

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

---

No. 628 CD 2024

---

IN RE: CANVASS OF PROVISIONAL BALLOTS IN THE 2024  
PRIMARY ELECTION

APPEAL OF: MIKE CABELL

---

**BRIEF FOR APPELLANT MIKE CABELL**

---

Appeal from the May 15, 2024 Order of the Court of Common Pleas of  
Luzerne County, No. 2024-05082, affirming the May 3, 2024 decision of  
the Luzerne County Board of Elections and Registration

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  
Eml: svance@kleinbard.com  
fnotarianni@kleinbard.com

*Attorneys for Appellant Mike Cabell*

## TABLE OF CONTENTS

|       |   |    |
|-------|---|----|
| I.    | INTRODUCTION.....   | 1  |
| II.   | STATEMENT OF JURISDICTION.....  | 1  |
| III.  | ORDER IN QUESTION .....   | 2  |
| IV.   | STATEMENT OF THE SCOPE AND STANDARD OF REVIEW..   | 3  |
| V.    | STATEMENT OF THE QUESTIONS INVOLVED .....   | 4  |
| VI.   | STATEMENT OF THE CASE .....   | 5  |
| A.    | Form of Action, Procedural History, and Statement of Prior Determinations.....  | 5  |
| B.    | Name of Judge Whose Decision is to be Reviewed.....   | 8  |
| C.    | Chronological Statement of Facts.....   | 8  |
| D.    | Brief Statement of the Order Under Review.....  | 12 |
| E.    | Place of Raising or Preservation of Issues.....   | 12 |
| VII.  | SUMMARY OF ARGUMENT.....  | 13 |
| VIII. | ARGUMENT .....  | 15 |
| A.    | Section 3050(a.4)(5)(ii)(A) expressly prohibits boards of elections from canvassing any ballot that lacks either of the two requisite signatures..... | 15 |
| B.    | Even if Wagner’s ballot could be cured, Wagner waived and forfeited his right to do so by failing to appear before the Board. ....                    | 26 |
| C.    | Wagner’s testimony violated constitutional secrecy requirements. ....   | 29 |

- D. Because O'Donnell was a qualified elector in the 117<sup>th</sup> House District and his registration was transferred in violation of law, the O'Donnell provisional ballot should be canvassed. 31

IX. CONCLUSION..... 39

RETRIEVED FROM DEMOCRACYDOCKET.COM

## TABLE OF AUTHORITIES

### **Cases**

|   |        |
|---|--------|
| <i>., In re Stack</i> , 184 A.3d 591 (Pa. Cmwlth. 2018).....  | 35     |
| <i>Appeal of Orsatti</i> , 5598 A.2d 1341 (Pa. Cmwlth. 1991).....   | 31     |
| <i>Dotterer v. Sch. Dist. of City of Allentown</i> , 92 A.3d 875 (Pa. Cmwlth. 2014).....  | 22     |
| <i>Fulton v. Fulton</i> , 106 A.3d 127 (Pa. Super. 2014) .....  | 30     |
| <i>In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election</i> , 1161 CD 2020, 2020 WL 6867946 (Pa. Cmwlth. Nov. 20, 2020)...                       | 21, 22 |
| <i>In re Canvass of Absentee and Mail-in-Ballots of Nov. 3, 2020 Gen. Election</i> , 241 A.3d 1058 (Pa. 2020) .....   | 26     |
| <i>In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election</i> , 843 A.2d 1223 (Pa. 2004).....  | 19     |
| <i>In Re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1</i> , 1381-85, 1395-99, 1403 CD 2021, 2022 WL 96156 (Pa. Cmwlth. Jan. 10, 2022) ..... | 23, 24 |
| <i>In re Guzzardi</i> , 99 A.3d 381 (Pa. 2014).....   | 27     |
| <i>In re Major</i> , 248 A.3d 445 (Pa. 2021) .....  | 25     |
| <i>In re Scroggin</i> , 237 A.3d 1006 (Pa. 2020) .....  | 27     |
| <i>McLinko v. Dep't of State</i> , 279 A.3d 539 (Pa. 2022).....   | 32     |
| <i>Oberneder v. Link Computer Corp.</i> , 696 A.2d 148 (Pa. 1997) .....   | 20     |
| <i>Pennsylvania Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020) .  | 25     |
| <i>Petition of Cianfrani</i> , 359 A.2d 383 (Pa. 1976) .....  | 26     |

|  |    |
|--|----|
| <i>See In re Allegheny Cnty. Provisional Ballots in 2020 Gen. Election</i> , 242 A.3d 307 (Pa. 2020) ..... | 22 |
|--|----|

|   |    |
|---|----|
| <i>See In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election</i> , 241 A.3d 1058 (Pa. 2020) ..... | 20 |
|---|----|

## **Statutes**

|                         |        |
|-------------------------|--------|
| 1 Pa.C.S. § 1903 .....  | 21     |
| 1 Pa.C.S. § 1921 .....  | 20     |
| 25 P.S. § 2811 .....    | 35, 36 |
| 25 P.S. § 3050 .....    | passim |
| 25 P.S. § 3146 .....    | 16     |
| 25 P.S. § 3150 .....    | 16     |
| 25 Pa.C.S. § 1321 ..... | 41     |
| 25 Pa.C.S. § 1323 ..... | 41     |
| 25 Pa.C.S. § 1501 ..... | 39, 40 |
| 25 Pa.C.S. § 1502 ..... | 39     |
| 75 Pa.C.S. § 1510 ..... | 41     |

## **Constitutional Provisions**

|                              |    |
|------------------------------|----|
| Pa. Const. art. 7, § 4 ..... | 31 |
|------------------------------|----|

## I. INTRODUCTION

The Election Code's plain language must be followed absent any ambiguity. No ambiguity exists here and the trial court's failure to accept the plain language was error. As developed below, the provisional ballot cast by Timothy Wagner should not be canvassed and the provisional ballot cast by Shane O'Donnell should be canvassed.

Wagner's provisional ballot is missing a signature on the ballot's outer envelope as required by 25 P.S. § 3050(a.4)(3). And because it is missing that signature, subsection (5)(ii)(A) explicitly requires that Wagner's provisional ballot "shall" not be counted. *See* 25 P.S. § 3050(a.4)(5)(ii)(A). Section 3050(a.4)(5)(ii)(A) could not be clearer and the trial court had no basis to disregard the plain language in favor of general principles of liberal construction. This Court must restore meaning to 3050(a.4)(5)(ii)(A)'s plain terms.

## **II. STATEMENT OF JURISDICTION**

The Court has jurisdiction over this election-related appeal pursuant to Section 762(a)(4) of the Judicial Code, 42 Pa.C.S. § 762.

RETRIEVED FROM DEMOCRACYDOCKET.COM

### III. ORDER IN QUESTION

Cabell appeals from the Order of the Court of Common Pleas of Luzerne County dated May 15, 2024, which states in total as follows:

AND NOW, this 15<sup>th</sup> day of May, 2024, after a hearing on the *Petition for Review in the Nature of a Statutory Appeal Pursuant to Section 1210 of the Election Code*, where in Shohin H. Vance, Esquire, Gene M. Molino, Esquire, Paula L. Radick, Esquire, and Jamie Walsh, pro-se, appeared, and after review and consideration of said petition and the responses filed thereto, IT IS HEREBY ORDERED AND DECREED AS FOLLOWS

The *Petition for Review in the Nature of a Statutory Appeal Pursuant to Section 1210 of the Election Code* is DENIED. Accordingly, the decisions of the Luzerne County Election Board are AFFIRMED.

The Clerk of Judicial Records is directed to serve notice of the entry of this Order pursuant to Pa.R.C.P. 236.

The Order, as well as the Opinion in support thereof, are attached as Exhibit A.



#### **IV. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW**

This matter calls on the Court to review and determine the meaning of the Election Code. “[S]tatutory interpretation of the Election Code ... as a question of law, is subject to a de novo standard of review and a plenary scope of review.” *Banfield v. Cortes*, 110 A.3d 155, 166 (Pa. 2015).

RETRIEVED FROM DEMOCRACYDOCKET.COM

## V. STATEMENT OF THE QUESTIONS INVOLVED

1. Did the trial court err when it ignored the plain language in 25 P.S. § 3050(a.4)(5)(ii)(A) that a clearly commands that a “provisional ballot shall not be counted if . . . the provisional ballot envelope . . . is not signed by the” voter?

*Suggested Answer: Yes.*

2. Did the trial court err when it permitted Mr. Wagner to testify at hearing because Mr. Wagner waived his opportunity to testify with regard to his provisional ballot when he did not appear at the Board’s hearing?

*Suggested Answer: Yes.*

3. Did the trial court err when it permitted Mr. Wagner to waive his right to secrecy of his vote when he testified for whom he cast his vote in violation of Pa. Const. art. 7, § 4?

*Suggested Answer: Yes.*

## **VI. STATEMENT OF THE CASE**

### **A. Form of Action, Procedural History, and Statement of Prior Determinations.**

Appellant Mike Cabell appeals from an order of the Luzerne County Court of Common Pleas, which affirmed the Luzerne County Board of Elections (the “Board”)’s decision regarding the canvassing of two provisional ballots.

#### **1. Proceedings before the Board.**

During a public hearing held on April 29, 2024, the Board began its formal review and deliberation of the provisional ballots cast in the preceding primary, which was held on April 23, 2024. In keeping with the requirements of the Election Code, all interested parties, including Candidate Cabell and his primary opponent—James “Jamie” Walsh—were afforded an opportunity to review the provisional ballots submitted by voters claiming to be qualified to vote in the Republican primary for Representative in the General Assembly from the 117th House District.

As relevant here, during the proceedings, the Board voted to canvass provisional ballots where the elector had properly executed the affidavit that must be completed prior to receiving a ballot, but failed to

sign the envelope after casting the ballot, including one which was submitted in the 117<sup>th</sup> House District by Timothy Wagner (the “Wagner Ballot”).<sup>1</sup> The Board also voted to reject the provisional ballot of Shane O’Donnell (the “O’Donnell Ballot”), whose Luzerne County voter registration had been transferred to an address in McAdoo (the “McAdoo Home”), Schuylkill County prior to the April 23, 2024 primary election.

Candidate Cabell lodged challenges to the Board’s decision on the Wagner Ballot and the O’Donnell Ballot. The Board promptly scheduled these challenges for a May 3, 2024, hearing and issued a public notice of the same. In addition, the Board also published the names of the affected individuals on its website and its staff attempted to contact the voters whose ballots had been challenged.

At the May 3, 2024, the Board several voters whose ballots had been challenged by Candidate Cabell appeared in defense of their provisional ballots. Mr. O’Donnell did not appear in person, but he did submit an affidavit explaining the circumstances of his change in voter

---

<sup>1</sup> The Wagner Ballot was the only ballot submitted in the Republican primary for the 117<sup>th</sup> House District where the elector had failed to sign the provisional ballot envelope.

registration and stating that, although he had started to move some of his possessions to the McAdoo Home months before the April 23, 2024 primary, he continued to reside in Butler Township until March 29, 2024 (i.e., less than thirty days before the election). The Board also heard testimony from several judges of elections. Importantly, however, no testimony was presented from any election official who worked at the voting district in which the Wagner Ballot was cast.

At the conclusion of the hearing, the Board reaffirmed its initial determination and, thus, voted to canvass the Wagner Ballot and reject the O'Donnell Ballot.

## **2. Trial Court**

The trial court affirmed the Board's decision to canvass Wagner's provisional ballot notwithstanding Section 3050(a.4)(5)(ii)(A)'s plain language. Tr. Ct. Op. at 3-5 (unpaginated). The trial court acknowledged Section 3050(a.4)(5)(ii)(A)'s plain language, but held that Wagner's ballot should be canvassed in light of the principle that the Election Code be liberally construed "in favor of enfranchisement where fraud is not an issue and a voter's intent is clear." *Id.* at 4.

With regard to O'Donnell's provisional ballot, the trial court affirmed the Board's decision not to canvass the provisional ballot. The trial court recounted O'Donnell's testimony that he appeared at his polling place in Butler Township and was informed that he was not currently registered at that polling place. *Id.* at 5.

**B. Name of Judge Whose Decision is to be Reviewed**

The Order and Opinion of the Court of Common Pleas of Luzerne County denying the appeal was issued by the Hon. Tina Polachek Gartley, the Hon. Richard M. Hughes, III, and the Hon. Fred A. Peirantoni, III.

**C. Chronological Statement of Facts**

**1. The Wagner Provisional Ballot**

Wagner testified that he appeared in person at his polling place in Lake Township and was required to fill out a provisional ballot because he was provided with a mail-in ballot and did not bring the ballot with him to the polling place. *See* N.T., 21:17-22:6. Wagner further testified that he followed the instructions of the poll workers regarding the process for completing his provisional ballot. N.T., 22:15-20; 24: 12-15. Wagner further testified that he intended to cast a vote for Jamie Walsh. N.T., 23:23-24:1. It is undisputed that Wagner's provisional

ballot envelop did not bear his signature. Tr. Ct. Op. at 3. Finally, and although Mr. Wagner testified that he did not know about the Board's May 3 hearing regarding provisional ballots, Board Chair Denise Williams testified that notice was provided to individuals whose provisional ballots were being challenged. N.T., 18:21-20:25. Ms. Williams further testified that she did not believe that Mr. Wagner ever appeared at the Board's hearing. N.T., 20:18-25.

## **2. The O'Donnell Provisional Ballot.**

Mr. O'Donnell testified that he had been a resident of Butler Township his entire life, where had been a registered voter since turning eighteen, actively participating in elections for over ten years. See N.T., 31-33. In June of 2023, Mr. O'Donnell purchased the McAdoo home, but because it required extensive renovation, he continued to live in his prior residence with his mother and brother in Butler Township. See N.T., 31:13-16. Sometime in December of 2023, Mr. O'Donnell's vehicle registration expired and, given that he anticipated relocating to the McAdoo township home at some point within the following year, he changed the address on his vehicle registration to the McAdoo home. See N.T., 33:12-34:30. In doing so, Mr. O'Donnell explained that he had

no intention of transferring his voter registration to Schuylkill County and was unaware that the change in his vehicle registration could have such a result. *See* N.T. 34:15-35:30.

In the months that followed, Mr. O'Donnell continued to renovate the McAdoo Home and periodically moved various possessions into there. *See* N.T., 31:13-32:28. However, Mr. O'Donnell explained that he did not begin to live at the McAdoo Home until March 29, 2024. *See* N.T., 32:5-12. When asked to clarify what he meant by this, Mr. O'Donnell elaborated that he did not begin sleeping there until March 29, 2024 and prior to that date, he would rarely (if ever) spend the night at the McAdoo Home. *See id.*

With regard to his provisional ballot, Mr. O'Donnell explained that on April 23, 2024, Mr. O'Donnell appeared to vote in-person at the polling location in Butler Township where he was used to voting. *See* N.T. 34:7-16. Upon offering to vote, however, Mr. O'Donnell was informed that he was not currently registered to vote in Butler Township, but as he had been registered to vote there previously, he was allowed to fill out and cast a provisional ballot. *See* 34:13-18. At the time he offered to vote in Butler Township, Mr. O'Donnell was not



aware that he was no longer registered there and only learned of the transfer in his registration after the election. Based on the timing of the change, Mr. O'Donnell determined that his change in vehicle registration must have somehow triggered the transfer of his voter registration. In this regard, however, Mr. O'Donnell explained that he did not recall receiving any correspondence from either the Board, or its counterpart in Schuylkill County informing him of the change in registration.

Mr. O'Donnell's version of events was largely corroborated by Ms. Cook, who testified that Mr. O'Donnell's voter registration had been transferred as a result of a notice received from the Pennsylvania Department of Transportation in December 2023—which came in the form of a *new application*. She explained that where a new application is received reflecting a change in address for a voter registered in Luzerne County, the Board transfers the registration to the address indicated on the application. Where the new address is out-of-county, the Board transfers the registration to that county, but does not send any communication informing the voters that a change in their registration had occurred. Such correspondence, Ms. Cook explained is

generally sent by the elector's new county of registration (here, Schuylkill). Finally, Ms. Cook confirmed that Mr. O'Donnell did not cast any other ballots in the 2024 primary election.

**D. Brief Statement of the Order Under Review**

Cabell seeks review of the May 15, 2024 Order of the Court of Common Pleas of Luzerne County, which is attached hereto as Exhibit A.

**E. Place of Raising or Preservation of Issues**

Appellant Cabell timely raised his objection to the Disputed Ballots in the hearing before the Board on May 3, 2024. He further preserved his objections in his formal appeal to the trial court on May 6. The same objections were raised again by Appellant Ritter during the May 8 trial court hearing.

## VII. SUMMARY OF ARGUMENT

The trial court erred when it disregarded Section 3050(a.4)(5)(ii)(A)'s plain language. This error is manifest, and warrants reversal. To the extent this Court disagrees however, the trial court further erred when it considered Wagner's testimony after he waived his opportunity to cure his ballot before the Board, and by permitting Wagner to disclose for whom he voted in violation of Article 7, Section 4 of the Pennsylvania Constitution. The trial court's decision to disregard 3050(a.4)(5)(ii)(A)'s plain language was based, in part, on Wagner's testimony. Thus, to the extent Wagner's testimony was improper, the trial court's analysis is undermined and should be reversed.

The trial court also erred in rejecting the provisional ballot submitted by Shane O'Donnell. First, based on the common pleas court's own findings of fact and credibility determinations, Mr. O'Donnell had been a resident of Butler Township (in Luzerne County) less than thirty days before the April 2024 primary. Second, to the extent the December 2023 change in Mr. O'Donnell's registration is

relevant to the analysis, it was effectuated in violation of law and, thus,  
is void *ab initio*.

RETRIEVED FROM DEMOCRACYDOCKET.COM

## VIII. ARGUMENT

### A. **Section 3050(a.4)(5)(ii)(A) expressly prohibits boards of elections from canvassing any ballot that lacks either of the two requisite signatures.**

The trial court erroneously held that Section 3050(a.4)(5)(ii)(A)'s plain language can yield to general principles of liberal construction of the Election Code even in the absence of any ambiguity. This Court should correct that error and restore meaning to Section 3050(a.4)(5)(ii)(A)'s plain language

#### 1. **25 P.S. § 3050(a.4)'s Provisional Ballot Process.**

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.<sup>2</sup> Voting by provisional ballot may be necessary if, for example: an individual's name does not appear in the district register, *see* 25 P.S. § 3050(a.4)(1), the voter is required to present proof of identification, but is unable to do so, *see id.*, or the elector has requested an absentee or mail-in ballot, but has not voted the ballot. *See id.* at § 3146(b)(2) (permitting a voter who has requested

---

<sup>2</sup> *See generally* Act of Dec. 9, 2022, 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”).

an absentee ballot to vote provisionally); *see also id.* at § 3150(b)(2) (same as to applicants for mail-in ballots).

Section 3150(a.4) sets forth a simple two-step process for provisional voting. 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); 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).<sup>3</sup>

---

<sup>3</sup> 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 \_\_\_\_\_ 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

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).

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:

***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).

Subclause (ii), referenced in the above provision, enumerates five circumstances under which county boards of elections are expressly

---

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.

25 P.S. § 3050(a.4)(2), (3)

prohibited from counting a provisional ballot. In this regard, Section 1210(a.4)(5)(ii) provides, in pertinent part:

- (ii) A provisional ballot ***shall not be counted*** if:
  - (A) either ***the provisional ballot envelope*** under clause (3) or the affidavit under clause (2) ***is not signed by the individual***[:.]

25 P.S. §§ 3050(a.4)(5)(ii)(A) (emphasis supplied),

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.

Where the elector has failed to render a signature in both fields, the Board is expressly prohibited 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)).



## **2. The Trial Court Ignored Section 3050(a.4)(5)(ii)(A)’s Plain Text.**

Here, it is undisputed that Wagner did not sign his provisional ballot envelope as required by Section 3050(a.4)(3). *See* Tr. Ct. Op. at 3. Notwithstanding subsection (3)’s requirement that the envelope “shall” be signed and subsection (5)’s command that a provisional ballot not signed in accordance with subsection (3) “shall not be counted[,]” *see* 25 P.S. § 3050(a.4)(3), (5)(ii), the trial court affirmed the Board’s decision to canvass Wagner’s provisional ballot. *See* Tr. Ct. Op. at 4. The trial court impermissibly disregarded Section 3050(a.4)’s plain terms in favor of the spirit of the Election Code in the absence of any ambiguity.

To start, because “the word ‘shall’ carries an imperative or mandatory meaning,” Section 3050(a.4)’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.”). In the mail-in ballot context a majority of Justices agreed that “shall” is mandatory. *See In re*

*Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020) (plurality).

Here, Section 3050(a.4)(5)(ii)(A)’s mandatory language is clear and unambiguous and must be followed. Indeed, it is beyond cavil that when statutory language is unambiguous, the plain language controls the outcome and resort to the statute’s purpose or spirit is prohibited. *See* 1 Pa.C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”); *see also generally id.* at § 1903(a) (“Words and phrases shall be construed according to rules of grammar and according to their common and approved usage[.]”). Accordingly, based upon the plain language of the Election Code, the trial court’s decision affirming the Board’s decision to canvass Wagner’s provisional ballot is unsustainable.

In fact, the Commonwealth Court’s recent decision in *In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 1161 CD 2020, 2020 WL 6867946 (Pa. Cmwlth. Nov. 20, 2020) (unpublished three-judge opinion) further confirms that the Election Code prohibits

the Board from canvassing a provisional ballot that is missing one of the two required signatures.<sup>4</sup>

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. § 3050(a.4)(5)(ii)(A)). "Stated otherwise," the Court concluded, "*both* signatures are required." *Id.* (emphasis in original).<sup>5</sup>

---

<sup>4</sup> 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*.").

<sup>5</sup> 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 *In Re Allegheny County Provisional Ballot* decision. *See In re Allegheny Cnty. Provisional*

A little over a year after *In Re Allegheny County Provisional Ballots* was decided, a different three-judge panel of this Court was unanimous in its conclusion that, where one of the disqualifying grounds under Section 1210(a.4)(5)(ii) are present, an invalid ballot cannot be saved by equitable considerations, such as voter intent and preference for enfranchisement. *See In Re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 1381-85, 1395-99, 1403 CD 2021, 2022 WL 96156 at \*2 (Pa. Cmwlth. Jan. 10, 2022) (unpublished, three-judge panel) (per Leadbetter, J.) (“While we agree with the trial court that voters should not be lightly disenfranchised where there is no real question raised that the ballot is the genuine vote of the elector, we simply are not free to disregard the explicit directive of the statute.”); *id.* at \*9 (“I agree with the Honorable Judge Leadbetter's View in ruling that: the trial court erred by determining that the provisional ballots marked VS-4 and VS-5 shall be counted.”) (per Covery, J.); *id.* (Leavitt, J.) (“I agree with Senior Judge Leadbetter that the provisional ballots marked VS-4 and VS-5 may not be counted.”).<sup>6</sup> (quoting 25 P.S. §

---

*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).

<sup>6</sup> Notably, the lower court’s rationale for canvassing the defective provisional ballots in *In Re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*,

3050(a.4)(5)(ii)(C)) (emphasis in original); *see also Trump for President, Inc. v. Boockvar*, 481 F.Supp.3d 476, 492 (W.D. Pa. 2020) (observing, in dicta, that 25 P.S. § 3050(a.4)(5)(ii)(C) “specifically direct[s] that [provisional] ballots will not be counted without a secrecy envelope”). As Judge Leadbetter aptly observed: “[w]hile we agree with the trial court that voters should not be lightly disenfranchised where there is no real question raised that the ballot is the genuine vote of the elector, *we simply are not free to disregard the explicit directive of the statute.*” *In Re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 2022 WL 96156 at \*2 (emphasis added). This Court should follow these well-reasoned decisions.<sup>7</sup>

---

closely tracks the reasoning of the trial court here. *See id.* (noting that “[i]n support [of its decision to accept the ballots] the trial court cited the testimony of Ms. Saitis that they did not raise concerns of tampering or fraud”).

<sup>7</sup> Although the voters who cast the challenged provisional ballots did not personally testify in either *In Re Allegheny County Provisional Ballots*, or *In Re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan*, this distinction is immaterial for present purposes. In both cases, the parties generally agreed that there was no indication of fraud or tampering and that the electors in question were otherwise qualified to vote. *See id.* (recounting the testimony of the director of bureau of elections); *see also Zicarelli v. Allegheny Cnty. Bd. of Elections*, 2020 WL 7012632, at \*1 (Pa.Com.Pl.Civil Div.) (“In light of the fact that there is no fraud alleged in this case, these provisional ballots submitted by registered and eligible voters must be counted. They should not be penalized because they were given and relied on incorrect information by the election administration.”), *rev’d by In re Allegheny County Provisional Ballots in 2020 General Election*. Mr. Wagner’s testimony, therefore, may add color that was absent in this Court’s prior decisions; but as a legal matter, it does not distinguish this case from the previous ones involving the very same issue.

Given Section 3050(a.4)(5)(ii)(A)’s plain language, the trial court’s reliance on the Election Code’s liberal construction is entirely misplaced. Indeed, as our High Court recently noted, “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 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 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); *see also Petition*

of *Cianfrani*, 359 A.2d 383, 384 (Pa. 1976) (“the 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). The trial court improperly elevated consideration of the liberal construction principle over the statute’s plain terms.<sup>8</sup>

---

<sup>8</sup> Similarly, to the trial court erred to the extent it relied on Wagner’s testimony that he followed the Board’s guidance when he filled out his provisional ballot as reason to accept Wagner’s ballot. See N.T., 22-23. As the Supreme Court held in the context of a candidate’s affidavit to a nomination petition:

[I]t is the Election Code's express terms that control, not the written guidance provided by the Department. And as this Court repeatedly has cautioned, even erroneous guidance from the Department or county boards of elections cannot nullify the express provisions of the Election Code. See [*In re Guzzardi*, 99 A.3d 381, 388 (Pa. 2014)] (“[E]ven if there was some miscommunication at the Department of State ..., this does not offset the underlying, self-acknowledged mistake” of the candidate “in failing to apprehend, from the outset, the express statutory requirement to file a statement of financial interests with the Election Commission.”); *Appeal of Pierce*, 843 A.2d at 1225 (holding that the delivery of absentee ballots by

Because the statute is clear that both signatures are required in order for a provisional ballot to be counted, the trial court erred when it ignored Section 3050(a.4)(5)(ii)(A)'s plain terms and affirmed the Board's decision to canvass Wagner's partially completed provisional ballot. This Court should reverse.<sup>9</sup>

**B. Even if Wagner's ballot could be cured, Wagner waived and forfeited his right to do so by failing to appear before the Board.**

To the extent this Court disagrees that 3050(a.4)(5)(ii)(A)'s plain terms requires Wagner's provisional ballot to be rejected, this Court should nevertheless reverse the trial court's decision because it relied, in part, on Wagner's testimony. *See* Tr. Ct. Op. at 3-4. Because Wagner did not appear at the Board's hearing on challenged provisional ballots, Wagner waived his right to cure his defective provisional ballot. Thus, to the extent the trial court was persuaded to disregard Section

---

third persons rendered them invalid, notwithstanding indications from the Allegheny County Board of Elections that the practice was permitted).

*In re Scroggin*, 237 A.3d 1006, 1021 (Pa. 2020). This astute rationale should apply equally in the provisional ballot context. Even if there were circumstances in which plainly mistaken instructions by an election worker would justify overcoming the plain language of the statute, this is not such a case. Rather, much like *In re Guzzardi*, Mr. Wagner's testimony in this regard was vague and unparticularized.

<sup>9</sup> To the extent the Board will seek to distinguish this case from



3050(a.4)(5)(ii)(A)’s plain language based on Wagner’s testimony, that decision was erroneous.

To start, the Election Code sets out a detailed process for election boards to follow when a provisional ballot is marked “challenged.” *See* 25 P.S. § 3050(a.4)(4). The election board is required to hold a hearing for all challenges and give notice “where possible to all provisional electors” whose ballots are challenged. *See id.* at § 3050(a.4)(4)(i). The hearings are transcribed and the board of elections can receive testimony. *See id.* at § 3050(a.4)(4)(i)-(iv). And a decision from the election board is appealable to the court of common pleas. *See id.* at § 3050(a.4)(4)(v).

Here, Board Chair Williams testified that the Board provided notice to the individuals whose provisional ballots were being challenged. *See* N.T., 18:22-20:25. Ms. Williams further testified that some individuals whose ballots were challenged appeared and testified regarding their ballots, but that Wagner did not. *See id.* at 20:14-25. In this connection, Wagner waived his ability to provide testimony regarding his provisional ballot and cure the defect therein. The Election Code expressly provides a process by which voters can attempt

to cure their challenged provisional ballots. And by permitting Wagner the opportunity to cure his ballot outside of that specific, statutorily prescribed process, the trial court erred. Indeed, trial court's decision disrupts the otherwise orderly procedure established by the Election Code.

The doctrine of laches is also instructive here. Laches "is an equitable bar to the prosecution of stale claims and is the practical application of the maxim that those who sleep on their rights must awaken to the consequence that they have disappeared." *Fulton v. Fulton*, 106 A.3d 127, 131 (Pa. Super. 2014) (internal quotations omitted). Laches "bars relief when the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another." *Id.*

Here, Wagner had the opportunity to attend the Board's hearing and cure his ballot, and did not do so. Although he claims he did not know about the hearing, *see* N.T., 26:22, Ms. Williams testified that the Board published notice regarding challenged provisional ballots and that multiple individuals appeared at the hearing to cure their ballots. Thus, Wagner's claim that he lacked actual notice should not control.

Moreover, Cabell was prejudiced by Wagner's tardy testimony because his testimony was relied upon by the trial court to disregard Section 3050(a.4)(5)(ii)(A)'s plain language.

By way of summary, Wagner waived his ability to cure his challenged provisional ballot when he did not follow the process prescribed in the Election Code. The trial court therefore erred to the extent it relied on Wagner's testimony to disregard Section 3050(a.4)(5)(ii)(A)'s plain language, that decision was error and should be reversed.

**C. Wagner's testimony violated constitutional secrecy requirements.**

The Pennsylvania Constitution expressly provides "That secrecy in voting be preserved." Pa. Const. art. 7, § 4. Importantly, a voter "cannot be permitted to waive his right to secrecy." *Appeal of Orsatti*, 5598 A.2d 1341, 1343 (Pa. Cmwlth. 1991). Indeed, as Robert Woodside explained with regard to secrecy:

This is sound public policy. It is to prevent intimidation and bribery. When a person has the right to reveal how he voted he can be intimidated into revealing it. Hitler came to power in Germany under a law which permitted the electorate to choose whether they would vote privately or publicly. In other words, they could waive their right to vote secretly. We are told that approximately 98% were intimidated to waive the secrecy of their

ballot and vote publicly. If in every close election in this Commonwealth voters could be subpoenaed into Court, as they were here, and asked how they voted, bribery and intimidation would become a simple matter, even though the witness after taking the stand would have the legal right to refuse to answer the question.

The sanctity of the ballot must be preserved, and the courts must throw no technicalities in the way of discovering false or fraudulent election returns, but neither can we abandon the keystone of our democracy—the secrecy of the ballot, on the pretense of discovering an error in the return.

*Id.* at 1343-44 (quoting *Thomas A. Crowley—Election Contest*, 57 Dauphin Co. Rep. 120, 126-27 (Dauphin Cnty. Ct. Comm. Pls. 1945)).

Secrecy can be pierced only where the vote was cast illegally, which is not the case here. *See id.* at 1343. Recently, in *McLinko v. Dep't of State*, 279 A.3d 539 (Pa. 2022), the Supreme Court observed that “secrecy has historically served as a bastion to the integrity of the election franchise” *id.* at 577-78.

The legislature is required to implement methods to maintain secrecy. *See id.* at 578. And with regard to provisional ballots, the legislature has implemented requirements to safeguard secrecy. The ballot itself which must be in a secrecy envelope. *See* 25 P.S. § 3050(a.4)(3). Further, with regard to challenged provisional ballots, the

board is instructed to maintain them *unopened* until all appeals to the challenged ballots are exhausted. *See* 25 P.S. § 3050(a.4)(4)(i)-(vii).

Here, Wagner expressly testified for whom he voted thereby undermining the secrecy mechanism put in place by the legislature. *See* N.T., 23:23-24-1.<sup>10</sup> And the trial court's holding was at least based, in part, on "Wagner's electoral intent." Tr. Ct. Op. at 4-5. Given the Constitutional mandate for secrecy, and the General Assembly's careful process to preserve secrecy, it was error for the trial court to base its decision on Wagner's testimony regarding who he voted for.

**D. Because O'Donnell was a qualified elector in the 117<sup>th</sup> House District and his registration was transferred in violation of law, the O'Donnell provisional ballot should be canvassed.**

This Court should reverse the trial court's decision to reject the O'Donnell Ballot for at least two overarching reasons. *First*, because the trial court found that Mr. O'Donnell did not take up residence in the McAdoo home until March 29, 2024, under the plain language of the Election Code, Mr. O'Donnell was entitled to vote in Luzerne County in the 2024 primary election—notwithstanding any change in his

---

<sup>10</sup> Cabell's counsel did not object to the question that elicited Wagner's testimony because the question did not call for Wagner to make this disclosure and it was therefore unanticipated. *See* N.T., 23:13-24:1.

registration. *Second*, even if the Court determines that the transfer in registration has any bearing on the outcome, because Mr. O'Donnell's registration was changed in violation of law, it was void *ab initio* and, thus, should be disregarded.

**1. Because O'Donnell changed his domicile less than thirty days prior the election, he was entitled to vote at his prior residence within the 117th House District.**

Under Section 1210(a.4) of the Election Code, a person whose eligibility to vote cannot be readily ascertained at the polling location is entitled to cast a provisional ballot. Such ballots are then transferred to the county boards of elections, who “[w]ithin seven calendar days of the election, . . . [must] 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.” 25 P.S. § 3050(a.4)(4).

Although Section 1210 does not define the term “entitled to vote,” under Section 701 of the Election Code, “[e]very citizen of this Commonwealth eighteen years of age, . . . shall be entitled to vote at all elections, provided he or she has complied with the provisions of the acts requiring and regulating the registration of electors[.]” if, among other things, “[h]e or she shall have resided in the election district where he

or she shall offer to vote at least thirty days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, 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.” 25 P.S. § 2811(3).

Take together, therefore, Sections 1210 and 701 of the Election Code provide that a voter may vote in the election district where they previously resided, provided that the voter: (a) was a resident of that district within the thirty-day period preceding the; and (b) election complied with all of the laws regulating registration of electors. Because Mr. O'Donnell satisfied both prerequisites, the O'Donnell ballot should have been canvassed.

First, Mr. O'Donnell's credible and uncontroverted testimony firmly established that the change in Mr. O'Donnell's domicile—which for purposes of the Election Code is conterminous with residence—did not occur until March 29, 2024. Thus, Mr. O'Donnell was a resident of Butler Township within the thirty-day period prescribed by Section 701 of the Election Code. *See, e.g., In re Stack*, 184 A.3d 591, 596 (Pa. Cmwlth. 2018) (discussing the facts necessary to effect a change in

domicile under the Election Code). Indeed, the trial court seemingly recognized that Mr. O'Donnell abandoned his domicile on March 29, 2024 (*i.e.*, less than thirty days before the election). *See* Trial Ct. Op. at 5 (unpaginated) (recognizing that “[o]n March 29, 2024, O'Donnell took up residence at the McAdoo home”)

Nevertheless, despite acknowledging that the circumstances of Mr. O'Donnell's case appear to implicate “the seemingly permissive 30-day window provided for by Section 701 of the Election Code,” Trial Ct. Op. at 7 (unpaginated) (citing 25 P.S. § 2811(3)), the common pleas court affirmed the rejection of the O'Donnell Ballot. In this regard, without citing any authority (statutory or otherwise), the trial court concluded that the thirty-day period expressly established in Section 701 was inapplicable because Mr. O'Donnell “maintain[ed] his elective franchise with an active voter registration at his place of residence on the date of [the] election,” but had “attempt[ed] to cast a vote in the municipality of [his] former residence while fully possessing the ability to instead cast a vote in the municipality of [his] current residence.” Trial Ct. Op. at 7 (unpaginated); *see also id.* (“But for O'Donnell's decision not to attempt to cast a vote in McAdoo, nothing prevented



O'Donnell from exercising his franchise in the place of his residence and active voter registration for the April 23, 2204, Primary Election.”).

The trial court's rationale, however, is legally unsustainable. As an initial matter, no authority is offered—and, to the best of Candidate Cabell's knowledge, none exists—for the proposition that a change in voter registration (even if voluntary) somehow renders the 30-day window in Section 701 inapplicable. And the absence of any authority is unsurprising, since the trial court's construct is legally and logically untenable. Specifically, based on the trial court's own factual findings, Mr. O'Donnell ***could not*** have voted in McAdoo on April 23, 2024 because, at that point, he had resided in the McAdoo Home for ***less than 30 days***. See 25 P.S. § 2811(3); see also *In re Stabile*, 36 A.2d 451, 452 (Pa. 1944). Accordingly, contrary to the trial court's suggestion that “nothing prevented O'Donnell from exercising his franchise in the place of his residence and active voter registration for the April 23, 2024, Primary Election [*i.e.*, McAdoo],” the plain language of Section 701(3) prohibited Mr. O'Donnell from voting in McAdoo. Having removed his residence less than thirty days before the primary, the only election

district in which Mr. O'Donnell was qualified to vote was the one in which he cast his provisional ballot.

The second requirement of eligibility under Section 701 relevant here—*i.e.*, compliance with the registration laws—is also satisfied. As Mr. O'Donnell credibly testified, he had registered to vote in Butler Township and no evidence has been offered to suggest that he failed to comply with any laws related to registration of voters. Moreover, the December 2023 change in Mr. O'Donnell's registration, which in any event, was unlawful, does not change the calculus, as it does not reflect a violation of any laws pertaining to registration.<sup>11</sup>

**2. Even if relevant to the present analysis, the December 2023 change in O'Donnell's voter registration violated Pennsylvania's voter registration statutes and, thus, was void *ab initio*.**

Although neither have been able to clearly articulate why the principal inquiry should focus on the timing of Mr. O'Donnell's change in voter registration—rather than the timing of his change in residence—both the Board and the trial court have placed significant (even dispositive) weight on the fact that Mr. O'Donnell's voter

---

<sup>11</sup> To the extent there is any doubt in this regard, a review of Subsection(2) *infra* should put it to rest.

registration was transferred in December 2023. As explained above, the timing of the transfer of an elector's voter registration is, at best, a secondary consideration, since Section 701 plainly permits a voter to cast a ballot at the place of their former residence if the change in residence (**not** registration) occurred less than thirty days before the election. The only limitation related to registration mentioned in Section 701 is that the voter must have generally "complied" with the laws governing registration of electors.

Nevertheless, insofar as it is relevant to the present analysis, the change in Mr. O'Donnell's registration was effectuated in violation of Pennsylvania law and, thus, was void *ab initio*.

Specifically, under Pennsylvania's voter registration law, *see* 25 Pa.C.S. §§ 1101-1906, a voter's registration may be transferred only upon completion and submission of a "removal notice." 25 Pa.C.S. §§ 1501 ("Removal notices"); 1502 ("Transfer of registration"). In order to be effective, a removal notice must include certain information, including, the date on which the voter removed to the residence and various warnings designed to ensure that the elector understands the consequences of signing and submitting the form. *See id.* at § 1501(a).

In lieu of a removal notice, a previously-registered voter may also submit a new voter registration application containing the change in address. *See id.* at § 1501(b) (“An official registration application of an elector who has registered by mail qualifies as a removal notice.”).

Here, a removal notice was not submitted. Rather, according to Ms. Cook, the transfer in Mr. O’Donnell’s registration occurred because the vehicle registration form was treated as a “new registration.” But under the plain language of the voter registration statute, a “vehicle registration” application **cannot** serve as a voter registration application and the Commonwealth’s policy to the contrary violates the law. Specifically, Section 1321, titled “Methods of Voter Registration,” and provides:

An individual qualified to register to vote under section 1301(a) (relating to qualifications to register) may apply to register as follows:

- (1) Under section 1322 (relating to in-person voter registration).
- (2) Under section 1323 (relating to application with driver's license application).
- (3) Under section 1324 (relating to application by mail).
- (4) Under section 1325 (relating to government agencies).

25 Pa.C.S. § 1321. Each of the methods of voting enumerated above, with the exception of Subsection (2), require the voter to submit a

**separate** form, which contains certain disclosures and warnings and is used for the specific purpose of voter registration. Furthermore, although Subsection (2) allows an elector's application for a **driver's license** to simultaneously serve as a voter registration application, it does not allow any other applications to be treated in this manner. See 25 Pa.C.S. § 1323. To the contrary, it expressly incorporates Section 1510 of the Vehicle Code, which deals exclusively with the issuance of a **driver's license**. See 25 Pa.C.S. § 1323(a) ("The Department of Transportation shall provide for simultaneous application for voter registration in conjunction with the process under 75 Pa.C.S. § 1510 (relating to issuance and content of driver's license).").

The unilateral transformation of vehicle registration forms submitted to the Pennsylvania Department into "voter registration applications" has no statutory (or even regulatory) predicate. Accordingly, the change to Mr. O'Donnell's voter registration was contrary to law and, thus, was void *ab initio*.

## **IX. CONCLUSION**

For all the reasons stated above, this Court should reverse the decision of the Court of Common Pleas and order the Luzerne County

Board of Elections to reject the Wagner Ballot and accept for canvassing the O'Donnell Ballot.

Respectfully submitted,

Dated: May 27, 2024

s/ 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  
Eml: svance@kleinbard.com  
fnotarianni@kleinbard.com

*Attorneys for Appellant Mike Cabell*

## **WORD COUNT CERTIFICATION**

I hereby certify that the above brief complies with the word count limits of Pa.R.A.P. 2135. Based on the word count feature of the word processing system used to prepare this brief, this document contains 8378 words, exclusive of the cover page, tables of content and authorities, and the signature block.

Dated: May 27, 2024

s/ Shohin H. Vance

RETRIEVED FROM DEMOCRACYDOCKET.COM





# EXHIBIT A

RETRIEVED FROM DEMOCRACYDOCKET.COM

IN THE COURT OF COMMON PLEAS  
OF LUZERNE COUNTY

IN RE: CANVASS OF PROVISIONAL  
BALLOTS IN THE 2024 PRIMARY  
ELECTION

CIVIL ACTION

NO. 2024-05082

ORDER

**AND NOW**, this 15<sup>th</sup> day of May, 2024, after a hearing on the *Petition for Review in the Nature of a Statutory Appeal Pursuant to Section 1210 of the Election Code*, wherein Shohin H. Vance, Esquire, Gene M. Molino, Esquire, Paula L. Radick, Esquire, and Jamie Walsh, pro-se, appeared, and after review and consideration of said petition and the responses filed thereto, **IT IS HEREBY ORDERED AND DECREED AS FOLLOWS:**

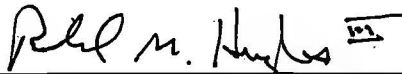
The *Petition for Review in the Nature of a Statutory Appeal Pursuant to Section 1210 of the Election Code* is **DENIED**. Accordingly, the decisions of the Luzerne County Election Board are **AFFIRMED**.

The Clerk of Judicial Records is directed to serve notice of the entry of this Order pursuant to Pa.R.C.P. 236.

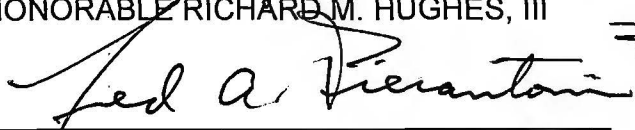
BY THE COURT,



THE HONORABLE TINA POLACHEK GARTLEY



THE HONORABLE RICHARD M. HUGHES, III



THE HONORABLE FRED A. PEIRANTONI, III

|                                   |   |                                   |
|-----------------------------------|---|-----------------------------------|
| IN RE: CANVASS OF PROVISIONAL     | : | IN THE COURT OF COMMON PLEAS      |
| BALLOTS IN 2024 PRIMARY ELECTION. | : | OF LUZERNE COUNTY                 |
|                                   | : | CIVIL DIVISION                    |
|                                   | : |                                   |
|                                   | : | LUZ. CO. C.C.P. NO.: 2024-05082   |
|                                   | : |                                   |
|                                   | : | PA. COMMW. CT. NO.: 628 C.D. 2024 |

**OPINION IN SUPPORT OF ORDER PURSUANT TO Pa.R.A.P. 1925(a)**

Mike Cabell (hereinafter referred to as “Appellant”) appeals from this Court’s order of May 15, 2024 (hereinafter referred to as the “Order”), wherein Appellant’s Petition for Review in the Nature of a Statutory Appeal pursuant to Section 1210 of the Election Code (hereinafter referred to as the “Petition”) was denied and two decisions of the Luzerne County Board of Elections and Registration (hereinafter referred to as the “Election Board”)—from each of which Appellant had appealed to this Court—were affirmed. On May 17, 2024, Appellant filed a notice of appeal from the Order. On May 21, 2024, at 628 C.D. 2024, the Commonwealth Court of Pennsylvania directed that this Court transmit by no later than May 22, 2024, at 4:00 P.M., the record in this matter—including an opinion or statement in accordance with Pa.R.A.P. 1925(a). We now submit to the record our opinion in accordance with Pa.R.A.P. 1925(a) and the May 21, 2024, order of the Commonwealth Court.

In his Petition, Appellant challenged the decisions of the Election Board with regard to each of two provisional ballots cast in the 2024 Primary Election for nomination of Republican Party candidate for Representative in the General Assembly from the 117<sup>th</sup> District: (1) to accept

COPIES MAILED 5/22/2024 CS

a provisional ballot cast in Lake Township without the required signature on the provisional ballot envelope (hereinafter referred to as the “Wagner Ballot”); and (2) to reject a provisional ballot cast in Butler Township by a voter registered to vote in a district other than the 117<sup>th</sup> District (hereinafter referred to as the “O’Donnell Ballot”). On May 8, 2024, a hearing was held, at which counsel for the Appellant, counsel for the Election Board, and Appellant’s challenger in the primary race—Jamie Walsh, *pro se*—appeared and had the opportunity to present witnesses and evidence. This Court received testimony and evidence with respect to the challenged issues. After the hearing, and upon consideration of the testimony, evidence, and argument presented, we issued the Order—affirming each of these decisions made by the Election Board—and herein set forth our reasons therefor.

## **I. THE WAGNER BALLOT**

The Election Board presented the testimony of Timothy James Wagner (hereinafter referred to as “Wagner”) in support of its decision to accept his provisional ballot as cast in Lake Township. Wagner testified that he appeared in person at his Lake Township polling place to vote in the 2024 Primary Election and, upon presentment, was instructed to complete a provisional ballot.<sup>1</sup> Wagner testified the election workers at his polling place informed him the completion of a provisional ballot was necessary due to his having been provided but not having appeared with a mail-in ballot.<sup>2</sup> Wagner did fill out his provisional ballot and completed this process with the assistance of and instruction from a poll worker at his polling place.<sup>3</sup> Wagner followed the instructions of the poll worker with respect to the mechanics of casting his vote by way of

---

<sup>1</sup> *Notes of Testimony*, May 8, 2024, p. 21:17-25.

<sup>2</sup> *N.T.*, pp. 21:21—22:6; Emily Cook, Acting Director of Luzerne County Elections, also confirmed by way of her testimony that Wagner had been issued a mail-in ballot for the 2024 Primary Election but had not cast his mail-in ballot. *N.T.*, p. 27:16-24.

<sup>3</sup> *N.T.*, pp. 22:7—23:19.

provisional ballot<sup>4</sup> and testified, unequivocally, that he intended to and believed that he did cast his vote in the 117<sup>th</sup> District nominating contest for Jamie Walsh.<sup>5</sup> When it came time for Wagner to place his ballot in the provisional ballot envelope and cast his vote, Wagner testified that he couldn't remember whether he affixed his signature to the provisional ballot envelope, but affirmed that he followed the instructions of the poll worker and provided the poll worker with the final envelope containing his ballot inside its secrecy envelope.<sup>6</sup> We found the testimony of Wagner credible.

It was undisputed before this Court that Wagner's provisional ballot envelope did not bear his signature. Section 1210 of the Pennsylvania Election Code (Election Code), Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2601-3591, provides, in pertinent part, as follows:

(a.4) ... (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. ...

...

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

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

25 P.S. § 3050(a.4). Nonetheless, the Election Board voted unanimously to accept the Wagner Ballot as cast<sup>7</sup> and—in light of the seemingly explicit proscription of Section 1210 of the Election Code—Appellant filed his challenge to the Wagner Ballot before this Court. We note that the Election Board relied upon, *inter alia*, guidance for state-wide uniformity published by the Pennsylvania Department of State in reaching its decision to accept the Wagner Ballot.<sup>8</sup>

---

<sup>4</sup> *N.T.*, pp. 22:15-20; p. 24:12-15.

<sup>5</sup> *N.T.*, pp. 23:23—24:1.

<sup>6</sup> *N.T.*, p. 24:12-25.

<sup>7</sup> *N.T.*, pp. 17:19—18:11.

<sup>8</sup> *Pennsylvania Provisional Voting Guidance*, Pennsylvania Department of State, Ver. 2.1, March 11, 2024.

In reviewing the decision of the Election Board to accept the Wagner Ballot, we are mindful of those election law principles long-recognized by our appellate courts, including by the Commonwealth Court in its opinion in *Dayhoff v. Weaver*, 808 A.2d 1002 (Pa. Commw. Ct. 2002), wherein the Commonwealth Court wrote:

The vote may be the central act in our democratic form of government. To advance the goal of free and fair elections, the legislature enacted the Election Code, and it is often said that in the interest of preventing fraud, the terms of the Election Code must be strictly enforced. *E.g., In re Luzerne County Return*, 447 Pa. 418, 290 A.2d 108 (1972). At the same time, the purpose of the Election Code is to protect, not defeat, a citizen's vote. Our Supreme Court has directed that technicalities should not make the right to vote insecure, but instead, the statute should be construed to indulge that right. *Appeal of James*, 377 Pa. 405, 105 A.2d 64 (1954). These principles are difficult to reconcile. On balance, we believe that they mean that the terms of the Election Code must be satisfied without exception, but where, as a factual matter, voter intent is clear, questions should be resolved in favor of holding that the Election Code has been satisfied.

*Dayhoff*, 808 A.2d at 1006. As noted by the Commonwealth Court in its opinion in *Dayhoff*, the Pennsylvania Supreme Court has repeatedly recognized the need to construe the Election Code liberally in favor of enfranchisement where fraud is not an issue and a voter's intent is clear. In its opinion in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 663 Pa. 283, 241 A.3d 1058 (2020), our Supreme Court wrote:

We begin by recognizing from the outset that it is the "longstanding and overriding policy in this Commonwealth to protect the elective franchise." *Shambach v. Bickhart*, 577 Pa. 384, 845 A.2d 793, 798 (2004). "The Election Code must be liberally construed so as not to deprive ... the voters of their right to elect a candidate of their choice." *Ross Nomination Petition*, 411 Pa. 45, 190 A.2d 719, 719 (1963). It is therefore a well-settled principle of Pennsylvania election law that "[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." *Appeal of Norwood*, 382 Pa. 547, 116 A.2d 552, 554-55 (1955).

*Id.*, 241 A.3d at 1062. Here, in reliance on these principles, and in light of the fact that there has been no assertion of fraud with respect to the Wagner Ballot and also noting that Wagner's

electoral intent was made exceedingly clear by his credible testimony, we affirmed the decision of the Election Board to accept for canvassing Wagner's provisional ballot as cast.

## **II. THE O'DONNELL BALLOT**

Appellant presented the testimony of Shane Francis O'Donnell (hereinafter referred to as "O'Donnell") in challenging the decision of the Election Board not to accept his provisional ballot as cast in Butler Township. O'Donnell testified that he appeared in person at a Butler Township polling place to cast his vote in the 2024 Primary Election.<sup>9</sup> Upon presentment, O'Donnell was informed by poll workers at the Butler Township polling place that he was not currently registered to vote in Butler Township, but as he had been registered to vote previously at that polling place, he was allowed to fill out and cast a provisional ballot.<sup>10</sup> As of the date of the Primary Election—April 23, 2024—O'Donnell was no longer registered to vote in Butler Township, Luzerne County, because he had opted to change his voter registration to the Borough of McAdoo, Schuylkill County, when he renewed his vehicle registration to register his vehicle at the McAdoo address in December of 2023.<sup>11</sup> In June of 2023, O'Donnell had purchased a home in McAdoo.<sup>12</sup> Between June of 2023 and March 29, 2024, O'Donnell had been renovating the McAdoo home for the purpose of transferring his residence there, and had been residing with his mother and brother in Butler Township.<sup>13</sup> On March 29, 2024, O'Donnell took up residence at the McAdoo home.<sup>14</sup> We found the testimony of O'Donnell credible.

Emily Cook (hereinafter referred to as "Cook"), Acting Director of Luzerne County Elections, confirmed by way of her testimony on this issue that at the time of the April 23, 2024,

---

<sup>9</sup> *N.T.*, p. 34:7-16.

<sup>10</sup> *N.T.*, p. 34:13-17.

<sup>11</sup> *N.T.*, pp. 33:12—34:6.

<sup>12</sup> *N.T.*, p. 31:13-14.

<sup>13</sup> *N.T.*, pp. 31:13—32:22.

<sup>14</sup> *N.T.*, p. 32:5-12.

Primary Election, O'Donnell was actively registered to vote in Schuylkill County and did not have an active voter registration in Luzerne County.<sup>15</sup> Cook also testified that subsequent to a change in the Pennsylvania Department of Transportation (DOT) vehicle registration system in the summer of 2023, a person registering their vehicle would have to affirmatively opt out of concurrently updating their voter registration to the address at which a vehicle is being registered.<sup>16</sup> Cook testified that the Election Board received a notification from DOT that as of December 21, 2023, O'Donnell had transferred his voter registration to Schuylkill County,<sup>17</sup> and that when the Election Board receives such a notification, the procedure is to cancel the active voter registration within Luzerne County and transfer the voter's registration data to the new county in which the voter is registered.<sup>18</sup> Cook testified that the effect of the policy of the Election Board with respect to the issue of a voting registration having been transferred to another county is that voters no longer registered in Luzerne County are no longer able to vote in Luzerne County, but instead are able to vote in their county of residence and registration.<sup>19</sup> We found the testimony of Cook credible.

Section 701 of the Election Code provides as follows:

Every citizen of this Commonwealth, eighteen years of age, possessing the following qualifications, shall be entitled to vote at all elections, provided he or she has complied with the provisions of the acts requiring and regulating the registration of electors:

...

(3) He or she shall have resided in the election district where he or she shall offer to vote at least thirty days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his residence within thirty days preceding the election.

---

<sup>15</sup> *N.T.*, p. 39:5-13.

<sup>16</sup> *N.T.*, pp. 39:22—40:14.

<sup>17</sup> *N.T.*, p. 45:11-15.

<sup>18</sup> *N.T.*, pp. 40:15—41:8.

<sup>19</sup> *See N.T.*, p. 47:20-23.



25 P.S. § 2811. Despite, again, the seemingly permissive 30-day window provided for by Section 701 of the Election Code, the Election Board decided not to accept the O'Donnell Ballot.

In reviewing the decision of the Election Board not to accept this ballot—and in light of the credible testimony of record—we, again, keep in mind the principles enunciated by the appellate courts of our Commonwealth with respect to the preference for a liberal construction of the Election Code to favor enfranchisement where there is no evidence of fraud and a voter's intent is clear. *See, e.g., Dayhoff, supra*. We read the jurisprudence of our Commonwealth to emphasize protection against disenfranchisement. Where, however, the record demonstrates clearly that a voter, such as O'Donnell, maintains his elective franchise with an active voter registration at his place of residence on the date of an election, no danger of disenfranchisement exists where such a voter elects to attempt to cast a vote in the municipality of their former residence while fully possessing the ability to instead cast a vote in the municipality of their current residence. O'Donnell registered his vehicle in and changed his voter registration to McAdoo in December of 2023, and transferred his residence to McAdoo in March of 2024. But for O'Donnell's decision not to attempt to cast a vote in McAdoo, nothing prevented O'Donnell from exercising his franchise in the place of his residence and active voter registration for the April 23, 2024, Primary Election. As the decision of the Election Board not to accept the O'Donnell Ballot has visited upon O'Donnell no actual disenfranchisement, we find no fault with and affirm the decision of the Election Board.

### **III. CONCLUSION**

For all of the above reasons we entered our Order of May 15, 2024, and enter the attached order for transmission of the record in accordance with the directive of the May 21, 2024, Order of the Commonwealth Court filed to 628 C.D. 2024.