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IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

<p>FAITH GENSER and FRANK MATIS,</p> <p>Petitioners,</p> <p>v.</p> <p>BUTLER COUNTY BOARD OF ELECTIONS,</p> <p>Respondent.</p>	<p>CIVIL DIVISION</p> <p>No. _____</p> <p>ELECTION APPEAL</p>
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PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL

Petitioners Faith Genser and Frank Matis, qualified registered electors of Butler County, by and through their undersigned counsel, American Civil Liberties Union of Pennsylvania, the Public Interest Law Center, and Dechert LLP, appeal pursuant to 25 P.S. § 3157 from the decisions of the Butler County Board of Elections (the “Board”) on April 26, 2024, to not count their provisional ballots in the 2024 Primary Election,¹ and aver as follows:

INTRODUCTION

1. Voting is the cornerstone of our democracy and the fundamental right upon which all our civil liberties rest. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). It includes the right of eligible voters to both cast their ballots and have them counted. Accordingly, the Pennsylvania Supreme Court directs that the Election Code “must be liberally construed to protect voters’ right to vote.” *Shambach v. Bickhart*, 845 A.2d 793, 801–02 (Pa. 2004); *see also Petition of Cioppa*, 626 A.2d 146, 148 (Pa. 1993) (recognizing the “longstanding and overriding policy in this Commonwealth to protect the elective franchise”).

2. This appeal concerns the decision of the Butler County Board of Elections (the “Board”) following the April 23, 2024, Primary Election to disenfranchise Petitioners and refuse to count their votes. The Board rejected Petitioners’ mail-in ballots due to lack of an inner secrecy envelope,² but then refused to count the provisional ballots Petitioners cast on Election Day. This refusal to count Petitioners’ provisional ballots violated the Pennsylvania Election

¹ As Petitioners do not seek a recount or recanvass under §§ 1701, 1702, or 1703 of the Election Code, and no race in their election districts is close enough for the affected voters’ provisional ballots to potentially impact any outcomes, there is no need for the Court or the Board to suspend certification of any federal, state, or local race in any election district. Rather, Petitioners seek an order declaring the Board’s decision unlawful and requiring the Board to amend the final vote count to include Petitioners’ provisional ballots.

² Such ballots are often referred to as “naked ballots.”

Code and the Free and Equal Elections clause of the Pennsylvania Constitution, Pa. Const. art. 1, § 5.

3. The Board published the challenged policy at issue on its website prior to the election. *See* Butler Cnty. Bureau of Elections,³ *Butler County Ballot Curing Policy* (adopted Apr. 2, 2023, modified Feb. 14, 2024), <https://www.butlercountypa.gov/DocumentCenter/View/8405/Butler-County-Ballot-Curing-Policy-Effective-5223> (the “Policy”). The Policy states that the Bureau will set aside ballots with disqualifying mistakes on the envelopes and allow voters to appear at the Bureau’s office to “sign an Attestation that includes the Deficiency; which shall be recorded with their Ballot.” *Id.* The Policy also “allow[s] a Provisional Ballot to be counted for a voter who cannot come into the Bureau to remedy a Deficiency on the Ballot envelope but is able to go to their polling place on Election Day.” *Id.*

4. This part of the Policy aligns with guidance from the Pennsylvania Department of State stating that a voter can obtain a provisional ballot at the polling place on Election Day if, among other reasons, the voter “returned a completed absentee or mail-in ballot that was rejected by the county board of elections.” Pa. Dep’t of State, *Voting by Provisional Ballot*, <https://www.vote.pa.gov/Voting-in-PA/Pages/Voting-by-Provisional-Ballot.aspx> (last visited Apr. 29, 2024).

5. However, the Policy applies only to a “Deficiency,” which the Board interprets to include problems with the date and signature on the outer envelope but to exclude mail-in ballots

³ Under the Election Code, the Board of Elections is the county entity that takes official action around elections. In Butler County, the “Bureau of Elections” consists of county employees who carry out the Board’s policies. In Butler County, as provided by law, the three elected county commissioners also serve as the Board of Elections. *See* 25 P.S. § 2641.

that are returned without the inner secrecy envelope. Accordingly, under the Policy, if a voter sends in a naked ballot, the Board denies the voter any opportunity to cure the defect.

6. After learning Butler County had rejected their mail-in ballots due to a missing secrecy envelope, Petitioners followed the county's procedures for completing provisional ballots and instructions they received via email from the Pennsylvania Department of State and cast provisional ballots at their polling places on Election Day. Following its Policy regarding naked ballots, the Board rejected the provisional ballots.

7. Upon information and belief, the Board's decision to implement the Policy and to reject Petitioners' provisional ballots was based on a mistaken interpretation of the Pennsylvania Supreme Court's decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). The Court held only that failure to place the "ballot in the secrecy envelope renders the ballot invalid," *id.* at 380; it said nothing about the *cure process* following the delivery of a naked, and thereby invalid, ballot. The Court did not hold that a missing secrecy envelope would preclude a voter from curing the defect by completing a provisional ballot. The Board's decision to refuse to count Petitioners' votes violates the Pennsylvania Election Code and art. 1, § 5 of the Pennsylvania Constitution.

8. Petitioners are aggrieved by this order and decision and hereby appeal from it pursuant to 25 P.S. § 3157(a).

JURISDICTION

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

PARTIES

10. Petitioner Faith Genser is a fifty-six-year-old qualified registered voter who resides in Zelianople, Butler County, and attempted to vote by mail-in ballot in the April 2024 Primary Election.

11. Ms. Genser received an email from the Department of State on April 11, 2024, alerting her that Butler County had rejected her mail-in ballot due to the lack of a secrecy envelope. *See* Declaration of Faith A. Genser (“FG Decl.”) ¶ 11.⁴ The same email also advised her that if she “did not have time to request a new ballot before April 16, 2024,” she could “go to [her] polling place on election day and cast a provisional ballot.” ¶ 12.

12. Ms. Genser completed and submitted a provisional ballot in person at her polling place on April 23, 2024. *Id.* ¶ 19.

13. Petitioner Frank Matis is a sixty-seven-year-old longtime qualified registered voter who resides in Center Township, Butler County, and attempted to vote by mail-in ballot in the April 2024 Primary Election. *See* Declaration of Frank Matis (“FM Decl.”) ¶ 3, 8.⁵ Mr. Matis spent his career working for the County, including as Director of Emergency Services for sixteen years. *Id.* ¶ 4–5.

14. Prior to Election Day, Mr. Matis learned that the Board had rejected his mail-in ballot. *Id.* ¶ 9. At the recommendation of a Bureau official over the phone, Mr. Matis completed and submitted a provisional ballot at his polling place on Election Day to ensure his participation in the Primary Election. *Id.* ¶ 10–11.

⁴ A true and correct copy of Faith Genser’s Declaration is attached hereto as Exhibit 1.

⁵ A true and correct copy of Frank Matis’s Declaration is attached hereto as Exhibit 2.

15. Respondent, the Butler County Board of Elections, is a local government agency responsible for overseeing the conduct of all elections in Butler County. This function includes adjudicating and deciding whether to count provisional ballots in accordance with the Pennsylvania Election Code. *See* 25 P.S. § 2642 (powers and duties of boards of elections); *id.* § 3050(a.4) (adjudication of provisional ballots).

DECISION OF THE BOARD AT ISSUE

16. Petitioners appeal from the decisions of the Board to not count their provisional ballots, which they each completed after the Board had notified them that it would not count their previously submitted mail-in ballots because of a missing secrecy envelope.

17. The Board orally announced its decision to refuse to count the ballots during the adjudication of provisional ballots on April 26, 2024.

FACTUAL BACKGROUND

A. Voting by Mail in Pennsylvania

18. The Pennsylvania Election Code permits registered voters to vote by mail, either as (1) an “absentee elector,” if the voter satisfies prescribed conditions, such as current military service, disability that prevents attendance at a polling place, or absence from the municipality on Election Day, *see* 25 P.S. § 3146.1; or (2) a “mail-in” elector, if the voter applies for a mail-in ballot by the deadline, without any requirement that the voter provide a reason for voting by mail instead of in person, *see id.* § 3150.11.

19. Under Pennsylvania law, identical procedures govern how voters apply for, complete, and return both absentee and mail-in ballots.⁶

⁶ We refer herein to both types of ballots simply as “mail-in” or “mail” ballots.

20. Pennsylvania mail-in ballot applications require the voter to provide their name, address of registration, and proof of identification. 25 P.S. §§ 3146.2, 3150.12. Proof of identification includes either a Pennsylvania driver's license number or the last 4 digits of the voter's Social Security number. 25 P.S. § 2602(z.5)(3).

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

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

23. Widespread voting by mail-in ballot is relatively new in Pennsylvania. The Pennsylvania General Assembly adopted no-excuse mail voting in late 2019, with implementation commencing in 2020. Act of Oct. 31, 2019, P.L. 552, No. 77, § 8.

24. Clerical mistakes by mail-in voters are not uncommon. In the November 2022 general election, more than 16,000 mail-in ballots in Pennsylvania were set aside and not counted because they lacked a secrecy envelope, or a proper signature or date on the declaration envelope. *See* Mark Scolforo, *Majority of 16k Canceled Pa. Mail-In Ballots Were from Dems,*

Associated Press (Jan. 6, 2023, 2:22 PM), <https://apnews.com/article/2022-midterm-elections-pennsylvania-united-states-government-a1c75c9cfc2f1bfca21ac4a4cbfe60f0>.

B. The Board Rejected Petitioners' Mail-In Ballots.

25. Petitioners applied for, received, and timely submitted their mail-in ballots prior to the Primary Election on April 23, 2024.

26. Petitioners are both qualified voters who are registered to vote and validly requested and returned their mail-in ballots.

27. Prior to Election Day and upon receipt of the mail-in ballots at issue here, the Board reviewed the envelopes and determined both Petitioners had made an error that would prevent the Board from counting them under Pennsylvania law. Specifically, the Board rejected the ballots because they lacked the required secrecy envelope.

28. Each Petitioner received automatic notice prior to Election Day through an email from the SURE system⁷ that the Board had rejected their respective mail-in ballot and it would “not be counted because it was not returned in a secrecy envelope.” FG Decl. ¶ 12; FM Decl. ¶ 9.

C. Butler County Offers Voters Two Ways to Cure Mail-In Ballots with Errors on the Declaration Envelope.

29. The Board posted its Policy for curing faulty mail-in ballots on its website. The Policy identifies a “Deficiency” as “[a] defect on the Declaration Envelope recognized by the Department of State as curable by applicable law, i.e. a lack of signature.” *See* Butler Cnty. Bureau of Elections, *Butler County Ballot Curing Policy* (adopted Apr. 2, 2023, modified Feb. 14, 2024), <https://www.butlercountypa.gov/DocumentCenter/View/8405/Butler-County-Ballot-Curing-Policy-Effective-5223>. The “Declaration Envelope” is the larger of the “two

⁷ The Statewide Uniform Registry of Electors (SURE) is a computer system run by the Pennsylvania Department of State.

envelopes . . . mailed to each absentee or mail-in elector” that “contains a declaration which the Voter must sign.” *Id.* Notably, the Board does not include errors involving the smaller envelope—the secrecy envelope—within its definition of Deficiency.

30. In addition to an email alert from the SURE system, the Board uses the following notice procedure during Primary Elections:

During a Primary Election, the list of Voters who submitted Deficient Declaration Envelopes shall be made available to the Party Committees once a day upon request of the Party Committee.

The Party Committees may contact the Voter who submitted a Declaration Envelope with a Deficiency to advise that there is a Deficiency with their Declaration Envelope and that the Voter is permitted to appear at the Bureau to remedy such Deficiency by means of an Attestation.

Id. The Policy also says the Bureau will “publicize through its regular course that any Voter can check the status of their Ballots via the Department of State website and that cure procedures are available.” *Id.*

31. The Policy instructs a voter to cure a deficient mail-in ballot as follows: “To effect a cure, a Voter must appear in person at the Bureau before 8:00 P.M. on Election Day and sign an Attestation that includes the Deficiency; which shall be recorded with their Ballot.” *Id.*

32. The Policy also provides a cure option to vote by way of a provisional ballot: “This Policy shall not modify any procedures regarding Provisional Ballots with the exception of allowing a Provisional Ballot to be counted for a Voter who cannot come into the Bureau to remedy a Deficiency on the Ballot envelope but is able to go to their polling place on Election Day.” *Id.* This provision aligns with guidance from the Pennsylvania Department of State that a voter can obtain a provisional ballot at their polling place if, among other reasons, the voter “returned a completed absentee or mail-in ballot that was rejected by the county board of

elections.” Pa. Dep’t of State, *Voting by Provisional Ballot*, <https://www.vote.pa.gov/Voting-in-PA/Pages/Voting-by-Provisional-Ballot.aspx> (last visited Apr. 29, 2024).

33. The Department of State email notice sent to voters also contains instructions to voters about how to correct a rejected mail-in ballot. The email instructions advise:

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. FG Decl., Ex. B.

34. Butler County specifically trains poll workers to allow a voter whose mail-in ballot has a date or signature deficiency on the declaration envelope to cast a provisional ballot. *See* Butler Cnty. Bureau of Elections, *Butler County Poll Worker Guide, 2024 Presidential Primary Election: April 23, 2024*, at 28, <https://www.butlercountypa.gov/DocumentCenter/View/7564/Poll-Worker-Guide-2024-Primary-Election-training> (last visited Apr. 29, 2024). The Poll Worker Guide does not mention mail-in voters who return naked ballots without a secrecy envelope.

D. Petitioners Attempted to Cure Their Rejected Mail-In Ballots.

35. The Board notified both Petitioners that it had rejected their mail-in ballots. *See* FG Decl. ¶ 12; FM Decl. ¶ 9.

36. Both Petitioners appeared in person at their respective polling places on Election Day. Each completed and submitted a provisional ballot. *See* FG Decl. ¶ 11; FM Decl. ¶ 7.

37. Petitioners’ provisional ballots were otherwise valid and acceptable for counting.

i. Petitioner Faith Genser

38. Petitioner Faith Genser is fifty-six years old. FG Decl. ¶ 2. She moved to Butler County in 2016 and registered to vote in Pennsylvania. *Id.* ¶ 6, 8. In recent years, she has “typically opted to vote by mail and never had any issues with the process.” *Id.* ¶ 8.

39. On March 27, 2024, the Board sent Ms. Genser an email saying her ballot would arrive within one week. Upon receiving her ballot, she “filled everything out and mailed it back to Butler County” thinking she had done everything correctly. *Id.* ¶ 9–11.

40. On April 11, Ms. Genser received an email from the Pennsylvania Department of State informing her that her mail-in ballot “will not be counted because it was not returned in a secrecy envelope.” The email further advised that she could “go to [her] polling place on election day and cast a provisional ballot.” *Id.* ¶ 12.

41. The same day, Ms. Genser called the Butler County Bureau of Elections. The man with whom she spoke double checked and confirmed the secrecy envelope was not inside her outer Declaration Envelope. *Id.* ¶ 14. When she asked about fixing her mail-in ballot, the man told her she could follow DOS’s instructions in the email on how to do so, but that her error in not using the secrecy envelope was a “fatal flaw” since her “first vote is the one that is counted.” *Id.* ¶ 15.

42. A few days later, on or about April 15, 2024, Ms. Genser called the Bureau and spoke with the same man with whom she had spoken on April 11. When she asked why she was not permitted to fix her mail-in ballot, he informed her that a decision had been made by the Computation Board after the November 2023 election that “mail-in voters can correct a ballot for a missing signature or date, but *not* for a missing secrecy envelope.” *Id.* ¶ 16. She then asked the man about the Pennsylvania Department of State email with instructions to cast a provisional ballot on Election Day; the man replied she could cast a provisional ballot, but “the first vote is the cast vote, regardless of any attempts made to cure.” *Id.* ¶ 17.

43. Ms. Genser went to her polling place on Election Day and cast a provisional ballot. *Id.* ¶ 19.

44. On April 26, 2024, the Board’s Computation Board decided to not count Ms. Genser’s provisional ballot.

45. Voting is very important to Ms. Genser, as it is “the one equalizer for every person in our society.” *Id.* ¶ 21. She feels she is being told, “you don’t count, your voice doesn’t matter,” and she believes her provisional ballot should count. *Id.* ¶ 18–20.

ii. Petitioner Frank Matis

46. Petitioner Frank Matis is sixty-seven years old. FM Decl. ¶ 2. Now retired, he worked for Butler County for thirty-two years, including a sixteen-year tenure as the County’s Director of Emergency Services, where he oversaw “the County’s emergency management services, disaster planning and response, and hazardous materials response team.” *Id.* ¶ 4.

47. Mr. Matis also served twice on the Butler County Board of Elections when County Commissioners were on the ballot. *Id.* ¶ 5.

48. Mr. Matis has been registered to vote since he first became eligible. His time working in county government made him “much more conscious about the importance of voting,” and he has “made an effort to vote in nearly every single election” over the last two decades. *Id.* ¶ 6.

49. Prior to 2020, Mr. Matis and his wife voted several times by absentee ballot when they were out of the county on Election Day. Since 2020, he has “opted to vote by mail in every election.” *Id.* ¶ 7.

50. Mr. Matis applied for a mail-in ballot ahead of the 2024 Primary Election. Upon receiving his ballot packet, he “filled everything out and mailed it back to Butler County.” *Id.* ¶ 8.

51. A few weeks before Election Day, Mr. Matis received an email informing him he had not included the secrecy envelope when completing his mail-in ballot. He remembered he had in fact mailed his ballot without the secrecy envelope in “a moment of forgetfulness.” *Id.* ¶ 9.

52. That same day, Mr. Matis called the Bureau. The person with whom he spoke “told [him] to go to [his] polling place on Election Day and cast a provisional ballot.” Mr. Matis “was never given any indication that the provisional ballot would not be counted.” *Id.* ¶ 10.

53. Following the Bureau official’s advice, Mr. Matis went to his polling place on Election Day and cast a provisional ballot. *Id.* ¶ 11.

54. Mr. Matis learned three days later that Butler County would not count his provisional ballot. *Id.* ¶ 12. Mr. Matis was “shocked to receive this news,” as he “never had any indication—either at the polling place or from the election bureau—that there was a chance [his] provisional ballot would not be counted, after they had told [him] . . . [he] should vote by provisional ballot.” *Id.* ¶ 13.

55. Mr. Matis was “surprised to learn” the Board “is taking this position” in denying his provisional ballot, and he believes his vote should count. *Id.* ¶ 14.

E. The Board Did Not Count Petitioners’ Provisional Ballots.

56. The Board, through its designees, adjudicated all provisional ballots on April 26, 2024, and decided to not count Petitioners’ provisional ballots at issue in this appeal.

GROUND FOR APPEAL

A. The Board Misinterpreted Pennsylvania Supreme Court Precedent.

57. Upon information and belief, the Board based its decision to reject Petitioners’ provisional ballots on an incorrect reading of the Pennsylvania Supreme Court’s decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

58. Among four other voting-related issues, the Court addressed in *Boockvar* how election officials should handle naked ballots that voters returned without the inner secrecy envelope. The Court held “the secrecy provision language in Section 3150.16(a) is mandatory and the mail-in elector’s failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid.” *Id.* at 380. The Court neither discussed nor decided whether voters can cure ballots missing secrecy envelopes by correcting their mail-in ballots before Election Day or by submitting provisional ballots on Election Day.

59. When drafting its ballot-curing Policy, the Board misinterpreted *Boockvar* to conclude that voters who return naked mail-in ballots are forbidden to cure the error. Consequently, the Policy permits voters to cure only “a Deficiency on a Declaration Envelope”—namely, an error with the date or signature—and does not provide recourse to cure a missing secrecy envelope. *Butler County Ballot Curing Policy*.

60. The Pennsylvania Supreme Court in *Boockvar* held merely that not “enclosing the ballot in the secrecy envelope renders the *ballot* invalid.” *Boockvar*, 238 A.3d at 380 (emphasis added). In other words, the *Boockvar* decision means only that a county cannot count a naked ballot. The Court did not hold that the submission of such an invalid naked ballot precludes curing by way of casting a provisional ballot. Such a drastic consequence does not follow from the opinion.

B. Rejecting Petitioners’ Provisional Ballots Violated the Pennsylvania Election Code.

61. Upon information and belief, the Board also based its decision on a misreading of the Pennsylvania Election Code.

62. The General Assembly added subsection (F) to the Election Code as part of Act 77. *See* 2019, Oct. 31, P.L. 552, No. 77, § 3.2. The law prohibits counting provisional ballots if

“the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.”

25 P.S. § 3050(a.4)(5)(ii)(F).

63. The preceding section in the statute states:

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

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

64. Subsections 3050(a.4)(5)(i) and 3050(a.4)(5)(ii)(F) are readily harmonized. If a mail-in ballot cannot be counted because of a defect on one of the envelopes, and the voter does not cure that defect by 8:00 p.m. on Election Day, the mail-in ballot is not “timely received,” nor is it “cast,” because it is not a ballot that can be tabulated. Therefore, subsection 3050(a.4)(5)(ii)(F) does not bar the Board from counting the provisional ballot, and subsection 3050(a.4)(5)(i) requires the Board to count the provisional ballot.

65. To the extent there is any ambiguity in these two subsections, when two separate statutory provisions can be read either as harmonious or as in conflict, courts should construe them as in harmony with each other. *See In re Borough of Downingtown*, 161 A.3d 844, 871 (Pa. 2017); 1 Pa.C.S. §§ 1922(1)-(2), 1933.

66. This reading of the Election Code gives meaning to the General Assembly’s intent. To prevent double voting, the General Assembly prohibited counting provisional ballots when the county had previously received a voter’s valid absentee or mail-in ballot. The General Assembly gave voters the fallback option of casting a provisional ballot to ensure that voters

would have a safety net to protect them from disenfranchisement in case their mail-in ballots were declared invalid.

67. This process is consistent with existing Pennsylvania Department of State (“DOS”) guidance on using provisional ballots to cure defective mail-in ballots. The DOS website lists instances when a person may be issued a provisional ballot, including when a voter previously “returned a completed absentee or mail-in ballot that was rejected by the county board of elections” and believes they are otherwise eligible to vote. *See* Pa. Dep’t of State, *Voting by Provisional Ballot*, <https://www.vote.pa.gov/Voting-in-PA/Pages/Voting-by-Provisional-Ballot.aspx> (last visited Apr. 29, 2024).

68. This DOS guidance is an authoritative and correct reading of the Election Code.

69. The Board’s distinction between mistakes related to the date or signature on the declaration envelope, which it permits voters to cure, and mistakes related to a missing secrecy envelope, which the Board does not permit voters to cure, is improper under the Election Code.

70. In *Keohane v. Delaware County Board of Election*, which was decided following the 2023 Primary Election, the Delaware County Board of Elections had refused to count provisional ballots cast by voters who had previously attempted to vote by mail-in ballots but had made errors in signing the declaration envelope and/or using the secrecy envelope. CV-2023-004458 (Del. Cnty. Ct. Common Pleas Sept. 21, 2023).⁸ The court overruled the Delaware County Board of Elections’ decision, holding that a voter whose mail-in ballot has been rejected is entitled to cast a provisional ballot and have it counted. *Id.* at 3 (the “qualified voters who attempted to submit mail-in ballots to the Board and were later notified by the Board that their

⁸ See a copy of the *Keohane* opinion in Exhibit 3.

respective mail-in ballots were defective, cannot be said to have ‘cast’ a ballot” and are therefore not precluded from having their provisional ballots counted).

71. Moreover, DOS “agrees with the analysis” in the *Keohane* decision. DOS’s latest guidance on provisional voting states that if a voter’s mail-in ballot “was rejected for a reason unrelated to the voter’s qualifications and the voter submits a provisional ballot . . . , the provisional ballot shall be counted if the county determines that the voter is eligible to vote.” *See* Pa. Dep’t of State, *Pennsylvania Provisional Voting Guidance, Version 2.0*, at 5 (Oct. 12, 2023), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2023-ProvisionalBallots-Guidance-2.0.pdf>.

72. Butler County’s Policy to not count provisional ballots that voters cast with the intent to cure their rejected, deficient mail-in ballots that were missing the secrecy envelope also frustrates the policy underlying the Help America Vote Act (“HAVA”). 52 U.S.C. § 21082.

73. Title 25 § 3050(a.4) of the Pennsylvania code implements HAVA. In fact, it goes further than HAVA to ensure the availability of provisional ballots in state and local elections. A voter’s right to cast a provisional ballot under HAVA is mandatory and unambiguous. *See, e.g., Common Cause Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1292–93 (N.D. Ga. 2018) (citing *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004)) (“The purpose of HAVA’s provisional voting section is to ensure that voters are allowed to vote (and to have their votes counted) when they appear at the proper polling place and are otherwise eligible to vote.”).

74. The Election Code instructs counties to count provisional ballots cast by eligible voters who appear at their correct polling places and who have not cast any other ballot in the

election. 25 P.S. § 3050(a.4)(5)(i). This policy is intended to avoid disenfranchisement. The Board violated the Election Code when it rejected Petitioners' provisional ballots.

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

75. Article I, Section 5 of the Pennsylvania Constitution guarantees that “[e]lections 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. 1, § 5. Under this guarantee,

all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government.

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

76. The Pennsylvania Constitution requires the Board to demonstrate a compelling interest to justify its policy to not count provisional ballots intended to cure mail-in ballots missing a secrecy envelope because such action will disenfranchise voters. *See Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964) (“[E]ither an individual voter or a group of voters are not to be disenfranchised at an election except for compelling reasons.”); *see also Shambach v. Bickhart*, 845 A.2d 793, 801–02 (Pa. 2004) (the Pennsylvania Election Code “must be liberally construed to protect voters’ right to vote”).

77. Pennsylvania constitutional law 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.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914); *see also DeWalt v. Bartley*, 24 A. 185 (Pa. 1892) (“The test is whether legislation denies the franchise, or renders its exercise so difficult and inconvenient as to amount to a denial”); *In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) (noting

that “the right to vote” is “fundamental”), *overruled on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016).

78. The Board cannot demonstrate a compelling interest to justify disenfranchising Petitioners and similarly situated voters, especially since Butler County already deploys an adequate solution—the existing provisional ballot process—that would protect their fundamental right to vote. The Board’s Policy that mail-in voters can cure a mail-in ballot for missing a signature or date, but not for missing a secrecy envelope, is unnecessary and arbitrary, and therefore it unconstitutionally burdens Petitioners’ fundamental right to vote guaranteed by the Pennsylvania Constitution.

WHEREFORE, Petitioners respectfully request this Honorable Court to enter an order reversing the decision of the Butler County Board of Elections; declaring that Pennsylvania Supreme Court precedent, the Pennsylvania Election Code, and the Pennsylvania Constitution require the Board to count Petitioners’ provisional ballots cast in the Primary Election on April 23, 2024; and entering such other and further relief as provided by the Pennsylvania Election Code or as this Court deems just and appropriate.

Respectfully submitted,

Dated: April 29, 2024

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Counsel for Petitioners

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

FAITH GENSER and FRANK MATIS

Petitioners,

v.

**BUTLER COUNTY BOARD OF
ELECTIONS,**

Respondent.

CIVIL DIVISION

No. _____

ELECTION APPEAL

VERIFICATION

I verify that the statements made in this Petition for Review in the Nature of a Statutory Appeal are true and correct to the best of my knowledge, information, and belief. I understand that false statements made herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

FAITH A. GENSER

Name

4/28/24

Date

Faith A. Genser

Signature

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

FAITH GENSER and FRANK MATIS

Petitioners,

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ELECTIONS,

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FRANK P MATIS
Name

Date

4/28/24

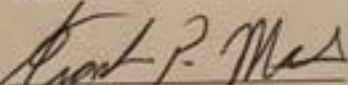

Signature

EXHIBIT 1

DECLARATION OF FAITH A. GENSER

I, Faith A. Genser hereby declare as follows:

1. I have personal knowledge of the matters in this declaration and this is what I would testify to if called as a witness in Court.

2. I am 56 years old and am otherwise competent to testify.

3. I am a resident of Zelienople, Pennsylvania, which is located in Butler County.

4. I was born and raised in Pittsburgh, Pennsylvania. I received an undergraduate degree in Business Administration from Duquesne University.

5. From 1997 until 2016, I lived in Chicago, Illinois, which is where I first became passionate about politics. I worked as an accountant at a nonprofit community center that provides education, employment, and health services to low-income families and individuals.

6. In 2016, I moved to Butler County to be close to my mother, Bernadette, who was diagnosed with Alzheimer's and was living in a skilled nursing facility. My mother passed away in 2021.

7. When I moved back to Pennsylvania, I started a job as a financial grant administrator at an HIV clinic in Pittsburgh.

8. I have been a registered voter in Butler County since moving back to Pennsylvania. In recent years, I have typically opted to vote by mail and never had any issues with the process.

9. Ahead of the 2024 primary election, I applied for a mail-in ballot. On

March 27, I received an email stating “Your ballot is on the Way” and advising me that the ballot would arrive within a week. A true and correct copy of the email dated March 27, 2024 is attached hereto as Exhibit A.

10. When I received the ballot packet, I filled everything out and mailed it back to Butler County a few days later. I thought I had done everything correctly.

11. On April 11, 2024, I received another email with the subject line: “Your Ballot Status Has Changed.” A true and correct copy of the email dated April 11, 2024 is attached hereto as Exhibit B.

12. The email stated that my ballot “will not be counted because it was not returned in a secrecy envelope.” The email further advised that if I “did not have time to request a new ballot before April 16, 2024,” I could “go to [my] polling place on election day and cast a provisional ballot.”

13. I was very surprised to receive this email. I remember seeing the secrecy envelope and thought I had placed the ballot inside as instructed. I decided to call Butler County to double check, in case there had been some kind of mistake.

14. The same day, I called the Butler County elections office. I told the person on the phone (who I later learned was named Tom) that I couldn’t believe I had made this mistake with my mail ballot. Tom went to double check, and confirmed that the secrecy envelope “wasn’t in there.”

15. I asked Tom about the instructions in the email about fixing the

mail-in ballot so that my vote could be counted. He said I could follow those instructions, but that my error was a “fatal flaw.” I told him that I didn’t understand, and he said something to the effect of, “your first vote is the one that is counted. You can do either of the remedies [in the email] but it’s still a fatal flaw.”

16. On or about Monday, April 15th, I called the Butler County elections office again and spoke with the same person. I told him that I was “having a hard time understanding” why I wasn’t permitted to fix my ballot. Tom informed me that a decision was made by the computation board after the November 2023 election that mail-in voters can correct a ballot for a missing signature or date, but *not* for a missing secrecy envelope.

17. I reminded Tom again about the email with instructions to cast a provisional ballot. Tom said that I can cast a provisional ballot, but repeated that “the first vote is the cast vote, regardless of any attempts made to cure.”

18. I felt very angry after this second phone call. I was grateful that Tom was honest and forthcoming with me. But I felt like I was being told, “you don’t count, your voice doesn’t matter.” I have read about voter disenfranchisement happening in other states, but I never imagined I would experience this in my own county.

19. On Tuesday, April 23, 2024, I went to my polling place early in the morning and cast a provisional ballot.

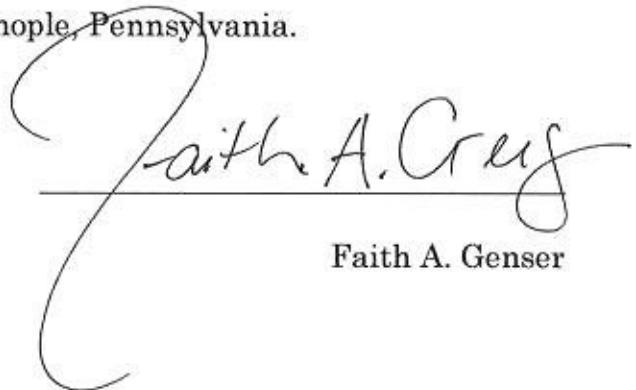
20. I want my vote to count for the April 2024 primary. I understand

that I made a mistake when completing the mail-ballot packet, but it is not fair for my attempt to remedy this situation not to be counted.

21. I believe that voting is the one equalizer for every person in our society. It transcends money, race, gender, and political affiliation. Many generations have fought for this sacred right, and as we can see from examples in other countries, voting is the last thing you want to take away in a democratic society.

I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Executed this 28 of April, 2024 in Zelienople, Pennsylvania.



Faith A. Genser

**DECLARATION
EXHIBIT A**

Fwd: Your Ballot Is on the Way

1 message

To: [REDACTED]
ksteiker-ginzberg@aclupa.org

Wed, Apr 24, 2024 at 10:04 AM

Begin forwarded message:

From: RA-voterregstatcert@state.pa.us

Date: March 27, 2024 at 11:19:45 EDT

To: [REDACTED]

Subject: Your Ballot Is on the Way

Dear FAITH ANN GENSER,

Your ballot is almost ready, and it is being prepared for mailing. If you do not receive your ballot within 7 days, please contact your county election office.

If you have questions concerning your ballot, please contact BUTLER County at (724) 284-5308.

Thank you

****Please do not reply to this email.****

**DECLARATION
EXHIBIT B**

Fwd: Your Ballot Status Has Changed – Check for Updates

[REDACTED]
To: ksteiker-ginzberg@aclupa.org

Wed, Apr 24, 2024 at 9:43 AM

From: RA-voterregstatcert@state.pa.us

Date: April 11, 2024 at 13:36:23 EDT

To: [REDACTED]

Subject: Your Ballot Status Has Changed – Check for Updates

Dear FAITH ANN GENSER,

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

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

You can get more information on your ballot's new status by going to <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

If you have questions or need more information after checking your ballot's status, please contact BUTLER County at (724) 284-5308.

Para leer esta información en español, vaya a <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

要閱讀此資訊的中文版, 請造訪 <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

Thank you.

****Please do not reply to this email.****

EXHIBIT 2

DECLARATION OF FRANK MATIS

I, Frank Matis hereby declare as follows:

1. I have personal knowledge of the matters in this declaration and this is what I would testify to if called as a witness in Court.

2. I am 67 years old and am otherwise competent to testify.

3. I am a resident of Center Township, located in Butler County, Pennsylvania. I am a lifelong resident of Butler County.

4. I am retired. I spent my career working for Butler County. From 1996 until retiring in 2012, I was the Director of Emergency Services. In that role, I was responsible for the County's emergency management services, disaster planning and response, and hazardous materials response team.

5. Two times while working for Butler County, I served on the Board of Elections in years when the County Commissioners were on the ballot.

6. I have been registered to vote since I first became eligible. I was less regular about voting in my 20's, but for the past two decades I have made an effort to vote in nearly every single election—both primary and general. Because of my work in county government, I became much more conscious about the importance of voting.

7. Before the adoption of no-excuse mail-in voting, my wife and I voted by absentee ballot several times when we were going to be in Florida on Election Day. Since 2020, I have opted to vote by mail in every election and never had any issues, except one time when my mail-in ballot didn't arrive and I had to

resolve the situation at the election office.

8. Ahead of the 2024 primary election, I applied for a mail-in ballot. When I received the ballot packet, I immediately filled everything out and mailed it back to Butler County.

9. Several weeks before the election, I received a Department of State email letting me know that I had forgotten to include the secrecy envelope when completing my mail-in ballot. I remembered that I had forgotten to include the secrecy envelope, and had placed the ballot directly in the outer envelope. I don't have a reason or explanation – it was just a moment of forgetfulness.

10. When I received the DOS email, I immediately called the Butler County elections office. The person who answered the phone told me to go to my polling place on Election Day and cast a provisional ballot. I was never given any indication that the provisional ballot would not be counted.

11. On Election Day, I went to my local precinct and cast a provisional ballot. I thought everything was fine and that my ballot would be counted.

12. On Friday, April 26, 2024, I received a call from the ACLU of Pennsylvania informing me that Butler County had decided not to count my provisional ballot.

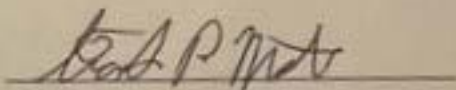
13. I was shocked to receive this news. I never had any indication—either at the polling place or from the election bureau—that there was a chance my provisional ballot would not be counted, after they had told me they wouldn't count my mail-in ballot because I forgot the secrecy envelope and that I should

vote by provisional ballot.

14. I believe that voting is an important right that belongs to every American. I am surprised to learn that the County is taking this position in regard to my provisional ballot, and I feel that my vote should count.

I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Executed this 28 of April, 2024 in Butler, Pennsylvania.

A handwritten signature in cursive script, appearing to read "Frank Matis", is written over a horizontal line.

Frank Matis

EXHIBIT 3

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION AT LAW

SONJA KEOHANE, RICHARD KEOHANE :
and BARBARA WELSH :
 :
 :
 v. :
 :
DELAWARE COUNTY BOARD OF :
ELECTIONS :

No.: 2023-004458

ORDER

AND NOW, this *21st* day of September, 2023, upon consideration of the Motion for Judgment on the Pleadings of Petitioners Sonja Keohane, Richard Keohane, and Barbara Welsh, a Memorandum of Law in support thereof, Respondent Delaware County Board of Elections' response to the Motion in which Respondent does not oppose the relief requested by Petitioners, and Petitioners' reply in support of the Motion, it is ORDERED that the Motion for Judgment on the Pleadings is GRANTED. It is further ORDERED that Respondent is directed to count Petitioners' provisional ballots submitted at their respective polling places on Primary Election Day, May 16, 2023, and amend the official vote count from the May 2023 Primary Election to include the votes indicated on Petitioners' provisional ballots. In support of the foregoing, the Court hereby sets forth the following:

1. The facts of this case are not in dispute as this matter concerns the decision of Respondent Delaware County Board of Elections ("the Board") not to count three provisional ballots submitted by Petitioners, who each voted by mail but whose mail-in ballots were canceled due to disqualifying defects on the outer envelopes;
2. In each instance, the Board contacted Petitioners and provided a "notice and cure letter" explaining the opportunity to cure the defective ballots in person at the Board's

office in Media, Delaware County, Pennsylvania or to request a replacement ballot be issued by mail in advance of primary Election Day, May 16, 2023;

3. The Petitioners did not request replacement ballots nor appear in person in Media, Delaware County, Pennsylvania to avail themselves of the “notice and cure” procedure offered by the Board but rather each Petitioner voted provisionally at their polling place on primary Election Day, May 16, 2023;

4. Subsequently, at the provisional ballot challenge hearing, the Board voted to not count these ballots based on *In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 (Pa.Cmwlt. 2020) which stands for the proposition that voters who have cast another ballot and/or whose ballots have been timely received by the Board may not have subsequent provisional ballots counted;

5. This Court recognizes the Election Code contains two provisions which are at issue and relate to casting a provisional ballot following an unsuccessful attempt to cast a mail-in or absentee ballot. The first subsection states that “[e]xcept as provided in clause (ii), if it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector’s registration form and, if the signatures are determined to be genuine, shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election.” 25 P.S. § 3050(a.4)(5)(i);

6. The second subsection states that a provisional ballot “shall not be counted” if “the elector’s absentee ballot or mail-in ballot are timely received by a county board of elections.” 25 P.S. § 3050(a.4)(5)(ii)(F);

7. To the extent there is any ambiguity between § 3050(a.4)(5)(i) and § 3050(a.4)(5)(ii)(F), Pennsylvania law demands that statutory provisions be read harmoniously to give effect to both provisions and should be construed in a way that does not nullify or exclude another provision. *See, e.g., In re Borough of Downingtown*, 161 A.3d 844, 871 (Pa. 2017) (noting that when two statutory provisions can be read as harmonious or in conflict, courts should construe them as in harmony with each other).

8. “It is the longstanding and overriding policy in this Commonwealth to protect the elective franchise. The Election Code must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice. It is therefore a well-settled principle of Pennsylvania election law that every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058, 1071 (Pa. 2020).

9. In this instance, these three qualified voters who attempted to submit mail-in ballots to the Board and were later notified by the Board that their respective mail-in ballots were defective, cannot be said to have “cast” a ballot.

10. All parties and this Court are concerned with the risk of double voting; however, the Board has safeguards in place to prevent double voting in this situation.

11. “When the Board receives a mail-in or absentee ballot, Board staff examines the outer envelope for obvious defects such as a missing signature or date. If such a defect is found, the Board provides a notice via e-mail or regular mail to the affected voter and offers them the opportunity to cure their ballot at Government Center in person, or mails a replacement ballot.” (Board’s 7/28/23 Memorandum of Law, p. 6).

12. The defective mail-in ballot is segregated from other mail-in ballots and is not counted or included in the pre-canvass and canvass. (Board's 7/28/23 Memorandum of Law, p. 6). It is treated by the Board's staff as if the ballot was not received at all.

Id. Then, the voter may vote their replacement ballot;

13. The Board also provided this Court with additional protections afforded by the provisional ballot challenge hearing process. These include:

- a. "The Board schedules and holds a provisional ballot challenge hearing within seven days of each primary or election. *See* 25 P.S. § 3050(a.4)(4);
- b. Prior to the hearing, the Board checks all provisional ballots against Election Day poll books and by-mail ballots to determine if each voter who voted provisionally also voted a different way;
- c. The Board also collects the names and addresses of each voter who cast a provisional ballot in Delaware County and makes those available to party leaders and candidates;
- d. The Board further publishes all mail-in and absentee voters on its website. Therefore, ahead of the hearing, representatives and the Board, and any other interested party, can confirm that voters have not cast a provisional ballot and also voted in some other way."

(Board's 7/28/23 Memorandum of Law, p. 7).

14. With these safeguards in place, Respondent shall count Petitioners' provisional ballots submitted at their respective polling places on Primary Election Day, May 16, 2023, and amend the official vote count from the May 2023 Primary Election to include the votes indicated on Petitioners' provisional ballots.

BY THE COURT:



JOHN J. WHELAN, J.