

IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 26 WAP 2024 and 27 WAP 2024

Faith A. Genser, Frank P. Matis, and Pennsylvania Democratic Party,
Petitioners-Appellees,

v.

Butler County Board of Elections, Republican National Committee, and
Republican Party of Pennsylvania,
Respondents-Appellants.

AMICUS BRIEF OF AFT PENNSYLVANIA AND THE PENNSYLVANIA ALLIANCE FOR RETIRED AMERICANS IN SUPPORT OF APPELLEES

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INTERESTS OF AMICI CURIAE

AFT Pennsylvania (“AFTPA”)—the state affiliate of the American Federation of Teachers—is a union of professionals with a mission to champion fairness, democracy, economic opportunity, and high-quality public education, healthcare, and public services for its members and their communities. Among its more than 25,000 members in 55 local affiliates across Pennsylvania are public school educators and support staff, higher-education faculty, and other public employees such as social workers. AFTPA is committed to advancing its principles through community engagement, organizing, collective bargaining, and political activism. Ensuring that its members can cast an effective ballot is critical to AFTPA’s ability to advance the welfare of its members and achieve sound, commonsense public education policy through the political process. To that end, AFTPA has fought for its members’ right to vote in recent litigation in Pennsylvania federal court. *See Eakin v. Adams Cnty. Bd. of Elections*, No. 1:22-cv-340 (W.D. Pa.).

Because AFTPA members typically work on election day, many turn to mail ballots to exercise their right to vote.¹ In the 2022 general election, at

¹ Amici use the terms “mail ballots” and “mail voting” here to encompass both forms of voting offered in Pennsylvania that are subject to the secrecy envelope requirement: absentee ballots, see 25 P.S. § 3146.6; and mail-in ballots, see 25 P.S. § 3150.16.

least 1,500 AFTPA members voted by mail across at least 35 counties—including in Butler County. Any provision or policy that prevents those members from casting an effective provisional ballot in the event of any errors on their mail ballot threatens their political rights.

The Pennsylvania Alliance for Retired Americans (“PARA”) is a 501(c)(4) nonprofit, social welfare organization serving and representing over 335,000 members in the Commonwealth of Pennsylvania, including in Butler County. Its membership is composed of retirees, most of whom are over the age of 65, from public and private sector unions, community organizations, as well as individual activists. PARA is a chartered state affiliate of the Alliance for Retired Americans, one of the country’s leading grassroots senior organizations which engages in important political efforts to protect and preserve programs vital to the health and economic security of retirees. PARA’s mission is to ensure social and economic justice and to protect the civil rights of retirees after a lifetime of work. As such, PARA has a distinct interest in procedures affecting the ability of its members to cast an effective vote in Pennsylvania’s elections. Appellants’ erroneous interpretation of the provisional ballot statutes would work particular harm to PARA’s members who, due to age or health difficulties, disproportionately rely on mail voting to participate in the political process. Like AFTPA’s

members, PARA's members who vote by mail ballot will be at risk of losing the opportunity to complete a meaningful provisional ballot if Appellants' erroneous interpretation is adopted by this Court.

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SUMMARY OF ARGUMENT

The basic right of an elector who cannot cast a regular ballot on election day to submit a provisional ballot is not in dispute. Appellants instead argue that in some circumstances this right is meaningless: In their view, because the election code states that “[a] provisional ballot shall not be counted” if a mail ballot “is timely received by a county board of elections,” 25 P.S. § 3050(a.4)(5)(ii)(F), the board must discard the provisional ballot of an elector who previously has submitted a defective mail ballot so long as that ballot arrived at the board of elections by election day. This interpretation has grave consequences: Not only would it guarantee the widespread disenfranchisement of tens of thousands of Pennsylvanians, but it would also make Pennsylvania an extreme outlier—one of only a handful of states that punish a voter for making minor mistakes on their mail ballot by entirely preventing them from casting a countable vote. AFTPA, PARA, and their members are deeply concerned that adopting Appellants’ punitive view of the law distorts the Legislature’s intent and undermines Pennsylvania’s commitment to protecting the right to vote.

Appellants’ preferred reading also is wrong as a matter of statutory interpretation. Although “receive” can mean “to come into possession of”² or

² *Receive*, BLACK’S LAW DICTIONARY (12th ed. 2024).

“to take delivery of,”³ it also can mean “[t]o accept with approval,”⁴ “to admit the . . . validity of,”⁵ or “to accept as authoritative, true, or accurate.”⁶ And when read in the context of the statute, using traditional tools of statutory construction—including by effectuating the entire statute, avoiding absurd results, maintaining consistency with federal law, and applying the presumption in favor of enfranchisement—it is clear that the “timely received” provision is more limited than Appellants propose: It only prevents a county board from counting a provisional ballot if that board has accepted as presumptively valid a mail ballot submitted by the same elector.

ARGUMENT

I. Counting a provisional ballot is distinct from curing a mail ballot.

Appellants misread this Court’s ruling in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), to foreclose any interpretation of the provisional ballot statute that would allow a provisional ballot to count over a defective mail ballot. See Principal Br. of Appellants at 20–24 (“RNC Br.”). But *Boockvar* presented an entirely different question. There, the petitioners sought a declaration that county boards were required by the

³ *Receive*, III.9.a, OXFORD ENGLISH DICTIONARY (2024).

⁴ *Receive*, BLACK’S LAW DICTIONARY (12th ed. 2024).

⁵ *Receive*, I, OXFORD ENGLISH DICTIONARY (2024).

⁶ *Receive*, MERRIAM-WEBSTER DICTIONARY (2024).

Pennsylvania Constitution to “contact qualified electors whose mail-in or absentee ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail, and provide them with an opportunity to cure those defects.” 238 A.3d at 372. In other words, they demanded a mandatory process by which voters would be notified of defects and permitted to correct issues with mail ballots that would otherwise be rejected and not counted.

The statutory right to cast a provisional ballot is *not* a notice and cure procedure; when a voter casts a provisional ballot pursuant to Section 3050(a.4)(5)(i) (the “ballot casting” provision), the voter does not “cure” any defects in their mail-in or absentee ballot. Instead, the voter casts a new ballot altogether. And unlike the notice and cure process requested in *Boockvar*, this provisional voting procedure does not “rel[y] upon the Free and Equal Elections Clause,” 238 A.3d at 372, but instead is explicitly authorized by the Election Code. *See also infra* Section II.B. *Boockvar* therefore does not foreclose interpreting the statutory language of Section 3050(a.4) to allow county boards to count an elector’s provisional ballot if they have not otherwise voted.

Appellants put forth an expansive definition of “cure,” notably without any support, in an attempt to force a conflict between the Commonwealth

Court’s decision here and this Court’s precedent. See RNC Br. at 24 (defining “Curing” as “fixing and avoiding the consequence of the voter’s error” (emphasis omitted)). In sharp contrast to this conceptual definition focused on abstract consequences, to “cure” more generally is defined as “to remove one or more legal defects to correct one or more legal errors.”⁷ “Ballot curing” therefore is an act focused on alleviating specific defects on specific ballots to correct legal errors preventing those ballots from being counted.⁸ Provisional ballots, meanwhile, are a separate means of casting a countable ballot that does not depend on whatever defect or deficiency prevented a voter’s earlier ballot from counting. It is no surprise then, that the Help America Vote Act of 2002 (“HAVA”)—the federal law that mandated the availability of provisional ballot options across the country—specifically addresses circumstances in which a voter otherwise would not be able to vote, and not circumstances in which a voter seeks to fix a previously-submitted ballot. See 52 U.S.C. § 21082(a) (permitting an individual to *cast* a provisional ballot if their name “does not appear on the official list of eligible

⁷ *Cure*, BLACK’S LAW DICTIONARY (12th ed. 2024).

⁸ *Table 15: States with Signature Cure Processes*, Nat’l Conf. of State Legislatures, <https://www.ncsl.org/elections-and-campaigns/table-15-states-with-signature-cure-processes> (last updated Aug. 22, 2024). And “curing” is common shorthand for “ballot curing.” See Wendy Underhill, *Elections Defined: Ballot Curing Provides Safeguard*, Nat’l Conf. of State Legislatures (June 20, 2024), <https://www.ncsl.org/state-legislatures-news/details/elections-defined-ballot-curing-provides-safeguard>.

voters for the polling place or an election official asserts that the individual is not eligible to vote”).⁹ Here, the defective mail ballot cast by an eligible Pennsylvania voter is a nullity—the voter casting a provisional ballot is not attempting to correct the defect, but is instead casting a new ballot entirely. The defect on the original mail ballot will remain, and that ballot will not be counted. *Boockvar* simply does not address this procedure or the provisions that authorize it.

II. The ambiguities in the Election Code provisions regarding provisional ballots should be resolved in favor of enfranchising Pennsylvania voters.

Appellants ask this Court to adopt an unreasonable interpretation of the relevant statutes that would punish voters who make minor mistakes when submitting their mail ballots—sometimes well in advance of election day—by entirely depriving them of the ability to participate in the election. That view would make Pennsylvania an extreme outlier; the vast majority of states recognize that the right to vote should be preserved if at all possible,

⁹ Similarly, “cure” in the context of provisional ballots refers to the requisite actions taken by voters to prove their eligibility and ensure their provisional ballots are counted. See, e.g., *Ohio Democratic Party v. LaRose*, 402 F. Supp. 3d 419, 426 (S.D. Ohio 2019) (“A cure period of seven days is granted to provisional voters who are unable to provide the required forms of identification on election day.”); *Common Cause Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1281 (N.D. Ga. 2018) (discussing where a voter “did not receive any information about how to cure his provisional ballot”).

and that voters who make minor mistakes on mail ballots submitted before election day are not entirely banished from the electoral process.

It is also wrong on the law. Appellants' arguments lean heavily on statutory text capable of multiple reasonable interpretations, but they fail to reconcile their preferred reading with surrounding contextual clues, long-established rules of statutory interpretation, or with the absurd results that their proposed construction would create. When viewed in its proper context, it is clear the Legislature enacted the provisional ballot statutes to prevent double votes—not to punish voters for timely submitting a mail ballot with technical errors. And applying the common tools of interpretation demonstrates how Appellants' interpretation falls outside the realm of reasonable statutory interpretation in this Commonwealth and elsewhere.

A. Appellants' interpretation would make Pennsylvania an extreme outlier among states across the country.

According to Appellants, once a Pennsylvania voter has sent their mail ballot to their county board of elections, *there is nothing more* that voter can do to effectuate their right to vote, such that any error results in that voter's total exclusion from participating in the election. See RNC Br. at 24, 27–36. This draconian rule would place Pennsylvania among the most extreme outliers compared to other states around the country, as at least 40 states provide voters some option to correct or confirm requisite information on their

mail or absentee ballots, and most of the remaining states—including New Hampshire, Connecticut, Delaware, the District of Columbia, and Wyoming—otherwise allow a voter to cast a different ballot if their mail ballots are or may be defective. See Addendum. If Appellants' view is adopted, Pennsylvania would be one of *only three states*—along with Alaska and South Dakota—that allows no-excuse absentee voting but does not offer any opportunity for a voter who has submitted a defective mail ballot to have their vote counted. This outlier view would also disenfranchise tens of thousands of Pennsylvanians—potentially tipping the results of critical elections.

These issues have plagued Pennsylvania elections in recent years, affecting large numbers of voters across the Commonwealth. For example, in the November 2022 elections, approximately 8,250 mail ballots were not counted because the voter neglected to place the ballot inside a secrecy envelope.¹⁰ About 2,533 mail ballots, cast by voters across Pennsylvania's 67 counties were not counted in the 2023 primaries for the same reason.¹¹ And, in the 2024 primaries, another 1,577 voters submitted mail ballots

¹⁰ Mark Scolforo, *Majority of 16k canceled Pa. mail-in ballots were from Dems*, Assoc. Press (Jan. 6, 2023), <https://apnews.com/article/2022-midterm-elections-pennsylvania-united-states-government-a1c75c9cfc2f1bfca21ac4a4cbfe60f0>.

¹¹ *Shapiro Administration Introduces Redesigned Mail Ballot Materials to Give Voters Clearer Instructions, Decrease Number of Rejected Ballots, and Ensure Every Legal Vote is Counted*, Pa. Pressroom (Nov. 29, 2023), <https://www.media.pa.gov/pages/state-details.aspx?newsid=584> (“Redesigned Mail Ballot”).

without a secrecy envelope—these ballots were not counted either.¹² Even more voters have submitted ballots with missing, incorrect, or incomplete dates or missing signatures. All in all, over 40,000 ballots have been rejected because of such technical errors since 2022.¹³ Appellants would urge this court to preclude every last one of these individuals from voting through any other means.

Provisional voting, however, exists for exactly such circumstances: when the ordinary means of voting is or becomes unavailable. See, e.g., *Donald J. Trump for President, Inc. v. Sec’y of Pa.*, 830 F. App’x 377, 382–83 (3d Cir. 2020) (“provisional ballots a[re] those cast by voters whose voter registration cannot be verified right away” (citing 25 P.S. § 3050(a.4)(12)); *French v. County of Luzerne*, 704 F. Supp. 3d 580, 583 (M.D. Pa. 2023) (“provisional ballots . . . are typically used when a voter’s qualifications cannot be determined”); *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 429 (E.D. Mich. 2004) (similar). The interpretation that Appellants urge this Court to adopt would instead ensure that voters who choose to cast

¹² See Decl. of Ariel Shapell in Supp. of Pls.’ Action for Declaratory J. ¶ 14, *Ctr. for Coalfield Justice v. Washington Cnty. Bd. of Elections*, No. 24-3953 (Pa. Ct. Comm. Pleas July 1, 2024), available at https://www.aclupa.org/sites/default/files/field_documents/ccj_v._washington_boe_complaint_filed.pdf

¹³ See *id.*; *Redesigned Mail Ballot*, *supra* note 11.

mail ballots in an election are unreasonably precluded from any further action to effectuate their right to vote—but only if their mail ballot arrives on time. RNC Br. at 35–36. That would set Pennsylvania aside as one of the *only states* in which the timeliness of a voter’s defective mail ballot determines whether they face total disenfranchisement without any possibility of recourse. Such a result would undermine the longstanding democratic traditions and laws of the Commonwealth of Pennsylvania. See *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) (“Pennsylvania’s Constitution, when adopted in 1776, was widely viewed as the most radically democratic of all the early state constitutions.” (quotation omitted)).

B. Tools of statutory interpretation show that the “timely received” provision is best understood as applying to ballots accepted as presumptively valid.

In Pennsylvania, an elector who has requested a mail ballot may vote by marking the ballot and then placing it in a security envelope; placing the security envelope inside a mailing envelope and signing a declaration on the outer envelope; and returning the completed package to the appropriate board of elections by the deadline. 25 P.S. § 3150.16(a). Unless it is a UOCAVA 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.” *Id.* § 3150.16(c). When mail ballot envelopes arrive in the board’s office, the declaration is visually inspected, and envelopes with evident errors are set aside. See RNC Br. at 5–9. In Butler County, envelopes also are processed through a machine called the Agilis Falcon, which is designed to determine whether a secrecy ballot has been included; again, ballot envelopes that appear to lack a secrecy envelope are set aside. Envelopes with no apparent defects are accepted for eventual canvassing. See RNC Br. at 8–10.

An elector who has requested a mail ballot also has the option to submit a ballot provisionally at their polling place. 25 P.S. § 3150.16(b)(2); see also *id.* § 3146.6(b)(2) (absentee ballots). Within seven days of the election the board of elections “shall examine each provisional ballot envelope” to determine whether “the individual was registered and entitled to vote at the election district where the ballot was cast.” 25 P.S. § 3050(a.4)(4), (5)(i). If the individual was not registered, “the provisional ballot shall not be counted and the ballot shall remain in the provisional ballot envelope and shall be marked ‘Rejected as Ineligible.’” *Id.* § 3050(a.4)(6). If the individual was registered and entitled to vote, however, the board shall count the provisional ballot once it “confirms that the individual did not cast

any other ballot, including an absentee ballot, in the election,” unless an exception applies. *Id.* § 3050(a.4)(5)(i).

1. The “timely received” provision is susceptible to multiple interpretations.

There are six enumerated circumstances under which “[a] provisional ballot shall not be counted.” The first three concern issues with the provisional ballot itself, *id.* § 3050(a.4)(5)(ii)(A)–(C); the next two concern whether an elector who lacked identification at the polls has appeared before the board post-election to confirm their identity, *id.* § 3050(a.4)(5)(ii)(D)–(E); and the final circumstance is when the elector’s mail ballot “is timely received by a county board of elections,” *id.* § 3050(a.4)(5)(ii)(F).

The “timely received” provision, which is the main focus of Appellants’ arguments, is susceptible to more than one reasonable interpretation, however. The term “receive” means not just “to come into possession of,”¹⁴ but also “to take delivery of,”¹⁵ “[t]o accept with approval,”¹⁶ “to admit the . . . validity of,”¹⁷ or “to accept as authoritative, true, or accurate.”¹⁸ Where “competing interpretations are reasonable,” the Court “turn[s] to interpretive

¹⁴ *Receive*, BLACK’S LAW DICTIONARY (12th ed. 2024).

¹⁵ *Receive*, III.9.a, OXFORD ENGLISH DICTIONARY (2024).

¹⁶ *Receive*, BLACK’S LAW DICTIONARY (12th ed. 2024).

¹⁷ *Receive*, I, OXFORD ENGLISH DICTIONARY (2024).

¹⁸ *Receive*, MERRIAM-WEBSTER DICTIONARY (2024).

principles that govern ambiguous statutes generally and election matters specifically, . . . mindful of the ‘longstanding and overriding policy in this Commonwealth to protect the elective franchise.’” *Boockvar*, 238 A.3d at 360–61 (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (2004)). Here, application of those interpretive principles demonstrates that the Appellants’ restrictive interpretation should be rejected and the “timely received” provision should instead be “construed liberally in favor of the right to vote.” *Id.* (quoting *Shambach*, 845 A.2d at 798).

2. Appellants’ interpretation does not give effect to the entire statute.

The Pennsylvania Statutory Construction Act instructs courts that “the General Assembly intends the entire statute to be effective and certain.” 1 P.S. § 1922(2). This means that “[w]henever possible each word in a statutory provision is to be given meaning and not to be treated as surplusage.” *Matter of Emps. of Student Servs., Inc.*, 432 A.2d 189, 195 (1981). Of the two potential interpretations of the “timely received” provision, only Appellees satisfy this standard.

In 2020, the General Assembly amended the Election Code to, among other things, revise the instructions provided to mail voters. See Act of Mar. 27, 2020, P.L. 41, No. 12, §§ 9, 13. Prior to these amendments, the instructions for mail ballot voters informed them that if their ballot was not

“timely received” they could vote by provisional ballot. *Id.* § 9(e). The General Assembly revised this provision to specifically reference the return of a “voted” mail-in ballot. *Id.* (emphasis added). Thus, the new instruction states:

[A]n elector who receives an absentee ballot . . . and whose **voted** ballot is not timely received by the commission . . . may only vote on election day by provisional ballot [] unless the elector brings the elector’s absentee ballot to the elector’s polling place
. . . .

Id. (first and third emphases omitted). This amendment clarifies the General Assembly’s understanding that timely receipt of a voter’s mail ballot by itself is not sufficient to disqualify the voter from casting a provisional ballot if the mail ballot has not been “voted.” *Id.* It is also consistent with amici’s interpretation of the “timely received” provision: The General Assembly did not seek to prohibit *everyone* who merely submits their mail ballot on time from casting a provisional ballot, but instead has directed that those who already have *voted* their mail ballot may not do so again. And it confirms that not all “timely received” ballots are considered to have been “voted.” *Id.*

3. Appellants’ interpretation leads to absurd or unreasonable results.

The Statutory Construction Act also clarifies that “the General Assembly does not intend absurd or unreasonable results.” *Vellon v. Commonwealth, Dep’t of Transp.*, 292 A.3d 882, 890 (Pa. 2023); 1 P.S.

§ 1922(1). Appellants' interpretation of the "timely received" provision violates this principle.

First, Appellants' interpretation makes diligence a disadvantage. Consider three electors, all of whom requested mail ballots, all of whom enclosed their mail ballot within the outer envelope without first placing it in a secrecy envelope, and all of whom eventually submitted a provisional ballot. Under Appellants' interpretation, the board will count the vote of the elector who entirely forgets to put his ballot envelope in the mail; it will count the vote of the elector who puts his ballot envelope in the mail the afternoon of election day, when it cannot be timely delivered; and it will *reject* the vote of the elector who mailed his ballot two weeks before the election to ensure timely arrival. No reasonable election law would punish the elector who makes the greatest effort to vote.

Second, prohibiting an elector's provisional ballot from counting if the elector's defective mail ballot arrives *before* the deadline but counting the provisional ballot if the elector's otherwise valid mail ballot arrives *after* the deadline arbitrarily disenfranchises qualified and eligible electors who have complied with all the requirements for casting a provisional ballot. Appellants offer no explanation for why the General Assembly would condition counting an elector's provisional ballot on the particular procedural grounds on which

a different ballot was rejected—that is, why a voter who submits a mail ballot rejected as untimely retains their right to vote, while the mail voter who submits a mail ballot rejected as lacking a secrecy envelope does not—and none of the usual explanations makes sense within the context of the provisional balloting statutes.

The justifications generally offered for requirements that make it more difficult for an elector to vote and have their vote counted are preventing fraud, see *Ball v. Chapman*, 289 A.3d 1, 14–16 & n.77 (Pa. 2023), preserving ballot secrecy, see *Boockvar*, 238 A.3d at 377, avoiding double voting, see *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989, 2022 WL 16577, *4 (Pa. Commw. Ct. Jan. 3, 2022), *appeal denied*, 271 A.3d 1285 (Pa. 2022), and administrability, see *In re Zulick*, 832 A.2d 572, 579–80 (Pa. Commw. Ct.), *as amended* (Sept. 26, 2003), *aff'd*, 834 A.2d 1126 (Pa. 2003). Appellants' interpretation of the “timely received” provision does not advance any of these interests. The provisional voter must appear at a polling place and present identification, and only the provisional ballots of qualified and registered electors may be counted; there is no fraud that could plausibly involve submitting both a defective yet timely mail ballot as well as a provisional ballot. Ballot secrecy is not implicated, because the defective mail ballot will not be counted, and the votes cast on the provisional ballot remain

secret. The requirement in the “ballot casting” provision that the board confirm the provisional elector has not cast another ballot in the election already prevents double voting. And any benefit to administrability is *de minimis*; the timely mail ballot must be reviewed in any case, and it is no more difficult to count the provisional ballot than to disqualify it.

Furthermore, this Court has “held that ballots containing mere minor irregularities should only be stricken for compelling reasons.” *Shambach*, 845 A.2d at 798. Here, the provisional ballots themselves have *no* irregularities, and there is no reason at all—let alone a compelling reason—to refuse to count an eligible elector’s validly cast provisional ballot simply because the elector tried (but failed) to vote a mail ballot. Yet, according to Appellant, the “timely received” provision requires just that. This Court may presume that the General Assembly did not intend such an unreasonable result. See 1 P.S. § 1922(1).

4. Appellants’ interpretation risks conflict with federal law.

The purpose behind the federal Help America Vote Act of 2002 (“HAVA”) further supports counting provisional ballots submitted by electors who have not otherwise cast an effective ballot, because Pennsylvania law does not clearly make elector eligibility contingent on not having submitted a defective mail ballot. The “statutory requirements [of 25 P.S. § 3050] are

consistent with the federal mandates established by the HAVA,” *Project Vote v. Kelly*, 805 F. Supp. 2d 152, 182 (W.D. Pa. 2011), and HAVA therefore is instructive to interpreting Section 3050. *Cf. Commonwealth, Off. of Admin. v. Pa. Lab. Rels. Bd.*, 916 A.2d 541, 550 (Pa. 2007) (recognizing that this “Court has not hesitated to consider, and to follow, federal interpretation of the NLRA due to the similarity between the federal labor law and our own laws” (citing *Appeal of Cumberland Valley School District*, 394 A.2d 946, 950 (Pa. 1978))).

HAVA allows any voter who believes they are eligible to vote to submit a provisional ballot and, “[i]f the appropriate State or local election official to whom the ballot or voter information is transmitted . . . 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.” 52 U.S.C. § 21082(a)(4). In other words, the relevant question is only whether the elector is “eligible to vote in this specific election in this specific polling place.” *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 577 (6th Cir. 2004) (emphasis omitted).

The eligibility requirements are established by Pennsylvania law: every citizen is qualified to vote if they are 18; a citizen of the United States for at least one month; a resident of Pennsylvania for 90 days before the election;

a resident of their election district for 30 days; and properly registered, 25 P.S. § 2811, unless they already have voted. There is a procedural requirement that the elector must present proof of identification at the polls, 25 P.S. § 3050(a), but no other *eligibility* criteria are specified; an elector who does not have proof of identification remains eligible, and their vote will count if they timely provide proof of identity to the board of elections. See 25 P.S. § 3050(a.4)(5)(ii)(D)–(E). Likewise, when a mail ballot is rejected because it is untimely or there is some defect on the ballot, it is rejected because the elector did not follow the appropriate procedural steps—not because they are not eligible to vote.

Appellants' interpretation of the “timely received” provision requires the rejection of otherwise valid provisional ballots submitted by qualified and eligible electors based on a procedural violation having nothing to do with the provisional ballot itself or the elector's eligibility to vote in that election. It therefore at least creates tension with HAVA's requirement that a provisional ballot must be counted if the elector is “eligible under State law to vote.” 52 U.S.C. § 21082(a)(4). Interpreting the “timely received” provision as applying only to ballots accepted as presumptively valid, however, is consistent with the purposes of HAVA because it ensures that eligible voters who have

simply made a mistake on their mail ballots will be able to have their vote counted.

5. The “timely received” provision should be interpreted in a manner that protects the right to vote.

The text of the “timely received” provision is ambiguous, and the normal tools of statutory construction counsel against Appellants’ interpretation. That is enough to reject Appellants’ reading and instead adopt the common-sense interpretation provided above. The well-established presumption in favor of protecting the right to vote confirms that this Court should reject Appellants’ view. See *In re Major*, 248 A.3d 445, 450 (Pa. 2021).

As this Court has long recognized, when interpreting the election code “[e]very rationalization within the realm of common sense should aim at saving [a] ballot rather than voiding it.” *Appeal of Norwood*, 116 A.2d 552, 554–55 (Pa. 1955). This interpretive canon effectuates the Free and Equal Clause of the Pennsylvania Constitution, which “requires that ‘all aspects of the electoral process, to the greatest degree possible, be . . . conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process.’” *Boockvar*, 238 A.3d at 369 (quoting *League of Women Voters*, 178 A.3d at 804).

Appellants' interpretation unequivocally requires voiding provisional ballots cast by eligible electors. Although "election officials should disqualify ballots that do not comply with unambiguous statutory requirements," *Ball*, 289 A.3d at 10 (quoting *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1089 (Pa. 2020)), here the disqualified provisional ballots do not *themselves* fail to comply with any statutory requirement. And while the statutory provisions at issue are susceptible to multiple interpretations, Appellants' proposed reading seeks to maximize disenfranchisement while creating arbitrary distinctions: Voters whose defective ballots arrive on time are denied any further opportunity to cast an effective vote; but voters who return their defective mail ballots after the deadline may have another opportunity to vote provisionally. *See supra* Section II.B.3. Amici's interpretation, on the other hand, is supported by dictionary definitions, gives effect to the entire statute, and avoids purposeless disenfranchisement. Under these circumstances, the Court should adopt the interpretation that protects the franchise rather than the one that limits it.

CONCLUSION

This Court should affirm the decision of the Commonwealth Court.

Dated: September 26, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that this filing contains no more than 7,000 words, in accordance with Rules 531(b) and 2135(b) of the Pennsylvania Rules of Appellate Procedure.

/s/ Adam C. Bonin
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CERTIFICATE OF COMPLIANCE WITH P.A.R.A.P. 127

I hereby 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 non-confidential information and documents.

/s/ Adam C. Bonin
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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

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ADDENDUM

| STATES THAT ALLOW VOTERS WITH DEFECTIVE MAIL BALLOTS AN OPPORTUNITY TO SUBMIT A COUNTABLE BALLOT ¹ | | STATES THAT <u>DO NOT</u> ALLOW VOTERS WITH DEFECTIVE MAIL BALLOTS AN OPPORTUNITY TO SUBMIT A COUNTABLE BALLOT |
|---|----------------|--|
| Alabama | Montana | Alaska |
| Arizona | Nebraska | Arkansas |
| California | Nevada | Missouri |
| Colorado | New Hampshire | South Carolina |
| Connecticut | New Jersey | South Dakota |
| Delaware | New Mexico | |
| District of Columbia | New York | |
| Florida | North Carolina | |
| Georgia | North Dakota | |
| Hawaii | Ohio | |
| Idaho | Oklahoma | |
| Illinois | Oregon | |
| Indiana | Pennsylvania | |
| Iowa | Rhode Island | |
| Kansas | Tennessee | |
| Kentucky | Texas | |
| Louisiana | Utah | |
| Maine | Vermont | |
| Maryland | Virginia | |
| Massachusetts | Washington | |
| Michigan | West Virginia | |
| Minnesota | Wisconsin | |
| Mississippi | Wyoming | |

¹ See, e.g., Ariz. Rev. Stat. § 16-550(A); Cal. Elec. Code § 3019(d)(4)(A); 8 Colo. Code Regs. §§ 1505-1:7.6, 1505-1:7.7; Colo. Rev. Stat. § 1-7.5-107(3.5)(b), (d); Conn. Gen. Stat. § 9-1590; D.C. Mun. Regs. tit. 3, § 700.5(f); Ga. Code § 21-2-386(a)(1)(C); Ga. Comp. R. & Regs. R. 183-1-14-.13; Haw. Rev. Stat. Ann. § 11-106; 10 Ill. Comp. Stat. 5/19-8(g-5); Ind. Code §§ 3-11.5-4-13.5(i)(1), 3-11.5-4-13.6(c); Iowa Code § 53.18(2); Iowa Admin. Code r. 721-21.355(53); Ky. Rev. Stat. § 117.087(3)(c)(5); La. Admin. Code. tit. 31, Pt I, § 303(F); Me. Rev. Stat. tit. 21-A, § 756-A(2)(A), (3)(A); Md. Elec. Law § 11-302(d)(4)(ii); Mass. Gen. Laws ch. 54, § 94; 950 Mass. Code Regs. 47.10(5); Mich. Comp. Laws § 168.766; Minn. Stat. § 203B.121, subd. 2(c)(3); 1 Code Miss. R. Pt. 17, R. 4.2; Mont. Code § 13-13-245(1)–(3); Neb. Rev. Stat. §§ 32-915, 32-949.01; Nev. Rev. Stat. § 293.269927(6)–(9); N.J. Stat. §§ 19:63-17(b), 19:63.17.1; N.M. Admin. Code 1.10.12.16(C); N.C. Gen. Stat. § 163-230.1(e); N.D. Cent. Code 16.1-07-13.1; Ohio Rev. Code § 3509.06(D)(3)(b); Or. Rev. Stat. § 254.431(2); R.I. Code R. 20-00-23.12(C); Tex. Elec. Code § 87.0411; Utah Code § 20A-3a-401(7); Vt. Stat. tit. 17, § 2547(d); Wash. Rev. Code § 29A.60.165; Wis. Stat. Ann. § 6.87(6), (9). See also *Form DS-DE 139: Vote-By-Mail Cure Affidavit*, Fla. Div. of Elections, <https://files.floridados.gov/media/700479/dsde139.pdf> (last accessed Sept. 26, 2024); *Idaho Sec'y of State Directives at 52*, Idaho Sec'y of State (Aug. 2023), https://sos.idaho.gov/elections/publications/Directives_Guide.pdf; *Kansas Election Standards: Chapter III. Canvassing at III-10*, Kan. Sec'y of State (June 21, 2021), <https://www.sos.ks.gov/elections/19elec/2019-Kansas-Election-Standards-Chapter-III-Canvassing.pdf>; *N.H. Election Procedure Manual at 58–62*, N.H. Sec'y of State (Aug. 2024), <https://www.sos.nh.gov/sites/g/files/ehbemt561/files/documents/2024-08/epm-2024-2025-final-ada-for-web.pdf>; *Senate Bill S9837*, N.Y. Senate, <https://www.nysenate.gov/legislation/bills/2023/S9837> (last accessed Sept. 26, 2024); *Absentee Voting, Absentee Cure Process: Voter Affidavit – AB Cure*, Va. Dep't of Elections, <https://www.elections.virginia.gov/formswarehouse/absentee/> (last accessed Sept. 26, 2024). In Oklahoma, the opportunity to correct errors is limited to voters who submit their mail ballot in person, see Okla. Admin. Code § 230:30-11-1.1(d), but mail voters must be immediately informed if their ballot has been rejected, see Okla. Stat. tit. 26, § 14-133. Amici's counsel also contacted the offices of the secretaries of state of Tennessee, West Virginia, and Wyoming. Tennessee and Wyoming both confirmed that mail voters can vote provisionally and in-person in those states, respectively, even if their mail ballots are defective. West Virginia confirmed that voters may correct obvious defects with county officials. Similar contact with county officials in Alabama and Delaware confirmed voters can cast a provisional ballot even after requesting and returning an absentee ballot.