IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

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

Plaintiffs,

v.

WASHINGTON COUNTY BOARD OF ELECTIONS,

Defendant.

G.D. No. 24-3953

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Filed on Behalf of Defendant
Washington County Board of Elections

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WASHINGTON COUNTY BOARD OF ELECTIONS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

In a one-count Complaint, Plaintiffs seek forward-looking injunctive relief for the 2024 general election. They claim a denial of procedural due process because the Washington County Board of Elections ("WBOE"), **pursuant to a legislatively-adopted policy**, declines to provide notice of a defective mail-in ballot and an opportunity to cure that defective ballot via a provisional ballot. *E.g.*, Compl. ¶¶ 81-82, Wherefore Clause ¶(c). In substance, Plaintiffs are asking this Court to order the WBOE to provide them both notice of a defective mail-in ballot and an opportunity to cure it. But the Court cannot order such relief under binding Pennsylvania Supreme Court precedent. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372-74 (Pa. 2020) (hereinafter "*Pa. Dems.*"). The WBOE's actions were – and are – in full compliance with Pennsylvania statutory and decisional law.

Before addressing the multitude of legal issues that render Plaintiffs' claim infirm, one issue warrants upfront discussion. Plaintiffs accuse the WBOE of affirmatively misleading voters and deliberately concealing information. *E.g.,* Compl. ¶¶ 2-3, 9, 81, 155. Those are serious allegations. **They are also flat wrong**.

The Election Code has no provision allowing for curing a defective mail-in ballot – either by provisional ballot or otherwise. Nor does it require a county board of elections to provide a voter notice of a defective mail-in ballot. Under current Pennsylvania law, the WBOE was entitled to adopt a policy of not providing "notice and curing" with regard to defective mail-in ballots. *See R.N.C. v. Chapman,* No. 447 M.D. 2022, 2022 WL 16754061, at * 4, *17-18, *21 (Pa.Commw.Ct. 2022) (hereinafter "*Chapman*"); Marks Dep., 14. Its elected officials did just that on April 11, 2024.

Once the WBOE adopted that policy for the 2024 primary, disclosing whether a voter's mail-in ballot was potentially defective or not was of no import – the voter *could not* cure the ballot under either the WBOE policy or the Election Code. Accordingly, as part of the policy, the WBOE told inquiring voters only that their mail-in ballot had been received, recorded and placed under security. Ostrander Dep. at 179-80. **These statements are not misleading – they are 100% accurate**.

Nothing the WBOE said caused any alleged confusion. The misaimed aspersions cast at the WBOE are based on emails received by certain voters – **but those emails came from the Department of State ("DOS"), *not* the WBOE**. *Id.*, 39, 42, 58, 79, 162-67. The WBOE did not send these emails. *Id.* The WBOE does not control their content. *Id.* Any confusion is the result of actions emanating from 401 North Street in Harrisburg (address of DOS), not from 100 W. Beau Street in Washington (address of the WBOE). Plaintiffs *could* have sued the Secretary of State to

force him to send automated emails through the SURE System that are consistent with the WBOE's "no curing" policy adopted for the 2024 primary, rather than the inaccurate DOS emails. They chose not to do so. Their failure to do so pulls back the curtain on what this case is really about. The allegedly misleading emails are mere window dressing for Plaintiffs' real goal here – to, contrary to the WBOE's legislatively-adopted policy, have this Court order the WBOE to provide **both** notice and the ability to cure a defective mail-in ballot. But the Court cannot oblige – doing so would be directly contrary to the Supreme Court's ruling in *Pa. Dems*.

Regardless, any purported confusion is of no moment. Under the properly adopted WBOE policy not to provide "notice and curing" for the 2024 primary and the plain language of the Election Code, confused or not, Plaintiffs were not entitled to notice of a ballot defect and were not able to cure their defective mail-in ballots. **WBOE's valid legislative decision is the end of this case**. And, if that were not enough, as a practical matter, DOS is **changing** the emails for the 2024 general election to accurately account for policies in non-curing counties. *See* Marks Dep., 76-82, 118-19. Any alleged confusion is eliminated moving forward, rendering Plaintiffs' claim moot.

As to the law, for numerous reasons, Plaintiffs' procedural due process claim fails and Summary Judgment should be entered for the WBOE.

Procedurally, Plaintiffs cannot even get to the starting gate because: (i) their claim is now moot given that DOS is changing the emails, (ii) each Plaintiff lacks standing, and (iii) this action is not ripe because the WBOE has yet to adopt a policy for the 2024 general election. If they could get to the starting gate, Plaintiffs cannot get out of it because the WBOE's valid, discretionary legislative decision not to permit "notice and curing" for the 2024 primary cannot be challenged on procedural due process grounds. *E.g., Vega v. Wetzel*, No. 39 M.D. 2022, 303 A.2d 1274

(Table), 2023 WL 4853004, at *3 (Pa.Commw.Ct. 2023). Further, the procedural due process clause only covers protected "life, liberty or property" interests. *See generally,* Pa. Const. Art. I, §1. Life and property interests are not implicated here and, while voting is a fundamental right for substantive due process purposes, for procedural due process purposes, voting is **not** a protected liberty interest. *See e.g., Richardson v. Texas Sec. of State.*, 978 F.3d 220, 231-33 (5th Cir. 2020). Certainly, voting by mail or voting via provisional ballot where one is not authorized by the Election Code (as is the case here), let alone getting a particular email from the DOS' SURE system warning a voter of a ballot defect, is not a protected liberty interest. *E.g. Id.* at 232. And, **most importantly**, the Pennsylvania Supreme Court's decision in *Pa. Dems* precludes Plaintiffs from basing a due process challenge on a purported right to receive "notice and an opportunity to cure" a defective mail-in ballot, since *Pa. Dems.* made clear that no such right exists. 238 A.3d at 372-74. Plaintiffs' claim fails for each of these independent reason.

And if Plaintiffs happen to get out of the starting gate, on the merits, Plaintiffs' claim fails because it is at odds with binding precedent from the Pennsylvania Supreme Court, conflicts with decisions of the Commonwealth Court, and is contrary to the express terms of the Election Code. The Pennsylvania Supreme Court has held that courts **cannot** mandate notice and an opportunity to cure a defective mail-in ballot. *Pa. Dems.*, 238 A.3d 372-74. And the Commonwealth Court has held that county boards of election have discretion whether to adopt **or not adopt** "notice and curing." *See Chapman,* 2022 WL 16754061, at *4, *17-18, *21. These higher court decisions are dispositive here. The relief sought by Plaintiffs is directly contrary to *Pa. Dems*. and, under *Chapman*, improperly invades the legislative discretion of the WBOE.

Further, while Plaintiffs seek the chance to cure defective mail-in ballots by filing a provisional ballot, not only do the express terms of the Election Code not provide for this relief,

they make it illusory. The Election Code does not authorize the use of a provisional ballot to fix a defective mail-in ballot. And, even in the limited circumstances when a provisional ballot is authorized, if a voter's mail-in ballot is received by the WBOE before the close of the polls on Election Day – and here the ballots were undisputedly "timely received" – the mail-in ballot, not any provisional ballot, is the voter's ballot for the election. 25 P.S. § 3050(a.4)(5)(ii)(F) (a provisional ballot "shall not be counted" in any circumstance where the voter's mail ballot "is timely received by a county board of elections."). *See* JSOF ¶47. As Washington County's Director of Elections testified, a "provisional ballot would not be counted if we had a [mail-in] ballot marked as received." Ostrander Dep., 89-90, 215-16. And Deputy Secretary of State Marks confirmed that whether to count or not count a provisional ballot is ultimately up to the county board of elections. Marks Dep., 61-62, 67-68. The Court cannot disregard or rewrite the plain language of the Election Code, *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004), but the Court would need to do just that to find for Plaintiffs. The relief Plaintiffs seek is legally invalid and illusory.

Additionally, Plaintiffs urge the Court to apply an incorrect constitutional standard. As Plaintiffs acknowledge, Pennsylvania procedural due process standards are similar to federal due process standards. *See* Compl. ¶152. When analyzing Fourteenth Amendment claims aimed at voting-related rights, which would include procedural due process claims, rather than the) *Mathews* test proffered by Plaintiffs, U.S. Supreme Court law dictates that courts use the *Anderson/Burdick* framework. *Richardson,* 978 F.3d at 233-35; *see generally, Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (setting forth standard). The policy at issue here, which has no impact on a mail-in voter if they simply follow the rules, satisfies *Anderson/Burdick*. The "usual burdens of voting" – such as properly completing the declaration envelope on a mail-

in ballot – do not violate any right to vote under *Anderson/Burdick. E.g. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.).

Finally, even if the *Mathews* test applies, Plaintiffs cannot make out a procedural due process claim. The ballot instructions to a mail-in voter provide clear notice that "[**f]or your ballot to count, you must follow all of these steps**"; Washington County's policy of not providing "notice and curing" was adopted at a public meeting and reported in the press; members of the public attending the canvass of mail-in ballots can learn the names of voters whose mail-in ballots are rejected; and the Election Code in 25 P.S. § 3157 already provides a process (including a hearing) for a voter to challenge a ballot rejection. This procedure was available for the April 2024 primary, but no Plaintiff used it. It will be available in November. This notice and opportunity to be heard satisfies procedural due process. *See generally*, *Sutton v. Bickell*, 220 A.3d 1027, 1032 (Pa. 2019).

For all of the above reasons, Summary Judgment should be entered for the WBOE.

II. ACT 77 AND RELEVANT APPELLATE PRECEDENT

In 2019, the Pennsylvania General Assembly, in bipartisan fashion, passed Act 77, 25 P.S. § 3150.16, thereby broadening the ability of Pennsylvania voters to vote by mail. As part of its authority to "regulate elections . .. . [which] has been exercised by the General Assembly since the foundation of the government," *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914), the General Assembly provided rules to govern mail-in voting. These include the requirements that a voter sign and date the outer declaration envelope and place the ballot in the supplied secrecy envelope. 25 P.S. § 3150.16(a). A description of these requirements (and what a voter must do to satisfy them) accompanies every mail-in ballot sent by the WBOE. Ostrander Dep. at 189-92 and Ex. 10. The instructions expressly warn that **"[f]or your ballot to count, you must follow all of these**

steps." *Id.* In Act 77, the General Assembly did **not** include a provision whereby a mail-in voter would be notified for failing to follow the rules and be provided an opportunity to cure a non-compliant ballot. *See Pa. Dems.*, 238 A.3d at 374.[1]

In the lead up to the 2020 general election, similar to the relief sough here, the Pennsylvania Supreme Court was requested "to require [county boards] to contact qualified [voters] whose [mail-in] ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail, and provide them an opportunity to cure those defects." *Id.* at 372. The petitioner in *Pa. Dems.* rested this claim "on its assertion that the multi-stepped process for voting by [mail] ballot inevitably leads to what it describes as minor errors" by voters who fail to comply with all of the requirements. *Id.* The Secretary of the Commonwealth opposed this request noting the power to regulate elections is legislative," not judicial, and that courts "cannot create statutory language that the General Assembly chooses not to provide." *See id.* at 373. "*Id.* The Secretary explained that "so long as the voter follows the requisite voting procedures, he or she will have an equally effective power to select the representative of his or her choice[.]" *Id.; accord NAACP,* 97 F.4th at 133-35 ("[A] voter who fails to abide by state rules prescribing how to make a vote effective is not 'denied the right to vote'" or disenfranchised "when his ballot is not counted.") (quoting *Ritter v. Migliori*, 142 S.Ct. 1824 (2022) (Alito, J., dissental)).

[1] 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.") (emphasis in original); *Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 133-34 (3d Cir. 2024) (hereinafter "*NAACP*").

The Supreme Court unanimously held that a voter has no constitutional, statutory, or legal right to be provided notice of and an opportunity to cure a defective mail-in ballot. *See id.* at 372-74. "To the extent that a voter is at risk of having his or her ballot rejected" due to their failure to comply with the Election Code's requirements for mail-in ballots, "the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk is one best suited for the Legislature." *Id.* The General Assembly, however, has not mandated notice and curing in a bill signed into law. *See id.* at 372-80. In light of the Supreme Court's decision in *Pa. Dems.*, this Court may not mandate the WBOE to impose notice or curing either. *See id.* at 374. **The law is clear – in Pennsylvania a court cannot order a Board of Elections to adopt a policy of providing either notice or curing**.

Subsequently, the Supreme Court held that Act 77's "date" requirement for a mail-in ballot's declaration envelope are mandatory and that failure to comply renders a mail-in ballot invalid. *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022). Relatedly, in a recent opinion, the Third Circuit held that invalidating mail-in ballots for failure to comply with the date requirement does **not** violate the "right to vote" under the Materiality Provision of the Civil Rights Act of 1964. *NAACP*, 97 F.4th at 133-35. Read together, *Pa. Dems., Ball* and *NAACP*, establish that (1) a court cannot order a county to adopt notice and curing, (2) in a county that does not employ a notice and cure policy, a mail-in ballot that has a defect is invalid and cannot be cured, and (3) invalidating that defective mail-in ballot does not violate the right to vote. **The actions of the WBOE were – and are – entirely in accord with these court decisions and the Election Code**.

In the wake of *Pa. Dems.*, with the inability to have courts mandate notice and curing, the next question the courts faced was: could a county board of elections decide, using its own

discretion, to provide notice and an opportunity to cure? In *Chapman*, the Commonwealth Court, sitting in original jurisdiction, determined that each county board has the authority to decide whether or **not** to permit notice and curing. *Chapman,* No. 447 M.D. 2022, 2022 WL 16754061, at *4, *17-18, *21. **The WBOE's decision not to provide notice and curing for the 2024 primary is squarely within the discretion it has under *Chapman*.**

The relief sought by Plaintiffs here must be assessed in light of this clear Pennsylvania law. When that is done, Summary Judgment must be entered for the WBOE. The WBOE has done nothing more than exercise its discretion to make a legislative judgment not to provide notice and curing for the 2024 primary. There is nothing illegal or improper about that decision. Once that decision was legislatively adopted, this Court cannot order the WBOE to provide notice to voters or curing – let alone order the WBOE to have DOS send the voter a particular email. And it would be nonsensical, and itself misleading, for this Court to order the WBOE to provide information to voters indicating that they might be able to cure a defective mail-in ballot, including by filing a provisional ballot, when that information would be illusory. The properly adopted WBOE policy precludes voters from curing a defective mail-in ballot, and the Election Code expressly provides that a provisional ballot filed to cure a defective mail-in ballot received by the WBOE cannot count in the election. 25 P.S. § 3050(a.4)(5)(ii)(F).

III. RELEVANT UNDISPUTED FACTS OF RECORD

A. The Individual Plaintiffs' Mail-In Ballots

After receiving a valid application from a voter for a mail-in ballot, the WBOE sends a voter a mail-in ballot. Ostrander Dep., 25-27. Accompanying the ballot are detailed Instructions to the voter about how to properly fill out the ballot so that Act 77's declaration envelope and secrecy envelope requirements can be satisfied. Jt.Ex. E. The Instructions expressly warn the voter "**[f]or**

your ballot to count, you must follow all of these steps." *Id.* (emphasis added). Deputy Secretary Marks testified that this language is intended to "notify voters that to ensure their ballot is counted, they must do certain things." Marks Dep., 84.

Despite each Individual Plaintiff having previously successfully voted by mail before 2024, when they voted by mail in the April 2024 primary, they failed to comply with one or more of Act 77's requirements. JSOF ¶8. Because Act 77's requirements are mandatory, the voters' ballots were not included in the election tally. *Id.*

Each Individual Plaintiff intends to vote by mail in the 2024 general election; each is now well aware of the requirements for properly filing out a mail-in ballot; and each intends to comply with those requirements in November 2024. *Id.* If they do, their mail-in vote will be counted.

B. <u>The SURE System, Its Purpose, and the Automated Emails Sent by DOS</u>

The SURE system is a state-wide database run by DOS into which counties are required to input voter registration information. *See generally*, Ostrander Dep., 23-24, 205; Marks Dep., 24. Information inputted into SURE is used to create poll books for election day and, in order to have accurate poll books, a county needs to enter (a) whether a voter was sent a mail-in ballot and (b) if that voter's ballot was received by the county board of elections. Ostrander Dep., 23-24, 89, 147-49; JSOF ¶47. Washington County did that for the 2024 primary. Ostrander Dep., 23-24, 89, 147-49.

When inputting receipt of a mail-in ballot into SURE, the WBOE is provided twenty-three different "codes" in the form of a drop-down menu that it "may" use. Jt.Ex. D, pp. 6-11; Marks Dep., 83-84. One such code is "Record-Ballot Returned." *Id.* If DOS has an email on file for the voter, when a particular code is selected from the drop-down menu, DOS sends an auto-generated email to the voter that is linked with the selected code. Ostrander Dep., 39. The email is not sent

from the WBOE. Ostrander Dep., 39, 42, 58, 79, 162-67. The WBOE did not write the email's content. *Id.* The WBOE cannot change the email's content. *Id.* What email will be sent to a voter is not visible to a WBOE Elections Office staffer when selecting a particular code. Marks Dep., 83.

Assistant Secretary of State Jonathan Marks testified:

- All that is required to be entered into the SURE system is that the ballot is marked as received and the date of receipt. *Id.*, 35.
- The WBOE is not mandated to use any particular code. *Id*., 39-40, 83-84.
- The instructions for using the SURE system provided by DOS are not a regulation, a Directive, or even a Guidance from DOS; they are akin to a "product notification." *Id*., 31-32.
- The use of any particular code is "optional"; the WBOE has full discretion to pick which drop down code to select; and the WBOE need not update a voter's ballot return status prior to close of the polls. *Id.*, 39-40, 69, 83-84, 88-89, 94.

Ms. Ostrander testified that, given the current policy in Washington County, none of the current DOS auto-emails provides true and completely accurate information to a voter and each is "misleading" in its own way. Ostrander Dep., 163-66, 195-96, 217-19. For example, if one of the "Canc" (cancelled) codes is selected, a voter receives an automatic email advising that, if they have time, they can request a new ballot and, if not, they can file a provisional ballot on election day. Jt.Ex. D, pp. 7-9. But, in Washington County, a voter presently cannot receive a new ballot to cure a defective mail-in ballot. Ostrander Dep., 183, 195-96, 214-219. Mr. Marks agreed that the language about possibly receiving a new ballot was potentially confusing for a voter in a non-curing county. Marks Dep., 115.

Concerning provisional ballots, Ms. Ostrander explained, that while poll workers will typically allow anyone who asks to fill out a provisional ballot to fill one out, a provisional ballot

filed by a voter who has returned a mail-in ballot cannot be counted under the Election Code.[2] Ostrander Dep., 89-90, 214-217. Marks agreed that it is up to each county board to determine whether to count or not count a provisional ballot. Marks Dep., 61-62, 67-68.

Ms. Ostrander further explained that the "Canc" codes are not appropriate because a voter's ballot is not being cancelled at the time the code is inputted into SURE – rather, a ballot is never "cancelled" unless it is spoiled and a voter is provided a new ballot; the formal decision not to count a mail-in ballot does not happen until the official canvas starting the Friday after election day. Ostrander Dep., 87-90, 108, 152-53, 214-17. Marks testified that the email sent with the "Canc" codes will be revised for the November election to be more accurate. Marks Dep., 118-119.

Similarly, the DOS email associated with "Record-Ballot Returned" incorrectly advises a Washington County voter that the county may notify the voter if an issue with the ballot is identified (which is contrary to the WBOE's policy of not providing notice and curing). Ostrander Dep., 163-66, 195-96. Mr. Marks testified that this email is being revised to make it more accurate for non-curing counties. Marks Dep., 76-82.

Following the 2024 primary election, DOS held "feedback sessions" with county election directors to evaluate the need to revise the language in the auto-generated emails. Ostrander Dep., 119-25, 167-68, 188-89. At one feedback session, Ms. Ostrander and at least one director from a different county voiced their concern that, because their counties did not offer notice and curing, the auto-generated emails were inaccurate and misleading. *Id.* Based on these feedback sessions, **DOS is changing the emails for the 2024 general election**. Marks Dep., 76-82. This includes

[2] *See* 25 P.S. § 3050(a.4)(5)(ii)(F) (a provisional ballot "shall not be counted" in any circumstance where the voter's mail ballot "is timely received by a county board of elections.").

changing the emails that the Complaint alleges mislead voters so that they simply say, "your ballot has been received." *Id*.

C. The WBOE's Adoption of a Non-Curing Policy in April 2024 for the Primary

For elections cycles that do not involve elections for the three Washington County Commissioners, the three elected County Commissioners serve as the WBOE. Ostrander Dep., 111-12. In 2023, the County Commissioners were on the ballot, so the WBOE had two members who were appointed by two of the Commissioners, with the third member being a Commissioner who was not running for reelection. *Id.* The 2023 WBOE adopted a policy of permitting notice and curing for voter errors on a mail-in ballot declaration envelope. *Id.*, 40, 49. Under the policy, voters were issued new mail-in ballots to cure defective ballots and had the original ballots spoiled. *Id.* Because the original ballots were being spoiled, the WBOE used the "Canc" codes in SURE and the auto-generated email from DOS was fairly accurate – voters could request new ballots and could cure a defect via provisional ballot on election day since the prior ballot was substantively deemed spoiled. *Id.*, 32-40

The current group of three County Commissioners took office in January 2024 and comprise the present WBOE. *Id.*, 53. Because this was a new WBOE, and in light of new legal precedent decided in early 20024 (*i.e.*, *NAACP*), the new WBOE took up the issue of whether or not to permit notice and curing for the April 2024 primary. *Id.*, 52-62, 192-96. At a March 12, 2024 public meeting, Ms. Ostrander briefed the WBOE on the current options available to it regarding curing or not curing and discussed the SURE codes that could be used depending on whether the WBOE decided to permit or not permit curing. *Id.* The WBOE adjourned the March 12 meeting without deciding and indicated it would decide at its public meeting in April. *Id.*

At the April 11, 2024 meeting, the WBOE again took up the issue. *Id.*, 63-72, 91-92, 179-80, 196-203. A representative from Plaintiff CCJ attended the meeting and spoke in favor of curing. *Id.*, 200-203. Following public comment, the WBOE again discussed its options, as well as the SURE codes that might be used, and what to tell voters who inquired about mail-in ballot status. *Id.* The WBOE voted to adopt a policy not to permit "notice and curing" for the 2024 primary election. *Id.* The policy included a directive to the Elections Office to use the "Record-Ballot Retuned" code in SURE and to instruct inquiring mail-in voters only that their ballot had been received, recorded and locked under security. *Id.* The WBOE felt that "Record-Ballot Returned" was the most accurate code because it correctly indicated that the ballot had been returned to the Elections Office. *Id.*, 63-72, 91-92, 196-203. Other code options such as "Canc" were determined to be less accurate because the voter's ballot was not cancelled and would not be formally determined as defective until canvassing. *Id.* As to what was to be told to an inquiring voter, the policy is factually accurate – the ballot had been received, recorded and secured. *Id.*, 196, 216-17.

Following the adoption of this policy, on April 16, 2024, the ACLU sent a letter to the County objecting to the policy – current counsel for Plaintiffs signed that letter. Compl. Ex. 19. At the public County Commissioners' meeting on April 18, the policy not to permit curing was raised again. JSOF ¶¶ 38-39. Commissioner Magi made a motion to reconsider the policy adopted on April 11, but the motion did not receive a second. *Id.*

The WBOE will meet again before the 2024 general election to decide whether to keep the current policy of not providing notice and curing or to adopt a different policy. Ostrander Dep., 126-27.

D. Washington County's Handling of Mail-In Ballots from Receipt Through Canvass

If a voter either calls the Elections Office or arrives in person with their mail-in ballot and a question about how to fill it out, the Elections Office will do their best to help the voter. Ostrander Dep., 90, 177-78.

When a mail-in ballot arrives at the WBOE's Elections Office by mail or hand delivery, its unique bar code is scanned and the ballot is recorded in the SURE system as "Record-Ballot Returned." Ostrander Dep., 73-74. The email that will be sent to a voter by DOS is not visible to a WBOE elections office staffer when selecting this code. Marks Dep., 83. The "Record-Ballot Returned" code itself, as opposed to the DOS auto-email, is accurate – the ballot was both returned to the WBOE and recorded. Ostrander Dep., 196, 216-17. The DOS email sent when "Record-Ballot Returned" is selected is being revised for the November general election and will now be consistent with polices in non-curing counties. Marks Dep., 76-82.

When received, based on a quick visual inspection of the ballot's declaration envelope, if the ballot appears to be non-compliant with Act 77, it is segregated and placed in a bin in a locked area (that also houses compliant ballots) with other segregated, non-compliant ballots for that precinct. Ostrander Dep., 30-31, 73-75, 80-81. It remains there until Election Day at 7 a.m , when the pre-canvass beings. *Id.*, 102-06. During the pre-canvass, all the mail-in ballots are opened and each declaration reviewed; any new potentially non-compliant ballots that are identified, along with those previously identified, are again segregated. *Id.*

On the Friday after Election Day, the Canvass Board meets to officially canvass the ballots, including mail-in ballots. *Id.*, 109-119. The Canvass Board meeting is advertised to the public in Washington County's two local newspapers. *Id.*, 111. Members of the public are free to attend the canvass and members of the public *did* attend for the 2024 primary – however, no representative

of either Organizational Plaintiff attended. *Id.*, 109-119; JSOF ¶48. As part of its overall tasks, the Canvass Board reviews the segregated mail-in ballots and officially determines whether they can or cannot be counted. Ostrander Dep., 109-119.. In the April 2024 primary, there was no disagreement about which ballots not to count. *Id.* The non-compliant mail-in ballots are organized into batches depending on the deficiency (*i.e.*, missing signature, missing date, etc.) and each batch is then rubber banded with a covering note indicating why it is non-complaint. *Id.* Members of the public attending the canvass are entitled to review the non-complaint ballots and to make a list of the voters whose ballots were not counted. *Id.,* 119, 183-84.

If there is an objection to a ballot not being counted, a voter can appeal to the Court of Common Pleas under 25 P.S. § 3157. *Id.*, 185-86. In the 2024 primary, no such appeals were taken. *Id.*

IV. ARGUMENT

While the procedural posture of this case is unique, the standards for the Court to apply are well-settled. Summary judgment is appropriate "where there are no disputed issues of material fact and it is clear that the applicant is entitled to the requested relief under the law." *Marcellus Shale Coal. v. Dep't of Env't Prot.*, 216 A.3d 448, 458 (Pa.Commw.Ct. 2019). The court must view the record in the light most favorable to the non-moving party, and all doubts must be resolved against the moving party. *Hartford Fire Ins. Co. v. Davis,* 275 A.3d 507, 511 (Pa.Super.Ct. 2022).

A. DOS' Changes to the SURE Emails for the November Election Render the Complaint Moot

At every stage of the judicial process, an actual case or controversy must exist to avoid dismissal for mootness. *Erie Ins. Exch. v. Claypoole*, 673 A.2d 348, 353 (Pa.Super.Ct. 1996). Moreover, a change in the facts may render a case moot after filing. *Id.*; *see also Deutsche Bank Nat. Co. v. Butler*, 868 A.2d 574, 577 (Pa.Super.Ct. 2005).

Central to Plaintiffs' claim is the assertion that the SURE-generated emails sent by DOS after WBOE selected the "Record-Ballot Returned" button in the SURE system are misleading. *See e.g.*, Compl. ¶¶ 9, 68. **But, to eliminate any confusion, DOS is changing the email associated with "Record-Ballot Returned" for the November election**. Thus, to the extent Plaintiffs' claim is founded on these allegedly misleading emails, it is moot and must be dismissed.

B. <u>Plaintiffs Each Lack Standing and this Action Is Not Ripe, Requiring Dismissal</u>

In Pennsylvania, a party initiating litigation must establish as a threshold matter that he or she has standing to bring the action. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (collecting cases). Because "a court must resolve justiciability concerns as a threshold matter before addressing the merits of the case," standing is a requisite to the case moving forward. *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 481 (Pa. 2021). "[U]nder a traditional standing analysis, the individual initiating the legal action must show that he is aggrieved by the matter he seeks to challenge." *Id.* at 473. A plaintiff must establish both "a causal connection between the asserted violation and the harm complained of" and that a judicial order would "redress" the plaintiff's harm. *Id.* at 473-74; *see also id.* at 492 (Wecht, J., concurring); *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). If a party is not adversely affected by what it challenges, it "has no standing." *Soc'y Hill Civic Ass'n v. Pa. Gaming Control Bd.*, 928 A.2d 175, 184 (Pa. 2007). "By requiring the plaintiff to show an injury in fact, [] standing screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action." *FDA v. All. for Hippocratic Medic.*, 602 U.S. 367, 368 (2024).

Also, to have standing, the requisite interest cannot be speculative. "A speculative or remote possibility of harm is insufficient to support standing." *Tishok v. Dep't of Educ.*, 133 A.3d

118, 124 (Pa.Commw.Ct. 2016) (citing *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 659–61 (Pa. 2005)).

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, 263 A.3d 1028 (Table), 2021 WL 4735059, at *6 (Pa.Commw.Ct. 2021) (citation omitted).

Here, each Plaintiff lacks standing. The Individual Plaintiffs lack standing because any purported harm they face in November is entirely speculative. The Organizational Plaintiffs lack standing because "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)). And all Plaintiffs lack standing because, given the WBOE's adoption of a policy not to provide notice and curing, there is no causal connection between the relief they seek (telling the WBOE to provide them certain information) and the harm they seek to redress (not having their invalid mail-in vote count). *See Firearm Owners*, 261 A.3d at 473-74.

Further, because the WBOE will vote again in September regarding whether to allow or not allow curing for the 2024 general election (Ostrander Dep., 126-27), (i) all Plaintiffs lack standing and (ii) this case is not ripe for adjudication. In light of this yet-to-be taken vote, the entire

premise of this action is speculative. *E.g., Carter*, 2021 WL 4735059, at *4-7 (dismissing for both lack of standing and ripeness). This lack of ripeness is further cemented because DOS is changing the emails sent via the SURE system for the November election so they are more accurate for non-curing counties. Marks Dep., 76-82, 118-119.

1. The Individual Plaintiffs Lack Standing and the Case Is Not Ripe Because Any Harm to Them in November Is Entirely Speculative

Each Individual Plaintiff voted by mail in the April 2024 primary and, consistent with the Pennsylvania Supreme Court authority discussed above, had his or her ballot declared invalid because of a declaration envelope error. Compl. ¶¶ 15-21. Each still plans to vote by mail in November. *Id*. As Plaintiffs in this lawsuit, they are now well aware of the importance of following the instructions regarding how to properly fill out the mail-in ballot and intend to comply with the rules in November. JSOF ¶8. With that knowledge and intent, it strains credulity to believe that any of them would, in November, fail to properly fill out their mail-in ballot. And, before delivering control of the ballot to the WBOE, each could choose to take it to the WBOE and make sure it has been filled out correctly or call the WBOE to discuss any concerns. Ostrander Dep., 90, 177-78. And, if any Plaintiff did have his or her ballot invalidated in November, they could pursue an appeal under 25 P.S. § 3157.

If Plaintiffs properly fill out their mail-in ballots for the November election, the concerns raised by this action are not implicated one bit. Thus, with regard to the forward-looking relief sought by the Complaint (and forward-looking relief is the only relief sought), **any claimed injury to the Individual Plaintiffs is entirely speculative**. This is highlighted by the fact that the WBOE will vote again in September on whether to allow or not allow curing and that DOS is changing the langue of the emails that the SURE system sends to voters. **Such speculative injuries do not support standing or ripeness**. *E.g*., *Tishok*, 133 A.3d at 124 (Pa.Commw.Ct. 2016); *Americans*

for Fair Treatment, Inc. v. Phil. Fed. of Teachers, 150 A.3d 528, 536 (Pa.Commw.Ct. 2016) ("The mere possibility that future events might occur that could cause one of Plaintiff's teacher members to be affected by union leave teachers' seniority is not sufficient to establish the direct and immediate interest required for standing."); *Pittsburgh Palisades Park*, 888 A.2d at 660 (no standing because "any possible harm . . . is wholly contingent on future events."); *Carter,* 2021 WL 4735059, at *4-7 (dismissing for both lack of standing and ripeness). Simply, no non-speculative injury supporting standing exists and the action is not ripe – both of which require dismissal.

2. The Organizational Plaintiffs Lack Standing Because Their Allegations Regarding Diversion of Resources Are Insufficient As a Matter of Law to Confer Standing

Organizations must satisfy the same standards for standing that apply to individuals – injury in fact, causation, and redressability. In discussing organizational standing, the U.S. Supreme Court recently stated:

> Like an individual, an organization may not establish standing simply based on the "intensity of the litigant's interest" or because of strong opposition to the government's conduct, "no matter how longstanding the interest and no matter how qualified the organization." A plaintiff must show "far more than simply a setback to the organization's abstract social interests."

All. for Hippocratic Medic., 602 U.S. at 369-70 (citations omitted).

Plaintiff CCJ alleges that the policy of the WBOE has "directly impaired [its] ability to fulfill its mission and forced [it] to divert time and resources away from its core work to address the disenfranchisement of the County's voters." Compl. ¶135; *see also, id.* at ¶¶ 140, 141. The Washington Branch NAACP makes similar allegations. *Id.* at ¶145 ("the Washington Branch NAACP has had to shift its resources away from previously planned initiatives . . . Instead, the NAACP has redirected resources to address the county board's actions, advocating against the new policy and investigating concerns about voter disenfranchisement in the community."); ¶146.

None of the Individual Plaintiffs are alleged to be members of CCP or the Washington Branch NAACP. Organizational Plaintiffs appear to believe that they can obtain standing by simply alleging that they have had to divert resources to deal with an issue involved in the litigation. The law does not sweep that broadly.

As articulated by the Pennsylvania Supreme Court in *Ball*, "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.*, 141 F.3d at 79). Similarly, in discussing standing under the federal Constitution, the U.S. Supreme Court recently held that standing does not "exist[] when an organization diverts its resources in response to a defendant's actions." *All. for Hippocratic Medic.*, 602 U.S. at 370.[3] Instead, organizational plaintiffs must plead (and prove) that the defendants' actions "directly affected and interfered with [the plaintiffs'] core business activities." *Id.*at 395. This injury is similar "to a retailer who sues a manufacturer for selling defective goods to the retailer." *Id. "*An organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action. An organization cannot manufacture its own standing in that way." *Id.* at 394. The Organizational Plaintiffs' alleged injuries here do not come close to satisfying the above standards including those articulated by the Pennsylvania Supreme Court in *Ball*.

Rather, Plaintiffs simply seek "to compel the [WBOE] to act in a way that aligns with its mission or its investment of resources." *Ball* 289 A.3d at 19. That is insufficient, as a matter of

[3] While federal standing cases are not controlling, *see Allegheny Reproductive Health Cntr. v. Pa. Dept. of Hum. Serv's,* 309 A.3d 808, 832 (Pa. 2024), they are persuasive authority, particularly the pronouncements of the U.S. Supreme Court and because of the similarities in the standards set forth in *Ball* and *All. for Hippocratic Medic.*

law, to confer standing and the claim of the Organizational Plaintiffs must be dismissed.

3. All Plaintiffs Lack Standing and the Action Is Not Ripe Due to a Failure to Demonstrate Causation

The WBOE adopted a policy *not* to provide notice and curing. Under that policy, if a mail-in ballot is defective, a voter does not have chance to remedy the fatal error. This includes attempting to remedy it by filing a provisional ballot – such a remedy is not supported by, and is in fact contrary to, the Election Code. *See* 25 P.S. § 3050(a.4)(5)(ii)(F) (a provisional ballot "shall not be counted" in any circumstance where the voter's mail ballot "is timely received by a county board of elections.").[4] Yet, Plaintiffs ask this Court to force the WBOE to provide them information about opportunities to cure a defective mail-in ballot. The Election Code does not permit use of a provisional ballot as a means of curing, and Washington County has not enacted any separate policy which would permit curing of a defective mail-in ballot by some other mechanism. *See infra.* pp. 29-35. Thus, there is no causal connection between the relief Plaintiffs seek – telling the WBOE to provide them certain information – and the harm they seek to redress – not having their invalid mail-in vote count. *E.g., Firearm Owners*, 261 A.3d at 473-74. Accordingly, standing is lacking and the Complaint should be dismissed.

Additionally, because the WBOE will vote again in September on its notice and curing policy and because DOS is changing the emails in question sent by SURE, the instant claim is not ripe requiring dismissal. *Carter,* 2021 WL 4735059, at *4-7.

[4] The inability, as a matter of law, to use a provisional ballot to cure a defective mail-in ballot that has been received by the WBOE is discussed in detail *infra*. at Section F, pp. 29-35.

C. WBOE'S Legislatively-Enacted Policy Not to Provide Notice and Curing Is Not Subject to a Procedural Due Process Challenge

In a public meeting on March 12, the WBOE discussed options for providing (or not providing) notice and curing for a defective mail-in ballot for the 2024 primary. Ostrander Dep., 52-62, 192-96. At the WBOE's next public meeting on April 11, 2024, the WBOE, in a public vote, passed a policy of *not* permitting notice and curing of defective mail-in ballots for the 2024 primary. *Id.*, 63-72, 91-92, 196-99. The policy agreed to at the meeting included instructions to the Washington County Elections Director to use "Record-Ballot Returned" on the SURE system drop down menu when recording receipt of a mail-in ballot and to tell voters who inquired about their mail-in ballots only that their mail-in ballot had been received, recorded and placed under security. *Id.*

The WBOE's adoption of that policy for the 2024 primary is a clear legislative act by elected officials who the residents of Washington County voted into office to set policy for the County. Plaintiffs obviously disagree with that legislative act and wish a different policy had been adopted – they want notice and curing. But that does not give rise to a basis for a procedural due process attack on what is clearly a legislative, as opposed to an adjudicative act, by the WBOE. *See Sutton,* 220 A.3d at 1032 ("[A]djudicative 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 adjudication. Agency actions that are legislative in character result in rules of prospective effect and bind all, or at least a broad class of citizens.").

The legislative adoption of the policy for the 2024 primary is at the heart of Plaintiffs' claims. *E.g.,* Compl. ¶¶ 2, 8, 55-62, 67, 70. For example, Plaintiffs compare communications under the prior policy in 2023 (which permitted notice and curing) to current communications made "pursuant to the Board's new policy" and compare WBOE's policy to those utilized in neighboring

counties that do provide notice and curing. *Id.,* ¶¶ 2, 67, 70, 71, 53, 158. Clearly, the WBOE's new policy, including how mail-in votes were recorded in SURE and what voters were told if they called the Elections Office, is the root of this lawsuit. That is fatal to Plaintiffs' claim.

Plaintiffs bring a single claim for an alleged procedural due process violation. But, as a matter of law, legislative acts of a public body (like the WBOE) cannot be challenged on procedural due process grounds. *Vega*, 2023 WL 4853004, at *3 (*quoting Sutton,* 220 A.3d at 1032). Rather, procedural due process applies only to adjudicative decisions. As the Pennsylvania Supreme Court held in *Sutton*, procedural due process is "implicated only by adjudications, ***not by state actions that are legislative in character***." *Id.* (emphasis added); *accord Vega, supra* ("[A] procedural due process claim necessarily requires an adjudicative agency action."); *see also Ondek v. Allegheny County Council,* 860 A.2d 644, 648 (Pa.Commw.Ct.. 2004) (discussing legislative versus adjudicative actions under the Local Agency Law).

As the Supreme Court stressed in *Mazur v. Trinity Area Sch. Dist*., 961 A.2d 96, 104 (Pa. 2008):

> 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, no adjudicative decision or action is challenged. Only legislative action in adopting the new policy in April 2024 is challenged, which policy included how to record mail-in votes in the SURE system and what to tell voters who inquired about the status of their mail-in ballot. That legislative action is not subject to a procedural due process challenge. *Vega, supra; Sutton, supra.*

Accordingly, Plaintiffs' procedural due process claim – and that is the only claim they have brought – fails as a matter of law. Summary Judgment should be entered for the WBOE.

D. Plaintiffs' Procedural Due Process Claim Also Fails Because No "Life, Liberty or Property" Interest Is at Stake

Even if the Court disagrees and finds that (i) Plaintiffs have standing, (ii) the claim is not moot (iii) is ripe and (iv) they are challenging non-legislative action, Plaintiffs' claim still fails for lack of an underlying liberty interest protected by procedural due process. The procedural due process clause only covers protected "life, liberty or property" interests. *See generally,* Pa. Const. Art. I, §1. In the initial step of a procedural due process analysis, the Court must first determine whether Plaintiffs have a protected "life, liberty or property interest" with which the WBOE has interfered, *i.e.,* whether due process applies in the first place, and only if it does should the Court then move on to determining what process is due. *E.g., Com. v. Turner*, 80 A.3d 754, 764 (Pa. 2013) (citing *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)); *Pennsylvania Game Com'n v. Marich*, 666 A.2d 253, 256 (Pa. 1995) (explaining that courts only "employ the methodology" of *Mathews* after first determining "that a protected liberty of property right was involved"). Life and property interests are not implicated here. Thus, if no liberty interest is at stake, Plaintiffs' procedural due process claim fails.

Plaintiffs are correct that voting is a fundamental right for *substantive* due process purposes. But Plaintiffs have not brought a substantive due process claim, only a procedural due process claim. None of the Pennsylvania decisions cited in the Complaint that describe voting as a fundamental right arise in the context of a *procedural* due process claim. *See* Compl. ¶154. No Pennsylvania court (or federal Circuit Court of Appeals) has ever held that voting is a liberty interest protected by procedural due process. The absence of such a decision should be of no surprise.

"The range of deprivations implicating cognizable state-created liberty interests is narrow" and "the notion of constitutionally created liberty interests [] is quite narrow." *Memphis A. Phillip Randolph Inst. v. Hargett*, 482 F.Supp.3d 673, 686-87 (M.D.Tenn. 2020). A protectible liberty interest under the due process clause is **not** synonymous with a fundamental right for other constitutional purposes such as equal protection. *See Richardson*, 978 F.2d at 231 ("For procedural due process, the question is not whether the plaintiff asserts a *fundamental right*, but instead whether the right they assert is a *liberty interest*.") (emphasis in original)*; League of Women Voters v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) ("That Ohio's voting system impinges on the fundamental right to vote does not, however, implicate procedural due process . . . the League has not alleged a constitutionally protected interest.").

Consistent with this law, no Pennsylvania Court has *ever* held that voting is a liberty interest protected by procedural due process. Likewise, no U.S. Circuit Court of Appeals has ever held that voting is a liberty interest protected by the procedural due process clause, nor has the U.S. Supreme Court. In fact, the two federal Circuit Courts of Appeals that have directly addressed the issue have found that it is **not**. *Richardson,* 978 F.3d 230-32; *Brunner*, 548 F.3d at 479; *see also Memphis A. Phillip Randolph Inst.*, 482 F.Supp.3d at 676-92 (voting is not a liberty interest protected by procedural due process); *Lecky v. Va. State Bd. of Elections*, 285 F.Supp.3d 908, 918 (E.D.Va. 2018) (same).

The decisions of these two federal Circuit Courts of Appeals are correct and, in particular, the Fifth Circuit's decision in *Richardson* is detailed and well-reasoned. *Richardson*, in precise fashion, examined historical case law, as did the U.S. District for the Middle District of Tennessee in *Memphis A. Phillip Randolph Inst.*, 482 F.Supp.3d at 685-92. This included law establishing that state created liberty interests are "narrow" and "generally limited to freedom from restraint."

Richardson, 978 F.3d at 230 (quoting *Sandin v. Conner,* 515 U.S. 472, 484 (1995) and *Jordan v. Fisher*, 823 F.3d 805, 810 (5th Cir. 2016)). The *Richardson* court also analyzed liberty interests arising from the Constitution as articulated by the U.S. Supreme Court in *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 572 (1972), none of which "immediately resemble" the right to vote. *Id.* at 230-31; *accord Memphis A. Phillip Randolph Inst.*, 482 F.Supp.3d at 685-92. The Court should follow these decisions. The contention that voting amounts to a liberty interest protected by procedural due process is wrong. This Court should not become the first Pennsylvania court to embrace it. Because Plaintiffs' claim does not involve a protected liberty interest, its sole claim for a violation of procedural due process fails. Summary Judgment should be entered for the WBOE.

In apparent recognition of this fatal deficiency, in footnote 1 of their Complaint, Plaintiffs cite to three non-binding federal district court cases, *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F.Supp.3d 158, 228 (M.D.N.C 2020), *Frederick v. Lawson*, 481 F.Supp.3d 774, 794 (S.D.Ind. 2020), and *Self Advoc. Sols. N.D. v. Jaeger*, 464 F.Supp.3d 1039, 1053 (D.N.D. 2020) that have applied procedural due process to regulations concerning mail-in voting. These should not impact the determination that voting is not a protected liberty interest. First, each was decided before *Richardson.* Plaintiffs' Complaint cites no authority on this critical issue that post-dates *Richardson.* Second, each case was a state-wide challenge to a voting regulation made during the Covid-19 pandemic. In none of the states at issue was there clear, binding precedent from the state's highest court holding the underlying election regulation valid. In contrast, here we have the Pennsylvania Supreme Court's decisions in *Pa. Dems* and *Ball.* Third, unlike the clear and *objective* mail-in voter regulations at issue here (*i.e.,* signature and date requirements), the cited cases primarily concerned *subjective* "signature matching" requirements. Fourth, unlike the

warning offered here to voters that "[f]or your ballot to count, you must follow all of these steps," no such notice that a ballot might be rejected for lack of signature match was provided in *Lawson* or *Jaeger*. 481 F.Supp.3d at 781; 464 F.Supp.3d at 1044. Finally, and most importantly, none of these courts engaged in the detailed legal analysis employed by the Fifth Circuit in *Richardson. Richardson,* in detailed, compelling fashion, explains why the holdings in these (and similar) cases are legally infirm. 978 F.3d at 230-33. The Court should follow *Richardson*'s correct and legally sound analysis and enter Summary Judgment for the WBOE.

E. ***Pa. Dems.*** **Nullifies Any Claimed Right to Notice and Curing of a Defective Mail-In Ballot, Precluding Plaintiffs' Procedural Due Process Claim**

Even if the Court determines that voting is a protected liberty interest, the Pennsylvania Supreme Court's decision in *Pa. Dems.* nonetheless precludes Plaintiffs' claim. In order to state a procedural due process claim, Plaintiffs must first establish a protected "right" that has been violated. *E.g., Turner*, 80 A.3d at 764. Plaintiffs complain about lack of notice and an opportunity to cure their defective mail-in ballot. *See e.g.* Compl. ¶160. But the Pennsylvania Supreme Court has found that no constitutional, statutory, or legal right to notice and an opportunity to cure a defective mail-in ballot exists. *Pa. Dems.*, 238 A.3d at 372-74. **Plaintiffs seek to enforce a right that the Supreme Court has held does not exist**. And, without a protected right, they have no procedural due process claim.

The Court cannot disregard the binding decision of the Pennsylvania Supreme Court in *Pa. Dems.* Based on *Pa. Dems.*, Plaintiffs have no right to "notice and an opportunity to cure." Lacking such a right, they obviously have no basis for a procedural due process claim asserting that they were denied the very right that they have no entitlement to. "It would 'stretch [] the concept too far to suggest that a person is deprived of liberty' when the Court has said that he has no right to the object of his alleged liberty interest." *Richardson*, 978 F.3d at 232 (quoting *Roth,* 408 U.S. at

572). Plaintiffs cannot base a procedural due process claim on a right that the Pennsylvania Supreme Court has determined does not exist – but that is exactly what the Complaint tries to do. Summary Judgment should be entered for WBOE on this basis.

The clear lack of a right on which a procedural due process claim can be founded is highlighted by the relief Plaintiffs ask from this Court. They want the Court to order the WBOE to use a certain code in the SURE system. But the document that provides advice on when to use certain codes in SURE has no legal force. It is not a regulation issued by DOS, nor a Directive from DOS; it is not even a non-legally binding Guidance from DOS. Deputy Secretary Marks referred to it as a "product notification." Marks Dep., 32. He also testified that the codes are "optional," counties are not obligated to use a particular code, and a county has full discretion to select the code they think is proper based on the county's own policy. *Id.*, 39-40, 69, 83-84, 88-89, 94. Followed to its logical extreme, Plaintiffs ask this Court to enforce a "right" that the Supreme Court has held does not exist, and to do so by ordering the WBOE to insert a code in the SURE system, which code is contrary to its legislatively-adopted policy, and which code and the instructions regarding it are found in a document that has now legal force and which Mr. Mark's indicated the WBOE is not required to follow. That is utter nonsense, yet it is exactly what Plaintiffs ask the Court to do. Summary Judgment should be entered.

F. Plaintiffs Have No Interest Protected by Due Process in Filing a Provisional Ballot to Cure a Defective Mail-In Ballot

Central to Plaintiffs' allegations and the relief sought is the assertion that they can file a provisional ballot to cure a defective mail-in ballot. Compl. ¶¶ 6, 22, 51, 74, 81, 158, 160. This too is wrong and shows a fundamental misunderstanding of the Election Code. The Code provides no right to file a provisional ballot to cure a defective mail-in ballot. In actuality, the Code has express language providing that such a provisional ballot cannot be counted. 25 P.S.

§ 3050(a.4)(5)(ii)(F). Accordingly, assuming *arguendo* that the Court determines that (i) Plaintiffs have standing, (ii) the case is not moot, (iii) is ripe, (iv) is not barred under *Vega* and *Sutton* because it challenges only legislative action, (v) voting constitutes a liberty interest protected by procedural due process, and (vi) *Pa. Dems* does not bar the relief Plaintiffs seek, Plaintiffs' claim still fails because they have no legal right to use a provisional ballot to cure a defective mail-in ballot. Without such a right, Plaintiffs hold no "interest" protectible by due process that is being infringed. *See Turner*, 80 A.3d at 764.

The Commonwealth Court has already decided this issue. In *In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election,* 241 A.3d 695 (table), 2020 WL 6867946, at *4 (Pa.Commw.Ct. 2020), the Commonwealth Court held that, under the plain language of 25 P.S. § 3050(a.4)(5)(ii)(F), it could not order provisional ballots which were cast in an effort to cure defective mail-in ballots to be counted. *Id.* The Court stated:

> With regard to the small number of provisional ballots cast by a voter whose mail-in ballots were timely received, our analysis is the same. Section 1204(a.4)(5)(ii)(F) plainly provides that a provisional ballot shall not be counted if "the elector's absentee ballot or mail-in ballot is timely received by a county board of elections." 25 P.S. § 3050(a.4)(5)(ii)(F). Like the language relating to the requisite signatures, this provision is unambiguous. We are not at liberty to disregard the clear statutory mandate that the provisional ballots to which this language applies must not be counted.

2020 WL 6867946, at *4. The Court further explained:

> Finally, although our decision may be perceived as disenfranchising voters, the Election Code mandates that these deficient ballots **shall not be counted**. This Court emphasizes that it is following and faithfully applying the mandates of our General Assembly and our Supreme Court precedent. Accordingly, the plain language of the Election Code and the lack of evidence in support of the position advanced by the Appellees require this Court to reverse the trial court's decision.

2020 WL 6867946, at *5 (emphasis in original).

As the Commonwealth Court's opinion makes clear, provisional ballots are not a failsafe for errors made in mail-in voting. The Legislature has not authorized provisional voting to cure mail-in ballot defects.[5] The General Assembly's silence is dispositive: provisional voting may not be used to cure mail-in ballot defects. *See 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.").

Rather, for a voter who requested a mail-in ballot, the Election Code provides for use of a provisional ballot in ***only one single*** circumstance: the voter "requests a [mail] ballot [but] is not shown on the district register as having voted."[6] 25 P.S. § 3150.16(b)(2); *see also* 25 P.S. § 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[.]"). The single exception in the Code is not implicated here, as Plaintiffs admit that their mail-in ballots were received by the WBOE before 8 p.m. on Election Day.

Moreover, as the Commonwealth Court recognized, the **express language** of the Election Code precludes a provisional ballot cast in an effort to cure a defective mail-in ballot from being counted. The Complaint in Paragraph 51 cites to 25 P.S. § 3050(a.4)(5), but that section, when

[5] 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-in ballot by voting provisionally and, in substance, is nearly identical to the limited language in 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 provisionally and the validity of any such vote are to be determined under "State law," which the Pennsylvania General Assembly has done in 25 P.S. § 3050(a.4)(5)(ii)(F) as discussed below. HAVA provides Plaintiffs no relief.

[6] 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. The Election Code establishes a three-step sequence for mail voting: (1) first, the voter applies for, is sent, and casts his ballot; (2) next, the county board receives the ballot; and (3) finally, the board canvasses the ballot to determine its validity and whether to count it. *See In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d at 1067 (voters "cast their . . . mail-in ballots," the board "receiv[es]" the ballots, and "[t]he pre-canvassing or canvassing of absentee and mail-in ballots then proceeds"). The exception permitting filing a provisional ballot applies if the process never reaches step two (2) and is not implicated here.

read in complete fashion and in conjunction with the sections of the Code that follow it, actually defeats Plaintiffs' claim. Subclause (i) of 25 P.S. § 3050(a.4)(5) reads:

> ***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). Subclause (ii)(F) of 25 P.S. § 3050(a.4)(5) then goes on to unambiguously require 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) (emphasis added).

As the above excerpts show, the plain language of Section 3050(a.4)(5)(i) ("*Except as provided in subclause (ii)*") declares the section inapplicable if Section 3050(a.4)(5)(ii) applies. And Section 3050(a.4)(5)(ii)(F) undoubtedly applies here. Any mail-in ballot recorded in the SURE system as "received" is *per se* "timely received" because, to be in SURE, it must have been received by the WBOE before 8 p.m. on election day. Thus, under 25 P.S. § 3050(a.4)(5)(ii)(F), any provisional ballot cast in an effort to cure a defective but "timely received" mail-in ballot cannot be counted. Because the Court cannot disregard or rewrite the plain language of the Election Code[7], this unambiguous statutory language is dispositive.

The core relief Plaintiffs seek – to be able to cast and have counted a provisional ballot to cure a defective mail-in ballot – is directly contrary to the Code. As Washington County's Elections Director testified, "that provisional ballot would not be counted if we had a [mail-in] ballot marked as received." Ostrander Dep., 89-90, 214-16. Even though not authorized by the

[7] *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1231.

Code, Plaintiffs are requesting the ability to use a provisional ballot to remedy an invalid mail-in ballot. **That is curing**. But WBOE did not permit curing in the 2024 primary. And *Pa. Dems*. precludes this Court from ordering a board to require notice or curing. *Pa. Dems.,* 238 A.3d at 374. 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." *In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election,* 2020 WL 6867946, at *4. This Court lacks the power to impose the relief Plaintiffs seek and should enter Summary Judgment.

The only Pennsylvania legal authority cited in the Complaint to support the purported ability to cast a provisional ballot to cure a defective mail-in ballot is *Koehane v. Delaware County Board of Election*, No. CV-2023-004458 (Del.Cnty.Ct.Comm.Pl. 2023). *Keohane* is unpersuasive and inapposite. Initially, Judge Whelan believed there is "ambiguity" between 25 P.S. § 3050(a.4)(5) subclauses (i) and (ii)(F), but no such ambiguity exists or can exist due to subclause (i)'s express exception (*Except as provided in subclause (ii)*") that makes it inapplicable if subclause (ii) applies, *see supra* pp. 29-32. As an exception to its rule, Section 3050(a.4)(5)(ii)(F) *per se* **cannot** conflict with Section 3050(a.4)(5)(i). Moreover, Judge Whelan concluded that subclause (i) provides a right to cure a mail-in ballot defect by provisional ballot, but that, too, is incorrect, *see supra id*. Thus, Judge Whelan's conclusion was not only incorrect, but irreconcilable with the plain terms of the Election Code and the authorities noted above. And *Keohane* is at odds with the Commonwealth Court's decision in *In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election,* 2020 WL 6867946, at *4 – between an opinion of a three judge panel of the Commonwealth Court even if unpublished and an unpublished opinion of a fellow Common Pleas Court judge, the Commonwealth Court decision should be given greater persuasive weight. Most importantly, Judge Whelan's decision concerned Delaware County, which **permits** curing of

defective mail-in ballots. But here the WBOE's present policy **does not permit** curing. A decision allowing the use of a provisional ballot to cure a defective mail-in ballot in a "curing county" has no bearing or weight in a "non-curing county." *Keohane* is clearly inapposite.

The Secretary's "Guidance" cited in Paragraph 51 of the Complaint is equally unavailing. The Guidance is, ironically, misguided. First, such Guidance does not have the force of law and is not binding on the WBOE. *E.g., Ziccarelli v. Allegheny Cnty. Bd. of Elections*, 2:20-cv-1831-NR, 2021 WL 101683, at *5 n.6 (W.D. Pa. Jan. 12, 2021); Ostrander Dep. at 181-82; Marks Dep., 13-15. Second, the only authority on which the Guidance is based is *Keohane*, which as discussed above is no authority at all, particularly in a "non-curing" county. The Guidance does not cite or discuss the plain language of 25 P.S. § 3050(a.4)(5) subclauses (i) and (ii)(F) – the text of the law which speaks to these issues.

Most importantly, history shows why the Secretary's Guidances are not legally binding or enforceable – **they are often wrong**. For example, in 2020, the Secretary issued a Guidance advising that boards of election should count "naked ballots" (mail-in ballots without the required secrecy envelope). *Pa. Dems.,* 238 A.3d at 376 n. 29. Contrary to this Guidance, the Supreme Court in *Pa. Dems* held that "naked ballots" were legally infirm and could not be counted. *Id.* at 374-80. The Secretary's Guidance in that instance was wrong and provided incorrect information to county boards of election. The current Guidance – given the plain language of 25 P.S. § 3050(a.4)(5) subclauses (i) and (ii)(F) – is equally as wrong, particularly for a county like Washington, whose duly elected officials voted not to permit notice and curing.

Regardless of his "Guidance," "the Secretary has no authority to definitively interpret the provisions of the Election Code." *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d at 1078 n.6. Correspondingly, the Secretary obviously has no authority

to *change* the law, let alone do so through the issuance of mere Guidance – and, thus, lacks authority to announce a right to notice and cure of mail-in ballot defects when the Pennsylvania Supreme Court has determined that no such "constitutional or statutory" right exists. *Pa. Dems.*, 238 A.3d at 374. The Election Code vests authority to administer elections and to determine whether to count ballots in county boards of elections, not the Secretary. *Compare* 25 P.S. § 2642 (setting out county boards' expansive powers) *with id.* § 2621 (setting out Secretary's limited powers). Mr. Marks acknowledged this fact. Marks Dep., 14. The WBOE has exercised its statutory authority and adopted a policy not to permit notice and curing. The Secretary's Guidance does not and cannot change that policy. Summary Judgment should be entered for the WBOE.

Further, what the Guidance instructs and what Plaintiffs seek in this action is illusory in Washington County. Of what aid is it to a voter to tell him he can vote a provisional ballot, when the Election Code mandates that the provisional ballot he would vote will not be counted? Yet, that is what the Guidance does and that is the relief Plaintiffs seek to have this Court order. *See* Compl., WHEREFORE Clause (c). As Elections Director Ostrander testified, a "provisional ballot would not be counted if we had a [mail-in] ballot marked as received." Ostrander Dep., 214-16; JSOF ¶47 (agreeing provisional ballot would not count). Because the WBOE does not permit notice and curing, to tell a voter that they can file a provisional ballot "would mislead voters in Washington County," *id.*, 218, which the Court obviously does not want to do.

G. <u>The Court Should Apply the *Andersen/Burdick* Framework</u>

Plaintiffs invite the Court to look to federal due process cases for the standards to use in evaluating procedural due process challenges under the Pennsylvania Constitution. *See* Compl. ¶152. If the Court accepts that invitation, it should apply the *Anderson/Burdick* framework announced by the U.S. Supreme Court for evaluating "[c]onstitutional challenges to specific

provisions of a State's election laws" under "the First and Fourteenth Amendment" rather than the *Mathews v. Eldridge* ("*Mathews*") standard proffered by Plaintiffs. *Anderson v. Celebreze*, 460 U.S. 780, 789 (1983); *see Richardson,* 978 A.2d at 233-41.

While the *Anderson/Burdick* framework arises out of equal protection jurisprudence, the U.S. Supreme Court's language in adopting it discusses Fourteenth Amendment challenges in general. *Anderson*, 460 U.S. at 789. Fourteenth Amendment challenges include procedural due process challenges. The U.S. Courts of Appeals for the Fifth, Ninth and Eleventh Circuits have all applied *Anderson/Burdick* to procedural due process challenges to voting regulations. *Richardson,* 978 F.3d at 233-41; *Ariz. Democratic Party v. Hobbs,* 18 F.4th 1179, 1194-95 (9th Cir. 2021); *New Ga. Project v. Raffensperger,* 976 F.3d 1278, 1282 (11th Cir. 2020). The reasoning of these courts is on point here and the Court should follow it.

Anderson/Burdick "is better suited to the context of election laws than is the more general [*Mathews*] test." *Richardson*, 978 F.3d at 234. This is because "[t]here must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos is to accompany the democratic process." *Id.* (citations omitted). State and local bodies, "not [] judges[,]" are "authorized to establish rules that govern elections." *Id.* (citations omitted). This need to regulate elections is at odds with the *Mathews* test because applying *Mathews* "inevitably result[s] in courts weighing the pros and cons of various balloting systems, thereby tying the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* (citations omitted). "Unlike [*Mathews*], the *Anderson/Burdick* approach recognizes that the state's important regulatory interests are generally sufficient to justify reasonably, nondiscriminatory restrictions. Because *Anderson/Burdick* – unlike [*Mathews*] – appropriately accounts for the state's interest in regulating voting, it provides the most appropriate test for procedural due process claims

challenging elections laws." *Id.* (citations omitted). Unlike *Anderson/Burdick,* "[t]he generalized due process argument that the plaintiffs argue[] for [] would stretch concepts of due process to their breaking point." *Raffensperger*, 976 F.3d at 1282. And "[g]ranting Plaintiffs' relief here would improperly immerse the Court in a sensitive political dispute, forcing it to make judgments that appear "political, not legal." *Rucho v. Common Cause*, 588 U.S. 684, 707 (2019); *see also, Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (courts should avoid standards of review in right-to-vote cases that would cause "courts to rewrite state electoral codes").

Using *Anderson/Burdick* here is also consistent with the state of the law in Pennsylvania. In *Pa. Dems.,* the Pennsylvania Supreme Court determined that it lacked authority to order county boards of election to implement notice and curing for defective mail-in ballots. And, in *Ball*, the Supreme Court held that the date requirement is mandatory. *Chapman* held that each county board has discretion whether to adopt, or not adopt, a policy permitting notice and curing. WBOE adopted a policy that is consistent with this Pennsylvania appellate precedent. To engraft a procedural due process standard that fails to properly account for this Pennsylvania precedent onto the WBOE's legislative decision would clearly be improper. *Anderson/Burdick* appropriately recognizes and accounts for this Pennsylvania precedent, *Mathews* does not.

Applying *Anderson/Burdick*, here Plaintiffs' claim fails. The "usual burdens of voting," such as properly completing a mail-in ballot's declaration envelope, do not run afoul of due process under *Anderson/Burdick*. *Crawford*, 553 U.S. at 198; *Brnovich v. Democratic Nat. Committee*, 594 U.S. 647, 669 (2021).[8] No binding authority has *ever* invalidated rules, like the WBOE's policy, imposing "usual burdens of voting" under the *Anderson/Burdick* balancing framework. *Crawford*,

[8] Moreover, the WBOE policy to not provide for notice and curing concerns only mail-in voting and there is no constitutional right to vote by mail. If in-person voting is offered, no one is denied "the right to vote" by policies regulating mail-in voting. *E.g. Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-05 (5th Cir. 2020) (citing *McDonald v. Board of Election Com'rs of Chicago*, 394 U.S. 802, 807-11 (1969)).

553 U.S. at 198; *Brnovich*, 594 U.S. at 669; *NAACP*, 97 F.4th at 135. This Court should not be the first. Summary Judgment should be entered for the WBOE.

Further, because the WBOE's no-curing policy imposes, at most, a minor burden on voting – namely filling out your mail-in ballot correctly – under *Anderson/Burdick*, at most, it is subject to "rational basis review," *Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020), which is "quite deferential," *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 153 (3d Cir. 2022).[9] Under that standard, the "State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory" election regulations. *Timmons*, 520 U.S. at 351-52. Rational basis review "is not a license for courts to judge the wisdom, fairness or logic of legislative choices." *Donatelli v. Mitchell*, 2 F.3d 508, 515 (3d Cir. 1993).

That rationale basis review is satisfied here is the necessary and logical result of the General Assembly's decision not to provide notice and curing as part of Act 77, as well as the Supreme Court's decisions in *Pa. Dems.* and *Ball* and the Commonwealth Court's decision in *Chapman. See generally, Richardson*, 978 F.3d at 235-41; *Raffensperger*, 976 F.3d at 1280-83; *Hobbs,* 18 F.4th at 1186-94. A policy that is in accord with Act 77 and this Pennsylvania precedent (and the WBOE's policy is) *per se* cannot lack a rational basis. Again, Summary Judgment for the WBOE is appropriate.

[9] Rational-basis review is one of the most forgiving standards of review in American law, and laws reviewed under this standard are "overwhelmingly likely to be upheld." M. Barnes & E. Chemerinsky, *The Once and Future of Equal Protection Doctrine?*, 43 Conn. L. Rev. 1059, 1077 (2011). Courts must uphold a law under rational-basis review if there is *any* conceivable basis to uphold it. *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993).

H. Plaintiffs are Provided Sufficient Procedural Due Process for the 2024 General Election

Even if the Court determines that (i) Plaintiffs have standing, (ii) their claim is not moot, (iii) is ripe, (iv) is not precluded because they challenge only legislative action, (v) voting is a liberty interest protected by procedural due process, (vi) they can make a procedural due process claim for not being provided "notice and curing" for a mail-in ballot even though *Pa. Dems* holds they have no such right to "notice and curing," (vii) Plaintiffs can cure a defective mail-in ballot by filing a provisional ballot, and (viii) the *Anderson/Burdick* standard is not the correct standard to apply, Plaintiffs still lose for the simple reason that they have adequate notice as to the upcoming November general election and the Election Code provides them an opportunity to be heard.

As Plaintiffs admit, the baseline inquiry is the need for proper notice and an opportunity to be heard. Compl. ¶151 *citing Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018); *accord Com. v. Wright*, 961 A.2d 119, 132 (Pa. 2008) ("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.").

As to notice: the mail-in ballot instructions expressly tell the voter, "[f]or your ballot to count, you must follow all of these steps." Jt.Ex. E. That is sufficient notice for procedural due process purpose. *See Johnson v. Wetzel,* 311 A.3d 684, 691 (Pa.Cmwlth. 2024); *see also, Richardson*, 978 F.3d at 237 (voters were provided notice of the challenged signature verification requirement as part of ballot instructions); *Lawson*, 481 F.Supp.3d at 781 (lack of notice of signature verification requirement as part of ballot materials factored into due process analysis); *Jaeger*, 464 F.Supp.3d at 1044 (same). Moreover, as to Plaintiffs in particular, and keeping in mind that the Complaint seeks only forward-looking injunctive relief related to the upcoming 2024 general election, the history and facts of this suit provide Plaintiffs with ample notice that a

defective mail-in ballot will not be counted. And, in the incredibly unlikely scenario that one of the Plaintiffs would submit a defective mail-in ballot in the upcoming election, they now know that they can attend the canvas to learn if their ballot has been rejected and can subsequently file a statutory appeal pursuant to 25 P.S. § 3157. Likewise, the Organizational Plaintiffs can attend the canvas to try to protect other voters. That is more than sufficient notice. *See Johnson, supra.*

As to an opportunity to be heard: If someone happens to have their mail-in ballot rejected, they can appeal that rejection to the Court of Common Pleas under 25 P.S. § 3157 where a full hearing is required.[10] Such a hearing clearly satisfies procedural due process. As the Pennsylvania Supreme Court has held, "the right to procedural due process is distinct from the right the government seeks to impair" and procedural due process enables "persons to contest the basis upon which the State proposes to deprive them of protected interests." *Washington v. Pa. Dept. of Corr.*, 306 A.3d 263, 285 (Pa. 2023); *accord Memphis A. Phillip Randolph Inst.*, 482 F.Supp.3d at 684.[11] And, of course, a voter can always elect to vote in person to fully eliminate even any potential risk of improperly or incompletely filling out a mail-in ballot. *Cf. NAACP,* 97 F.4th at 133-35.

[10] In relevant parts Section 3157 provides:

> (a) Any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election . . . may appeal therefrom within two days after such order or decision shall have been made, whether then reduced to writing or not, to the court specified in this subsection, setting forth why he feels that an injustice has been done, and praying for such order as will give him relief . . . Upon the payment to the prothonotary of a fee for filing such appeal, a judge of the court shall fix a time and place for hearing the matter in dispute within three days thereafter[.]
>
> (b) The court on an appeal shall have full power and authority to hear and determine all matters pertaining to any fraud or error committed in any election district to which such appeal relates, and to make such decree as right and justice may require.

[11] While the hearing under 25 P.S. § 3157 would occur after Election Day, the Pennsylvania Supreme Court has held that "in circumstances where procedural safeguards are not feasible in the pre-deprivation time frame, the availability of a meaningful post-deprivation remedy satisfies due process requirements." *Johnson,* 311 A.3d at 686 (citing *Bundy*, 184 A.3d at 557). Here, the ballots are not formally rejected until the canvas which occurs after election day. Ostrander Dep. at 87-90, 116-18, 215-17. So no earlier opportunity to contest the formal decision not to count the ballots exists. Further, a Section 3157 appeal would be heard before the election results are certified, meaning if such an appeal is granted, a vote is counted in the official tally – that amounts to pre- not post-deprivation process.

As to Plaintiffs purported concerns about the 2024 general election, they clearly have both notice and an opportunity for a hearing if needed.[12] Procedural due process is more than satisfied and Summary Judgment should be entered for the WBOE.

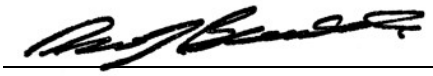
V. CONCLUSION

Plaintiffs' claim fails on a multitude of levels, both procedural and substantive. At bottom, Plaintiffs disagree with the WBOE's adoption of a policy not to provide notice and curing, but lack standing and ripeness, as well as a valid a substantive basis to challenge that policy. The WBOE's policy is consistent with Pennsylvania statutory and decisional law. Procedural due process is not a valid basis to challenge the WBOE's legislative policy; the relief Plaintiffs seek (having the WBOE tell them they can cure a defective mail-in ballot via the filing of a provisional ballot when the Election Code is to the contrary) is illusory; and the Court cannot order, and Plaintiffs have no right protected by procedural due process in, the "notice and curing" that Plaintiffs seek because it would run afoul of the directives of the Supreme Court in *Pa. Dems*.

As an effort to do an end-run around *Pa. Dems.*, Plaintiffs are trying to have this Court overturn a valid legislative act by the WBOE in deciding not to offer notice and curing. But this Court should not and cannot legislate from the bench in such a manner. The WBOE has done nothing more than adopt a mail-in voting policy that is consistent with Pennsylvania law. That does not and cannot violate procedural due process. Summary Judgment must be entered for the WBOE.

[12] While Plaintiffs' requested relief is forward looking, as to the April 2024 primary, despite having full knowledge of the WBOE's policy and advocating against it, neither Organizational Plaintiff attended the publicly advertised canvass where they could have objected to the rejection of ballots, nor were any appeals filed under 25 P.S. § 3157. Those were Plaintiffs' proper avenues of relief, not this contrived action based on procedural due process. For example, a Section 3157 appeal brought by two voters in Butler County concerning whether they can cure a defective mail-in ballot by filing a provisional ballot was filed on April 29, 2024 and is presently pending in the Court of Common Pleas of Butler County. *Genser v. Butler County Board of Elections*, Misc.D.No. 2024-40116.

Dated: July 26, 2024



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CERTIFICATION

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

Dated: July 26, 2024

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I hereby certify that on this 26th day of July, 2024, a true and correct copy of the foregoing *Brief in Support of Motion For Summary Judgement* was served by email on the following:

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