

IN THE SUPREME COURT OF PENNSYLVANIA

No. 55 MAP 2024

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

APPEAL OF: JAMIE WALSH

**BRIEF OF APPELLANT
JAMIE WALSH**

On appeal from the July 1, 2024 Order of the Commonwealth Court in Docket No. 628 C.D. 2024, which reversed the May 15, 2024 Order of the Honorable Tina Polachek Gartely, the Honorable Richard M. Hughes, III and the Honorable Fred A. Peirantoni, III, Judges of the Court of Common Pleas of Luzerne County, No. 2024-05082, that affirmed May 3, 2024 decisions of the Luzerne County Election Board

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Date: July 31, 2024

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I. STATEMENT OF JURISDICTION.

This Court has jurisdiction over this matter pursuant to 42 Pa.C.S. § 724(a).

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II. ORDER IN QUESTION.

The text of the order of the Commonwealth Court in question is as follows:

ORDER

AND NOW, this 1st day of July, 2024, the Luzerne County Common Pleas Court's May 15, 2024 order is reversed.

/s/ Anne E. Covey

ANNE E. COVEY, Judge^[1]

The Order from the Court of Common Pleas of Luzerne County that was reversed by the Commonwealth Court is as follows:

ORDER

AND NOW, this 15th 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 Mi 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:**

¹ A copy of this Order is attached to the Commonwealth Court's majority opinion at Exhibit C.

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.RC.P. 236.

BY THE COURT,

/s/ Tina P. Gartley

Tina Polachek Gartely

/s/ Richard M. Hughes, III

Richard M. Hughes, III

/s/ Fred A. Peirantoni, III

Fred A. Peirantoni, III^[2]

² As a Reproduced Record is not being provided with this Brief, the trial court's order is attached hereto at Exhibit A.

III. STATEMENT OF STANDARD AND SCOPE OF REVIEW.

This matter involves the interpretation of the Election Code, 25 P.S. §§ 2601 *et seq.*, this matter presents a question of law for which this Court's standard of review is *de novo* and its scope of review is plenary. *See, e.g., Banfield v. Cortés*, 110 A.3d 155, 166 (Pa. 2015).

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IV. STATEMENT OF THE QUESTIONS INVOLVED.

A. Whether, as a matter of first impression and of significant public importance and because this opinion conflicts with a holding of this Court, an unsigned provisional ballot should be counted where the voter demonstrated “exceedingly clear” electoral intent, acted in conformity with instructions of election officials and subsequently verified that his ballot had been counted?

SUGGESTED ANSWER: Yes.

B. Whether, as a matter of significant public importance, a provisional ballot submitted by a voter domiciled and registered to vote elsewhere should be rejected?

SUGGESTED ANSWER: Yes.

V. STATEMENT OF THE CASE.

Appellant Jamie Walsh (“Appellant”) and his opponent, Appellee Mike Cabell (“Appellee”), both sought the Republican nomination to represent the 117th District in the Pennsylvania House of Representatives in the April 23, 2024 primary election. Appellant led Appellee by three votes prior to the Commonwealth Court’s decision, and, based on a canvass of remaining provisional ballots that occurred on Friday, July 12, 2024, Appellant leads Appellee by five votes.³ Due to the razor-thin margin of votes, the outcome of this petition may very well decide which candidate appears on the 2024 General Election ballot.

Two provisional ballots are at issue in this matter, and, below, the Luzerne County Election Board (“Election Board”) decided to count a provisional ballot submitted by Mr. Timothy James Wagner (“Wagner”) based on guidance issued by the Pennsylvania Department of State. *See* Trial Court opinion, attached hereto at Exhibit B at 3⁴ n.8 (citing *Pennsylvania Provisional Voting Guidance*, Pennsylvania Department of State, Ver. 2.1, March 11, 2024); *see also* Exhibit C at 2-3. The Election Board rejected Mr. O’Donnell’s provisional ballot where he was domiciled and registered to vote elsewhere. *See* Exhibit B at 5-7; Exhibit C at 2-3.

³ *See* Steve Ulrich, *HD-117: State Supreme Court Denies Cabell Appeal; State House Race Nearing End*, PoliticsPA, July 24, 2024, available at <https://www.politicspa.com/hd-117-state-supreme-court-denies-cabell-appeal-state-house-race-nearing-end/137611/> (last accessed July 29, 2024).

⁴ As noted by the Commonwealth Court, the trial court’s opinion is not numbered.

Respondent appealed to the Luzerne County Court of Common Pleas, and the trial court took evidence and testimony from Messrs. Wagner and O'Donnell. Specifically, Mr. Wagner testified that he appeared in person at his Lake Township polling place to vote in the primary election. *See* Exhibit C at 3 (citing Transcript of May 9, 2024 Hearing (“Tr.”) at 21). As Mr. Wagner had requested but not returned a mail-in ballot, Mr. Wagner was instructed by poll worker to complete a provisional ballot. *Id.* (citing Tr. at 22). A senior election worker provided instructions to Mr. Wagner, both in completing the ballot and in completing the accompanying envelope. *Id.* (citing Tr. at 24). Mr. Wagner followed those instructions, and, after receiving paperwork from the election worker, subsequently called to verify that his ballot was accepted. *Id.* (citing Tr. at 22-23). While Mr. Wagner signed the required affidavit for his provisional ballot, he did not add a second signature on the outer envelope.

As to Mr. O'Donnell, the testimony and evidence revealed that Mr. O'Donnell had voluntarily changed his voter registration to his new home in McAdoo, Schuylkill County as of December of 2023. *See* Exhibit B at 5 (citing Tr. at 33-34). When Mr. O'Donnell had transferred his voter registration to Schuylkill County in December of 2023, the Election Board cancelled Mr. O'Donnell's registration and transferred “the voter's registration data to the new county in which the voter is registered.” *See id.* at 6 (citing Tr. 40-41). In accordance with the

Election Board’s policy, voters registered in another county are “able to vote in their county of residence and registration,” but not in the Luzerne County. *Id.* at 9 (citing Tr. at 47). Mr. O’Donnell, the first cousin of Respondent, claimed that he had been residing with his mother and brother in Butler Township between June of 2023 and March 29, 2024. *See* Exhibit C at 4 (citing Tr. 31-32).

The trial court, in light of case law interpreting the Election Code in favor of ensuring enfranchisement in the absence of fraud and in the presence of a clear voter intent, affirmed the Election Board’s decision to cavass Mr. Wagner’s ballot because his intent was “exceedingly clear” and because there was no allegation of fraud. *See* Exhibit B at 4-5. With respect to Mr. O’Donnell, the trial court affirmed the Election Board’s decision to reject Mr. O’Donnell’s provisional ballot because, since Mr. O’Donnell could have – but chose not to – vote at his new residence in Schuylkill County, he was not disenfranchised as a result of his voluntary decision to change his voter registration. *Id.* at 7.

With respect to Mr. Wagner’s ballot, a majority of the three-judge panel of the Commonwealth Court reversed the trial court based on an unreported memorandum opinion in *In re: Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, No. 1161 C.D. 2020, 241 A.3d 695 (Pa. Commw. Nov. 20, 2020) (unreported) (“*Allegheny County*”) and held that, despite the fact that Mr. Wagner followed the instructions of elections officials, his clear intent and the absence of

any allegation of fraud, his vote should not be counted as a result of 25 P.S. § 3050(a.4)(5)(ii)(A). *See* Exhibit C at 6-8. Judge Wolf dissented as to Mr. Wagner’s ballot, noting that, under a 2020 Pennsylvania Supreme Court decision in *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020) (“*Canvass*”), this Court reaffirmed that the Election Code should be liberally construed in favor of ensuring the right of suffrage and because “the sole defect of Mr. Wagner’s provisional ballot is a technical one.” *See* Concurring and Dissenting Opinion of Judge Wolf, attached hereto at Exhibit D at 1-6.

With respect to Mr. O’Donnell’s provisional ballot, the entire panel found that “O’Donnell moved out of the [election district] on Mach 29, 2024” and, as a result, was permitted to vote in Luzerne County as of the 2024 Primary Election as a result of 25 P.S. § 2811. *See* Exhibit C at 10-11.

On July 10, 2024, Appellant filed a Petition for Allowance of Appeal, which was docketed before this Court at *In re: Canvass of Provisional Ballots in the 2024 Primary Election*, 328 MAL 2024. On July 24, 2024, this Court entered an order granting Appellant’s Petition for Allowance of Appeal as to the following issues:

(1) Whether, as a matter of first impression and of significant public importance and because this opinion conflicts with a holding of this Court, an unsigned provisional ballot should be counted where the voter demonstrated “exceedingly clear” electoral intent, acted in conformity with instructions of election officials and subsequently verified that his ballot had been counted?

(2) Whether, as a matter of significant public importance, a provisional ballot submitted by a voter domiciled and registered to vote elsewhere should be rejected?

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VI. SUMMARY OF ARGUMENT.

Where a voter expresses clear electoral intent, follows the instructions of election officials and later confirms that his provisional vote has been recorded, that vote should be counted in the absence of any allegation of fraud for the purpose of ensuring the franchise.

Similarly, where a voter takes affirmative steps to register to vote and become domiciled in another election district more than 30 days prior to an election, that voter, while free to vote in his new election district, cannot be permitted to vote in his former election district.

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VII. ARGUMENT.

A. As Mr. Wagner expressed a clear electoral intent, followed the instructions of election workers and confirmed that his ballot was counted, his provisional ballot should be counted in the absence of any allegation of fraud.

Where a voter expresses clear electoral intent and follows the instructions of election officials when completing a provisional ballot, such a ballot should be counted in the absence of any allegation of fraud. Here, as Mr. Wagner expressed a clear electoral intent, followed the instructions of elections officials and even confirmed that his vote was counted, his provisional ballot should be counted where no allegation of fraud was raised. The Commonwealth Court erred in otherwise holding.

The basis for the Commonwealth Court's decision is its unreported, non-binding⁵ 2-1 panel decision in *In re: Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, No. 1161 C.D. 2020, 241 A.3d 695 (Pa. Commw. Nov. 20, 2020) (unreported) ("*Allegheny County*"). In that case, the majority of a panel of the Commonwealth Court held that, under the plain language of 25 P.S. § 3050(a.4), provisional ballots that failed to include statutorily-required signatures should not be counted, even if the intent of the voter was clear and even if there

⁵ See 210 Pa. Code § 69.414(a).

was “evidence of election officials providing misleading advice to voters.”

Allegheny County, 241 A.3d 695 at *3-4.

In the decision under review, the Commonwealth Court extensively quoted from the unreported, 2-1 panel decision in *Allegheny County* for the proposition that, because 25 P.S. § 3050(a.4)(5)(ii)(A) requires the provisional ballot envelope to be signed, the plain text of the Election Code applies, despite Mr. Wagner’s clear legislative intent. *See* Exhibit C at 6-8.

As pointed out in Judge Wolf’s concurring and dissenting opinion, the problem with *Allegheny County* is that it conflicts with this Court’s decision in *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020) (“*Canvass*”). *See* Exhibit D at 1-6. In *Canvass*, this Court, in reviewing whether to accept mail-in and absentee ballots who failed to write their name, address and/or dates, reaffirmed the longstanding principle that “the Election Code should be liberally construed so as to not deprive, inter alia, electors of their right to elect a candidate of their choice.” *Canvass*, 241 A.3d at 1062 (citing *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) and *Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954)). As result of the liberal interpretation of the Election Code to ensure that voters are not disenfranchised, this Court concluded that boards of election should not disqualify mailed ballots missing certain information in the absence of fraud or irregularity. *Id.*

In *Canvass*, this Court was clear in reaffirming the longstanding principle that

Election laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.

Canvass, 241 A.3d at 1062.

In the context of mail-in ballots, this Court found that, although the Election Code used the word “shall” with respect to dating mail-in and absentee envelopes, this Court noted that the use of the word “‘shall’ is not determinative as to whether the obligation is mandatory or directive in nature.” *Id.* at 1076. Because a handwritten date was made “unnecessary” as a result of the date-stamping of ballots by county boards of election, this Court held that the obligation to date a mail-in or absentee ballot was not mandatory and that, as a result, ballots with the omission of a handwritten date should be counted. *Id.* at 1077.

Here, like the statutory provisions considered in *Canvass*, the Election Code uses the word “shall,” this time in the context of returning provisional ballots. *See* 25 P.S. § 3050(a.4)(5)(ii). This Court should follow its holding in *Canvass* by similarly holding that “shall” in this context is directive, rather than mandatory,

because of the context of submitting provisional ballots. In order to vote provisionally, an elector must appear at a polling place, just as Mr. Wagner did here. *See* Exhibit C at 3 (citing Tr. at 21). Because Mr. Wagner had requested but did not return his mail-in ballot, *id.* (citing Tr. at 22), Mr. Wagner could only vote provisionally. 25 P.S. § 3150.13(e) (noting that voters who have not timely returned mail-in ballots “may only vote on election day by provisional ballot...”).

As Mr. Wagner had requested a mail-in ballot, his name and address appeared on the list of such electors that was required to be delivered to the polling place under 25 P.S. § 3146.2c(c). Because his name and address appeared on that list, a poll worker appropriately instructed Mr. Wagner to complete a provisional ballot. *See* Exhibit C at 3 (citing Tr. at 22). In other words, because Mr. Wagner appeared in person, election workers verified his name and address through consulting the mail-in ballot list under 25 P.S. § 3146.2c(c). The provisional ballot itself includes an affidavit – signed by voter, the Judge of Elections and the minority inspector – affirming (1) the voter’s name, date of birth, address, municipality and county of residence and (2) that the provisional ballot “is the only ballot” the voter cast during that election. 25 P.S. § 3050(a.4)(2). Because Mr. Wagner’s identity was confirmed through both consulting the mail-in ballot list 25 P.S. § 3146.2c(c) and through the affidavit within the secrecy envelope under 25 P.S. § 3050(a.4)(2), the requirement for Mr. Wagner to place an additional

signature on the front of the outer provisional ballot envelope as set forth under 25 P.S. § 3050(a.4)(3) was unnecessary and superfluous.

Such a result is further buttressed by the fact that provisional ballots can only be submitted in person at the polling place, directly to the poll workers. Here, it is undisputed that Mr. Wagner followed the instructions of a senior election worker in completing the ballot and accompanying envelope. *See* Exhibit C (citing Tr. at 24). After receiving paperwork from the election worker, Mr. Wagner subsequently called to verify that his ballot was accepted. *Id.* (citing Tr. at 22-23). Mr. Wagner's actions resulted in the trial court finding that his electoral intent was "exceedingly clear." *See* Exhibit B at 5. In the absence of any allegation of fraud, this Court should follow its decision in *Canvass* by finding that Mr. Wagner's failure to sign the outer provisional ballot was a mere technical error and that, as a result, his ballot should be counted.

B. Where Mr. O'Donnell was domiciled elsewhere more than 30 days prior to the election, the Commonwealth Court erred in accepting his provisional ballot.

With respect to the O'Donnell provisional ballot, the Election Code provides, in order to vote, a citizen must have, among other things, "have resided in the election district where he or she shall offer to vote at least thirty days immediately preceding the election..." 24 P.S. § 2811(3). In the event that a voter is "qualified to vote in an election district prior to removal of residence, he or she

may ... vote in the election district from which he or she removed his or her residence within thirty days preceding the election.” *Id.*

Both the Election Code and case law, however, has clarified that “residence” for purpose of this provision means a person’s domicile. The Election Code, for example, provides, in relevant part, that

In determining the residence of a person desiring to register or vote, the following rules shall be followed so far as they may be applicable:

- (a) That place shall be considered the residence of a person **in which his habitation is fixed**, and to which, whenever he is absent, **he has the intention of returning**.

....

- (c) A person shall not be considered to have gained a residence in any election district of this State into which he comes for temporary purposes only, without the intention of making such election district his **permanent place of abode**.

....

25 P.S. § 2814 (emphasis added). As this Court has previously stated

The courts have never accepted the contention sometimes made that a man’s legal residence is **wherever he says it is** or where he says he intends it to be. An individual’s legal residence is a question of fact which the state has a paramount interest in determining. A voter can vote only where his legal residence is...

In re Stabile, 36 A.2d 451, 452 (Pa. 1944) (emphasis added); *In re Nomination*

Petition of Driscoll, 847 A.2d 44, 49–50 (Pa. 2004) (“[A]s made clear by section

704, while a person may have several residences, only one of those residences may qualify as that person’s residence or domicile for purposes of the Election Code”).

The question before this Court is whether the Commonwealth Court erred in permitting Mr. O'Donnell to vote in his former election district where the testimony demonstrated that he was domiciled in Schuylkill County more than 30 days prior to the 2024 primary election. As long ago explained by this Court in the context of the Election Code, a "domicile" refers to "a fixed, permanent, final home to which one always intends to return," as opposed to a habitation, which is "an abode for the moment" or "a tarrying place for some specific purpose of business or pleasure." *In re Lesker*, 105 A.2d 376, 380 (Pa. 1954); *see also In re Shimkus*, 946 A.2d 139, 148 (Pa. Commw. 2008) (noting that, in the context of running for public office, such "definitions are helpful in that they establish that, whether one uses the term residence or domicile, one's residence ... must be a habitation where one has put down roots, not a place where one has hoisted a flag of convenience").

Here, the trial court found that Mr. O'Donnell had voluntarily changed his voter registration to his new home in McAdoo, Schuylkill County as of December of 2023. *See* Exhibit B at 5 (citing Tr. at 33-34). When Mr. O'Donnell had transferred his voter registration to Schuylkill County in December of 2023, the Election Board cancelled Mr. O'Donnell's registration and transferred "the voter's registration data to the new county in which the voter is registered." *See id.* at 6 (citing Tr. 40-41). In accordance with the Election Board's policy, voters registered

in another county are “able to vote in their county of residence and registration,” but not in the Luzerne County. *Id.* 9 (citing Tr. at 47). Although Mr. O’Donnell, the first cousin of Respondent, claimed that he had been residing with his mother and brother in Butler Township between June of 2023 and March 29, 2024, *see* Exhibit C at 4 (citing Tr. 31-32), he was domiciled at his permanent home in Schuylkill County as of December of 2023 and had the intention of returning to his home in that county upon the completion of renovations. *See* Exhibit B at 5 (citing Tr. at 31-32).

As set forth above, the Election Code specifically provides that

(b) A person shall not be considered to have lost his residence who leaves his home and goes into ... another election district of this State for temporary purposes only, with the intention of returning.

(c) A person shall not be considered to have gained a residence in any election district of this State into which he comes for temporary purposes only, without the intention of making such election district his permanent place of abode.

25 P.S. §§ 2814(b)-(c). In the present case, Mr. O’Donnell lost his residence (for purposes of the Election Code) at the time he purchased a home in Schuylkill County, transferred his vehicle registration and transferred his voter registration to that county, as he, according to the trial court, was *temporarily* residing with his mother and brother while renovations were underway at his domicile in Schuylkill County. *See* Exhibit B at 5-7. The fact that O’Donnell physically moved into his domicile in Schuylkill County from his temporary residence on March 29, 2024 is

of no importance as he had already signaled his intent to be domiciled in Schuylkill County as of December of 2023. Just because O'Donnell – Respondent's cousin – claimed he resided in Luzerne County does not make it so. *In re Stabile*, 36 A.2d at 452 (“The courts have never accepted the contention sometimes made that a man's legal residence is **wherever he says it is...**”) (emphasis added).

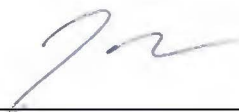
The question of whether a voter is domiciled in an election district is one of fact, and, because the testimony and evidence in the present matter demonstrate that Mr. O'Donnell had become domiciled in Schuylkill County more than 30 days prior to the 2024 primary election, the Commonwealth Court erred in holding that Mr. O'Donnell's provisional ballot should be counted. While Mr. O'Donnell was certainly free to vote in the election district in which his domicile was located, he was unable to choose which election district in which to vote when he had taken affirmative steps to establish his domicile in Schuylkill County. For these reasons, Appellant respectfully asks this Court to find that Mr. O'Donnell's provisional ballot should not be counted.

VIII. CONCLUSION.

For the reasons set forth above, Appellant respectfully asks this Honorable Court to find that (1) Mr. Wagner's provisional ballot that was missing a signature on the outer provisional envelope should be counted in light of his "exceedingly clear" electoral intent and his following of instructions of election officials in the absence of any allegation of fraud; and/or (2) Mr. O'Donnell's provisional ballot should not be counted where the record establishes that he was domiciled elsewhere more than 30 days prior to the 2024 primary election.

Respectfully submitted,

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Dated: July 31, 2024

CERTIFICATE OF COMPLIANCE – PUBLIC ACCESS

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial Systems of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents

/s/ J. Chadwick Schnee, Esq.
J. Chadwick Schnee, Esq.
PA ID 306907

CERTIFICATE OF COMPLIANCE – WORD COUNT

I certify that this filing complies with the word count limits set forth under Pa. R.A.P. 2135(a)(1).

/s/ J. Chadwick Schnee, Esq.
J. Chadwick Schnee, Esq.
PA ID 306907

EXHIBIT A

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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 15th 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:**

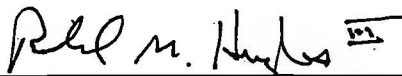
The *Petition for Review in the Nature of a Statutory Appeal Pursuant to Section 1210 of the Election Code* is **DENIED**. Accordingly, the decisions of the Luzerne County Election Board are **AFFIRMED**.

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

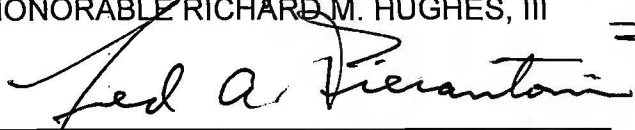
BY THE COURT,



THE HONORABLE TINA POLACHEK GARTLEY



THE HONORABLE RICHARD M. HUGHES, III



THE HONORABLE FRED A. PEIRANTONI, III

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EXHIBIT B

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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 117th District: (1) to accept

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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 117th 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.¹ 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.² 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.³ Wagner followed the instructions of the poll worker with respect to the mechanics of casting his vote by way of

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

² *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.

³ *N.T.*, pp. 22:7—23:19.

provisional ballot⁴ and testified, unequivocally, that he intended to and believed that he did cast his vote in the 117th District nominating contest for Jamie Walsh.⁵ 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.⁶ 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 cast⁷ 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.⁸

⁴ *N.T.*, pp. 22:15-20; p. 24:12-15.

⁵ *N.T.*, pp. 23:23—24:1.

⁶ *N.T.*, p. 24:12-25.

⁷ *N.T.*, pp. 17:19—18:11.

⁸ *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.⁹ 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.¹⁰ 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 2023.¹¹ In June of 2023, O'Donnell had purchased a home in McAdoo.¹² 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.¹³ On March 29, 2024, O'Donnell took up residence at the McAdoo home.¹⁴ 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,

⁹ *N.T.*, p. 34:7-16.

¹⁰ *N.T.*, p. 34:13-17.

¹¹ *N.T.*, pp. 33:12—34:6.

¹² *N.T.*, p. 31:13-14.

¹³ *N.T.*, pp. 31:13—32:22.

¹⁴ *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.¹⁵ 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.¹⁶ 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,¹⁷ 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.¹⁸ 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.¹⁹ 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.

¹⁵ *N.T.*, p. 39:5-13.

¹⁶ *N.T.*, pp. 39:22—40:14.

¹⁷ *N.T.*, p. 45:11-15.

¹⁸ *N.T.*, pp. 40:15—41:8.

¹⁹ *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.

EXHIBIT C

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Canvass of Provisional Ballots :
in the 2024 Primary Election :
: No. 628 C.D. 2024
Appeal of: Mike Cabell : Submitted: May 31, 2024

BEFORE: HONORABLE ANNE E. COVEY, Judge
HONORABLE STACY WALLACE, Judge
HONORABLE MATTHEW S. WOLF, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY

FILED: July 1, 2024

Mike Cabell (Appellant)¹ appeals from the Luzerne County (County) Common Pleas Court's (trial court) May 15, 2024 order denying his appeal from the County Elections Board's (Board) decisions that accepted a provisional ballot without the required voter signature on the provisional ballot envelope and rejected a provisional ballot by a voter registered to vote in another legislative district. There are four issues before this Court: (1) whether the trial court erred by ignoring the plain language of Section 1210(a.4)(5)(ii)(A) of the Pennsylvania Election Code (Election Code),² which provides that a provisional ballot shall not be counted if the provisional ballot envelope is not signed by the voter; (2) whether the trial court erred by permitting Timothy James Wagner (Wagner) to testify at the hearing because he waived his opportunity to testify with regard to his provisional ballot (Wagner Ballot) by not appearing at the Board hearing; (3) whether the trial court

¹ Appellant is a candidate in the Republican 2024 Primary Election for Representative in the Pennsylvania General Assembly from the 117th Legislative District.

² Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. § 3050(a.4)(5)(ii)(A).

erred by permitting Wagner to waive his right to secrecy of his vote when he testified for whom he cast his vote in violation of article VII, section 4 of the Pennsylvania Constitution, PA. CONST. art. VII, § 4; and (4) whether the trial court erred by rejecting the provisional ballot by a voter registered to vote in his new voting district when the voter still resided in his original voting district within the 30 days preceding the 2024 Primary Election. After review, this Court reverses.

Various voting districts in the County returned dozens of provisional ballots to the Board following the 2024 Primary Election for the Republican Party nomination for the Office of Representative in the General Assembly from the 117th Legislative District. On April 29, 2024, the Board held a public hearing, during which all interested parties were afforded an opportunity to review the provisional ballots submitted in precincts located within the 117th Legislative District. *See* Pet. for Rev. ¶ 14. After review, Republican candidate James Walsh (Candidate Walsh) challenged 12 of the provisional ballots that the Board had voted to accept. *See* Pet. for Rev. ¶ 15. Appellant challenged the Wagner Ballot (that was accompanied by a properly executed affidavit) on the ground that the provisional ballot envelope was not signed. *See* Pet. for Rev. ¶ 16. Thus, challenges were lodged on a total of 13 provisional ballots, all of which the Board had voted to accept. *See* Pet. for Rev. ¶ 17. On April 30, 2024, the Board also considered three additional provisional ballots, including the provisional ballot submitted by Shane O'Donnell (O'Donnell) (O'Donnell Ballot), a voter registered to vote in another district. *See* Pet. for Rev. ¶ 20.

The Board scheduled a hearing for May 3, 2024, to determine the validity of the challenged provisional ballots, and the O'Donnell Ballot. *See* Pet. for Rev. ¶ 21. Relevant here, on May 3, 2024, after the hearing, the Board upheld its

decision to canvass the Wagner Ballot, and rejected the O'Donnell Ballot. *See* Pet. for Rev. ¶¶ 26, 32. Appellant appealed to the trial court.

The trial court held a hearing during which Wagner testified. Wagner related that, on April 23, 2024, he appeared in person at his Lake Township polling place to vote in the 2024 Primary Election. *See* Notes of Testimony, May 9, 2024 (N.T.) at 21. He explained that a poll worker informed him that because he had been issued and did not return his mail-in ballot, he would need to complete a provisional ballot. *See* N.T. at 22. Wagner also testified that he followed the instructions of a senior election worker in completing the ballot and its accompanying envelope. *See* N.T. at 24.

Specifically, Wagner described:

If I can, if I'm allowed, I was more or less being led on how to do this. I have never had to go and sit down at a table and do this throwing out of ballots. And the lady, I guess whatever she was, the head, she basically was leading me through everything. She was telling me what to do, what not to do.

And yes, by the time I finished she had actually said I put the date on something for you so you didn't have to. And she gave me this paper and said this - I said, What's this? She goes, [w]ell, read it and follow the directions on it. It said call in five days to check and see if my ballot was accepted. And I did call. And they gave me another phone number to call. And when I called the other number they said, [y]ep, we have your ballot. It's good. It's accepted. You're verified.

N.T. at 22-23.

Based on the above, the trial court determined:

[I]n 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, [the trial court] affirmed the

decision of the [] Board to accept for canvassing Wagner's provisional ballot as cast.

Trial Ct. Op. at 4-5.³

O'Donnell also testified at the trial court hearing. O'Donnell related that he appeared in person at his Butler Township polling place, Edgewood District 3 (District), to vote in the 2024 Primary Election, but the poll workers informed him that they could not find his name on their voter list. *See* N.T. at 34. O'Donnell stated that a poll worker let him vote by provisional ballot because he had previously voted at the District. *See id.* O'Donnell further explained that he had purchased a home outside of the District in June of 2023; however, he had been residing with his mother and brother in Butler Township from June of 2023 through March 29, 2024, while he renovated his new home. *See* N.T. at 31-32. The trial court "found the testimony of O'Donnell credible[,]” and further found that, “[o]n March 29, 2024, O'Donnell took up residence at the [new] home.” Trial Ct. Op. at 5; *see also* N.T. at 32.

Referencing the Board's decision, the trial court stated: “Despite, again, the seemingly permissive 30-day window provided for by Section 701 of the Election Code,^[4] the [Board] decided not to accept the O'Donnell Ballot.” Trial Ct. Op. at 7. The trial court nonetheless reasoned:

But for O'Donnell's decision not to attempt to cast a vote in [his new voting district], 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 [Board] visited upon O'Donnell no actual disenfranchisement, [the trial court] find[s] no fault with and affirm[s] the decision of the [Board].

³ The trial court's opinion pages are not numbered.

⁴ 25 P.S. § 2811.

Id. Appellant appealed to this Court.⁵

Preliminarily, the Board asserts that Appellant is trailing his opponent by three votes. The Board maintains that Appellant's challenges to the Wagner Ballot and O'Donnell Ballot are not capable of changing the outcome of the 2024 Primary Election and, as a result, this appeal is moot.

This Court has explained:

It is well settled that an actual case or controversy must be extant at all stages of litigation, not merely at the time that a complaint is filed; otherwise, this Court will dismiss an appeal as moot. *Harris v. Rendell*, 982 A.2d 1030, 1035 (Pa. Cmwlth. 2009). An “actual case or controversy” is one that is real rather than hypothetical and affects someone in a concrete manner so as to provide a factual predicate for reasoned adjudication. *Finn v. Rendell*, 990 A.2d 100, 105 (Pa. Cmwlth. 2010). Exceptions to the mootness doctrine may be made where the conduct complained of is capable of repetition yet likely to evade judicial review, where the case involves issues of great public importance, or where one party will suffer a detriment without the court's decision. *Horsehead Res. Dev. Co., Inc. v. Dep't of Env't Prot.*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001). As a pure question of law, the issue of mootness is subject to a *de novo* standard of review. *Commonwealth v. Dixon*, . . . 907 A.2d 468, 472 ([Pa.] 2006).

Gray v. Phila. Dist. Att'y's Off., 311 A.3d 1230, 1236 (Pa. Cmwlth. 2024).

Here, however, there are two additional appeals involving Appellant and Candidate Walsh concerning ballots cast in the 2024 Primary Election also pending in this Court, i.e., *In re: Six Ballots in the 2024 General Primary Election* (Pa. Cmwlth. No. 629 C.D. 2024), and *In re: Petition to Cumulate Write-In Votes in*

⁵ This Court's review “in election contest cases is limited to [an] examination of the record to determine whether the trial court committed errors of law and whether the [trial court's] findings [a]re supported by adequate evidence.” *Dayhous v. Weaver*, 808 A.2d 1002, 1005 n.4 (Pa. Cmwlth. 2002).

2024 Primary Election for Representative in the General Assembly from the 117th District (Pa. Cmwlth. No. 651 C.D. 2024). The first case involves the canvassing of 6 mail-in ballots, and the second case involves the canvassing of 22 write-in ballots. In addition, the 12 provisional ballots challenged before the Board on April 29, 2024, and potentially the 2 additional provisional ballots considered by the Board on April 30, 2024,⁶ will be canvassed once all appeals related to the 117th House District are resolved. *See* Section 1210(a.4)(4)(vi) of the Election Code, 25 P.S. § 3050(a.4)(4)(vi) (“Pending the final determination of all appeals, the [Board] shall suspend any action in canvassing and computing all challenged provisional ballots irrespective of whether or not an appeal was taken from the [Board’s] decision.”). Because these appeals and the canvassing of the other 12 provisional ballots are pending, the outcome of this case may affect the result of the 2024 Primary Election. Accordingly, the appeal is not moot.

Appellant argues relative to the Wagner Ballot that the trial court erred by ignoring the plain language of Section 1210(a.4)(5)(ii)(A) of the Election Code, declaring that a provisional ballot shall not be counted if the voter does not sign the provisional ballot envelope. The Board rejoins that well-settled precedent requires interpreting the Election Code in favor of enfranchisement.

Section 1210(a.4)(5)(ii) of the Election Code provides: “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). This Court has explained:

[I]t is uncontested that the ballots failed to conform to statutory requirements [of Section 1210(a.4)(5)(ii) of the Election Code]. [The a]ppellees’ position [] is premised upon the rule that we must interpret the Election Code

⁶ The record before this Court does not indicate whether the Board accepted or rejected these provisional ballots.

liberally in favor of the right to vote, and that we should avoid disenfranchising voters due to minor irregularities in their ballots. However, unlike matters which involve ambiguous statutory language where courts apply principles of statutory construction to interpret same, this matter requires no application of statutory construction principles, for the language is plain and unambiguous - the provisional ballots at issue “shall not be counted.” 25 P.S. § 3050(a.4)(5)(ii). Although we do not take lightly the disqualification of any ballot, it is a cardinal rule that, “[w]hen 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.” 1 Pa.C.S. § 1921(b); see *Tr[.] Under Agreement of Taylor*, 164 A.3d 1147, 1155 (Pa. 2017) [(*Taylor*)] (“If the language of the statute clearly and unambiguously sets forth the legislative intent, it is the duty of the court to apply that intent and not look beyond the statutory language to ascertain its meaning.”).

In re: Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election (Pa. Cmwlth. No. 1161 C.D. 2020, filed November 20, 2020), *appeal denied*, 242 A.3d 307 (Pa. 2020) (internal record citations omitted), slip op. at 7-8.⁷

The *Allegheny County* Court expounded:

Assuming . . . there was evidence of election officials providing misleading advice to these voters, [as in the case before this Court,] this Court, nonetheless, would be unable to excuse the defects in the ballot based on Pennsylvania Supreme Court precedent that, because our General Assembly “pronounced a bright-line rule couched in strong admonitory terms,” we “are not free to disregard the explicit legislative direction based on equitable considerations.” *In re Nomination Petition of Guzzardi*, 99 A.3d 381 (Pa. 2014) (candidate not excused from filing timely financial statement through principles of equity, even if the election office provided him with misleading information). In other words, “where the [l]egislature has

⁷ This Court’s unreported memorandum opinions issued on or after January 15, 2008, may be cited for their persuasive value. See Section 414(a) of this Court’s Internal Operating Procedures, 210 Pa. Code § 69.414(a).

attached specific consequences to particular actions or omissions, Pennsylvania courts may not mitigate the legislatively prescribed outcome through recourse to equity,” and this holds true even where, as here, election officials allegedly provide erroneous advice and the recipient relies on that advice. *See id.* As explained above, our General Assembly, in clear and unmistakable language, dictated that, in circumstances like this case, the “provisional ballot[s] **shall not be counted.**” 25 P.S. § 3050(a.4) (emphasis added). This Court is not at liberty to ignore this mandate.

Allegheny Cnty., slip op. at 9.

The *Allegheny County* Court opined:

[A]lthough our decision may be perceived as disenfranchising voters, the Election Code mandates that these deficient ballots **shall not be counted.** This Court emphasizes that it is following and faithfully applying the mandates of our General Assembly and our Supreme Court precedent. Accordingly, the plain language of the Election Code and the lack of evidence in support of the position advanced by the [a]ppellees require this Court to reverse the trial court’s decision.

Id. Similarly, here, the trial court erred by ignoring the mandatory plain language of Section 1210(a.4)(5)(ii)(A) of the Election Code.⁸ Accordingly, this Court is required to reverse the trial court’s determination to accept the Wagner Ballot.⁹

⁸ The Dissent cites *In re Canvass cf Absentee & Mail-In Ballots cf November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020) (*In re Canvass*), to support its position that “the Majority’s decision to disenfranchise [] Wagner based on a **mere technicality** defies common sense and Supreme Court precedent.” *In re: Canvass cf Provisional Ballots in the 2024 Primary Election* (Pa. Cmwlth. No. 628 C.D. 2024, filed July 1, 2024), (Wolf, J., concurring/dissenting) (Dissent), slip op. at 6 (emphasis added). However, the issue before the Pennsylvania Supreme Court in *In re Canvass* was whether the Election Code requires a county board of elections to disqualify mail-in or absentee ballots submitted by qualified electors **who signed the declaration on their ballot’s outer envelope, but did not handwrite their name, their address, and/or a date**, where no fraud or irregularity has been alleged. The *In re Canvass* Court determined that “[t]he Election Code does not require that the outer envelope declaration include a handwritten name or address at all[,]” only that the voter *fill out* the declaration. *Id.* at 1073 (emphasis added). Thus, the *In re Canvass* Court ruled: “[S]ince the General Assembly did not choose the information to be provided, its omission is merely a technical defect and does not invalidate the ballot.” *Id.* at 1074 (emphasis added). Concerning the date, the *In re Canvass* Court held:

Although unlike the handwritten name and address, which are not mentioned in the statute, the inclusion of the word “date” in the statute does not change the analysis because the word “shall” is not determinative as to whether the obligation is mandatory or directive in nature. That distinction turns on whether the obligation carries “weighty interests.” The date that the declaration is signed is irrelevant to a board of elections’ comparison of the voter declaration to the applicable voter list, and a board can reasonably determine that a voter’s declaration is sufficient even without the date of signature.

Id. at 1076-77. However, in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), the Pennsylvania Supreme Court clarified: “[A]lthough the Court’s rationale was expressed in serial opinions, an undeniable majority already has determined that the Election Code’s command is unambiguous and mandatory, and that undated ballots would *not* be counted in the wake of *In re [] Canvass*.” *Ball*, 289 A.3d at 21-22 (footnote omitted). The *Ball* Court concluded: “**The Election Code commands absentee and mail-in electors to date the declaration** that appears upon ballot return envelopes, and **failure to comply with that command renders a ballot invalid** as a matter of Pennsylvania law.” *Id.* at 28 (emphasis added).

Regarding the O'Donnell Ballot, Appellant argues that the trial court erred by rejecting the provisional ballot because he was registered to vote in another voting district when, in fact, O'Donnell resided in the District within the 30 days preceding the 2024 Primary Election. The Board rejoins that O'Donnell was not disenfranchised but, rather, was registered and able to vote in his new voting district for the 2024 Primary Election.

Section 701 of the Election Code provides, in relevant part:

Contrary to *In re Canvass*, this Court is not determining **whether the obligation** in Section 1210(a.4)(3) of the Election Code, which states that “[t]he individual . . . shall place his signature on the front of the provisional ballot envelope[.]” **is directory or mandatory.** 25 P.S. § 3050(a.4)(3). Rather, this Court is following the unambiguous language of Section 1210(a.4)(5)(ii) of the Election Code, which mandates: **“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) (emphasis added). As the Pennsylvania Supreme Court stated in *Taylor*, **“[i]f the language of the statute clearly and unambiguously sets forth the legislative intent, it is the duty of the court to apply that intent and not look beyond the statutory language to ascertain its meaning.”** 164 A.3d at 1155 (emphasis added). “It is [] ‘well[]settled that the ‘so-called technicalities of the Election Code’ must be strictly enforced[.]” *In re Scroggin*, 237 A.3d [1006,] 1018 [(Pa. 2020)] quoting *In re Canvass cf Absentee Ballots cf Nov 4, 2003 Gen. Election*, . . . 843 A.2d 1223, 1234 [(Pa.] 2004) ([*Appeal cf Pierce*]).” *In re Major*, 248 A.3d 445, 449-50 (Pa. 2021) (bold emphasis added; italics omitted). “[A]ll things being equal, the law will be construed liberally in favor of the right to vote but, at the same time, **we cannot ignore the clear mandates of the Election Code.**” *Appeal cf Pierce*, 843 A.3d at 1231 (emphasis added).

The Pennsylvania Supreme Court has long held:

[T]he judiciary should act with restraint, in the election arena, subordinate to express statutory directives. Subject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania. **At least where the [l]egislature has attached specific consequences to particular actions or omissions, Pennsylvania courts may not mitigate the legislatively prescribed outcome through recourse to equity.**

In re Guzzardi, 99 A.3d at 386 (emphasis added).

⁹ Based on the disposition of Appellant’s first issue, this Court does not reach Appellant’s second and third issues.

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 or her residence within thirty days preceding the election.**

25 P.S. § 2811 (emphasis added). Here, the trial court, as the fact-finder, found that O'Donnell had moved into his new residence (which is outside the District) on March 29, 2024. Thus, O'Donnell is a Pennsylvania resident who “removed his . . . residence within [30] days preceding the election[.]” 25 P.S. § 2811(3). Accordingly, “he . . . may . . . vote in the election district from which he . . . removed his . . . residence . . .” *Id.*

The trial court maintains that it is not disenfranchising O'Donnell's right to vote because he was permitted to vote in the District in which he currently resides. However, because the trial court found that O'Donnell moved out of the District on March 29, 2024, and the 2024 Primary Election occurred on April 23, 2024 (25 days later), it is axiomatic that he did not reside in his new district within the required “[30] days immediately preceding the election[.]” *Id.* Thus, applying the trial court's reasoning to its findings of fact, O'Donnell would not have been permitted to vote in **any** district on April 23, 2024, and would indeed have been disenfranchised. Accordingly, the trial court erred by rejecting the O'Donnell Ballot where O'Donnell resided in the District within 30 days preceding the 2024 Primary Election.

For all of the above reasons, the trial court's order is reversed.



ANNE E. COVEY, Judge

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Canvass of Provisional Ballots :
in the 2024 Primary Election :
: No. 628 C.D. 2024
Appeal of: Mike Cabell :

ORDER

AND NOW, this 1st day of July, 2024, the Luzerne County Common
Pleas Court's May 15, 2024 order is reversed.



ANNE E. COVEY, Judge

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EXHIBIT D

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Canvass of Provisional Ballots :
in the 2024 Primary Election :
: No. 628 C.D. 2024
Appeal of: Mike Cabell : Submitted: May 31, 2024

BEFORE: HONORABLE ANNE E. COVEY, Judge
HONORABLE STACY WALLACE, Judge
HONORABLE MATTHEW S. WOLF, Judge

OPINION NOT REPORTED

CONCURRING/DISSENTING OPINION
BY JUDGE WOLF

FILED: July 1, 2024

I join the Majority's opinion with respect to mootness and to the extent it enfranchises Mr. Shane O'Donnell. However, because the Majority disenfranchises Mr. Timothy James Wagner, despite his "exceedingly clear" electoral intent, I must respectfully dissent. Trial Ct. Op. at 4-5 (pagination added).

As mandated by our Supreme Court, in deciding election appeals, the courts are required to "adhere to the overarching principle that the [Pennsylvania] Election Code [(Election Code)]^[1] should be liberally construed so as to not deprive [] electors of their right to elect a candidate of their choice." *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1062 (Pa. 2020) (*In re Canvass*). The Supreme Court recently reinforced this long-standing principle, expounding that:

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

Election laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.

Id. at 1062 (quoting *Appeal of James*, 105 A.2d 64, 65-55 (Pa. 1954)). Because the sole defect of Mr. Wagner's provisional ballot is a technical one, and his credible testimony before the Court of Common Pleas of Luzerne County (trial court) makes his electoral intent incontrovertible, I would affirm the trial court's and the Luzerne County Election Board's (Board) decision to accept Mr. Wagner's provisional ballot.

At issue here is Section 1210 of the Election Code, which describes the process for casting a provisional ballot. 25 P.S. § 3050. It provides, in relevant part:

(a.4)(1) At all elections an individual who claims to be properly registered and eligible to vote at the election district but whose name does not appear on the district register and whose registration cannot be determined by the inspectors of election or the county election board shall be permitted to cast a provisional ballot. Individuals who appear to vote shall be required to produce proof of identification pursuant to subsection (a) and if unable to do so shall be permitted to cast a provisional ballot. An individual presenting a judicial order to vote shall be permitted to cast a provisional ballot.

(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 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)(1)-(3). Section 1210(a.4)(5)(ii) refers back to the double-enveloping process discussed in subsection (a.4)(3), stating: “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). Here, Mr. Wagner executed the affidavit per subsection (a.4)(2); however, the provisional ballot envelope, which encloses the provisional ballot and the secrecy envelope, was sealed but not signed.

Before the trial court, Mr. Wagner testified unequivocally that he appeared at his Lake Township polling place on April 23, 2024 and completed a provisional ballot with guidance from the head election official. Notes of Testimony (N.T.) at 22-23. After returning the provisional ballot, said official gave Mr. Wagner a number to call to ensure that his provisional ballot was accepted. *Id.* Mr. Wagner

followed up by calling the number and was told: “Yep, we have your ballot. It’s good. It’s accepted. You’re verified.” *Id.* at 23. The trial court found Mr. Wagner’s testimony regarding his intent to vote by provisional ballot credible. Denise Williams, Chair of the Luzerne County Board of Elections and Registrations also testified. She explained that the Board unanimously voted to accept Mr. Wagner’s ballot despite the lack of signature on the provisional ballot envelope. *Id.* at 17. She further explained that this decision is consistent with the Board’s practice, stating “since all the elections I’ve been on the Board, the Board has chosen by majority vote to accept [provisional ballots] with one signature.” *Id.* at 18.²

An unreported decision of this Court speaks to the issue at hand.³ In *In re Allegheny County Provisional Ballots in the 2020 General Election* (Pa. Cmwlth., No. 1161 C.D. 2020, filed November 20, 2020) (*Allegheny County*), this Court split on the issue of whether a provisional ballot that lacked a signature on the provisional ballot envelope could be counted. While the majority determined that Section 1210(a.4)(5)(ii)’s use of the word “shall” requires both a signed affidavit and a signed provisional ballot envelope to count the vote, Judge Wojcik’s persuasive dissenting view faithfully applied Supreme Court precedent so as to not “blithely disenfranchise” voters “who merely neglected to enter a signature on one of the various signed documents of an otherwise properly executed and timely-submitted provisional ballot.” *Allegheny County*, slip op. at 5 (Wojcik, J. dissenting).⁴

² Ms. Williams has been a member and chairperson of the Board since May 2021. Notes of Testimony (N.T.) at 18.

³ Unreported decisions of this Court issued after January 15, 2008 are not binding precedent. Section 414(a) of the Commonwealth Court’s Internal Operating Procedures, 210 Pa. Code § 69.414(a).

⁴ Despite this Court’s fracture in *Allegheny County*, and at least one county board of elections practice to count provisional ballot votes sans signature on the provisional ballot envelope, N.T. **(Footnote continued on next page...)**

Like Judge Wojcik, I too view the provisional ballot envelope signature requirement as a technical one akin to the issue of the color of ink used to fill in an absentee or mail-in ballot. *Id.* As precedent illustrates, technical nonconformance with Election Code provisions is not always fatal, even where the provision at issue includes the word “shall.” For example, in *In re Luzerne County Return Board*, our Supreme Court held that absentee ballots marked with green or red pen could be counted despite Section 1306(a)⁵ and Section 1306-D(a)⁶ of the Election Code’s clear directive that voters “*shall* [] proceed to mark the ballot *only* in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen.” 290 A.2d 108, 109 (Pa. 1972) (emphasis added). In reaching that conclusion, the Supreme Court arguably applied an even more liberal construction, where the General Assembly coupled the word “shall” with the word “only” in discussing appropriate ink colors. In so doing, the Court echoed that “the power to throw out a ballot for minor irregularities should be sparingly used [] and done only for very compelling reasons. Marking a ballot in voting is a matter not of precision engineering but of an unmistakable registration of the voter’s will in substantial conformity to statutory requirements.” *Id.* (emphasis added) (quoting *Appeal of James*, 105 A.2d at 65).

The lack of signature on Mr. Wagner’s provisional ballot envelope is at most a minor irregularity, and Appellant did not present any reason, no less a compelling one, for throwing it out. In this Commonwealth, “[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding

18, the Supreme Court has yet to speak on this precise issue. See *Allegheny County, petition for allowance of appeal denied* (Pa., No. 338 WAL 2020, filed November 23, 2020).

⁵ Added by the Act of March 6, 1951, P.L. 3, as amended, 25 P.S. § 3146.6(a).

⁶ Added by the Act of October 31, 2019, P.L. 552, 25 P.S. § 3150.16a.

it.” *In re Canvass*, 241 A.3d at 1071 (quoting *Appeal of Norwood*, 116 A.2d 552, 554-55 (Pa. 1955)). There is not a hint of an allegation of fraud as to this vote; quite the opposite, it is undisputed that the vote was appropriately cast but for this minor irregularity. On this record, the Majority’s decision to disenfranchise Mr. Wagner based on a mere technicality defies common sense and Supreme Court precedent. Accordingly, unlike the Majority, I would affirm the trial court’s order to accept Mr. Wagner’s provisional ballot.

Matthew S. Wolf

MATTHEW S. WOLF, Judge