

**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.

CIVIL DIVISION

24 No. 3953

Judge Brandon P. Neuman

**PLAINTIFFS' OMNIBUS
MEMORANDUM OF LAW IN
OPPOSITION TO
WASHINGTON COUNTY
BOARD OF ELECTIONS'
MOTION FOR SUMMARY
JUDGMENT AND
REPUBLICAN NATIONAL
COMMITTEE AND
REPUBLICAN PARTY OF
PENNSYLVANIA'S MOTION
FOR SUMMARY JUDGMENT**

Filed on behalf of Plaintiffs,
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JUSTICE, WASHINGTON
BRANCH NAACP, BRUCE
JACOBS, JEFFREY MARKS,
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MOTION FOR SUMMARY JUDGMENT AND
THE REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN
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INTRODUCTION

The Washington County Board of Elections and Republican Intervenors¹ have no answer to the fundamental point at the heart of Plaintiffs' due process claim—that there is absolutely no burden on Washington County election officials in entering proper codes into the SURE system. Instead, Defendants hope to sweep this case under the rug with a series of procedural challenges. None of these arguments avail, and on the merits, Defendants hardly whisper an answer.

Prudential doctrines like mootness, ripeness, and standing are designed to close the courthouse doors to hypothetical cases, not to create a shield against judicial review regarding matters of public importance. The courts do not shirk from deciding such cases, particularly when an issue is capable of repetition yet evading review. Defendants' justiciability arguments border on the cynical. Republican Intervenors ironically insist that they have standing but other organizations who focus on voting rights do not. Both Defendants make the remarkable claim that the issues in dispute are simultaneously moot and unripe. But following their arguments to the logical conclusion, there will *never* be a time when the Board's actions can be reviewed. Perhaps that is the point, but surely, it

¹ The Washington County Board of Elections (the "Board") and Republican National Committee and Republican Party of Pennsylvania ("Republican Intervenors") will be referred to collectively as "Defendants".

is not the law. There are important rights at issue here, and this Court should decide the case on the merits.

Under the *Mathews*² test, which is the due process framework the Pennsylvania Supreme Court has approved, the Board's actions simply flunk the exam. Defendants' assertion that there is no "liberty interest" in voting and therefore no protectable right at issue is contradicted by dozens of cases. On the crucial burden question, they provide no justification. The Board's pre-suit excuse that looking at the ballots would be some sort of improper "pre-canvassing" does not even feature in the briefs. Defendants simply have no answer to the three-part *Mathews* inquiry.

Aware of the difficulty of their position, Defendants try to throw up legal dust to confuse the issues. Relying heavily on *Pa. Dems.*,³ they assert that no process is due to mail-in voters because they have no right to "notice and cure" and therefore nothing to protect. They misread the case and Plaintiffs' position. The decision in *Pa. Dems.* was made on a truncated record in the heated days of the pandemic, right after no-excuse mail-in voting came to Pennsylvania. The Supreme Court understandably declined a sweeping request to create a notice and cure system from scratch due to separation of powers and manageability concerns.

² *Mathews v. Eldridge*, 424 U.S. 319 (1976)

³ *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) ("*Pa. Dems.*")

But the Court did not consider, much less decide, whether election officials were entitled to enter false and misleading data into the SURE system, which the state was only then modifying to handle Act 77 mail-in voting. Indeed, the Supreme Court did not consider a due process challenge at all, much less refuse to protect the interest at issue here. This is a case of first impression, which calls out for adjudication.

Defendants' remaining plea that the Board's conduct is insulated by the "legislative acts doctrine" has no merit. The actions of election workers in reviewing mail-in ballot packets, identifying which ones are defective, placing them in a separate bin, entering an incorrect code into the SURE system, and then refusing to tell anyone who asks what the status of their ballot is, are individualized acts that are subject to challenge. That the Board has directed its employees to violate the due process rights of its constituents is hardly a defense to Plaintiffs' due process claim.

In summary, this case presents an important issue that must be decided before mail-in ballot voting starts in just a few weeks. The record demonstrates that the Board has violated the due process rights of its constituents and that there would be no burden and substantial benefit in making information relating to defective ballots available to voters before, not after, the election. That is the minimum process due. Plaintiffs respectfully request that the Court uphold the

rights of the voters of Washington County, deny summary judgment to Defendants, and grant summary judgment in favor of Plaintiffs.

BRIEF HISTORY OF THE CASE

Plaintiffs, seven Washington County voters (“Voter Plaintiffs”), the Center for Coalfield Justice, and Washington Branch NAACP (“Organizational Plaintiffs”), commenced this case on July 1, 2024 seeking injunctive and declaratory relief against the Washington County Board of Elections, the local government agency responsible for overseeing elections in the county and ensuring that they are “honestly, efficiently, and uniformly conducted.” 25 P.S. § 2642(g). On July 9, the Republican Intervenors, who have no role in administering elections, intervened in this action.

Following Plaintiffs’ filing of a motion seeking a preliminary injunction, the parties commenced a brief discovery period and agreed on a stipulated set of facts.⁴ On July 26, the parties filed cross-motions for summary judgment. Plaintiffs now file this Omnibus Memorandum of Law in opposition to the two Motions for Summary Judgment filed by the Board and the Republican Intervenors and ask the Court to deny Defendants’ requests for relief and enter summary judgment in favor of Plaintiffs.

⁴ The Parties’ Joint Stipulation of Facts was filed contemporaneously with the parties’ July 26, 2024 cross-motions for summary judgment.

STATEMENT OF ISSUES INVOLVED

Plaintiffs ask the Court to find that the Board's pre-election actions—concealing information and misleading voters about known mail-in ballot envelope defects—violate the procedural due process protections in Article I, Section I of the Pennsylvania Constitution. Plaintiffs seek a judgment from the Court declaring the Board's actions unconstitutional, enjoining the Board from continuing to disqualify mail-in ballots without notice to voters in the November general election, and ordering the Board to provide accurate, timely information to voters by promptly and accurately entering voters' correct ballot statuses into the SURE system.

ARGUMENT

I. PA. DEMS. DOES NOT ALTER PLAINTIFFS' RIGHT TO PROCEDURAL DUE PROCESS AND DOES NOT CONTROL THE QUESTIONS BEFORE THIS COURT.

The Board's and Republican Intervenors' hodgepodge of attacks on Plaintiffs' constitutional claim fail because they are premised on two overriding mischaracterizations. First, that the Pennsylvania Supreme Court's decision in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) bars this lawsuit; it does not. And second, that Plaintiffs are asking this Court to direct Washington County to adopt a notice and cure policy; they are not. Rather, Plaintiffs are asking for pre-deprivation notice under Article I, Section 1 of the Pennsylvania Constitution so

voters have an opportunity to exercise their right to vote. Pa. Const. art I, § 1.

Contrary to Defendants' arguments, such notice is not discretionary. And voting by provisional ballot is neither "curing" nor "illusory." *See, e.g.*, Board Brief in Support of Summary Judgment ("Board Br.") 29-35; Republican Intervenors Brief in Support of Summary Judgment ("GOP Br.") 30-34.

A. The Board and Republican Intervenors Misstate Pennsylvania Precedent.

Pa. Dems. was not a procedural due process case. It did not involve a claim under Article I, Section 1 of the Pennsylvania Constitution. Rather, the petitioners in that case, which was filed shortly after mail-in voting was adopted and implemented, sought to require county boards of election to provide "notice and cure procedures" under the Free and Equal Elections Clause of the Pennsylvania Constitution, Pa. Const. art I, § 5, and the "spirit of the Election Code." 238 A.3d at 372-73. The Court held that counties were not required to implement a "notice and cure procedure" because "Petitioner [had] cited no constitutional or statutory basis that would countenance imposing the procedure Petitioner seeks to require." *Id.* at 374.

Plaintiffs in the case before this Court have cited a distinct constitutional challenge, alleging that the Board's segregation of mail-in ballots and failure to timely notify voters through the SURE system that they made a disqualifying error on their ballot envelope violates the basic tenets of procedural due process, a

question that has not been considered or decided by any Pennsylvania court. *See Washington v. Pa. Dep't of Corr.*, 306 A.3d 263, 285 (Pa. 2023) (holding that “the right to procedural due process is distinct from the right the government seeks to impair.”). The Court in *Pa. Dems.* did not conduct an analysis of the interest that was at stake—the fundamental right to vote—or the process that was due under Article I, Section 1 before a board of elections can deny voters their fundamental right. Nor did the Court in *Pa. Dems.* hold that there is no right to procedural due process as the Board and Republican Intervenors repeatedly press.⁵ *See e.g.*, Board Br. 28-29; GOP Br. 27-30. The Court did not even mention procedural due process. In short, *Pa. Dems.* is inapplicable.

Moreover, the petitioners in *Pa. Dems.* sought sweeping relief, asking the Court to invoke its “broad authority to craft meaningful remedies” and create a statewide procedure out of whole cloth that would require boards of elections to contact voters and provide an opportunity to cure defective mail-in ballots. 238 A.3d at 373. The Court declined, particularly in light of the “open policy questions attendant to that decision, including what the precise contours of the procedure would be [and] how the concomitant burdens would be addressed,” *id.* at 374, as

⁵ Likewise, the Board’s reliance on an unreported decision by a single Judge in *Republican Nat’l Comm. v. Chapman*, No. 447 M.D. 2022, 2022 WL 16754061, at *17 (Pa. Commw. Sept. 29, 2022) misses the mark. Board Br. 2, 4. That case was also not a procedural due process case, does not preclude Plaintiffs’ claim, and does not stand for the proposition that providing pre-deprivation notice is discretionary under the constitution’s Due Process Guarantee.

well as “the lack of any proposal regarding a practicable manner of relieving the problem alleged.” *Id.* at 389 (Wecht, J., concurring).

But four years later the “contours of the procedure” and the “concomitant burden” are not open policy questions as Defendants would have this Court believe. GOP Br. 27-29; Board Br. 7-8, 28-29. And the “practicable manner of relieving the problem” is in place. Plaintiffs ask for narrow relief: only that the Court direct the Board to use the existing infrastructure provided by the Department of State—the SURE system—to enter a code to notify voters about known errors on their ballot envelope before the right to vote is irrevocably lost. Failure to input accurate ballot statuses in this statewide system, which provides automated pre-Election Day notice to voters, violates the due process rights of mail-in voters in Washington County, whose ballots will be rejected for disqualifying mistakes on their declaration envelopes.

In short, neither this legal claim nor these facts were before the Pennsylvania Supreme Court in *Pa. Dems.* Contrary to Defendants’ repeated assertions, this Court is not being asked to overturn precedent. Rather, this Court is being asked to rule on an issue of first impression, but one that is based on longstanding and foundational principles of fairness.⁶ *See, e.g. Washington*, 306 A.3d at 267 (“a

⁶ Nor are Plaintiffs asking the Court to “rewrite” statutes or “design an alternative scheme” or act as a “Supreme, or even a Superior Legislature” or “weigh in on [] political policy judgments.”

democratic government must practice fairness to be worthy of its name, and procedural due process must be afforded ...when state action infringes on a fundamental right”); *Commonwealth v. Turner*, 80 A.3d 754, 763-764 (Pa. 2013) (due process “expresses the requirement of ‘fundamental fairness’”).

B. Voting By Provisional Ballot Does Not Constitute “Curing” and a Provisional Ballot Cast After a Voter Mail-In Ballot Has Been Rejected Should be Counted.

Defendants’ arguments are also grounded in their recurring assertion that voting a provisional ballot and having that vote count is “curing,” which the Court in *Pa. Dems.* held is not required, and which Defendants claim is prohibited by the Election Code. Board Br. 29-35; GOP Br. 30-34. But nowhere in *Pa. Dems.* is there any indication that the Pennsylvania Supreme Court considered voting by provisional ballot a form of “curing” and thus discretionary. To the contrary, the federal Help America Vote Act (“HAVA”) and the Pennsylvania Election Code have long mandated the availability of provisional voting as a distinct failsafe to prevent voter disenfranchisement. *See* 52 U.S.C. § 21082; *see also* 25 P.S. § 3050(a.4) (implementing HAVA); *see, e.g., Common Cause Ga. v. Kemp*, 347 F.Supp.3d 1270, 1292-93 (N.D. Ga. 2018) (citation omitted). *Pa. Dems.* does not

GOP Br. 28-29. Rather, Plaintiffs ask this Court to use a routine application of bedrock principles of judicial review. Whether the Board’s denial of voters’ fundamental right to vote without pre-deprivation notice violates the procedural due process requirements of the Pennsylvania Constitution is not a question entrusted to the legislature; it is in the judiciary’s prerogative to adjudicate. *See, e.g., Washington*, 306 A.3d at 285.

allow counties to “opt out” of the separate, preexisting provisional ballot regime established by state and federal law.

To grant Plaintiffs relief, this Court need not decide the parameters of that regime; Plaintiffs are not seeking a declaration that mail-in voters who make disqualifying errors on their declaration envelopes have the right to have their provisional ballot counted.⁷ Plaintiffs only ask this Court to ensure voters have the notice necessary to enable them to preserve that right, which is supported by both a plain reading of the Election Code and the Pennsylvania Constitution.

The legal issue of whether a provisional ballot should count boils down to the proper interpretation of two provisions of the Pennsylvania Election Code:

- 25 P.S. § 3050(a.4)(5)(i): “Except as provided in subclause (ii), if it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector’s registration form and, if the signatures are determined to be genuine, *shall count the ballot if the county board of elections confirms that the individual did not cast*

⁷ This question is currently pending before President Judge Yeager in the Butler County Court of Common Pleas. A hearing has been held, briefing is complete, and the parties are awaiting a decision from the court on whether Butler County must count provisional ballots cast in the April 2024 primary after voters’ mail-in ballots were not counted because the voters forgot to include their secrecy envelopes. *Genser v. Butler Cnty. Bd. of Elections*, No. 24-40116 (Butler Cnty. Ct. Common Pleas Apr. 29, 2024). For the reasons discussed *infra*, the court is likely to follow the lead of the Delaware County Court of Common Pleas in *Keohane* and hold that these provisional ballots must be counted. *See infra* at Section I.B. This would also be consistent with Department of State Guidance. Stip. Facts, Ex. J., Pennsylvania Provisional Voting Guidance. But as explained *infra* at Section IV.C.3, Plaintiffs’ right to notice does not depend on the existence of a right to have their provisional ballot counted: “the absence of a concrete remedy at the end of the process that is due is [not] an excuse for denying the right to process itself.” *Washington*, 306 A.3d at 296.

any other ballot, including an absentee ballot, in the election.”
(emphasis added)

- 25 P.S. § 3050(a.4)(5)(ii)(F): “*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.*” (Emphasis added.)

Under the Defendants’ interpretation, by timely submitting a mail-in ballot with a disqualifying error, voters surrender the opportunity to vote by provisional ballot on Election Day. But the required plain, commonsense reading of these two provisions leads to the opposite conclusion. Under this reading, voters never “cast” a mail-in ballot under § 3050(a.4)(5)(i) if their attempt to submit a mail-in ballot was unsuccessful because the packet of papers they mailed to the Board could not be counted as a vote. Likewise, the Board did not “timely receive[]” a “mail-in ballot” that was capable of being canvassed or counted if the submitted mail ballot packet contained disqualifying errors on the envelope. Thus, where a mail-in ballot submission was rejected, the voter’s first attempt to vote by mail was nullified, and the voter retained the right to cast a provisional ballot at their polling places on Election Day. *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1230 (Pa. 2004) (“the polestar of statutory construction is to determine the intent of the General Assembly” and that “the best indication of legislative

intent is the plain language of a statute.”) (citations omitted).⁸

This reading is also consistent with the obvious purpose of § 3050(a.4)(5): to ensure that each voter gets to vote once and only once. By rejecting *both* a voter’s mail-in ballot submission *and* their provisional ballot, Defendants ensure that the voter does not get to vote at all. Finally, this reading harmonizes the two election code provisions. *Keohane v. Del. Cnty. Bd. of Elections*, CV-2023-4458 at 3-5 (Del. Cnty. Ct. Com. Pl. Sept. 21, 2023)⁹ (holding that that to the extent there is any ambiguity between § 3050(a.4)(5)(i) and § 3050(a.4)(5)(ii)(F), Pennsylvania law “demands that statutory provisions be read harmoniously to give effect to both . . .” and ordering the Delaware County Board to count the provisional ballots cast by voters whose mail-in ballots had been rejected due to disqualifying errors).¹⁰

⁸ This reading is also consistent with the Board’s conduct in 2023 where the Board counted provisional ballots cast by voters after they timely returned a mail-in ballot that could not be counted because it had a disqualifying error. Stip. Facts ¶¶ 26-28.

⁹ A true and correct copy of *Keohane* is attached to Plaintiffs’ Verified Complaint as Exhibit 12.

¹⁰ Defendants argue that the Court should follow the Commonwealth Court’s decision in *In re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 1161 CD 2020, 2020 WL 6867946 (Pa. Commw. Nov. 20, 2020). Board Br. 30-31; GOP Br. 31-32. For starters, *In re Allegheny County* is not controlling and does not bind this Court because it is not precedential by the Commonwealth Court’s own rules as it is an “Unpublished Disposition” and is not reported. 2020 WL 6867946, at *1. Nor does *In re Allegheny County*’s cursory review of the provisional ballot issue hold much persuasive value. The panel made no attempt to reconcile the two relevant provisions in the election code. It ignored that 25 P.S. § 3050(a.4)(5)(i) requires that a provisional ballot be counted if “the individual did not cast any other ballot, including an absentee ballot, in the election.” It did not explain how receipt of a defective ballot package could constitute “timely” receipt of a valid “mail-in ballot.” Nor did the panel explain how the defective mail-in ballot package could not constitute a “ballot” for purposes of being counted while counting as a timely received “ballot” for purposes of depriving the voters of their right to cast a provisional ballot. Not surprisingly, the Delaware County Court of Common Pleas in

The question of whether a provisional ballot must be counted is a matter of clear statutory interpretation, but Article I, Section 5 of the Pennsylvania Constitution also demands that a voter's provisional ballot count in these circumstances. If the Election Code lends itself to two possible interpretations, courts must choose the one that enfranchises voters rather than disenfranchises them. "In construing election laws . . . [o]ur goal must be to enfranchise and not to disenfranchise." *In re Luzerne Cty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972). *See also, e.g., Shambach v. Bickhart*, 845 A.2d 793, 798-802 (Pa. 2004); *Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954) ("Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage.").

But either way, it is not a question the Court must resolve to find that Plaintiffs' rights to due process protections have been and continue to be violated by the Board's actions. Notice is a constitutional right that stands on its own, and "failure to give notice" is itself a violation of "the most rudimentary demands of due process of law." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988) (quotation marks and citation omitted).

Keohane disregarded *In re Allegheny Cnty.* and held that provisional ballots must be counted in these circumstances.

II. PLAINTIFFS ARE ENTITLED TO PROCEDURAL DUE PROCESS PROTECTION UNDER ARTICLE I, SECTION 1 OF THE PENNSYLVANIA CONSTITUTION.

A. The Board's Individualized Decisions Are Adjudicative and The Legislative Act Doctrine Does Not Apply.

Defendants' argument that the Board's policy is exempt from procedural due process strictures by the "legislative act doctrine" misses the point because once again they mischaracterize Plaintiffs' claim. *See* Board Br. 23-25; GOP Br. 46-50. Plaintiffs are not challenging the Board's legislative adoption of a new policy at their April 11, 2024 meeting; they are challenging the process followed by Washington County election staff for processing individual voters' mail-in ballots in the April 2024 primary and in the upcoming November election. *See* July 1, 2024 Verified Complaint ("Compl.") ¶¶ 67-82; Plaintiffs' Brief in Support of Summary Judgment ("Plaintiffs' Br.") 21-31. Plaintiffs are challenging the series of individualized determinations the election staff have made and will make going forward: to set aside a voter's mail ballot because it has a known disqualifying error on the envelope; to miscode that ballot in the SURE system so that the voter never knows the ballot will not count even though there is still time for the voter to preserve their fundamental right to vote; and ultimately to not count the voter's mail ballot. *Id.* These decisions are not legislative acts. They are adjudicative acts to which the legislative act doctrine does not apply. The Board cannot issue an

edict to its staff “to deny due process” to voters, and then assert that the “legislative act doctrine” prevents review.

The legislative act doctrine holds that “procedural due process concerns are implicated only by adjudications, not by state actions that are legislative in character.” *Washington*, 306 A.3d at 297-98 (internal citation and quotations omitted). However, just because legislation is involved does not make a state action a legislative act. Due process safeguards still apply to “[a]djudicative agency actions [which] are those that affect one individual or a few individuals, and apply existing laws or regulations to facts that occurred prior to the adjudication.” *Small v. Horn*, 722 A.2d 664, 671, n.12 (Pa. 1998). Although Defendants cite an assortment of cases generally invoking the legislative act doctrine,¹¹ they ignore the Pennsylvania Supreme Court’s decision in *Washington*,

¹¹ Two of the cases cited by Defendants do not involve the Constitution, let alone due process claims. See *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96 (Pa. 2008) (holding that local authority’s determination that an area was “blighted” under the Tax Increment Financing Act was a legislative enactment, not adjudication); *Ondek v. Allegheny Cnty. Council*, 860 A.2d 644 (Pa. Commw. 2004) (holding that County Council’s resolution to use tax increment financing was a legislative enactment, not an adjudication). And the other three cases are pro se prisoner challenges, two of which, in the Supreme Court’s words, contain “scant analysis.” *Washington*, 306 A.3d at 299, n. 53. See *Small*, 722 A.2d 664 (Department of Corrections directive restricting prisoner clothing was legislative in character, not an adjudication); *Sutton v. Bickell*, 220 A.3d 1027, 1032 (Pa. 2019) (following *Small*). See also *Vega v. Wetzel*, 302 A.3d 1274 (Pa. Commw. 2023) (unreported) (noting in dicta that due process elements “are implicated only by adjudications, not by state actions that are legislative in character” but dismissing petitioner’s due process claim because he did not plead material facts regarding inadequate notice or a constitutionally protected right).

which is the Court's most recent examination of the doctrine and illustrates why it does not apply here.

In *Washington*, the Court held that a state statute passed to increase the garnishment rate for inmate accounts nevertheless required the Department of Corrections ("DOC") to give a prisoner "pre-deprivation notice and an opportunity to be heard" regarding DOC's increase in his garnishment rate. *Washington*, 306 A.3d. at 267. Finding that the garnishment law did not apply equally to all inmates and that DOC had discretion in its application, the Court rejected DOC's argument that the legislative act doctrine immunized its actions from procedural due process requirements. *Id.* at 299 n.53. Moreover, "because the infrastructure [was] already in place to provide both notice and an opportunity to be heard," there was no concern that requiring DOC to provide notice and an opportunity to be heard would inhibit DOC's operations. *Id.*

Similar to *Washington*, the Board's policy here applies only to the roughly 2% of mail-in-ballot voters who make a disqualifying error on their return envelope, and it directs a "subordinate body," the County Elections Office, to make individualized determinations as to whether the envelope transmitting each mail-in ballot contains a disqualifying error, and if so, to conceal information about the impending disqualification of their vote from the voter. *See* Parties' Joint Stipulation of Facts ("Stip. Facts") ¶¶ 41-44; Exhibit 4, Deposition of Washington

County Elections Director Melanie Ostrander (“Ostrander Tr.”) 67:9-23; 71:5-18. Moreover, Election Director Melanie Ostrander’s testimony is clear that the “infrastructure” already exists to give voters submitting mail ballots in envelopes with disqualifying errors notice of the problem and an opportunity to preserve their vote. Ostrander Tr. 32:25-33:7; 34:15-35:12; 40:2-19. Indeed, prior to April 2024, Washington County did just that. Stip. Facts ¶¶ 26-28. The current political decision to needlessly disenfranchise these voters still requires County elections workers to use the same infrastructure, the SURE system, in essentially the same way. *See* Plaintiffs’ Br. 28. Because the challenged practice involves individualized determinations by the elections office and the infrastructure to provide notice and an opportunity to address the ballot disqualifications already exists, the legislative act doctrine does not shield Washington County from providing procedural due process before it disqualifies voters’ ballots.

B. Voting Is a Fundamental Right Within the Interests Protected by Procedural Due Process.

The Court should also reject the Board’s argument that Plaintiffs are not entitled to procedural due process because even though voting is a “fundamental right,” it is not a protected “liberty interest.” Board Br. 25-28.¹² This position is

¹² Republican Intervenors also assert that Plaintiffs “have failed to . . . establish that the Board has interfered with a constitutionally protected life, liberty or property interest,” but their argument is based only on the same fallacious argument that permeates the rest of their brief: that because no right to cure exists under Pennsylvania law, the Board’s actions “necessarily did not

directly at odds with the Pennsylvania Supreme Court’s recognition of the inextricable link between the Pennsylvania Constitution’s enumerated fundamental rights and the interests protected by the Due Process Guarantee. The Board’s view also flies in the face of the origins of the right to vote in the constitution, and its place in the Declaration of Rights alongside entitlements to other individual freedoms. Finally, the Board ignores a large body of federal court decisions recognizing voting as a protected liberty interest entitled to procedural due process protections, and instead asks this Court to adopt the minority view.

For due process to attach under Article I, Section 1, the alleged deprivation must implicate a life, liberty, or property interest. *Commonwealth v. Turner*, 80 A.3d 754, 764 (Pa. 2013). To determine whether an asserted interest triggers due process protections, the Pennsylvania Supreme Court has held that the fact that an interest “is recognized and protected by our highest state law[,] our Constitution” through “explicit reference . . . provid[es] the basis for this Court to regard it as a fundamental interest which cannot be abridged without compliance with constitutional standards of due process.” *R v. Dep’t of Public Welfare*, 636 A.2d

interfere with any constitutionally protected life, liberty, or property interest.” *See* GOP Br. 39-40. And to the extent Republican Intervenors argue that there is no right to “know when their mail-in ballot is disqualified in time to rescue their right to vote by casting a provisional ballot,” *id.* at 40, this confuses the process that is due to Plaintiffs with the protected interest to which that process attaches. For the reasons articulated elsewhere in this brief, this reasoning should be rejected.

142, 149 (Pa. 1994) (finding that the fundamental right to reputation under the Pennsylvania Constitution triggers due process protections).

The right to vote, which has long been recognized as a fundamental right guaranteed to all Pennsylvania citizens, *see Applewhite v. Commonwealth*, 54 A.3d 1, 3 (Pa. 2012), is explicitly referenced in both Article I, Section 5 and Article VII, Section 1 of the Pennsylvania Constitution. *See* Article I, Section 5 (“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”); Article VII, Section 1 (“Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections....”).

Although no Pennsylvania court has directly considered the question of whether the right to vote is a protected liberty interest under Article I, Section 1, the answer is apparent from the Supreme Court’s treatment of the right to vote, which it has called “the most treasured prerogative of citizenship.” *Appeal of Norwood*, 116 A.2d 552, 553 (Pa. 1955). The Court has linked the right to vote directly to citizens’ freedoms, noting its place in the Declaration of Rights and observing that “the plain and expansive sweep of the words ‘free and equal,’ . . . [is] indicative of the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth.” *See League of Women Voters of Pa. v. Commonwealth*, 178 A.3d

737, 804 (Pa. 2018). Indeed, a liberty interest in exercising the franchise is inherent in the Court’s understanding of the right itself, which guarantees not only that “each voter under the law has the right to cast his ballot and have it honestly counted” but that voting not be encumbered by “regulation of the right to exercise the franchise” that could “deny the franchise itself, or make it so difficult as to amount to a denial.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

The majority of federal district courts that have considered the question have found that voting is a liberty interest entitled to the protections of due process. The earliest case goes back to the 1960’s. *See United States v. Texas*, 252 F.Supp. 234, 250 (W.D.Tex.1966) (right to vote is “included within the concept of liberty”), *aff’d per curiam*, 384 U.S. 155 (1966) (mem.). Since then, a parade of courts have so held. *See, e.g., Raetzel v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1356–57 (D. Ariz. 1990); *Doe v. Rowe*, 156 F. Supp. 2d 35, 47–48 (D. Me. 2001); *Zessar v. Helander*, No. 05-C-1917, 2006 WL 642646, *6 (N.D. Ill. Mar. 13, 2006); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018), *denying stay pending appeal*, *Georgia Muslim Voter Project v. Kemp*, No. 18-14502-GG, 2018 WL 7822108 (11th Cir. Nov. 2, 2018); *Self Advocacy Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1052 (D.N.D. 2020); *North Carolina v. North Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 227 (M.D.N.C. 2020); *Frederick v. Lawson*, 481 F.

Supp. 3d 774, 788 (S.D. Ind. 2020); *League of Women Voters of S.C. v. Andino*, 497 F. Supp. 3d 59, 77 (D.S.C. 2020), *appeal dismissed (as likely moot) and remanded*, 849 F. App'x 39 (4th Cir. 2021).

The Board's argument to the contrary rests entirely on the faulty reasoning of a Fifth Circuit decision, which was predicated on that court's erroneous conclusion that a "liberty interest" is "generally limited to freedom from restraint." *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 230 (5th Cir. 2020).¹³ Other courts that have considered *Richardson* have declined to follow it, calling it an "outlier" that takes "an extremely constricted view of liberty that does not include voting rights,"¹⁴ and fails to "explain why voting deserves less protection than other state-created rights or constitutionally created liberty interests."¹⁵ This Court should decline to follow it as well, and proceed to a consideration of the *Mathews* balancing test.

¹³ The Board cites only one other case, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478-79 (6th Cir. 2008), for the proposition that voting is not a legally protected interest, but the court in that case did not engage in an analysis of the question, deciding the issue based on the insufficiency of Plaintiff's allegations.

¹⁴ *League of Women Voters of S.C. v. Andino*, 497 F. Supp. 3d 59, 77 (D.S.C. 2020), *appeal dismissed (as likely moot) and remanded*, 849 F. App'x 39 (4th Cir. 2021).

¹⁵ *League of Women Voters of Kansas v. Schwab*, 525 P.3d 803, 826 (Kan. Ct. App. 2023), *aff'd in part, rev'd in part*, 549 P.3d 363 (Kan. 2024).

III. THE BOARD'S ACTIONS TO CONCEAL MAIL-IN VOTERS' BALLOT DEFECTS BEFORE ELECTION DAY VIOLATED THEIR RIGHT TO PROCEDURAL DUE PROCESS.

Given the important, even “sacred,” nature of the right to vote in Pennsylvania, the Board’s pre-election actions—concealing and miscoding in SURE known mail ballot defects—violated and will continue to violate Plaintiffs’ procedural due process rights under the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Board’s argument that this Court should apply the *Anderson-Burdick* test drawn from federal Equal Protection cases misses the mark. That is not the current law of the Commonwealth, which is what this Court is bound to apply. And even if the Pennsylvania Supreme Court were to adopt the new standard proposed by the Board, the Board’s conduct would flunk that test too.

A. The Board’s Actions Fail the *Mathews* Test.

As noted in Plaintiffs’ opening summary judgment brief, Pennsylvania courts have long applied the three-part balancing test from the U.S. Supreme Court’s *Mathews v. Eldridge* opinion to determine whether the government has violated a plaintiff’s due process rights. Plaintiffs’ Br. 21-31; *Washington*, 306 A.3d at 284-85; *R v. Dep’t of Pub. Welfare*, 636 A.2d 142, 152-53 (Pa. 1994). Under *Mathews*, courts balance the following three factors: 1) the private interest affected; 2) the risk of an erroneous deprivation and the value of additional or

substitute safeguards; and 3) the state's interest, including the burdens the additional or substitute procedural requirements would impose on the state. *Washington*, 306 A.3d at 300 (citations omitted). All three factors here establish that the Board has violated Plaintiffs' due process rights.

Under the first factor, the private interest in question is the right to vote, which Pennsylvania considers "the most treasured prerogative of citizenship." *Appeal of Norwood*, 116 A.2d 552, 553 (Pa. 1955); *see also Applewhite v. Commonwealth*, 54 A.3d 1, 3 (Pa. 2012) (referring to "the right to vote in Pennsylvania, as vested in eligible, qualified voters" as "fundamental"). With respect to the second factor, the Board's actions, which prevent voters from knowing their mail-in ballot will not be counted while there is still time to cast a provisional ballot, cause complete disenfranchisement—an unacceptable outcome that could easily be avoided by additional procedural safeguards. *See Plaintiffs' Br.* 25-27. And under the third factor, the record is clear that it would be no burden on the Board to provide those safeguards by timely and accurately entering information into SURE: the only difference between the election office's mail-in ballot procedures in 2023 and 2024 was which code workers selected from the SURE system's drop-down menu when they scanned in a voter's ballot. *Id.* 27-30.

Tellingly, the Board makes no argument that it would be unduly burdened by having to enter the proper codes. Indeed, the Board does not address the

Mathews analysis head-on at all, arguing only that the mail-in ballot packages include instructions on how to fill them out and that after the canvass, voters with defective ballots can file a pointless appeal. Board Br. 39-40. What the Board fails to address is why it cannot simply give voters *pre-deprivation* notice of their defective ballot envelopes and allow them to take up what remedies are available to them at the time—for example, voting a provisional ballot.¹⁶ Instead, the Board simply repeats that it is not obligated to do so under *Pa. Dems.*, even though that case did not exempt the Board from procedural due process requirements. *See supra* at Section I.A. The Republican Intervenors take a slightly different tack, arguing that under the first and second *Mathews* factors, the Plaintiffs have no cognizable right to cure and so there is no deprivation of a right in the first place. GOP Br. 42. As discussed *supra* at Section I.A, this is a mischaracterization of Plaintiffs’ claim and completely ignores the actual private interest affected, which is the fundamental right to vote.

Notice is “the most basic requirement of due process.” *Bornstein v. City of Connellsville*, 39 A.3d 513, 519 (Pa. Commw. 2012). “Notice should be reasonably calculated to inform interested parties of the pending action.... The form of the

¹⁶ As discussed at length *supra* at Section I.B, the Court does not need to determine whether the Board would be required to count these provisional ballots—that question will be resolved in co-pending litigation. The Court only needs to decide whether the Board must provide pre-deprivation notice so voters have an opportunity to cast a provisional ballot, which the Board concedes all voters can do. *See Ostrander* Tr. 89:11-15, 89:18-19.

notice required depends on what is reasonable, considering the interests at stake and the burdens of providing notice.” *Id.* (quoting *Pa. Coal Mining Ass’n v. Ins. Dep’t*, 370 A.2d 685, 692-93 (Pa. 1977)). Given the fundamental right to vote at stake here, the minimal process necessary to ensure that voters can exercise that right is to tell them they have mailed in a ballot with a mistake on the envelope by entering accurate information into SURE.¹⁷ The fact that the Board keeps voters in the dark as to whether they need to cast a provisional ballot creates a total deprivation of that right. That is sufficient to support Plaintiffs’ claim for a deprivation of due process.

B. The Board’s Argument That the Court Should Analyze the Board’s Actions Under The *Anderson-Burdick* Standard Should Be Rejected.

The Board (but not the Intervenors) argues that *Mathews* is the wrong test and that the Plaintiffs’ claim should be analyzed under the *Anderson-Burdick* standard. Board Br. 35-37; *Anderson v. Celebrezze*, 460 U.S. 780 (1983). While the choice of test makes no difference to the outcome, the appropriate framework here is *Mathews*.

¹⁷ Defendants attempt to characterize this narrow request for relief as an attempt to convert the requirements of the SURE system to law. Board Br. 29; GOP Br. 34-38. This argument has no merit. Counties are required by state law to use the SURE system to administer elections. *See* Plaintiffs’ Br. 7-18; *see also* Compl. ¶¶ 37-40. Plaintiffs are simply seeking to stop the Board from misusing the existing SURE system to deny voters pre-deprivation notice.

1. *Mathews* Is the Appropriate Test Under Pennsylvania Due Process Law.

Interpreting the Pennsylvania Constitution is a matter of state law and within the purview of the Pennsylvania Supreme Court. Plaintiffs are unaware of any Pennsylvania court applying the *Anderson-Burdick* standard to a procedural due process claim under Article I, Section 1 of the Pennsylvania Constitution, nor do Defendants cite any.

On the other hand, the Pennsylvania Supreme Court *has* utilized the *Mathews* test, setting forth an expansive view of procedural due process: “These rules are intended to ‘minimize substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests.’” *Washington*, 306 A.3d at 284 (citing *Mathews*, 424 U.S. at 333 and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). There is no reason to believe that the Supreme Court would carve out a special test for this case, rather than apply the “flexible” *Mathews* test it lauded in *Washington* just a year ago.

There is nothing remarkable about a state court using the *Mathews* test to evaluate its own voting laws. A number of courts have declined to apply *Anderson-Burdick* to state constitutional challenges to voting laws. See *Montana Democratic Party v. Jacobsen*, 545 P.3d 1074, 1090 (Mont. 2024) (rejecting *Anderson-Burdick* for challenges to voting laws under state constitutional right to vote); *Weinschenk*

v. State, 203 S.W.3d 201, 216 (Mo. 2006) (rejecting state's argument that *Anderson-Burdick* applied to state constitutional challenge to voter ID law but finding law failed strict scrutiny under that standard also).

That is because the *Anderson-Burdick* test evolved to solve a different set of problems and is not part of the U.S. Supreme Court's due process jurisprudence. The Board candidly concedes that the Supreme Court developed the *Anderson-Burdick* framework under equal protection law, not as a matter of due process law. Board Br. 36. *Anderson* was a First Amendment and Equal Protection challenge to nominating petition rules, 460 U.S. at 782-83 and *Burdick v. Takushi* was a First Amendment attack on Hawaii's refusal to allow write-in ballots. 504 U.S. 428, 430-31 (1992). Both involved facial challenges to the constitutionality of statutes, not what process was due to an individual voter once an election was underway. The core holding of the cases was that courts should apply a balancing test rather than strict scrutiny in evaluating such challenges. The cases did not discuss the *Mathews* test, much less reject the specific balancing test for due process claims set forth in *Mathews*.

What Defendants are really asking for is that this Court refuse to follow the extant law set forth in *Washington*. That case states the current test in the Commonwealth for challenging due process violations of all types. There is no reason to believe the Pennsylvania Supreme Court would follow *Richardson*,

which as discussed above is an outlier, but that is a question for another day. This Court must follow the law as it now stands, not as the Board hopes it will be some day.

2. Applying *Anderson-Burdick* Would Make No Difference to the Result.

Even were the Court to analyze Plaintiffs' claims under the *Anderson-Burdick* standard, the result would be the same as under *Mathews*: a finding that the Board has violated and, without injunctive relief, will violate Plaintiffs' procedural due process rights.

a. Severe Voter Burdens Are Subject to Strict Scrutiny Under *Anderson-Burdick*.

The *Anderson-Burdick* test requires a balancing of the plaintiff's rights and state's interests, with the standard of review—strict or something else—determined by a threshold inquiry into the nature of the burden on the plaintiff's rights:

[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State's important regulatory interests are generally sufficient to justify” the restrictions.

Burdick v. Takushi, 504 U.S. 428, 434 (1992).

The language is vague, and courts have disagreed on exactly what levels of scrutiny applies to non-severe burdens, but they agree that severe burdens must be “narrowly drawn to advance a state interest of compelling importance,” *i.e.* they must survive strict scrutiny analysis. *Kishore v. Whitmer*, 972 F.3d 745, 749 (6th Cir. 2020); *Libertarian Party of New Hampshire v. Sununu*, No. 20-cv-688-JL, 2020 WL 4340308, at *11 (D.N.H. July 28, 2020) (discussing competing interpretations of *Anderson-Burdick* test).

Applying the test, courts have found constitutional violations in numerous contexts. *See Driscoll v. Stapleton*, 473 P.3d 386, 393-94 (Mont. 2020) (deciding that under *Anderson-Burdick* strict scrutiny analysis, lower court did not abuse its discretion in preliminarily enjoining state law restricting collection and delivery of absentee ballots); *Weinschenk v. State*, 203 S.W.3d 201, 215-16 (Mo. 2006) (finding that while court was applying state constitution and not federal, voter ID law imposed severe burden on voting that would fail *Anderson-Burdick* strict scrutiny test). *See also Democratic Executive Comm. of Florida v. Detzner*, 347 F.Supp.3d 1017, 1029-30 (N.D. Fla. 2018) (“the deprivation of the right to vote based on a standardless determination made by laypeople that the signature on a voters' vote-by-mail or provisional ballot does not match the signature on file with the supervisor of elections” constitutes a substantial burden on voting that would fail *Anderson-Burdick*); *Northeast Ohio Coalition for the Homeless v. Husted*, 696

F.3d 580, 592-95 (6th Cir. 2012) (voters sent by poll workers to wrong polling place and voted provisional ballots that would therefore go uncounted suffered a “substantial burden” that likely violated the equal protection and due process clauses).

b. The Board’s Actions Fail Strict Scrutiny Under *Anderson-Burdick*.

The burden imposed by the Board’s concealment of Plaintiffs’ mail ballot status is severe and, indeed, total. With knowledge that the Board has identified a potential ballot defect from a SURE email or otherwise, voters could exercise their right to vote a provisional ballot, a right the Board acknowledges. Ostrander Tr. 89:11-15, 89:18-19. Without that knowledge, a voter would have no reason to go to the polls on election day and vote a provisional ballot.¹⁸ The Board’s analysis utterly ignores the obstructive effect on voting of its practice to conceal and miscode ballot defects in SURE.

Instead, in analyzing voter burden, the Board only points to the Election Code’s mail ballot signature and date requirements and the Board’s no-cure policy. Board Br. 37-38. But that is all beside the point. The question at issue is what process is due to a voter who has supplied a ballot with a disqualifying error on the

¹⁸ Nor would a voter have any knowledge or reason to exercise any other procedural avenue suggested by the Board, such as attending the official post-election canvass of mail ballots. Board Br. 16, 40. Even if a voter attended, there would be no way to resurrect the disqualified mail ballot.

declaration envelope. Under *Anderson-Burdick*, the Board must show that its practice of refusing to enter accurate ballot status defect codes into SURE, and to otherwise hide that information from anyone, is “narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434. The Board does not take up that gauntlet because obviously, it has no legitimate interest in hiding information from its constituents. *See* Plaintiffs’ Br. 27-31. Without such a justification, the Board’s conduct fails under *Anderson-Burdick* as well as *Mathews*.

C. The Board’s Proffered “Process” is Constitutionally Deficient.

The relevant question on what process is due is whether the additional steps requested by Plaintiffs burden the Board. Here, there is no burden in entering proper codes into SURE, *see* Plaintiffs’ Br. 27-30, and as a result, the Board tries to change the subject. Instead of explaining why it will not provide simple notice to voters who make errors on the ballot envelope, the Board tries to shift the conversation to irrelevancies—a one-line statement on the mail-in ballot instructions and a doomed statutory appeal. Because neither of these provides a remedy for the deprivation at issue, the cancellation of a mail-in ballot, they cannot be the process that is due.

1. Ballot Instructions Alone Do Not Provide Adequate Due Process.

The Board suggests that the instructions on the mail-in ballot, standing alone, suffice to adequate “notice” to the voter, but the instruction does not notify the voter that he or she has made a mistake. Board Br. 39. Accordingly, the instruction does not put the voter on notice that he or she should vote a provisional ballot. The instruction provides no process at all.

There is no support for the Board’s position in the case law. *Johnson v. Wetzel*, the only Pennsylvania case cited by the Board for this argument, is not a voting rights case at all. Rather, it considers the propriety of notice of deduction of monies from a prison inmate’s account for payment of court-assessed costs and fees. 311 A.3d 684, 686 (Pa. Commw. 2024). And in *Johnson*, the deduction could be reversed if found wrongful, which is not the case here, where the deprivation is complete and incurable.

Recognizing this lack of Pennsylvania case law to support its position, the Board relies on three cases from other jurisdictions. Board Br. 39. None of these cases support the Board’s position either. The court in *Frederick v. Lawson* outright rejected the position that a lack of notice to the voter of a defect in a mail-in ballot constitutes adequate due process. 481 F. Supp. 3d 774, 793-94 (S.D. Ind. 2020). The court held that the statutes “fail to provide notice to the voter at any stage in the process or a meaningful opportunity to cure before a mail-in absentee

ballot is rejected based on a perceived signature mismatch...there is no requirement that voters eligible to vote by mail-in absentee ballot be informed, either before submitting their application for a mail-in ballot or before completing their ballot, that their ballot may be rejected if election officials determine there is a signature mismatch.” *Id.* Nowhere does the court suggest that pre-deprivation notice, in the form of a single line on the ballot instructions, would satisfy procedural due process. Similarly, in *Self Advocacy Solutions N.D. v. Jaeger*, the court rejected a position virtually identical to the Board’s here, holding a signature-matching requirement was wholly deficient because “[v]oters are simply never notified or afforded any opportunity to respond if election officials reject their ballots for a signature discrepancy. This all but ends the inquiry.” 464 F. Supp. 3d 1039, 1052 (D.N.D. 2020). There is no suggestion that the ballot instructions themselves would suffice; indeed the cases all address the process due to voters who failed to follow the instructions. *See also Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *7 (N.D. Ill. Mar. 13, 2006) (lack of notice to the voter leaves “no recourse for the voter and no way to remedy the loss of that vote in that election”); *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 228 (M.D.N.C. 2020) (“when the ballot is rejected for a reason that is curable . . . and the voter is not given notice or an opportunity to be heard on this deficiency. . . this facially effect[s] a deprivation of the right to vote.”) (internal

quotations omitted). *Richardson v. Texas Sec’y of State* was a challenge to a signature-verification requirement and is therefore inapposite. 978 F.3d 220, 237 (5th Cir. 2020). Plaintiffs here do not challenge the requirements for voting by mail; they seek only notice of a disqualifying error when a mail-in ballot declaration envelope is identified as deficient.

The issue here is pre-deprivation notice, which is the default rule, *Washington*, 306 A.3d at 289-90, and which the Board is intentionally refusing to provide. The reality is that voters are all human beings, capable of making mistakes. Thousands of voters across the Commonwealth have made disqualifying mistakes when submitting their mail-in ballot that result in their vote not being counted. *See* July 1, 2024 Verified Complaint (“Compl.”) ¶ 32. Notice of a mistake in a mail-in ballot serves to let voters know of an error so that they can avail themselves of whatever procedures exist to address such an error. The instructions on the ballot envelope have been shown to be insufficient for thousands of voters. It is no trouble at all for the Board to enter the right SURE code and give everyone a fair chance to vote. That is the process which is due.

2. An Appeal to Common Pleas Under Section 3157 Is Meaningless Unless a Voter Knows That Their Vote Has Not Been Counted.

The Board next suggests that any voter whose mail-in ballot has been rejected has access to procedural due process because that voter may “appeal that

rejection to the Court of Common Pleas under 25 P.S. § 3157 where a full hearing is required.” Board Br. 40. The argument is disingenuous. To exercise their right to appeal, every mail-in voter would have to attend the official canvass to ask whether their mail-in ballot was rejected. And if the mail-in ballot had a disqualifying error on the declaration envelope, it would be useless to appeal, and yet too late to vote a provisional ballot. Pre-Election Day, pre-deprivation notice—alerting the voter that their mail-in ballot has been set aside while there is still time to cast a provisional ballot that can be counted if the mail ballot is rejected—is the only notice sufficient to preserve the right to vote. *See Washington*, 306 A.3d at 300 n.54 (“the general rule is that pre-deprivation process is required . . . it is only in exceptional circumstances when a post-deprivation remedy is appropriate”). Instead, the Board presents a Catch-22 to the residents of Washington County: the only possible opportunity to be heard is one that the voter can never exercise.

The Board also flippantly suggests that “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.” Board Br. 40. But residents of the Commonwealth of Pennsylvania have a right to vote by mail-in ballot and to have such ballot count in the election. 25 P.S. § 3150.11(a) (“A qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article”). The Board’s proposal

that all voters should choose to vote in person to avoid any potential risk is unreasonable and provides no justification to avoid the Board's duty to provide adequate due process.

IV. DEFENDANTS' PROCEDURAL ARGUMENTS ARE MERITLESS.

In an effort to avoid liability on the merits, the Board and Republican Intervenors also throw a kitchen sink of procedural objections at Plaintiffs' claim. None of them preclude Plaintiffs' right to the relief they seek.

As an initial matter, Defendants do not challenge Plaintiffs' ability to seek a declaration from this Court that Washington County's practice of concealing information, misleading voters, and then disenfranchising them in April of 2024 violated the Due Process Guarantee. *See* Plaintiffs' Motion for Summary Judgment at 7. Instead, their justiciability arguments focus only on Plaintiffs' request for prospective relief. *See* Board Br. 17-22; GOP Br. 18-27.

All of these arguments fail. The request for declaratory and permanent injunctive relief before this court is not moot, is ripe for adjudication, and is being prosecuted by plaintiffs with cognizable injuries that can be redressed by this Court.

A. Plaintiffs' Case Is Not Rendered Moot by The Department of State's Forthcoming Updates to the SURE System.

First, Plaintiffs' request for relief is not rendered moot by the fact that the DOS will be making updates to the SURE system ahead of the November election. Board Br. 16-17. Mootness arises when "changes in the facts or in the law . . . deprive the litigant of the necessary stake in the outcome." *Pap's A.M. v. City of Erie*, 812 A.2d 591, 599–600 (Pa. 2002). But nothing about the anticipated changes to the SURE system will relieve the Board of liability or obviate Plaintiffs' entitlement to relief.

As an initial matter, the Board claims that DOS, not the Board, is at fault for misleading voters into believing that their mail-in ballot will be counted because it is DOS that controls the language of the emails that voters receive through the SURE system. Board Br. 2-3. From that false premise, the Board asserts that because DOS is planning to change the language in some of those emails ahead of the November election, "[a]ny alleged confusion is eliminated going forward," and Plaintiffs will no longer have a case. Board Br. 3; 17.

None of this supposed logic is supported by the record. The Board has admitted that it is the *Board* that triggers the emails sent to voters through the SURE system, based on the code the *Board* selects. Stip. Facts ¶ 24; *see also* Exhibit 3, Deposition of Deputy Secretary for Elections and Commissions Jonathan Marks ("Marks Tr.") 57:7-12; 69:25-70:6; Ostrander Tr. 34:25-35:12;

38:24-39:8. The Board has also admitted that selecting the “record-ballot returned” code triggers an email that does not provide voters with notice that their mail-in ballot envelope has a disqualifying error, while entering “CANC” or “PEND” does provide such notice. Stip. Facts ¶¶ 24; 30-34; Ostrander Tr. 57:15-61:7; 63:7-64:2. And the record is clear that nothing in DOS’s forthcoming updates will alter any of these facts. Assistant Secretary Marks’ testimony demonstrates that the email triggered by selecting the “Record – Ballot Returned” code, even as modified, will not tell the voter that their ballot has been segregated for a disqualifying error; that the CANC and PEND codes, which will also remain options in the system, will provide that notice; and that the Board will still control which of those emails is sent to the voter. Marks Tr. 79:22-80:14; 82:2-84:1; 118:4-119:9.

The issue of DOS’s slight changes to the language of some of the emails in SURE is a red herring: it is the Board’s deliberate choice to use those emails in a way that conceals information and misleads voters that has violated and will continue to violate the procedural due process guarantee. And Washington County’s insistence that coding defective mail-in ballots as “Record – Ballot Returned” will no longer cause “confusion” after these minor updates are implemented only confirms the Board’s intent to continue misusing that code to deprive voters of notice that their ballot will not be counted. Plaintiffs’ due process

rights have been and will continue to be violated by these deliberate efforts to conceal and mislead.

B. Plaintiffs' Case Is Ripe.

The Court should also reject Defendants' baseless assertion that Plaintiffs' suit is not ripe because the Board has not yet decided how it will handle mail-in ballots with disqualifying errors in the upcoming November general election. Board Br. 18-19; GOP Br. 18-20, 23.

"The basic rationale underlying the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Phila. Entm't & Dev. Partners, L.P. v. City of Phila.*, 937 A.2d 385, 392 (Pa. 2007) (citation and quotation marks omitted). To determine whether an action for declaratory and injunctive relief is ripe, courts consider "(1) whether the issues are adequately developed for judicial review, including whether the claim involves uncertain and contingent events that may not occur as anticipated or at all; and (2) what hardship the parties will suffer if review is delayed." *Banfield v. Cortes*, 922 A.2d 36, 45 (Pa. Commw. 2007). An action is ripe for adjudication so long as "the claims of the several parties in interest, while not having reached the active stage, are nevertheless present, and indicative of threatened litigation in the immediate future, which seems unavoidable"

Berwick Twp. v. O'Brien, 148 A.3d 872, 881 (Pa. Commw. 2016) (citation omitted).

That standard is clearly met here. The undisputed record demonstrates that in April of 2024, the Board implemented a procedure for handling mail-in ballots in which the elections office set aside mail-in ballots with disqualifying errors and then entered them into the SURE system using a code that deprived voters of notice that their vote would not be counted. Stip. Facts ¶ 42; Stip. Facts, Exs. A-C; Ostrander Tr. 67:9-23; 71:5-18. Board of Elections Director Melanie Ostrander testified that, in keeping with past practice, the Board will “most likely” handle mail-in ballots with disqualifying errors on the declaration envelopes in November the same way it did for the April 2024 primary. Ostrander Tr. 126:14-127:14; 127:24-128:6.

Defendants’ insistence that the Board “has yet to adopt a policy” for November is squarely at odds with the record and with their litigation strategy. *see* Board Br. 3, 18-19; GOP Br. 19-20. According to Election Director Ostrander’s testimony, the Board’s practice is to “review” its existing mail-in ballot process prior to each election. Ostrander Tr. 126:23-24. And as demonstrated by the Board’s practice in 2023, a vote is not required to keep an existing mail-in ballot process in place. For example, at the Board’s April 26, 2023 meeting, which was held ahead of the May 2023 primary, a motion was made, seconded, and approved

to allow curing of certain mail-in ballots. *See* Stip. Facts, Ex. K. As Director Ostrander testified, the policy was subsequently applied to the November 2023 general election. Ostrander Tr. 127:4-13. However, there was no *new* vote held at the September 19, 2023 board meeting to continue the policy: instead, the meeting minutes state only that “[t]he process for curing received absentee and mail in ballots *will remain the same as was voted* on at the April 26, 2023 BOE meeting” Stip. Facts, Ex. K (emphasis added).

In short, contrary to Defendants’ claim that “there are no facts of record to establish that the Policy will be in effect for the 2024 General Election,” GOP Br. 19, the mail-in ballot process the Board implemented in April 2024 *is* the Board’s process for November unless and until the Board decides to change course.¹⁹ And the Board has given no indication of doing so, as evidenced by the Board’s vigorous defense of how it conducted the April 2024 primary, and Defendants’ insistence that the Board’s changes in procedure “were—and are—in full compliance with Pennsylvania statutory and decisional law.” Board Br. 1.

¹⁹ The cases relied on by Republican Intervenors are inapposite. GOP Br. 18-19. In *Disability Rights Pennsylvania*, Justice Wecht concluded plaintiffs’ request for prospective relief was not ripe because it sought to remedy the impact of delays in mail service that “may or may not occur . . . in several weeks’ time.” *Disability Rights Pa. v. Boockvar*, 660 Pa. 210, 211 (2020) (Wecht, J., concurring). Here, there is no question of what will occur in November: Washington County’s *current* mail-in ballot procedure violates Plaintiffs’ procedural due process rights, and the only “speculation” about whether that policy will be in place in November is introduced by the Board and is entirely within its control. Moreover, in *Delisle*, the Court did not dismiss the case on ripeness grounds, but merely declined to exercise King’s Bench authority. *Delisle v. Boockvar*, 660 Pa. 253, 254 (2020) (Wecht, J., concurring).

It is clear that absent court intervention, this November the Board will continue to deprive voters of timely notice that their mail-in ballot envelope has a disqualifying error and their vote will not be counted. If the court delays its review of Plaintiffs' claim until after the Board once again starts segregating and miscoding mail-in ballot status for the November election, another cycle of voters will be foreclosed from rescuing their right to vote, disenfranchising hundreds of voters in Washington County.

The Court does not need to wait for this harm to occur to address it. *See Berwick*, 148 A.3d at 881; *see also Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1217-18 (Pa. Commw. 2018) (an action for declaratory and injunctive relief is ripe where it presents the "ripening seeds of a controversy") (quotation and citation omitted). But even if the Board could credibly assert that this practice is not currently in place, such a claim would constitute voluntary cessation of illegal conduct, which "does not moot a case where the offensive conduct could be resumed upon dismissal of the proceedings." *Atlantic Inland, Inc. v. Township of Bensalem*, 394 A.2d 1335, 1337 (Pa. Commw. 1978) (citation omitted). The Court should not permit the Board to take a position that "would allow the party acting wrongly to revert, upon dismissal of the proceedings, to the offensive pattern of conduct." *Temple Univ. v. Pa. Dep't of Public Welfare*, 374 A.2d 991, 995 (Pa. Commw. 1977); *cf. DeJohn v. Temple Univ.*, 537 F.3d 301, 309

(3d Cir. 2008 (declining to dismiss claims when the court was “left with no assurance that [defendant] will not reimplement its... policy, absent an injunction, after this litigation has concluded” and particularly when the defendant “defended and continues to defend . . . the constitutionality of its prior ... policy”). Plaintiffs’ challenge is ripe for adjudication.

C. Plaintiffs Have Standing.

1. Voter Plaintiffs Have Standing.

Defendants argue that the seven Voter Plaintiffs in this action lack standing to seek prospective relief because “[i]f Plaintiffs properly fill out their mail-in ballots for the November election, the concerns raised by this action are not implicated one bit.” Board Br. 19; *see also* GOP Br. 22-23. Defendants’ attempts to evade the legal consequences of the Board’s efforts to deprive voters of procedural due process should be rejected.

a. Voter Plaintiffs’ Interests Are Substantial, Direct, And Immediate.

Standing is established when a petitioner is “aggrieved” by the matter she seeks to challenge. *Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009). “An individual can demonstrate that he has been aggrieved if he can establish that he has a substantial, direct, and immediate interest in the outcome of the litigation.” *Id.* The interest is “substantial” if it “surpasses that of all citizens in procuring obedience to the law.” *Id.* (internal quotation marks and citation omitted). The

interest is “direct” when there is a “causal connection between the asserted violation and the harm complained of,” and it is “immediate” so long as that connection is “not remote or speculative.” *Id.* Voter Plaintiffs meet all these requirements.

Defendants do not dispute that all seven Voter Plaintiffs are qualified, eligible voters in Washington County who intend to vote by mail in the November election. Stip. Facts ¶¶ 8-15. Yet Republican Intervenors argue that because the County’s practice deprives *all* voters of such notice, “the interest of Voter Plaintiffs with respect to the Policy is no different than that of all other voters in Washington County.” GOP Br. 23. That is not the test for standing. The fundamental thrust of the “substantial interest” inquiry is whether the Board’s actions have “some discernible adverse effect” on Voter Plaintiffs’ procedural due process rights beyond an “abstract interest” in ensuring that the Board does not violate the Pennsylvania Constitution. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975); *see also Fumo*, 972 A.2d at 496 (framing the inquiry into standing as whether a person has been “adversely affected . . . by the matter he seeks to challenge”). Voter Plaintiffs have concrete, identifiable interests that distinguish them from the public at large. The fact that hundreds of additional Washington County voters’ due process rights will also be violated as a result of the Board’s actions does not reduce the violation of

Plaintiffs’ individual rights to a “generalized grievance.” *Cf. Fumo*, 972 A.2d at 500.

Nor is there anything “speculative” about the fact that when Voter Plaintiffs vote by mail in November, they will once again be subjected to the Board’s practice of segregating and ultimately canceling ballots without notice. Stip. Facts ¶ 8; Ostrander Tr. 126:14-127:14; *see supra* at Section IV.B. Indeed, Defendants admit that if Voter Plaintiffs make an error on their declaration envelope that prevents their vote from being counted in November, they will never know what the error was, or that they made an error at all. Stip. Facts ¶ 8. These facts establish a concrete, “causal relationship between the asserted violation and the harm complained of,” rendering Individual Plaintiffs’ interests both “direct and immediate.” *Fumo*, 972 A.2d at 496.

b. This Case Presents Matters of Public Importance That Are Capable of Repetition, Yet Likely to Evade Review.

The Board’s attempts to reassure the Court that Plaintiffs will not be injured again because they “are now well aware of the importance of following the instructions . . . and intend to comply with the rules” rings hollow. Board Br. 19.²⁰ Inadvertent errors are just that—inadvertent. No one intends to make a mistake

²⁰ Moreover, the Board’s argument that plaintiffs “could pursue an appeal under 25 P.S. § 3157” without such notice, *see* Board Br. 19, is not reasonable. *See supra* at Section III.C.2.

when they fill out their declaration envelope, and yet as the record makes clear, hundreds of people did, including Voter Plaintiffs, all of whom are long-time voters who have successfully voted by mail before, and two of whom have been poll workers themselves. *See, e.g.*, Compl. Exs. 1-7. But even if the Board could guarantee that all the Voter Plaintiffs' votes would be counted this November, the Court should still consider Plaintiffs' request for prospective relief, because the case raises issues of public importance that are capable of repetition yet likely to evade review.

Courts can consider claims that are technically moot where the duration of the injury is "too short to be fully litigated prior to its cessation or expiration," and where there is a "reasonable expectation" that the injury will recur. *Driscoll v. Zoning Bd. of Adjustment of City of Phila.*, 201 A.3d 265, 269 (Pa. Commw. 2018); *see, e.g., Int. of N.E.M.*, 311 A.3d 1088, 1094–95 (Pa. 2024) (considering the question of whether juveniles had the right to expedited review of their delinquency placement, despite the fact that those placements routinely expired before reaching the court as "a clear example of an issue that is 'capable of repetition yet evading review.'"). Courts can also consider claims that are moot when they raise issues of public importance. *See Sierra Club v. Pa. Pub. Util. Comm'n*, 702 A.2d 1131, 1134 (Pa. 1996).

“Given the abbreviated time frame applicable to elections and the amount of time that it takes for litigation to reach this Court,” the mootness exception allowing consideration of issues capable of repetition yet evading review “is particularly applicable when the question presented relates to an election dispute.” *Reuther v. Delaware Cnty. Bureau of Elections*, 205 A.3d 302, 306 n. 6 (Pa. 2019). Accordingly, courts regularly rely on this exception to consider election-related injuries that are technically moot for the parties before the court by the time they are litigated, but which will be inflicted on new parties in the next election and once again evade judicial review if they are not addressed. *See, e.g., In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1226 n.3 (Pa. 2004) (considering question about third-party absentee ballot deliveries because “it is an important issue, of general concern beyond this election, which is capable of repetition and of escaping review.”); *Pilchesky v. Lackawanna Cnty.*, 88 A.3d 954, 965 (Pa. 2014) (“the time constraints inherent in election matters often leave little time for deliberation upon challenges relevant thereto such that the courts may not always be able to render an appropriate decision in matters such as the one presented”); *Bradway v. Cohen*, 642 A.2d 615, 617 (Pa. Commw. 1994) (“Election cases in particular raise the question of mootness when the election at issue has passed before the appeal can be heard.”); *In re Gen. Election, Nov. 8, 1988*, 560 A.2d 260, 262 (Pa. Commw. 1989) (considering the question of whether

election officials could register untimely voter registration applications because “the issue. . . has wide public importance, it is recurring in nature and yet its timing aspects are such that it will evade review if the general rule excluding moot issues is followed.”). Courts also recognize that cases concerning who will be able to vote or to hold public office are of undisputed public importance. *See, e.g., Commonwealth ex rel. Kearney v. Rambler*, 32 A.3d 658, 663 (Pa. 2011); *In re Gen. Election*, Nov. 8, 1988, 560 A.2d at 262; *In re Canvass*, 843 A.2d at 1226 n.3.

This Court should find that the issue presented by Plaintiffs here “is too important to evade review and the controversy remains.” *Applewhite v. Com.*, No. 330 M.D. 2012, 2014 WL 184988, at *6 n. 16 (Pa. Commw. Jan. 17, 2014). The facts of *Applewhite* are instructive. In that case, petitioners challenged a voter identification law, arguing that they were unable to exercise their right to vote because they could not obtain a compliant photo ID under the statute. On appeal, respondents suggested that none of the petitioners would be prevented from voting because after bringing the case, many of them had been able to obtain the necessary ID—in one instance, without the documents required by PennDOT for other applicants. *See* Appellee Commonwealth’s Brief, No. 71 MAP 2012, at 20-21 (2012 WL 8685087, at *20-21); Appellants’ Brief, No. 71 MAP 2012, at 12 n.9 (2012 WL 8685078, at *12 n.9). The court nevertheless decided the issue, reasoning that “[t]o the extent Respondents provided compliant ID to named

petitioners without holding them to the barriers that apply generally, the Court finds the issue is too important to evade review and the controversy remains even if the named Individual Petitioners obtained photo ID.” 2014 WL 184988 at *6 n.16. The same is true here. Even accepting Defendants’ supposition that Voter Plaintiffs are uniquely immunized from future injury because they have been made aware of their errors “as a result of participating in this lawsuit,” and even if the Board is willing to help each Voter Plaintiff ensure they fill out their November ballot properly, *see* Board Br. 19, there are 252 voters who made errors in the last election who do not have the benefit of that knowledge or assistance, and many more coming behind them. The Court can and should address the Board’s unlawful conduct now.

2. Organizational Plaintiffs Have Standing.

Many of the objections Defendants raise to organizational standing rely on the same meritless arguments, already addressed *supra*, that the Organizational Plaintiffs’ claim is foreclosed by *Pa. Dems.*, and that their injury is speculative because “it will only occur ‘if’ the Policy stays in place.” *See, e.g.*, GOP Br. 24-26; Board Br. 21-22. For the reasons set forth above, these arguments lack any basis in the law or facts and should be dismissed.

The only other objection the Board and Republican Intervenors raise to organizational standing relies on an incomplete articulation of organizational

standing doctrine. An organization has standing to seek relief from injury to itself when it has “a substantial, direct and immediate interest in the outcome of the litigation.” *Allegheny Reproductive Health Ctr. v. Pa. Dep’t of Human Servs.*, 309 A.3d 808, 832 (Pa. 2024). Courts have consistently found that an organization has a cognizable injury when the entity must “alter its operations and reroute its resources in response to allegedly unlawful conduct in a way it otherwise would not have.” *See, e.g., Disability Rts. Pa. v. Pa. Dep’t of Hum. Servs.*, No. 1:19-CV-737, 2020 WL 1491186, at *5 (M.D. Pa. Mar. 27, 2020); *accord Allegheny*, 309 A.3d at 838-39 (finding that medical providers had standing to challenge the Abortion Control Act where they were forced to modify their treatment plans and incur additional expenses as a result of the Act’s coverage exclusion); *see also Applewhite*, 2014 WL 184988 at *8. (finding that respondents’ actions caused organizational petitioners “to waste, not merely divert resources to perform its voter education efforts that are crucial to its mission.”) (emphasis in original).

Here, both CCJ and Washington Branch NAACP have demonstrated a cognizable legal interest in this litigation. CCJ’s mission is to advance policies that address the health and environmental impacts of the coal, oil, and gas industries in Washington County. Stip. Facts ¶ 1. Ensuring that residents have a voice in electing officials who will be accountable on these issues is central to CCJ’s mission, and since 2020 it has invested significant time and resources to its

Defending Democracy Program, which seeks to increase civic engagement, educate residents about candidates' positions on important issues, and ensure that voters have the information they need to participate in the democratic process. *Id.* The Board's unlawful pre-election activities have directly interfered with CCJ's ability to carry out this work by confusing and misleading its members, and by requiring CCJ to jettison important initiatives in order to mitigate the impact of the Board's actions on voter participation. Stip. Facts ¶ 2; *see also* Compl. ¶¶ 136-141. The Board's conduct has similarly stymied the Washington Branch NAACP's ability to advance its mission of ensuring equal rights, including voting rights, for its members. Stip. Facts ¶¶ 3-4. Washington Branch NAACP works to expand voter participation among its members through voter registration and turnout efforts, candidate fora to help voters make informed decisions at the polls, and public education to improve trust in the political process. *Id.* at ¶ 3. The Board's conduct has forced the Washington Branch NAACP to divert time and attention away from this work to address the fallout of the Board's actions, fallout which includes not only the disenfranchisement of its members, but also damage to voters' perceptions of the integrity of the electoral system, and its resulting impact on voter turnout in future elections. Stip. Facts ¶ 4; *see also* Compl. ¶¶ 143-147.

Defendants cite *Ball v. Chapman* for the proposition that “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.” Board Br. 18 and GOP Br. 24, citing 289 A.3d 1, 19 n.103 (Pa. 2023) (emphasis added). But Defendants fail to acknowledge that in *Ball*, the court went on to consider “the particular facts” of the case, which it underscored were “highly relevant, and . . . must guide our analysis,” and concluded that the organizational petitioners—which included Republican Intervenors in this case—had standing based on injuries analogous to those asserted here. *Id.* at 19-20.

In *Ball*, Republican party petitioners challenged DOS guidance and asserted organizational standing based on the fact that they devoted “substantial time and resources to training election monitors,” and that the guidance had created “a lack of clarity” that rendered their activities “less effective, wasting the considerable resources they have devoted to those activities, or requiring them to devote even more resources to them.” *Id.* at 13. The Pennsylvania Supreme Court held that this expenditure of resources constituted a “substantial interest” and that there was a “causal connection” between the respondent’s conduct and the organizational petitioners’ “inability to educate candidates, electors, and voting officials effectively” that was “neither remote nor speculative.” *Id.* at 19-20.²¹

²¹ Republican Intervenors’ allegations of organizational injury in *Ball* closely resemble their basis for standing in this case. *See* Stip. Facts ¶ 18 (Intervenors “devot[e] substantial time and resources toward monitoring the voting and vote counting processes” and “make expenditures to ensure they and their voters understand the rules governing the elections process,” which are “wasted” whenever a rule is changed, requiring them to “make new expenditures to learn and to

Considering the “particular facts” before this Court, the same reasoning is applicable here.²² Both CCJ and Washington Branch NAACP devote “substantial time and resources” to increasing civic engagement and voter turnout. *See* Stip. Facts ¶¶ 1-4; Compl. ¶¶ 133-134; 142-143. The Board’s conduct has directly “rendered those activities less effective, wasting . . . considerable resources . . . or requiring them to devote even more resources,” *See* Stip. Facts ¶¶ 1-4; Compl. ¶¶ 135-141; 144-146. CCJ and Washington Branch NAACP have standing to bring this suit.

3. There Is a Direct Causal Connection Between The Harm Plaintiffs Seek To Redress And The Relief They Seek.

The Board argues that “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.” Board Br. 22. This is incorrect for two reasons. First, the relief Plaintiffs seek—the entry of

educate voters, volunteers, and candidates.”); *id.* ¶ 19 (judicial order requiring Board to change its policy would require Republican Intervenors “to divert resources from their other core business activities toward revising their training and education programs.”).

²² By contrast, the facts of *FDA v. All. For Hippocratic Medic.*, 602 U.S. 367 (2024), the only other case upon which Defendants rely, are completely inapposite. There, plaintiff pro-life medical associations challenged the FDA’s decision to relax its regulation of mifepristone, an abortion drug. The associations, who did not prescribe the drug, claimed they were nevertheless injured because they had incurred costs to advocate against the FDA’s actions. The Court declined to find that the resources plaintiffs expended were cognizable because the FDA’s actions did not “directly affect” or “interfere” with the associations’ ability to engage in advocacy and public education objecting to the drug’s increased availability. *All. For Hippocratic Medic.*, 602 U.S. at 394-395 (citing *Havens Realty Corp. v. Coleman*, 455 US 363 (1982)). Here, by contrast, CCJ and Washington Branch NAACP’s “core business activities” have been impaired by the Board’s conduct. *Id.*

timely, accurate information about their mail-in ballot status into the SURE system—*would* provide a remedy, in the form of the opportunity to vote by provisional ballot at their polling place on Election Day. Plaintiffs’ Br. 26. As discussed *supra* at Section I.B, voters who make disqualifying errors on their mail-in ballot envelopes are statutorily entitled to vote a provisional ballot. But they can only exercise that right if they receive pre-Election Day notice that their mail-in ballot has been set aside. Providing notice to voters could also reduce the risk that they make the same mistake again.

Moreover, Plaintiffs’ right to notice is not predicated on the right to vote a provisional ballot in the first instance. That is because, as the Supreme Court recently affirmed in *Washington*, “the right to procedural due process is distinct from the right the government seeks to impair.” 306 A.3d at 285. Accordingly, “the controlling inquiry in procedural due process claims is not whether some form of concrete relief will manifest at the end of the process that the Constitution requires; rather, “the ‘controlling inquiry’ in this regard is whether the state is in a position to provide for pre-deprivation process.” *Id.* at 296 (citations and quotations omitted). The Board’s argument to the contrary is error because it “sidesteps the injury asserted” by “presuming that the absence of a concrete remedy . . . is an excuse for denying the right to process itself.” *Id.* at 296 & n.47 (internal quotation marks and citation omitted).

Accordingly, the “controlling inquiry” for this court is simply whether the Board is “in a position to provide for pre-deprivation process” to Plaintiffs by entering timely, accurate information about voters’ mail-in ballot status into the SURE system. The record establishes that the Board is plainly well-positioned to do so, warranting judgment in Plaintiffs’ favor.

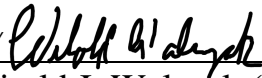
CONCLUSION

Plaintiffs respectfully request that the Court deny the Board’s and Republican Intervenors’ Motions for Summary Judgment, grant Plaintiffs’ Motion for Summary Judgment, and enter an order in the form attached thereto.

Dated: August 2, 2024

Respectfully submitted,

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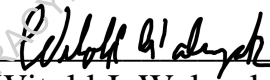
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of August, 2024, a true and correct copy of the foregoing Omnibus Memorandum of Law in Opposition to the Washington County Board of Elections' Motion for Summary Judgment and Republican Intervenors' Motion for Summary Judgment has been served electronically upon counsel of record for the Washington County Board of Elections and the Republican Intervenors, the Republican National Committee and the Republican Party of Pennsylvania.


Witold J. Walczak

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Exhibit 3

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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

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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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

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1 MS. GALLAGHER: Yeah.

2 BY MS. GALLAGHER:

3 Q And Deputy Secretary Marks, did you meet
4 with -- other than your counsel, did you meet with
5 anyone else prior to today in preparation of your
6 deposition?

7 A No, just counsel.

8 Q Okay. I'd like if you would -- with
9 respect to mail-in ballots, could you walk us through
10 the process of from, you know, application -- from the
11 voter perspective?

12 A From the voter's perspective?

13 Q Uh-huh.

14 A Okay. So from the voter's perspective the
15 voter must first submit an application to request a
16 mail-in ballot. And -- well, I'll get into the
17 permanent mail-in voter list in a minute. But you
18 submit an application that application, you have to
19 provide identification in the form of either your
20 driver's license number, if you do not have a
21 driver's license number, the last four digits of your
22 social security number.

23 Submit that application to your county
24 election office. The county election office
25 processes that, and that involves confirming that the

1 voter is a registered voter within the county, and
2 also verifying the identify -- identification
3 information provided by the voter. If the
4 identification information checks out, then the
5 county issues a mail ballot to the voter. And that
6 process involves printing out a mailing label,
7 essentially, that has the voter's unique information
8 as well as a unique identifying number that is
9 attached to the mail ballot request and attached
10 likewise to the voter's record.

11 That is then mailed out to the voter. The
12 voter, once the -- once she receives the ballot, will
13 complete the ballot, insert the ballot in the inner
14 secrecy envelope is the term of art most people use.
15 It's a yellow envelope, seal that envelope, then
16 insert that envelope into the outer declaration
17 envelope on which is the declaration of the voter
18 verifying where they have to affirm that they are
19 qualified to vote in the election, and they must also
20 sign and date the declaration envelope and then
21 return it to the county election office.

22 If a county -- if a voter is on the
23 permanent mail-in voter list --

24 Q Could you explain, excuse me. I don't
25 mean --

1 A Yeah.

2 Q -- to interrupt. If you could explain for
3 the record what that means.

4 A Permanent -- so the statute calls it
5 permanent. It's actually -- we use the term annual
6 when we're describing it because the voter has to
7 submit an application annually. But if the voter
8 does that, they are entitled to receive mail-in
9 ballots for every election in that election cycle up
10 to actually, I believe into February.

11 And I forget if it's the first Monday or
12 second Monday in February. But they're entitled to
13 receive without having to make any additional
14 request, a mail-in ballot for every election, they're
15 entitled to vote in during that period of time.

16 Q So once the ballot is sent back in, we've
17 -- you've gotten that far, and I apologize for
18 interrupting you, then what's the process for the
19 ballot?

20 A So the first thing the county does is they
21 will mark it as received, and we -- our guidance is
22 to date that, to mark the date that it was received,
23 and then they will scan it into the SURE system, the
24 Statewide Uniform Registry of Electors. And at that
25 point, the ballot will be marked as received.

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 or that's contained in the Statewide Uniform Registry
2 of Electors. But it's basically a -- it's rulemaking
3 by an agency as opposed to a statutory requirement.

4 Q And is there a process that a regulation
5 goes through before it's adopted?

6 A There is --

7 MS. MULLEN: Objection.

8 A Sorry. There is -- there's a drafting
9 process to my knowledge, again, not an attorney, but
10 I believe there's public comment period typically on
11 regulations. And then there's an independent review
12 body that reviews proposed regulations before they're
13 ultimately published.

14 Q And I think we can go back. We've covered
15 that another way. We were talking about what happens
16 to a ballot, it's received in the County Board of
17 Elections, is where we dropped off. If you could
18 walk us through that again, please.

19 MS. MULLEN: Objection.

20 A So once it's received, as I said, our
21 guidance to county says that they date stamp it so
22 that it's clear what date it was received and then
23 they scan it. And that records the ballot as
24 returned in the -- in the SURE system. And then
25 counties must keep those ballots secure until they

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 explain what the SURE system is? What we refer to as
2 the SURE system?

3 A I'll try to be as brief as possible, but
4 the acronym SURE stands for Statewide Uniform
5 Registry of Electors. It is essentially the
6 Commonwealth's single uniform voter registration
7 database and that database, aside from allowing --
8 enabling counties to register voters and maintain
9 their official registry of voters, it also provides
10 for other processes like the processing of absentee
11 and mail-in ballots, and also the processing of
12 provisional ballots.

13 So it's essentially the official voter
14 registration database for the Commonwealth of
15 Pennsylvania on which all counties must maintain
16 their official voter registry.

17 Q Does that also help the -- strike that.
18 Excuse me.

19 With respect to the term poll book
20 reconciliation, can you explain what that means?

21 A So the term poll book is, I don't know
22 that it's actually used in the -- in the voter
23 registration law, but the poll book is the district
24 register, which is basically a list of the registered
25 voters for a specific election district or precinct,

1 if you will, within a county.

2 Q And the county board maintains those?

3 A Yes.

4 Q That was not a question, I apologize for
5 the form, but that was posted here.

6 A Yes. The county board maintains those.

7 Q Does the information in the SURE system
8 help the county board to do that? Is that the source
9 of information in part for poll book record keeping?

10 A Yes, because the counties must maintain
11 their official voter roles in the SURE system. Then
12 both the general register, which is the entire voter
13 role for the county, and the district registers
14 within that county are generated from the SURE
15 system.

16 Q With respect to an individual voter, what
17 information is contained in the SURE system about
18 individual voters?

19 A Well, I -- obviously the voter's name,
20 their address of registration. There is personal
21 identifying information contained in the SURE system
22 such as the voter's date of birth, identifying
23 information like the voter's driver's license number
24 or the last four digits of their social security
25 number. Their record will also be linked to a

1 Allegheny County. Is that reflected in the SURE
2 system?

3 A It -- there will be a vote history record
4 that will show that the voter voted, and it will also
5 indicate the method of voting. So if a voter voted
6 by mail ballot, it'll indicate that in the public --
7 publicly available information.

8 Q And is that information available in real
9 time or there -- is it sequenced when the information
10 can be made available, if that makes sense?

11 A It's -- well, I can only speak to the
12 department. The department provides what's called
13 the full voter export, which is actually a list of
14 every valid, you know, registered voter in the
15 Commonwealth. And it includes vote history and all
16 the other information we talked about, that is
17 published once a week.

18 Q Okay.

19 A If someone goes to a county board of
20 elections and request public information, I believe
21 the county would be obligated to provide that as
22 quickly as possible.

23 Q Thank you. And one other question is
24 regard, which has been on -- every time I listen to
25 the news and hear about Pennsylvania's ballots are

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 cover. But we did make changes to our guidance on
2 the processing of provisional ballots at the same
3 time that we were deploying these changes to the SURE
4 system.

5 Q Fair enough. I just wanted to make sure
6 it was not related to the actual release notes. If
7 we could turn back to those, could you tell us --

8 A The release notes?

9 Q The release notes, yes. Why were the
10 release notes developed or why were the changes to
11 the SURE system?

12 A Well, the changes to the SURE system were
13 developed to provide counties with options that best
14 met their needs -- that best met their needs for
15 processing absentee and mail ballots.

16 Q Could you explain that a little better?

17 A So we -- the primary change that we are
18 announcing here was the addition of pending status
19 codes. So for example, we talked a while ago about
20 the term cure. So for example, if a county provides
21 voters an opportunity to cure a ballot, they may want
22 to put them into a pending status. And we were -- we
23 were trying to accommodate that process where it
24 would essentially tell the voter, your ballot is in
25 this pending status because you made an error and you

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 A Yes, the first sentence in that first full
2 paragraph, yes.

3 Q Okay. So were the changes that are
4 reflected or discussed in this document in effect for
5 the April, 2024 primary election?

6 A They were, yes.

7 Q Okay. Turn to page 2, and I would ask you
8 to look at the first paragraph. Would you agree with
9 me -- I want to try to move it along. So, ballot
10 response type updates. What is a ballot response?

11 A A ballot response is basically the
12 disposition of the ballot at a -- at a point in time.
13 So voter returns the ballot and the county would
14 essentially indicate that the ballot was received,
15 and they could subsequently update that to indicate
16 the disposition of the ballot at that point in time.

17 Q What do you mean by disposition of ballot?

18 A So -- and looking at this, for example, at
19 pend incorrect date, that would indicate that the
20 ballot was received, but based on the county's review
21 of the outer envelope, that ballot did not contain a
22 correct date.

23 Q Okay. We'll come back down to that. I'd
24 like you to look at the first paragraph, the third
25 line -- well actually the second line. And starting

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 systematic notice that the voter would get regarding
2 the status of their ballot.

3 Q Do the Department of State always notify a
4 voter, a mail ballot when their voter was -- vote was
5 received or their ballot was received?

6 MS. MULLEN: Objection.

7 A We've provided for many years emails,
8 systematically generated emails that would go out
9 based on actions taken by the county. And in this
10 case, it's updating the response type which would
11 generate an email to the voter provided that the
12 voter has provided an email address.

13 Q Okay. And in that second -- in that
14 third, bless you, the third paragraph, your mail
15 ballot may not be counted because you did not
16 correctly date the declaration on your ballot return.
17 If you do not have time to request a new ballot
18 before, in parenthetical, ballot application deadline
19 date, or if the deadline has passed, you can go to
20 your polling place on election day and cast a
21 provisional ballot.

22 A Correct.

23 Q Who determine that language or develop the
24 language that goes to the voter?

25 A Well, the department as I mentioned

1 A Well, if a county doesn't want this email
2 sent to the voter, one option they have is to leave
3 that in the ballot return status and only update this
4 after 8:00 p.m. on election.

5 Q Okay. Fair enough. And for a non-curing
6 county, that would be acceptable, correct?

7 MS. MULLEN: Objection,

8 A It -- are you asking if it would be
9 acceptable to the department and it's certainly --

10 Q Correct.

11 A -- with, you know, within our
12 understanding and my understanding of the Supreme
13 Court's ruling on notice and cure, that is an option
14 that is available to the county.

15 Q That's all I'm going to ask. Could we
16 look please at Ostrander 5. I'm not going to expect
17 you to testify as to an actual email that went to the
18 voter identified here. This format of email, have
19 you seen it before?

20 A I have, yes.

21 (Ostrander's 5, previously marked, is
22 attached to the transcript.

23 Q Okay. Could you tell us what it is
24 please?

25 A This is the -- this is an example of an

1 email that is generated from the SURE system.

2 Q And how is it generated from the SURE
3 system?

4 A Well, it is generated when the county
5 updates the ballot response type for an individual
6 voter.

7 Q So would this email then have been
8 generated when a county received a mail-in ballot and
9 entered it into the SURE system -- recorded it, I
10 want to try to use it correct?

11 A Recorded it as received, yes.

12 Q Can you tell from this email which
13 dropdown menu, the county in which this voter resides
14 would have used? I believe it's Washington.

15 A I believe it would just be ballot
16 recorded. Basically, this is when the county records
17 the ballot as returned --

18 Q Is that --

19 A -- this email is general.

20 Q Isn't that -- is that email, if we can
21 agree, ballot record -- record ballot return, I
22 believe is the term?

23 A Record ballot return.

24 Q Okay. If that make a lot of sense. If
25 you look down and we just spoke about that the county

1 MS. GALLAGHER: Attorney Mullen, I would
2 ask if you would mind producing those in conjunction
3 with Mr. Marks' testimony here today.

4 THE VIDEOGRAPHER: Counsel, do you mind
5 putting your --

6 MS. GALLAGHER: Oh gosh, I'm sorry.

7 THE VIDEOGRAPHER: It's okay. I can still
8 hear everything.

9 MS. MULLEN: Just put something in
10 writing.

11 MS. GALLAGHER: And we have -- for
12 purposes of the record, I made a request to counsel
13 for the state to produce all of the SURE system
14 release document since the date of enactment of Act
15 77.

16 MS. MULLEN: Do you mean with respect to -
17 -

18 MS. GALLAGHER: With respect to --

19 MS. MULLEN: -- dropdown menu?

20 MS. GALLAGHER: -- dropdown menu, yes.

21 BY MS. GALLAGHER:

22 Q Are changes going to be made to the
23 dropdown menus, do you know?

24 A It is -- it is our intent to change not
25 necessarily dropdown menus, but to change the wording

1 in the emails based on the feedback we received from
2 counties.

3 Q Do you know when those -- do you know what
4 the -- excuse, strike that. I apologize.

5 Do you know what types of changes, as you
6 sit here today, will be made to the emails?

7 A As I said the overarching message with
8 counties, this kind of less, not more, you know, one
9 other example is sometimes it was very specific words
10 that counties didn't like and they suggested
11 different words. So for example, on the message
12 related to provisional ballots they suggested that
13 you can request a provisional ballot as opposed to
14 cast a provisional ballot.

15 Q Are you aware of litigation, which was
16 filed in Butler County as a result of voters there
17 who received one of your emails and Butler County did
18 not count it because -- did not count the provisional
19 ballot because they had a non-curing policy as to
20 secrecy envelope. Are you aware of that?

21 A I am aware that litigation was filed in
22 Butler County.

23 Q Do you know when the new information will
24 be available?

25 A No later than 45 days before the election.

1 BY MR. BERARDINELLI:

2 Q Mr. Marks, my name's David Berardinelli,
3 and I just have a couple brief follow ups. I
4 represent the Washington County Board of Elections.
5 As to the new emails that are going to be used for
6 the November general election, is it the department's
7 intent to use an email for the received ballot
8 return, like which was suggested, and I think what
9 you testified to was some of the counties wanted
10 simply your ballot has been received. Will that be
11 an option?

12 A Yes. I -- based on what, you know, came
13 out of those feedback sessions, I believe we will
14 shorten the text in that email to simply say the
15 ballot's been received and that if the voter wants
16 additional information to reach out to the county
17 election office.

18 Q Can you get out the, I'm going to call it
19 the SURE release notes if I've got the right term of
20 art.

21 A Marks' 1?

22 Q Yeah, please.

23 A Yes.

24 Q Page 4, if you don't mind. When a county
25 is inputting information into the system, is this the

1 dropdown menu they see, the menu that's pictured on
2 page 4?

3 A Yes. This is a depiction of the dropdown
4 menu they would -- they would see for status reason.

5 Q And when they're viewing this screen, it
6 doesn't automatically show them what email will be
7 sent, correct?

8 A It does not, no.

9 Q And mine is small, but I think I counted
10 23 different options that a county could choose.
11 Right?

12 A I'm not going to disagree. I'd have to
13 count them myself, but yes, it looks like about two
14 dozen.

15 Q And I used the word options because I
16 think you used that word because this release was
17 about putting six new options for counties to choose
18 from.

19 A Right.

20 Q And assume for my counting is correct,
21 that would mean there was 17 prior?

22 A Yes.

23 Q And the county, if I understand your
24 testimony, has the discretion which of those 23 it's
25 going to use?

1 A Correct.

2 Q I'm jumping around a little bit, I
3 apologize. But right at the start of your
4 deposition, I think you were talking about the
5 instructions that are sent to a voter, right, mail-in
6 voter? And those instructions are ultimately sent by
7 the County Board of Elections, right?

8 A Correct.

9 Q But the Department of State is essentially
10 the author of those instructions?

11 A Yes. The department prescribes that.

12 Q And at the top of those instructions,
13 there's language that tells the voter for you -- for
14 your ballot to count, you must follow all these
15 steps. You're aware of that, right?

16 A That sounds right. If -- I'd have to see
17 a copy to know if that's verbatim, but yes, we do --
18 we do notify voters that -- to ensure that their
19 ballot is counted, they must do certain things.

20 Q And I think you may have just answered,
21 but why do you -- why do you have that language on
22 there?

23 A Well, we want voters to know how to
24 properly complete their balloting materials to ensure
25 that there -- that they will be counted.

1 MR. BERARDINELLI: I think that's all I
2 have. I'm going to review, but someone else may have
3 a couple questions.

4 THE VIDEOGRAPHER: You're going to pass
5 the witness?

6 MR. BERARDINELLI: Yeah. I will pass the
7 witness and --

8 THE VIDEOGRAPHER: Should I take the --

9 MR. BLACK: Yeah, if you don't mind --

10 THE VIDEOGRAPHER: (indiscernible)

11 01:49:43

12 MR. BERARDINELLI: Yeah, I'm loud to --
13 hopefully you got me.

14 THE VIDEOGRAPHER: Yeah, no, your volume
15 is great.

16 MR. BERARDINELLI: Thank you.

17 EXAMINATION BY COUNSEL FOR THE PLAINTIFF

18 BY MR. BLACK:

19 Q Okay. Deputy Secretary Marks, my name's
20 Martin Black, I'm from the Dechert firm, and I
21 represent the plaintiffs. And I also have a few
22 questions for you. Let's just go back and make sure
23 we understand the process from the moment that the
24 ballot comes into the election office. So the mail-
25 in ballot comes into the election office, and the

1 election worker looks at the ballot, and I assume can
2 see right away, for instance, if there's a signature
3 missing, correct?

4 A Correct.

5 Q And they can see right away if the date's
6 missing, correct?

7 A Correct.

8 Q And they can see right away in many cases,
9 if the date is wrong, like the voter has put in his
10 birthdate rather than 2024. Correct?

11 A I -- yeah, I would think that's certainly
12 the case.

13 Q Now, I believe the next step is for the
14 election worker to stamp the date on the ballot. Is
15 that what you directing to --

16 A That is our guidance to stamp the date so
17 there's no question about when the ballot was
18 received.

19 Q And does the stamp go on the side of the
20 envelope with the signature on it or on the other
21 side, or is it -- varied?

22 A It varies depending on county practice. I
23 do believe we intentionally left some space on the
24 declaration side of the envelope that the county
25 could use. So it didn't interfere with anything

1 the county has made a final decision as to the
2 ballot, or it does not offer the opportunity to
3 cure." Is that right?

4 A That is correct, yes.

5 Q And that is the guidance that DOS provided
6 with respect to the use of the cancel-incorrect date
7 code, correct?

8 MS. MULLEN: Objection to the term
9 guidance.

10 MR. BLACK: Thank you.

11 MR. BERARDINELLI: Form.

12 THE WITNESS: It is -- we provided this
13 matrix to give counties basically the business reason
14 is we are telling counties based on their individual
15 practices, we're kind of giving them cues when they
16 would use this code versus another code. That does
17 not necessarily mean that a county is going to follow
18 our recommended process there.

19 BY MR. BLACK:

20 Q I'm not asking you to say it's mandated by
21 law or --

22 A Correct.

23 Q -- to predict what counties are going to
24 do. I'm just asking you to confirm that --

25 A This is our opinion of when it should be

1 Q If I go into the SURE system, polls are
2 closed, right? Yes?

3 A Correct. Yes.

4 Q Okay. I go into the SURE system, I mark
5 canceled no date. Okay. Is the county voter going
6 to get this email that tells them to go vote a
7 provisional ballot?

8 A If -- yes. If the email notifications are
9 being sent out, yes.

10 Q Yeah. If Jane Smith has janesmith@yahoo
11 on file, she's going to get this email, right?

12 A Right.

13 Q And this email is telling her after the
14 polls have closed to go try and cast a provisional
15 ballot?

16 A Correct.

17 Q Has the department considered adopting a
18 code for use after the canvassing that will simply
19 say your ballot was canceled, for example, because of
20 an incorrect date?

21 A We -- what we've looked at and based on
22 our feedback during the feedback sessions while we
23 looked at, was adding clear language that if it's --
24 if it's after election day at the -- the voters
25 receiving a notification that this is essentially the

1 final disposition. I don't recall the exact
2 language, but certainly that issue was raised. And
3 what -- what we discussed and what is our intent is
4 to put clear language in there that some of this
5 information would only be applicable up to 8:00 p.m.
6 on election day.

7 Q And that's going to be in effect for the
8 November, 2024 election?

9 A That is the intent. Yes.

10 Q Let me show you what is already marked as
11 -- that was Ostrander Exhibit 10. You and I had some
12 discussions about the ballot instructions, right

13 A Correct.

14 (Ostrander's 10, previously marked, is
15 attached to the transcript.

16 Q And those are the ballot instructions from
17 the primary, correct?

18 A They are, yes.

19 Q And can you read the -- not the immediate
20 top line, but the second line of the document into
21 the record.

22 A "For your ballot to count, you must follow
23 all of these steps."

24 Q And that was the notice you were talking
25 about that you wanted to provide to people who are

Exhibit 4

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Transcript of the Testimony of

MELANIE OSTRANDER

July 18, 2024

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



412-261-2323
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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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17
18
19
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21
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25

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 MS. BENOIT: Sure. She's going
2 to be asking questions on behalf of us.

3 MS. GALLAGHER: For expediency's
4 sake, although the PAGOP has separate
5 counsel here, I will be conducting the
6 examination and lodging objections on
7 behalf of both entities to avoid
8 duplication.

9 MS. McKENZIE: And assuming that
10 you are raising the same objections to
11 form, you don't need to say it twice.

12 MR. BERARDINELLI: Great. Thank
13 you.

14 MS. McKENZIE: If for some
15 reason you are asserting a different
16 objection, please let me know.

17 MR. BERARDINELLI: I appreciate
18 it.

19 MS. McKENZIE: Can you read back
20 the last question?

21 - - - -

22 (The record was read by the reporter.)

23 - - - -

24 BY MS. McKENZIE:

25 Q. In 2023 if the declaration envelope

1 was missing a signature or a date or had
2 an incorrect date, was there a code
3 entered into the SURE system?

4 MR. BERARDINELLI: Object to the
5 form, compound. You can answer.

6 A. Yes. We used the SURE code's
7 cancel, no signature or cancel, no date.

8 BY MS. McKENZIE:

9 Q. Was there also a SURE code for
10 cancel, incorrect date in 2023?

11 A. I can't recall. They have changed
12 the codes quite often that I can't recall
13 if that one was available in 2023.

14 Q. Okay, in the process for -- sorry,
15 let me start over.

16 When in the process of the mail
17 ballot in 2023 was that code entered?

18 MR. BERARDINELLI: Object to the
19 form. You can answer if you understand.

20 A. When the ballot was scanned as
21 being received in the system, instead of
22 choosing recorded, ballot returned,
23 canceled, no date, or canceled, no
24 signature was selected.

25 BY MS. McKENZIE:

1 Q. So the scanning of the ballot and
2 the choosing of a code in 2023 happened
3 all in one -- happened simultaneously?

4 MR. BERARDINELLI: Object to the
5 form.

6 BY MS. McKENZIE:

7 Q. I'll rephrase that. So in 2023,
8 the scanning of the ballot and the
9 selection of a code happened in the same
10 sitting?

11 A. It happened on the same day that
12 the ballot was received through either in-
13 person delivery by the voter or mail
14 delivery.

15 Q. In 2023, there were three code
16 options your office was using, received;
17 cancel, no signature; cancel, no date; is
18 that correct?

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

21 A. From my memory, yes, because I
22 can't recall if there was a canceled,
23 incorrect date option in 2023.

24 BY MS. McKENZIE:

25 Q. Okay, how would you -- how would

1 your office decide which code to select?

2 A. If a signature was missing, it
3 would be no signature. If the date was
4 missing, it would be canceled, no date.
5 If it was incorrect, my memory -- I
6 don't believe there was an incorrect date
7 in 2023, so it would have been canceled,
8 no date as that is the best option that
9 the Department of State provided us in the
10 SURE system. And if it was correctly --
11 if the voter's signature and full date
12 were present, recorded, ballot returned.

13 Q. In 2023 if a ballot was returned
14 without a secrecy envelope, did your
15 office have any way to determine that?

16 MR. BERARDINELLI: Object to the
17 form. You can answer.

18 A. Not until the prec canvassing when
19 the ballots were by law opened.

20 BY MS. MCKENZIE:

21 Q. So your office did not weigh
22 ballots on a scale to see if there was a
23 secrecy envelope?

24 A. No.

25 Q. Okay, and your office did not take

1 When your office was looking at a
2 declaration envelope in 2023, how long
3 would it take on average to determine if
4 the date was correct?

5 MR. BERARDINELLI: Object to the
6 form. You can answer if you can.

7 A. I don't know an exact time, but it
8 did not -- within seconds, 10 to 30 second
9 or less.

10 BY MS. MCKENZIE:

11 Q. And how long would it take to
12 determine if a date was present at all?

13 A. Again, I don't know the exact time
14 but within 10 to 30 seconds.

15 Q. Okay, once that ballot is scanned
16 in and a SURE code was selected in 2023,
17 what would your office do with the ballots
18 that had either a missing date or an
19 incorrect date?

20 A. Those ballots were segregated, but
21 they were still in the same locked, secure
22 area as the ballots that contained, you
23 know, correctly completed declarations.

24 Q. When the canceled, no date code was
25 entered into the SURE system in 2023, if a

1 voter had an email on record, what would
2 they receive?

3 MR. BERARDINELLI: Object to
4 form. You can answer.

5 A. The Department of State would send
6 the voter an email based upon the code
7 that was selected by our staff in the SURE
8 system.

9 BY MS. MCKENZIE:

10 Q. And what would that email tell the
11 voter?

12 A. For which code?

13 Q. The canceled, no date code.

14 A. That their ballot was canceled
15 because it did not contain a date, and
16 those emails came from the Department of
17 State.

18 Q. Would the email provide any other
19 instruction to the voter in 2023?

20 MR. BERARDINELLI: Object to
21 form.

22 A. I can't recall as we did not draft
23 those emails nor had any input in drafting
24 those emails, so I can't recall the exact
25 language.

1 BY MS. McKENZIE:

2 Q. In 2023, did the Board of Elections
3 allow a voter to come to the Board of
4 Elections and either fix that date or
5 request a new ballot?

6 A. The Board in 2023, if the voter's
7 ballot was canceled for a no-date issue,
8 the voter had to come in person to the
9 Board of Elections office, and a new
10 ballot with new declaration envelope was
11 issued.

12 Q. Okay, in 2023 if a voter's ballot
13 was canceled for the no-date issue and
14 they weren't able to get to the Board of
15 Elections prior to election day, could
16 they vote a provisional ballot at the
17 polling place on election day?

18 A. In 2023, the Board of Elections did
19 allow voters to vote a provisional, yes.

20 Q. You also testified that in 2023
21 there was a code for canceled, no
22 signature; is that correct?

23 A. That is correct.

24 Q. When your office was scanning a
25 mail-in or absentee ballot, how would they

1 determine if there was a signature present
2 or not present?

3 A. Can you repeat that?

4 Q. When your office was scanning a
5 ballot, how would they determine if a
6 signature was present or not present?

7 A. On the declaration envelope?

8 Q. Ah-huh.

9 A. By examining it visually.

10 Q. Was that an examination that,
11 similar to the date, took a matter of
12 seconds?

13 A. Yes.

14 Q. If a ballot was -- if the
15 declaration envelope was missing a
16 signature in 2023, what would your office
17 do with that ballot?

18 A. The ballot was scanned in the SURE
19 system, and the canceled, no signature
20 code was selected. That ballot was also
21 placed in the locked room with the other
22 ballots, but it was segregated from the
23 ballots that contained dates and
24 signatures.

25 Q. And after your office selected a

1 envelope?

2 A. Yes. The voter could sign the
3 original declaration envelope that was
4 missing the signature, and then that
5 ballot, the code would be changed in the
6 SURE system to recorded, ballot returned.

7 Q. In 2023, did your office call
8 voters and let them know that their ballot
9 was either missing a signature or a date
10 or had an incorrect date?

11 A. If there was not an email on the
12 voter's record, then we contacted them
13 with one phone call in 2023.

14 Q. If a voter's ballot in 2023 was
15 missing a signature or a date, did your
16 office send a letter by mail to voters to
17 let them know?

18 A. No.

19 Q. In 2023 in the general election,
20 how many voters made these types of errors
21 that we've been talking about, a missing
22 signature, a missing date, an incorrect
23 date on their declaration envelope?

24 MR. BERARDINELLI: Object to
25 form.

1 A. I don't recall.

2 BY MS. McKENZIE:

3 Q. A news article about a Board of
4 Elections meeting in 2024 reported that in
5 2023 there were -- you know what? You can
6 scratch that question.

7 In 2023 in the poll books that were
8 generated for the election, what would the
9 poll books reflect about a voter who
10 returned a mail ballot that had a missing
11 signature or a missing date or an
12 incorrect date?

13 MR. BERARDINELLI: Object to
14 form.

15 A. It would -- if the voter corrected
16 the issue, whether it was a signature or
17 date, then it would say ballot returned.
18 If the voter did not correct the issue and
19 the ballot was marked in the SURE system
20 as canceled, then the poll book would say
21 that a ballot was issued to the voter.

22 BY MS. McKENZIE:

23 Q. Would the poll book reflect that
24 the ballot was canceled?

25 A. No.

1 MS. McKENZIE: Sure. I'll be
2 clear if it's something like that.

3 BY MS. McKENZIE:

4 Q. But for the declaration envelopes
5 that had one of those three disqualifying
6 errors, you had testified that they were
7 segregated --

8 MR. BERARDINELLI: In 2023?

9 BY MS. McKENZIE:

10 Q. -- in 2023, and where were they
11 stored?

12 A. They were stored in our -- what we
13 refer to as our mail ballot room. And it
14 is a separate room from the main elections
15 office but still on the same floor.
16 It's separated by a hallway, and
17 they were stored in that room which is a
18 separate lock than the lock for the
19 elections office, and that room has
20 security cameras.

21 And the reason for the
22 differentiation between our office and
23 that room is that the housekeeping is not
24 permitted in the mail ballot room which is
25 why it's a different lock and separate

1 from the main election office.

2 Q. And in 2023, all mail ballots were
3 stored in the mail ballot room?

4 A. Yes.

5 Q. But the ballots that had a
6 disqualifying error were kept separate
7 from the ballots that did not have any
8 disqualifying errors; is that correct?

9 A. In 2023, yes. They were in the
10 same room, but they were not in the same
11 container as the ballots with signatures
12 and dates.

13 Q. The ballots that were missing
14 signatures or dates on their declaration
15 envelope, were they separated by precinct?

16 A. Yes. The ballots that were missing
17 dates and signatures were in their own
18 separate bin and filed alphabetically by
19 precinct name.

20 MS. SCHNEIDER: I'm sorry, I
21 didn't hear you. Did you say filed
22 alphabetically by precinct name?

23 THE WITNESS: By precinct name,
24 by Precinct A, Precinct B.

25 BY MS. McKENZIE:

1 Q. In 2023, why did your office choose
2 to use the canceled codes when processing
3 mail-in ballots?

4 A. The Board of Elections in 2023
5 voted at their meeting on the policy that
6 our office would follow for mail ballots
7 that were not signed and dated, and they
8 instructed us as to which codes to use and
9 how to handle ballots that were missing
10 dates or signatures, the Board of
11 Elections in 2023.

12 MR. BERARDINELLI: I'm sorry,
13 what was the end?

14 THE WITNESS: I said they, so
15 the Board of Elections in 2023.

16 BY MS. MCKENZIE:

17 Q. And what was the Board of
18 Elections's reasoning for using the
19 canceled codes?

20 MR. BERARDINELLI: Object to
21 form, if you know.

22 A. I don't know their particular
23 reasons, but out of what was offered, they
24 voted for us to use the canceled codes and
25 gave us instructions as to how to handle

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 Q. At the March meeting with the Board
2 of Elections, did you explain the
3 different types of notice that would be
4 sent to the voter if you entered each of
5 those codes?

6 A. I didn't go over with the Board the
7 exact verbiage in each email as there's
8 different emails the voter would receive,
9 but I summarized and told the Board of
10 Elections that, if an email address was on
11 file, the voter would receive an email
12 from the Department of State informing
13 them of which error they made on their
14 ballot, declaration envelope.

15 Q. I think I forgot to ask this. Did
16 you also inform the Board of Elections
17 that there was a record ballot returned
18 code available?

19 A. Yes.

20 Q. When you summarized for the Board
21 the different types of emails that would
22 be sent to the voter depending on which
23 code was entered, what did you tell the
24 Board about the canceled codes?

25 A. I informed the Board that there

1 were cancel codes available in the SURE
2 system provided by the Department of State
3 that we could -- that the Board of
4 Elections could instruct my office to use
5 depending on how they wanted us to handle
6 ballots received with disqualifying errors
7 on the declaration envelope.

8 MR. BERARDINELLI: Can you read
9 that answer back? I'm sorry.

10 - - - -

11 (The record was read by the reporter.)

12 - - - -

13 BY MS. MCKENZIE:

14 Q. And what did you tell the Board of
15 Elections about the email a voter would
16 receive if the Board of Elections
17 instructed you to enter a pending code for
18 a ballot that had a disqualifying error?

19 A. I informed the Board that they
20 would receive an email from the Department
21 of State that would inform the voter there
22 was an error and depending on which code
23 which error was described on their
24 declaration envelope.

25 Q. And what did you tell the Board of

1 Q. Ms. Ostrander, I'm showing you a
2 document that's been marked Ostrander 3.

3 A. Yes.

4 Q. Have you seen this document before?

5 A. I have.

6 Q. And what is this document?

7 A. These are the approved Board of
8 Election minutes from April 11, 2024.
9 They're just not printed on the fancy
10 minute paper like the others and signed by
11 the chief clerk, but they were approved at
12 the -- they were approved by the Board of
13 Elections.

14 Q. I want to direct your attention to
15 the second page of the document which is
16 the first page of the minutes. In the
17 middle of the page under the Election
18 Director Comments, the second sentence
19 says: Ms. Ostrander provided an example
20 of the email voters received after their
21 absentee or mail-in ballot had been
22 received by the elections office.

23 A. Yes.

24 Q. Did you at that point actually
25 physically present a copy of a sample

1 email to the Board of Elections?

2 A. I did.

3 MS. McKENZIE: Okay, I want to
4 mark these next documents. I guess they
5 would be 4, 5, and 6, Ostrander 4, 5, and
6 6.

7 - - - - (Exhibit Nos. 4, 5,
8 and 6 marked for
9 identification.)

10 - - - -

11 BY MS. McKENZIE:

12 Q. The document that's been marked
13 Ostrander 4 is a copy of an email received
14 by Plaintiff Jeffrey Marks. Ostrander 5
15 is a document of an email received by
16 Sandra Macioce, and Ostrander 6 is an
17 email received by Plaintiff Kenneth
18 Elliott.

19 Ms. Ostrander, the documents that
20 have been marked 4, 5, and 6, the text of
21 those emails, is that the same text that
22 you would have shown to the Board of
23 Elections at the April 11th meeting where
24 you provided examples of the emails voters
25 received after their absentee or mail-in

1 Q. Okay, let's start over. If a voter
2 in April of 2024 returned a ballot with a
3 disqualifying error, what type of email
4 would they receive?

5 MR. BERARDINELLI: Object to
6 form.

7 A. In Washington County according to
8 the Board of Elections's decision, not in
9 general as to what was available?

10 BY MS. MCKENZIE:

11 Q. Sure, I can ask it all in one
12 question.

13 A. That's why I misunderstood.

14 Q. In Washington County in 2024, if a
15 voter returns a mail-in or absentee ballot
16 with a disqualifying error and they have
17 an email on file, what type of email do
18 they receive?

19 A. The voter received an email from
20 the Department of State informing them
21 that their ballot had been received by
22 Washington County which is the email that
23 you have as Exhibits 4, 5 and 6.

24 Q. And they receive this email,
25 Examples 4, 5, and 6, based on the

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 mail-in ballots received with errors on
2 the declaration envelope.

3 Q. And what was the vote?

4 A. The vote was two to one.

5 Q. Okay, I believe you also mentioned
6 that at this April 11th, 2024 meeting the
7 Board of Elections gave instructions to
8 your office about what codes to use in the
9 SURE system; is that correct?

10 A. Yes. It was during the discussion.

11 Q. Okay, and what did the Board of
12 Elections tell you and your office with
13 respect to the SURE codes for the 2024
14 election?

15 A. The Board of Elections informed me
16 that all ballots would be coded as
17 recorded, ballot returned in the SURE
18 system.

19 Q. I just want to refer back to the
20 documents that have been marked Exhibits
21 4, 5, and 6, and each of these emails in
22 the middle of the email specifically
23 state, to get more information on your
24 ballot status, you can look it up at, and
25 it provides a website.

1 If a voter in April of 2024 after
2 they had returned their ballot went to
3 that website, a Washington County voter,
4 what would they see on that website?

5 MR. BERARDINELLI: Object to
6 form, if you know.

7 A. The website, I believe, informs the
8 voter if they applied for a mail ballot
9 when it was sent and when it was received
10 by our office, the Washington County
11 office, elections office.

12 BY MS. MCKENZIE:

13 Q. If your office had entered a
14 canceled code for a ballot that had a
15 disqualifying error and the voter went to
16 the website, what would they have seen?

17 MR. BERARDINELLI: Object to
18 form, if you know.

19 A. I don't know.

20 BY MS. MCKENZIE:

21 Q. In April of 2024 when mail-in and
22 absentee ballots were returned to your
23 office, were they physically stamped like
24 they were in 2023?

25 A. Yes.

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 A. I do.

2 Q. Okay, do you recall at that point
3 how many ballots had been returned with
4 disqualifying errors at that April 11,
5 2024 meeting?

6 A. I believe it was 60.

7 Q. Would that have been the first time
8 you updated on the number of disqualifying
9 -- I'll start over.

10 Would that have been the first time
11 you reported on the number of ballots that
12 had disqualifying errors in April of 2023?

13 A. Yes.

14 Q. Do you recall the second time that
15 you reported on that?

16 A. Yes, it was prior to the
17 commissioner's public meeting on April
18 18th.

19 Q. Okay, do you recall at that point
20 how many ballots had been returned with
21 disqualifying errors?

22 A. I don't recall. It may have been
23 -- 170 is sticking out to me, but I'm not
24 certain on that number.

25 Q. There was a newspaper article in

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 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 segregated because it was not signed or
2 not dated?

3 MR. BERARDINELLI: Object to
4 form. You can answer.

5 A. If I'm understanding this
6 correctly, you're asking did my staff tell
7 any voter that their declaration envelope
8 had a disqualifying error? Is that what
9 you're asking?

10 BY MS. McKENZIE:

11 Q. Yes.

12 A. No.

13 Q. In April of 2024, did any voter or
14 -- I'll start over.
15 In April of 2024, did any voter,
16 Washington County voter, ask the election
17 office for a list of voters whose mail-in
18 ballots had disqualifying errors?

19 MR. BERARDINELLI: Object to the
20 form.

21 A. You're asking did a resident or
22 voter of Washington County ask us, my
23 office, for a list of the voters with
24 disqualifying errors?

25 BY MS. McKENZIE:

1 Q. Yes.

2 A. Yes.

3 Q. And when was that?

4 A. There was a phone inquiry by a
5 resident who asked for that, and I told
6 her I was not able to provide it.
7 But the verbal -- or, I'm sorry, a
8 written request, there was a written
9 request from the Center for Coalfield
10 Justice. There was a representative, but
11 I don't know if he was a Washington County
12 voter. I don't know who he was. There
13 was a representative that brought us a
14 written letter.

15 Q. Do you recall when the phone
16 inquiry was from a voter asking for the
17 list?

18 A. It was around when the
19 commissioners had their public meeting on
20 April 18th. I can't recall if it was
21 right before or right after, but it was
22 around the April 18th commissioners'
23 public meeting.

24 Q. And why weren't you able to provide
25 a list to that voter who had called?

1 A. Because the ballots had not been
2 canvassed as of yet. Canvassing doesn't
3 start until election day at 7 a.m.

4 MS. MCKENZIE: What number are
5 we on?

6 THE REPORTER: 7.

7 - - - -

8 (Exhibit No. 7 marked for identification.)

9 - - - -

10 BY MS. MCKENZIE:

11 Q. I'm showing you a document that's
12 been marked Exhibit 7. Ms. Ostrander,
13 have you seen this document before?

14 A. I have.

15 Q. And what is this?

16 A. This is an email that was sent to
17 the counties from Deputy Secretary
18 Jonathan Marks. Well, it was signed --
19 well, sent on behalf of because Rachel
20 Hadrick sent it, but it was sent on behalf
21 of Deputy Secretary Marks.

22 Q. And this email in the bottom half
23 talks about the different types of
24 incorrect and undated ballots, and I just
25 want to make sure I understand this.

1 democrat commissioner representatives is
2 on one team and one is on the other team.
3 So we end up with three, three people on
4 each team. They divide envelopes and
5 individually review them.

6 Q. So each team of three is looking at
7 half the ballots; is that correct?

8 A. Yes. And if they have a
9 disagreement, we can bring in members of
10 the other team to review the ballot that
11 there may be a disagreement on.

12 Q. Okay.

13 A. We want to make sure that if there
14 is a disagreement, all six canvass board
15 members have reviewed it. If there is not
16 disagreement, then they remain in their
17 two teams.

18 Q. Were there any disagreements on
19 Monday, April 29th?

20 A. There were not.

21 Q. At that point, how many ballots
22 were in this segregated category for
23 having qualifying errors?

24 A. I believe it was over 250.

25 Q. Did any ballots that had been

1 contained in the Department of State
2 emails that are generated by the SURE
3 codes, and they asked for feedback
4 regarding the language.

5 BY MS. MCKENZIE:

6 Q. Did you provide any feedback
7 regarding the codes or the language in the
8 emails during that meeting?

9 A. Yes. I did not bring up the topic,
10 but I agreed with some of my colleagues
11 from other counties that I personally did
12 not care for the language in the ballot
13 received email which is generated from the
14 record, ballot returned SURE code because
15 the language does not reflect the decision
16 made by the Washington County Board of
17 Elections.

18 Q. And how did the language not
19 reflect the decision made by the county
20 Board of Elections?

21 A. It had an indication that -- I
22 can't recall. We have it as an exhibit,
23 but it was if there was --

24 Q. You can refer to the exhibits.

25 A. Yeah, we can. It's the language of

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 and the November '23 election was the
2 same?

3 A. In 2023?

4 Q. Yes.

5 A. Yeah. The primary was in May of
6 2023.

7 Q. Correct.

8 A. Pennsylvania has those new little
9 nuances in the election.

10 MS. SCHNEIDER: Little.

11 A. So the primary was May of 2023 and
12 then November of 2023 for the election.

13 BY MS. MCKENZIE:

14 Q. Okay, are you familiar with what
15 any nearby counties are doing with respect
16 to mail-in and absentee ballots that are
17 returned with disqualifying errors?

18 A. I know of the counties that are in
19 our newspaper circulation area based upon
20 articles that have been in our Observer
21 Reporter since they also cover Greene
22 County and Fayette County.

23 So based upon what was reported on
24 the newspaper, I knew of Greene County and
25 Fayette County, what their boards had

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 MS. McKENZIE: Objection.

2 BY MS. GALLAGHER:

3 Q. -- in the election code?

4 MS. McKENZIE: Objection.

5 A. According to the election code
6 which was affirmed in Ball V. Chapman's
7 ruling, the Board of Elections can decide
8 whether the County cures or does not cure
9 absentee and mail-in ballots, and then
10 they would decide the procedures on how
11 they would cure or not cure.

12 BY MS. GALLAGHER:

13 Q. As an elections director -- strike
14 that.

15 In 2023, was the decision to cure
16 also done via Board vote?

17 A. Yes. Prior to the 2023 primary in
18 May and prior to the 2023 election in
19 November, the Board of Elections voted on
20 the curing policy.

21 Q. Did you have any concerns about the
22 curing policy that was enacted by the
23 Board?

24 MR. BERARDINELLI: Object to
25 form, if you understand it.

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 A. At the April 11th, 2024 Board of
2 Elections meeting.

3 Q. Did that vote occur before or after
4 Mr. Fedore's comments?

5 A. After.

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

8 - - - -

9 RE-EXAMINATION

10 - - - -

11 BY MS. MCKENZIE:

12 Q. I just have a few follow-up
13 questions. You were asked by Ms.
14 Gallagher if there had been a received
15 code in Exhibit 2 would that have been an
16 appropriate code for the Washington County
17 Board of Elections to direct you to use?

18 A. Yes.

19 Q. Was there a code that was simply
20 received with nothing else?

21 A. In the SURE system, the Department
22 of State did not have a simply recorded or
23 received code in SURE.

24 Q. Is Washington County required to
25 use the SURE system in administering

1 elections?

2 MR. BERARDINELLI: Objection.

3 MS. GALLAGHER: Object to form.

4 MR. BERARDINELLI: Join. You
5 can answer.

6 A. Yes. The election law outlines
7 that the secretary of the Commonwealth is
8 to like have the SURE system -- it's in
9 the law. It's in the election law that we
10 are to use the SURE system.

11 BY MS. MCKENZIE:

12 Q. Are you familiar with the laws
13 concerning the SURE system and the
14 regulations under those laws?

15 MR. BERARDINELLI: Object to
16 form.

17 A. I'm not sure. Specific codes? I
18 don't understand.

19 BY MS. MCKENZIE:

20 Q. Are you generally familiar with the
21 Pennsylvania law concerning the SURE
22 system?

23 A. Yes.

24 Q. Okay, are you familiar with the
25 regulations under the SURE system law?

1 MS. GALLAGHER: She can answer.

2 A. That information is contained in
3 the complaint.

4 BY MS. GALLAGHER:

5 Q. Okay, do you believe it would
6 mislead a voter whose ballot in 2024 the
7 Board had already decided could not be
8 cured to tell them that they could come
9 and get and apply for a second ballot or
10 vote provisionally? Do you believe that
11 misleads them into believing that they had
12 a right to cure that ballot?

13 MS. McKENZIE: Objection.

14 A. Based upon the Board of Elections's
15 decision not to allow curing, the language
16 contained in the Department of State's
17 emails in my opinion would mislead voters
18 in Washington County.

19 BY MS. GALLAGHER:

20 Q. In Washington County, in a
21 noncuring county. It would lead them to
22 believe that they could cure a defect in a
23 ballot, correct?

24 MS. McKENZIE: Objection.

25 A. My opinion is that reading -- if I

1 were a voter receiving that email and
2 reading it, I would assume that I could
3 rectify the issue on the declaration
4 envelope.

5 BY MS. GALLAGHER:

6 Q. And once again, are you aware of
7 any provision in the election code that
8 cancels an otherwise fatally defective
9 mail-in ballot?

10 MS. McKENZIE: Objection.

11 BY MS. GALLAGHER:

12 Q. Cancels, that's the word.

13 A. The election code does not -- it
14 does not tell us, tell the Board of
15 Elections or the election office, to
16 cancel voters' ballots based on any
17 issues.

18 Q. So this is just the Department of
19 State making it up, correct?

20 MS. McKENZIE: Objection.

21 BY MS. GALLAGHER:

22 Q. It's either in there or it's not.

23 A. It's the Department of State's
24 guidance.

25 MS. GALLAGHER: Got it. I don't