcept as provided in clause (ii),” and its clear and unambiguous language in clause (ii) stating a provisional ballot “**shall not be counted**” if it meets any of the six specific conditions set forth in subparagraphs (ii)(A) through (F). Through its clear and unambiguous language, Sections 3050(a.4)(5)(i) and (ii) are mandatory because they delineate the specific consequence—either counting or not counting the provisional ballot—depending on whether any of the enumerated exceptions to counting qualified provisional ballots applies.

There is no other legal authority (including within Section 3050, elsewhere in the Election Code, or any interpreting caselaw) that requires—or allows—a provisional ballot to be counted if it falls under one of the enumerated exceptions in Section 3050(a.4)(5)(ii)(A) or (C). The Court concludes that Petitioners’ argument is without merit and is contrary to Section 3050(a.4)(5)(ii), which requires the Board to reject and not count provisional ballots that fall under one of the six enumerated exceptions in subsections (ii)(A) through (F).

Petitioners argue, without presenting any evidence, that the voters’ failure to include both required signatures on their provisional ballot, or their failure to place their provisional ballot in the required secrecy envelope, must have been the result of faulty or incomplete instructions by election workers at the polling places. This argument is purely speculative. The parties stipulated that detailed voter instructions for completing their provisional ballots, a copy of which is attached hereto as Court Exhibit 1, were prominently placed or otherwise provided at each polling place within Berks County for voters seeking to vote by provisional ballot. The Court finds that these detailed instructions adequately placed voters on notice of the requirements for submitting a valid provisional ballot, and that the Election Code makes it the voter’s responsibility to comply with all voter requirements for submitting a provisional ballot.

As explained above, the failure to include the required two signatures on the provisional ballot, or the failure to place the provisional ballot in the required secrecy envelope, places each of these 145 challenged provisional ballots under one of the Election Code's enumerated exceptions—either Section 3050(a.4)(5)(ii)(A) or (C)—that mandates rejecting and not counting these provisional ballots. Therefore, the Board was duty-bound to reject and not count any of the 145 challenged provisional ballots.

Petitioners assert that not counting the 145 challenged provisional ballots would violate HAVA. Petitioners' Brief at 15-16. As explained above, however, HAVA defers to State law for the determination of whether to count or not count a provisional ballot. *Genser*, 2024 WL 4553285, at \*11 (whether a provisional ballot is counted depends entirely on its compliance with State law regulating casting provisional ballots). The Election Code requires the Board to reject and not count these 145 challenged provisional ballots.

Petitioners also assert that not counting the 145 challenged provisional ballots would violate these voters' rights under the Due Process Clause of the United States. Petitioners' Brief at 11-15. Petitioners' constitutional argument depends on a determination that voters were misled or otherwise provided with incorrect guidance by election poll workers that caused their failure to comply with the Election Code requirements for their provisional ballots. As explained above, however, Petitioners did not provide any evidence that poll workers caused any of the mistakes to be made with respect to the challenged 145 provisional ballots. The Court finds that the provisional ballot instructions at each polling place provided adequate guidance to voters seeking to cast a provisional ballot.<sup>2</sup> Petitioners fail to cite any legal authority that would allow

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<sup>2</sup> Even if Petitioners had introduced evidence that poll workers provided misleading advice or instructions to these 145 voters, it is doubtful the Court could excuse these fatal defects in their

**(Text of footnote continued on next page . . . .)**



these 145 ballots to be counted under the circumstances. Counting these 145 ballots would result in the Board violating a mandatory provision of the Election Code. Because the Election Code mandates not counting these 145 ballots, Petitioners' constitutional argument fails.

**Conclusion**

Applying Section 3050(a.4)(5)(i) and (ii) of the Election Code as described above, the Board correctly rejected and did not count the 145 provisional ballots challenged by Petitioners in this appeal. The Board's correct interpretation and application of these provisions of the Election Code requires the Court to deny Petitioners' appeal and affirm the Board's adjudication and decision to reject and not count the 145 challenged provisional ballots.

An appropriate Order follows.

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provisional ballots based on the bright-line rules set by the Legislature in the relevant Election Code provisions. *See, e.g., In Re Allegheny County Provisional Ballots in the 2020 Gen. Election*, No. 1161 C.D. 2020, 241 A.3d 695 (Table), 2020 WL 6867946, at \*4 (Pa. Commw. Ct. 2020) (unpublished non-precedential decision).