

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

CENTER FOR COALFIELD  
JUSTICE, WASHINGTON BRANCH  
NAACP, BRUCE JACOBS, JEFFREY  
MARKS, JUNE DEVAUGHN  
HYTHON, ERIKA WOROBEK,  
SANDRA MACIOCE, KENNETH  
ELLIOTT, and DAVID DEAN,

Plaintiffs,

v.

WASHINGTON COUNTY BOARD  
OF ELECTIONS,

Defendant,

v.

REPUBLICAN NATIONAL  
COMMITTEE and REPUBLICAN  
PARTY OF PENNSYLVANIA,

Intervenors.

CIVIL DIVISION

No. 2024-3953

***INTERVENORS' BRIEF IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT***

Filed on behalf of Intervenors:  
**Republican National Committee and  
Republican Party of Pennsylvania**

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CENTER FOR COALFIELD JUSTICE,	:	CIVIL DIVISION
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BRUCE JACOBS, JEFFREY MARKS,	:	No. 2024-3953
JUNE DEVAUGHN HYTHON, ERIKA	:	
WOROBEC, SANDRA MACIOCE,	:	
KENNETH ELLIOTT, and DAVID	:	
DEAN,	:	
	:	
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v.	:	
	:	
WASHINGTON COUNTY BOARD	:	
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	:	
v.	:	
	:	
REPUBLICAN NATIONAL	:	
COMMITTEE and REPUBLICAN	:	
PARTY OF PENNSYLVANIA,	:	
	:	
Intervenors.	:	

**INTERVENORS' BRIEF  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Intervenors, Republican National Committee and Republican Party of Pennsylvania (“Intervenors”), by and through their undersigned counsel, submit this Brief in Support of their Motion for Summary Judgment.

## I. INTRODUCTION

At no time in our Nation's history has integrity and transparency in the election process been more important. The public's faith in the election process and its results can only arise if elections are conducted in a transparent manner in accordance with the rule of law—not the whim of litigants. Hence, in order to function properly, elections must have rules, including ballot-casting rules. The judiciary may not disregard those rules, rewrite them, or declare them unconstitutional simply because a voter failed to follow them and, accordingly, had his or her ballot rejected. *See, e.g., Ins. Fed'n of Pa., Inc. v. Commonwealth, Ins. Dep't*, 970 A.2d 1108, 1122 n.15 (Pa. 2009).

While cloaked in emotional terms of voter disenfranchisement and a contrived due process violation, that is exactly what Plaintiffs seek, an election process which has no rules. At its core, this matter is nothing more than an attempt by Plaintiffs to overturn a nearly four-year-old landmark decision of the Pennsylvania Supreme Court and have this Court do what the Pennsylvania Supreme Court has said it cannot: mandate that a county board of elections provide a voter with notice of a legally defective mail ballot and permit a voter to cure by casting a provisional ballot. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (hereinafter

“*Pa. Dems.*”).<sup>1</sup> Indeed, granting Plaintiffs’ requested relief would require the Court to disregard the controlling holdings of the Pennsylvania Supreme Court and multiple opinions by the Commonwealth Court of Pennsylvania, and to effectively rewrite key provisions of the Pennsylvania Election Code, 25 P.S. §§ 2601, *et seq.* (the “Election Code”).

In *Pa. Dems.*, the Pennsylvania Supreme Court specifically held that a voter has no constitutional, statutory, or legal right to notice of a defect in a mail ballot or an opportunity to cure. *See id.* at 372-74. To the contrary, the decision whether and in what form to allow notice-and-cure procedures presents “open policy questions,” including “what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots.” *Id.* at 374. Thus, the Supreme Court declined the Pennsylvania Democratic Party’s request to mandate that the Commonwealth’s 67 county boards of elections adopt notice-and-cure procedures for mail ballot defects, concluding instead that such a mandate is “for the Legislature,” not the courts. *Id.*

In so holding, the Pennsylvania Supreme Court recognized longstanding precedent that “[t]he power to regulate elections is a legislative one, and has been

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<sup>1</sup> This Brief uses the term “mail ballot” to refer to both absentee ballots and mail-in ballots, each of which are authorized under the Pennsylvania Election Code. *See* 25 P.S. § 3146.6, § 3150.16.

exercised by the General Assembly since the foundation of the government.” *Id.* at 366 (quoting *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v. Barlow*, 60 Pa. 54 (1869))); *see also* *Agre v. Wolf*, 284 F. Supp. 3d 591, 620 (E.D. Pa. 2018) (Smith, C.J.) (“The process for crafting procedural regulations is textually committed to state legislatures and to Congress.”).

Pennsylvania law is therefore clear. Thus, this Court, like the Pennsylvania Supreme Court, lacks authority to order the Washington County Board of Elections (the “Board”) to adopt a policy which provides voters with notice of fatally defective mail ballots or the opportunity to cure. *See Pa. Dems.* at 374.

Plaintiffs attempt to avoid this inevitable result by relying on a non-binding Guidance issued by the Secretary of the Commonwealth (the “Secretary”) and the Secretary’s recent changes to the Statewide Uniform Registry of Electors (“SURE”) System. But “the Secretary has no authority to definitively interpret provisions of the Election Code,” *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1078 n.6 (Pa. 2020), much less to override the Pennsylvania Supreme Court’s holding in *Pa. Dems.* Moreover, the Secretary lacks authority to bind county boards of elections to provide notice of defective mail ballots or an opportunity to cure—as the Secretary’s own director of elections confirmed in this very case. Plaintiffs’ attempt to forge the Secretary’s non-binding

Guidance and SURE Instruction into a constitutional right the Pennsylvania Supreme Court has expressly rejected is nonsensical and untenable.

Fortunately, the Court need not entertain Plaintiffs' legally unfounded request for relief because Plaintiffs' claim fails at a threshold level and should be dismissed on ripeness and standing grounds without any need to address the merits. And even if the Court reaches the merits, it will soon discover that Plaintiffs' claim quickly falls apart. For all of these reasons, and as explained more fully below, the Court should grant Intervenors' Motion for Summary Judgment and dismiss the Complaint.

## **II. STATEMENT OF THE CASE**

### **A. Factual and Procedural Background.**

On July 1, 2024, Plaintiffs, the Center for Coalfield Justice ("CCJ"), the Washington Branch NAACP ("NAACP") (collectively, the "Organizational Plaintiffs"), and a group of individual Washington County voters—Bruce Jacobs, Jeffrey Marks, June DeVaughn Hython, Erika Worobec, Sandra Macioce, Kenneth Elliott, and David Dean (collectively, the "Voter Plaintiffs"), filed a Complaint for Declaratory and Injunctive Relief against the Board. The Complaint seeks, *inter alia*, a declaration that the Board's lawfully adopted policy declining to provide notice of defective mail ballots and an opportunity to cure in the 2024 Primary Elections (the "Policy") is unconstitutional. Plaintiffs further seek an order

enjoining the Policy and requiring the Board to notify voters who return a fatally defective mail ballot and to permit them to cure the defect by casting a provisional ballot.

**B. Statement of Facts.**

Under the Election Code, county boards of elections have sole authority to determine the conduct and administration of elections within their respective counties. *See* 25 P.S. § 2641; Comp. ¶ 22; *accord* Deposition of Jonathan Marks, Pennsylvania Deputy Secretary for Elections and Commissions (“Marks Dep.”), July 23, 2024, pp. 13-14.<sup>2</sup> Consistent with that authority, and in keeping with the Pennsylvania Supreme Court’s holding in *Pa. Dems.*, some county boards of elections have adopted policies which permit voters who cast otherwise defective mail ballots to receive notice of the defect(s) and the opportunity to cure. *See* Marks Dep., p. 14. Initially, this is what the Board chose to do in Washington County. In 2023, the Board adopted a policy which permitted limited notice-and-cure procedures for some defects on mail ballots. Comp. ¶¶ 55-56. However, on March 12, 2024, in preparing for the 2024 Primary Election, the Board met at a duly noticed public meeting to reconsider its notice-and-cure policy. Deposition of Melanie Ostrander, Washington County Director of Elections (“Ostrander Dep.”),

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<sup>2</sup> The cited excerpts of the Marks Dep. are collectively attached hereto as Exhibit A.



July 18, 2024, pp. 51-53;<sup>3</sup> Comp. ¶ 57. No resolution regarding the Board’s notice-and-cure policy was reached during this meeting, however, and the Board met a second time at a duly advertised public meeting on April 11, 2024. *See* April 11, 2024 Board Meeting Minutes, Ex. 3 to Ostrander Dep.; Joint Stipulation of Facts (“JSOF”) Joint Stipulation Exhibit M (the “Minutes”). The Minutes reflect that following public comment, duly made motions, and discussion, the Board ultimately voted 2-1 to adopt a new policy relating to how it would handle notice-and-curing of defective mail ballots for the 2024 Primary Election (the “Policy”). Under the Policy, the Board chose not to provide notice of defective mail ballots or an opportunity to cure.

The Parties agree that under the bipartisan Act 77 the General Assembly enacted in 2019, any eligible voter is permitted to request and cast a mail-in ballot without having to provide a reason for doing so. *See* 25 P.S. §§ 3150.11-3150.17; Comp. ¶ 25. All that is required is that a voter complete and submit an application to their county board of elections, which must include the voter’s name, address of registration, proof of identification (such as a driver’s license or non-driver ID card), and the last four digits of the voter’s Social Security number. 25 P.S. §§ 3146.2, 3150.12; *see also* § 2602(z.5)(3) (defining “proof of identification”).

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<sup>3</sup> The cited excerpts of the Ostrander Dep. are collectively attached hereto as Exhibit B.

After submitting an application, county boards of elections are required to verify the voter's identity and eligibility to vote, and then send the voter a mail ballot package which includes: 1) the ballot; 2) an inner "secrecy envelope," 3) an outer "declaration envelope," and 4) instruction for completing and submitting the ballot. *Id.* §§ 3146.6(a), 3150.16(a). In order to successfully vote via mail-in ballot, the voter must mark the ballot itself, place the ballot inside the secrecy envelope, and then place the secrecy envelope inside the declaration envelope and complete the declaration. *Id.* §§ 3146.6(c), 3150.16(c).

As noted above, in an attempt to assist voters with proper completion of their mail ballots and to ensure that such ballots are counted, the package sent to the voter includes a detailed instruction sheet which explains, "[f]or your ballot to count, you must complete all of these steps," and then sets forth every action which a voter must take to complete the ballot and the declaration envelope properly, as well as instructions for how to timely return the ballot. *See Ostrander Dep.*, pp. 27-28, 189-192, Ex. 10; Joint Stipulation Exhibit E.

As Plaintiffs admit, Pennsylvania law declares invalid—and prohibits election officials from counting—any mail ballot that is defective because the voter failed to sign or date the declaration envelope, wrote an incorrect date on the declaration envelope, or failed to seal the ballot in an unmarked secrecy envelope. Comp. ¶ 31 (citing *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Pa. Dems.*, 238 A.3d 345 (Pa. 2020))

(the “Non-Curable Defects”). Each Voter Plaintiff admits that when they voted by mail in the 2024 Primary Election, their ballots contained one or more Non-Curable Defects and, thus, their ballots were not counted. Comp. ¶¶ 83-132. Each of the Voter Plaintiffs intend to vote by mail in the 2024 General Election. JSOF ¶ 8.

The Election Code mandates that the Department of State (“DOS”) create the SURE system as the single, uniform integrated computer system governing the database of registered electors in the Commonwealth, which shall be accessible by all county election bureaus. 25 Pa. C.S.A. § 1222; Comp. ¶ 37. Information input into SURE is used to create poll books for election day. In order to ensure that the poll books are accurate, a county needs to enter into SURE (a) whether a voter was sent a mail ballot, and (b) whether that voter’s ballot was received by the county board of elections. *Id.*; *see also* Marks Dep., p. 35. The Board complied with those requirements in the 2024 Primary Election. Ostrander Dep., pp. 23-30. It did so by selecting the “Record-Ballot Returned” code for each returned mail ballot from the dropdown menu in SURE. *See id.*

On March 11, 2024, the Secretary issued guidance to the county boards of elections entitled “Pennsylvania Provisional Voting Guidance” (the “Guidance”) concerning how to process mail ballots. Comp. ¶ 41, Ex. 9; Joint Stipulation Exhibit J. In addition to the Guidance, DOS also issued a document entitled “Changes to SURE VR and PA Voter Services as of March 11, 2024” (hereinafter “SURE

Instruction”). Comp. ¶ 43, Ex. 10; Joint Stipulation Exhibit D. The SURE Instruction informs county boards of elections of new codes which the boards *may* use when receiving and logging the return of mail ballots. Comp. ¶¶ 44-47; Ostrander Dep., pp. 55-59. While the Secretary has authority to promulgate regulations governing SURE, *see* 25 P.S. § 2621, the SURE Instruction is not such a regulation. *See* Marks Dep., p. 31 (explaining SURE Instruction is not a guidance, directive, or regulation). It therefore is not binding on county boards of elections. *See id.*, pp. 14-15 (acknowledging Secretary’s guidance to boards “does not have the force and effect of law”). Prior to the issuance of the SURE Instruction, all that was entered into the SURE system to record a mail ballot, “was probably similar to [‘received].” Marks Dep., p. 78.

As the Guidance and SURE Instruction explain, SURE provides county boards the option to use one of multiple codes from the dropdown menu other than “Record-Ballot Returned.” These other codes permit the county board to record any further determination it made regarding the ballot. Comp., Ex. 10, pp. 6-11; *see* Marks Dep., pp. 39-40 (agreeing codes were “**optional**,” explaining “the very first sentence [of the SURE Instruction] actually spells that out very clearly in all caps,” and stressing that boards “may select one of those status reasons **if that is consistent with their county’s practice**” (emphasis added)). For example, the SURE Instruction offers a variety of “CANC” codes allowing the county board to record

that the ballot was “CANCELED” for a variety of reasons, such as a missing signature, date, or secrecy envelope. *See id.* Selecting “CANC” or other codes triggers a response from DOS. *See id.* If DOS has an email on file for the voter whose ballot is so coded, DOS sends an auto-generated email to the voter. *Id.* The recording county board is neither the author of nor the sender of the auto-generated email and cannot change it. *Id.*; Ostrander Dep., pp. 78-79; 162-165.

All of DOS’s current auto-generated emails would provide Washington County voters inaccurate information under the Policy. Ostrander Dep., pp. 162-163. For example, if election personnel select one of the “CANC” codes, the auto-generated email informs the voter that the voter’s mail ballot will not be counted, and further advises the voter of the time permitted to request a new ballot or, alternatively, of an opportunity to cure the defect by casting a provisional ballot on election day. Comp., Ex. 10, pp. 7-9. This information *contradicts* the Policy, which afforded no notice or opportunity to cure. Ostrander Dep., pp. 214-216, Ex. 3. Moreover, the Board’s Elections Director, Melanie Ostrander, explained that while Washington County poll workers will typically allow anyone to submit a provisional ballot on request, the Board will not count such provisional ballots. *Id.*, pp. 218-219. Indeed, the Election Code is clear that a provisional ballot “shall not be counted” if a mail ballot cast by that voter “is timely received by a county board of elections.” 25 P.S. § 3050(a.5)(5)(ii)(F).

Director Ostrander also explained that her office does not believe the “CANC” codes are appropriate because a voter’s ballot is not being cancelled at the time the code is input into SURE—rather, a ballot is never “cancelled” and the formal decision not to count a mail ballot does not happen until the official canvass after election day. Ostrander Dep., pp. 124, 195-199. Similarly, the automatically generated email associated with “Record-Ballot Returned” in the SURE Instruction incorrectly advises Washington County voters that the County may notify the voter if an issue with the ballot is identified. This, however, is not correct per the Policy, which does not provide for notice and/or an opportunity to cure. Director Ostrander testified that given the current Policy in Washington County, none of the DOS auto-emails contained in the SURE Instruction provides true and completely accurate information to a voter. *Id.*, pp. 122-124, 161-166.

Following discussion with the Board regarding the limited options under the SURE Instruction and consistent with the Policy not to provide notice-and-cure procedures, the Board decided that the “Record Ballot-Return” option would be used to record all mail ballots received. *See* Ostrander Dep., Ex. 3 (April 11, 2024 Board Meeting Minutes); Joint Stipulation Exhibit M.

Accordingly, during the 2024 Primary Election, and consistent with the Policy, Board employees stamped the outer envelope of each received mail ballot as “received.” Board employees also examined the declaration for any defects (*i.e.*,

lack of signature or date), entered the ballot into the SURE system as “Record-Ballot Returned,” and segregated the envelopes by defect pending formal inspection during the pre-canvass. *See* Ostrander Dep., pp. 73-78, 87-89; Marks Dep., p. 19 (“[O]nce [the board has] recorded the ballot, they are required by statute to keep those ballots securely until pre-canvassing begins.”). Further, Board personnel have testified that if a voter calls to inquire about the status of their mail ballot, they would explain that every received mail ballot was locked as required by the Election Code and would be reviewed during the canvass. Ostrander Dep., pp. 91-92; *see also* Comp. ¶ 70. Upon the Board recording the ballots as “Return-Ballot Received” in the SURE system, DOS automatically and without the consent of the Board, issued an auto-generated email with inaccurate information to each voter. Ostrander Dep., Exhs. 4-6; Joint Stipulation Exhibits A-C.

The canvass for the April 2024 Primary Election, which began on April 26, 2024, was publicly advertised in two newspapers. Ostrander Dep., pp. 109-112. During the course of the canvass, the Board voted not to count mail ballots which lacked a signature or a date, had an incorrect date on the declaration envelope, or were found to lack a secrecy envelope. *Id.*, Ex. 3. No Plaintiff or any other individual took any appeal from the Board’s decision not to count a mail ballot. *Id.*, pp. 113-117, 175-176.

Following the 2024 Primary Election, DOS held “feedback sessions” with county election directors in an effort to evaluate the need to revise language in the auto-generated emails. *Id.*, pp. 119-123. At one such feedback session, Director Ostrander and at least one director from a different county both voiced their concern that, because their counties did not offer notice and curing of defective mail ballots, all the auto-generated emails were inaccurate and misleading. *Id.*, pp. 123-125. Via an email dated May 10, 2024, Deputy Secretary Marks sent “a meeting invitation” to county elections officials regarding feedback sessions to talk about “the primary and the ballot status codes specifically.” Marks Dep., pp 75-78 (explaining “There were concerns by a number of counties regarding some of the wording and the emails the voters were receiving.” and “They were primarily concerned about things that they believe might be misleading to voters...”); Joint Stipulation Exhibit G. As a result of the feedback sessions, DOS intended “...to change the wording in the emails.” Marks Dep., pp. 79-80. He further testified that revised emails would be distributed to the counties no later than 45 days before the November election in additional release notes. *Id.*, pp. 80-81. To date, however, DOS has made no changes. Ostrander Dep., p. 125.

The Board adopted the Policy only for the 2024 Primary Election. The Board has not yet adopted a policy on notice or curing for the 2024 General Election. Director Ostrander testified during her deposition that the Board’s “past practice is



that [the policy] is reviewed prior to each election,” so the Board will have a public meeting where “absentee and mail-in ballot procedure will be on the agenda” for the November General Election. *Id.*, pp. 126-127.

The Voter Plaintiffs each alleged that they applied for, received, and submitted mail ballots which were rejected because they did not comply with the requirements for mail ballots under the Election Code. Comp. §§ 83-132. Plaintiffs contend that the Board’s failure to comply with the Guidance and/or to use the SURE Instruction codes for mail ballots which were not signed or dated (instead, logging all voted mail ballots in the SURE system as “Record-Ballot Returned”), has misled and harmed Plaintiffs. Plaintiffs assert that the Board’s actions have deprived them of a “right” to receive notice that their ballots were defective, as well as the right “to cure a defective mail ballot by voting a provisional ballot and have that provisional ballot count.” *See, e.g., id.* §§ 37-51, 55-62, 159.

In particular, Plaintiffs contend that the Board violated the Pennsylvania Constitution’s Procedural Due Process Guarantee found at Article I, § 1 by not providing them with notice and an opportunity to cure the deficiency. Comp. §§ 148-160. Plaintiffs therefore request that the Court provide the following prospective relief:

- a. Declare that the Washington County Board of Elections’ policy and practice of concealing information and misleading voters about their mail-in ballot status is unconstitutional and invalid because it violates the rights

of Plaintiffs and all voters under the Pennsylvania Constitution's Due Process Guarantee, Article I, § 1.

- b. Enjoin the Washington County Board of Elections from concealing information and misleading voters about their mail-in ballot status.
- c. Direct the Washington County Board of Elections to provide accurate, timely information to voters about mail-in ballots containing disqualifying errors.
- d. Provide such other and further relief as this Honorable Court deems just and appropriate.

Comp., Prayer for Relief, pp. 40-41.

On July 9, 2024, this Court granted the Republican National Committee and Republican Party of Pennsylvania leave to intervene in this matter. Intervenors now move for summary judgment.

### **III. STANDARD OF REVIEW**

Summary judgment is appropriate if the “evidentiary record . . . entitles the moving party to judgment as a matter of law.” Pa. R. Civ. P. 1035.2. “[A] court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery.” *Swords v. Harleysville Ins. Companies*, 883 A.2d 562, 566-67 (Pa. 2005). A material fact is one that directly affects the outcome of the case. *See Bartlett v. Bradford Publ’g, Inc.*, 885 A.2d 562, 568 (Pa. Super. 2008). “Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case

and on which it bears the burden of proof . . . establishes the entitlement of the moving party to judgment as a matter of law.” *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 429 (Pa. 2001).

#### **IV. ARGUMENT AND AUTHORITY**

Stripping away the hyperbole—the unfounded claims of voter disenfranchisement, a contrived constitutional due process deprivation argument predicated upon misplaced reliance on non-binding Guidance, and an attempt to mandate non-mandatory usage of the SURE system—Plaintiffs’ Complaint is nothing more than a request that the Court require the Board to adopt a notice-and-cure policy for the 2024 General Election. Plaintiffs’ suit therefore is foreclosed by the Pennsylvania Supreme Court’s holding in *Pa. Dems.*

Indeed, Plaintiffs’ suit suffers multiple procedural defects, including lack of ripeness and standing, that warrant summary judgment without any examination of the merits. Moreover, Plaintiffs’ suit fails on the merits for multiple reasons. The Court should grant Intervenors’ Motion and dismiss this suit.

##### **A. Plaintiffs’ Suit Suffers Myriad Procedural Defects.**

The Court should grant Intervenors’ Motion for Summary Judgment and dismiss Plaintiffs’ Complaint on ripeness and standing grounds.

## 1. Plaintiffs' Suit Is Speculative And Not Ripe.

The doctrine of ripeness “mandates the presence of an actual controversy.” *Bayada Nurses, Inc. v. Dep’t of Labor & Industry*, 8 A.3d 866, 874 (Pa. 2010). “Standing and ripeness are distinct concepts insofar as ripeness also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013). “Under the ripeness doctrine, ‘[w]here no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained.’” *Carter v. Degraffenreid*, No. 132 M.D. 2021, 2021 WL 4735059, at \*6 (Pa. Commw. Oct. 8, 2021) (quoting *Cherry v. City of Philadelphia*, 692 A.2d 1082, 1085 (Pa. 1997)).

The Pennsylvania Supreme Court confirmed in a pair of 2020 election cases that a claim is not ripe—and must be dismissed—where it rests on speculation regarding future events. *See Disability Rights Pa. v. Boockvar*, 660 Pa. 210, 211 (2020) (Wecht, J., concurring); *Delisle v. Boockvar*, 660 Pa. 253, 254 (2020) (Wecht, J., concurring). In those cases, voters brought petitions seeking relief from the Election Code’s received-by deadline for mail ballots in the lead-up to the 2020 Primary Election, based on the effect of the COVID-19 pandemic and its perceived impact on the Commonwealth’s ability to administer the election. *See id.* The Supreme Court dismissed the petitions because the allegations regarding the effect

of the COVID-19 pandemic on the Primary Election were speculative, as the election had not yet happened, and Plaintiffs could only guess as to what might happen. *Id.*

Similarly, the Complaint here is predicated on the alleged harm which Plaintiffs contend they suffered in the 2024 Primary Election when their defective mail ballots were not counted. However, Plaintiffs' request for relief is prospective, and thus assumes that the Policy adopted by the Board in conjunction with the 2024 Primary Election will likewise be adopted for the 2024 General Election. Plaintiffs' claims also assume that they **will again** vote via a defective mail ballot in the upcoming General Election. The problem with this theory is clear: there are no facts of record to establish that the Policy will be in effect for the 2024 General Election, and Plaintiffs cannot demonstrate that they will be harmed by such a Policy, unless they plan to intentionally cast defective mail ballots in the future.

As Director Ostrander testified, "there will have to be a meeting" before a decision can be made as to whether the Policy will continue for the 2024 General Election. Ostrander Dep., pp. 126-127. Indeed, Plaintiffs admit that the Policy is not presently in place for the 2024 General Election. *See* Comp. ¶ 81 ("The Washington County Board of Elections has given every indication that it **intends** to continue its policy and practice of concealing information and misleading voters about their mail in ballot status by entering inaccurate codes into the SURE system thus depriving voters of their opportunity to vote by provisional ballot in the

upcoming November 5, 2024 general election.”) (emphasis added). Thus, until that meeting is scheduled and the Board adopts a policy regarding notice-and-cure procedures for the 2024 General Election, the terms of any such policy and its impact on Plaintiffs is purely speculative. As explained by the Commonwealth Court, “[a] declaratory judgment must not be employed to determine rights in anticipation of events [that] may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.” *Carter*, 2021 WL 4735059, at \*6 (quoting *Gulnac by Gulnac v. S. Butler Cty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991)).

Plaintiffs request only prospective relief, and that request is not ripe. The Court should grant Intervenor’s Motion for Summary Judgment.

## **2. Plaintiffs Lack Standing to Maintain This Action.**

### **a. Applicable Legal Standards as to Standing.**

“In Pennsylvania, a party to litigation must establish as a threshold matter that he or she has standing to bring an action.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (citing cases). Because “[s]tanding is a justiciability concern . . . a court must resolve justiciability concerns as a threshold matter before addressing the merits of the case.” *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 481 (Pa. 2021). The cornerstone of standing in Pennsylvania is that the party “must be

negatively impacted in some real and direct fashion.” *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005).

To have standing, petitioners must show that they have been “aggrieved,” meaning that they have a “substantial, direct and immediate interest in the outcome of the litigation.” *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003); *see also Soc’y Hill Civic Ass’n v. Pa. Gaming Control Bd.*, 928 A.2d 175, 184 (Pa. 2007) (if a party is not adversely affected by what it challenges, it cannot be aggrieved and therefore “has no standing”). A substantial interest is one that is distinct from and exceeds “the common interest of all citizens in procuring obedience to the law;” a direct interest is one where the challenged conduct caused petitioner’s harm; and an immediate interest is one where the harm alleged is concrete, not speculative. *In re Hickson*, 821 A.2d at 1243 (quoting *Indep. State Store Union v. Pa. Liquor Control Bd.*, 432 A.2d 1375, 1379-80 (Pa. 1981)); *see also Markham*, 136 A.3d at 140 (“To have a substantial interest, the concern in the outcome of the challenge must surpass ‘the common interest of all citizens in procuring obedience to the law.’”) (quoting *In re Hickson*, 821 A.2d at 1243); *accord Ball*, 289 A.3d at 19; *Ams. for Fair Treatment, Inc. v. Phila. Fed’n of Tchrs.*, 150 A.3d 528, 533 (Pa. Commw. 2016).

Further, in order to satisfy the criterion of directness, a litigant must “demonstrat[e] that the matter caused harm to the party’s interest.” *Markham*, 136 A.3d at 140 (internal quotation marks omitted); *see also Ball*, 289 A.3d at 19 (“An

interest . . . is immediate when the causal connection with the alleged harm is neither remote nor speculative.”) (internal quotation marks omitted).

“If a petition contains only ‘general averments’ or allegations that ‘lack the necessary factual depth to support a conclusion that the [petitioner] is an aggrieved party,’ standing will not be found.” *Open PA Schs. v. Dep’t of Educ.*, No. 504 M.D. 2020, 2021 WL 129666, at \*6 (Pa. Commw. Jan. 14, 2021) (en banc) (quoting *Pa. State Lodge, Fraternal Ord. of Police v. Dep’t of Conservation & Nat. Res.*, 909 A.2d 413, 417 (Pa. Commw. 2006)).

“In particular, it is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.” *Pittsburgh Palisades Park*, 888 A.2d at 660 (citing *In re Hickson*, 821 A.2d at 1243). It is “hornbook law that a person whose interest is common to that of the public generally, in contradistinction to an interest peculiar to himself, lacks standing.” *Kauffman v. Osser*, 271 A.2d 236, 239 (Pa. 1970).

**b. Voter Plaintiffs Lack Standing.**

Voter Plaintiffs have failed to establish standing to bring their prospective challenges to a 2024 General Election policy that the Board has not yet adopted—and may *never* adopt. Voter Plaintiffs attempt to leverage the Board’s decision *not* to count their defective mail ballots in the 2024 Primary Election, *see* Comp. ¶¶ 15-



21, into a claim for forward-looking invalidation of a nonexistent policy for the 2024 General Election, *see* Comp., Prayer for Relief, pp. 40-41.

In other words, Plaintiffs, who intend to vote by mail in the November 2024 General Election, assert that they will incur harm *if* the Policy is in effect in the general election and *if* their mail ballots are defective and they are not notified of the same, and do not have an opportunity to cast a provisional ballot and have that provisional ballot counted. *See* Comp. ¶¶ 10, 15-21, 79-82, 155. Such allegations of harm are predicated upon events that may or may not occur in the future and, thus, cannot establish standing. Indeed, Plaintiffs obviously cannot show that any such nonexistent policy “caused harm to [their] interest,” *Markham*, 136 A.3d at 140, offer nothing more than a “speculative” claim of injury, *Ball*, 289 A.3d at 19.

Moreover, the Policy applied to all voters in Washington County during the 2024 Primary Election. Even assuming that the Policy is adopted for the November General Election, the interest of Voter Plaintiffs with respect to the Policy is no different than that of all other voters in Washington County. It is “hornbook law that a person whose interest is common to that of the public generally, in contradistinction to an interest peculiar to himself, lacks standing.” *Kauffman*, 271 A.2d at 239. For this reason as well, Voter Plaintiffs lack standing and should be dismissed.

**c. Organizational Plaintiffs Lack Standing.**

Under the organizational standing doctrine, an organization may establish standing by showing that it suffers a legally cognizable harm from the challenged practice. However, “an organization’s expenditure of resources alone ordinarily does not confer standing,” and an organization cannot “base standing on the diversion of resources from one program to another.” *Ball*, 289 A.3d at 19, n.103 (citing *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 79 (3d Cir. 1998)).

Moreover, a declaratory judgment is not the appropriate method for an organization to challenge “an existing interpretation of settled law, or [] to compel the Commonwealth to act in a way that aligns with [the association’s] mission or its investment of resources.” *Ball*, 289 A.3d at 19. On this basis, the Organizational Plaintiffs have not been aggrieved in a manner giving rise to standing because they fail to identify any concrete and distinct harm they have suffered as a result of the Board lawfully adopting its Policy in accordance with clear Pennsylvania law. In other words, the Board’s actions in no way inflict a particularized injury upon the Organizational Plaintiffs.

Each of the Organizational Plaintiffs proffer the same argument for how they have been “harmed” by the Policy: that they have had to expend and will have to continue to address the alleged disenfranchisement of voters caused by the Policy,

to advocate against the same and to educate voters on the Policy, and that such resources could be spent elsewhere.

In particular:

- a. Organizational Plaintiff Center for Coalfield Justice (“CCJ”) alleges that that it, “uses public education, organizing and advocacy to,” inter alia, “ensure that area residents have a voice in education election officials that will be accountable on the issues that matter most to their community.” Comp. ¶ 13. The basis for CCJ’s harm is that “if” the Policy remains in place, it will have “to continue putting projects on hold in order to address “the impact of the Policy on its members. *Id.* ¶¶ 140, 141.
- b. Organizational Plaintiff the Washington Branch of the NAACP (“NAACP”) alleges that its “mission is to ensure the political, educational, social and economic equality of rights of all persons ...” *Id.* ¶ 11. Again, NAACP’s sole alleged injury here is that it “has had to shift its resources away from previously planned initiatives” due to the policy and that “if” the Policy remains in place it will have to “continue diverting staff time and funding to develop and implement tools and strategies to prevent eligible, qualified voters from having their ballots disqualified...” *Id.* ¶¶ 145-147.

These allegations, however, are not sufficient to establish standing for a few reasons. *First*, the alleged harm the Organizational Plaintiffs will incur is speculative and will only occur “if” the Policy stays in place for the 2024 General Election, which has not yet been determined. *Id.* Moreover, to the extent the Policy is adopted for the upcoming General Election, any alleged harm arising out of its enactment is predicated upon speculation that voters will fail to properly complete the mail ballots

months from now. Allegations of such speculative harm are patently insufficient to confer standing. To satisfy the criterion of directness, a litigant must “demonstrat[e] that the matter caused harm to the party’s interest.” *Markham*, 136 A.3d at 140 (internal quotation marks omitted); *see also Ball*, 289 A.3d at 19 (“An interest . . . is immediate when the causal connection with the alleged harm is neither remote nor speculative.”) (internal quotation marks omitted).

*Second*, “an organization’s expenditure of resources alone ordinarily does not confer standing,” and an organization cannot “base standing on the diversion of resources from one program to another.” *Ball*, 289 A.3d at 19, n.103 (citing *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 79 (3d Cir. 1998)). But that is all the Complaint alleges.

*Third*, this matter is nothing more than a challenge to “an existing interpretation of law” as expressed by the Pennsylvania Supreme Court in holding that county boards of election cannot be compelled to adopt notice and cure policies. *Pa. Dems.* at 374. Organizational Plaintiffs therefore lack standing to bring this challenge. *See Ball*, 289 A.3d at 19.

*Fourth*, Organizational Plaintiffs are merely attempting to take another bite at the apple on an issue which has already been decided by the Pennsylvania Supreme Court. Plaintiffs request this Court order the Board to adopt a notice-and-cure policy that allows otherwise defective mail ballots to be cured by the casting and counting

of provisional ballots in an attempt “to compel the Commonwealth to act in a way that aligns with its mission and investment of resources[.]” *Id.* That is insufficient, as a matter of law, to confer standing in a request for declaratory relief. *See id.*

*Fourth*, the Organizational Plaintiffs claim that they are injured by the Boards’ adherence to the Election Code that does nothing more than generalize the abstract “interest in obedience to the law.” *Id.* at 14.

For each of the above reasons, Organizational Plaintiffs lack standing. The Court should grant summary judgment dismissing the Complaint.

**B. Plaintiffs’ Due Process Claim For Prospective Relief Fails On The Merits.**

If the Court reaches the merits, it should grant Intervenor’s Motion for Summary Judgment because Plaintiffs’ due process claim for prospective relief fails for multiple reasons.

**1. *Pa. Dems.* Forecloses Plaintiffs’ Claim And Request For Relief.**

The Pennsylvania Supreme Court’s holding is clear: Pennsylvania voters have no constitutional, statutory, or legal right to notice of a defect in a mail ballot or an opportunity to cure. *See Pa. Dems.*, 238 A.3d at 372-74. To the contrary, the decision whether and in what form to allow notice-and-cure procedures presents “open policy questions,” including “what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure

would impact the confidentiality and counting of ballots.” *Id.* at 374. Thus, the question whether to mandate notice and curing resides exclusively with “the Legislature,” not the courts. *Id.*

Plaintiffs thus invite this Court to override Pennsylvania Supreme Court precedent—an invitation this Court must decline. For this reason alone, the Court should grant Intervenors’ Motion for Summary Judgment.

And there is even more. In its refusal to order the boards of elections to engage in notice-and-cure procedures in the absence of any statutory authority to do so in the Election Code, the Pennsylvania Supreme Court recognized longstanding precedent that, “[t]he power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government.” *Id.* at 366 (internal citations omitted). In interpreting curing and the use of provisional ballots in accordance with the Election Code, the judiciary “may not usurp the province of the legislature by rewriting [statutes] . . . as that is not [the court’s] proper role under our constitutionally established tripartite form of governance.” *In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 721 (Pa. 2018); accord *Heller v. Frankston*, 475 A.2d 1291, 1296 (Pa. 1984) (“Where a legislative scheme is determined to have run afoul of constitutional mandate, it is not the role of this Court to design an alternative scheme which may pass constitutional muster.”).

Indeed, courts cannot take unilateral action to rewrite the law, as that would overstep the bounds of their authority. See *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 583 (Pa. 2016) (“It is not our Court’s role under our tripartite system of governance to rewrite a statute once we have fulfilled our constitutional duty of judicial review; that is a function reserved to the policymaking branch.”); *Cali v. Phila.*, 177 A.2d 824, 835 (Pa. 1962) (“We are not a Supreme, or even a Superior Legislature, and we have no power to redraw the Constitution or to rewrite Legislative Acts or Charters, desirable as that sometimes would be.”). This is because “editing” a statute “would amount to judicial legislation.” *State Bd. of Chiropractic Exam’rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971). For a court to assume “the power to write legislation would upset the delicate balance in our tripartite system of government.” *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998), rev’d on other grounds, 529 U.S. 277 (2000). By pressing this constitutional challenge, Plaintiffs are asking this Court to weigh in on the political policy judgments regarding the administration of elections, which falls solely within the province of the General Assembly, rewrite the Election Code and bring into existence, via judicial fiat, Plaintiffs’ preferred election scheme.

As acknowledged by the Pennsylvania Supreme Court in *Pa. Dems.*, such a request exceeds its authority. It is thus beyond this Court’s authority to grant such

relief as well. On this basis, the Court should grant Intervenor's Motion for Summary Judgment and dismiss the Complaint.

## **2. The Election Code Does Not Permit A Voter To Cast A Provisional Ballot To Cure A Defective Mail Ballot.**

Plaintiffs' due process claim fails for another fundamental reason. That claim is premised upon and seeks relief based on the assertion that Pennsylvania law permits a voter to cure a defective mail ballot by casting a provisional ballot. Comp. ¶¶ 6, 22, 51, 74, 81, 158, 160.<sup>4</sup> This assertion, however, is contrary to the express provisions of the Election Code and attendant case law.

First and foremost, Plaintiffs' assertion is foreclosed by the Board's decision and its right not to engage in notice-and-cure procedures as established by the Policy pursuant to *Pa. Dems.* See 238 A.3d at 274; *supra*, Part I.B.1.

Second, when the General Assembly has wanted to authorize use of provisional voting, it has expressly identified the circumstances for such use in the Election Code. But the General Assembly has not authorized the use of provisional voting to cure mail ballot defects. See *Pa. Dems.* at 373-74. Its silence is dispositive: provisional voting may not be used to cure mail ballot defects. See *id.*; see also

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<sup>4</sup> Nor, contrary to the citations in Paragraph 51 of the Complaint, is the ability to use a provisional ballot to cure a mail-in ballot defect required or authorized by HAVA (the federal Help America Vote Act). See generally, 52 U.S.C. § 21082(a). Section 21082(a) of HAVA does not mention curing a defective mail ballot by voting provisionally and, in substance, is nearly identical to the limited language in the Pennsylvania Election Code (25 P.S. § 3050(a.4)(5)(i)) concerning provisional ballots. More importantly, HAVA in 52 U.S.C. § 21082(a)(4) ultimately provides that the ability to vote by provisional ballot and the validity of any such vote are to be determined under "State law," which the Pennsylvania General Assembly has done in 25 § 3050(a.4)(5)(ii)(F) as discussed in the instant Section of this Brief. HAVA provides no relief to Plaintiffs.



*Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304, 321 (Pa. 2017) (“[W]hen interpreting a statute, we must listen attentively to what the statute says, but also to what it does not say.”) (internal citations omitted).

The Election Code authorizes the use of provisional voting in only limited circumstances, none of which applies here. *See, e.g.*, 25 P.S. §§ 3050(a.2) (voter cannot produce required identification at the polling place); 3050(a.4)(1) (registration of individual who appears at the polling place cannot be verified); *accord Pa. Dems.* at 375 n.28. Curing a defect in a mail ballot is *not* one of those circumstances. *See, e.g.*, 25 P.S. §§ 3050(a.2), 3050(a.4)(1). Indeed, “there is no statutory or constitutional” provision authorizing use of provisional voting because the voter committed an “error” that requires the voter’s mail ballot to be “rejected.” *Pa. Dems.* at 373-74; *see also Discovery Charter Sch.*, 166 A.3d at 321.

Moreover, to the extent the Election Code permits a voter who requested a mail ballot to vote by provisional ballot, that permission is of no help to the Voter Plaintiffs who wish to cast a provisional ballot to cure a timely but defective mail ballot. The Commonwealth Court so held when it was presented with the question of whether mail voters may cure defects via a provisional ballot. *See In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election*, No. 1161 C.D. 2020, 2020 WL 6867946, at \*4 (Pa. Commw. 2020) (“[U]nlike 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.”) (quoting 25 P.S. § 3050(a.4)(5)(ii)).

In particular, the Election Code provides that a would-be mail voter “may vote by provisional ballot” in the narrow circumstance where the voter “requests a [mail] ballot [but] is not shown on the district register as having voted.” 25 P.S. §§ 3146.6(b)(2), 3150.16(b)(2); *see also id.* §§ 3146.6(b)(1); 3150.16(b)(1) (“The district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place.”). This could occur, for example, if the voter never received the mail ballot after requesting it or never completed or returned it to election officials. *See, e.g., id.* §§ 3146.6(b)(2), 3150.16(b)(2).

At the same time, the Election Code declares that a provisional ballot “shall not be counted” in any circumstance where the voter’s mail ballot “is timely received by the county board of elections.” *Id.* § 3050(a.4)(5)(ii)(F). This language is “unambiguous.” *In re Allegheny Cty.*, 2020 WL 6867946, at \*4. Thus, the Commonwealth Court held that a provisional ballot submitted by a voter whose naked mail ballot was timely received “shall not be counted.” *Id.* Like the Commonwealth Court, this Court is “not at liberty to disregard the clear statutory

mandate that the provisional ballots to which this language applies must not be counted.” *Id.*

A review of the relevant statutory language addressed by the Commonwealth Court in *In re Allegheny County* defeats Plaintiffs’ reliance upon 25 P.S. § 3050(a.4)(5) for support that a provisional ballot can be cast to cure a defective mail ballot. To the contrary, Section 3050(a.4)(5), when read *in pari materia* with subsequent provisions of the Election Code, forecloses Plaintiffs’ claim. Subclause (i) of 25 P.S. § 3050(a.4)(5) provides:

*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) (emphasis added). The analysis, however, does not stop there. Subclause (ii)(F) of 25 P.S. § 3050(a.4)(5) is limiting as it unequivocally states that “[a] provisional ballot shall not be counted if the elector’s absentee or mail-in ballot is timely received by a county board of elections.” *Id.* § 3050(a.4)(5)(ii)(F).

As a result, the explicit language of § 3050(a.4)(5)(i) (“Except as provided in subclause (ii)”) renders that Section inapplicable if Section 3050(a.4)(5)(ii) applies. Clearly, Section 3050(a.4)(5)(ii)(F) applies in those instances where a mail ballot is “timely received.” Accordingly, under 25 P.S. § 3050(a.4)(5)(ii)(F), any provisional

ballots that would have been cast by any voter whose mail-in ballot is “timely received,” cannot be counted.

The sole authority for Plaintiffs’ contention, *Koehane v. Delaware County Board of Election*, No. CV-2023-004458 (Delaware C.P. Sept. 21, 2023) (Comp., Ex. 12), is unpersuasive and inapposite. In the first place, it contradicts the plain holding of *Pa. Dems.* Moreover, Judge Whelan rested his decision at least in part on the fact that the Delaware County Board’s policy allows voters to cure the defects in the mail ballots at issue in that case—but the Board here has no such policy. Judge Whelan also believed there is “ambiguity” between subclauses (i) and (ii), but no such ambiguity exists due to subclause (i)’s express exception, as set forth above. And Judge Whelan concluded that subclause (i) provides a right to cure a mail ballot defect by provisional ballot, but that, too, is incorrect. *Koehane* is of no moment. The Court should grant Intervenors’ Motion for Summary Judgment.

### **3. The Secretary’s Guidance Is Not Controlling.**

Plaintiffs further predicate their position that “[a] mail-in voter whose ballot has been rejected due to a technical error, such as a missing date, signature or secrecy envelope, is entitled to cast a provisional ballot at their local polling place on Election Day and have that ballot counted,” at least, in part, on the Guidance issued by the Secretary on March 11, 2024, and based upon Section 3050(a.4)(5). Comp.

¶ 51. Such reliance is unfounded.

First, “the Secretary has no authority to definitively interpret provisions of the Election Code,” *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1078 n.6 (Pa. 2020), much less to override the Pennsylvania Supreme Court’s holding in *Pa. Dems.*

Second, the Guidance is not binding on the Board—as the Secretary’s Director of Elections admitted again in this case. *See Marks Dep.*, pp. 14-15 (acknowledging any guidance issued to boards by Secretary “does not have the force and effect of law”).

Indeed, 15 months ago, Judge Ceisler of the Commonwealth Court of Pennsylvania held that any guidance issued by the Secretary of the Commonwealth is not binding on county boards of elections. *See Republican Nat’l Comm. v. Schmidt*, No. 447 M.D. 2022, slip op. at 20 (Pa. Commw. Mar. 23, 2023) (Ceisler, J.) (attached as Exhibit C). As Judge Ceisler reasoned, the “Secretary does not have control over the County Boards’ administration of elections, as the General Assembly conferred such authority solely upon the County Boards.” *Schmidt*, Ex. C at 20 (“not[ing]” that the Secretary’s “duties and responsibilities” under the Election Code “are limited”); *see also Marks Dep.*, pp. 13-14 (acknowledging Boards and the Secretary “have their separate scope[s] of authority [as] outlined in the Pennsylvania Election Code,” and stressing that responsibility of handling and processing mail ballots, as well as whether to permit curing, lies with the Boards).

Moreover, “the Secretary has no authority to definitively interpret the provisions of the Election Code.” *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d 1058, 1078 n.6 (Pa. 2020). In fact, the Secretary has *admitted* to lacking authority to direct county boards in their administration of elections, to direct county boards to follow any guidance from the Secretary, or even to direct county boards to comply with a court order. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at \*10 (Pa. Commw. Aug. 19, 2022) (acknowledging the Secretary “does not have the authority to direct the Boards to comply with [a court order]”); Pa. House of Representatives, State Gov’t Comm. Hearing, *In re: Election Oversight Pennsylvania Department of State’s Election Guidance* (Jan. 21, 2021), at pp. 23-25 (previous Secretary acknowledging that a Secretary’s guidance is not directory), available at <https://tinyurl.com/4wxjvd4c>.

Accordingly, as Judge Ceisler and numerous other courts have held, any guidance of the Secretary regarding the county boards’ administration of elections does not affect the Boards’ legal obligations and is not legally binding or enforceable against the boards. *See Schmidt*, Ex. C at 13-14, 18-22; *see also Zicarelli v. Allegheny Cnty. Bd. of Elections*, 2:20-cv-1831-NR, 2021 WL 101683, at \*5 n.6 (W.D. Pa. Jan. 12, 2021) (“[U]nder Pennsylvania law, the Secretary’s pre-election guidance is just that—guidance. County boards of elections ultimately determine

what ballots to count or not count in the first instance.”). Hence, the Board is not bound by the Guidance.

Third, the Guidance is based upon a reading of Section 3050(a.4)(5) of the Election Code which, as discussed above, is simply wrong.<sup>5</sup>

The SURE Instruction likewise provides no support for Plaintiffs’ position. As voters have no right to cure a defective mail ballot, and the county boards cannot be required to adopt notice-and-cure procedures, any argument that a voter is nonetheless entitled to be notified of fatal defects in a mail ballot is counterintuitive and legally unfounded. The SURE Instruction merely informs county boards of new codes which the county boards “may” use when receiving and logging the return of mail-in ballots. *Ostrander Dep.*, Ex. 2; *Marks Dep.*, pp. 13-14, 39-40. Indeed, because the “Secretary does not have control over the County Boards’ administration of elections, as the General Assembly conferred such authority solely upon the County Boards,” *Schmidt*, Ex. C at 20 (“not[ing]” that the Secretary’s “duties and responsibilities” under the Election Code “are limited”), the Secretary’s SURE Instruction cannot oblige county boards to provide notice or an opportunity to cure where no such obligation exists. *See Marks Dep.*, pp. 13-14. Such an action would exceed the Secretary’s and the Department’s authorities, while at the same time

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<sup>5</sup> This is not the first time the Secretary has issued a legally incorrect Guidance. In 2020, the Secretary issued Guidance advising that boards of elections should count mail ballots timely delivered but without the required secrecy envelope. *See Pa. Dems.* at 376 n.29. Contrary to this Guidance, the Supreme Court held that “naked ballots” were legally infirm and could not be counted. *Id.* at 378. The Secretary withdrew the Guidance.

undermining the Board's sole authority to determine how it will conduct elections. *See* 25 P.S. § 2642; *Pa. Dems.* at 374. The Court should grant Intervenors' Motion for Summary Judgment.

### **C. Plaintiffs Cannot Prove A Procedural Due Process Violation.**

Plaintiffs' claim fails on the merits for the multiple reasons identified above. If more were somehow needed, Plaintiffs' claim also fails under the procedural due process framework Plaintiffs themselves invoke. Indeed, Plaintiffs have failed to prove facts sufficient to establish that the Board has interfered with a constitutionally protected life, liberty, or property interest.

#### **1. Pennsylvania Procedural Due Process Standard.**

A due process inquiry, in its most general form, "entails an assessment as to whether the challenged proceeding or conduct offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental and that define[s] the community's sense of fair play and decency." *Com. v. Wright*, 961 A.2d 119, 132 (Pa. 2008) (internal citations omitted). "While not capable of an exact definition, basic elements of procedural due process are adequate notice, the opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction over the case." *Id.*<sup>6</sup>

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<sup>6</sup> Though not explicitly mentioned, the Pennsylvania Supreme Court has held that the guarantee of due process of law in Pennsylvania jurisprudence emanates from Article I, Sections 1, 9, and 11 of the Pennsylvania Constitution. *Lyness v. State Bd. of Med.*, 605 A.2d 1204, 1207 (Pa. 1992). The due process standards of the United States and Pennsylvania Constitutions are essentially the same. *Muscarella v. Commonwealth*, 87 A.3d 966, 973 (Pa. Commw. 2014).



Pennsylvania courts analyze procedural due process challenges in two steps. The first step is to determine “whether there is a life, liberty, or property interest with which the state has interfered[.]” *J.P. v. Dep’t of Hum. Servs.*, 170 A.3d 575, 580–81 (Pa. Commw. 2017). The second examines whether the procedures attendant to that deprivation were constitutionally sufficient. *Id.* If the court determines that no constitutionally protected liberty or property interest has been impacted, **the procedural due process analysis ends**. See *Pennsylvania Game Comm’n v. Marich*, 666 A.2d 253, 255–56 (Pa. 1995).

Moreover, the protections of procedural due process do not extend to legislative actions. *South Union Tp. v. Com.*, 839 A.2d 1179, 1186-87 (Pa. Commw. 2003) (citing *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915) in sustaining preliminary objection to due process claim). In other words, “[i]t is well settled that procedural due process concerns are implicated **only by adjudications**, not by state actions that are legislative in character.” *Small v. Horn*, 722 A.2d 664, 671 (Pa. 1998) (emphasis added).

## **2. The Policy Does Not Interfere with Any Constitutionally Protected Life, Liberty, Or Property Interest.**

Plaintiffs’ due process claim fails at the first step because they have failed to prove facts sufficient to establish that the Board has interfered with a constitutionally protected life, liberty, or property interest.

The reason is plain: Plaintiffs claim a right to notice of defects in their mail ballots and an opportunity to cure—but Pennsylvania law is clear that *no such right exists*. See *Pa. Dems.*, 238 A.3d at 274. Thus, by failing to provide notice and an opportunity to cure, the Policy necessarily did not interfere with any constitutionally protected life, liberty, or property interest.

Plaintiffs nonetheless incorrectly claim that the procedural due process guarantee contained in Article I, Section 1 of the Pennsylvania Constitution “entitles qualified, eligible voters to know when their mail-in ballot is disqualified in time to rescue their right to vote by casting a provisional ballot.” Comp. ¶ 160. In other words, Plaintiffs seek to have this Court—despite the Pennsylvania Supreme Court’s express holding in *Pa. Dems.* that a voter has no **constitutional**, statutory, or legal right to cure a defective mail ballot, *see id.* at 372-74 (emphasis added)—mandate that voters are entitled to a particular form of notice as well as an opportunity to cast a provisional ballot, generally. See Comp. ¶¶ 23, 160. Effectively, Plaintiffs want this Court to overrule the highest Court in the Commonwealth. In support, Plaintiffs cite a string of cases discussing the procedural due process standard for adequate notice generally; however, Plaintiffs cannot show that the alleged lack of notice of a defective ballot interfered with any legally protected right to cure a defective mail ballot as no such right exists. As a result, Plaintiffs’ claims relating to the adequacy of the Board’s notice are immaterial. See *id.* ¶ 9.

Plaintiffs also cite to additional cases, including federal court decisions outside of this Commonwealth and having no precedential value, to argue that the Board's actions violate their procedural due process rights based on the balancing test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976). See Comp. ¶ 9 n.1, ¶¶ 152-159. These out-of-state, non-precedential opinions cannot circumvent the Pennsylvania Supreme Court's unequivocal ruling that boards of elections in Pennsylvania "are not required to implement a 'notice and opportunity to cure' procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly," and that individual voters do not have a right to cure a defective mail ballot. *Pa. Dems.* at 374. Thus, it is clear that **no right to cure exists under Pennsylvania law.**

Thus, because Plaintiffs cannot show that the Board interfered with any legally protected right, the balancing of interests under *Mathews* is irrelevant. See *Pennsylvania Game Com'n v. Marich*, 666 A.2d 253, 256 (Pa. 1995) (explaining that courts only "employ the methodology" of *Mathews v. Eldridge* after first determining "that a protected liberty of property right was involved"). But even if Plaintiffs could show the deprivation of a protected interest—which they cannot—a balancing of the *Mathews* factors here demonstrates that the Board's procedures were constitutionally sufficient. *Id.* at 256, n.7 (explaining that the *Mathews* analysis consists of three distinct factors which must be considered: (1) the private interest

that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3), the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail).

With respect to the first *Mathews* factor, Plaintiffs refer broadly to the “fundamental right to vote,” Comp., ¶¶ 154, 155, but the crux of Plaintiffs’ procedural due process claim is that the Board interfered with Plaintiffs’ ability to cure their deficient ballots by casting a provisional ballot. *See id.* ¶¶ 6, 156, 160. That the right to vote is fundamental is not in dispute in this case. Not a single Voter Plaintiff was deprived of the fundamental right to vote by any of the actions allegedly taken by the Board. After all, it is Plaintiffs’ admitted exercise of their right to vote in the 2024 Primary Election that gives rise to the Complaint itself. Despite Plaintiffs’ citations and references to the “fundamental right to vote,” Plaintiffs’ procedural due process claim boils down to an allegation that the Board interfered with Plaintiffs’ ability to *cure* their deficient ballots by casting a provisional ballot and a demand to have that provisional ballot counted. *See id.* ¶¶ 6, 156, 160. As set forth in Section IV(B)(2), *supra*, Plaintiffs have no such right.

Second, there is no risk of an erroneous deprivation of any protected interest through the Board’s procedures and additional procedural safeguards would be of

little to no value. The Board's Policy is compliant with the Pennsylvania Supreme Court's holding in *Pa. Dems.* and the Election Code and does not result in the erroneous deprivation of Voter Plaintiffs' private interests. Upon receipt of a mail ballot, the Board is only required to enter the ballot into the SURE system to show that it has been received. As the Complaint indicates, this is exactly what the Board did. *See* Comp. ¶ 62; Ostrander Dep., pp. 179-180.

Finally, the Court imposing additional procedures on the Board would, in fact, impair the interests of the Board as it would usurp the Board's powers despite clear statutory entitlement to enact the Policy, and Supreme Court precedent affirming the same. Moreover, granting Plaintiffs' requested relief would effectively rubber stamp the Secretary's attempt to exceed its ministerial function by hijacking the operation of elections throughout the Commonwealth.

As discussed more fully in Section IV(B)(3), *supra*, the Secretary has attempted to sidestep the legislature and usurp the powers of the county boards of elections by using the SURE system to impose notice-and-cure procedures on county boards. The Secretary's improper attempted usurpation, however, does not mean that Plaintiffs have a protectable interest here. The county boards of elections alone and not the Secretary have the jurisdiction over the conduct and manner of elections.

Likewise, the Secretary's Guidance which unlawfully provided that voters could cure defective mail ballots by voting provisionally does not save Plaintiffs'

claims. The Secretary has no authority to definitively interpret the provisions of the Election Code[,]” and the Guidance has no legal impact. *In re Canvass*, 241 A.3d at 1078 n.6.

Despite this, Plaintiffs cite to the Secretary’s Guidance in an attempt to establish that, upon receipt of a defective ballot, the Board had a legal obligation to select certain codes in the SURE system that would trigger the automatic notification to the voter. *See e.g.*, Comp. ¶¶ 42, 47, 51. Effectively, Plaintiffs are attempting to bypass the legislative process and enforce compliance with changes the Secretary has made to the SURE system.

Under Pennsylvania law, upon receipt of a mail-in ballot, county election boards are only required to enter it into the SURE system to show that it has been received. As the Complaint indicates, this is exactly what the Board did. *See* Comp. ¶ 62; Ostrander Dep., pp. 179-180.

In essence, what Plaintiffs truly seek is the right to have their vote counted without regard for any ballot-casting rules. As stated earlier, in order to function properly elections must have rules, including ballot-casting rules. The judiciary may not disregard those rules, rewrite them, or declare them unconstitutional simply because a voter failed to follow them and, accordingly, had his or her ballot rejected. *See, e.g., Ins. Fed’n of Pa., Inc. v. Commonwealth, Ins. Dep’t*, 970 A.2d 1108, 1122 n.15 (Pa. 2009) (“Our role is distinctly not to second-guess the policy choices of the

General Assembly.”); *Pa. Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 938 n.31 (Pa. 2017); *accord Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissent) (“When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied ‘the right to vote.’ Rather, that individual’s vote is not counted because he or she did not follow the rules for casting a ballot. ‘Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules.’” (quoting *Brnovich v. DNC*, 594 U.S. 647, 669 (2021))); *Pa. State Conf. of NAACP Branches v. Sec. Com. of Pa.*, 97 F.4th 120, 133-34 (3d Cir. 2024) (agreeing with Justice Alito on this point). Thus, a voter does not suffer constitutional harm when his ballot is rejected because he failed to follow the rules the General Assembly enacted for completing or casting it.

Because Plaintiffs cannot establish that the Board interfered with any legally protected life, liberty, or property interest, their procedural due process claim fails and should be dismissed. Even if Plaintiffs could demonstrate that the Board’s Policy infringed on a protected interest, application of the *Mathews* factors demonstrates that the Board’s procedures were constitutionally sufficient.

**3. Plaintiffs' Claim Fails As A Matter Of Law Because The Resolution Passed By The Washington County Board Of Elections Was A Legislative Act.**

Even if the Policy infringed on one of Plaintiffs' protected life, liberty, or property interests (which it does not), Plaintiffs' procedural due process claim further fails because the Board's action was legislative, not adjudicative.

A procedural due process claim requires pleading "at least one of the following: inadequate notice, no opportunity to be heard, or any inability to defend oneself before a fair and impartial tribunal having jurisdiction over the case." *Vega v. Wetzel*, No. 39 M.D. 2022, 2023 WL 4853004, at \*3 (Pa. Commw. July 31, 2023). Those due process elements "are implicated **only by adjudication**, not by state actions that are legislative in character, *i.e.*, a procedural due process claim necessarily requires an adjudicative agency action." *Id.* (quoting *Sutton v. Bickell*, 220 A.3d 1027, 1032 (Pa. 2019) (emphasis added)). As the Commonwealth Court explained:

Adjudicative agency actions are those that affect one individual or a few individuals and apply existing laws or regulations to facts that occurred prior to the adjudications. Agency actions that are legislative in character result in rules of prospective effect and bind all, or at least a broad class of citizens.

*Sutton*, 220 A.2d at 1032 (citing *Small v. Horn*, 722 A.2d 664, 671 n.12 (Pa. 1998)).

In other words, a procedural due process claim necessarily requires an *adjudicatory* action. Where an action of an agency is legislative, a claim that that



agency violated a person or group's procedural due process rights fails as a matter of law and must be dismissed. Thus, in *Small*, plaintiffs challenged two bulletins issued by the Department of Corrections requiring inmates to wear clothing in the nature of prison uniforms rather than civilian clothing. The Supreme Court concluded the bulletins were legislative in character and did not constitute an adjudication because the bulletins were rules of prospective effect and bound all inmates. *Small*, 722 A.2d at 671. For the same reasons that the bulletins in *Small* were legislative, the Commonwealth Court in *Sutton* concluded that a memorandum prohibiting prisoners from possessing a particular style of boot set forth "rules of prospective effect that bind a broad class of individuals in Pennsylvania state prisons." *Sutton*, 220 A.3d at 1032.

Moreover, where a group of taxpayers challenged an Allegheny County Council resolution authorizing the use of Tax Increment Financing (TIF) to help finance public infrastructure improvements associated with a proposed commercial development, the Commonwealth Court found that the action was legislative in nature. *Ondek v. Allegheny County Council*, 860 A.2d 644, 649 (Pa. Commw. 2004). In *Ondek*, the Commonwealth Court considered whether the Council's action was adjudicatory or legislative pursuant to the Local Agency Law, 2 Pa. C.S.A. §§ 551–555, 751–754. *Id.* at 648. The Local Agency Law states that "any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication

shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42.” 2 Pa. C.S.A. § 101. If, however, the agency action does not affect the rights of the parties, but only affects the interest of the public in general, then the action will not be deemed an adjudication. *Ondek*, A.2d at 648 (citing *Ins. Dep’t. v. Pennsylvania Coal Mining Assoc.*, 358 A.2d 745 (Pa. Commw. 1976); *Xun Imaging Assocs., Ltd. v. Dep’t. of Health*, 644 A.2d 255 (Pa. Commw. 1994)).

The resolution at issue in *Ondek* affected the interests of all residents of Allegheny County and not just the challengers, meaning the resolution was a purely legislative enactment and not an adjudication. *Id.* at 649 (concluding trial court lacked jurisdiction under Local Agency Law and should have dismissed action on that basis); accord *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 104 (Pa. 2008) (citing, favorably, *Ondek* in concluding court of common pleas did not have jurisdiction under Local Agency Law to review challenge to township's designation of blight under Tax Increment Financing Act)).

As the Supreme Court stressed in *Mazur*, in no uncertain terms:

The holdings in [*Ondek*, among others] are derived in essence from the constitutional doctrine of separation of powers. As the United States Supreme Court has stated, ‘[courts] are not equipped to decide desirability [of legislation]; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature.’

961 A.2d at 104 (*quoting Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220, 224 (1949)).

Here, as in *Ondek*, the Washington County Board of Elections is a local agency and therefore subject to the Local Agency Law. *See, e.g., Patterson v. DeCarbo*, 46 Pa. D. & C. 4th 148, 155 (Lawrence C.P. 2000) (treating Lawrence County Board of Commissioners as local agency for purposes of applying Pennsylvania Sunshine Act). The Policy was duly enacted by the Board following a duly advertised public meeting, public comment, the appropriate motion and second, discussion amongst the Board, and a 2-1 vote. *See Ostrander Dep.*, Ex. 3 (April 11, 2024 Board Meeting Minutes).

The validity of Plaintiffs' procedural due process claim, therefore, hinges on whether the policy issued by the Washington County Board of Elections affects the rights of the public in general or just the Plaintiffs who have chosen to mount a legal challenge. It is indisputable that the Board's Policy affected the interests of all Washington County voters in conjunction with the 2024 Primary Election.

In *Ondek*, the Commonwealth Court emphasized that because the resolution passed by the Allegheny County Council "affect[ed] the interest of all the residents of Allegheny County[,]" it was a legislative act, not an adjudicative one. 860 A.2d

at 649.<sup>7</sup> Similarly, the Board did not target the rights of Plaintiffs when they passed the resolution; rather, the Board enacted a policy affecting all residents of the county equally and was, therefore, a quintessentially legislative act, not adjudicative, and thus cannot give rise to a due process claim. *See also Pittsburgh Palisades Park*, 888 A.2d at 660 (“[I]t is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.”); *Kauffman*, 271 A.2d at 239 (stressing it is “hornbook law that a person whose interest is common to that of the public generally, in contradistinction to an interest peculiar to himself, lacks standing”).

Having demonstrated that the Board is subject to the Local Agency Law and that Policy, Plaintiffs’ challenge is legislative in nature, and the Board’s policy is valid and enforceable. *See In re Voter Referendum Petition Filed August 5, 2008*, 981 A.2d 163, 170 (Pa. 2008) (explaining that “in reviewing the decision of a local agency, such as the Allegheny County Board of Elections, we are required to affirm unless we determine that constitutional rights were violated”).

Accordingly, Plaintiffs’ due process claim fails and Intervenor’s Motion for Summary Judgment should be granted, and the Complaint should be dismissed.

---

<sup>7</sup> The Commonwealth Court provided a helpful illustration of an example of agency action that *would* be adjudicative in nature. Where a resolution by Pittsburgh City Council effectively granted a conditional use permit to a women’s shelter under an existing ordinance, the action “was really a subterfuge for granting a conditional land use permit[,] which clearly “affected the personal or property rights or obligations of the applicant and the adjoining landowners, as is the case in any land use appeal.” *Ondek*, 860 A.2d 644 (citing *North Point Breeze Coalition v. City of Pittsburgh*, 431 A.2d 398 (Pa. Commw. 1981)).

## V. CONCLUSION

Based on the foregoing, Intervenors, Republican National Committee and Republican Party of Pennsylvania, respectfully request that the Court dismiss Plaintiffs' Complaint and enter judgment against Plaintiffs.

Dated: July 26, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

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*\*Pro hac vice application forthcoming*

# EXHIBIT A

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# Transcript of Jonathan Marks

**Date:** July 23, 2024

**Case:** Center for Coalfield Justice, et al. -v- Washington County Board of Elections

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IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY,  
PENNSYLVANIA

-----X

CENTER FOR COAL FIELD JUSTICE, :

WASHINGTON BRANCH NAACP, :

BRUCE JACOBS, JEFFREY MARKS, :

JUNE DEVAUGHN HYTHON, ERIKA :

WOROBEC, SANDRA MACIOCE, :

KENNETH ELLIOT, and DAVID :

DEAN, :

Plaintiffs, :

V. : Case No. 2024-3953

WASHINGTON COUNTY BOARD :

OF ELECTIONS, :

Defendant. :

-----x

Deposition of JONATHAN MARKS

Harrisburg, Pennsylvania

Tuesday, July 23, 2024

10:01 a.m.

Job: 546180

Pages: 1 - 132

Transcribed by: Robert Kreb



Transcript of Jonathan Marks  
Conducted on July 23, 2024

2

1           Deposition of JONATHAN MARKS, held at the  
2       offices of:

3  
4  
5           OFFICE OF GENERAL COUNSEL  
6           333 Market Street, 17th Floor  
7           Harrisburg, Pennsylvania 17101  
8           (717) 783-6563

9  
10  
11          Pursuant to Notice, before KYLAN BARRY, Notary  
12       Public in and for PENNSYLVANIA.

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ALSO PRESENT:

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Konly Harding -Planet Depos Tech

Sara-Paige Silvestro - Public interest law

Claudia De Palma - Public interest law

Mimi Mckenzie - Public Interest Law

Marian K. Schneider, Esquire

Kate Steiker-Ginzberg, Esquire

Witold Walczak, Esquire

1           Q     You just get this out of the way. You  
2 just referred to the term guidance, I believe. Could  
3 you tell us please what that means? What a guidance  
4 is?

5           A     A guidance is basically the department's  
6 guidance or articulation of best practices to county  
7 election offices for how to process work in the  
8 administration of elections.

9           Q     With respect to the county boards and your  
10 office, is there a division of jurisdiction, for lack  
11 of a better word?

12                   MS. MULLEN: Objection.

13           Q     Or responsibility?

14           A     There is, the -- both the secretary and  
15 the Commonwealth -- secretary of the Commonwealth and  
16 the County Boards of Elections have in the election  
17 code, they have their separate scope of authority and  
18 it's outlined in the Pennsylvania election code.

19           Q     And I'm not asking for you for a legal  
20 opinion, I'm sure your counsel will tell me, but in  
21 your understanding, what is the authority of the  
22 county boards with respect to mail-in ballots in the  
23 mail-in ballot system?

24                   MS. MULLEN: Objection to vagueness.

25                   MR. BLACK: Objection to form.

1 Q As to -- let me re-ask the question. Who  
2 administers or has responsibility at the county level  
3 for handling and processing a voter's mail-in ballot?

4 A That would be the County Board of  
5 Elections.

6 Q Okay. And with respect to the term  
7 curing, are you familiar with that, that term?

8 A I am, yes.

9 Q And what's your understanding of the term  
10 curing?

11 A My understanding of the term curing is  
12 giving a voter who has made a fixable error on ballot  
13 envelope, an opportunity to cure that defect before  
14 election day.

15 Q Who makes the decision as to whether or  
16 not a voter gets that opportunity?

17 A That would also be the County Board of  
18 Elections.

19 Q And as we just spoke guidance, is a  
20 guidance finding, and I don't mean that in a legal  
21 sense or is it -- could you describe what authority  
22 guidance has from the Department of State level?

23 MR. BLACK: Objection to form.

24 A It is our expectation when we issue  
25 guidance that counties will follow that guidance, but

1 it does not have the force and effective law. If  
2 that's -- if that's your question. That's my  
3 layman's understanding of it.

4 Q Anyway, you anticipated the question, so  
5 that was great. Are you familiar with the term  
6 directive?

7 A Yes.

8 Q Could you tell us please what a directive  
9 is?

10 A A directive is something that the  
11 Secretary of the Commonwealth has explicit authority  
12 to issue on matters of election administration. An  
13 example would be directive on the use and  
14 implementation of voting systems, for example.

15 Q With respect to mail-in ballots, what is  
16 the authority of the secretary with respect to mail-  
17 in ballots as -- go ahead.

18 MS. MULLEN: Objection.

19 Q To the ballot itself, and the envelope --  
20 declaration envelope.

21 A Well, I -- to the ballot itself, well,  
22 I'll start with the envelope. The secretary does  
23 have the statutory authority to prescribe the form of  
24 the balloting envelopes as well as the instructions  
25 that are included with those envelopes.

1 begin pre-canvassing or canvassing the ballots.

2           You know, in the interim, you know, they  
3 may be organizing them, you know, by precinct, for  
4 example, to prepare for the pre-canvassing. But  
5 generally once they've recorded the ballot, they are  
6 required by statute to keep those ballots securely  
7 until pre-canvassing begins.

8           Q     And when does the pre-canvass begin?

9           A     It cannot begin earlier than election day  
10 7:00 a.m., I believe, on election day.

11          Q     Okay. What occurs during the pre-canvass?

12          A     Basically, the county election office, or  
13 the County Board of Elections will go through all of  
14 the ballots that have been submitted by voters,  
15 confirm that the information is accurate and  
16 complete. They will set aside any ballots that may  
17 have a defect at that time, the rest of the ballots  
18 ultimately will be approved. And then the outer  
19 envelope is opened exposing the secrecy envelope that  
20 contains the ballot. Those are ultimately opened and  
21 then tabulated by the Board of Elections.

22          Q     And is there a name for the process when  
23 they're tabulated?

24          A     Well, it's -- they're tabulated as part of  
25 the -- of the pre-canvass or the official canvas.

1 please and tell me -- tell us if you're familiar with  
2 that document. Yeah, that's fine.

3 A Yes, I am familiar with this.

4 Q And could you tell us what this document  
5 is, please?

6 A These are -- they're release notes for a  
7 deployment of changes that we made to the SURE system  
8 back in March of this year.

9 Q And what's a release note?

10 A A release note is basically something that  
11 we issue to the counties that outlines the changes  
12 that we've made to the SURE system. It -- sometimes  
13 it provides them with, you know, a job aid or some  
14 other information that they may need to know the  
15 process work under the new changed, you know,  
16 application. In this case here, these release notes  
17 were primarily related to changes that we were making  
18 to the ballot response types in the SURE system.

19 Q We can get to that in a moment, but could  
20 you tell us how -- this document we've spoken about,  
21 guidance, directive, regulation, is this document any  
22 one of the three of those?

23 A It is not, no.

24 Q And how is a release note developed?

25 A A release note is essentially a summary of



1 need to do additional follow up with the County Board  
2 of Elections to resolve that.

3 Q Fair enough. With respect to what the  
4 board, putting aside the update and what's contained  
5 in the release notes, which we'll get to in a moment,  
6 what is the obligation of a county board to input  
7 into the SURE system when it receives a mail-in  
8 ballot?

9 MULLEN: Objection.

10 Q I'm not asking for a legal just to be  
11 clear, but from a practical standpoint, what does the  
12 SURE system have to reflect?

13 A The SURE system would at least have to  
14 reflect that a ballot was received.

15 Q And again, not, I'm asking you legal  
16 conclusion, I'm sure your counsel will object,  
17 received, is there any other information that has to  
18 be provided about that information to the best of  
19 your knowledge?

20 MS. MULLEN: Objection.

21 Q About ballot, excuse me. Other than it  
22 was received.

23 A The date I want you is received.

24 Q If you could take a look at, in the top  
25 left hand corner, there is a -- I'm not sure what

1 at the end of the second line of that paragraph,  
2 there were these, these options may be used if a  
3 county offers ballot curing. So this was optional.  
4 Was it -- is it fair to say that the options were  
5 optional for the county to use?

6 A Yes. I would note that the very first  
7 sentence actually spells that out very clearly in all  
8 caps, they were adding six optional pending status  
9 reasons.

10 Q Thank you. I'd like to go down to the  
11 next paragraph or the next line below, below where  
12 the new pending status reason. Could you walk us  
13 through each one of those please?

14 A Sure. I think -- I think most of them are  
15 self-explanatory, but pending incorrect date as I  
16 noted a few minutes ago would mean that the voter did  
17 not provide a correct date in the opinion of the  
18 County Board of Elections.

19 Q I think it'd stop you there. So to get  
20 back to what you explained before, the ballot comes  
21 in, the county board stamps it, and they're then to  
22 enter it into the SURE system that it was received.  
23 Correct?

24 A That they scan it at the -- there's a  
25 unique barcode and the county scans that and that

1 updates the system to indicate that the ballot has  
2 been received.

3 Q So during that process, the county can  
4 select which of -- out of these, which option of the  
5 status reasons they want?

6 A Yes, they may -- they may select one of  
7 those status reasons if that is consistent with their  
8 county's practice.

9 Q Okay. And again, these are when a  
10 ballot's first received, when it's first going to be  
11 recorded into the SURE system, for lack of better  
12 word?

13 A Yes.

14 Q Okay. So we have an incorrect date. And  
15 how would the county determine if there was an  
16 incorrect date?

17 MS. MULLEN: Objection.

18 A Well, if the county noticed on the  
19 envelope as it's basically the intake of the return  
20 ballots that the voter inserted, for example, their  
21 birth date as opposed to the date they signed the  
22 ballot, then they may -- they may wish to update the  
23 disposition of the ballot to pending incorrect date.

24 Q Deputy Secretary Marks, earlier on, and we  
25 can read it back, I want to make sure I'm stating it

1           A     Correct.

2           Q     Okay. Is that a term of art with respect  
3 to a mail ballot?

4           A     I -- cancel, I don't know that it's a term  
5 of art. It's a -- it's a term that is used within  
6 the SURE system, and it could mean rejecting a  
7 ballot. It really depends on the response type. It  
8 could also -- you could also cancel, replace for  
9 example, which isn't necessarily a rejection, but and  
10 I believe that's on the next page, cancel label,  
11 cancel replace, maybe it's not.

12          Q     Well, let's go to page 8. Maybe that'll  
13 help.

14          A     Anyway, it -- so it's not a term of art so  
15 much as it is a technical term that we've been stuck  
16 with in the SURE system for many years.

17          Q     Okay. Is it -- can a cancel ballot be  
18 counted?

19          A     It would depend on why it's been canceled.

20          Q     Why don't I ask this? Can you tell --

21          A     I mean, I think we have to distinguish  
22 here between recording things in the SURE system and  
23 the official canvass. The Board of Elections makes  
24 the determination as to whether a ballot is counted,  
25 whether that's a mail-in ballot or a provisional

# EXHIBIT B

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Transcript of the Testimony of

**MELANIE OSTRANDER**

July 18, 2024

**CENTER FOR COALFIELD JUSTICE VS WASHINGTON  
COUNTY BOARD OF ELECTIONS**



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IN THE COURT OF COMMON PLEAS  
OF WASHINGTON COUNTY, PENNSYLVANIA

CENTER FOR COALFIELD  
JUSTICE, WASHINGTON  
BRANCH NAACP, BRUCE  
JACOBS, JEFFREY MARKS,  
JUNE DEVAUGHN HYTHON,  
ERIKA WOROBEK, SANDRA  
MACIOCE, KENNETH  
ELLIOTT, and DAVID  
DEAN,

Plaintiffs,

-vs-

WASHINGTON COUNTY BOARD  
OF ELECTIONS,

Defendant.

CIVIL DIVISION

Case No. 2024 3953

DEPOSITION TRANSCRIPT OF:  
MELANIE OSTRANDER

DEPOSITION DATE:  
July 18, 2024  
Thursday, 9:41 a.m.

PARTY TAKING DEPOSITION:  
Plaintiffs

COUNSEL OF RECORD  
FOR THIS PARTY:  
Mary M. McKenzie, Esq.  
mmckenzie@pubintl.org  
PUBLIC INTEREST LAW CENTER  
1500 JFK Boulevard  
Suite 802  
Philadelphia, PA 19102

REPORTED BY:  
Kristina Kozlowsky  
Notary Public  
Reference No. KK60820

1 DEPOSITION OF MELANIE OSTRANDER,  
2 a witness called by the Plaintiffs, for examination,  
3 in accordance with the Pennsylvania Rules of Civil  
4 Procedure, taken by and before Kristina Kozlowsky, a  
5 Court Reporter and Notary Public in and for the  
6 Commonwealth of Pennsylvania, at the offices of AKF  
7 Technologies, 445 Fort Pitt Boulevard, Suite 200,  
8 Pittsburgh, Pennsylvania, on Thursday, July 18,  
9 2024, commencing at 9:41 a.m.

10 - - - -

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25

1 Does your office use the SURE system  
2 for keeping track of voter registration?

3 A. Yes.

4 Q. And does your office use the SURE  
5 system to track mail-in and absentee  
6 ballots?

7 A. Yes.

8 Q. Does the SURE system track the  
9 sending of mail-in and absentee ballots?

10 A. Yes.

11 Q. Do you use the office to track the  
12 receipt of the mail-in and absentee  
13 ballots back to your office?

14 MR. BERARDINELLI: Object to the  
15 form.

16 A. Our office?

17 MR. BERARDINELLI: I think you  
18 misspoke. That's all right.

19 A. Do you mean the SURE system?

20 BY MS. MCKENZIE:

21 Q. Yes. Does your office use the SURE  
22 system to track the receipt of mail-in and  
23 absentee ballots?

24 A. Yes.

25 Q. Does your office use the SURE

1 system to generate poll books?

2 A. Yes.

3 Q. Who in your office has the  
4 responsibility for generating the poll  
5 books used on election day?

6 A. We have electronic poll books as  
7 well as using the paper for emergency  
8 back-up. So the technicians are  
9 responsible for printing those papers. I  
10 am responsible for the generation of the  
11 data for conversion for the electronic  
12 poll books.

13 Q. And just to clarify, the voter  
14 registration, the tracking of mail ballots  
15 out and back in, the generating of poll  
16 books, the data that your office is  
17 inputting is only on behalf of Washington  
18 County voters; is that correct?

19 A. Yes.

20 Q. When a voter submits an application  
21 for a mail ballot, how does the elections  
22 office process that application? Let me  
23 ask it a better way.

24 When the voter submits an  
25 application for a mail ballot, what are

1 the steps that the office uses to process  
2 the application?

3 A. The application is first reviewed  
4 to ensure that the voter has completed all  
5 the required sections, name, address,  
6 birth date, if provided, either the last  
7 four of their social or a Pennsylvania  
8 driver's license number, and that the  
9 application has been signed by the voter.  
10 If everything has been filled out  
11 correctly, then you can compare it with  
12 the SURE system information by inputting  
13 the voter's name to bring up their record  
14 in the SURE system, and then from there,  
15 you would verify that their address  
16 matches, their birth date matches, their  
17 identification, either their last four of  
18 their social or driver's license number.  
19 From there, you would input the  
20 information, that they're requesting a  
21 mail-in or absentee ballot. It does  
22 verify through either the Social Security  
23 Administration or the DMV records that  
24 that identification number is correct for  
25 that voter, that their name matches, that

1 the voter is not deceased.

2 And then once that, it will issue  
3 them -- it will provide us a label to  
4 print which we can then use to issue the  
5 ballot.

6 Q. The process you just described,  
7 that is the current process for processing  
8 an application for a mail ballot?

9 A. Yes.

10 Q. Okay, was that process the same in  
11 2023?

12 A. Yes.

13 Q. You said that once your office  
14 takes all the appropriate verification  
15 steps, the SURE system provides a label  
16 for you to use on the ballot envelope; is  
17 that correct?

18 A. Yes.

19 Q. Okay, what happens next in the  
20 process with the mail-in or absentee  
21 ballot after you have the label?

22 A. The label is printed from the SURE  
23 system, and that enables us to pull an  
24 appropriate ballot according to their  
25 precinct and, if it was a primary

1 election, according to their party, label  
2 the envelopes, insert the ballot into the  
3 envelopes -- envelope along with the  
4 additional information that is required  
5 for the mail ballot package.

6 Q. What other additional information  
7 would be in the packet?

8 A. In addition to the ballot, there  
9 are two envelopes. One is the return  
10 envelope for the voter with the voter's  
11 declaration on it. You also have the  
12 secrecy envelope, and the Department of  
13 State issued instructions.

14 Q. Once the mailing packet is prepared  
15 and is ready to be sent out, is the date  
16 that your office sends out the mail packet  
17 tracked?

18 A. Yes, in the SURE system.

19 Q. Okay, and is that by keying in a  
20 date, or is it by scanning?

21 A. It's by the date that the labels  
22 were printed. If the labels were printed  
23 ahead of time, when we sent our first  
24 mail-in out, I'm able to update that  
25 address -- or, I'm sorry, update that date

1 so that it's the correct, exact date that  
2 they were mailed.

3 Q. And you update that date in the  
4 SURE system?

5 A. Yes.

6 Q. And was that the same process for  
7 mailing out a ballot and tracking it in  
8 2023?

9 A. Yes.

10 Q. So when a voter returned a mail  
11 ballot or an absentee ballot -- and if I  
12 say mail ballot, I'm talking about both  
13 mail ballots and absentee ballots -- how  
14 can a voter return the mail -- in 2023,  
15 how could a voter return the ballot to the  
16 elections office?

17 A. They could either mail through the  
18 U.S. Postal Service or another service,  
19 mail the ballot to our office, or they  
20 could come in person and turn in their  
21 ballot. And it's only -- the voter can  
22 only return their own personal ballot in  
23 person.

24 Q. Does Washington County use drop  
25 boxes?

1 A. No.

2 Q. Has Washington County ever used  
3 drop boxes?

4 A. No.

5 Q. So when mail ballots are returned  
6 to your office, how is the return date  
7 tracked?

8 A. They are first date stamped with  
9 our office date stamp. Once they're date  
10 stamped, they are then recorded in the  
11 SURE system on the voter's record.

12 Q. Okay, and the office date stamp, is  
13 that a physical stamp?

14 A. Yes.

15 Q. Where is that stamped on the  
16 envelope?

17 A. On the -- not the side with the  
18 declaration because there's not sufficient  
19 room so that it's prominent. We date  
20 stamp in the white space on the side of  
21 the envelope that has our return  
22 information, our office address, and the  
23 postage markings.

24 Q. Okay, and in 2023 when you were  
25 tracking the receipt of ballots in the



1 SURE system, was that through scanning or  
2 keying in of data?

3 A. There's a label on the declarations  
4 side of the envelope that contains the  
5 voter's name and address as well as a bar  
6 code. That bar code is scanned into the  
7 SURE system. We have a handheld scanner  
8 that we use to scan the bar code, and it  
9 will record on the voter's record that  
10 their ballot was returned.

11 Q. And mail ballots in 2023, were they  
12 scanned the same day they arrived at your  
13 office?

14 A. Yes. We don't leave until they've  
15 been scanned.

16 Q. Where is the bar code on the return  
17 envelope in relation to the voter  
18 declaration?

19 A. It's on the same side as the voter  
20 declaration. I believe the sticker -- the  
21 label sticker is right below where the  
22 voter would sign and date, and that label  
23 contains their name, address, and the bar  
24 code.

25 Q. Okay, so in 2023 when one of the

1 election, according to their party, label  
2 the envelopes, insert the ballot into the  
3 envelopes -- envelope along with the  
4 additional information that is required  
5 for the mail ballot package.

6 Q. What other additional information  
7 would be in the packet?

8 A. In addition to the ballot, there  
9 are two envelopes. One is the return  
10 envelope for the voter with the voter's  
11 declaration on it. You also have the  
12 secrecy envelope, and the Department of  
13 State issued instructions.

14 Q. Once the mailing packet is prepared  
15 and is ready to be sent out, is the date  
16 that your office sends out the mail packet  
17 tracked?

18 A. Yes, in the SURE system.

19 Q. Okay, and is that by keying in a  
20 date, or is it by scanning?

21 A. It's by the date that the labels  
22 were printed. If the labels were printed  
23 ahead of time, when we sent our first  
24 mail-in out, I'm able to update that  
25 address -- or, I'm sorry, update that date

1 so that it's the correct, exact date that  
2 they were mailed.

3 Q. And you update that date in the  
4 SURE system?

5 A. Yes.

6 Q. And was that the same process for  
7 mailing out a ballot and tracking it in  
8 2023?

9 A. Yes.

10 Q. So when a voter returned a mail  
11 ballot or an absentee ballot -- and if I  
12 say mail ballot, I'm talking about both  
13 mail ballots and absentee ballots -- how  
14 can a voter return the mail -- in 2023,  
15 how could a voter return the ballot to the  
16 elections office?

17 A. They could either mail through the  
18 U.S. Postal Service or another service,  
19 mail the ballot to our office, or they  
20 could come in person and turn in their  
21 ballot. And it's only -- the voter can  
22 only return their own personal ballot in  
23 person.

24 Q. Does Washington County use drop  
25 boxes?

1 For example, there was a canceled -- there  
2 is a canceled, deceased option. So there  
3 are other codes available, but I can't  
4 recall exactly the specific wording of  
5 each code.

6 BY MS. McKENZIE:

7 Q. For a living voter in 2023 who  
8 returned a mail ballot with a  
9 disqualifying error, what were your  
10 options in SURE for coding?

11 MR. BERARDINELLI: Object to  
12 form, asked and answered. You can answer.

13 A. Canceled, no signature and  
14 canceled, no date. As I said before, I  
15 don't recall if the canceled, incorrect  
16 date option was available in 2023.

17 MS. McKENZIE: I want to mark an  
18 exhibit, Ostrander 1.

19 - - - -

20 (Exhibit No. 1 marked for identification.)

21 - - - -

22 BY MS. McKENZIE:

23 Q. Ms. Ostrander, I'm showing you a  
24 document that's been marked Ostrander 1.  
25 Do you recognize this document?

1 A. I do.

2 Q. And can you please identify it?

3 A. These are the approved minutes from  
4 the Board of Elections meeting on March  
5 12, 2024.

6 Q. I want to direct your attention to  
7 the middle of Page 1 of the document under  
8 election director comments, and the  
9 minutes state that: The procedure for the  
10 handling of absentee and mail-in ballot  
11 envelopes received as incomplete needs to  
12 be decided. Ms. Ostrander described the  
13 options available, and the Board will vote  
14 at the next meeting.

15 How did that discussion end up on  
16 the agenda for the March 12, 2024 Board of  
17 Elections meeting?

18 A. I placed it on the agenda.

19 Q. Okay, and why did you place that  
20 item on the agenda?

21 A. With each new election in light of  
22 court -- new court rulings and new  
23 guidance from the Department of State and  
24 the Board of Elections contained new  
25 members because of the county

1 commissioner's election, it's appropriate  
2 to review and decide if there was going to  
3 be the procedure for mail-in and absentee  
4 ballots.

5 Q. Prior to placing this item on the  
6 agenda for the March 12, 2024 board  
7 meeting, did you have any discussions with  
8 any of the three commissioners?

9 MR. BERARDINELLI: About this?

10 MS. McKENZIE: About placing it  
11 on the agenda.

12 MR. BERARDINELLI: Thank you.

13 A. I emailed the three commissioners  
14 who are the Board of Election members. On  
15 that email, I also copied our county  
16 solicitor who by election law is the Board  
17 of Elections solicitor and our chief of  
18 staff who is the -- he serves as a county  
19 administrator in between the directors and  
20 the commissioners.

21 We're a little different than other  
22 offices since I have a Board of Elections  
23 as well, but for -- so everyone was aware,  
24 I emailed the five individuals and told  
25 them that I was placing -- that we needed

1 just trying to recall everything. There's  
2 so many.

3 Q. You also said that you attached new  
4 guidance from the Department of State.  
5 What was the topic of that guidance?

6 A. The Department of State issued  
7 guidance for examining absentee and mail-  
8 in ballot declaration envelopes.

9 Q. At the Board meeting on March 12th,  
10 what options did you describe for the  
11 Board for handling absentee and mail-in  
12 ballots that had disqualifying errors?

13 A. That the Board -- there was a court  
14 ruling that affirmed in -- I believe it  
15 was Ball V. Chapman that it was up to the  
16 County Board of Elections to decide curing  
17 policies, so they were to decide if -- for  
18 Washington County in 2024, the Board of  
19 Elections was to decide was Washington  
20 County offering curing, a curing for the  
21 mail-in ballots received with a  
22 disqualifying error, or a not curing  
23 policy for the disqualifying error --  
24 mail-in ballots received with  
25 disqualifying errors and then also the

1 various codes that were offered by the  
2 Department of State in the SURE system as  
3 the Department of State in 2024 updated  
4 and provided new code options in the SURE  
5 system.

6 MS. MCKENZIE: I'd like to mark  
7 this document Ostrander 2.

8 - - - -

9 (Exhibit No. 2 marked for identification.)

10 - - - -

11 MS. GALLAGHER: Is this from  
12 Genzer?

13 MS. MCKENZIE: It is. David,  
14 this marking on the bottom comes from a  
15 different lawsuit.

16 MR. BERARDINELLI: Okay, just so  
17 the records notes it.

18 MS. GALLAGHER: That's what I  
19 wanted to know.

20 - - - -

21 (The record was read by the reporter.)

22 - - - -

23 BY MS. MCKENZIE:

24 Q. Ms. Ostrander, I'm showing you a  
25 document that's marked Ostrander 2. Have



1           you seen this document before?

2           A.    I have.

3           Q.    Okay, and can you identify  
4           document?

5           A.    This is a document that was  
6           provided to the counties by the Department  
7           of State in reference to the SURE system  
8           and changes for 2024 for mail ballots.

9           Q.    And when you testified just a few  
10          minutes ago about changes in the SURE  
11          codes, are these the types of changes that  
12          you're referring to?

13          A.    Yes, this is what I was referring  
14          to, correct.

15          Q.    So in explaining to the Board about  
16          the code options available in 2024, what  
17          did you tell them at the March meeting?

18          A.    I explained to them, to the Board  
19          of Elections, if they wanted to allow  
20          curing there were various codes that the  
21          Department of State issued, updated in the  
22          SURE system, and I explained the different  
23          codes that can be used. If they wanted to  
24          not cure, I also explained what codes  
25          could then be used in the SURE system.

1 Q. Was there any discussion at that  
2 board meeting about letting voters know if  
3 there was a disqualifying error on their  
4 declaration envelope?

5 A. Yes. The Board asked when these  
6 codes are used how would the voter be  
7 notified, and I explained that the  
8 Department of State -- depending on the  
9 code chosen, the Department of State  
10 issues an email to the voter if there is  
11 an email on file.

12 Q. Did you lay out for the Board at  
13 the March 12th meeting the availability of  
14 the canceled, no date code?

15 MR. BERARDINELLI: Object to  
16 form. You can answer if you understand.

17 A. Yes, I informed the Board that the  
18 Department of State has a code available  
19 that says canceled, no date.

20 BY MS. MCKENZIE:

21 Q. And at the March 12th meeting, did  
22 you inform the Board of Elections that  
23 there was a canceled, incorrect date code  
24 available?

25 A. Yes.

1 Q. And did you inform the Board of  
2 Elections at the March 2024 meeting that  
3 there was a canceled, no signature code  
4 available?

5 A. Yes.

6 Q. Did you inform the Department --  
7 sorry, I'll start over.

8 Did you inform the Board of  
9 Elections that there were pending codes  
10 available for ballots that had  
11 disqualifying errors?

12 A. Yes.

13 Q. And would you have informed the  
14 Board of Elections that there was a  
15 pending, incorrect date code available?

16 A. Yes.

17 Q. And did you inform the department  
18 -- I'm sorry. Did you inform the Board of  
19 Elections that there was a pending, no  
20 date code available?

21 A. Yes.

22 Q. And did you inform the Board of  
23 Elections that there was a pending, no  
24 signature code available to your office?

25 A. Yes.

1 received return code that is entered by  
2 your office?

3 A. Yes, depending on the code -- the  
4 SURE code. Depending on the SURE code that  
5 my office was instructed by the Board of  
6 Elections to use would have determined  
7 which email was generated to the voter.  
8 Is that what you meant? Yeah.

9 Q. If a voter returned a mail-in  
10 ballot in April of 2024 and there were no  
11 disqualifying errors, what code in the  
12 SURE system would your office enter?

13 A. Recorded, ballot returned.

14 Q. Okay, if a voter returned a ballot  
15 in April of 2024 with a disqualifying  
16 error, which code in the SURE system would  
17 your office enter?

18 A. Recorded, ballot returned.

19 Q. So whether a voter had a  
20 disqualifying error or not, your office  
21 would enter the same SURE code in the  
22 system?

23 A. Yes.

24 Q. So looking again at Ostrander  
25 Exhibit 3, Page 3 of the document, second

1 Q. And were they scanned into the SURE  
2 system like they were in 2023?

3 A. Yes. But because the Board of  
4 Elections voted, there were different  
5 codes in 2024 that were used in the SURE  
6 system by my staff as opposed to 2023.

7 Q. Okay, and I believe you testified  
8 that the only code your office used in  
9 April of 2024 was the returned received  
10 code in the SURE system?

11 A. Yes, for all -- I'm sorry, did you  
12 say 2023?

13 Q. 2024.

14 A. 2024, all ballots received by our  
15 office were scanned in the SURE system  
16 with the code record ballot returned. I  
17 think that's what the code says.

18 Q. And that scanning and selection of  
19 a SURE code was done on the same day that  
20 the ballot was returned?

21 A. Yes.

22 Q. If a mail-in ballot or absentee  
23 ballot was returned in April of 2024 and  
24 it was undated, how was that ballot  
25 handled?

1 MS. GALLAGHER: Object to form.

2 MR. BERARDINELLI: Can you read  
3 that back? I'm sorry, I got lost.

4 MS. McKENZIE: I can just repeat  
5 it.

6 MR. BERARDINELLI: I'd  
7 appreciate that.

8 BY MS. McKENZIE:

9 Q. If a mail-in or absentee ballot was  
10 returned to your office in April of 2024  
11 and the declaration envelope was undated,  
12 how did your office process that ballot?

13 A. The ballot was scanned into the  
14 SURE system using the code record ballot  
15 returned.

16 Q. Was that ballot set aside or  
17 segregated in any way from the other mail-  
18 in ballots that were returned that did not  
19 have errors?

20 A. Yes.

21 Q. Were they similarly based in the  
22 mail ballot room but segregated like they  
23 were in 2023?

24 A. Yes. But it was different in 2024  
25 as to 2023 because we were recording them

1 all as ballot returned, so those ballots  
2 were -- each precinct in our mail ballot  
3 room has two bins. So the ballots with the  
4 properly completed declaration envelope  
5 were in one bin for that precinct, and the  
6 ballots with the declaration envelope that  
7 contained a disqualifying error were in a  
8 different bin for that precinct.

9 Q. For a mail-in or absentee ballot in  
10 2024 that is undated, what did that look  
11 like on the envelope?

12 A. Can you repeat that?

13 MR. BERARDINELLI: Object to the  
14 form.

15 BY MS. MCKENZIE:

16 Q. What does it mean for a ballot to  
17 be undated in April of 2024?

18 A. The area on the declaration  
19 envelope that says today's date would be  
20 blank.

21 Q. So it's missing a month and a day  
22 and a year?

23 A. Correct.

24 Q. Or any one of those items, a month  
25 a day or a year, or does it have to be

1 missing all three items to be undated?

2 A. Undated is all three items missing.

3 Q. Okay, what is an incorrectly dated  
4 mail-in ballot in April of 2023?

5 A. You said '23.

6 Q. I'm sorry, I need more caffeine.  
7 What is an incorrectly dated ballot in  
8 April of 2024?

9 A. In 2024, an incorrect date would be  
10 a date outside of the date April 1st,  
11 2024, which is the date the first ballots  
12 went out and election day which was April  
13 23rd, 2024.

14 Q. If a ballot was missing the month  
15 or the day on the declaration envelope, is  
16 that an undated ballot or an incorrectly  
17 dated ballot?

18 A. We classified those in a third  
19 category called incomplete date, so the  
20 date was not complete.

21 Q. So there are three categories of  
22 disqualifying errors when it comes to the  
23 date on the declaration envelope from the  
24 Washington County Board's perspective?

25 A. In 2024, according to the date,



1 just the date part, yes.

2 Q. And that could be it's missing a  
3 date altogether; is that correct?

4 A. Yes.

5 Q. It's outside of the April 1st to  
6 April 23rd range that you described?

7 A. Yes.

8 Q. Or it's missing a month or the day  
9 of the month or the year?

10 A. Yes.

11 MR. BERARDINELLI: Or some  
12 combination thereof.

13 A. Or some combination thereof, yes,  
14 because it could have been missing the day  
15 and the last two digits of the year or --  
16 yes.

17 BY MS. MCKENZIE:

18 Q. Okay, so if a -- let me start over.

19 In 2024 on the declaration envelope for  
20 the year, 2-0 was prefilled; is that  
21 correct?

22 A. Yes. The Secretary of the  
23 Commonwealth, Department of State, designs  
24 the envelope that is used by all counties,  
25 and they prefilled in the 2-0 on the

1           template.

2           Q.   And if 2-4 was missing on the  
3           declaration envelope, that ballot was  
4           considered incompletely dated?

5           A.   Yes.

6                       MR. BERARDINELLI:   Can we take a  
7           quick break?

8                       MS. McKENZIE:   Ah-huh.

9                       - - - -

10           (There was a recess in the proceedings.)

11                       - - - -

12 BY MS. McKENZIE:

13           Q.   Ms. Ostrander, I just wanted to ask  
14           you a question about Emails 4, 5, and 6,  
15           and I had directed you to the sentence  
16           about the fact that if the voter goes to  
17           the app to --

18                       MR. BERARDINELLI:   The website.

19                       MS. McKENZIE:   The website,  
20           you're correct, to get more information on  
21           their ballot status.

22 BY MS. McKENZIE:

23           Q.   Does the voter get different  
24           information if a canceled code is entered  
25           compared to a recorded, ballot returned

1           template.

2           Q.   And if 2-4 was missing on the  
3           declaration envelope, that ballot was  
4           considered incompletely dated?

5           A.   Yes.

6                   MR. BERARDINELLI:   Can we take a  
7           quick break?

8                   MS. McKENZIE:   Ah-huh.

9                           - - - -

10           (There was a recess in the proceedings.)

11                           - - - -

12 BY MS. McKENZIE:

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14           you a question about Emails 4, 5, and 6,  
15           and I had directed you to the sentence  
16           about the fact that if the voter goes to  
17           the app to --

18                   MR. BERARDINELLI:   The website.

19                   MS. McKENZIE:   The website,  
20           you're correct, to get more information on  
21           their ballot status.

22 BY MS. McKENZIE:

23           Q.   Does the voter get different  
24           information if a canceled code is entered  
25           compared to a recorded, ballot returned

1 code is entered in SURE?

2 MR. BERARDINELLI: Objection,  
3 asked and answered. Go ahead.

4 A. Again, I don't know. The  
5 Washington County Board of Elections  
6 doesn't control the website. The  
7 Department of State does, and they don't  
8 ask our input. So I'm not familiar with  
9 what exactly is on there other than it  
10 tells them when their ballot was mailed  
11 and when it was received.

12 BY MS. MCKENZIE:

13 Q. I want to direct your attention  
14 back to Ostrander 2, and I want to just  
15 make SURE the record is clear on this.  
16 Ostrander 2 is what?

17 A. It is the SURE user guide from the  
18 Department of State as to the codes  
19 available in SURE when you record a  
20 ballot.

21 Q. Okay, in Ostrander 2 -- actually  
22 I'm going to scratch that question.  
23 When you testified earlier about the  
24 email you sent the commissioners and some  
25 other folks before the March 12th Board of

1 The Herald Standard that reported the  
2 number was 170 ballots. Does that refresh  
3 your recollection?

4 A. Yes. Well said. I was right.

5 Q. These 170 ballots that were  
6 returned with disqualifying errors, would  
7 they be counted on election day during the  
8 prec canvass and canvass?

9 MR. BERARDINELLI: Object to  
10 form. You can answer.

11 A. If the canvass -- when they were  
12 canvassed, if the ultimate decision was  
13 made by the canvassers that they had  
14 disqualifying errors, they would not be  
15 counted.

16 BY MS. MCKENZIE:

17 Q. If a ballot is returned in the  
18 declaration envelope in 2024 and is  
19 missing a signature, will anything change  
20 between the time that ballot is returned  
21 without a signature and the canvass that  
22 would allow that ballot to be counted?

23 MR. BERARDINELLI: Object to  
24 form.

25 A. I don't understand what you're

1 asking.

2 BY MS. MCKENZIE:

3 Q. In April of 2024 when a ballot is  
4 returned without a signature, will that  
5 ballot be counted or not counted?

6 A. The canvass board would make the  
7 decision on whether it was counted or not  
8 counted according to the election law,  
9 which election law says it needs a  
10 signature.

11 Q. Okay, when a ballot was returned in  
12 April of 2024 with a missing date, an  
13 incomplete date, or an incorrect date,  
14 would that ballot be counted?

15 MR. BERARDINELLI: Object to  
16 form.

17 A. It would be the same situation as  
18 the unsigned declaration envelope ballot;  
19 that when during canvassing, the canvass  
20 board would decide according to election  
21 code can that ballot be counted or not  
22 with an incomplete, incorrect, or missing  
23 date on the declaration envelope.  
24 And according to election law, it  
25 shall be signed and dated which was upheld

1 by the Third Circuit Court that the  
2 declaration envelope needs a date, a  
3 correct date.

4 BY MS. MCKENZIE:

5 Q. In April of 2024, what would the  
6 poll books reflect for a voter who  
7 returned a mail ballot with a  
8 disqualifying error?

9 A. The poll book would say that their  
10 mail ballot was returned.

11 Q. If a voter who returned a ballot  
12 with a disqualifying error went to their  
13 polling place on election day in April of  
14 2024 and asked to vote a provisional  
15 ballot, what would they have been told?

16 MR. BERARDINELLI: Object to  
17 form. Go ahead.

18 A. All voters or anyone can vote a  
19 provisional ballot.

20 BY MS. MCKENZIE:

21 Q. If a voter returned a ballot with a  
22 disqualifying error in April of 2024 and  
23 they went to the polling place and voted a  
24 provisional ballot, would that ballot be  
25 counted?

1 specific voters or any voter? I'm sorry,  
2 I didn't catch the beginning of that  
3 question.

4 Q. Yes, did any voters in April of  
5 2024 call and ask about the status of  
6 their mail-in ballot?

7 MR. BERARDINELLI: You're not  
8 asking did John Smith call? You're asking  
9 in general?

10 BY MS. MCKENZIE:

11 Q. Any voters.

12 A. Yes, voters would call and inquire  
13 if their ballot had been received by our  
14 office.

15 Q. Okay, did any voters call and ask  
16 if their ballot had disqualifying errors  
17 in April of 2024?

18 A. I can't recall if specifically they  
19 asked that question.

20 Q. Did the Board of Elections instruct  
21 your office how to respond to voter  
22 inquiries about whether they had any  
23 disqualifying errors?

24 A. We would inform voters when they  
25 called and asked about their mail ballot



1       that if their ballot was received, we  
2       would tell them that their ballot was  
3       received and it was locked -- according to  
4       the election law, it was locked and it  
5       would be reviewed during the canvass.

6       Q.   Would anyone in your office --  
7       actually, no, I'll withdraw that question.  
8       Were there any written instructions  
9       to the employees working in your office  
10      about how to respond to voter inquiries in  
11      April of 2024 about whether or not they  
12      had properly filled out their declaration  
13      envelope?

14      A.   No, no written instructions.

15      Q.   In April of 2024, did your office  
16      inform any voters who called that their  
17      ballot was not signed or was incorrectly  
18      dated?

19               MR. BERARDINELLI:   Object to  
20      form. You can answer.

21      A.   Can you repeat that?   I didn't  
22      understand.

23 BY MS. MCKENZIE:

24      Q.   In April of 2024, did your office  
25      tell voters if their ballot had been

1 counted. It sounds fancier.

2 BY MS. McKENZIE:

3 Q. So when you say tabulated, that's  
4 the same as counting the vote?

5 A. Yes, because it's fancier, right?

6 Q. Either way, it's an important thing  
7 to do?

8 A. Yes. Tabulation is the process of  
9 counting the ballots.

10 Q. Okay, so the segregated ballots are  
11 not tabulated once that tabulation starts  
12 or are not counted once that tabulation  
13 starts?

14 MR. BERARDINELLI: Object to  
15 form.

16 A. That's correct.

17 BY MS. McKENZIE:

18 Q. I think you said something about a  
19 canvass board meeting.

20 A. Yes.

21 Q. What is the canvass board meeting?

22 A. Beginning the Friday after election  
23 -- so the election law requires three days  
24 after the election which would be the  
25 Friday after for the canvasser computation

1 -- canvassing and computation of the  
2 election or of the vote. I can't remember  
3 the exact word that's used in the election  
4 code.

5 So that would be when. The canvass  
6 board meets 9 a.m. the Friday after the  
7 election.

8 Q. Okay, and did that take place then  
9 on Friday, April 26, 2024, that the  
10 canvass board met?

11 A. Yes.

12 Q. And is that the appropriate term  
13 that I should be using? Canvass board?  
14 Computation board? Just so we're clear on  
15 --

16 A. In Washington County because I know  
17 every county considers it something  
18 different, returns board, computation  
19 board. In Washington County, we use the  
20 word canvass board.

21 Q. Canvass board, okay.

22 A. It's essentially the same thing as  
23 a returns board or computation as other  
24 counties use those terms.

25 Q. And who sits on the canvass board?

1           A. Each Board of Elections appoints  
2 two electors from Washington County to  
3 represent them.

4           Q. So there are six people?

5           A. Correct.

6           Q. Do you attend the meeting of the  
7 canvass board three days after election?

8           A. Yes.

9           Q. Is that meeting open to the public?

10          A. It is.

11          Q. How is the public notified about  
12 that meeting?

13          A. It is advertised in a newspaper of  
14 general circulation in the county. So we  
15 have two newspapers that are in  
16 circulation in our county, and we publish  
17 the notice of canvass meeting. It's  
18 required by law a week's notice, so the  
19 Friday prior, the notice would be in both  
20 newspapers.

21          Q. And what are the two newspapers?

22          A. Mon Valley Independent and The  
23 Observer Reporter.

24          Q. And where did the canvass board  
25 meet on Friday, April 26, 2024?

1           A. They meet in what is referred to in  
2           our county as Conference Room G-17. It's  
3           on the other side of the hallway from  
4           where the elections office is. It's all  
5           located on the ground floor. The G-17  
6           conference room is next to the  
7           commissioners public meeting room.

8           Q. Is that meeting recorded?

9           A. It is not.

10          Q. Are there minutes taken of that  
11          meeting?

12          A. No.

13          Q. How long did that meeting last?

14          A. It lasts day to day until finished.

15          So we meet from -- the first day, we meet  
16          at 9 a.m. because that is what is said in  
17          the law, in the election law. Then we  
18          meet until approximately 3 o'clock each  
19          day.

20          After the initial 9 o'clock meeting,  
21          we convene at 8:30, and so we work 8:30 to  
22          approximately 3 o'clock until the work is  
23          finished.

24          Q. Okay, and do you meet on Saturdays  
25          and Sundays?

1 A. We do not.

2 Q. Okay, so in April of 2024, how many  
3 meeting days did the canvass board meet  
4 for?

5 A. We met -- if I recall, I believe it  
6 was May 6. And the election -- the  
7 election results are required to be  
8 certified according to the election law by  
9 the third Monday after the election which  
10 was May 13th. And the canvass board does  
11 not certify the election. The Board of  
12 Elections does at a publicly advertised  
13 meeting.

14 Q. So in April of 2024 for the  
15 primary, it sounds like the canvass board  
16 would have met on seven different dates?

17 A. That sounds right.

18 MR. BERARDINELLI: Good math.

19 BY MS. MCKENZIE:

20 Q. Are each of those meeting dates  
21 publicly advertised?

22 A. Not each day. The initial first  
23 day is advertised that they will continue  
24 to meet until the work is done.

25 Q. In April of 2024, did you have

1 voters calling your office and asking when  
2 the canvass board would meet?

3 A. I believe -- I'm trying to think  
4 here. I don't believe anyone called. I  
5 know we had inquiries about it, but I  
6 believe they inquired about it at the  
7 public test that was held the Friday  
8 before the election. But I cannot recall  
9 if anyone contacted us via telephone to  
10 ask about the canvass meeting.

11 Q. Did anyone contact you via email?

12 A. I can't recall. Someone may have,  
13 but I can't recall.

14 Q. And you said you believed there  
15 might have been inquiries at the public  
16 test. What is the public test?

17 A. I can't recall the number of days.  
18 We always do ours on the Thursday before  
19 the election, but you have to have a  
20 public test where you tabulate -- or  
21 sorry, where you do logic and accuracy  
22 testing on the central count voting  
23 machine, scanner.

24 Q. Okay, and that public test is open  
25 to the public?

1           A. Yes. And it is advertised in the  
2 same newspapers as well. I think it's 48  
3 hours before.

4           Q. When the canvass board began  
5 meeting on Friday, April 26, 2024, did  
6 members of the public show up to that  
7 meeting?

8           A. Yes.

9           Q. Do you know approximately how many  
10 on the first day of the meeting?

11          A. I believe we had -- I think his  
12 wife was there. I think we had three on  
13 the first day.

14          Q. Do you know on the subsequent days  
15 that the canvass board met how many  
16 members of the public showed up?

17          A. They were there Friday for a  
18 portion of the meeting. I can't recall if  
19 they were there when we did the  
20 provisional which we started on Monday.  
21 They came back, but I just can't recall  
22 which day. There were two that came back.

23          Q. The mail-in and absentee ballots  
24 that have been segregated and not part of  
25 that tabulation, are they in any way



1 addressed at the meeting of the canvass  
2 board?

3 A. Yes.

4 Q. Okay, when did that take place?

5 A. That took place Monday if my memory  
6 is correct.

7 Q. And what --

8 MR. BERARDINELLI: Monday, the  
9 29th?

10 MS. MCKENZIE: Yes.

11 MR. BERARDINELLI: Thank you.

12 BY MS. MCKENZIE:

13 Q. And what actions does the canvass  
14 board take with respect to the mail-in and  
15 absentee ballots that have been  
16 segregated?

17 A. They reviewed the declaration  
18 envelope of each and decided -- and agreed  
19 with the segregation and decided that  
20 those were not to be counted because the  
21 declaration envelope had a disqualifying  
22 error.

23 And then they were segregated  
24 into -- or they were placed into  
25 categories based upon what the

1 disqualifying error was. Then they were  
2 counted as to how many were in each  
3 category. They were gum-banded, and a  
4 note of the number and what the  
5 disqualifying error was placed on that  
6 note. That's how I made the list.

7 Q. And were any additional SURE codes  
8 placed into the system about those ballots  
9 that had been segregated and not counted?

10 A. No, no.

11 MR. BERARDINELLI: Object to the  
12 form.

13 A. No.

14 BY MS. MCKENZIE:

15 Q. You testified that there are six  
16 members to the canvass board?

17 A. That's correct.

18 Q. And how does just physically that  
19 review of the ballots segregated for  
20 disqualifying errors take place?

21 A. So each -- to make sure that it's  
22 done bipartisan, each commissioner, as I  
23 said, has two appointees. So we have one  
24 democrat commissioner, so we form two  
25 teams to make SURE that one of the

1 the email in Exhibit 4, 5, and 6, the part  
2 that does not reflect the decision by the  
3 Washington County Board of Elections is  
4 the sentence: If your county election  
5 office identifies an issue with your  
6 ballot envelope that prevents the ballot  
7 from being counted, you may receive  
8 another notification. Otherwise -- well,  
9 I guess two sentences: Otherwise, you  
10 will not receive any further updates on  
11 the status of your ballot from this email  
12 address, and you are no longer permitted  
13 to vote at your polling place/location.  
14 So the language in those two  
15 sentences I do not agree with because they  
16 do not reflect the decision made by the  
17 Washington County Board of Elections.

18 Q. And what decision is that?

19 A. The decision is that the election  
20 office does not identify and prevent your  
21 ballot from being counted. That decision  
22 is a made when they are canvassed. So to  
23 voters in Washington County, the language  
24 in the email is misleading.

25 Q. Did the representatives from the

1 Q. Does the Washington County Board of  
2 Elections and your office intend to follow  
3 that directive that was issued on July 1,  
4 2024?

5 MR. BERARDINELLI: Object to the  
6 form.

7 A. Yes, the Board of Elections will  
8 follow the directive.

9 BY MS. MCKENZIE:

10 Q. Concerning the form of absentee and  
11 mail-in ballot materials?

12 A. Yes.

13 Q. I really am getting near the end.  
14 For the upcoming November general  
15 election, does the Board of Elections plan  
16 to use the same process for handling mail-  
17 in ballots that are returned with one of  
18 these disqualifying errors?

19 MR. BERARDINELLI: Object to the  
20 form. Go ahead.

21 A. I haven't spoken directly to the  
22 Board of Elections in regards to this, but  
23 our past practice is that it's reviewed  
24 prior to each election. So we will have a  
25 Board of Elections public meeting, and the

1 ballot procedure -- absentee and mail-in  
2 ballot procedure will be on the agenda.

3 BY MS. McKENZIE:

4 Q. Has the past practice been that the  
5 absentee and mail-in ballot practice be  
6 the same in the primary and the general  
7 election in the same year, calendar year?

8 MR. BERARDINELLI: Object to the  
9 form.

10 A. Past practice in 2023, what was  
11 followed in the primary, was again voted  
12 and decided and to follow in the general  
13 election, so based on that, most likely it  
14 will be the same.  
15 I can't speak for other years  
16 because of all the various litigation that  
17 has gone on, but in 2023, there was not  
18 any.

19 BY MS. McKENZIE:

20 Q. There was not any --

21 A. Any litigation. There were several  
22 court rulings after the 2020 election,  
23 after 2022.

24 Q. So the same process for processing  
25 mail-in ballots in the April '23 primary

1 received this email from the Department of  
2 State, the emails of 4 -- Exhibits 4, 5  
3 and 6.

4 Q. Did the Washington County Board of  
5 Elections have any input into the language  
6 in that email?

7 A. No. To my knowledge, these emails  
8 were drafted by the Department of State.

9 Q. Did the Department of State give  
10 you prior review, an ability to review  
11 these emails prior to the implementation  
12 of the system?

13 A. The Washington County Board of  
14 Elections did not have any input in the  
15 language contained in the emails of  
16 Exhibits 4, 5, and 6.

17 Q. I'd like you to look at the first  
18 paragraph: Your ballot has been received  
19 by Washington County as of April 22nd,  
20 2024. Would that be an accurate statement  
21 for this? I'm looking at Mr. Marks's.

22 A. Yes, that sentence.

23 Q. The next line: If your county  
24 election office identifies an issue with  
25 your ballot that prevents the ballot from

1 being counted, you may receive another  
2 notification. As to Washington County for  
3 the April 2024 primary election, is that  
4 an accurate statement to that voter?

5 A. No. Based upon the decision made  
6 by the Washington County Board of  
7 Elections, that sentence is misleading.

8 Q. So to the extent a voter received  
9 this email, could you stop -- strike that.  
10 Could the Washington County Board of  
11 Elections have stopped this email from  
12 going to their voters, their mail-in  
13 voters?

14 MS. MCKENZIE: Objection.

15 A. No, not to -- we could have not  
16 included the email address in the voters'  
17 --

18 BY MS. GALLAGHER:

19 Q. Well, that wouldn't have been  
20 accurate, would it, though?

21 A. That wouldn't have been accurate.

22 Q. So --

23 MR. BERARDINELLI: Let her  
24 finish, please.

25 A. That's the only way we could have

1 prevented the voter from receiving an  
2 email is by not including their email on  
3 the application in the SURE system which  
4 would not have been accurate.

5 BY MS. GALLAGHER:

6 Q. But the Department of State didn't  
7 give you that option, did they, Ms.  
8 Ostrander --

9 MS. McKENZIE: Objection.

10 BY MS. GALLAGHER:

11 Q. -- to have an accurate email go out  
12 to your voter?

13 A. The Washington County Board of  
14 Elections did not have any input into the  
15 language of the email.

16 Q. Was there an option not to have --  
17 to not allow the email to be sent -- and I  
18 said that backwards. Do you understand  
19 what I meant?

20 MS. McKENZIE: Objection.

21 A. No.

22 BY MS. GALLAGHER:

23 Q. Did you have the ability to stop  
24 this email from going out to Washington  
25 County voters?



1           A. As I said before, the only way we  
2 could have prevented this email was to not  
3 have inputted the email address into the  
4 application which would not have been  
5 accurate. We would not have done that.

6           Q. So maybe I can ask it better. Once  
7 you put in all accurate information, did  
8 you have any control over what Washington  
9 County voters were being told?

10          A. No.

11          Q. To the extent that a voter in  
12 Washington County received this email and  
13 thought, oh, if there's a problem with my  
14 ballot, I may get more notification, was  
15 that belief caused by Washington County?

16               MS. McKENZIE: Objection.

17          A. I don't understand. Could you  
18 rephrase?

19 BY MS. GALLAGHER:

20          Q. Once a voter received this and they  
21 read this language, if your county  
22 election official identifies an issue with  
23 your ballot envelopes that prevent the  
24 ballot from being counted, you may receive  
25 another notification -- as you stated,

1           A. Not under Pennsylvania's current  
2 election code. It does not -- we would  
3 not be able to provide each voter an  
4 opportunity to correct a disqualifying  
5 error.

6 BY MS. GALLAGHER:

7           Q. Would you agree that by not  
8 allowing any curing, all voters are being  
9 treated equally?

10           MS. McKENZIE: Objection.

11           A. By not allowing curing, it's -- not  
12 allowing curing is, for lack of a better  
13 word, more fair because you're not --  
14 those voters who turn their ballot in at  
15 7:45, 7:59 with a disqualifying error  
16 aren't losing out on a special privilege  
17 than voters who turned their ballot in two  
18 weeks ahead of time and a disqualifying  
19 error was discovered.

20 BY MS. GALLAGHER:

21           Q. So it goes through the canvass, and  
22 it's not counted. Does that voter, as you  
23 understand it, have a right to challenge  
24 that no count -- strike that.  
25 For someone whose ballot is not

1 counted because it's missing a signature  
2 or a date, do they have a right to  
3 challenge that action or appeal from that  
4 decision if you know?

5 MS. MCKENZIE: Objection.

6 MR. BERARDINELLI: Object to the  
7 form.

8 A. During the canvass, the voter can  
9 challenge a decision made by the canvass  
10 board.

11 BY MS. GALLAGHER:

12 Q. You were asked if Washington County  
13 had utilized the envelope with the hole in  
14 it to be able to see if there's a secrecy  
15 ballot. And I apologize, but I could not  
16 hear all of your answer at the time. What  
17 was your response?

18 A. We do not utilize an envelope with  
19 a hole.

20 Q. I'm sorry, you do not what?

21 A. We don't utilize -- we don't use an  
22 envelope that has a hole in the  
23 declaration envelope, no.

24 Q. And why is that?

25 A. The hole would cause the envelope

1        jump around a little bit. At some point,  
2        you were asked whether after the Board of  
3        Elections voted in favor of a noncuring  
4        policy and directed use of the received,  
5        record code, whatever the right term of  
6        art is which I apologize for messing up,  
7        whether you provide any written  
8        instructions to your employees. And I  
9        believe your answer is no.

10        A. That's correct. I did not give  
11        them written instructions.

12        Q. Did you give them instructions?

13        A. Yes, I did.

14        Q. Can you walk us through what you  
15        did?

16        A. Okay, I provided them with verbal  
17        instructions which then they took notes  
18        for themselves, but I informed them after  
19        the Board of Elections met on April 11th  
20        and voted to not allow curing.

21        I informed my staff as to that  
22        decision, and then I informed them that  
23        for all ballots received, we would be  
24        using the record, ballot return code in  
25        SURE as that was the most appropriate code

1 that was provided and that if any voter  
2 called asking if their ballot had been  
3 received that we were to tell them, you  
4 know, according to our system that, yes,  
5 their ballot had been received if it was  
6 on their record that had been recorded.  
7 If they began to ask more detailed  
8 questions on did I, you know, properly  
9 complete the declaration envelope, they  
10 would respond that according to the  
11 election law their ballot was received and  
12 it is locked and secure until the  
13 canvassing begins 7 a.m. on election  
14 morning.

15 Q. Did you have sort of like a staff  
16 meeting?

17 A. Yes.

18 Q. You were asked some questions about  
19 after the canvass whether you updated  
20 voter status in the SURE system. Do you  
21 recall that?

22 A. Yes, I do.

23 Q. Are you aware of anything in the  
24 election code that would dictate that you  
25 should update the SURE system post

1 subsequent communications with  
2 representatives of the Department of  
3 State, did anybody ever tell you that they  
4 were thinking about changing the email?

5 A. During the feedback session, the  
6 Department of State alluded that they were  
7 going to change the language in their  
8 record, ballot returned email that was  
9 generated.

10 Q. And what was the change that was  
11 alluded to?

12 A. That they would remove the language  
13 stating that if your ballot contained  
14 errors -- that according to Exhibits 4, 5,  
15 and 6, if your county election office  
16 identifies an issue with your ballot  
17 envelopes that prevents the ballot from  
18 being counted, you may receive another  
19 notification. They indicated that they  
20 were considering removing that language.

21 Q. As I understand it, when you send a  
22 mail-in ballot to a voter, there's a set  
23 of instructions that go with it, right?

24 A. That is correct.

25 Q. Is there anything from -- withdraw

1 that.

2 Is the paper in Washington County,  
3 the instructions, printed a different  
4 color than the rest of the ballot  
5 information?

6 A. Yes. That is in accordance with  
7 the Department of State's directive on the  
8 absentee and mail-in ballot package that  
9 the directions are to be printed on a  
10 nonwhite color. And there's graphics on  
11 the directions, and we are to make sure  
12 it's in color font or ink so that it's  
13 more eye-catching.

14 Q. What color paper do you guys use  
15 for the instructions?

16 A. For the primary in 2024, we used a  
17 light pink.

18 Q. Do you know what you plan on using  
19 for the general in 2024?

20 A. We plan on using the same color.

21 Q. And those instructions, do they  
22 also warn a voter that if they don't fill  
23 out the declaration correctly that the  
24 ballot is not going to be counted?

25 MS. McKENZIE: Objection.

1 BY MR. BERARDINELLI:

2 Q. Let me withdraw it.

3 A. To my knowledge --

4 Q. Let me withdraw it.

5 MR. BERARDINELLI: Why don't we  
6 mark this as -- what are we up to? 10?

7 A. Yeah.

8 - - - -

9 (Exhibit No. 10 marked for identification.)

10 - - - -

11 MR. BERARDINELLI: Here, I have  
12 white copies. I'm violating the code by  
13 giving you the white copies.

14 BY MR. BERARDINELLI:

15 Q. Melanie, is what we've marked as  
16 Exhibit 10 a copy of the instructions that  
17 were sent out by Washington County with  
18 regard to -- in conjunction with sending  
19 out a mail-in ballot in the 2024 primary?

20 A. Yes. These directions were to be  
21 included in each mail ballot.

22 Q. And the top in bold, it says:  
23 Instructions, how to pack your ballot,  
24 right?

25 A. Yes.



1 Q. Read into the record the next line,  
2 please.

3 A. For your ballot to count, you must  
4 follow all of these steps.

5 Q. And then it goes to label one, two,  
6 three, four steps with a bunch of bullet  
7 points?

8 A. Yes.

9 Q. And does every voter who receives a  
10 mail-in ballot from the Washington County  
11 Board of Elections get these instructions?

12 A. Yes.

13 Q. I want to jump back to March 12th  
14 of 2024, all right?

15 A. (Witness nods head up and down.)

16 Q. Yes?

17 A. Yes.

18 Q. I just want to make sure you're  
19 with me. I've been jumping all over the  
20 place. That was the meeting of the Board  
21 of Elections -- the first meeting of the  
22 Board of Elections in 2024 where the issue  
23 of curing or not curing was discussed,  
24 correct?

25 A. Yes, that was the actual first

1 If you guys decide noncuring, here are our  
2 code options?

3 MS. MCKENZIE: Objection.

4 BY MR. BERARDINELLI:

5 Q. Did you talk with them about what  
6 codes could be used for noncuring?

7 A. Yes.

8 Q. Can you tell us what you talked to  
9 them about?

10 A. Yes, that the record, ballot  
11 returned would be the most appropriate  
12 code for use if they decided not to -- if  
13 the Board of Elections decided not to  
14 cure. The other codes in my opinion were  
15 not applicable to a noncuring county.  
16 But I did tell them, the Board of  
17 Elections, that they could use the  
18 canceled, no signature/canceled, no date  
19 which would alert the voter with an email  
20 sent by the Department of State that their  
21 ballot was not being counted because of no  
22 date/no signature.  
23 But the email also contained  
24 information for the voter that they could  
25 correct the error, and if we used those

1 codes, it would be misleading because we  
2 were not allowing -- that the Board of  
3 Elections did not decide to cure, so there  
4 was no correction available for the voter.

5 Q. In the noncuring scenario based on  
6 your knowledge of the emails that are sent  
7 from the Department of State, are any of  
8 them 100 percent accurate?

9 A. For a noncuring county, the SURE  
10 codes with the emails affixed to them are  
11 not appropriate for a noncuring county.

12 Q. The actual codes you chose -- what  
13 is the name again?

14 A. Record, ballot returned.

15 Q. Let's assume no email was sent.

16 A. Okay.

17 Q. That verbiage, that word, is  
18 actually what you did, right?

19 A. Yes. That code is appropriate, but  
20 because it produces an email with language  
21 that does not fit into Washington County's  
22 decision, it was misleading to voters.

23 Q. Now, I want to jump to the April  
24 11th meeting. At the April 11th meeting,  
25 that is when the Board voted to not allow

1 curing, correct?

2 A. Yes, that is correct.

3 Q. And if I'm understanding your  
4 testimony, in the course of the discussion  
5 about that, they also talked about what  
6 code in the SURE drop-down menu you and  
7 your staff ought to use when dealing with  
8 a mail-in ballot?

9 A. Yes.

10 Q. Okay, first of all, do you remember  
11 any dialogue from that meeting about why  
12 to use one code versus another?

13 A. Because the Board of Elections  
14 decided with the code to use one code  
15 versus the other because of the emails  
16 that would be generated automatically to  
17 the voter.

18 Q. And tell me what you remember them  
19 discussing.

20 A. That the most appropriate code when  
21 you take in what the code says, like the  
22 SURE code, and the email that's sent out  
23 that we have no control over, the record,  
24 ballot returned code was the most  
25 appropriate in the Board of Elections of

1 Washington County situation.

2 Q. Was the concept of, quote, unquote,  
3 canceling a ballot discussed if you  
4 remember?

5 A. I did ask the Board of Elections if  
6 they wanted the code once the decision was  
7 made whether --

8 Q. Once which decision was made?

9 A. The canvass board.

10 Q. Go ahead. Please continue.

11 A. Once the canvass board's decision  
12 was made whether the ballot was counted or  
13 not counted based on the declaration  
14 envelope, I asked the Board if they wanted  
15 the codes changed, and the Board of  
16 Elections did not.

17 Q. During the discussion about --  
18 strike that.

19 Was there discussion about which  
20 code to use after the vote to not permit  
21 curing, or was it all before?

22 A. It was during -- the decision on  
23 the codes was during the discussion.

24 Q. In that discussion about the codes,  
25 what, if anything, did the Board talk

1 about when a ballot is actually formally  
2 counted or not counted?

3 A. It would be during the canvass  
4 board meeting.

5 Q. And was that discussed as the Board  
6 was deciding what codes to use and whether  
7 to adopt curing or not curing?

8 MS. MCKENZIE: Objection.

9 A. Yes, it was.

10 BY MR. BERARDINELLI:

11 Q. Tell us what you remember about  
12 that discussion just so we have a clear  
13 record.

14 A. That the election law says that the  
15 ballot -- once it's received by the Board  
16 of Elections, it is recorded on the  
17 voter's record. It is locked and secure  
18 until it's canvassed.

19 So the Board decided -- you know,  
20 when you read that in the context of the  
21 law or the language, no decision can be  
22 made on the declaration envelope ahead of  
23 the canvassing, so all ballots are  
24 received until canvass.

25 MR. BERARDINELLI: Let's go off

1 MS. McKENZIE: I don't have any  
2 further questions.

3 MR. BERARDINELLI: I just -- do  
4 you have any more? Let me do mine first.

5 - - - -

6 RE-EXAMINATION

7 - - - -

8 BY MR. BERARDINELLI:

9 Q. On the language on Exhibit 2, if  
10 you do not have time to request a new  
11 ballot before --

12 A. You're on Page 9?

13 Q. 9 or 8. It is all the same. If  
14 someone had in the primary of 2024  
15 submitted their mail-in ballot already and  
16 it had a defect and they got an email like  
17 this and asked you for a new ballot, would  
18 you have given them one?

19 A. Based upon the decision by the  
20 Board of Elections, no, I was not able.

21 Q. The decision being what?

22 A. The Washington County Board of  
23 Elections voted to not allow curing.

24 Q. And you were asked some questions  
25 whether that same voter in this example

1 could go and vote a provisional, right?

2 A. Yeah. Any voter, even a  
3 nonregistered voter, anyone can vote a  
4 provisional ballot.

5 Q. If someone had sent in a mail-in  
6 ballot that was received by the Board of  
7 Elections and -- what was the term of art  
8 we were using?

9 MS. MCKENZIE: Disqualifying  
10 errors.

11 BY MR. BERARDINELLI:

12 Q. A disqualifying error or errors and  
13 they voted a professional ballot on  
14 election day, would the provisional ballot  
15 be counted?

16 A. Let me see if I understand this  
17 right. If the ballot had a disqualifying  
18 error and they went to the poll and voted  
19 a provisional ballot, that provisional  
20 ballot would not be counted if we had a  
21 ballot marked as received in our ballot  
22 room because we would have received that  
23 ballot.

24 Q. Mail-in ballot?

25 A. Mail-in ballot. We would have



1 received that mail-in ballot first, so  
2 that ballot would count. And also the  
3 canvass board -- the actual decision on  
4 that ballot would not have been made until  
5 it was canvassed.

6 MR. BERARDINELLI: That's all I  
7 have. Thank you.

8 - - - -

9 RE-EXAMINATION

10 - - - -

11 BY MS. GALLAGHER:

12 Q. Mine is a little more basic. Could  
13 you go back to that page, please?

14 A. Oh, yeah.

15 Q. You were asked if you had entered  
16 canceled, incorrect date?

17 A. Yes.

18 Q. Had Washington County deemed mail-  
19 in ballots for 2024 with an incorrect date  
20 -- that were received with an incorrect  
21 date as canceled?

22 A. No. The ballots were -- according  
23 to the Board's decision not to cure, the  
24 ballot was received, and then it was  
25 locked and secure until it was canvassed.

# EXHIBIT C

RETRIEVED FROM DEMOCRACYDOCKET.COM

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; :  
National Republican Senatorial :  
Committee; National Republican :  
Congressional Committee; Republican :  
Party of Pennsylvania; David Ball; :  
James D. Bee; Debra A. Biro; Jesse D. :  
Daniel; Gwendolyn Mae Deluca; Ross :  
M. Farber; Connor R. Gallagher; Lynn :  
Marie Kalcevic; Linda S. Kozlovich; :  
William P. Kozlovich; Vallerie :  
Siciliano-Biancaniello; S. Michael :  
Streib, :

Petitioners :

v. :

Al Schmidt, in his official :  
capacity as Acting Secretary of the :  
Commonwealth; Jessica Mathis, in :  
her official capacity as Director of the :  
Pennsylvania Bureau of Election :  
Services and Notaries; Adams County :  
Board of Elections; Allegheny County :  
Board of Elections; Armstrong County :  
Board of Elections; Beaver County :  
Board of Elections; Bedford County :  
Board of Elections; Berks County Board :  
of Elections; Blair County Board of :  
Elections; Bradford County Board of :  
Elections; Bucks County Board of :  
Elections; Butler County Board of :  
Elections; Cambria County Board of :  
Elections; Cameron County Board of :  
Elections; Carbon County Board of :  
Elections; Centre County Board of :  
Elections; Chester County Board of :  
Elections; Clarion County Board of :  
Elections; Clearfield County Board of :  
Elections; Clinton County Board of :  
Elections; Columbia County Board of :  
Elections; Crawford County Board of :

No. 447 M.D. 2022

Elections; Cumberland County Board :  
of Elections; Dauphin County Board of :  
Elections; Delaware County Board of :  
Elections; Elk County Board of :  
Elections; Erie County Board of :  
Elections; Fayette County Board of :  
Elections; Forest County Board of :  
Elections; Franklin County Board of :  
Elections; Fulton County Board of :  
Elections; Greene County Board of :  
Elections; Huntingdon County Board :  
of Elections; Indiana County Board of :  
Elections; Jefferson County Board of :  
Elections; Juniata County Board of :  
Elections; Lackawanna County Board :  
of Elections; Lancaster County Board :  
of Elections; Lawrence County Board :  
of Elections; Lebanon County Board :  
of Elections; Lehigh County Board of :  
Elections; Luzerne County Board of :  
Elections; Lycoming County Board of :  
Elections; McKean County Board of :  
Elections; Mercer County Board of :  
Elections; Mifflin County Board of :  
Elections; Monroe County Board of :  
Elections; Montgomery County Board :  
of Elections; Montour County Board of :  
Elections; Northampton County Board :  
of Elections; Northumberland County :  
Board of Elections; Perry County :  
Board of Elections; Philadelphia County: :  
Board of Elections; Pike County Board :  
of Elections; Potter County Board of :  
Elections; Schuylkill County Board of :  
Elections; Snyder County Board of :  
Elections; Somerset County Board of :  
Elections; Sullivan County Board of :  
Elections; Susquehanna County Board :  
of Elections; Tioga County Board of :  
Elections; Union County Board of :  
Elections; Venango County Board of :  
Elections; Warren County Board of :  
Elections; Wayne County Board of :

Elections; Westmoreland County Board :  
of Elections; Wyoming County Board of:  
Elections; and York County Board of :  
Elections, :  
Respondents :

BEFORE: HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE CEISLER

FILED: March 23, 2023

In this original jurisdiction action, the Republican National Committee (RNC), and the Republican Party of Pennsylvania (RPP) (collectively, Republican Committee Petitioners),<sup>1</sup> and David Ball, James D. Bee, Debra A. Biro, Jesse D. Daniel, Gwendolyn Mae DeLuca, Ross M. Farber, Connor R. Gallagher, Lynn Marie Kalcevic, Linda S. Kozlovich, William P. Kozlovich, Vallerie Siciliano-Biancaniello, and S. Michael Streib (collectively, Voter Petitioners)<sup>2</sup> (all collectively referred to as Petitioners), filed a petition for review directed to this Court's original jurisdiction seeking declaratory and injunctive relief (petition for review or petition) on September 1, 2022, and later a First Amended Petition for Review Directed to

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<sup>1</sup> The National Republican Senatorial Committee (NRSC) and the National Republican Congressional Committee (NRCC) voluntarily terminated their claims against all Respondents via praecipe on January 30, 2023. As such, the term "Petitioners" used throughout this opinion does not include either the NRSC or the NRCC, except where indicated.

<sup>2</sup> Voter Petitioners are 12 registered voters who reside in Washington County, Cambria County, Northampton County, Indiana County, Beaver County, Westmoreland County, Allegheny County, Fayette County, Delaware County, and Butler County, who regularly vote in both primary and general elections. (First Amended Petition for Review (Amended Pet.) ¶¶ 33-44.) They repeat that they intend to vote for candidates in all races, including for federal and statewide offices, that will be on the ballot in the 2022 General Election, notwithstanding that election has since passed. (Amended Pet. ¶ 45.)

Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief (Amended Petition), on February 17, 2023,<sup>3</sup> against Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth (Acting Secretary),<sup>4</sup> and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries (collectively, Commonwealth Respondents); and the Commonwealth's 67 County Boards of Elections (County Boards).<sup>5</sup> In the Amended Petition, Petitioners again challenge the various County Boards' actions in developing and implementing notice and opportunity to cure procedures with respect to absentee and mail-in ballots that fail to comply with the Pennsylvania Election Code's (Election Code)<sup>6</sup> signature and ballot secrecy requirements. Specifically, Petitioners allege that the County Boards' "practice of conducting these pre-canvass activities" before Election Day "under the guise of [notice and opportunity to cure] procedures" is in direct contravention of multiple provisions of the Election Code; the Pennsylvania Supreme Court's holding in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); article I, section 5 and article VII, section 6 of the Pennsylvania

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<sup>3</sup> On this date, the Court, *inter alia*, granted Petitioners' unopposed Application for Leave to File Amended Petition for Review, and struck as moot the preliminary objections filed to the original petition for review.

<sup>4</sup> By Order dated February 16, 2023, this Court substituted Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth, as a party respondent for Leigh M. Chapman, in her official capacity as former Acting Secretary of the Commonwealth pursuant to Pennsylvania Rule of Appellate Procedure 502(c), Pa.R.A.P. 502(c).

<sup>5</sup> Notwithstanding its apparent omission from the caption, as noted in this Court's September 29, 2022 Memorandum Opinion in this case, the Court considers the Washington County Board of Elections to be a Respondent in this case. *See Republican Nat'l Comm. v. Chapman* (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022) (single-Judge op.) (Ceisler, J.) (*RNC I*), slip op. at 3 n.2, *aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022) (Oct. 21, 2022) (Pa., No. 100 MAP 2022).

<sup>6</sup> Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

Constitution, Pa. Const. art. I, § 5 (free and equal elections clause)<sup>7</sup> & art. VII, § 6 (relating to uniformity with respect to laws regulating elections);<sup>8</sup> and Article I, Section 4, Clause 1 of the United States Constitution, U.S. Const. art. I, § 4, cl. 1 (Elections Clause).<sup>9</sup> (First Amended Petition for Review (Amended Pet.) ¶¶ 2-14, 17-19.) They seek declarations in these regards under the Declaratory Judgments Act (DJA),<sup>10</sup> as well as statewide, permanent injunctive relief enjoining the 67 County Boards from implementing such procedures and prohibiting the Acting Secretary from issuing any guidance as to such procedures in violation of the Election Code.

Presently before the Court are the Preliminary Objections (POs) of: (1) Commonwealth Respondents; (2) Bucks County Board of Elections; (3) Bedford, Carbon, Centre, Columbia, Dauphin, Fayette, Jefferson, Huntingdon, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York County Boards of Elections; (4) Chester County Board of Elections; (5) Delaware County Board of Elections; (6) Montgomery County Board of Elections; (7) Philadelphia County Board of Elections; (8) the Democratic National Committee and the Pennsylvania Democratic Party (DNC and PDP); and (9) the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee (DSCC and

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<sup>7</sup> The free and equal elections clause provides: “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.

<sup>8</sup> It provides: “All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State,” with certain exceptions not applicable to this case. Pa. Const. art. VII, § 6.

<sup>9</sup> The Elections Clause provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.” U.S. Const. art. I, § 4, cl. 1.

<sup>10</sup> 42 Pa.C.S. §§ 7531-7541.

DCCC)<sup>11</sup> (all collectively referred to as Respondents, unless otherwise indicated). Respondents ask the Court to dismiss Petitioners' Amended Petition based on (1) lack of subject matter jurisdiction; (2) lack of standing (3) laches; and (4) legal insufficiency and/or failure to state a claim as to all counts.

For the reasons that follow, the Court sustains the POs asserting lack of subject matter jurisdiction and dismisses as moot the remaining POs.

### **Background & Procedural History**

By way of brief background, Petitioners initially alleged in the petition for review that several County Boards took it upon themselves to develop and implement notice and opportunity to cure procedures with respect to absentee and mail-in ballots that failed to comply with the Election Code's signature and ballot secrecy requirements, for the November 8, 2022 General Election and beyond, in direct contravention of the Election Code and the Supreme Court's holding in *Pennsylvania Democratic Party*; and that the County Boards' cure procedures usurped the General Assembly's exclusive legislative authority to adopt cure procedures and constituted a violation of the authority granted to the General Assembly to regulate the manner of federal elections under the Elections Clause. They requested declarations in those regards, as well as a declaration that the County Boards may not adopt **cure** procedures other than as the General Assembly expressly provided in the Election Code<sup>12</sup> and, further, statewide injunctive relief prohibiting

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<sup>11</sup> The Court permitted the intervention of the DNC and the PDP, and the DSCC and the DCCC on September 22, 2022.

<sup>12</sup> See Section 1308(h) of the Election Code, added by the Act of March 6, 1951, P.L. 3, which provides:

(h) For those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified:



the 67 County Boards from developing or implementing **cure** procedures and directing the Acting Secretary to take no action inconsistent with such injunction order.<sup>13</sup>

Petitioners then filed the Amended Petition upon leave of this Court on February 17, 2023. Also on that date, this Court set an expedited briefing schedule, and further directed the parties to file and serve separate briefs addressing the Supreme Court's recent decision in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), and the effect of that decision, if any, on the instant matter. The Court also indicated, among other things, that following the filing of the above briefs, the Court would determine whether this matter would be argued or decided on the papers.

The Parties have complied with this Court's February 17, 2023 Order and filed pleadings and/or POs and comprehensive supporting briefs, as well as briefs addressing *Ball*.<sup>14</sup> As noted above, Respondents filed nine sets of POs, and eight

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(1) Deleted by [the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), effective immediately] . . . .

(2) If the proof of identification is received and verified prior to the sixth calendar day following the election, then the county board of elections shall canvass the absentee ballots and mail-in ballots under this subsection in accordance with subsection (g)(2).

(3) If an elector fails to provide proof of identification that can be verified by the county board of elections by the sixth calendar day following the election, then the absentee ballot or mail-in ballot shall not be counted.

25 P.S. § 3146.8(h).

<sup>13</sup> In a single-Judge Memorandum Opinion and Order issued on September 29, 2022, this Court denied Petitioners' separate request for preliminary injunctive relief because Petitioners failed to meet their heavy burden of proving entitlement to such sweeping relief. On appeal, the Supreme Court affirmed this Court's decision on the basis that the Justices were evenly divided on the question before them. *See RNC I, aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022).

<sup>14</sup> The following Parties filed briefs addressing the Supreme Court's decision in *Ball*: Berks County; DNC and PDP; Montgomery County; Bedford, Carbon, Centre, Columbia,

Answers, some with New Matter,<sup>15</sup> to the Amended Petition. Petitioners filed responses generally opposing the POs, and an omnibus brief addressing all of the POs. In light of the Parties' comprehensive filings, and the proximity of the May 16, 2023 Municipal Primary Election and the County Boards' distribution of absentee and mail-in ballots to voters, the Court determined that argument was not necessary and, by Order dated March 16, 2023, directed that the POs and responses opposing them would be decided on the papers already filed, without oral argument, unless otherwise ordered.

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Dauphin, Fayette, Jefferson, Huntingdon, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York Counties (collectively, Bedford County, et al.); Lehigh County; Chester County; Commonwealth Respondents; Philadelphia County; Bucks County; Petitioners; Delaware County; Allegheny County; Luzerne County; Potter County; and DSCC and DCCC.

Lehigh, Bucks, and Delaware Counties join in Montgomery County's brief. Chester County joins in Commonwealth Respondents' and Philadelphia County's briefs. Allegheny County joins in all Respondents' briefs to the extent they address, among other things, lack of standing.

Berks and Potter Counties take no position on *Ball*'s applicability to this case, and Bedford County, et al., Luzerne County, and DNC and PDP opine that *Ball* is not relevant to this case. DNC and PDP additionally opine that *Ball* reaffirms the broad authority of County Boards in administering elections. Aside from Petitioners, the other Respondents observe that *Ball* is applicable here with respect to, *inter alia*, standing and the broad authority of County Boards.

<sup>15</sup> Adams, Allegheny (with New Matter), Berks, Lehigh, Luzerne, Northampton (with New Matter), and Potter Counties filed Answers to the Amended Petition, generally denying the averments of the Amended Petition. In addition to filing an Answer, Luzerne County filed a Statement in Lieu of Brief in Support of Answer. Blair County filed a no answer letter, indicating therein that it will not be filing an answer in this case.

In its New Matter, Allegheny County contends that Petitioners claims are barred by laches and res judicata, that this Court lacks subject matter jurisdiction, and that Petitioners failed to state a claim upon which relief can be granted and lack standing. (Allegheny Ans. & New Matter ¶¶ 1-5.) Northampton County asserts in its New Matter that Petitioners' claims are barred by laches and the applicable statute of limitations, and that Petitioners have failed to state a claim upon which relief may be granted and failed to exhaust other remedies available to them. (Northampton Ans. & New Matter ¶¶ 163-66.)

### Amended Petition

In their Amended Petition, Petitioners repeat the same background information regarding Voter Petitioners and Republican Committee Petitioners, respectively, and the factual circumstances of the case described in this Court's September 29, 2022 Memorandum Opinion, which the Court will not repeat here in its entirety for the sake of brevity. (*See Republican Nat'l Comm. v. Chapman* (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022) (single-Judge op.) (Ceisler, J.) (*RNC I*), slip op. at 11-17, *aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022) (Oct. 21, 2022) (Pa., No. 100 MAP 2022); *compare* original petition for review ¶¶ 2-12, 13-39, 40-64, 65-80, 82-85, 86-92 (count I), 93-96 (count II), 97-103 (count III), *with* Amended Pet. ¶¶ 2-23, 27, 28-52, 53-77, 93-104, 111-14, 117-20, 127-33 (Count I), 152-55 (Count III), 156-62 (Count IV).)

The Court observes, however, that in the Amended Petition, Petitioners add to their argument from their original petition that the County Boards are prohibited from developing and implementing **notice and cure** procedures<sup>16</sup> not expressly created by the General Assembly, now asserting and seeking a declaration under the DJA that the Boards' implementation of such procedures directly violates the Election Code's various pre-canvassing and provisional ballot provisions; that the furnishing of voters' personally identifying information to political party representatives, candidates, and/or special interest groups violates voters' constitutional right to informational privacy under article I, section 1 of the Pennsylvania Constitution, Pa. Const. art. I, § 1,<sup>17</sup> and *Pennsylvania State Education*

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<sup>16</sup> In their Amended Petition, Petitioners now highlight "**notice and cure** procedures," as opposed to just "**cure** procedures" mentioned in the original petition for review.

<sup>17</sup> It provides: "All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own

*Association v. Department of Community and Economic Development*, 148 A.3d 142 (Pa. 2016); and that the Acting Secretary has issued guidance directing the County Boards to engage in pre-canvass activities under the guise of making “administrative determinations” and statements encouraging the Boards to contact voters whose defective ballots have been cancelled due to errors on the ballots’ outer envelopes so they may have the opportunity to have their votes count. (See Amended Pet. ¶¶ 29, 79-92, & 134-35 (Count I).)

As to the pre-canvass and provisional ballot provisions specifically, Petitioners newly argue that notice and cure procedures are “inconsistent with law” under Section 302(f) of the Election Code, 25 P.S. § 2642(f),<sup>18</sup> and directly violate the Election Code, because “[t]he Election Code tightly constrains what Boards may do with absentee and mail-in ballots once they receive them.” (Amended. Pet. ¶¶ 76, 78.) In this regard, they first assert that absentee and mail-in ballots must be kept in sealed or locked containers until Election Day under Section 1308(a) of the Election Code, 25 P.S. § 3146.8(a),<sup>19</sup> and that County Boards are thus prohibited

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happiness.” Pa. Const. art. I, § 1. Petitioners do not develop this argument in the Amended Petition.

<sup>18</sup> Section 302(f) provides that County Boards have authority “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” 25 P.S. § 2642(f).

<sup>19</sup> Section 1308(a) provides:

(a) The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections. An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be canvassed in accordance with subsection (g). A mail-in ballot shall be canvassed in accordance with subsection (g).

25 P.S. § 3146.8(a).

from doing anything else with the ballots until Election Day. (*Id.* ¶¶ 79-80.) Second, they claim that notice and cure procedures are effectively an “inspection . . . of” absentee and mail-in ballots under the definition of “pre-canvass” in Section 102(q.1) of the Election Code, 25 P.S. § 2602(q.1);<sup>20</sup> however, they highlight that County Boards cannot begin the pre-canvass of those ballots until 7:00 a.m. on Election Day under Section 1308(g)(1.1) of the Election Code, 25 P.S. § 3146.8(g)(1.1).<sup>21</sup> (*Id.* ¶¶ 81-82.) Third, they argue that the County Boards’ email

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<sup>20</sup> Section 102(q.1) provides:

(q.1) The word “pre-canvass” shall mean **the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots**, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.

25 P.S. § 2602(q.1) (emphasis added).

<sup>21</sup> Section 1308(g)(1.1) provides:

(g)(1)(i) An absentee ballot cast by any absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).  
. . . .

(1.1) The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours’ notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

25 P.S. § 3146.8(g)(1.1).

and/or internet notification to voters via the SURE System and others regarding signature, date, or secrecy envelope defects in absentee or mail-in ballots following their “inspection” is “inconsistent with law” because Section 1308(g)(1.1)’s prohibition on nondisclosure of the results of the pre-canvass until the polls close on Election Day necessarily includes a prohibition on the disclosure of a Board’s determination that a ballot will not count due to such a defect. (*Id.* ¶¶ 83-85.) Last, Petitioners acknowledge that those voters who requested absentee and mail-in ballots but did not cast them may vote provisionally. (*Id.* ¶ 90 n.2 (citing Sections 1306(b)(2)-(3) and 1306-D(b)(2)-(3) of the Election Code, 25 P.S. §§ 3146.6(b)(2)-(3), 3150.16(b)(2)-(3)).)<sup>22</sup> They argue, however, that the County Boards cannot encourage voters who improperly cast their absentee or mail-in ballot to cast a second vote via provisional ballot, claiming this “cure” essentially requires voters to make knowingly false statements subject to the penalty of perjury on their provisional ballots. (Amended Pet. ¶¶ 87-92 (citing Sections 1306(b)(1), 1306-D(b)(1), and 1210(a.4)(2) of the Election Code, 25 P.S. §§ 3146.6(b)(1) (providing that an elector who receives and votes an absentee ballot “shall not be eligible to vote at a polling place on election day”), 3150.16(b)(1) (same with respect to mail-in ballots), 3050(a.4)(2) (requiring an elector to sign affidavit prior to voting a provisional ballot)).)

Petitioners also add a new Count II to the Amended Petition, in which they request a declaration that the disparate approaches taken by the County Boards with respect to notice and cure procedures violate the free and equal elections clause (Pa. Const. art. I, § 5), the clause requiring uniformity in the laws regulating the holding

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<sup>22</sup> Section 1306 was added to the Election Code by the Act of March 6, 1951, P.L. 3. Section 1306-D was added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

of elections in the Commonwealth (Pa. Const. art. VII, § 6), and Section 302(g) of the Election Code, 25 P.S. § 2642(g).<sup>23</sup> (See Amended Pet. ¶¶ 136-51 (Count II).)

Petitioners seek declarations from this Court under the DJA that the County Boards' development and implementation of notice and cure procedures violates Pennsylvania law and is prohibited, (Amended Pet. ¶¶ 127-35 & Wherefore Clause, pp. 34-35 (Count I) & ¶¶ 136-51 & Wherefore Clause, p. 38 (Count II)); and that the adoption of such procedures not expressly authorized by the General Assembly for federal elections violates the Elections Clause of the United States Constitution (Amended Pet. ¶¶ 152-55 & Wherefore Clause, p. 39 (Count III)). They further seek a statewide, permanent injunction prohibiting the County Boards from developing or implementing notice and cure procedures. (Amended Pet. ¶¶ 156-62 & Wherefore Clause, p. 41 (Count IV).) In addition to the relief sought in Counts I, II, and IV, Petitioners request that this Court prohibit the Acting Secretary from issuing guidance or other statements directing the County Boards to violate provisions of the Election Code. (Amended Pet. at 34-35 (Count I, Wherefore Clause), 38 (Count II, Wherefore Clause), 41 (Count IV, Wherefore Clause).)

Notably, Petitioners further allege that this Court has original jurisdiction over the Amended Petition under Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), "because this matter is asserted against Commonwealth officials in their official capacities." (Amended Pet. ¶ 28.)

As mentioned above, Commonwealth Respondents and some County Boards have filed the following POs, asserting that the Amended Petition should be

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<sup>23</sup> Section 302(g) provides that County Boards have authority "[t]o instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted." 25 P.S. § 2642(g).

dismissed based on this Court's lack of subject matter jurisdiction, Petitioners' lack of standing, the doctrine of laches, and the legal insufficiency of the Amended Petition and/or Petitioners' failure to state a claim as to some or all counts of the Amended Petition.<sup>24</sup>

### **Standard of Review**

In ruling on preliminary objections, the Court accepts as true all well-pleaded material allegations in the petition for review and any reasonable inferences that may be drawn from the averments. *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Cmwlth. 1994). This Court, however, is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the petition for review. *Id.* The Court may sustain preliminary objections only when the law makes clear that the petitioner cannot succeed on the claim, and the Court must resolve any doubt in favor of the petitioner. *Id.* “[The Court] review[s] preliminary objections in the nature of a demurrer under the above guidelines and may sustain a demurrer only when a petitioner has failed to state a claim for which relief may be granted.” *Armstrong Cnty. Mem’l Hosp. v. Dep’t of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Cmwlth. 2013).

Because it is jurisdictional, the Court will first address the POs asserting the Court lacks subject matter jurisdiction, followed by the other POs, if necessary.

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<sup>24</sup> Specifically, Delaware County, Commonwealth Respondents, Chester County, and Philadelphia County demur to the Amended Petition based on lack of subject matter jurisdiction, lack of standing, and failure to state a claim as to all or various counts of the Amended Petition.

Bucks County and DSCC and DCCC demur to the Amended Petition based on lack of standing and failure to state a claim. Bucks County additionally asserts, along with Montgomery County, that laches bars the relief sought in the Amended Petition.

Bedford County, et al. and DNC and PDP demur to the Amended Petition solely based on failure to state a claim.



### **Subject Matter Jurisdiction**

Commonwealth Respondents (PO 1) and some County Boards<sup>25</sup> first argue that this Court lacks subject matter jurisdiction<sup>26</sup> under Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), because neither of the Commonwealth Respondents is an indispensable party to this matter; the County Boards are neither Commonwealth agencies nor part of the Commonwealth government, and, as such, the County Boards must be sued in their respective local court of common pleas; and the Acting Secretary has only limited powers over the County Boards relating to elections. (Cmwlth. Resp'ts' POs ¶¶ 33-55 (citing *In re Voter Referendum Pet. Filed Aug. 5, 2008*, 981 A.2d 163, 170 (Pa. 2009)), Cmwlth. Resp'ts' Br. at 14-23; Delaware POs ¶¶ 10-37, Delaware Br. at 3-7 (citing *Finan v. Pike Cnty. Conserv. Dist.*, 209 A.3d 1108, 111 (Pa. Cmwlth. 2019), and *Blount v. Phila. Parking Auth.*, 965 A.2d 226, 231-32 (Pa. 2009)); Chester POs ¶¶ 37-54, Chester Br. at 12-14; Phila. POs ¶¶ 47-72 (citing *Blount*), Phila. Br. at 15-20.) Commonwealth Respondents further assert that Petitioners do not challenge any Department of State (Department) requirement or statewide practice, and they have not alleged what, if any, type of action the Acting Secretary might take here if Petitioners' requested relief is granted. (Cmwlth. Resp'ts' POs ¶¶ 39-40, 43-46 (citing ¶ 116 of the Amended Petition); Chester POs ¶ 53; Chester Br. at 16 (noting the Amended Petition fails to seek any meaningful relief from either Commonwealth Respondent).) Chester County additionally highlights an inconsistency in paragraphs 68 and 103 of Petitioners' Amended Petition, noting that paragraph 103 asserts injunctive relief is necessary to stop Commonwealth Respondents from "encouraging" implementation of notice

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<sup>25</sup> These include: Delaware County (PO 1), Chester County (PO 2), and Philadelphia County (PO 1).

<sup>26</sup> See Pa.R.Civ.P. 1028(a)(1).

and cure procedures, but that paragraph 68 cites guidance showing Commonwealth Respondents oppose implementation of notice and cure procedures. (Chester POs ¶¶ 48-51; Chester Br. at 15-16.)

Petitioners respond that this Court has subject matter jurisdiction because the Acting Secretary is an indispensable party, and the County Boards are part of the Commonwealth government. (Pet’rs’ Omnibus Br. at 16-17.) As support for their assertion the Acting Secretary is an indispensable party, Petitioners point to the Acting Secretary’s November 3, 2022 guidance, issued in response to the Supreme Court’s November 1, 2022 order in *Ball*,<sup>27</sup> regarding the mechanics of absentee and mail-in voting and the County Boards’ inspection of ballots and whether a right to cure exists, as well as the former Acting Secretary’s recent litigation against three County Boards in *Chapman v. Berks County Board of Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed August 19, 2022), regarding whether Boards may exercise discretion to count absentee and mail-in ballots without dates or with incorrect dates. (Pet’rs’ Omnibus Br. at 17.) Petitioners claim that the Acting Secretary’s guidance “is precisely the type of inspection included within the definition of ‘pre-canvass’ under the Election Code, which cannot begin until 7:00 a.m. on Election Day”; thus, according to Petitioners, the Acting Secretary is instructing the County Boards to directly violate the Election Code. (*Id.* at 17-18.)<sup>28</sup> Petitioners therefore claim that

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<sup>27</sup> According to Petitioners, the Acting Secretary issued guidance on this date, directing County Boards to examine all absentee and mail-in ballots to determine if the return envelopes are signed and dated. (Pet’rs’ Omnibus Br. ¶ 17 (citing Pa. Dep’t of State, *Guidance on Undated and Incorrectly Dated Mail-in and Absentee Ballot Envelopes Based on the Pennsylvania Supreme Court’s Order in Ball v. Chapman*, issued November 1, 2022, <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-11-03-Guidance-UndatedBallot.pdf> (last visited Mar. 22, 2023).)

<sup>28</sup> Further, and notwithstanding that the 2022 General Election has already occurred, Petitioners again point to the Acting Secretary’s guidance issued days before that election, in which former Acting Secretary Chapman “encouraged” County Boards to contact voters whose ballots

this case challenges actions taken by the Acting Secretary, thus making him an indispensable party. (*Id.* at 18.) Petitioners do not address in their Amended Petition or subsequent briefs whether Director Mathis is an indispensable party.

As for the County Boards, Petitioners assert they are not “local authorities” excluded from the definition of “Commonwealth government,” as they are not created by political subdivisions. (Pet’rs’ Omnibus Br. at 19.) Rather, the County Boards are formed by statute, i.e., Section 301(a) of the Election Code, 25 P.S. § 2641(a) (relating to county boards of elections and membership), and, thus, they constitute a component part of the “Commonwealth government” as that term is defined under 42 Pa.C.S. § 761. (*Id.* at 18-19 (pointing to definition of “Commonwealth government” and specifically “boards” in the definition in 42 Pa.C.S. § 102, and citing *In re Nom. Pets. of Griffis*, 259 A.3d 542 (Pa. Cmwlth. 2021),<sup>29</sup> and *Cnty. of Fulton v. Sec. of the Cmwlth.*, 276 A.3d 846, 861 (Pa. Cmwlth. 2021) (stating that both the Secretary and County Boards “are government agencies created by the General Assembly”).)<sup>30</sup>

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were cancelled due to defects so that those voters could have the opportunity to have their vote count. (Pet’rs’ Omnibus Br. at 18 (citing an inactive link to the Department’s website).)

<sup>29</sup> Petitioners’ reliance on *In re Nomination Petitions of Griffis*, 259 A.3d 542 (Pa. Cmwlth. 2021), for the proposition that the 67 County Boards are part of the Commonwealth government for jurisdictional purposes is misplaced, as the case was properly brought in this Court’s **appellate** jurisdiction and involved review of a trial court’s order denying the objectors’ petitions to set aside the nomination petitions of a candidate for office who failed to properly file her statement of financial interests (SOFI) with the “governing authority” of a specific county. This Court held that the candidate’s filing of her SOFI with the county elections office satisfied the requirements of the applicable statute and regulations because the county’s commissioners were the “governing authority” of that county and the county’s board of elections under the Election Code. *In re Griffis*, 259 A.3d at 548.

<sup>30</sup> Petitioners’ reliance on *County of Fulton v. Secretary of the Commonwealth*, 276 A.3d 846, 861 (Pa. Cmwlth. 2021), is also misplaced, as it dealt with responsibilities of the Secretary and the County Boards in relation to election equipment. In that case, this Court noted that it was not clear whether the Secretary or the County Boards had the responsibility of preventing tampering with election equipment, but that “[b]oth are government agencies created by the

In considering this PO, the Court “begin[s] with the undisputed basic principle that this Court, as any other court, must have subject matter jurisdiction over a controversy because, without it, any judgment rendered would be void.” *Stedman v. Lancaster Cnty. Bd. of Comm’rs*, 221 A.3d 747, 755 (Pa. Cmwlth. 2019) (quoting *Patterson v. Shelton*, 175 A.3d 442, 449 (Pa. Cmwlth. 2017)). “Thus, ‘whenever a court discovers that it lacks jurisdiction over the subject matter or a cause of action, it is compelled to dismiss the matter under all circumstances.’” *Id.* (quoting *Hughes v. Pa. State Police*, 619 A.2d 390, 393 (Pa. Cwmlth. 1992)). Our Supreme Court previously set forth the well settled scope and standard of review regarding questions of subject matter jurisdiction as follows:

Jurisdiction over the subject matter is conferred solely by the Constitution and laws of the Commonwealth. The test for whether a court has subject matter jurisdiction inquires into the competency of the court to determine controversies of the general class to which the case presented for consideration belongs. Thus, as a pure question of law, the standard of review in determining whether a court has subject matter jurisdiction is *de novo* and the scope of review is plenary. Whether a court has subject matter jurisdiction over an action is a fundamental issue of law which may be raised at any time in the course of the proceedings, including by a reviewing court *sua sponte*.

*Office of Att’y Gen. ex rel. Corbett v. Locust Twp.*, 968 A.2d 1263, 1268-69 (Pa. 2009).

Relevant here, Section 761(a)(1) of the Judicial Code states that “[t]he Commonwealth Court shall have original jurisdiction of all civil actions or proceedings . . . (1) Against the Commonwealth government, including any officer

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General Assembly with discrete and separate roles to fulfill toward the end of honest elections in Pennsylvania” and that “[b]oth agencies are presumed to act lawfully and reasonably in the exercise of their statutory duties.” *County of Fulton*, 276 A.3d at 861. The case is otherwise irrelevant for purposes of the instant matter, except as indicated below.

thereof, acting in his official capacity . . . .” 42 Pa.C.S. § 761(a)(1). Section 102 of the Judicial Code defines the term “Commonwealth government” as follows:

**“Commonwealth government.”** The government of the Commonwealth, including the courts and other officers or agencies of the unified judicial system, the General Assembly and its officers and agencies, the Governor, and the departments, boards, commissions, authorities and officers and agencies of the Commonwealth, **but the term does not include any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority.**

42 Pa.C.S. § 102 (emphasis added). Although the Acting Secretary and Director Mathis are each an “officer” of the Commonwealth, “this alone is not sufficient to establish jurisdiction.” *Stedman*, 221 A.2d at 756 (quoting *Pa. Sch. Bds. Ass’n, Inc. v. Cmwlth. Ass’n of Sch. Admins.*, 696 A.2d 859, 867 (Pa. Cmwlth. 1997), and stating that “[t]he mere naming . . . of the Commonwealth or its officers in an action does not conclusively establish this [C]ourt’s jurisdiction, and [that] the joinder of such parties when they are only tangentially involved is improper”).

Rather, “for this Court to have original jurisdiction over a suit against the Commonwealth and another, non-Commonwealth party, the Commonwealth or one of its officers must be an indispensable party to the action.” *Stedman*, 221 A.3d at 757 (citations omitted). “A party is indispensable when ‘his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.’” *Stedman*, 221 A.3d at 757 (quoting *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conserv. & Nat. Res.*, 201 A.3d 273, 279 (Pa. Cmwlth. 2018)).<sup>31</sup> “‘Thus, the main inquiry for determining whether a party is indispensable

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<sup>31</sup> Section 7540(a) of the DJA further explains the concept of an indispensable party by providing that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration.” 42 Pa.C.S. § 7540(a).

involves whether justice can be accomplished in the absence of the party.” *Stedman*, 221 A.3d at 758 (quoting *Rachel Carson Trails*, 201 A.3d at 279). In conducting this inquiry,<sup>32</sup> “the nature of the particular claim and the type of relief sought should be considered.” *Rachel Carson Trails*, 201 A.3d at 279. “A Commonwealth party may be declared an indispensable party when meaningful relief cannot conceivably be afforded without the Commonwealth party’s direct involvement in the action.” *Ballroom, LLC v. Cmwlt.*, 984 A.2d 582, 588 (Pa. Cmwlt. 2009). Importantly, “‘where a petitioner ‘seeks absolutely no relief’ from the Commonwealth party, and the Commonwealth party’s involvement is only ‘minimal,’ we have held that it is not an indispensable party.” *Stedman*, 221 A.3d at 758 (quoting *Rachel Carson Trails*, 201 A.3d at 280).

With these principles in mind, the Court will evaluate the alleged indispensability of the Acting Secretary and Director Mathis.

In this case, Petitioners named the Acting Secretary and Director Mathis, in their official capacities, as Respondents, apparently due to their responsibilities under the Election Code. Petitioners identify the Acting Secretary’s responsibilities as including receiving the returns of primaries and elections from the County Boards, the canvassing and computing of the votes cast for candidates, proclaiming the results of such primaries and elections, and issuing certificates of election to the successful candidates at such elections. (Amended. Pet. ¶ 50 (citing Sections 201(f) and 1409 of the Election Code, 25 P.S. §§ 2621(f), 3159).) However, the only

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<sup>32</sup> This analysis requires an examination of the following four factors: (1) “[d]o absent parties have a right or interest related to the claim?”; (2) “[i]f so, what is the nature of that right or interest?”; (3) “[i]s that right or interest essential to the merits of the issue?”; and (4) “[c]an justice be afforded without violating the due process rights of absent parties?” *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conserv. & Nat. Res.*, 201 A.3d 273, 279 (Pa. Cmwlt. 2018).

material allegations made against former Acting Secretary Chapman in the Amended Petition relate to the following:

- her position in the *Pennsylvania Democratic Party* litigation from 2020, (Amended Pet. ¶ 58);
- her recent guidance that voters will not have the opportunity to correct their ballots before the election if there is a problem, (Amended Pet. ¶ 68 (quoting the Acting Secretary’s guidance that “if there’s a problem with your mail-in ballot, you won’t have the opportunity to correct it before the election[,]” and citing <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (last visited Mar. 22, 2023)));
- confusingly, her purported failure to take action to stop the County Boards’ unauthorized notice and cure procedures following her involvement as a party in an unrelated federal case, (Amended Pet. ¶¶ 103-04);
- the notion that in Counties that have not implemented cure procedures, the SURE system, maintained by the Acting Secretary, provides notice via email to voters that their ballots may not be counted, (Amended Pet. ¶ 116);
- the Acting Secretary’s November 3, 2022 guidance, issued in response to *Ball*, directing County Boards to examine all mail-in ballots received to determine if the return envelopes are signed and dated, which according to Petitioners directs the Boards to violate the Election Code, (Amended Pet. ¶¶ 121-24); and
- former Acting Secretary Chapman’s guidance issued prior to *Ball* in apparent response to the *Berks County* case, but before the November 2022 General Election, encouraging Boards to contact voters whose ballots have been cancelled due to defects on the outer envelopes so they can have their votes

count, which constitutes an endorsement of notice and cure, according to Petitioners, (Amended Pet. ¶¶ 125-26).

Based on these averments, Petitioners request that this Court prohibit the Acting Secretary from issuing guidance or other statements directing the County Boards to violate provisions of the Election Code. (*See* Amended Pet. at 34-35 (Count I, Wherefore Clause), 38 (Count II, Wherefore Clause), 41 (Count IV, Wherefore Clause).)

Here, Petitioners have not made any claims implicating the duties and responsibilities of the Acting Secretary under the Election Code identified in the Amended Petition, which duties and responsibilities the Court notes are limited,<sup>33</sup> but rather, Petitioners merely take issue with the various guidance the Acting Secretary has issued over the past three years in response to the developing case law in this area, which does not implicate what is truly at the heart of this case: ***some of the County Boards' development and implementation of notice and opportunity to cure procedures.*** Although the Acting Secretary may have a generalized interest in issues surrounding the administration of elections in the Commonwealth and the enfranchisement of voters, generally, the Acting Secretary's interests in this regard are not essential to a determination of whether some County Boards are unlawfully implementing notice and cure procedures with respect to absentee and mail-in ballots that are defective under the Election Code. Further, the Acting Secretary does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely upon the County Boards, as will be discussed *infra*. Compare 25 P.S. § 2642 (outlining County Boards' extensive powers and duties over administration and conduct of elections), with 25 P.S. §§

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<sup>33</sup> See 25 P.S. §§ 2621, 3159.



2621 (outlining limited powers and duties of Secretary), 3159 (providing for Secretary’s duties to tabulate, compute, and canvass returns). That the Acting Secretary *may, in the future*, issue guidance or statements on this issue is too “tangential” and “minimal” of an involvement, and speculative even,<sup>34</sup> to make him an indispensable party to this matter. Because Petitioners could conceivably obtain meaningful relief with respect to the County Boards’ purportedly unlawful actions without the Acting Secretary’s involvement in this case, the Acting Secretary is not an indispensable party.

As for Director Mathis, Petitioners observe she is responsible for overseeing the Election Services and Voter Registration divisions of the Department, as well as the Bureau of Election Services and Notaries, which is responsible for planning, developing, and coordinating the statewide implementation of the Election Code. (Amended Pet. ¶ 51 (citing <https://www.dos.pa.gov/about-us/Pages/Director-Bureau-of-Elections-and-Notaries.aspx> (last visited Mar. 22, 2023)).) Other than this statement of her duties, Petitioners do not make any claims or request any relief as to Director Mathis in the Amended Petition. Because no relief is sought against Director Mathis, she is not indispensable to this matter. *See Stedman*, 221 A.3d at 758.

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<sup>34</sup> Petitioners have also not identified any authority whatsoever that would **require** an order from this Court **at this juncture** prohibiting the Acting Secretary from issuing any guidance or statements on this issue later. The Court cannot predict whether the Acting Secretary will again issue guidance or any statements regarding notice and cure procedures, and notes that the former Acting Secretary has most recently issued guidance in response to the Supreme Court’s recent decision in *Ball* essentially **opposing** the implementation of any notice and cure procedures, which does not help Petitioners’ case. (See <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (last visited Mar. 22, 2023)).) Presumably, if the Acting Secretary was to issue any guidance or statements on this issue in the future, the Court opines that he would do so in accordance with whatever is the controlling case law on the issue at that time.

Having concluded that neither the Acting Secretary nor Director Mathis are indispensable parties to this action, the POs in this regard are sustained, and the Acting Secretary and Director Mathis are dismissed from this action.

The Court must now consider whether it has original jurisdiction over the remaining Respondents, i.e., the 67 County Boards, or whether original jurisdiction lies in the respective courts of common pleas. As the Parties suggest, these questions hinge on whether the County Boards are Commonwealth agencies, as Petitioners contend, or local agencies that are excluded from the definition of “Commonwealth government,” as Respondents contend. This Court agrees with Respondents.

As set forth above, this Court has original jurisdiction over all civil actions brought against the “Commonwealth government.” 42 Pa.C.S. § 761(a)(1). However, that term does not include any political subdivision, municipal, or other local authority, or any officer or agency of any such political subdivision or local authority. 42 Pa.C.S. § 102. The Court must therefore determine whether the County Boards fall into one of these categories.

In *Finan*, this Court considered, in the context of an appeal from a trial court order sustaining a preliminary objection challenging its jurisdiction, whether the Pike County Conversation District created pursuant to the Conservation District Law<sup>35</sup> qualified as a local agency or a Commonwealth agency for jurisdictional purposes. 209 A.3d at 1110. In doing so, this Court recognized that

[t]he type of agency dictates the proper court of original jurisdiction; for actions against local agencies, the proper court is the county court of common pleas, whereas actions against Commonwealth agencies are properly filed in the Commonwealth Court. *Blount*[, 965 A.2d 226.] Our analysis for determining the type of agency depends on the purpose for which we review agency status. [*James J. Gory Mech. Contr’g, Inc.*

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<sup>35</sup> Act of May 15, 1945, P.L. 547, as amended, 3 P.S. §§ 849-864.

*v. Phila. Hous. Auth.*, 855 A.2d 669 (Pa. 2004); *T & R Painting Co., Inc. v. Phila. Hous. Auth.*, 353 A.3d 800 (Pa. 1976); *Quinn v. Se. Pa. Transp. Auth. (SEPTA)*, 659 A.2d 613 (Pa. Cmwlth. 1995).]

Generally, for purposes of jurisdiction, Commonwealth agency status is narrowly construed. *Gory*; see *Dep't of Aging v. Lindberg*, . . . 469 A.2d 1012 (Pa. 1983) (construing this Court's jurisdiction under 42 Pa.C.S. § 761(a)(1) narrowly). When the enabling statute does not specify the court of original jurisdiction, in analyzing the type of agency for jurisdictional purposes, "the pivotal factors are whether the entity [1] operates on a statewide basis and [2] is predominantly controlled by the state." *Gory*, 855 A.2d at 677 (emphasis added). We discern legislative intent to confer jurisdiction on this Court where the entity acts throughout the state and under state control. *Id.* By contrast, where "the entity operates within a single county . . . and is governed in large part by that county . . . the entity must be characterized as a local agency and sued in the courts of common pleas." *Id.* at 678.

*Finan*, 209 A.3d at 1111-12 (footnote omitted). This Court further observed that *Blount*, cited above, is "[t]he seminal case in determining agency status for jurisdiction purposes[.]" *Id.* at 1114.

In *Blount*, the Supreme Court analyzed whether the Philadelphia Parking Authority (PPA) qualified as a Commonwealth agency such that this Court was the court of original jurisdiction. In so doing, the Supreme Court considered multiple factors, including the PPA's functions, reach of operations, and the degree of state control over finance and governance, and ultimately concluded that the PPA was a Commonwealth agency, and that jurisdiction in this Court was proper, because the PPA undertook both state functions and operated outside Philadelphia. See *Finan*, 209 A.3d at 1114 (discussing *Blount*); see also *Blount*, 965 A.2d at 229-34.

Returning to *Finan*, this Court concluded that the Pike County Conservation District did not meet the *Blount* factors for Commonwealth agency status because the District operates solely within the confines of Pike County, which reach of authority indicated local agency status addressing issues within a single county;

implements statewide policies and initiatives and fees, but only in Pike County; is not controlled by the Commonwealth, as its governing body was not selected by the Governor or any other Commonwealth agent; and there is little state control over the District's budget or finances. *Finan*, 209 A.3d at 1114-15. The Court further noted that although the Department of Environmental Protection (DEP) delegated certain functions to the District through a delegation agreement, such delegation did not confer Commonwealth agency status upon the District. *Id.* Accordingly, absent any state control or exercise of statewide authority, the Court concluded there was no basis for deeming the District to be a Commonwealth agency for jurisdictional purposes. *Id.* at 1115 (citing *Blount*; *T & R Painting*). Moreover, the Court rejected the District's proffered third factor for consideration, i.e., that this Court's jurisdiction should extend to county conservation districts because they share implementation and enforcement authority with two statewide agencies (DEP and the State Conservation Commission created under the Conservation District Law) and thus deal with implementation of statewide laws. *Id.* at 1115.

Considering the *Blount* factors, and *Finan*, as they relate to the instant matter, the Court concludes that the 67 County Boards are local agencies for jurisdictional purposes. Notably, the Judicial Code does not define what constitutes a local agency. However, Section 1991 of the Statutory Construction Act of 1972 defines "political subdivision" as "[a]ny county, city, borough, incorporated town, township, school district, vocational school district and county institution district." 1 Pa.C.S. § 1991; see *Blount*, 965 A.2d at 230 (observing, *inter alia*, the definition of "local authority" under the rules of statutory construction for purposes of determining whether the PPA was a Commonwealth or local agency). Section 102(b) and (c) of the Election Code defines "county" as "any county of this Commonwealth" and

“county board” or “board” as “the county board of elections of any county [t]herein provided for.” 25 P.S. § 102(b), (c).

Importantly, Section 301(a) of the Election Code provides that “[t]here shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act.” 25 P.S. § 2641(a) (emphasis added). Section 301(b) of the Election Code further provides that “[i]n each county of the Commonwealth, the county board of elections shall consist of the county commissioners of such county ex officio, or any officials or board who are performing or may perform the duties of the county commissioners . . . .” 25 P.S. § 2641(b). Section 302 of the Election Code outlines the powers and duties of the County Boards, providing that “[t]he county boards of elections, **within their respective counties**, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act,” including the 16 powers and duties enumerated in that section. 25 P.S. § 2642 (emphasis added). Included in these powers are those at issue in the instant matter, namely Section 302(f) and (g), which authorize the County Boards:

(f) To make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.

(g) To instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.

25 P.S. §§ 2642(f), (g).

Section 305(a) of the Election Code further provides that “[t]he county commissioners or other appropriating authorities of the county shall appropriate annually, and from time to time, to the county board of elections of such county, the funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county . . . .” 25 P.S. § 2645(a); *see also* Section 305(a)1.-4. of the Election Code, 25 P.S. § 2645(a)1.-4. (providing additional expenses related to elections for which the Counties are liable). Conversely, under Section 201 of the Election Code, the Secretary’s powers and duties are limited, and include different powers than those granted solely to the County Boards in Sections 301 and 302. *See* 25 P.S. § 2621.

Because these provisions of the Election Code reflect that the County Boards are local agencies, but do not expressly state the same, the Court must analyze the legislative intent behind the statute. “In discerning legislative intent to confer Commonwealth agency status, courts consider whether conferring jurisdiction on a particular court would lead to an absurd or unreasonable result.” *Finan*, 209 A.3d at 1113 (citing 1 Pa.C.S. § 1921). “When the matter involves a local community, and ‘the issues involved were matters strictly within the concern of a particular locality rather than a concern of the Commonwealth generally,’ then it would be absurd to conduct the litigation in Harrisburg as opposed to the locality.” *Finan*, 209 A.3d at 1113 (citing *T & R Painting*, 353 A.2d at 802 (citation omitted)).

Here, the County Boards do not meet the *Blount* factors, which means they are local agencies. First, the General Assembly granted jurisdiction to administer and conduct primaries and elections solely within the confines of the respective Counties of the Commonwealth to the County Boards under Section 301(a) of the Election Code. The County Boards’ authority indicates local agency status because

it has jurisdiction to administer and conduct elections and primaries **within each respective county**, not statewide. Second, the County Boards are not controlled by the Commonwealth, as the County Boards are governed by the county commissioners under Section 301(b) of the Election Code, and, under Section 302(f) and (g), the County Boards are authorized to make rules, regulations, and instructions necessary for the guidance of, among others, elections officers and electors and to instruct elections officers in their duties. The Court therefore rejects Petitioners' argument that the County Boards are Commonwealth agencies because they were created by statute; rather, under *Blount*, it is the degree of Commonwealth control over them that is dispositive. As the Court observed in *County of Fulton*, the Department does not control the County Boards. *See County of Fulton*, 276 A.3d at 861-62 (stating that "[t]he county boards of elections are not bureaus within the Department of State subject to management by the Secretary of the Commonwealth" and that "[t]hey are separate and stand-alone government agencies").

Further, the County Boards are funded by the county commissioners or other appropriating authorities of the county annually under Section 305 of the Election Code, not by the Department or other Commonwealth entity. Thus, although the subject matter of this litigation implicates elections, both local and statewide,<sup>36</sup> which are governed by the Election Code,<sup>37</sup> all signs point to the County Boards

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<sup>36</sup> In *Finan*, this Court declined "to expand this Court's original jurisdiction to include cases challenging local implementation of statewide laws in the interest of uniformity. The potential for conflicting constructions of statewide laws by the county courts of common pleas exists whenever a statewide law is applied differently by different local agencies." *Finan*, 209 A.3d at 1115-16.

<sup>37</sup> This Court has exclusive original jurisdiction in the following election-related matters only:

(1) Contested nominations and elections of the second class under the . . . [Election Code.]

falling under the designation of “political subdivision,” suits against which are excluded from this Court’s original jurisdiction under Section 761(a)(1) of the Judicial Code. *See also In re Voter Referendum Pet.*, 981 A.2d at 171 (recognizing that a county board of elections is a local agency). As a result, jurisdiction for an action challenging a County Board’s development and implementation of notice and cure procedures properly lies in the respective County’s court of common pleas. *See* 42 Pa.C.S. § 931 (providing that “[e]xcept where exclusive original jurisdiction of an action or proceeding is by statute or by general rule . . . vested in another court of this Commonwealth, the courts of common pleas shall have unlimited original jurisdiction of all actions and proceedings, including all actions and proceedings heretofore cognizable by law or usage in the courts of common pleas”). Accordingly, because this Court lacks subject matter jurisdiction over Petitioners’ claims against the 67 County Boards in the absence of the Acting Secretary and Director Mathis, the POs in this regard are sustained,<sup>38</sup> and the Amended Petition is dismissed.<sup>39</sup>



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ELLEN CEISLER, Judge

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(2) All matters arising in the Office of the Secretary of the Commonwealth relating to Statewide office, except nomination and election contests within the jurisdiction of another tribunal.

42 Pa.C.S. § 764.

<sup>38</sup> Given the Court’s disposition, Respondents’ other POs are dismissed as moot.

<sup>39</sup> Ordinarily, this Court would transfer the matter to the proper court with original jurisdiction over the matter. *See* 42 Pa.C.S. § 5103(a). However, given the impracticality of doing so in this case and given the fact that some County Boards may have changed their procedures since the November 2022 General Election, the Court will not transfer this matter and, instead, will dismiss the Amended Petition. Should Petitioners wish to file suit in the respective courts of common pleas where notice and cure procedures are challenged, they may do so.



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; :  
National Republican Senatorial :  
Committee; National Republican :  
Congressional Committee; Republican :  
Party of Pennsylvania; David Ball; :  
James D. Bee; Debra A. Biro; Jesse D. :  
Daniel; Gwendolyn Mae Deluca; Ross :  
M. Farber; Connor R. Gallagher; Lynn :  
Marie Kalcevic; Linda S. Kozlovich; :  
William P. Kozlovich; Vallerie :  
Siciliano-Biancaniello; S. Michael :  
Streib, :

Petitioners :

v. :

Al Schmidt, in his official :  
capacity as Acting Secretary of the :  
Commonwealth; Jessica Mathis, in :  
her official capacity as Director of the :  
Pennsylvania Bureau of Election :  
Services and Notaries; Adams County :  
Board of Elections; Allegheny County :  
Board of Elections; Armstrong County :  
Board of Elections; Beaver County :  
Board of Elections; Bedford County :  
Board of Elections; Berks County Board :  
of Elections; Blair County Board of :  
Elections; Bradford County Board of :  
Elections; Bucks County Board of :  
Elections; Butler County Board of :  
Elections; Cambria County Board of :  
Elections; Cameron County Board of :  
Elections; Carbon County Board of :  
Elections; Centre County Board of :  
Elections; Chester County Board of :  
Elections; Clarion County Board of :  
Elections; Clearfield County Board of :  
Elections; Clinton County Board of :  
Elections; Columbia County Board of :  
Elections; Crawford County Board of :

No. 447 M.D. 2022

Elections; Cumberland County Board :  
of Elections; Dauphin County Board of :  
Elections; Delaware County Board of :  
Elections; Elk County Board of :  
Elections; Erie County Board of :  
Elections; Fayette County Board of :  
Elections; Forest County Board of :  
Elections; Franklin County Board of :  
Elections; Fulton County Board of :  
Elections; Greene County Board of :  
Elections; Huntingdon County Board :  
of Elections; Indiana County Board of :  
Elections; Jefferson County Board of :  
Elections; Juniata County Board of :  
Elections; Lackawanna County Board :  
of Elections; Lancaster County Board :  
of Elections; Lawrence County Board :  
of Elections; Lebanon County Board :  
of Elections; Lehigh County Board of :  
Elections; Luzerne County Board of :  
Elections; Lycoming County Board of :  
Elections; McKean County Board of :  
Elections; Mercer County Board of :  
Elections; Mifflin County Board of :  
Elections; Monroe County Board of :  
Elections; Montgomery County Board :  
of Elections; Montour County Board of :  
Elections; Northampton County Board :  
of Elections; Northumberland County :  
Board of Elections; Perry County :  
Board of Elections; Philadelphia County :  
Board of Elections; Pike County Board :  
of Elections; Potter County Board of :  
Elections; Schuylkill County Board of :  
Elections; Snyder County Board of :  
Elections; Somerset County Board of :  
Elections; Sullivan County Board of :  
Elections; Susquehanna County Board :  
of Elections; Tioga County Board of :  
Elections; Union County Board of :  
Elections; Venango County Board of :  
Elections; Warren County Board of :  
Elections; Wayne County Board of :

Elections; Westmoreland County Board :  
of Elections; Wyoming County Board of:  
Elections; and York County Board of :  
Elections, :  
Respondents :

## **ORDER**

AND NOW, this 23<sup>rd</sup> day of March, 2023, it is hereby **ORDERED** as follows:

1. The first Preliminary objection (PO) of Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth, and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries; the first PO of the Delaware County Board of Elections; the second PO of the Chester County Board of Elections; and the first PO of the Philadelphia County Board of Elections, relating to lack of subject matter jurisdiction, are **SUSTAINED**.
2. All remaining POs are **DISMISSED AS MOOT**.
3. Petitioners' First Amended Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief is **DISMISSED**.



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ELLEN CEISLER, Judge

**CERTIFICATE OF COMPLIANCE  
WITH PUBLIC ACCESS POLICY**

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 require filing confidential information and documents differently than non-confidential information and documents.

Dated: July 26, 2024

THE GALLAGHER FIRM, LLC

Kathleen A. Gallagher

Kathleen A. Gallagher

RETRIEVED FROM DEMOCRACYDOCKET.COM

## **CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the within *INTERVENORS'*  
*BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT* has been  
provided to all counsel of record listed below via email this 26th day of July 2024:

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THE GALLAGHER FIRM, LLC

/s/ Kathleen A. Gallagher

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