

NO. 55 MAP 2024

In the Supreme Court of Pennsylvania

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

PETITION OF: JAMIE WALSH

Appeal from the July 1, 2024 Non-Precedential Opinion and Order of the
Commonwealth Court, at No. 628 C.D. 2024, Reversing the May 15, 2024 Order
of the Luzerne County Court of Common Pleas, at No. 2024-05082

**BRIEF OF APPELLEE LUZERNE COUNTY BOARD OF
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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal from a final order of the Commonwealth Court. *See* 42 Pa. C.S.A. § 724(a); Pa. R.A.P. 1112.

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ORDER IN QUESTION

This is an appeal from the July 1, 2024 Order of the Commonwealth Court,
which states:

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

The Commonwealth Court's July 1, 2024 unreported Opinion and Order is attached
as Exhibit "A," and the May 15, 2024 Order of the Court of Common Pleas of
Luzerne County and Opinion in Support of Order Pursuant to Pa. R.A.P. 1925(a) are
attached as Exhibits "B" and "C," respectively

STATEMENT OF SCOPE AND STANDARD OF REVIEW

An appellate court's review in election cases is limited to examination of the record to determine whether the trial court committed errors of law and whether the trial court's findings were supported by adequate evidence. *See In re Beyer*, 115 A.3d 835, 838 (Pa. 2014).

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STATEMENT OF QUESTIONS INVOLVED

Pursuant to the Order dated July 24, 2024, the questions for which review is granted are as follows:

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?

STATEMENT OF THE CASE

A. Introduction

The questions certified by the Court involve two provisional ballots cast in the April 23, 2024 primary election for the Republican nomination for the office of representative of the 117th District in the Pennsylvania House of Representatives. Appellant Jamie Walsh is one of two candidates on the Republican ballot. With no ballots left in dispute, he has five more votes than his opponent, Mike Cabell. The two ballots at issue here—one for Mr. Walsh and one counted for Mr. Cabell—have no ability to change the outcome of the election, regardless of how the Court rules on whether it was proper to count either challenged ballot.

The first provisional ballot at issue (“*Wagner* Ballot”) was cast in person by Timothy James Wagner, a registered voter who could not locate his mail ballot and voted in person by provisional ballot at his polling place. The *Wagner* Ballot included an affidavit signed by Mr. Wagner but did not have a second signature on the outer envelope. The Commonwealth Court, in a 2-1 decision, reversed the trial court and held that the *Wagner* Ballot should not be counted.

The second ballot at issue (“*O’Donnell* Ballot”) was cast by Shane Francis O’Donnell, a registered voter whose voter registration was changed to Schuylkill County in December 2023 after he purchased a new house there in June 2023. The

Commonwealth Court reversed the trial court and held that the *O'Donnell* Ballot should be counted.

B. Statement of Facts

In the April 23, 2024 primary election, Mr. Walsh and his opponent, Mike Cabell, sought the Republican nomination to represent the 117th District in the Pennsylvania House of Representatives. With no ballots left in dispute, Mr. Walsh leads Mr. Cabell by five votes. *See Luzerne County April 23, 2024 Primary Election Results*, available at https://results.enr.clarityelections.com/PA/Luzerne/120843/web.317647/#!/summary?category=C_5 (last visited July 31, 2024).

Post election, Messrs. Cabell and Walsh lodged various challenges to ballots cast in the April 23, 2024 primary election. In addition to this appeal, Mr. Walsh challenged six mail and absentee ballots which lack the year within the date on the return envelope in *In re Six Ballots in the 2024 General Primary Election*. On July 30, 2024, the Court denied Mr. Walsh's Petition for Allowance of Appeal to the Supreme Court in that matter. *See* Order denying Petition for Allowance of Appeal to the Supreme Court, in *In re Six Ballots in the 2024 General Primary Election*, No. 333 MAL 2024. A third appeal, this time by Mr. Cabell, challenged the Commonwealth Court's decision to reject his request to cumulate and count write-in votes cast for him. On July 25, 2024, the Court denied Mr. Cabell's Petition for

Allowance of Appeal in that matter. *See* Order denying Petition for Allowance of Appeal to the Supreme Court, in *In Re Petition to Cumulate Write-In Votes in 2024 Primary Election*, No. 332 MAL 2024.

C. The *Wagner* Ballot

On April 23, 2024, Mr. Wagner appeared in person at his Lake Township polling place to vote in the primary election. *See* Cmwlth. Ct. July 1, 2024 Op. at 3 (citing May 9, 2024 Tr. of Hr'g at 21).¹ At that time, Mr. Wagner was informed that, because he had been issued and did not return a mail ballot, he would need to vote by provisional ballot. *Id.* (citing Tr. at 22). Mr. Wagner thereafter completed his provisional ballot in person at his polling place with the assistance of a poll worker. *Id.* (citing Tr. at 24). He testified:

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, Well, 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, Yep, we have you ballot. It's good. It's accepted. You're verified.

¹ The May 9, 2024 Transcript of Hearing before the Court of Common Pleas of Luzerne County shall be referred to as "Tr."

Id. (citing Tr. at 22-23). Mr. Wagner further testified that he followed the instructions of a senior election worker in completing the ballot and accompanying envelope. Tr. at 24 (“[S]he was telling me what to do. I guess she was the boss.”). He later called the telephone number provided to him and verified that his vote was valid. *See* Cmwlth. Ct. July 1, 2024 Concurring/Dissenting Op. at 4 (citing Tr. at 23). Mr. Wagner signed the required affidavit attesting to his qualifications and that he had not cast another ballot, but he did not add a second signature on the outer envelope. He testified unequivocally that he intended to cast his vote in the 117th District. Tr. at 23.

D. The O’Donnell Ballot

On April 23, 2024, Mr. O’Donnell, a first cousin of Mr. Cabell, appeared in person to vote in the 2024 general primary at a polling place in Butler Township. *See* Cmwlth. Ct. July 1, 2024 Op. at 4 (citing Tr. at 34). Mr. O’Donnell was informed that, because he was no longer registered to vote in Butler Township, he would be permitted to complete a provisional ballot. *Id.* Mr. O’Donnell’s voter registration had been transferred to Schuylkill County four months earlier in December 2023 when he provided his new address when renewing his vehicle registration. Tr. at 33-34. Mr. O’Donnell testified that he bought a new home in McAdoo, Schuylkill County in June 2023, that he changed his address to Schuylkill County when he renewed his vehicle registration in December 2023, that he spent

time between the two homes, and that he began to spend all of his time at the Schuylkill County address on March 29, 2024. Tr. at 31-33.

E. Proceedings Below

At a May 3, 2024 hearing, the Board voted unanimously to count the *Wagner* Ballot and not count the *O'Donnell* Ballot. See Trial Ct. Op. in Support of Order Pursuant to Pa. R.A.P. 1925(a) at 3, 7. On May 6, 2024, Mr. Cabell filed a Petition for Review seeking to reverse those decisions of the Board. Mr. Cabell specifically argued that (1) the *Wagner* Ballot should not have been counted because a signature on the outer envelope is required by 25 P.S. § 3050(a.4)(5)(ii) and (2) the *O'Donnell* Ballot should have been counted pursuant to 25 P.S. § 2811(3).

The trial court rejected both arguments. First, the trial court affirmed the decision to count the *Wagner* ballot, explaining in its Opinion issued pursuant to Pa. R.A.P. 1925(a) that “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.” *Id.* at 4. Applying this well-settled principle, the trial court credited the testimony of Mr. Wagner, found no fraud, and determined that that his intent to vote was “exceedingly clear.” *Id.* at 4-5.

Second, after hearing testimony from Mr. O'Donnell and election officials describing the change of address process, the trial court rejected Mr. Cabell's

argument regarding the *O'Donnell* Ballot and ruled that the ballot should not be counted. The trial court reasoned that “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.” *Id.* at 7.

Mr. Cabell appealed the trial court’s decision and the Commonwealth Court reversed. Regarding the *Wagner* Ballot, the Court credited Mr. Cabell’s argument that the trial court had “erred by ignoring the mandatory plain language of Section 1210(a.4)(5)(ii)(A) of the Election Code.” *See* Cmwlth. Ct. July 1, 2024 Op. at 9. Regarding the *O'Donnell* Ballot, the Commonwealth Court rejected the trial court’s holding that Mr. O'Donnell faced no risk of disenfranchisement, reasoning that he “would not have been permitted to vote in any district on April 23, 2024.” *Id.* at 11.

SUMMARY OF ARGUMENT

This appeal should be dismissed as moot. Mr. Walsh leads his opponent Mr. Cabell by five votes and the only remaining avenues for Mr. Cabell to attempt to close that gap ended when 12 previously-challenged provisional ballots not at issue in this appeal were tabulated *and* this Court denied Petitions for Allowance of Appeal in *In Re Petition to Cumulate Write-In Votes in 2024 Primary Election* and *In re Six Ballots in the 2024 General Primary Election*. There are no additional

ballots outstanding, and this appeal cannot alter the outcome of the election in which Mr. Walsh is the apparent victor.

But if this Court were to weigh in on this moot controversy, and it should not, the Commonwealth Court's July 1 Opinion and Order should be reversed. The record below demonstrates that Mr. Wagner filled out his provisional ballot with the assistance of and instruction from a poll worker in the polling place and intended to and believed that he did cast his vote in the 117th District nominating contest. There is no evidence of fraud and Mr. Wagner's electoral intent is "exceedingly clear." Under these facts, the Election Code should not be interpreted to nullify Mr. Wagner's vote.

And the record below similarly demonstrates that Mr. O'Donnell voluntarily changed his vehicle (and voter) registration in December 2023 to McAdoo, Schuylkill County and as a result had the right to cast a ballot in that county. The Commonwealth Court was thus in error to find a risk of disenfranchisement.

In sum, this appeal should be dismissed as moot. In the alternative, the decision of the Commonwealth Court should be reversed.

ARGUMENT

A. Mr. Walsh's Appeal Should Be Dismissed as Moot Because He Leads His Opponent by *Five* Votes and Resolution of Certified Questions Involving *Two* Votes at Issue Here Will Not Have any Effect on the Outcome of the Election.

“[T]he mootness doctrine requires an actual case or controversy to be extant at all stages of a proceeding, and an issue may become moot during the pendency of an appeal due to an intervening change in the facts of the case.” *Pilchesky v. Lackawanna Cnty.*, 88 A.3d 954, 964 (Pa. 2014). “An issue before a court is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.” *Yount v. Pa. Lawyers Fund for Client Sec.*, 291 A.3d 349, 354 (Pa. 2023) (internal quotations omitted). The doctrine “is intertwined with the precept that Pennsylvania courts do not issue purely advisory opinions.” *Burke ex rel. Burke v. Independence Blue Cross*, 103 A.3d 1267, 1271 (Pa. 2014).

The Commonwealth Court rejected the suggestion of mootness below, reasoning that, because “there are two additional appeals” and “12 provisional ballots” left to tabulate, the adjudication of the *Wagner* and *O'Donnell* Ballots “may affect the result of the 2024 Primary Election.” *See* Cmwlth. Ct. July 1, 2024 Op. at 5-6. The *Wagner* and *O'Donnell* Ballots, however, are no longer capable of changing the outcome of the election. Following the Commonwealth Court's resolution of this matter, Messers. Cabell and Walsh agreed to have the Board

tabulate 12 previously-challenged provisional ballots not at issue in this appeal. The counting of those ballots expanded Mr. Walsh's lead to 5 votes. *See Luzerne County April 23, 2024 Primary Election Results*, available at <https://results.enr.clarityelections.com/PA/Luzerne/120843/web.317647/#/summary> (last visited July 31, 2024).

What's more, on July 25 and July 30, this Court denied Petitions for Allowance of Appeal filed in the *In Re Petition to Cumulate Write-In Votes in 2024 Primary Election* and *In re Six Ballots in the 2024 General Primary Election* matters. *See* Order denying Petition for Allowance of Appeal to the Supreme Court, *In Re Petition to Cumulate Write-In Votes in 2024 Primary Election*, No. 332 MAL 2024; Order denying Petition for Allowance of Appeal to the Supreme Court, in *In re Six Ballots in the 2024 General Primary Election*, No. 333 MAL 2024. The denial of these Petitions during the pendency of this appeal foreclosed the last opportunities for change in the leaderboard, and this appeal is properly dismissed as moot. *See In re Gross*, 382 A.2d 116, 120-21 (Pa. 1978) (dismissing as moot an appeal challenging the involuntary administration of medication at a mental healthy facility where the plaintiff was no longer a patient); *see also Allen v. Birmingham Twp.*, 244 A.2d 661 (Pa. 1968); *Strassburger v. Phila. Record Co.*, 6 A.2d 922, 923 (Pa. 1939).

Moreover, while the court may consider technically moot issues “when the issue presented is one of great public importance or is one that is capable of repetition yet evading review,” *Association of Pennsylvania State Coll. & Univ. Facs. v. PLBR*, 8 A.3d 300, 305 (Pa. 2010), neither exception applies here.

First, the issues presented here are not likely to evade review. The Election Code provides a specific procedure for challenging provisional ballots and that procedure was invoked and completed. *See, e.g.*, 25 P.S. § 3050(a.4)(4) (detailing the process for resolution of challenges to provisional ballots). As evident from the procedural history of this matter, such review was not evaded and further review will not change the outcome of the election.

Second, the public importance exception is very rarely applied and does not apply here. *See Bottomer v. Progressive Cas. Ins. Co.*, 859 A.2d 1282, 1285 (Pa. 2004) (“Although an exception to the mootness doctrine pertains to matters of great public importance, that exception is generally confined to a narrow category of cases.”). This case, involving two provisional ballots in a state legislature race in which the victor is apparent, does not involve the sort of broad impact necessary for invocation of the public interest exception. And Mr. Walsh will not suffer any detriment absent a decision from the Court. Even if this Court were to grant the relief sought, Mr. Walsh would only pad his lead.

B. In the Alternative, the Commonwealth Court’s Opinion Rejecting the *Wagner* Ballot Should Be Reversed.

If this Court were to entertain this appeal despite the lack of a live controversy, the Commonwealth Court’s decision rejecting the *Wagner* ballot should be reversed. The Commonwealth Court relied almost entirely on its earlier, non-precedential decision in *In re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 (Pa. Cmwlth. 2020), to hold that the “mandatory plain language of Section 1210(a.4)(5)(ii)(A)” requires rejection of the *Wagner* Ballot. Cmwlth. Ct. July 1, 2024 Op. at 9. But the record here supports a different interpretation of that statutory provision.

At the May 9, 2024 hearing, Mr. Wagner testified, and the trial court found as matters of fact, that he filled out his provisional ballot in person, signed the affidavit required by 25 P.S. § 3050(a.4)(2) attesting to his identity and qualifications, completed the provisional ballot process with the assistance of and instruction from an election worker in the polling place, and intended to and believed that he cast his vote in the 117th District nominating contest. *See* Cmwlth. Ct. July 1, 2024 Op. at 3 (citing Tr. at 22-23). There was no evidence of fraud and Mr. Wagner’s “electoral intent” was “exceedingly clear.”

Recognizing the longstanding principle in favor of construing election laws “liberally in favor of the right to vote,” *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) (quoting *Appeal of James*, 104 A.2d 64, 65 (Pa. 1954), the Board and trial

court had decided to count the *Wagner* Ballot under these facts. And there is a strong constitutional basis to follow that lead now.

The Free and Equal Elections Clause of the Pennsylvania Constitution guarantees Mr. Wagner the fundamental right to vote. That clause provides that “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5. This Court has written that the “expansive sweep of the words ‘free and equal’” indicate “the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). To that end, in order to comply with the “free and equal” clause of the Constitution, a “regulation of the right to exercise the franchise [must] not deny the franchise itself, or make it so difficult as to amount to a denial.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

Against this framework, Section 1210(a.4)(5)(ii)(A) must be interpreted to foster and comply with this fundamental right. *See Commonwealth v. McCoy*, 172 A.2d 795, 798 (Pa. 1961) (“A statute must be construed in such manner, if possible, as to bring it in harmony with constitutional requirement[s].”). Mr. Wagner’s failure to sign the outer envelope is thus insufficient grounds to invalidate his ballot. *See In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) (excusing use of other

colored ink given the policy to liberally construe voting laws and because such use would not render a particular ballot identifiable and would not promote the mischief sought to be remedied by the statute); *see also Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) (“[T]he Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice.”). That conclusion is buttressed where Mr. Wagner’s signed affidavit attests to his identity and qualifications and renders his signature on the outer envelope a mere redundancy. *See* 25 P.S. § 3050(a.4)(2) (detailing that form of affidavit).

The Commonwealth Court did not address remaining arguments advanced by Mr. Cabell below in support of rejecting the *Wagner* Ballot. *First*, Mr. Cabell argued below that Mr. Wagner had “waived his right to cure” by failing to appear at the Board hearing. But Mr. Wagner was not invited to correct or alter his ballot by the Board and the trial court did not find that the *Wagner* Ballot had been cured. Rather, the Board and trial court sought testimony from Mr. Wagner to determine his electoral intent. Moreover, Mr. Wagner offered un rebutted testimony that he did not know of the Board hearing. Tr. at 26. Once informed, he was an active participant in the proceedings before the trial court and his testimony was properly considered.

Second, Mr. Cabell argued that Mr. Wagner’s ballot should be invalidated because his testimony before the trial court violated constitutional secrecy requirements. In support, Mr. Cabell cites *Appeal of Orsatti*, 598 A.2d 1341, 1343

(Pa. Cmwlth. 1991), for the proposition that a voter cannot be permitted to waive his right to secrecy. But Mr. Wagner’s answer regarding who received his vote was neither prompted nor permitted. *Appeal of Orsatti* is therefore inapplicable here where Mr. Wagner’s vote was not disclosed or elicited by any election official. It should not be the basis for invalidation of his ballot. *See Appeal of Norwood*, 116 A.2d 552, 554–55 (Pa. 1955) (“Every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.”).

* * *

In sum, the Commonwealth Court’s decision to reject the *Wagner* ballot should be reversed.

C. The Commonwealth Court’s Decision to Count the *O’Donnell* Ballot at Mr. O’Donnell’s Former Place of Residence Should Be Reversed.

The Commonwealth Court reversed the decisions of the Board and trial court not to count the O’Donnell Ballot. In reaching this decision, the Commonwealth Court reasoned that because O’Donnell moved out of Luzerne County on March 29, 2024, he did not have the ability vote in any district on April 23, 2024. *See* Cmwlth. Ct. July 1, 2024 Op. at 11. That finding, however, is not supported, and is in fact contradicted, by the record.

First, while the Commonwealth Court credited Mr. O’Donnell’s testimony as establishing his residence in McAdoo, Schuylkill County on March 29, 2024 (and

inability to vote in that county 25 days later), “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.” *In re Stabile*, 36 A.2d 451, 452 (Pa. 1944). Rather, “[a]n individual’s legal residence is a question of fact which the state has a paramount interest in determining.” *Id.* Here, the factual record refutes Mr. O’Donnell’s assertion as to his residence. For one, Mr. O’Donnell purchased his residence in McAdoo, Schuylkill County in June 2023. *See* Cmwlth. Ct. July 1, 2024 Op. at 4 (citing Tr. at 31-32). While Mr. O’Donnell states that he did not reside at this residence until March 29, 2024, he nevertheless changed his vehicle registration (and voter registration) to the McAdoo residence in December 2023. Tr. at 33-34.²

What’s more, the record demonstrates that Mr. O’Donnell possessed the ability to instead cast a vote in the municipality of his current residence in McAdoo, Schuylkill County. The Acting Director of Luzerne County Elections testified that Mr. O’Donnell was registered and able to vote in his new county of residence (Schuylkill County) by virtue of his change in voter registration that accompanied his change of address on his vehicle registration. *See* Tr. at 39. Thus, contrary to

² Pennsylvania requires vehicle owners to provide their address when registering a motor vehicle, 75 Pa. C.S.A. § 1305(a), and to notify PennDOT of any change in the address on a vehicle registration within 15 days of the change, 75 Pa. C.S.A. § 1312. Mr. O’Donnell provided his new McAdoo address when he changed his address for his vehicle registration in December 2023.

the Commonwealth Court, Mr. O'Donnell was not disenfranchised, but rather was registered and able to vote in his new home on election day.

The Commonwealth Court did not address Mr. Cabell's additional arguments that Pennsylvania's voter registration process (the impetus of Mr. O'Donnell's change in voter registration) violates a voter registration statute and/or is unlawfully promulgated. At the outset, these arguments were not presented at the trial court level and are thereby waived. *See* Pa. R.A.P. 302(a) (stating, as a general rule, "[i]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal"); *Commonwealth v. Hitcho*, 123 A.3d 731, 756 (Pa. 2015) ("It is a bedrock appellate principle that issues not raised in the lower court are waived and cannot be raised for the first time on appeal.") (internal quotations omitted).

But even on the merits, the arguments fail. Under Pennsylvania's Voter Registration Act, a driver's license application "shall serve as an application to register to vote unless the applicant fails to sign the voter registration application" and "[t]he secretary [of the Commonwealth] has the primary responsibility for implementing and enforcing the driver's license voter registration system created under this section." 25 Pa. C.S. § 1323(a)(1). That statute further provides that the Secretary of the Commonwealth (along with the Secretary of Transportation) is vested with authority to "determine[] and prescribe[]" "the format of the driver's license/voter registration application." *Id.* § 1323(b)(2).

The Pennsylvania Voter Registration Act further expressly provides that any change of address submitted to PennDOT for purposes of driver licensing “shall serve as notification of change of address for voter registration for the registrant involved unless the registrant indicates that the change of address is not for voter registration purposes.” 25 Pa. C.S.A. § 1323(a)(3). The Act further details the procedure to be followed upon receipt of change of address information. Specifically, PennDOT is statutorily required to notify the county of the registrant’s former residence which must cancel the voter’s registration in that county and then forward the voter’s registration information to the new county of residence. 25 Pa. C.S.A. § 1323(c)(4)(i). “All changes of address received by [PennDOT] under this section at least 30 days before an election must be processed . . . for the ensuing election.” *Id.* That process, which is an express limitation on a voter’s ability to vote in the election district of his prior residence, 25 Pa. C.S.A. § 1301(c), was followed here: Mr. O’Donnell gave notice of his change of address and his registration was transferred to his new home more than 30 days before the primary election, enabling him to vote in his new home county on primary election day. The special exception to the voter residence requirement in 25 P.S. § 2811(3)—intended to enable voters to retain their qualification to vote if they relocate less than 30 days of an election—does not apply here because Mr. O’Donnell was registered and qualified to vote in his new home county.

And Section 5 of the National Voter Registration Act provides an additional basis for the voter registration process. It states that:

Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.

52 U.S.C.A. § 20504(a)(1). Such an application also serves to update any previous voter registration. *Id.* § 20504(a)(2). "Motor vehicle driver's license" is defined broadly to include "any personal identification document issued by a State motor vehicle authority." 52 U.S.C.A. § 20502(3). Mr. O'Donnell's renewal of his vehicle registration falls within that definition and rests on solid state and federal statutory ground.

Beyond misconstruing 25 P.S. § 2811(3) and contravening the change of address procedure in the Pennsylvania Voter Registration Act, the decision below is impractical. Allowing voters to choose where they want to vote notwithstanding the address information on their voter record will create confusion, invite challenges like the one here, and leave county election officials without a clear standard for determining where such votes should be counted. The change of address procedure in the Election Code was intended to avert just such uncertainty and that procedure should be enforced here.

CONCLUSION

For the reasons addressed above, Mr. Walsh's appeal should be dismissed as moot. In the alternative, the decision of the Commonwealth Court should be reversed.

Date: July 31, 2024

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

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



Timothy E. Gates

Date: July 31, 2024

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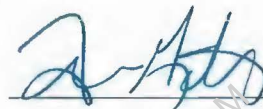
Timothy E. Gates

Dated: July 31, 2024

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PROOF OF SERVICE

I, Timothy E. Gates, hereby certify that I served the forgoing Brief in Opposition upon all counsel of record via the Court's PACFile eService system, which service satisfies the requirements of Pa. R.A.P. 121.



Timothy E. Gates

Date: July 31, 2024

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Exhibit A

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." *Dayhoff 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 of Absentee & Mail-In Ballots of 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 of 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 of Absentee Ballots of Nov. 4, 2003 Gen. Election*, . . . 843 A.2d 1223, 1234 [(Pa.) 2004] ([*Appeal of 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 of 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

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

Exhibit B

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

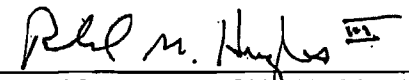
AND NOW, this 15th day of May, 2024, after a hearing on the *Petition for Review in the Nature of a Statutory Appeal Pursuant to Section 1210 of the Election Code*, wherein Shohin H. Vance, Esquire, Gene M. Molino, Esquire, Paula L. Radick, Esquire, and Jamie Walsh, pro-se, appeared, and after review 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 C

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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.