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BETHANY MURRANKO, MARK MURRANKO, MICHAEL MCKITISH, JOANNE MCKITISH, JEREMY WHALEY, DAVID MATTICOLI, JOHN MUKA, LISA WERDEL, PATRICIA JOHNSON, and GRACE ASAGRA STANLEY Plaintiffs, vs. MERCER COUNTY BOARD OF ELECTIONS, MARY CORRIGAN, MARTIN J. JENNINGS, JILL MOYER, CHARLES FARINA, NATHANIEL WALKER, SUPERINTENDENT OF ELECTIONS WALKER WORTHY, and PAULA SOLLAMI COVELLO, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY CIVIL PART DOCKET NO. MER-L-324-24 CIVIL ACTION

PLAINTIFF'S COMBINED BRIEF IN OPPOSITION TO ALL DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

The 2022 election Mercer County did not go according to any plan. The morning began with the tabulators failing across the county. That was the failure of Plan A. This lawsuit is not about that. This lawsuit is about what happened after and what the technological failure revealed about the county's regular election practices and its ability to conduct elections in the event of technological failure. In short, there was no Plan B. The complaint sets forth in detail, supported by public documents, news articles, public comments, and sworn affidavits, that the 2022 election in Mercer County was conducted in a manner aberrant to the law set forth in Title 19. In addition, the Complaint discusses the 2023 election, which was plagued by many of the same issues showing evidence of ongoing customs and practices that interfere with constitutional and statutory rights. Plaintiffs allege that these issues arise from the Defendants' failure to properly train District Board workers, and to be informed themselves, as to their statutory and constitutional obligations. Plaintiffs seek injunctive and prospective relief, as well as damages under three statutes: The NJ Civil Rights Act *N.J.S.A.* 10:6-2, 42 U.S.C. §1983, and the Declaratory Judgment Act.

Defendants do not say what Rule they are relying on in the Notice of Motion, but the brief does not seem to challenge the sufficiency of factual pleadings and the motion is primarily focused on jurisdictional issues, namely sovereign and qualified immunity. For the reasons discussed within, these affirmative defenses are not available to all these defendants, in both their individual and official capacities, on these facts. For these reasons, Defendants' motion to dismiss should be denied.

STATEMENT OF FACTS

Plaintiffs are all Mercer County voters whose rights were negatively impacted by the events of the 2022 election. Plaintiffs Michael McKitish, Jeremey Whaley, David Matticoli were all required to vote by provisional ballots, despite being qualified voters, and the Board of Elections rejected their provisional ballots with the given reason as "voted by machine" even thought it was impossible for them to have voted by machine, and the Board and each of its commissioners knew. Compl. at ¶¶243-252.

Plaintiffs Bethany and Mark Murranko were required to vote provisionally due to an error in the pollbook that mistakenly marked each of them as already having voted. Ms. Murranko's provisional ballot was later rejected for "missing ballot" even though she put the ballot in the envelope. Her vote was not counted and she was disenfranchised. Mr. Murranko's vote was subject to a different procedure due to pollbook error. He is not sure if his vote was counted. Simililarly, Plaintiff Lisa Werdel was required by vote by provisional ballot because she was incorrectly marked as having already voted by mail. *Id.* at ¶256.

Plaintiffs John Muka and Patricia Johnson were designated challengers and, as such, had a statutory right to observe the polling place and tabulation of the votes. However, they allege they were thwarted in this because the tabulation was not continuous, always in public, and the conditions kept them so far from where the tabulation was occurring that they were functionally unable to exercise their statutory rights. *Id.* at ¶¶262-265.

For brevity, and due to the limited scope of the motion to dismiss, Plaintiffs incorporate further relevant facts into each section below.

LEGAL ARGUMENT

I. THERE IS NO SOVERIGN IMMUNITY FOR THESE DEFENDANTS

A. Sovereign Immunity is Not Available as a Defense for Any Defendant With Regard to Plaintiffs' Prayer for Prospective/Injunctive Relief

As an initial matter, 11th Amendment sovereign immunity is only a limit on federal court jurisdiction, not state court jurisdiction. *Fuchilla v. Layman*, 109 N.J. 319, 324–25 (1988) (stating "the eleventh amendment limits the jurisdiction of federal, but not state, courts"). Thus, 11th Amendment sovereign immunity is not a defense to a §1983 claim brought in state court against state officials.

Second, sovereign immunity is not a defense available to government officials under §1983 when the plaintiff seeks prospective relief because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 *U.S.* 159, 167 (1985); *see also Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989)* (stating "[o]f course a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983" and noting that "[t]his distinction is 'commonplace in sovereign immunity doctrine'" (quoting L. Tribe, American Constitutional Law § 3–27, p. 190, n. 3 (2d ed. 1988)). Thus, "[i]n an injunctive or declaratory action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants. *Id.* at n.18.

Here, Plaintiffs are seeking prospective relief to bring Defendants' actions and policies in line with what Title 19 requires to avoid future deprivations of the right to vote and to rectify notations in affected voters' records so it does not appear that they tried to vote two times. Specifically, Plaintiffs request that the Court order the Defendants to: undergo training concerning Title 19, train District Board workers on how to count paper ballots in accordance with Title 19, train District Board workers to properly perform all of their other duties under Title 19, reconcile the ballots from the 2022 by ballot type, correct the improper designation of "voted by machine" for

voters who did not, and could not have, voted by machine in the 2022 general election, publish a public reconciliation of all ballots types for the 2023, 2024, and 2025 primary and general elections, identify the cause of errors in the electronic polling books and adopt measures to prevent such errors in the future, develop a plan in the event of machine failure and train all District Board workers accordingly, and appoint an independent monitor for the 2024 election to ensure compliance with Title 19. Amended Compl. Prayer for Relief. These requests for prospective and injunctive relief relate directly to the allegations in the complaint and the documented failures of the Defendants to implement Title 19, which led directly to deprivations of the right to vote and unconstitutional dilution of the vote by failure to adhere to chain of custody protocols.

Sovereign immunity is not a defense to these claims insofar as prospective relief is sought to prevent future violations of the same constitutional violations. Consequently, the motion to dismiss must be denied as to the individual Defendants in their official capacity against whom prospective and injunctive relief is sought.

B. Sovereign Immunity Does Not Apply to the Individual Defendants Sued Under §1983 in Their Personal Capacity

Again, 11th Amendment sovereign immunity does not apply in state court. Even if it did apply, it is not a defense available to the individual defendants named in their individual/personal capacity.

The Supreme Court distinguishes between two types of actions for damages under §1983, those brought against government actors in their official capacity and those brought against governor actors in their personal capacity. The distinction is important because the burden on the Plaintiff is different and so are the defenses available to a defendant. As the Supreme Court explained, "to establish *personal* liability in a §1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 *U.S.* 159,

167 (1985). In a personal capacity action the official may have defenses like qualified immunity, however "[i]n an official-capacity action, these defenses are unavailable." In an official capacity action "the only immunities that can be claimed…are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.*

Here, Plaintiffs bring suit against seven individuals and one entity. The individuals are all sued in their official and personal capacity. Compl. at ¶¶2-8. It is undisputed that the individual defendants as named in their personal capacity cannot raise the defense of sovereign immunity, and Defendants do not seem to argue otherwise. Instead, they raise the defense of qualified immunity, addressed in Part II, below.

C. Sovereign Immunity is Not an Available Defense for Officials Sued in Their Official Capacity When the Violation Was Caused by a "Custom or Practice" of the Government Entity

To hold an official or entity liable for damages in their official capacity under §1983, the plaintiff must show that "the entity's 'policy or custom' played a part in the violation of federal law." *Graham*, 473 U.S. at 166 (internal citations omitted).

Here, there is no question that the Board of Elections, comprised of the individual commissioners, is and was the final word on what policy to adopt concerning the provisional ballots that were rejected due to "vote by machine." Title 19 provides:

> The decision of a majority of the county board on any question concerning a provisional ballot matter shall be deemed the decision of the board and final. If any member of the board dissents from any decision and wishes to make the dissension known to avoid any of the consequences which may result from that decision, the member may record the dissent in the signature copy register, if it is available, or in a note signed and dated. If the dissent is in the form of a note, it shall be appended to or recorded on the signature copy register afterwards by the superintendent of elections or the commissioner of registration, as shall be appropriate.

N.J.S.A. 19:53C-18.

Here, there is no question that the Board of Elections, and each of its Commissioners, adopted a policy and/or custom of rejecting the votes of people who had been directed to vote provisionally. The reason given for rejecting the votes "voted by machine." The process of adjudicating the ballots, and choosing to reject these voters' votes, was specifically adopted by the individual commissioners acting under the color of law. They are the only ones who could have adopted that policy.

Plaintiffs also allege that "Defendants have arbitrarily adopted an official or unofficial policy of requiring voters to vote by provisional ballot when a machine is not functional" and that "this policy, which has endured through at least two elections, violates the Constitutional and Statutory rights of qualified voters to vote by regular ballots without interference." Compl. at ¶¶256-258. This is based on facts provided in sworn affidavits, and attached as exhibits to the Complaint. Exhibit S to Compl. (affidavit of David Lee stating in that he observed district board workers telling voters that they had to vote provisionally due to malfunctioning machine in 2023); Exhibit T to Complaint (affidavit of Beth Scheurerlein stating that she, too, observed voters being told to vote provisionally due to an inoperable machine in a different district). Plaintiffs cannot allege from whence this policy/practice came because Plaintiffs are not privy to that information, but there is weighty evidence that this is a policy, practice, or custom that Defendants have adopted.

For these reasons, the defense of sovereign immunity is not available to the Defendants in their official capacity.

D. <u>The Superintendent and Board of Elections are "Persons" within the meaning of §1983</u>

First, contrary to Defendant's assertion, Plaintiffs have not brought a claim against the "Office of the Superintendent of Elections." Plaintiffs brought claims against the individuals

holding the office, in 2022 (Nathaniel Walker) and currently (Walker Worthy), in their official and personal capacities. The argument that the "Office of the Superintendent" is not a person is not relevant because the Office of the Superintendent is not named, the persons serving in the office are named.

Second, it is settled law that "local government units" are persons within the meaning of §1983. The Supreme Court has held this explicitly: "Local governing bodies, therefore, can be sued directly under §1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements…or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 *U.S.* 658, 690 (1978). Under *Monell*, local government units are distinguished from "arms of the state," which are not considered persons within the meaning of §1983. The cases cited by Defendants are all specifically limited to the context of other statutes. In *Keenan*, the court was engaged in a very specific inquiry concerning the extent of the Superintendent's power. The limited question before the court was "whether [the superintendent] is an 'officer of the State Government' within the meaning of N.J.S.A. 52:17A—11 and N.J.S.A. 52:17A—4(e)." *Keenan v. Bd. of Chosen Freeholders of Essex Cnty.*, 106 *N.J.* Super. 312, 314 (App. Div. 1969). However, those statutes are not at issue here and the inquiry under §1983 is not whether an entity is an "officer of the state," it is whether the entity is an "arm of the state," so *Keenan* and the reasoning therein is not applicable here. *See also Meredith v. Mercer Cnty. Bd. of Chosen Freeholders, 117 N.J. Super. 379, 285 A.2d 27 (Law. Div. 1970)* (interpreting statute setting forth appointment procedure of superintendent).

This line of cases is not applicable because the question in a §1983 is whether the entity is an arm of the state and The Third Circuit has set forth specific factors to determine if a government

entity is a local government unit or an arm of the state under §1983. These factors, known at the *Fitchik* factors are much more concerned with the question of from where a money judgment would be satisfied than where power lies. The factors are notably absent from Defendants' brief, likely because they show the Board of Elections is a local government unit, not an arm of the state. The *Fitchik* factors are:

> (1) Whether the money that would pay the judgment would come from the state (this includes three of the Urbano factors—whether payment will come from the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts);
>
> (2) The status of the agency under state law (this includes four factors—how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and
>
> (3) What degree of autonomy the agency has.

Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655, 659 (3d Cir. 1989).

Even the language of the *Fitchik* test shows its lack of applicability here. The Superintendent and Board of Elections are not "agencies." The facts and law also demonstrate its inapplicability.

N.J.S.A. 19:32-1 provides that when a county like Mercer chooses to establish an office of the superintendent of elections, then the office is filled by the governor with the advice and consent of the Senate. The salary of the Superintendent is set and paid by the county. *Id.* Even in counties of the first class where the office of superintendent is required by state statute, the entire office is funded from the county treasury and salaries set by the Superintendent are subject to review and approval of the county governing body. *N.J.S.A.* 19:32-2(b).If the county commissioners fail to appropriate sufficient funding, then they are to use other county funds to make up the difference.

N.J.S.A. 19:32-52. The office is located in the county. *Id.* The position of Superintendent was created by Mercer County, not the state. *Cnty. Bd. of Chosen Freeholders*, 117 N.J. Super. 379, 380 (Law. Div. 1970) (stating that "Mercer County created the office of Superintendent of Elections on April 16, 1968). The county has the right to abolish the office as well. *N.J.S.A.* 19:32-54. State statute provides that the county government is responsible for providing "suitable room or rooms for the transaction of the business of such superintendent and procure suitable furniture therefore and any books, stationary, fuel, and supplies that may be necessary from time to time." *N.J.S.A.* 19:32-4. It is evident from the plain language of the statutes that the Superintendent Office was financially structured to be of the County, not the state. There appears to be no financial crossover, so the first *Fitchik* factor suggests that the SOE is not an arm of the state.

The same is true of the County Board of Elections. County Boards of Elections are also created by statute. They consist of four legal resident voters of the county, 2 members each from the two political parties that garnered the most and second most vote in the last general assembly election. *N.J.S.A.* 19:6-17. The commissioners are nominated by the local political parties. *N.J.S.A.* 19:6-18. The Board may, autonomously, vote to make itself larger by 2 members. *Id.* The Board may appoint a clerk of the board and office employees, "subject to approval by the board of county commissioners…and to the budgetary process." Like with the SOE, the county board of commissioners is responsible for providing office space, furniture, and other equipment the Board seems necessary. *N.J.S.A.* 19:6-21. As with the SOE, there appears to be no financial crossover, so the first *Fitchik* factor suggests that the BOE is not an arm of the state.

Here, both the office of the Superintendent and the BOE are enabled by statute, but being created by or allowed by the state does not make them arms of the state under §1983 any more than being governed by the Faulkner Act makes municipalities arms of the state or assiduously

following land use laws makes planning boards arms of the state. Indeed, the enabling statutes that created these specific local government units, the SOE and BOE, make clear that they are of the county, funded by the county, and in the case of the Superintendent, can be abolished by the county.

As to the second and third *Fitchik* factors, both the SOE and BOE are independent. State law generally treats both as regulated, but independent entities. Defendants did not present evidence either way as to whether the SOE or BOE are separately incorporated, but as both are tied financially to the county only, this inquiry comes down on the side of them not being a state arm regardless of whether they are separately incorporated or within the county. Defendants also did not present evidence on whether the BOE and SOE can sue and be sued in their own right, but internet research shows that the Mercer County Superintendent of Elections has entered into a collective bargaining agreement on its own, which suggests that it can be sued on that agreement. *See Exhibit* A to Wefer Cert. (Agreement between Mercer County Superintendent of Elections and Communications Workers of America) and *Exhibit B* to Wefer Cert. (screenshot of current bid solicitation from SOE).

In short, the structure of the SOE and BOE shows that they are not arms of the state. They are, by the plain terms of the statute, funded by the county and are otherwise autonomous. Because the county is a local government unit and not an arm of the state, neither are the SOE and BOE. Consequently, they are persons with the meaning of §1983 and the claims should be maintained against the Superintendent, Board of Elections, and each of the individual defendants.

E. <u>There is no sovereign immunity for the individual defendants under the NJ CRA</u>

Plaintiffs also bring claims pursuant to the NJ Civil Rights Act of 2004. The NJ CRA provides that:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law

N.J.S.A. 10:6–2(c). Plaintiffs may bring suit for "damages and for injunctive or other appropriate relief." *Id.* Permitted claims under the NJ CRA are broader than the claims under §1983 because §1983 is limited to actual constitutional violations while the NJ CRA allows private rights of action against any person acting under color of law who deprives a person of any substantive, equal protection, or privilege or immunity secured by the constitution or laws of the United States and New Jersey.

The individuals Defendants sued in their personal capacity are persons under the NJ CRA and sovereign immunity does not apply to them. They may only raise the defense of qualified immunity, discussed below.

As to the Superintendent and Board of Elections, Defendants' argument that they are not persons fails for the same reasons it does under the §1983 analysis.

II. QUALIFIED IMMUNITY IS NOT AVAILABLE TO THESE INDIVIDUAL DEFENDANTS

The individual defendants raise the affirmative defense of qualified immunity. First, it should be noted that, like §1983, this defense only applies to claims for money damages. Plaintiffs claims for prospective/injunctive relief are not subject to this defense. *Ramos v. Flowers,* 429 *N.J.* Super. 13, 24, 56 (App. Div. 2012) (holding that it was error to allow qualified immunity defense as to claims seeking prospective/injunctive relief because "[d]octrines of immunity have not been held to bar injunctive remedies in § 1983 cases") (internal citations omitted).

Here Plaintiffs allege violation of constitutional rights and statutory rights. Specifically, the Plaintiffs whose votes were wrongly rejected allege an abridgement on the clearly established right to vote as well as the right to equal protection in the exercise of that right. These rights are plainly set forth in the New Jersey Constitution, which provides that qualified voters "shall be entitled to vote." N.J. Const. art. II §1, ¶1. In addition, every NJ voter has the right to alter or reform the government through their participation in the elections, and that right was thwarted and interfered with by the overall conduct of Defendants in administering the 2022 election. It is well-recognized that "constitutional right to vote for the candidate of his or her choice necessarily includes the corollary right to have that vote counted 'at full value without dilution or discount. *Matter of Election for Atl. Cnty. Freeholder Dist. 3 2020 Gen. Election*, 468 N.J. Super. 341, 353 (App. Div. 2021). Further, "[t]he moment an individual's vote becomes subject to an error in the vote tabulation process, the easier it is for one's vote to be diluted." *In re Gen. Election of Nov. 5, 1991 for Off. of Twp. Comm. of Twp. of Maplewood, Essex Cnty.,* 255 N.J. Super. 690, 696, 605 A.2d 1164, 1167 (Law. Div. 1992). Plaintiffs plead detailed facts that show that the tabulation errors that took place in the 2022 election were numerous and that Plaintiffs were subject to having their right to vote abridged both directly (having their votes rejected) and indirectly (having their votes diluted through the many documented errors in the tabulation process, including a complete breakdown in ballot of chain of custody throughout the county). In addition, Plaintiffs plead violation of other statutorily guaranteed rights, including the right of the public to observe a tabulation that takes place continuously and in public, the right to vote by regular ballot when qualified. Compl. at ¶¶255

Defendants do not seem to challenge the sufficiency of the pleading. Nor do Defendants challenge whether these rights are clearly established. Instead Defendants introduce new facts,

essentially arguing that the alleged constitutional and statutory violations arose due to an "unforeseen, emergency situation." Moving brief at pg. 18. In support of this, Defendants introduce extraneous facts without support. Defendants assert without evidence that [t]he paper ballots from the impacted voters were placed into the slots of the bins on which the tabulators were mounted so that they could be counted." It is not clear what this statement means as "impacted voters" is not defined and may refer to the 749 voters who had their votes rejected, just the plaintiffs in this case, or voters all across the county the entire election day. To the extent it is meant to apply to these Plaintiffs, it is in direct contradiction to evidence submitted by Plaintiffs, which states that rejected ballots in those early morning hours were spoiled. *See* Exhibit E to Compl. (sworn declaration of poll worker Jennifer Strano that they spoiled the rejected ballots); Compl. at ¶71 (alleging that "Upon information and belief, hundreds of ballots were spoiled because the poll workers failed and/or refused to accept the properly completed ballots simply because the tabulator was not working"). As a matter of logic, it does not make sense that poll workers would put voters' ballots in the emergency slot and then also have them fill out a provisional ballot, which seems to be what the Defendants are suggesting. In addition to not making sense, there is no evidence that this is what happened.

Defendants also assert, without evidence, that "[a]ll ballots were counted." First, ballots are not the same thing as a vote. Here, Plaintiffs were required to vote provisionally and their provisional ballots were rejected, so their vote was not counted.

Defendants scapegoat the technological failure as an "unforeseen, emergency situation" and assert there was a "good faith effort to count all ballots while the issue was being investigated and resolved." Defendants pat themselves on the back grading their response to the technological failure as "[q]uick thinking and effective problem solving." However, the technological failure has

little to do with Plaintiff's underlying claims; it was the Defendants' inability to continue the election in a secure manner in the face of the failure that underlies the Plaintiff's claims. Title 19 has clear procedures in place that kick in when a tabulating machine fails. *N.J.S.A.* provides that "[i]f for any reason it becomes impracticable to count all or a part of the ballot cards with tabulating equipment, the county board of elections may direct that they be counted manually, following as far as practicable the provisions governing the counting of paper ballots contained in Title 19 of the Revised Statutes." Had Defendants followed these statutes, and trained the District Board Workers, to follow these statutes, *that* would have been a good-faith effort to properly count the ballots. Unfortunately, as detailed extensively in the Complaint, it does not appear that the Defendants had an emergency voting plan in place (as the State said it should have, *See* Exhibit A to Complaint at pg. 13). Moreover, it does not appear that District Board Workers, or Defendants themselves, had any knowledge or care about how paper ballots are to be handled, resulting in a complete breakdown in chain of custody detailed in the Complaint, including ballots being haphazardly removed from machines and strewn on the floor (Compl. at ¶80 and Exhibit F) and unsealed, uncounted bags of ballots being transported to the county by a single person, in contravention to multiple provisions of Title 19, governing the handling of paper ballots. 1,500 ballots sat in machines, some of which were unsealed, for up to a week after Election Day. Compl. at ¶90 (Exhibit I, news article "After Bungled Ballots, Machines Malfunctioning, Officials Calling for Overhaul of Mercer County Elections System").

Defendants assert the affirmative defense of qualified immunity, but no facts to support it. The 2022 election was administered in a way completely inconsistent with Title 19 and Plaintiffs' clearly established statutory and constitutional rights were violated by the Defendants' utter failure to know its statutory obligations and train District Board workers accordingly. Defendants' are

charged with the solemn responsibility of administering the elections in accordance with our election laws. They know that failure to do so in accordance with the law can result in violating the clearly established constitutional rights to vote and to equal protection, as well as statutory rights, like the right of the people to continuous and public vote tabulation. Qualified immunity is not available in these circumstances.

III. THE CLAIMS ARE NOT TIME-BARRED BECAUSE THIS IS A CIVIL RIGHTS ACTION, NOT AN ELECTION CHALLENGE

Plaintiffs are not challenging any outcome of the 2022 election and election law timelines do not apply.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

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DANA WEFER, ESQ.

Dated: July 11, 2024