

**IN THE SUPREME COURT OF PENNSYLVANIA**

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No. 55 MAP 2024

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

APPEAL OF: JAMIE WALSH

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**BRIEF FOR APPELLEE MIKE CABELL**

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Appeal from the July 1, 2024 Order of the Commonwealth Court, No. 628 CD 2024, reversing 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

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## I. INTRODUCTION

The General Assembly attached a clear consequence for Timothy Wagner's failure to sign his provisional ballot's envelope: it shall not count. Appellant does not explain why this Court can ignore those plain terms. Instead, Appellant appeals to this Court's equitable powers and complains that the signature on the envelope is merely technical or superfluous. But these considerations are irrelevant where Section 1204 unmistakably provides that such a provisional ballot shall not count. If this Court were to accept Appellant's arguments, it would be rewriting Section 1204 in direct contravention of the General Assembly's intent. The Commonwealth Court correctly observed that such a result would be untenable and applied Section 1204 according to its plain terms.

As for Shane O'Donnell's ballot, the Commonwealth Court correctly deferred to the trial court's findings of fact and credibility determinations regarding Mr. O'Donnell's testimony that he resided within the election district within thirty days of the election. The panel correctly concluded that Mr. O'Donnell's residence, and not his voter registration, was the material inquiry for whether a person can vote under Section 701's plain terms. This Court should affirm.



## II. COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

By order dated July 24, 2024, this Court granted allowance of appeal on the following two questions:

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?

*Commonwealth Court Answer: No.*

*Suggested Answer: No.*

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?

*Commonwealth Court Answer: No.*

*Suggested Answer: No.*

### **III. COUNTER-STATEMENT OF THE CASE**

#### **A. Form of Action and Procedural History**

This appeal concerns the Primary Election for the Republican nominee for Representative in the General Assembly from the 117th House District held on April 23, 2024 (the “Election”) between Mike Cabell (“Candidate Cabell”) and James Walsh (“Appellant”).

On April 29 2024, the Luzerne County Board of Registration and Elections (the “Board”) conducted its formal review and deliberation of the provisional ballots cast in the Election. 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 declaration on the outer envelope after casting the ballot, including one which was submitted in the 117th House District (the “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 from within the District to an

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

address in McAdoo (the “McAdoo Home”), Schuylkill County prior to the Election when he updated his vehicle registration.

Candidate Cabell lodged timely challenges to the Board’s decision on the Wagner Ballot and the O’Donnell Ballot. The Board affirmed its decision, and Candidate Cabell filed a timely appeal with the Luzerne County Court of Common Pleas, who affirmed the Board’s decision. Thereafter, Candidate Cabell filed a timely appeal to the Commonwealth Court. The Commonwealth Court reversed the trial court’s decision. Appellant petitioned this Court for allowance of appeal, and this Court granted that petition.

## **B. Statement of Prior Determinations**

### **1. The Board**

On April 29, 2024, the Board initially voted to canvass the Wagner Ballot. *See* Petition for Review ¶ 14. On April 30, 2024, the Board initially voted to reject the O’Donnell Ballot. *Id.* at ¶ 21. Candidate Cabell timely challenged the Board’s decisions with regard to the Wagner Ballot and O’Donnell Ballot. *Id.* at ¶¶ 15-16. The Board promptly scheduled these challenges for a May 3, 2024 hearing and issued a public notice of the same. *Id.* at ¶ 19, 21-22; N.T., 19:12-14. In

addition, the Board published the names of the voters whose ballots had been challenged on its website and its staff attempted to contact those voters. N.T., 19:12-20:13.

At the May 3, 2024 hearing, several voters whose ballots had been challenged by Candidate Cabell appeared in defense of their provisional ballots. N.T., 20:14-17. Mr. Wagner did not appear before the Board to defend his ballot. N.T., 20:18-24. Mr. O'Donnell did not appear in person, but he did submit an affidavit explaining the circumstances of his change in voter 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). Pet. for Rev. ¶ 27; N.T., 52:11-21. 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

By order dated May 15, 2024, the trial court affirmed the Board's decision to canvass the Wagner Ballot and reject the O'Donnell Ballot.

In its Opinion, the trial court concluded that the Wagner Ballot should count notwithstanding Section 1204(a.4)(5)(ii)(A)'s plain language. Tr. Ct. Op. at 3-5 (unpaginated) (citing 25 P.S. § 3050(a.4)). The trial court acknowledged Section 1204(a.4)(5)(ii)(A)'s plain language, but held the Wagner 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 the O'Donnell Ballot, the trial court affirmed the Board's decision not to canvass the provisional ballot. The trial court observed that it "found the testimony of O'Donnell credible" and concluded that Mr. O'Donnell resided within the District (i.e. in Butler Township) within thirty-days of the election. *Id.* at 5. The trial court also concluded that in December 2023, Mr. O'Donnell renewed his vehicle registration using a McAdoo address because he intended to move there sometime in 2024. *Id.* And in so doing, Mr. O'Donnell's voter

registration automatically switched to the McAdoo residence. *Id.* The trial court concluded that Mr. O'Donnell was renovating the McAdoo home from June 2023 through March 29, 2024 and officially took up residence there on March 29, 2024. *See id.* The trial court affirmed the Board's decision not to canvass Mr. O'Donnell's ballot because he was not registered to vote in Butler Township, notwithstanding that he resided in Butler Township within thirty days of the election. *Id.* at 6-7.

### **3. Commonwealth Court Memorandum Opinion**

The Commonwealth Court issued its unpublished Memorandum Opinion and Order on July 1, 2024. Regarding the Wagner Ballot the Court concluded—via a 2-1 decision—the prevailing rule from *In re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, No. 1161 C.D. 2020 (Pa. Cmwlth. Nov. 20, 2020), *appeal denied*, 242 A.3d 307 (Pa. 2020) was that provisional ballots with an unsigned voter declaration should not be counted. Cmwlth. Ct. Op. at 6-9. Judge Wolf disagreed, reasoning that a technical defect in Mr. Wagner's ballot should be overlooked given his clear electoral intent. Cmwlth. Ct. Op. at 2 (Wolf, J., concurring and dissenting).

As for the O'Donnell Ballot, all three judges agreed that given the trial court's factual determination that O'Donnell resided in the district on until March 29, 2024, he was eligible to vote in the district because he was a resident of the district within thirty-days of the election.

Cmwlth. Ct. Op. at 10-11. The panel further observed that under the trial court's reasoning, O'Donnell would not have been permitted to vote in **any** district on April 23, 2024, and would indeed have been disenfranchised" because he did not reside in his new district within thirty days. *Id.* at 11 (emphasis in original).

### **C. Chronological Statement of Facts**

#### **1. Voting by Provisional Ballot**

The Election Code provides a specific process for voting by provisional ballot. A person is permitted to cast a provisional ballot if, *inter alia*, the person "claims to be properly registered and eligible to vote at the election district but" their "name does not appear on the district register and" their "registration cannot be determined by the inspectors of election or the county election board[.]" 25 P.S. § 3050(a.4)(1). "Prior to voting by provisional ballot," a person can vote

via provision ballot, the person “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  
25 P.S. § 3050(a.4)(2). And “[a]fter the provisional ballot has been cast” the person places the ballot into a secrecy envelope and then places the secrecy envelope in a provisional ballot envelope. 25 P.S. § 3050(a.4)(3).  
The person “shall place his signature on the front of the provisional ballot envelope.” *Id.* The provisional ballots remain sealed and are returned to the county boards of elections. *Id.*

County boards of elections must thereafter “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). The Code provides a detailed process for lodging challenges to a board’s decision, and, upon challenge,



for the board to hold a hearing to review the challenge. 25 P.S. § 3050(a.4)(4)(i)-(vii).

If the county board determines that the person “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). Unless, one of the following three circumstances is present, in which case, “[a] provisional ballot shall not be counted[:]” (1) the “provisional ballot envelope . . . or the affidavit. . . is not signed by the individual;” (2) either signature is “not genuine or are not executed by the same individual;” or (3) the provisional ballot envelope does not contain a secrecy envelope[.]” 25 P.S. § 3050(a.5)(ii)(A)-(C).

## **2. 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 also testified that he intended to cast a vote for Jamie Walsh. N.T., 23:23-24:1. It is undisputed that the declaration on 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

### **3. 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. 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. 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. 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. 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. 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. 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. N.T., 32:8-22.

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. 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. N.T., 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. N.T., 36:5-11. Based on the timing of the change, however, Mr. O'Donnell determined that his change in vehicle registration must have somehow triggered the transfer of his voter registration. N.T., 33:12-34:22. In this regard, 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. N.T., 34:23-35:4.

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—in the form of an “update.” N.T., 39:10-40:24; *id.* at 45:11-15. Ms. Cook explained that

when a person “makes a change through the Department of Motor Vehicles they would have to opt out of changing their voter registration. N.T., 39:18-25.

Ms. Cook explained that when an update 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. N.T., 41:2-8. 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. N.T., 41: 9:19. Such correspondence, Ms. Cook explained is generally sent by the elector’s new county of registration (here, Schuylkill). N.T., 41:18-19. Finally, Ms. Cook confirmed that Mr. O’Donnell did not cast any other ballots in the 2024 primary election.

#### **IV. SUMMARY OF ARGUMENT**

The error on the Wagner Ballot cannot be overlooked for a simple reason: the General Assembly expressly stated that “[a] provisional ballot shall not be counted if” the signature on the provisional ballot’s envelope is missing. 25 P.S. § 3050(a.4)(5)(ii)(A). That provision does not offer any exception for a voter’s expressed intent or a voter’s reliance on

election official's guidance. Appellant, like the *amici* that support him, ignore this plain language in reliance on general principles of enfranchisement. But when the statute is clear, this Court must enforce its plain terms no matter how unfair the result might be.

As for the O'Donnell Ballot, the panel correctly concluded that it should be counted because it found, as a matter of fact, that Mr. O'Donnell resided in the District "within thirty days preceding the election." 25 P.S. § 2811. Appellant's arguments to the contrary contest the trial court's fact finding and would create an absurd result: Mr. O'Donnell would be ineligible to cast a ballot in *any* election district.

## V. ARGUMENT

### A. The Commonwealth Court correctly concluded that the Wagner Ballot should not be counted.

This Court should affirm the Commonwealth Court's sound analysis for at least three reasons. One, the panel's decision correctly interpreted Section 1204(a.4)(5)(ii)(A) consistent with its plain language. Two, Appellant's reliance on equitable principles and extratextual considerations—*i.e.*, Mr. Wagner's intent, his reliance on an election worker's direction, and the absence of fraud—are misplaced given Section 1204's unambiguous language. Three, Mr. Wagner

forfeited his right to cure his defective provisional ballot when he failed to appear at the Board's May 3 hearing.

**1. The Commonwealth Court enforced Section 1210(a.4)(5)(ii)(A)'s clear command that a provisional ballot envelope without a signature "shall not be counted."**

Appellant does not once mention Section 1204(a.4)(5)(ii)(A)'s plain language. Instead, he relies heavily on general principles of enfranchisement, despite not arguing that Section 1204(a.4)(5)(ii)(A) is ambiguous. Because Section 1204 contains unambiguous mandatory language that required Mr. Wagner's signature on the declaration on the provisional ballot envelope *and* attached a specific consequence for failure to do so, this Court' analysis should start in and with Section 1204's text.

Section 1204 includes two signature requirements. First, Section 1204 provides: "[p]rior to voting the provisional ballot, the elector *shall* be required to sign" the following affidavit. 25 P.S. § 3050(a.4)(2) (emphasis supplied). Second, Section 1204 requires an elector to place the provisional ballot in a secrecy envelope and then "place the secrecy envelope in the provisional ballot envelope and *shall* place his signature on the front of the provisional ballot envelope." 25 P.S. § 3050(a.4)(3)

(emphasis supplied). Critically, Section 1204 attaches a specific consequence for the failure to complete either of those signatures “[a] provisional ballot shall not be counted if[ ] either the provisional ballot envelope . . . or the affidavit . . . is not signed by the individual.” 25 P.S. § 3050(a.4)(5)(ii)(A).<sup>2</sup>

Appellant’s argument regarding the directory versus mandatory meaning of “shall” misses the point because here, unlike in *In re Canvass of Absentee Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020) (plurality), the General Assembly attached a

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<sup>2</sup> The full text of subsection (5) provides:

(5)(i) 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.

**(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;**

(B) the signature required under clause (3) and the signature required under clause (2) are either not genuine or are not executed by the same individual;

(C) a provisional ballot envelope does not contain a secrecy envelope;

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



specific consequence for failure to sign the declaration on the provisional envelope.<sup>3</sup>

Thus, although this Court has held that “the word ‘shall’ carries an imperative or mandatory meaning[.]” this Court need not rely solely on the term “shall” because the General Assembly’s intent was made unmistakably clear that “shall” in this context is mandatory given subsection (a.4)(5)(ii)(A)’s express directive that a provisional ballot that does not contain either of the two required signatures “shall not be counted.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004) (citing *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997) (“By definition, ‘shall’ is mandatory.”)); 25 P.S. § 3050(a.4)(5)(ii)(A).

As explained in *In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 1161 CD 2020, 2020 WL 6867946 (Pa. Cmwlth. Nov. 20, 2020), the circumstances regarding Section 1204 are “quite distinct from *Appeal of James*, 105 A.2d 64 (Pa. 1954)” where this Court

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<sup>3</sup> Initially, Mr. Walsh incorrectly argues that the *In re Canvass* Court held that “shall,” in the context of the envelope date requirement, was directory. See Br. at 17 (“This Court should follow its holding in *Canvass* by similarly holding that “shall” in this context is directive, rather than mandatory[.]”). But that is not what *In re Canvass* held. Only three Justices in *In re Canvass* concluded that “shall” was directory.

attached a directory meaning to shall. *In Re Allegheny Cnty. Provisional Ballots*, 2020 WL 6867946 at \*3. The panel explained Section 1204’s “unambiguous statutory provision directing that ballots shall not be counted if they contain specified deficiencies” is what distinguishes this case from the line of authority attaching a directory meaning to shall. *Id.*<sup>4</sup>

Just a two years later, a different Commonwealth Court panel agreed with *In re Allegheny County*’s holding that the enumerated grounds for invalidation under Section 1210(a.4)(5)(ii) are mandatory. See *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 1381-85, 1395-99, 1403 CD 2021, 2022 WL 96156 (Pa. Cmwlth. Jan. 10, 2022). There, 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)<sup>5</sup> are present, an invalid ballot cannot be saved by equitable considerations, such as voter

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<sup>4</sup> The panel ultimately concluded 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 (quoting 25 P.S. § 3050(a.4)(5)(ii)(A) (emphasis removed)). “Stated otherwise,” the Court concluded, “both signatures are required.” *Id.* (emphasis in original).

<sup>5</sup> “A provisional ballot shall not be counted if ... a provisional ballot envelope does not contain a secrecy envelope ...” 25 P.S. § 3050(a.4)(5)(ii)(C).

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) (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.”).<sup>6</sup>

Neither Walsh nor the Board offer any argument why the analysis in these decisions was incorrect; instead they merely rely on the fact that both decisions are technically not binding. The lack of any cogent rejoinder is telling.

In fact, the panel’s decision to follow *In re Allegheny County’s* adherence to the General Assembly’s express command is consistent with this Court’s jurisprudence. This Court has long recognized that “[i]f the law itself declares a specified irregularity to be fatal the courts will follow that command, irrespective of their views of the importance

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<sup>6</sup> Each judge authored their own opinion, however, they all agreed on this point. *id.* at \*9 (Covey, J.) (“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.”); *id.* (Leavitt, J.) (“I agree with Senior Judge Leadbetter that the provisional ballots marked VS-4 and VS-5 may not be counted.”)

of the requirement.” *Oncken v. Ewing*, 8 A.2d 402, 404 (Pa. 1939) (quoting *Knight v. Borough of Coudersport*, 92 A. 299, 300 (Pa. 1914); accord *Weiner v. Sec’y of Com.*, 558 A.2d 185, 188 (Pa. Cmwlth. 1989) (quoting *Oncken*, 8 A.2d at 404); *In re Upper Chichester Twp. Election*, 62 Pa. D. & C. 688, 693 (Pa. Com. Pl. Del. Cnty. 1948) (same). It is only “[i]n the absence of such declaration,” that courts “endeavor, as best they may, to discern whether the deviation from the prescribed forms” render a ballot invalid. *Commonwealth ex rel. Gast v. Kelly*, 100 A. 272, 274 (Pa. 1917); see also *In re Canvass of Absentee Ballots of April 28, 1964, Primary Election*, 34 Pa. D. & C.2d 419, 422 (Pa. Com. Pl. Phila. 1964) (“Where the legislature has clearly set forth the requirements for one to avail himself of a privilege, a strict compliance with the statutory requirements is the only route one may travel in exercising that privilege.”).<sup>7</sup>

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<sup>7</sup> Indeed, this basic tenet has been widely recognized by courts throughout the country. See *Miller v. Picacho Elementary Sch. Dist. No. 33*, 877 P.2d 277, 279 (Ariz. 1994) (“If a statute expressly provides that noncompliance invalidates the vote, then the vote is invalid.”); *In re Cleveland Cnty. Com’rs: Protest of Crawford*, 287 S.E.2d 451, 454 (N.C. 1982) (“[I]f the statute expressly declares that a particular act is essential to the validity of an election, or that its omission shall render the election void, the violation of the statute will per se render the election invalid[.]”) *United Labor Comm. of Missouri v. Kirkpatrick*, 572 S.W.2d 449, 453 (Mo. 1978) (“The uppermost question is whether or not the statute itself makes a specified irregularity fatal.” (cleaned up) (internal citations and quotations marks omitted)); *Stake v. City of Kingfisher*, 707 P.2d 1220, 1223 (Okla. Civ. App.) (“If a

In the end, Appellant and the *amici curiae* supporting him cannot escape Section 1204's plain command. This Court should "remain faithful to the terms of the statute that the General Assembly enacted" by "employing only one juridical presumption when faced with unambiguous language: that the legislature *meant what it said.*" *In re Canvass*, 241 A.3d at 1082 (Pa. 2020) (Wecht, J., concurring in part) (emphasis in original).

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statute does not in express terms declare an election void for violation of its provision, the election will be sustained and the violation of the statute will be treated as an irregularity going to the form instead of the substance."); *Calloway v. Chicago Bd. of Election Commissioners*, 155 N.E.3d 509, 516 (Ill. App. Ct. 2020) ("Although section 5/18-14 states that the election judges 'shall' complete a Form 80, the General Assembly failed to provide for a consequence in the event of noncompliance, which is generally required for a provision to be deemed mandatory."); *Wollan v. Jacoby*, 653 N.E.2d 1303, 1307 (Ill. App. Ct. 1995) ("Undoubtedly, technical compliance with every single provision of the Code is unnecessary to sustain a ballot. However, where the statute, as in section 10-4 of the Code, mandates the performance of certain acts or things and provides a penalty for noncompliance, strict compliance is deemed mandatory, and noncompliance with such provisions will invalidate the ballot."); *Reese v. Duncan*, 80 S.W.3d 650, 657 (Tex. App. 2002) ("The legislature has determined the specific method of returning ballots by mail or carrier and has expressly prescribed the consequences for failing to comply by prohibiting ballots returned in violation of this method to be counted.").

**2. Appellant’s reliance on equitable principles of enfranchisement and extratextual considerations are misplaced given Section 1204’s plain language.**

Appellant swiftly ushers this Court past Section 1204’s plain terms and invites it to elevate equitable principles of enfranchisement over the provision’s text. Appellant also asks this Court to consider the unique facts here—that Mr. Walsh’s electoral intent was clear, he followed the instructions of an election worker, and there was no evidence of fraud—and conclude that one or all of them militate in favor of disregarding Section 1204’s plain terms. This Court should decline both invitations.

Start with the equitable principles. Mr. Walsh asks this Court to elevate liberal construction principles over the statute’s plain terms in the absence of any ambiguity. *See* Br. at 16-17. But there is no need to liberally construe a statutory provision where it is *not* “reasonably susceptible to any other meaning. *See In re Canvass*, 241 A.3d at 1062 (quoting *Appeal of James*, 105 A.2d at 65-66) (OAJC). Indeed, this Court recently explained, “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).<sup>8</sup>

Because Section 1204 expressly commands that the Wagner Ballot “shall not be counted[,]” there is no reasonable alternative meaning to that provision and this Court need not utilize the interpretive principles suggested by Appellant. 25 P.S § 3050(a.4)(5)(ii)(A).

Appellant’s argument that the signature requirement is “technical” or “unnecessary and superfluous” is similarly unpersuasive given the absence of any ambiguity here. In cases like *Appeal of James* or *In re Canvass*, where the court considered the technicality of the requirement and the “weighty interests,” that the requirement served, the statute did not attach a specific requirement for failure to meet one of the enumerated requirements. Consider *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108 (Pa. 1972). There, the provision requiring voters to

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<sup>8</sup> *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.”).

complete their ballots with certain colored ink did not contain attach a consequence for failure to follow that requirement. *See* 290 A.2d at 109-110. But when the legislature’s intent is clear that the information is required for the ballot to count, that information must be provided regardless of whether it is technically or redundant.<sup>9</sup> *Cf. In re Canvass*, 241 A.3d at 1079 (Wecht, J.) (concurring and dissenting) (“Absent evidence of legislative intent that what in context amounts to redundant information must be furnished to validate a mail ballot, their omission alone should not deny an elector his or her vote.”).

And that’s true even if the General Assembly’s requirement “appears to have a disenfranchising effect” so long as the statute is constitutional. *In re Canvass*, 241 A.3d at 1082 (Pa. 2020) (Wecht, J., concurring in part) (emphasis in original).<sup>10</sup> Here, the General

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<sup>9</sup> Importantly, the “double signature” requirement is not redundant because, as set forth in Section III(C)(1) above, the “first” signature relates to the affidavit, wherein the elector attests to possessing the qualifications to vote, and is rendered *prior* to receiving and voting the ballot. The “second” signature, is an attestation that the elector actually voted the ballot and is rendered *after* the ballot is securely sealed in the secrecy envelope and the outer provisional ballot envelope. Referring to these distinct requirements as mere technicalities misinterprets the nature of the statute.

<sup>10</sup> The Board and *amicus curiae* Democratic National Committee suggest that Section 1204’s signature requirement, if strictly interpreted, would violate Pennsylvania’s Free and Equal Elections Clause. *See* Board’s Br. at 16-17; DNC Br. at 4-5. However, this argument was never raised below and it is not adequately developed. This Court should therefore deem that argument waived.



Assembly's intent could not be clearer. This Court should not resort to the equitable considerations peddled by Appellant where Section 1204's plain terms attach a specific consequence for failing to sign the declaration on the provisional ballot envelope.

Moreover, Appellant's emphasis on three extratextual considerations— Mr. Wagner's intent, his reliance on an election official's instructions, and the absence of fraud—are misplaced. *See* Br. at 18-19. The Secretary similarly argues that "rejecting Mr. Wagner's ballot would violate constitutional principles that protect the right to vote" because he relied on the advice of an election official. *See* Secretary's Br. at 7.<sup>11</sup> But these argument runs headlong into authority from this Court concluding that the Election Code's plain terms control

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<sup>11</sup> Along those lines, the Secretary's argument that Section 1204 somehow conflicts with HAVA is likewise off-mark. First, no party raised this argument and *amici* cannot raise new arguments. *See Stilp v. Commonwealth*, 905 A.2d 918, 928 n.14 (2006) (noting that amici must take the issues as raised by the parties and cannot inject new issues that the parties have not preserved). Therefore, this Court should not consider this argument. On the merits, the Secretary's argument is misplaced. Section 1204 does not interfere with Mr. Wagner's eligibility to receive a provisional ballot; indeed, he did receive one. The Secretary claims that Section 21082(a)(4)'s "directive that 'shall be counted as a vote in that election in accordance with State law' instructs stats on how to count provisional ballots and not whether to count them. Secretary's Br. at 14-15 (citing 52 U.S.C. § 21082(a)(4)). That interpretation is flatly wrong. Here, the provisional ballot is being counted in accordance with state law, which requires the specifications in Section 1204 to be satisfied in order for the ballot to count. There is no conflict between the provisions.

even when a voter receives “erroneous guidance” from a “county board of elections.” *In re Scroggin*, 237 A.3d 1006, 1021 (Pa. 2020) (citing *In re Guzzardi*, 99 A.3d 381, 388 (Pa. 2014)).

Indeed, *In re Guzzardi* is controlling in this respect. There, this Court held “where the Legislature has attached specific consequences to particular actions or omissions, Pennsylvania courts may not mitigate the legislatively prescribed outcome through recourse to equity.”

*Guzzardi*, 99 A.3d at 387. This was true, the court held, even where the Department of State miscommunicated certain statutory requirements. *Id.* at 388. Recently, in *In re Scroggin*, this court affirmed *In re Guzzardi*’s holding on that point: “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.” *In re Scroggin*, 237 A.3d at 1021.

While those cases arose in the context of a candidate, rather than a voter, receiving information from an election official, that distinction is meaningless. The bottom line in those cases is that the Election Code’s plain language cannot be disregarded by an election official’s guidance.

Moreover, and critically, the nature of the guidance that Mr. Wagner received is not clear from the record. Mr. Wagner generally testified that he was being “lead” by an election official and that she was “telling” him what to do, but the exact nature of those conversations is not clear from the record. *See* N.T., 22:12-20. Mr. Wagner never testified that the unidentified election official provided him with specific instructions regarding the Section 1204’s signature requirements nor did he testify that the election official told him he did not have to sign the provisional ballot envelope. Absent this type of specified testimony, Mr. Wagner’s assertions are too vague and unparticularized to support a conclusion that he received guidance that was *inconsistent* with Section 1204.

**3. Alternatively, even if the Wagner Ballot could be cured, Mr. Wagner waived and forfeited his right to do so by failing to appear before the Board.**

Because the Commonwealth Court concluded Section 1204’s plain language required the Board to reject the Wagner Ballot, it did not consider whether Mr. Wagner waived his opportunity to cure his defective ballot when he did not appear before at the Board’s hearing on the challenged provisional ballots. To the extent this Court disagrees

with the panel's interpretation of Section 1204, it should nevertheless affirm the panel's decision because Mr. Wagner forfeited his right to cure.

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 Mr. Wagner did not. *See id.* at 20:14-25. In this connection, Mr. 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 Mr. 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, Mr. 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. But even if Mr. Wagner did not have specific knowledge, that fact is not dispositive. As the Supreme Court has explained, in “determining whether [a person’s] conduct resulted in a want of due diligence is to focus not upon ‘what the [person] knows, ‘but what he might have known, by the use of the means of information within his reach, with the vigilance the law requires of him[.]’” *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988) (quoting *Taylor v. Coggins*, 90 A. 633, 634 (Pa. 1914). Thus, Mr. Wagner was “require[d] . . . to discover those facts which were discoverable through the exercise of reasonable diligence.” *Sprague*, 550 A.2d at 188 (citing *Turtzo v. Boyer*, 88 A.2d 884 (Pa. 1952)). Here, the Board not only gave legal notice of the hearing, but it also individually contacted the fourteen affected voters and posted their names on its website. N.T. 18:22-19:22. Indeed, the notice was plainly adequate, given that multiple individuals personally appeared at the hearing. N.T. 19:23-20:24. Thus, Mr. Wagner’s claim that he lacked actual notice should not control.

Moreover, Candidate Cabell was prejudiced by Mr. Wagner’s tardy testimony because he was unable to call, for example, the judge of elections at Mr. Wagner’s polling place who purportedly gave Mr.

Wagner advice regarding his provisional ballot. Because Candidate Cabell did not have the opportunity to call additional witness, Mr. Wagner's un rebutted testimony was relied upon by the trial court to disregard Section 3050(a.4)(5)(ii)(A)'s plain language.

By way of summary, Mr. 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 Mr. Wagner's testimony to disregard Section 3050(a.4)(5)(ii)(A)'s plain language, that decision was error and should be reversed.

**B. The Commonwealth Court correctly held that because Mr. O'Donnell resided in the District within thirty days of the election, he was eligible to vote in the District.**

**1. The panel correctly interpreted Section 701 to avoid an absurd result.**

The unanimous panel correctly held that, based on the trial court's finding of fact that Mr. O'Donnell resided in the District within 30 days of the Election, he was eligible to vote in the District. *See* Cmwlt. Ct. Op. at 11. Appellant's arguments to the contrary largely ask this Court to disturb the trial court's factual findings without arguing that those facts were not supported by substantial evidence. As developed below,

the panel's interpretation is the only one that gives full meaning to Section 701's plain terms and avoids the absurd result wherein Mr. O'Donnell would not be eligible to vote in *any* election district.<sup>12</sup>

Recall that the trial court deemed Mr. O'Donnell's testimony credible. Tr. Ct. Op. at 5. The trial court further concluded that Mr. O'Donnell resided within the District (i.e. in Butler Township) within thirty-days of the election. *Id.* Finally The trial court concluded that Mr. O'Donnell was renovating the McAdoo home from June 2023 through March 29, 2024 and officially took up residence there on March 29, 2024. *See id.*

It is well-settled that an appellate court will not disturb a trial court's findings of fact unless those findings are not "supported by substantial evidence." *See Beaver Falls Mun. Auth. ex rel. Penndale Water Line Extension v. Beaver Falls Mun. Auth.*, 960 A.2d 933, 940 (Pa. Cmwlth. 2008); *id.* ("If sufficient evidence supports the trial court's findings as fact-finder, we will not disturb these findings."). Moreover, [q]uestions of credibility and conflicts in the evidence are for the trial

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<sup>12</sup> It is irrelevant that Mr. O'Donnell is Candidate Cabell's cousin. Mr. O'Donnell testified that he regularly voted, and did not intentionally vote in the District to vote for his cousin. N.T., 35:14-36:11.



court to resolve.”); *See Fletcher-Harlee Corp. v. Szymanski*, 936 A.2d 87, 93 (Pa. Super. 2007) (“It is not the role of an appellate court to pass on the credibility of witnesses; hence we will not substitute our judgment for that of the factfinder. Thus, the test we apply is not whether we would have reached the same result on the evidence presented, but rather, after due consideration of the evidence which the trial court found credible, whether the trial court could have reasonably reached its conclusion.”).

Appellant has not even attempted to argue that the trial court’s findings of fact or credibility determinations meet these lofty thresholds such that they should be disturbed. Instead, Appellant simply insists that Mr. O’Donnell was domiciled in Schuylkill County as of December 2023. Br. at 22. He argues that Mr. O’Donnell signaled his intent to be domiciled in Schuylkill County when he purchased his home there and changed his vehicle registration. But that is not what the trial court found.

Relevant here, Section 701 expressly provides that an of-age citizen “shall be entitled to vote at all elections” if

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(3) (emphasis supplied). The Election Code further establishes “rules for determining residence.” One of those rules provides that residence is a place where “his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.” 25 P.S. § 2814(a). As Mr. O’Donnell’s testimony made clear, he only rarely slept at his Schuylkill County house and resided primarily at his Butler house. N.T., 32:8-22. Thus, and given that Mr. O’Donnell always returned to his Butler house until March 28, 2024, that was the place of his residence. Appellants citation to the other rules of residence in Section 2814 are off mark. Indeed, subsection (b) and (c) also support the trial court’s conclusion that Mr. O’Donnell resided in Butler until March 28, 2029 because his trips to his Schuylkill house were always temporary and he always intended on returning to Butler until March 29, 2024 when he took up residence in Schuylkill. *See* 25 P.S. § 2814(b)-(c).

The Commonwealth Court’s conclusion is further bolstered by the fact that it avoids an absurd result. *See* Pa.C.S. § 1922. To explain, given that Mr. O’Donnell did not reside in Schuylkill for “at least thirty days immediately preceding the election” he would have been ineligible to vote in that District. *See* 25 P.S. § 2811(3).

As for the eligibility requirement under Section 701 relevant here—*i.e.*, compliance with the registration laws—that prerequisite 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.

Indeed, had Mr. O’Donnell attempted to vote in Schuylkill County, as suggested by Appellant and *amici curiae*, his vote would not only be invalid, but he would also face ***criminal conviction***. *See Commonwealth v. Cosentino*, 850 A.2d 58, 61 (Pa. Cmwlth. 2004) (affirming a criminal defendant’s conviction for voting at a polling location where he was registered, but did not reside); *see also, e.g.*,

*Commonwealth v. Debasi*, 189 A. 531, 533 (Pa. Super. 1937);

*Commonwealth v. Devine*, 14 Pa. D. 1, 2 (Pa. Quar. Sess. Phila. Cnty. 1904).

It would be an absurd result if a person who is otherwise registered to vote would be subject to criminal charges for exercising his right to vote. The Commonwealth Court correctly avoids such a result.

**2. The December 2023 change to O'Donnell's voter registration violated Pennsylvania's voter registration statutes and thus, was void *ab initio*.**

To the extent this Court disagrees with the panel's plain language interpretation of Section 701, the change in Mr. O'Donnell's registration was effectuated in violation of Pennsylvania law and, thus, was void *ab initio*.

Specifically, 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 serve a voter-registration function. *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).").

Notably, neither the Department of Transportation nor the Department of State have promulgated a valid regulation that would

extend the above statutory language to vehicle registration. It is well-established that “[c]ommonwealth agencies have no inherent power to make law or otherwise bind the public or regulated entities.”

*Northwestern Youth Services, Inc. v. Dep’t of Public Welfare*, 66 A.3d 301, 310 (Pa. 2013). A regulation must be consistent with the statutory language and can adopt regulations only via the “procedures prescribed in the Commonwealth Documents Law, the Regulatory Review Act, and the Commonwealth Attorneys Act.” *Id.* Importantly, “[a] regulation not promulgated in accordance with the statutory requirements will be declared a nullity.” *Germantown Cab Co. v. Philadelphia Parking Auth.*, 993 A.2d 933, 937 (Pa. 2010).

Thus, any existing regulation that permits changes to voter registration via vehicle registration is void *ab initio* as it was not promulgated in accordance with agency law. Indeed, 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*.

## VI. CONCLUSION

The Commonwealth Court's sound analysis should be affirmed with regard to the Wagner Ballot and the O'Donnell Ballot. With regard to the Wagner Ballot, the Commonwealth Court's interpretation gives fidelity to the General Assembly's clear intent as express in Section 1204. Appellant, on the other hand, would have this Court rewrite Section 1204 to advance aspirational policy objectives that are simply not at issue here given Section 1204 unambiguous plain terms. As for the O'Donnell Ballot, the Commonwealth Court's plain language analysis should be affirmed. To start, the Commonwealth Court correctly deferred to the trial court's findings of fact and credibility determinations regarding Mr. O'Donnell's residence. Against those facts, the panel properly applied Section 701's plain terms to avoid an absurd result such that Mr. O'Donnell was not disenfranchised.

Respectfully submitted,

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