



November 7, 2022

Lisa Dart
Director of Elections
44 Susquehanna Street
Jim Thorpe, PA 18229

Director Dart,

I am writing with an urgent demand that your county ensure that all voters who are unable to cast regular ballots are given the opportunity to cast a provisional ballot, particularly if they believe their mail-in or absentee ballot may not be counted because the voter either wrongly dated or failed to date the ballot's envelope. These voters are entitled to vote in person by provisional ballot under federal law. Given the recent court rulings and ongoing uncertainty about the counting of mail-in or absentee ballots with immaterial errors or omissions—such as incorrect or missing dates on the ballot envelope—the opportunity to vote provisionally is paramount.

Voters may not be prohibited from casting provisional ballots where “an election official asserts that the individual is not eligible to vote.” 52 U.S.C. § 21082(a). Federal law is clear that individuals who declare at a polling place that they are registered and eligible to vote in a jurisdiction “*shall be permitted to cast a provisional ballot.*” *Id.* (emphasis added). Officials may not prevent individuals from casting provisional ballots on the basis that voters are “ineligible” by virtue of having already returned a mail-in or absentee ballot. A voter must be provided a provisional ballot so long as they affirm that they are registered and eligible to vote in that jurisdiction. See *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 576 (6th Cir. 2004) (“Under HAVA, the only permissible requirement that may be imposed upon a would-be voter before permitting that voter to cast a provisional ballot is the affirmation contained in § 15482(a): that the voter is a registered voter in the jurisdiction in which he or she desires to vote, and that the voter is eligible to vote in an election for federal office.”). Indeed, HAVA makes clear that a voter is still entitled to cast a provisional ballot even if their name does not appear on the voting rolls. See 52 U.S.C. § 21082(a) (providing that a voter is entitled to cast a provisional ballot when “*the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote*”) (emphasis added).

It is entirely in accord with HAVA to enable individuals to cast provisional ballots if they believe their returned mail-in or absentee ballot might be invalidated because of a missing or incorrect date on the outside envelope (or for any other reason). HAVA was passed to ensure that eligible voters would not be “turned away from the polls.” See *Wash. Ass'n of Churches v. Reed*, 492 F.

Supp. 2d 1264, 1268 (W.D. Wash 2006). Thus, HAVA ensures that electors whose eligibility is challenged—including by virtue of having already submitted a mail-in or absentee ballot containing an error or omission—can vote provisionally to guarantee that their voice is heard. “Provisional ballots are cast by persons who assert they are eligible to vote but who are determined by election workers on-the-spot to be ineligible.” *Common Cause Georgia v. Kemp*, 347 F. Supp. 3d 1270, 1277 (N.D. Ga. 2018). There is no risk that voters who submit a provisional ballot after returning a mail-in or absentee ballot will have their vote double counted. “After all, the whole point of provisional ballots is to allow a ballot to be cast by a voter who claims to be eligible to cast a regular ballot, pending determination of that eligibility.” *Blackwell*, 387 F.3d at 576. Thus, provisional ballots will only be counted if the voter’s mail-in or absentee ballot is not counted.

Thousands of Pennsylvanians could be disenfranchised through no fault of their own because they understandably relied on the fact that their vote would count even if they failed to write a date (or wrote the wrong date) on the outside envelope of their mail-in or absentee ballot, an error that disproportionately impacts senior citizen voters. This mass disenfranchisement of blameless voters runs directly counter to the well-established principle that election rules should not be changed so close to an election so as to effectively invalidate the ballots of voters who relied on the prior rules. *See, e.g., Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Purcell v. Gonzalez*, 549 U. S. 1 (2006) (per curiam); *Frank v. Walker*, 574 U.S. 929 (2014). County election officials can at least partially mitigate this harm to innocent voters by complying with federal law and enabling individuals to cast provisional ballots if they believe their mail-in or absentee ballot will be invalidated.

Please confirm that election officials in your county will make provisional ballots available in person to those individuals who believe their mail-in or absentee ballot will be invalidated. Further, given the likelihood that many voters may opt to vote provisionally this election, please ensure that your county’s precincts are equipped with sufficient provisional ballots so that all voters will have the opportunity to make their voice heard this election.

Sincerely,

Nick Pressley
All Voting Is Local