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**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA**

**SONJA KEOHANE, RICHARD  
KEOHANE, and BARBARA WELSH,**

Petitioners,

v.

**DELAWARE COUNTY BOARD OF  
ELECTIONS,**

Respondent.

**CIVIL DIVISION**

**No. CV-2023-4458**

**ELECTION APPEAL**

**John J. Whelan, J.**

**PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR JUDGMENT ON THE PLEADINGS**

Petitioners Sonja Keohane, Richard Keohane, and Barbara Welsh (“Petitioners”), qualified registered electors of Delaware County, by and through their undersigned counsel, move pursuant to Rule 1034 of the Pennsylvania Rules of Civil Procedure and Local Rule 1028(c) for judgment on the pleadings, stating in support as follows:

## I. INTRODUCTION

At issue in this appeal is whether Respondent Delaware County Board of Elections (“Respondent” or the “Board”) is applying an overly restrictive reading of the Pennsylvania Election Code to deny dedicated life-long voters their fundamental right to vote. The Board refused to count the provisional ballots voted by each of the Petitioners, even though they were qualified electors who were registered to vote and who properly completed and submitted provisional ballots at their polling places on Primary Election Day, May 16, 2023 (“Primary Day”). The Board’s sole basis for refusing to count the provisional ballots was that Petitioners had previously returned mail-in ballots to the Board, even though the Board had already determined not to accept their prior attempts to vote by mail and cancelled their mail-in ballots. The Board rejected those mail-in ballots for various deficiencies on the envelopes used to return them, namely that they did not have a valid handwritten date or they had not properly signed the declaration. Then, the Board rejected Petitioners’ provisional ballots as if Petitioners had already voted in the election. Thus, by refusing to count Petitioners’ provisional ballots even after rejecting their mail-in ballots, the Board deprived Petitioners of their fundamental right to vote.

Voting is the cornerstone of our democracy and the fundamental right upon which all our civil liberties rest. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The fundamental nature of the right to vote is even more firmly established in Pennsylvania than it is under the U.S. Constitution. And statutes implicating this fundamental right must be read within an interpretive framework that gives due regard to the values embodied in the Pennsylvania Constitution. *See, e.g., Shambach v. Bickhart*, 845 A.2d 793, 801-02 (Pa. 2004) (discussing *Appeal of James*, 105 A.2d 64 (Pa. 1954)) (holding that the Election Code “must be liberally construed to protect voters’ right to vote”). *See also, e.g., Petition of Cioppa*, 626 A.2d 146, 148 (Pa. 1993) (noting the “longstanding and overriding policy in this Commonwealth to protect the elective franchise”)

(citations omitted). The Board’s unduly restrictive interpretation of the Election Code—resulting in denial of the right to vote under circumstances where all parties, including the Board, agree that Petitioners’ votes should be counted—fails to adhere to these fundamental principles.

The parties do not dispute the relevant facts; the Board all but concedes the absurdity of the result. The Board asserts, nonetheless, that its hands are somehow tied by an unreported 2020 Commonwealth Court decision that is not precedential and barely engaged with the issue at hand, *In re Allegheny County Provisional Ballots in the 2020 General Election*, No. 1161 C.D. 2020, 241 A.3d 695 (Table); 2020 WL 6867946 (Pa. Commw. Ct. Nov. 20, 2020). That decision is neither controlling law, nor is it grounded in logic or a sensible reading of the Election Code. The statutory text, rules of statutory construction, and overarching principles of Pennsylvania election law require election boards to count a provisional ballot when they have disqualified a mail-in ballot due to errors on the outer envelope. That result harmonizes the relevant Election Code sections, realizes the General Assembly’s intention that provisional ballots act as a safety net to protect the fundamental right to vote, and ensures the enfranchisement of all the Commonwealth’s voters.

The Court should reverse the Board’s decision and order the Board to count Petitioners’ provisional ballots.

## **II. BACKGROUND**

No material facts are disputed. And the facts that Respondent has admitted in its Answer to the Petition are sufficient to support judgment as a matter of law.

Petitioners are all qualified electors who are, and were at the time of the 2023 Primary Election, registered to vote in Delaware County, Pennsylvania. (Petition ¶¶ 8-10, 18-19; Answer ¶¶ 8-10, 18-19.) Respondent is the local government agency responsible for overseeing the conduct of all elections in Delaware County, including adjudicating and deciding whether to

count provisional ballots in accordance with the Pennsylvania Election Code. (Petition ¶ 11; Answer ¶ 11.)

Initially, Petitioners all attempted to vote by mail-in ballot in the Municipal Primary Election on May 16, 2023. (Petition ¶¶ 8-10; Answer ¶¶ 8-10.) Petitioners validly requested, received, and returned their mail ballots prior to Primary Day. (Petition ¶19; Answer ¶19.) However, Petitioners made certain mistakes in completing the outer envelopes of their mail-in ballot packages. (Petition ¶ 18; Answer ¶ 18.). Specifically, Petitioners Sonja and Richard Keohane inadvertently signed each other's ballot envelopes and wrote the incorrect date; Petitioner Barbara Welsh wrote the incorrect date on the outer envelope. (Petition ¶¶ 38, 44; Answer ¶¶ 38, 44; *see also* Petition Ex. A, SK Declaration; *id.* Ex. B, RK Declaration, *id.* Ex. C, BW Declaration.) Upon receipt of Petitioners' mail ballot packages, the Board reviewed the outer envelopes and determined that they contained technical errors that would prevent the ballots inside from being counted under current Pennsylvania law. (Petition ¶ 20; Answer ¶ 20.) On or about May 10 and 11, 2023, the Board notified Petitioners via email and postal mail that it had cancelled their mail-in ballots on account of these errors. (Petition ¶¶ 8-10, 18, 21, 38, 44; Answer ¶¶ 8-10, 18, 21, 38, 44.) The Board's correspondence included guidance for how Petitioners could cure the defect. (Petition ¶¶ 24, 28; Answer ¶¶ 24, 28.) The Board's letter did not mention provisional ballot voting. (Petition ¶¶ 25, 28; Answer ¶¶ 25, 28.)

The Board's guidance regarding how to cure defective mail-in ballots was also posted to its website. (Petition ¶ 22; Answer ¶ 22.) The guidance states that voters could either (a) obtain and complete a replacement ballot in person at the office of the Bureau of Elections (the "Bureau") in Media, Pennsylvania, or (b) request that the Bureau mail a replacement ballot to the

voter in advance of election day. (Petition ¶¶ 3, 22; Answer ¶¶ 3, 22.) The Board’s online guidance also did not mention provisional ballots. (Petition ¶ 25; Answer ¶ 25.)

However, Pennsylvania’s Department of State published guidance on its website stating that voters are entitled to request, receive, and vote a provisional ballot if, among other reasons, the voter returned a mail-in ballot that was rejected by the county board of elections. (Petition ¶¶ 27, 66; Answer ¶¶ 27, 66.) Although not as well publicized, it is the Board’s policy as well to permit voters to complete and submit provisional ballots under these circumstances. (Petition ¶ 36; Answer ¶ 36.)

Petitioners did not use the cure process outlined in the Board’s communications,<sup>1</sup> but instead appeared in person at their respective polling places on Primary Day, where they properly completed and submitted provisional ballots consistent with the Department of State’s guidance. (Petition ¶¶ 4, 8-10; Answer ¶¶ 4, 8-10.)

On May 17, 2023, the Board, through its designated provisional ballot review board, began review of the provisional ballots submitted on Primary Day. (Petition ¶ 47; Answer ¶ 47.) On May 18, 2023, the Board’s provisional ballot review board held a closed “exhibition” session during which it disclosed its recommendations for counting or not counting provisional ballots to candidates, political parties and their representatives. (Petition ¶¶ 48, 50; Answer ¶¶ 48, 50.)

On May 23, 2023, the Board considered the recommended disposition of the provisional ballots at a public hearing. (Petition ¶ 55; Answer ¶ 55.) At the public hearing, the Board

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<sup>1</sup> Petitioners do not challenge the Board’s ability to establish notice and cure procedures for voters to correct problems with mail ballots prior to a primary or election. Nor do Petitioners claim that the specific procedures established by the Board for the May 2023 Primary are in any way contrary to law. Rather, Petitioners only challenge the Board’s decision to reject their provisional ballots voted on Primary Day. Under the correct reading of the Election Code, the Board must accept provisional ballots even if it also makes the commendable decision to establish additional options for voters to cure mail ballot defects before Election Day.

unanimously voted not to count Petitioners' provisional ballots. (Petition ¶ 56; Answer ¶ 56.) The Board based its decision on the unpublished and nonprecedential Commonwealth Court decision, *In re Allegheny County Provisional Ballots in the 2020 General Election*, No. 1161 C.D. 2020, 241 A.3d 695 (Table), 2020 WL 6867946 (Pa. Commw. Ct. Nov. 20, 2020). (Petition ¶ 58; Answer ¶ 58.) Nevertheless, various Board members repeatedly stated on the record that they were troubled by the result and hoped the courts would reconsider. (Petition ¶¶ 56-59; Answer ¶¶ 56-59.) Indeed, the Board has expressed the view that provisional ballots cast by voters who submitted mail-in ballots that were cancelled due to facial defects should, in fairness, be counted. (Petition ¶ 5; Answer ¶ 5.) And the Board has now expressly asked this Court to rule in Petitioner's favor, requesting "an order declaring Petitioners' provisional ballots eligible to be counted and directing the Board to count them." (Answer at 17.)

### **III. ARGUMENT**

#### **A. Legal Standard**

Judgment on the pleadings may be granted where, as here, the pleadings demonstrate that no genuine issue of fact exists and the moving party is entitled to judgment as a matter of law. *See* Pa. R. Civ. P. 1034(a); *Angino & Rovner v. Jeffrey R. Lessin & Assocs.*, 131 A.3d 502, 507 (Pa. Super. Ct. 2016). A court must accept as true all well-pleaded facts of the party against whom the motion is made, while considering against it only those facts which it specifically admits. *Jones v. Travelers Ins. Co.*, 514 A.2d 576, 578 (Pa. Super. Ct. 1986). In deciding a motion for judgment on the pleadings, a court may consider the pleadings and any documents properly attached thereto. *Pfister v. City of Philadelphia*, 963 A.2d 593, 597 (Pa. Commw. Ct. 2009). As set forth above and in the accompanying motion, the essential facts of this case are not disputed and the Court may decide the legal issues without further factual development.

**B. A Plain Reading of the Statutory Text Commands that the Board Count Petitioners' Provisional Ballots**

Pursuant to § 3050(a.4)(5)(i) of the Pennsylvania Election Code, county boards of election have a positive duty to count provisional ballots subject to certain enumerated exceptions. The relevant text of the statute states as follows:

(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.

25 P.S. § 3050(a.4)(5)(i). The language is mandatory and requires election boards to count provisional ballots so long as the voter "did not cast any other ballot." The obvious purpose of the provision is to ensure that each voter gets to vote once and only once. But the Board's flawed interpretation ensured that these voters did not get to vote at all.

When interpreting a provision of the Election Code, Pennsylvania's Statutory Construction Act ("the Act") provides and the courts hold that "the polestar of statutory construction is to determine the intent of the General Assembly" and that "the best indication of legislative intent is the plain language of a statute." *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1230 (Pa. 2004) (citations omitted); 1 Pa. C.S.A. § 1921(a) ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly."); 1 Pa. C.S.A. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

A qualified voter who attempted to submit a mail-in ballot to the Board, only to have that attempt rejected by the Board before even opening the return envelope, cannot sensibly be said to

have “cast” their ballot within the ordinary meaning of that word. Black’s Law Dictionary defines “cast” as “[t]o formally deposit (a ballot) or signal one’s choice (in a vote).” Cast Definition, *Black’s Law Dictionary* (11th ed. 2019), available at Westlaw. A voter cannot be said to have “formally deposit[ed]” a ballot when the formalities of casting a vote have not been observed. Here, the envelopes containing Petitioners’ ballots were determined to be defective in form without even being opened. The defects in the outer envelopes resulted in the ballots being “cancelled”—before anyone ever saw the ballot. In no sense were votes “cast” by the Petitioners; the Board’s cancellation of the ballots prevented them from being “cast.” It is more accurate to say that the Petitioners *tried* to cast their ballots but failed.

Petitioners’ ballot status is similar to an elector at the polling place who realized they made a mistake on their ballot before depositing it into the scanner at the polling place and then receives a replacement ballot. The “casting” of a ballot requires more than a mental determination to vote for one candidate or another or even checking a box on a piece of paper marked “official ballot.” To “cast” a vote at the polls requires that a ballot be inserted irretrievably into the scanner. For a mail-in ballot, a ballot is not cast if it has been rejected, cancelled, and set aside before anyone opens the envelope and inserts the ballot into a scanner.

Similarly, the affidavit the voter signs for a provisional ballot supports that interpretation. The individual affirms that “this is the only ballot that I cast in this election.” 25 P.S. § 3050(a.4)(2). A voter whose ballot has been “cancelled” by the county, and who was notified of the cancellation and of their ability to request a “replacement ballot,” has a good-faith belief that they have not “cast” a ballot in the election. That is because the common-sense and plain



reading of this section of the Election Code obligates the Board to count a properly submitted provisional ballot after the Board has cancelled the voter's mail ballot.<sup>2</sup>

**C. Section 3050(a.4)(5)(ii)(F) Does Not Present a Conflict, as the Relevant Election Code Sections Are Easily Harmonized**

Plainly read, § 3050(a.4)(5)(i) requires the Board to count a properly submitted provisional ballot after the Board has cancelled the voter's mail-in ballot. Nothing in § 3050(a.4)(5)(ii)(F) changes that result. Section (F) states that "provisional ballot[s] shall not be counted if" one of several conditions is present, including: "the elector's absentee ballot or mail-in ballot is timely received by a county board of elections." 25 P.S. § 3050(a.4)(5)(ii)(F). The obvious and common-sense intent of this provision is also to prevent double voting. If a voter's legally sufficient mail-in ballot is received by the deadline, is not expressly rejected by the Board based on a problem on the outer envelope, and is readied for counting by the Board, then the provisional ballot cannot be counted under this provision. But if the outer envelope discloses a defect that precludes opening the envelope, it cannot be said that a "mail-in ballot" was "timely received."

That is the common sense reading of the statute. But should there be any ambiguity among provisions, Pennsylvania law demands that they be read harmoniously to give effect to both provisions and should be construed in a way that does not nullify or exclude another provision. *See In re Borough of Downingtown*, 161 A.3d 844, 871 (Pa. 2017) (noting that when two statutory provisions can be read as harmonious or in conflict, courts should construe them as

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<sup>2</sup> Moreover, the Board's notification to voters on its website about its cure process described the previously submitted mail ballots as "disqualified" because of a "legal flaw." *See Delaware County, Delaware County Bureau of Elections Issues Final Guidance Regarding Flawed Vote-by-Mail Envelopes* (May 6, 2023), available at <https://delcopa.gov/publicrelations/releases/2023/flawedvotebymailenvelopes.html>. Further, the Board also stated, "By law, the Delaware County Bureau of Elections is prevented from processing the ballots from flawed envelopes." *Id.* In other words, the Board itself was treating these ballots as not cast within the plain meaning of the word.

in harmony with each other); *Commonwealth v. Office of Open Records*, 103 A.3d 1276, 1284 (Pa. 2014). (affirming that “the principle of construing statutory parts harmoniously is one which is fundamental to our methodology of statutory construction”); *Cozzone v. Workers’ Comp. Appeal Bd.*, 73 A.3d 526, 536 (Pa. 2013) (citations omitted) (holding “as a fundamental principle” that statutory parts “are not to be construed as if one part operates to nullify, exclude or cancel the other . . . . ‘[I]f they can be made to stand together[,] effect should be given to both as far as possible.’”); *Lowman v. Unemployment Comp. Bd. of Review*, 235 A.3d 278, 296-97 (Pa. 2020). *See also* 1 Pa. C.S.A. § 1922(b) ([T]he General Assembly intends the entire statute to be effective and certain.”); 1 Pa. C.S.A. § 1932(b) (“Statutes in pari materia shall be construed together, if possible, as one statute.”).

The mandatory counting provision of § 3050(a.4)(5)(i) is easily harmonized with § 3050(a.4)(5)(ii)(F): if a mail-in ballot package is returned but cancelled because of a defect in the outer envelope, no viable ballot has been “timely received” by the Board or “cast” by the voter. To be “timely received” or “cast” means that the ballot was *received, not cancelled, and able to be counted*. *Cf., e.g., State ex rel. Colvin v. Brunner*, 896 N.E.2d 979, 989 (Ohio 2008) (“[A]n elector who submits an absentee ballot does not actually vote at an election until the ballot is tabulated on election day.”), *abrogated on other grounds by TWISM Enters., L.L.C. v. St. Bd. of Registration for Professional Engineers & Surveyors*, No. 2021-1440, 2022 WL 17981386 (Ohio Dec. 29, 2022). Under this construction, Section (F) would not bar voters’ provisional ballots from being counted where those voters submitted their mail-in ballots in envelopes with purported defects that the Board rejected.

This construction is also consistent with the provisions of the Election Code which allow voters to cast provisional ballots and ultimately to have them counted when the poll book

indicates they requested a mail-in ballot but does not indicate that they timely returned it to the county—whether because they mailed it too late, the ballot was lost in the mail, etc. *See* 25 P.S. § 3146.6(b)(2) (“An elector who requests an absentee ballot and who is not shown on the district register as having voted the ballot may vote by provisional ballot under section 1210(a.4)(1) [25 P.S. § 3050(a.4)(1)]; 25 P.S. § 3150.16 (b)(2) (same language). There is no reason to distinguish, on the one hand, those voters who failed to timely return their ballots and, on the other hand, those voters like Petitioners whose timely returned mail-in ballots were rejected by the Board as defective.

The alternative approach—reading § 3050(a.4)(5)(ii)(F) to prohibit counting these provisional ballots—produces an absurd result, as the Board itself acknowledged in a public hearing and in its filings with this Court. The rules of statutory construction presume that “the General Assembly does not intend a result that is absurd.” 1 Pa. C.S.A. § 1922(1). Section (F) was added to § 3050 after § 3050 (a.4)(5)(i), as part of Act 77, *see* 2019, Oct. 31, P.L. 552, No. 77, § 3.2. Implicit in the concept of a “timely received” mail-in ballot is that the ballot is accepted for counting. Construing these two provisions in harmony, rather than in tension with each other, yields the conclusion that both provisions are intended to prevent double voting. An interpretation that prohibits the counting of Petitioners’ provisional ballots frustrates the common-sense intent of these provisions of the Election Code and deprives Petitioners of their fundamental right to vote.

**D. This Court Should Liberally Construe the Election Code so as to Enfranchise, Not Disenfranchise**

Here, there is no conflict between the statutory provisions when read in context, but to the extent any question remains about the meaning of § 3050(a.4)(5), this Court must construe these two sections liberally in favor of the constitutional right to vote. “It is the longstanding and

overriding policy in this Commonwealth to protect the elective franchise. The Election Code must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice. It is therefore a well-settled principle of Pennsylvania election law that ***every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.*** *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058, 1071 (Pa. 2020) (emphasis added) (cleaned up). *See also* 1 Pa. C.S.A. § 1928(c) (“All other provisions of a statute [*i.e.*, aside from those enumerated, which do not apply here] shall be liberally construed to effect their objects and to promote justice.”). As the Pennsylvania Supreme Court held in *League of Women Voters of Pennsylvania v. Commonwealth*:

In accordance with the plain and expansive sweep of the words “free and equal,” we view them as indicative of 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, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.

178 A.3d 737, 804 (Pa. 2018) (discussing the Free and Equal Elections Clause, Pa. Const. Art. I, § 5). Consistent with this fundamental right, the Pennsylvania Supreme Court has long held that “[t]he disfranchisement of even one person validly exercising his right to vote is an extremely serious matter. . . . [E]ither an individual voter or group of voters are not to be disenfranchised at an election except for compelling reasons.” *Perles v. Cty. Ret. Bd. of Northumberland Cty.*, 202 A.2d 538, 540 (1964) (internal quotation marks omitted).

Following principles firmly established by published, controlling opinions of the Commonwealth’s highest court, if the Election Code lends itself to two possible interpretations, courts must choose the one that enfranchises voters rather than disenfranchises them. “In construing election laws . . . [o]ur goal must be to enfranchise and not to disenfranchise.” *In re Luzerne Cty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972). *See also, e.g., Shambach*, 845 A.2d at

798-802; *Appeal of James*, 105 A.2d at 65-66 (“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.” (cleaned up)).

The Petitioners are well-meaning citizens who tried but failed to exercise their right to vote by mail. When the Board notified them of the rejected ballots, they cast provisional ballots. There is no risk of double counting and no conceivable harm to the voting process. The only harm here is to Petitioners’ constitutional right to vote. In such circumstances, the constitutional imperative to interpret the Election Code in favor of enfranchising voters controls. *See Shambach*, 845 A.2d at 802-03 (noting that, where the procedure does “not undermine the efficiency of the voting system or make it possible for voters to cast more than one vote,” the statute should be “liberally construed” in favor of the voter).

**E. The Commonwealth Court’s Unreported and Non-Precedential Opinion Is Not Binding on the Board or this Court**

The Board points to the Commonwealth Court’s decision in *In re Allegheny County Provisional Ballots in the 2020 General Election* as the lone reason why it decided not to count Petitioners’ provisional ballots. (Petition ¶ 58; Answer ¶ 58. *See also* Answer at 2 (stating that the Board “felt bound to vote to reject [Petitioners’] provisional ballots . . . based on a 2020 decision by the Pennsylvania Commonwealth Court”); Answer ¶ 42 (“[T]he Board and its staff followed the law of the Commonwealth of Pennsylvania as they understood it.”).) That decision is not binding on this Court, is not well reasoned, and failed to account for the constitutional implications of the decision.

First, *In re Allegheny County* does not bind this Court or the Board because it is not precedential by the Commonwealth Court’s own rules. The heading above the opinion’s caption

states that it is an “Unpublished Disposition” and that it is not reported.<sup>3</sup> 2020 WL 6867946, at \*1. It is “well-settled that unpublished decisions from [the Commonwealth] Court are not binding.” *DeGrossi v. Commonwealth, Dep’t of Transp., Bureau of Driver Licensing*, 174 A.3d 1187, 1191 (Pa. Commw. Ct. 2017) (citing *Duke Energy Fayette II, LLC v. Fayette Cty. Bd. of Assessment Appeals*, 116 A.3d 1176, 1182 (Pa. Commw. Ct. 2015)). *See also* Commonwealth Court, Internal Operating Procedures § 414(a) (providing that unreported panel decisions of the Commonwealth Court may be cited for “persuasive value,” but “not as binding precedent”). Thus, while the litigants themselves in the *In re Allegheny County* action were bound to follow the Commonwealth Court’s decision, that decision has no precedential effect elsewhere, the issuing court’s rules preclude future parties from citing to it, and neither the Board nor this Court need follow its ruling.<sup>4</sup> *DeGrossi*, 174 A.3d at 1191.

Second, the Commonwealth Court’s cursory analysis of this issue was incorrect and not well-considered and therefore has little persuasive effect. The panel in *In re Allegheny County* ignored that § 3050(a.4)(5)(i) requires that a provisional ballot be counted if “the individual did not cast any other ballot, including an absentee ballot, in the election.” Rather the entirety of the Commonwealth Court’s analysis rests on its reading of § 3050(a.4)(5)(ii)(F) which states that a provisional ballot shall not be counted if “the elector’s absentee ballot or mail-in ballot is timely

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<sup>3</sup> The *In re Allegheny* decision appears in the Atlantic Reporter, but only with a “table citation” at 241 A.3d 695. Unpublished decisions are often listed in tables, but that does not change their unpublished status. *See, e.g., O’Neill v. State Emps.’ Ret. Sys.*, 280 A.3d 873, 878 (Pa. 2022) (citing to the Commonwealth Court decision below, which received a table citation in the Atlantic Reporter, and noting that the decision was unpublished).

<sup>4</sup> No inference can be drawn from the Pennsylvania Supreme Court’s denial of the petition for allowance of appeal with respect to *In re Allegheny County*, *see* 242 A.3d 307 (Table), since there are any number of reasons why the Supreme Court may decide not to take up a discretionary appeal. *See Salazar v. Allstate Ins. Co.*, 702 A.2d 1038, 1043 n.10 (Pa. 1997) (noting that “the fact that this court denied allowance of appeal in [lower court cases] is no indication of our endorsement of the reasoning used by the Superior Court in those matters”).

received by a county board of elections.” 25 P.S. § 3050(a.4)(5)(ii)(F). *In re Allegheny County*, 2020 WL 6867946, at \*4. The panel did not explain how sending a defective ballot package—or any piece of paper for that matter—to an election board could constitute “timely” receipt of a valid “ballot.” Nor did the panel explain how the defective mail-in ballot package *could not* constitute a “ballot” for purposes of being counted but *could* count as a timely received “ballot” for purposes of depriving the voters of their right to cast a provisional ballot. And it certainly did not address the import of a board of elections acting to cancel the attempted mail-in ballot prior to the voter requesting a provisional ballot.

There is no conflict between Section (i) and Section (ii)(F), and as Petitioners have already explained, *supra*, there is no difficulty in harmonizing these two provisions so as to protect the franchise. The court in *In re Allegheny County* made no attempt to reconcile these provisions. The purpose of § 3050 is to allow election boards to count provisional ballots as long as they do not result in double voting. The provisional ballot is a fallback option for voters who might otherwise be disenfranchised. *See, e.g.*, 25 P.S. § 3050(a.2) (permitting provisional ballots where the voter cannot produce proof of identification or where that proof is challenged). This Court should construe the Election Code in accordance with the obvious intent to prevent double voting and allow Petitioners’ ballots to be counted.

Third, the decision in *In re Allegheny County* is flawed for the additional reason that it failed to give due weight to the constitutional imperative to uphold the right to vote. As Petitioners have already explained, *supra*, courts must construe any ambiguity in the Election Code so as to enfranchise not disenfranchise.

**F. The Pennsylvania Department of State and Election Board Agree With Petitioners' Position**

The Pennsylvania Department of State and the Election Board in this case all agree that the right thing to do is to count provisional ballots of voters to ensure that voters are heard. This Court should not adopt a contrary construction of the statute simply because of an unreported Commonwealth Court decision.

First, the Department of State has considered the very question at issue here and provided guidance that confirms the common-sense reading of the statute. The Department of State website lists the reasons for which a person may be issued a provisional ballot, including the situation where a voter “returned a completed absentee or mail-in ballot that was rejected by the county board of elections and . . . believes they are otherwise eligible to vote.” (Petition ¶ 66; Answer ¶ 66 (cleaned up).) The Department’s guidelines also provide instructions to county election officials that they should not count a provisional ballot that is “invalid because the voter successfully cast another ballot,” but *should* count a provisional ballot if the voter’s mail ballot was previously rejected for a reason unrelated to the voter’s qualifications. *See* Pa. Dep’t of State, *Pennsylvania Provisional Voting Guidance, Version 1.1* at 5, (Oct. 21, 2020) [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_Provisional\\_Ballots\\_guidance\\_1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_Provisional_Ballots_guidance_1.0.pdf). Notably, the Department distinguishes between a voter who has “returned and successfully voted” a mail-in ballot (who is not permitted to vote in person) and a voter who returned a mail-in ballot that was rejected by the county (who *is* permitted to vote a provisional ballot). *Id.* at 3. The guidance demonstrates the Department’s common-sense interpretation of the statutory provision: individuals who have “successfully voted” or “successfully cast” an absentee or mail-in ballot are not entitled to vote at the polling place, because that would be double voting. In contrast, an individual whose ballot was “rejected” by



the county due to a defect on the outer envelope has not “successfully cast” their mail-in ballot and is therefore entitled to vote a provisional ballot on Election Day. The Department’s reading of the Election Code which is within the Department’s “sphere of expertise” should be accorded persuasive weight under these circumstances. *Cf. Winslow–Quattlebaum v. Maryland Ins. Group*, 752 A.2d 878, 881 (Pa. 2000).<sup>5</sup>

Second, the people “on the ground” who run our elections were themselves quite troubled by the implications of carrying out the panel decision. The Board’s members made the following statements on the record:

- the decision “poses an unreasonable burden on folks where casting [a] provisional ballot should be as good as coming into Media and curing a ballot. And so I do hope the courts have an opportunity to reconsider this question in the future[;]”
- “I do think that a voter that comes in and cast[s] a provisional ballot, that that court opinion should be reconsidered. And while we’re here as a Board to follow the election law, which usually in most cases favors the voter, I think that this one is also an undue burden[;]” and
- the outcome here is a “travesty of justice.”

(Petition ¶¶ 58-59; Answer ¶¶ 58-59.)

The Board did not believe that it had reached a just result and has urged the Court to order the counting of Petitioners’ provisional ballots—the same relief Petitioners request.

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<sup>5</sup> Respondents note that the Secretary of the Commonwealth’s interpretation of the Election Code is not *authoritative* under Pennsylvania law. See Answer ¶ 67 (citing *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d at 1078 n.6). Regardless, this Court may still consider as *persuasive* the fact that the Department of State’s interpretive guidance aligns with Petitioners’ interpretation.

(Compare Petition at 17-18 with Answer at 17.) This Court should decline to follow *In re Allegheny County* and require the Board to count Petitioners' provisional ballots.<sup>6</sup>

#### IV. CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court grant their Motion for Judgment on the Pleadings and enter an order declaring that the Pennsylvania Election Code requires the counting of Petitioners' provisional ballots and directing the Delaware County Board of Elections to count them.

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<sup>6</sup> Counting the ballots here would also be consistent with the Help America Vote Act ("HAVA"), which favors counting provisional ballots. HAVA governs federal elections and ensures that registered voters are able to cast provisional ballots. 52 U.S.C. § 21082. Section 3050(a.4) implements HAVA's provisional ballot procedure for Pennsylvania and extends it to non-federal elections by guaranteeing that "[a]t all elections an individual who claims to be properly registered and eligible to vote at the election district . . . shall be permitted to cast a provisional ballot." 25 P.S. § 3050(a.4)(1). A voter's right to cast a provisional ballot under HAVA is mandatory and unambiguous. *See, e.g., Common Cause Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1292-93 (N.D. Ga. 2018) ("The purpose of HAVA's provisional voting section is to ensure that voters are allowed to vote (and to have their votes counted) when they appear at the proper polling place and are otherwise eligible to vote." (citation omitted)).

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