

IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

*In Re: Canvass of Provisional Ballots in
the 2024 Primary Election.*

No. _____

2024-05082

[PROPOSED] ORDER

AND NOW, this ____ day of May, 2024, upon consideration of the Petition for Review in the Nature of a Statutory Appeal filed by Mike Cabel, it is hereby ORDERED that a hearing is scheduled for the ____ day of May, 2024, at ____ o'clock __.m., in Courtroom ____ of the Luzerne County Court of Common Pleas.

_____, J.

IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

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[PROPOSED] ORDER

AND NOW, this ____ day of May, 2024, upon consideration of the Petition for Review in the Nature of a Statutory Appeal filed by Mike Cabel, it is hereby ORDERED that the Petition is GRANTED.

_____, J.

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IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

*In Re: Canvass of Provisional Ballots in
the 2024 Primary Election.*

2024-05082

No. _____

**PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL
PURSUANT TO SECTION 1210 OF THE ELECTION CODE**

Mike Cabell, candidate for Representative in the General Assembly from the 117th House District, hereby appeals from the decision of the Luzerne County Board of Elections (the “Board”) on provisional ballots:

INTRODUCTION

1. This appeal concerns the Board’s decisions on two provisional ballots cast in the April 23, 2024. Specifically, Candidate Cabell seeks review of the Board’s decision to: (a) accept a provisional ballot that it is prohibited from canvassing under Section 1210(a.4)(5)(ii)(A) of the Election Code; and (b) reject a provisional ballot cast by an elector who—while not registered to vote in Butler Township on April 23, 2024—was duly qualified to vote in that district within the statutorily prescribed thirty-day period preceding the primary.

JURISDICTION AND VENUE

2. The Luzerne County Court of Common Pleas has jurisdiction over this statutory appeal pursuant to Sections 1210 and 1407 of the Election Code.¹

3. Venue is proper in this Court pursuant to the above-referenced provisions of the Election Code, as well as Pennsylvania Rule of Civil Procedure 2103. *See* Pa.R.Civ.P. 2103(b) (providing that, generally, “an action against a political subdivision may be brought only in the county in which the political subdivision is located”).

PARTIES

4. Petitioner Mike Cabell is a candidate in the Republican Primary for Representative in the Pennsylvania General Assembly from the 117th House District, which encompasses parts of Luzerne County.

5. Respondent Luzerne County Board of Elections (the “Board”), is the local governmental agency generally responsible for overseeing the conduct of elections in Luzerne County, including, as relevant here, the canvass of provisional

¹ Specifically, Section 1210(a.4)(4)(v) of the Election Code, which governs the procedure for casting and canvassing provisional ballots, provides:

The decision of the county board in upholding or dismissing any challenge [to a provisional ballot] may be reviewed by the court of common pleas of the county upon a petition filed by any petitioner aggrieved by the decision of the county board. The appeal shall be taken, within two days after the decision was made, whether the decision was reduced to writing or not, to the court of common pleas setting forth the objections to the county board's decision and praying for an order reversing the decision.

25 P.S. § 3050(a.4)(4)(v). Furthermore, under Section 1407 of the Election Code, “[a]ny person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election, . . . may appeal therefrom within two days after such order or decision shall have been made, whether then reduced to writing or not.” 25 P.S. 3157(a). Such appeals, subject to certain exceptions not relevant here, must be filed in the court of common pleas.

ballots. *See generally* 25 P.S. § 2642 (setting forth the powers and duties of the county boards of elections); *see also id.* at § 3050 (detailing the procedure for canvassing provisional ballots and disposing of challenges to same).

DETERMINATION SOUGHT TO BE REVIEWED

6. Candidate Cabell appeals from the May 3, 2024 decision of the Board to:
 - a) accept for canvassing a provisional ballot that lacks the verification required under Section 1210(a.4)(3) of the Election Code under Section 1210(a.4)(5)(ii)(A) of the Election Code; and
 - b) reject a provisional ballot cast by an elector who was duly qualified to vote in that district within the statutorily prescribed thirty-day period preceding the April 23, 2024 primary.

FACTS AND PROCEDURAL BACKGROUND

Provisional Voting Under the Election Code.

7. In 2002, the Election Code was amended to allow individuals whose qualifications to vote in a given voting district are not readily ascertainable to vote by provisional ballot.²

8. Among other reasons, voting by provisional ballot may be necessary if: an individual's name does not appear in the district register, *see id.* at § 3050(a.4)(1).

² *See generally* Act of Dec. 9, 2002, P.L. 1246, No. 150, § 12, *as amended* 25 P.S. § 3050(a.4)(12) (providing for provisional voting and defining a provisional ballot as “a ballot issued to an individual who claims to be a registered elector by the judge of elections on election day when the individual's name does not appear on the general register and the individual's registration cannot be verified”).

9. Section 1210(a.4), sets forth a simple two-step process for provisional voting:

- i. First, “[p]rior to voting the provisional ballot,” the elector must sign an affidavit affirming, *inter alia*, that the provisional ballot is the only one the voter has cast in the election; *id.* at § 3050(a.4)(2) (emphasis added);
- ii. Second, “[a]fter the provisional ballot has been cast,” the voter must place the provisional ballot in a secrecy envelope and sign a voter declaration on the front of the provisional ballot envelope. See *id.* at § 3050(a.4)(3) (emphasis added).

10. The provisional ballots must then “remain sealed in their provisional ballot envelopes for return to the county board of elections[,]” *id.* which, within seven days of the election, is required to “examine each provisional ballot envelope that is received to determine if the individual voting that ballot was entitled to vote at the election district in the election.” *Id.* at § 3050(a.4)(4).

11. Specifically, the duties of the boards of elections relative to canvassing of provisional ballots are set forth in Section 1210(a.4)(5), which provides, “[e]xcept 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).

12. In turn, subclause (ii), referenced in the above provision, enumerates five circumstances under which county boards of elections are expressly prohibited from counting a provisional ballot. Specifically, Section 1210(a.4)(5)(ii) provides, in pertinent part that “[a] provisional ballot ***shall not be counted*** if . . . either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual[.]”. 25 P.S. § 3050(a.4)(5)(ii)(A) (emphasis added).

Provisional Ballots received by the Luzerne County Board of Elections in the 2024 General Election.

13. Following the 2024 Primary Election, dozens of provisional ballots were returned to the Board from the various voting districts in Bucks County.

14. After the provisional ballots had been reviewed by its staff, the Board held a public hearing on Monday April 29, during which, its initial decisions on the various provisional ballots in the 2024 primary election were. All interested parties, including counsel for Candidate Cabell and his opponent in the primary election—James “Jamie” Walsh—were afforded an opportunity to review the provisional ballots submitted in precincts located within the 117th House District.

15. After review,³ Candidate Walsh challenged twelve provisional ballots that the Board had voted to accept, advancing various arguments.⁴

16. For his part, Candidate Cabell challenged the lone provisional ballot submitted in the Republican Primary for the 117th State House District, which was accompanied by properly executed affidavit that must be submitted prior to receiving a ballot, but was not signed *after* the ballot had been submitted, as required by Section 1210(a.4)(3) of the Election Code. (the “Partially Executed Ballots”).⁵

17. In sum, challenges were lodged on a total of thirteen provisional ballots cast in the Republican Primary for the 117th House District, which the Board had voted to accept.

18. At the conclusion of the proceedings on Monday, April 29, 2024, the Board publicly announced that all provisional ballots from the 117th House District had been considered and presented for review to counsel for Candidates Cabell and Walsh.

³The method for lodging such challenges is set forth in Section 1210(a.4)(4). *See id.* at § 3050(a.4)(4) (“Representatives [for the candidates and political parties] shall be permitted to keep a list of those persons who cast a provisional ballot and shall be entitled to challenge any determination of the county board of elections with respect to the counting or partial counting of the ballot under this section.”).

⁴ Representatives for the Pennsylvania State Democratic Party and for Mark Moffa—the Democratic Candidate for Representative from the 142nd House District—also registered challenges to various provisional ballots. Their challenges, however, were withdrawn prior to the hearing.

⁵ In particular, nine ballots contained a signed voter affidavit required under Section 1210(a.4)(2), but lacked a signed voter affidavit required by Section 1210(a.4)(3); and five ballots contained a signed voter declaration required by Section 1210(a.4)(3), but lacked a signed voter declaration required under Section 1210(a.4)(2).

19. The following day (April 30, 2024), the Board issued a public notice announcing that the validity of the thirteen provisional ballots challenged on the previous day would be considered at a hearing scheduled for Friday, May 3, 2024 (the “May 3 Hearing”).

20. In addition, despite its representations to the contrary, on Tuesday, April 30, the Board also considered three additional provisional ballots submitted in the Republican primary for the 117th House District, including a provisional ballot submitted by Shane O’Donnell in Butler Township (the “O’Donnell Ballot”).

21. Given the Board’s express assurances that no further provisional ballots implicating his client’s interests remained, undersigned counsel for Mr. Cabell did not attend the proceedings on April 30, 2024. Based on information relayed from others, however, Mr. Cabell and his counsel learned that the Board decided to reject the O’Donnell Ballot because it had concluded that Mr. O’Donnell was a registered elector in another county and, thus, not entitled to vote in Butler Township in the 2024 primary election. Because Candidate Cabell was familiar with the circumstances surrounding Mr. O’Donnell’s change in residence, Candidate Cabell—through his undersigned counsel—subsequently challenged the Board’s decision to reject the O’Donnell ballot. Thus, on Thursday, May 2, 2024, the O’Donnell Ballot was added to the list of matters the Board would consider at the May 3 Hearing.

22. The individuals who had submitted the Disputed Ballots were given notice pursuant to Section 1210(a.4)(4)(i) of the Election Code.⁶

23. At the May 3 Hearing, the Board heard argument from counsel for Candidates Cabell and Walsh, considered advice from Board counsel on various matters, and received evidence in the form of live testimony and documentary submissions. Relevant portions of the May 3 Hearing are summarized below.

The Partially Executed Provisional ballot.

24. With regard to the Partially Executed Provisional Ballot,⁷ the facts were essentially undisputed. All parties and the Board agreed that, although the affidavit required to obtain a provisional ballot had been properly executed under Section 1210(a.4)(2),⁸ the voter had failed to sign the provisional ballot envelope **after** casting the ballot, as required by Section 1210(a.4)(3).

25. Candidate Cabell argued that, under the plain and unambiguous language of Section 1210(a.4)(5)(ii)(A), as confirmed by the Commonwealth Court's decisions in *In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 2020 WL 6867946 (Pa. Cmwlth. 2020) (unpublished three-judge opinion) (hereinafter *In Re Allegheny Cnty. Provisional Ballots*), the Board was prohibited from canvassing that ballot.

⁶ See *id.* at § 3050(a.4)(4)(i) (providing that, once a challenge has been registered the Board is required to schedule a hearing and “where possible” give notice “to all provisional electors thus challenged”).

⁷ as noted above, is the only provisional ballot submitted in the 2024 Republican primary for the 117th House District that was not signed after the ballot had been cast, as required by, See 25 P.S. § 3050(a.4)(5)(ii)(A) (“A provisional ballot **shall not be counted** if. . . either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual[.]” (emphasis added)).

⁸ See 25 P.S. § 3050(a.4)(2)

26. Yet, despite the plain language of the Election Code and authority (albeit not precedential) from a three-judge panel of a statewide appellate court, the Board decided to stand by its decision to canvass the Partially Executed Ballot, purporting to rely on a Delaware County Court of Common Pleas decision. *See Keohane v. Delaware County Board of Elections*, No. 2023-004458 (Sept. 21, 2023).

The O'Donnell Provisional Ballot

27. With regard to the O'Donnell Provisional Ballot, Candidate Cabell presented an affidavit from Shane O'Donnell, setting forth the following facts:⁹

- a) in June 2023, he purchased a home in McAdoo, Schuylkill County (the "McAdoo House") and, shortly thereafter, started making various repairs and renovations to it.
- b) Sometime in late December 2023, Mr. O'Donnell began the process of moving certain items to the McAdoo House, including his Vehicle Registration. However, the address on file with his employer and on his Drivers' License were not changed at that time.
- c) Although Mr. O'Donnell continued the process of transitioning to the McAdoo House throughout the Spring, he did not fully relocate until Friday March, 29, 2024 and, until that time, continued to primarily reside in Butler Township.

⁹ Given that the rules of evidence do not apply in proceedings under Section 1210, an affidavit may properly be considered. Indeed, in the specific context of provisional ballots, courts have permitted—and given credence to—such submissions. *See, e.g. In re 2020 Gen. Election Provisional Ballot Challenges*, No. 4152 of 2020 (Ct. Com. Pl. Westmoreland Cty. Nov. 23, 2020).

d) Mr. O'Donnell had not requested a change in his registration and, when he offered to vote in Butler Township on April 23, 2024, he was surprised to learn that he was no longer registered there.

28. Mr. O'Donnell's voter registration record on the Statewide Uniform Registry of Electors ("SURE") confirmed that Mr. O'Donnell was a duly registered elector in Butler Township until late December 2023, at which time his registration was changed to the McAdoo House based on a transmission from the Pennsylvania Department of Transportation (PennDOT). In this regard, Board Vice-Chair Alyssa Fusaro claimed that the voter registration record was updated because of a change in Mr. O'Donnell's driver's license address. But after Candidate Cabell's request to review the referenced materials was granted, it became clear that Vice-Chair Fusaro's representation was not entirely accurate. Specifically, although the SURE system printout indicates that Mr. O'Donnell's registration was changed based on information transmitted by PennDOT, it did not suggest a change in his driver's license address.

29. The Board also heard testimony from the Acting Director of Elections for Luzerne County, Emily Cook, who testified that there is no basis for concluding that the change was related to Mr. O'Donnell's driver's license and confirmed that Mr. O'Donnell **did not** vote in Schuylkill County in the 2024 primary election. Ms. Cook also testified that she had no way of ascertaining whether Mr. O'Donnell received notice of the registration change, or whether any correspondence was sent informing him of the same. Specifically, she explained that when a voter's

registration is transferred into Luzerne County, her office sends a voter registration card to the newly-registered elector, but no such communication is sent to a person who leaves Luzerne County. Although Ms. Cook surmised, based on her own experience, that such correspondence would have been sent to Mr. O'Donnell from Schuylkill, she candidly testified that she could not confirm that such notice had even been sent by Schuylkill County—let alone received by Mr. O'Donnell.

30. For his part, Candidate Walsh did not present any evidence calling into question the veracity of Mr. O'Donnell's affidavit; instead, he argued that Mr. O'Donnell eligibility to vote had not been sufficiently established because the affidavit was not subject to cross-examination. Notably, however, aside from vague references to a purported motive stemming from his familial relationship between Mr. O'Donnell and Candidate Cabell (they are cousins), Candidate Walsh did not suggest that he was aware of any facts that would tend to cast doubt on the veracity of Mr. O'Donnell's affidavit.

31. Given that the foregoing facts firmly establish that Mr. O'Donnell was a qualified voter eligible to vote in Butler Township within the thirty-day period within which electors are allowed to vote at their previous residence,¹⁰ Candidate Cabell urged the Board to accept the O'Donnell's Provisional Ballot for canvassing.

¹⁰ See 25 P.S. § 2811(3) (providing that “if qualified to vote in an election district prior to removal of residence, [a registered elector], if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within thirty days preceding the election”).

32. Ultimately, however, the Board voted unanimously to reject the O'Donnell Provisional Ballot, with Board Chair Williams and Board Vice Chair Fusaro offering their respective reasons.

GROUND FOR APPEAL

33. As developed in greater detail below, the Board's decision to canvass the Board's decisions on the two provisional ballots at issue are utterly untenable. Not only does the Board's treatment of the Partially Executed Ballot and the O'Donnell Provisional Ballot contravene the plain language of the Election Code, but it also fundamentally misconstrues the nature of the Board's obligations.

- I. Section 1210 not only requires a voter to sign the affidavit under Subsection (a.4)(2) prior to voting and the declaration pursuant to Subsection (a.4)(3) after casting the ballot, but also expressly prohibits boards of elections from canvassing any ballot that lack either of the two requisite signatures.***

34. As discussed above, Section 1210 of the Election Code contemplates a two-step process for an individual voting by provisional ballot: first, **prior** to voting the provisional ballot, the elector must sign an affidavit attesting to the veracity of certain information; and second, **after** the provisional ballot has been cast, the elector must again sign a voter declaration on the front of the provisional envelope.¹¹

¹¹ Specifically, Subsection (a.4)(2), and (a.4)(3) provide that:

(2) Prior to voting the provisional ballot, the elector shall be required to sign an affidavit stating the following :

I do solemnly swear or affirm that my name is _____, that my date of birth is _____, and at the time that I registered I resided at _____

35. Where the elector has failed to render a signature in both fields, Subsection (a.4)(5)(ii)(A) expressly prohibits the Board from canvassing the ballot. See 25 P.S. § 3050(a.4)(5)(ii)(A) (“A provisional ballot ***shall not be counted*** if . . . either the provisional ballot envelope under clause (3) or the affidavit under clause (2) is not signed by the individual[.]” (emphasis added)).

36. Because “the word ‘shall’ carries an imperative or mandatory meaning,” Section 1210’s dual signature requirement—*i.e.*, that a provisional ballot contain both the signature on the affidavit and the ballot envelope—is presumptively mandatory. *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004); see also *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997) (“By definition, ‘shall’ is mandatory.”).

37. Accordingly, based upon the plain language of the Election Code, the Board’s decision to canvass the Partially Executed Ballots is unsustainable. In this regard, it bears reiterating that the signature required under Subsection (a.4)(3)

in the municipality of _____ in _____ County of the Commonwealth of Pennsylvania and that this is the only ballot that I cast in this election.

Signature of Voter/Elector

Current Address

Check the Reason for Casting the Provisional Ballot.

Signed by Judge of Elections and minority inspector

(3) After the provisional ballot has been cast, the individual shall place it in a secrecy envelope. The individual shall place the secrecy envelope in the provisional ballot envelope and shall place his signature on the front of the provisional ballot envelope. All provisional ballots shall remain sealed in their provisional ballot envelopes for return to the county board of elections.

was not merely incomplete or defective (e.g., missing a date, address, etc.). Rather, it was entirely lacking.

38. While the clear statutory text—without more—is ample grounds for reversing the Board’s decision, to the extent there is any lingering uncertainty in this regard, the Commonwealth Court’s recent decision in *In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 2020 WL 6867946 (Pa. Commw. 2020) (unpublished three-judge opinion) (hereinafter *In Re Allegheny Cnty. Provisional Ballots*) further confirms that the Election Code prohibits the Board from canvassing the Partially Executed Ballots.¹²

39. Specifically, on appeal from a decision of the Allegheny County Court of Common Pleas affirming the county election board’s canvass of provisional ballots containing only a signed affidavit or declaration (but not both), a three-judge panel of the Commonwealth Court reversed, explaining that, “**Section 1204(a.4)(5)(ii)(A) makes quite clear that, if ‘either’ the provisional ballot envelope ‘or’ the affidavit are not ‘signed by the individual,’ then the ‘provisional ballot shall not be counted.’**” *In Re Allegheny Cnty. Provisional Ballots*, 2020 WL 6867946, at *3. (emphasis in original) (quoting 25 P.S. §

¹² Although unpublished decisions of the Commonwealth Court are not binding, they are nonetheless persuasive authority. See 210 Pa. Code § 69.414. Indeed, the Court has often adopted the rationale expressed in such decisions in subsequent precedential opinions. See, e.g., *Dotterer v. Sch. Dist. of City of Allentown*, 92 A.3d 875, 884 (Pa. Cmwlth. 2014) (“This Court recently resolved a similar voluntary demotion/retirement case in an unpublished but persuasive opinion in *Migliore*.”).

3050(a.4)(5)(ii)(A)). “Stated otherwise,” the Court concluded, “*both* signatures are required.” *Id.* (emphasis in original).¹³

40. Faced with the unambiguous statutory command prohibiting it from canvassing the Partially Executed Ballot and the well-reasoned decision of a three-judge panel of the Commonwealth Court, the Board suggested that its decision was supported by *Keohane v. Delaware County Board of Elections*, No. 2023-004458 (Pa. Ct. Comm. Pls. Del. Cnty. Sept. 21, 2023).

41. The Board’s reliance on *Keohane*, however, is misplaced for a host of reasons.

42. Above all else, *Keohane* is utterly inapposite, as that decision had nothing to do with Subsection (a.4)(5)(ii)(A), which is presently at issue. Instead, *Keohane* involved a different defect that prohibits a provisional ballot from being canvassed—specifically, Subsection (a.4)(5)(ii)(F), prohibiting a provisional ballot from being “counted if . . . the elector’s absentee ballot or mail-in ballot is timely received by a county board of elections.” 25 P.S. § 3050(a.4)(5)(ii)(F). Although Subsection (a.4)(5)(ii)(F) was also at issue in *In Re Allegheny County Provisional Ballots*, it has no bearing on the present analysis.

43. In fact, the Delaware County common pleas court’s conclusion that an elector who has cast a defective mail-in or absentee ballot (*e.g.*, naked, unsigned,

¹³ Although denial of allocatur does not necessarily indicate wholesale approval of the decision sought to be reviewed, *Salazar v. Allstate Ins. Co.*, 702 A.2d 1038, 1043 (Pa. 1997), it is nevertheless notable that the Supreme Court declined to exercise its discretionary jurisdiction to conduct further review of the *Allegheny County Provisional Ballot* decision. See *In re Allegheny Cnty. Provisional Ballots in 2020 Gen. Election*, 242 A.3d 307 (Pa. 2020) (*per curiam*) (denying the Petition for Allowance of Appeal filed by the Allegheny County Board of Elections).

undated, etc.) may vote by way of a provisional ballot, was based solely and exclusively on its view that Subsection (a.4)(5)(ii)(F)'s prohibition against canvassing such ballots, when read in conjunction with Subsection (a.4)(5)(i), created interpretive difficulties. The interplay between these two provisions, according to *Keohane* creates an ambiguity, which, in turn, requires recourse to the tools of statutory construction, including the general principle that provisions of the Election Code are to be liberally construed in favor of enfranchisement.¹⁴

44. Given that the Board has never identified an ambiguity in the statute that would justify disregarding the plain text of the Election Code, *Keohane* is not applicable here. Absent such ambiguity, the Board may not rely on a liberal construction to support its *ad hoc* assessments of what is “fair” or “just.”

45. Indeed, the Supreme Court has repeatedly admonished that “while it is established public policy in this Commonwealth to protect the elective franchise, a liberal construction of Code provisions comes into play only where an election statute is ambiguous.” *In re Major*, 248 A.3d 445, 450 (Pa. 2021) (internal quotation marks omitted). Recourse to this precept of statutory construction is, therefore, appropriate only where a provision of the election code is susceptible to multiple reasonable interpretations. *See id.* (“Only where there are at least two reasonable interpretations of the text do we then turn to interpretive principles that govern ambiguous statutes generally, and election matters specifically, including the principle that the Election Code must be liberally construed so as not to deprive an

¹⁴ In any event, a review of *Keohane* leaves little doubt that it is poorly reasoned and based on only a perfunctory statutory analysis.

individual of his right to run for office, or the voters of their right to elect a candidate of their choice.” (internal citations and quotation marks omitted)); *see also, e.g., Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 360-61 (Pa. 2020) (applying the interpretive principle that the Election Code is liberally construed after determining the statute is ambiguous); *Petition of Cianfrani*, 359 A.2d 383, 384 (Pa. 1976) (“[T]he policy of the liberal reading of the Election Code cannot be distorted to emasculate those requirements necessary to assure the probity of the process.”). When faced with an unambiguous statute “[a] court’s only ‘goal’ should be to remain faithful to the terms of the statute that the General Assembly enacted, employing only one juridical presumption when faced with unambiguous language: that the legislature *meant what it said.*” *In re Canvass of Absentee and Mail-in-Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1082 (Pa. 2020) (Wecht, J., concurring in part) (emphasis in original). Resorting to a cannon of liberal construction at the outset—before considering the statute’s plain language—would flip the process on its head and transform boards of elections into legislative bodies.

46. Put simply, the Board’s decision cannot stand.

II. The Board’s decision to reject the O’Donnell Ballot contravenes the plain language of Section 701 of the Election

47. In rejecting the O’Donnell Ballot, neither the Board nor Candidate Walsh offered any evidence suggesting that Mr. O’Donnell was not, in fact, a resident of Butler Township until March 29, 2024. Nevertheless, based on strained rationale and an inexplicable disregard for the statutory protection afforded to

voters who change their residence within the 30-day grace period preceding an election, the Board refused to canvass the O'Donnell Ballot.

48. Although the Board seemingly acknowledged that Mr. O'Donnell's change in residence did not occur until March 29, 2024, to the extent it seeks to dispute that fact now, any such argument is unavailing. Specifically, under the Election Code, residence is conterminous with domicile. And once established, a change in such residence is not easily found. As the Commonwealth Court explained in *In Re Stack*:

To accomplish a change of domicile there must be not only the *animus* to change but the *factum* as well. There must be an actual transfer of bodily presence from one place to the other. The *animus* and the *factum* do not need to be simultaneous, but until they coincide the change of domicile is not effected. In the law a domicile is as deep rooted as a tree and to transfer it from one location to another requires an operation as intensive as the digging up, loading, transportation, and replanting of an elm or maple.

One almost conclusive criterion of domicile is the *animus manendi*. There must be the intention to *remain*.

In re Stack, 184 A.3d 591, 596 (Pa.Cmwlt. 2018).

49. Thus, for example, “a person cannot simply declare a new residence or domicile by purchasing or renting a home in one location.” *In re Nomination Petition of Driscoll*, 847 A.2d 44, 49 (Pa. 2004). Rather, it is only once the “elm or maple” has been replanted, that a change in residence may be found.

50. As for the application of Section 701, the Board—and in particular Ms. Fusaro—made much of Mr. O'Donnell's admission that he had changed his residence as of March 29, 2024 and, on that basis, suggested that he was not

entitled to vote. Repeatedly referring to the statutory command that voters may properly cast a vote in their prior residence within thirty days of relocating as “the thirty-day thing,” Vice Chair Fusaro (without any explanation) suggested that this safeguard was inapplicable.

51. As for Chairwoman Williams, her rationale is based on an amalgamation of mistaken understanding of facts and law. With regard to the facts, Ms. Williams concluded—without any basis—that Mr. O’Donnell had in fact received notice of the change in his registration. As for her misunderstanding of the law, Chairwoman Williams suggested that the review of the provisional ballots is “black-and-white” and “cut-and-dry.” But this formulation of the process fundamentally misconstrues the Board’s duties relative to provisional ballots. Indeed, the entire point of allowing voters to cast a provisional ballot is to account for situations that are not “black-and-white,” or “cut-and-dry”—that is, where a mistake may have been made regarding an elector’s eligibility to vote. Once presented with sufficient proof that an elector was entitled to cast the provisional ballot, to allow the Board to revert to the “cut-and-dry” and “black-and-white” information contained in the registration records would render provisional ballots nugatory.

WHEREFORE, Petitioner Mike Cabell respectfully requests that this Court issue an Order reversing the decision of the Luzerne County Board of Elections and directing it to set aside the Partially Executed Ballots and accept for canvassing the O’Donnell Ballot.

Respectfully submitted,

Dated: May 6, 2024

Shohin H. Vance

Shohin H. Vance (No. 323551)

Francis G. Notarianni (No. 327461)

KLEINBARD LLC

Three Logan Square

1717 Arch Street, 5th Floor

Philadelphia, PA 19103

Ph: (215) 568-2000

Fax: (215) 568-0140

svance@kleinbard.com

fnotarianni@kleinbard.com

Attorneys for Petitioner

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Certificate of Compliance

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Dated: May 6, 2024

/s/Shohin H. Vance
Shohin H. Vance (No. 323551)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140
svance@kleinbard.com
Attorneys for Petitioner

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Certificate of Service

I hereby certify that I caused the foregoing Petition to be served on the Luzerne County Board of Elections via electronic mail, which method was agreed to by counsel for the Board prior to filing of this Petition.

...

...

Dated: May 6, 2024

/s/Shohin H. Vance
Shohin H. Vance (No. 323551)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140
svance@kleinbard.com
Attorneys for Petitioner
submitted,

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VERIFICATION

I, Mike Cabell, verify that the statements made in the foregoing Petition for Review are true and correct based upon my personal knowledge or information and belief. I understand that false statements therein are subject to penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Dated: May 6, 2024

A handwritten signature in black ink, appearing to be 'Mike Cabell', written over a horizontal line.

Mike Cabell

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