

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

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

Plaintiffs,

v.

WASHINGTON COUNTY BOARD
OF ELECTIONS,

Defendant,

v.

REPUBLICAN NATIONAL
COMMITTEE and REPUBLICAN
PARTY OF PENNSYLVANIA,

Intervenors.

CIVIL DIVISION

No. 2024-3953

***INTERVENORS' BRIEF IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT***

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

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I. INTRODUCTION

Plaintiffs, under the guise of a legally deficient procedural due process claim, ask this Court to disregard controlling precedent of the Pennsylvania Supreme Court and, in effect, legislate from the bench, in a misguided attempt to impose notice and cure procedures on the Washington County Board of Elections. In doing so, Plaintiffs disregard myriad justiciability requirements for asserting such a claim, fail to address their threshold legal burdens, and ignore inconvenient substantive case law.

Plaintiffs' claim is simply an attempt to thwart the Pennsylvania Supreme Court's landmark decision in *Pennsylvania Democratic Party v. Boockvar* and have this Court do what the Supreme Court said it could not: mandate county boards of election to adopt notice and cure procedures for fatally defective absentee and mail ballots. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (hereinafter "*Pa. Dems.*").²

In essence, Plaintiffs seek relief which would reduce *Pa. Dems.* to a footnote; disregard the authority of the General Assembly to promulgate the Election Code; undermine the ability of county boards of elections to effectuate safe and secure

² This Brief uses the term "mail ballot" to refer to both absentee ballots and mail-in ballots, each of which are authorized under the Pennsylvania Election Code. *See* 25 P.S. § 3146.6, § 3150.16.

elections; and render this Court a mere scrivener for Plaintiffs' preferred election regime.

In accordance with *Pa. Dems.*, a voter has no constitutional or statutory right to notice and cure procedure and the county boards cannot be required to adopt such procedures. *Id.* at 372-374. That is the controlling law of the Commonwealth with respect to notice and cure procedures and Plaintiffs' case, inherently, ends there.

In order to avoid foreclosure of its claims under the controlling precedent of *Pa. Dems.*, however, Plaintiffs argue that the Supreme Court did not address notice and cure procedures under a due process analysis. Plaintiffs' Brief at 3. In that one statement, Plaintiffs reveal this case for what it is: a second bite at a constitutional challenge to Act 77 of 2019 to force county boards of elections to adopt notice and cure procedures.

Yet Plaintiffs have failed to cite to a single precedential case or other binding authority that allows this Court to disregard the clear holding of *Pa. Dems.* In that regard, Plaintiffs' silence speaks volumes. Plaintiffs have not cited to any such authority because none exists. Rather, existing authority is to the contrary.

Moreover, the ultimate logical consequence of Plaintiffs' case, were the Court to grant the relief Plaintiffs request is an inherent finding that the absence of notice and cure provisions in Act 77 is unconstitutional on a due process basis. Such a finding would trigger the non severability provisions of Act 77.

Fortunately, the Court need not reach such a Hobson's choice. In addition to the procedural defects set forth in Intervenor's Motion for Summary Judgment ("Intervenor's Motion") and Brief in Support ("Intervenor's Brief"), Plaintiffs' Motion fails substantively on multiple grounds.

First, a fundamental genuine issue of material fact exists which precludes the grant of Plaintiffs' Motion. Plaintiffs have failed to prove and cannot prove that the policy which was duly adopted in conjunction with the 2024 Primary Election (the "Policy") will be adopted for the upcoming General Election. Rather, all Plaintiffs present is that it is "**most likely**" that the Policy will be in effect for the November 2024 General Election, rendering the entire claim speculative. Plaintiffs' Brief at 18. Hence, a genuine issue of material fact – indeed the very basis for the case itself – exists and prohibits the entry of summary judgment in favor of Plaintiffs.

Second, Plaintiffs' inability to prove the existence of any action of the Board regarding any notice and cure procedure for the November election also renders this entire matter merely speculative and thus non justiciable. The case therefore should be dismissed for lack of ripeness. Likewise, the speculative nature of any notice and cure policy for the upcoming election and any resultant potential harm to Plaintiffs deprive Plaintiffs of standing to maintain this action.

Third, Plaintiffs have not demonstrated that the Board's actions deprived them of a protected life, liberty, or property interest. Even if Plaintiffs could meet this

initial burden, application of the *Mathews* balancing test reveals the Board's procedures are sufficient to comply with due process requirements.

Fourth, as set forth at length in Intervenor's Brief, the Pennsylvania Supreme Court's holding in *Pa. Dems* is dispositive. The law of the Commonwealth is clear: county boards of elections cannot be forced to adopt notice and cure procedures as no such procedures exist in Act 77. *Pa. Dems* at 372-74. The Board is not an exception to that holding and this Court is bound by the Supreme Court's ruling.

Finally, Plaintiffs' request for a permanent injunction is legally and factually deficient and the Court should refuse to grant such an extreme remedy.

For these reasons, Intervenor respectfully request that the Court deny Plaintiffs' Motion for Summary Judgment and dismiss Plaintiffs' Complaint.

II. COUNTERSTATEMENT OF THE CASE

A. Requirements for Applying and Voting Via Mail-In Ballot.

The Parties agree that under the bipartisan Act 77 the General Assembly enacted in 2019, any eligible voter is permitted to request and cast a mail-in ballot without having to provide a reason for doing so. *See* 25 P.S. §§ 3150.11-3150.17; Complaint for Declaratory and Injunctive Relief ("Comp.") ¶ 25.

Under Act 77, in order to apply to vote by mail-in ballot a voter must complete and submit an application to their county board of elections. Such an application must include the voter's name, address of registration, proof of identification (such

as a driver's license or non-driver ID card), and the last four digits of the voter's Social Security number. 25 P.S. §§ 3146.2, 3150.12; *see also* § 2602(z.5)(3) (defining "proof of identification"). Once a county board of elections receives an application for mail-in ballot from a voter, it is required to verify the voter's identity and eligibility to vote. If the voter is found to be eligible to vote, the board then sends the voter a mail ballot package which includes: 1) the ballot; 2) an inner "secrecy envelope," 3) an outer "declaration envelope," and 4) comprehensive instructions for completing and submitting the ballot. *Id.* §§ 3146.6(a), 3150.16(a); *see also* Deposition of Melanie Ostrander, Washington County Director of Elections ("Ostrander Dep."), July 18, 2024, attached as Exhibit A, pp. 27-28, 189-192, Ex. 10; Joint Stipulation of Facts ("JSOF") Exhibit E.

Once the voter receives their mail-in ballot package, the voter is required to mark the ballot itself, place the ballot inside the secrecy envelope, and then place the secrecy envelope inside the declaration envelope and complete the declaration. 25 P.S. §§ 3146.6(c), 3150.16(c). The county board of elections must receive the completed mail-in ballot packet by 8:00 p.m. on Election Day in order to be timely under the Pennsylvania Election Code. *Id.*

Plaintiffs do not dispute that under Pennsylvania law any mail ballot that is defective because the voter failed to sign or date the declaration envelope, wrote an incorrect date on the declaration envelope, or failed to seal the ballot in an unmarked

secrecy envelope is invalid and cannot be counted (hereinafter “disqualifying defect”). Comp. ¶ 31 (citing *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Pa. Dems.*, 238 A.3d 345 (Pa. 2020)).³

Each Voter Plaintiff admits that when they voted by mail in the 2024 Primary Election, their ballots contained one or more disqualifying defects and, thus, their ballots were not counted. *See* Comp. ¶¶ 83-132. Each of the Voter Plaintiffs intends to vote by mail in the 2024 General Election. *See* JSOF ¶ 8.

B. The SURE System and Notice and Curing Procedures

The Statewide Uniform Registry of Electors (“SURE”) System is a uniform integrated computer system governing the database of registered electors in the Commonwealth. The Election Code mandates that the Department of State (“DOS”) create the SURE System. 25 Pa. C.S.A. § 1222; Comp. ¶ 37. Information input into SURE is used to create poll books for election day. To ensure that the poll books are accurate, a county needs to enter into SURE (a) whether a voter was sent a mail ballot, and (b) whether that voter’s ballot was received by the county board of elections. 25 Pa. C.S.A. § 1222; *see also* Deposition of Jonathan Marks, Pennsylvania Deputy Secretary for Elections and Commissions (“Marks Dep.”), July 23, 2024, attached as Exhibit B p. 35; Ostrander Dep., pp. 204-205. Notably

³ Plaintiffs are the Center for Coalfield Justice (“CCJ”), the Washington Branch NAACP (“NAACP”) (collectively, the “Organizational Plaintiffs”), and a group of individual Washington County voters—Bruce Jacobs, Jeffrey Marks, June DeVaughn Hython, Erika Worobec, Sandra Macioce, Kenneth Elliott, and David Dean (collectively, the “Voter Plaintiffs”).

absent from the Election Code is any reference to sending voters notice that their submitted mail ballots were found to contain a disqualifying defect or any provisions which allows a voter to cure the same via provisional voting.

Notwithstanding this, on March 11, 2024, the Secretary issued documents to the county boards of elections which effectively created notice and cure procedures for mail ballots with disqualifying defects. To that end, the Secretary issued guidance entitled “Pennsylvania Provisional Voting Guidance” (the “Guidance”) concerning how to process mail ballots. Comp. ¶ 41, Ex. 9; JSOF Ex. J. In addition, DOS issued a document entitled “Changes to SURE VR and PA Voter Services as of March 11, 2024” (the “SURE Instruction”). See Comp. ¶ 43, Ex. 10; JSOF Ex. D. The SURE Instruction informs county boards of elections of new codes which the boards *may* use when receiving and logging the return of mail ballots. Comp. ¶¶ 44-47; Ostrander Dep., pp. 55-59. While the Secretary has authority to promulgate regulations governing SURE, *see* 25 P.S. § 2621, the SURE Instruction is not such a regulation, and therefore is not binding on the county boards of elections. See Marks Dep., pp. 14-15 (acknowledging Secretary’s guidance to boards “does not have the force and effect of law”); p. 31 (explaining SURE Instruction is not a guidance, directive, or regulation). Prior to the issuance of the SURE Instruction, all that was entered into the SURE system “was [a code] probably similar to [‘received].” *Id.*, p. 78.

The new Guidance and SURE Instruction informed county boards of elections that they have the *option* to use additional codes other than “Record-Ballot Returned” in order to record the receipt of a mail ballot from a voter. These other codes permit the boards to record further determinations they make regarding ballots if they so choose. *See* Comp., Ex. 10, pp. 6-11; Marks Dep., pp. 18-19 (the SURE instruction was developed “to provide counties with options that best met [the counties’] needs – that best met their needs for processing absentee and mail ballots); pp. 39-40 (agreeing codes were “optional,” explaining “the very first sentence [of the SURE Instruction] actually spells that out very clearly in all caps,” and stressing that boards “may select one of those status reasons **if that is consistent with their county’s practice**” (emphasis added)). Deputy Director Marks testified that all that has to be reflected in the SURE system is “that a ballot was received.” *Id.* p. 35.

For example, the SURE Instruction offers a variety of “CANC” codes allowing county boards to record that the ballot was “Cancelled” for a variety of reasons, such as a missing signature, date, or secrecy envelope. Joint Stipulation Exhibit D. The SURE Instruction also offers a variety of “PEND” codes which allow county boards to record that a ballot is “Pending” for one of the same reasons noted above- missing signature, date, or secrecy envelope. *Id.* The SURE Instruction explains that “PEND” codes can be used “when the county offers the opportunity for voters to replace or correct a submission error,” and the county has

noticed that the mail ballot contains a disqualifying defect. *Id.* The SURE Instruction also explains that the “CANC” codes are intended to be used when the county “has made a final decision as to the ballot, or it does not offer the opportunity to cure.” *Id.*

However, regardless of whether a board selects a “CANC” or “PEND” code, if DOS has an email on file for the voter, DOS sends an auto-generated email to the voter explaining the existence of the defect and encouraging the voter to either “fix” their ballot or go to their polling place on election day to cast a provisional ballot. *Id.* The recording county board is neither the author, nor the sender of such auto-generated emails, and county boards are unable to change the language contained in the email. *Id.*; Ostrander Dep., pp. 78-79; 162-165. These emails are sent by DOS to voters in every county in the Commonwealth, regardless of whether that county permits notice and cure procedures for defective mail ballots. JSOF Ex. D. All of DOS’s current auto-generated emails provide Washington County voters with the impression that they are permitted to cure a defective mail ballot

, despite the fact that this is not consistent with the policy that Washington County adopted for the 2024 Primary Election.

C. Washington County’s Policy for Handling Mail Ballots.

In 2023, the Washington County Board of Elections voted to adopt a policy that provided absentee and mail-in voters with notice of and the opportunity to cure

certain defects in their mail-in ballots in both the 2023 primary and general election. JSOF ¶ 26. Under this 2023 policy, Washington County permitted voters to “cure” mail-in ballots that lacked a signature by going to the election office to add the signature. Further, voters who failed to include the date or wrote an incorrect date could request a replacement mail-in ballot or vote a provisional ballot at their local polling place on Election Day. *Id.* ¶ 28. On March 12, 2024, the Board met to discuss what policy it would adopt for the 2024 Primary Election. *Id.* ¶ 29. No decision was made at that meeting, and the Board met again on April 11, 2024. *Id.* ¶ 33. After discussing the various options with Election Director Ostrander, the Board voted 2-1 to adopt a policy which did not provide voters with notice of disqualifying defects and an opportunity to cure same for mail ballots for the 2024 primary election (the “Policy”). *Id.* ¶ 35.

Director Ostrander testified that none of the options offered by DOS in the SURE Instruction results in an auto-generated email which contains accurate information for Washington County voters. *See Ostrander Dep.*, pp. 162-163. For example, if election personnel select one of the “CANC” codes, the auto-generated email informs the voter that the voter’s mail ballot will not be counted, and further advises the voter of the time permitted to request a new ballot or, alternatively, of an opportunity to cure the defect by casting a provisional ballot on election day. *Comp.*, Ex. 10, pp. 7-9. This information contradicted the Policy, which afforded no notice

or opportunity to cure. Ostrander Dep., pp. 214-216, Ex. 3. Ostrander further testified that while Board poll workers will typically allow anyone to submit a provisional ballot on request, the Board will not count such provisional ballots if the voter has already submitted a mail ballot. *Id.* pp. 218-219. The Election Code is clear that a provisional ballot “shall not be counted” if a mail ballot cast by that voter “is timely received by a county board of elections.” 25 P.S. § 3050(a.5)(5)(ii)(F). Director Ostrander explained that her office does not believe the “CANC” codes are appropriate because a voter’s ballot is not being cancelled at the time the code is input into SURE—rather, a ballot is never “cancelled” and the formal decision not to count a mail ballot does not happen until the official canvass after election day. Ostrander Dep., pp. 124, 195-199.

Following discussion with the Board regarding the limited options under the SURE Instruction and consistent with the Policy not to provide notice-and-cure procedures, the Board decided that the “Record Ballot-Return” option would be used to record all mail ballots received. *Id.*, pp. 122-124, 161-166. In essence, the Board determined that the “Record-Ballot Returned” option provided by DOS was the lesser evil.⁴ *See* Ostrander Dep., Ex. 3 (April 11, 2024 Board Meeting Minutes);

⁴ It should be noted that while auto-generated email notifications have been used by DOS since Act 77 was enacted, initially the options for logging ballots were more limited, and the auto-generated emails contained less detail, and did not encourage curing. For instance, the DOS March 6, 2020 Release Notes demonstrate that when a mail ballot was recorded as having been received through the use of the “RECORD-BALLOT RETURNED” option, DOS would send an email which simply stated that the ballot had been received by the county, and was marked as same, and if the voter had any questions they could contact the county. *See* Release Notes produced by DOS, attached as Exhibit C, Bates #DOS002. Similarly, in the same Release Notes, if a ballot was marked “CANC- NO SIGNATURE”, the voter would

JSOF Ex. M. Accordingly, during the 2024 Primary Election, and consistent with the Policy, Board employees stamped the outer envelope of each received mail ballot as “received.” Board employees also examined the declaration for any defects (*i.e.*, lack of signature or date), entered the ballot into the SURE system as “Record-Ballot Returned,” and segregated the envelopes by defect pending formal inspection during the pre-canvass. *See* Ostrander Dep., pp. 73-78, 87-89; Marks Dep., p. 19 (“[O]nce [the board has] recorded the ballot, they are required by statute to keep those ballots securely until pre-canvassing begins.”); pp. 20-21 (the pre-canvass only applies to mail ballots); pp. 44-45 (the declaration envelope cannot be opened until the pre-canvass of mail-in ballots).

Admittedly, the auto-generated email associated with “Record-Ballot Returned” in the SURE Instruction also incorrectly advises Washington County voters that the County may notify the voter if an issue with the ballot is identified. However, none of the DOS auto-generated emails contained in the SURE Instruction provided true and completely accurate information to a voter given the terms of the Policy. Ostrander Dep., pp. 122-124, 161-166.

simply be informed that the ballot was cancelled because there was no required signature. *Id.* There was no discussion of the voter’s right to “cure” such deficiency, nor was there advice offered to vote provisionally if their ballot had been rejected. These codes and resulting emails remained generally consistent through the Release Notes from DOS dated March 31, 2023, although it bears noting that for the March 2023 Release Note, when a ballot was logged as “RECORD-BALLOT RETURNED”, the explanation given to the voter was amended to also stated that “You are no longer permitted to vote at your polling place location now that you have returned your ballot timely.” *See* DOS006. Obviously, this language was again changed in the DOS’ Guidance and SURE Instruction issued in 2024, as noted herein, where voters were told that they may be notified if an issue with the ballot was identified.

Finally, Director Ostrander testified that if a voter were to call to inquire about the status of their mail ballot, the Board would explain that every received mail ballot was locked as required by the Election Code and would be reviewed during the canvass. Ostrander Dep., pp. 91-92; Marks Dep., pp. 18-19 (explaining once a ballot is recorded as having been received, the county is required by statute to keep those ballots secured until the pre-canvass); *see also* Comp. ¶ 70.

The canvass for the April 2024 Primary Election began on April 26, 2024, and was publicly advertised in two newspapers. Ostrander Dep., pp. 109-112. During the course of the canvass, the Board voted not to count mail ballots which lacked a signature or a date, had an incorrect date on the declaration envelope, or were found to lack a secrecy envelope. *Id.*, Ex. 3.

There is no dispute that the Policy was only in place for the 2024 Primary Election. Following the 2024 Primary Election, DOS held “feedback sessions” with county election directors in an effort to evaluate the need to revise language in the auto-generated emails. *Id.*, pp. 119-123. In a May 10, 2024, email Deputy Secretary Marks sent “a meeting invitation” to county elections officials regarding feedback sessions to talk about “the primary and the ballot status codes specifically.” Marks Dep., pp 75-78 (explaining “[t]here were concerns by a number of counties regarding some of the wording and the emails the voters were receiving[,]” and “[t]hey were primarily concerned about things that they believe might be misleading to voters...”);

JSOF Ex. G. Director Ostrander attended one such feedback session, where she and another county director each voiced their concern to DOS that, because their counties did not offer notice and curing of defective mail ballots, all the auto-generated emails were inaccurate and misleading. Ostrander Dep., pp. 123-125. Deputy Secretary of State Jonathan Marks testified that after the feedback sessions, DOS informed the county boards that it intended “to change the wording in the emails.” Marks Dep., pp. 79-80. He further testified that revised emails would be distributed to the counties no later than 45 days before the November election in additional release notes. *Id.*, pp. 80-81. To date, however, DOS has made no changes, and no revised language has been received by the Board. Ostrander Dep., p. 125.

The Board has not adopted a policy for the upcoming 2024 General Election. While Plaintiffs contend that the Board will most likely manage mail-in ballots with disqualifying defects in the same way it did for the 2020 Primary, there can be no dispute that at present, no such policy exists. *See* Ostrander Dep., pp. 126-127. In this regard, Director Ostrander testified that the Board’s “past practice is that [the policy] is reviewed prior to each election,” so the Board will have a public meeting where “absentee and mail-in ballot procedure will be on the agenda” for the November General Election. *Id.* Accordingly, any statement regarding what will happen as part of the 2024 General Election is mere speculation.

III. STANDARD OF REVIEW

Summary judgment is appropriate only if the “evidentiary record . . . entitles the moving party to judgment as a matter of law.” Pa. R.Civ.P. 1035.2. A motion for summary judgment may be granted only when the record clearly demonstrates that there are no genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. *Summers v. Certaineed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010).

It is the moving party's burden to demonstrate the absence of any issue of material fact, and the trial court must evaluate all the facts and make reasonable inferences in a light most favorable to the non-moving party. *Khalil v. Williams*, 278 A.3d 859, 871 (Pa. 2022). The trial court must also resolve any doubts as to the existence of a genuine issue of material fact against the moving party and may grant summary judgment only where the right to such a judgment is clear and free from doubt. *Id.*

IV. ARGUMENT AND AUTHORITY

A. Plaintiffs’ Motion for Summary Judgment Should Be Denied

This entire matter arises out of the Policy and alleged harm which Plaintiffs contend they incurred as a result of that Policy. Plaintiffs’ Brief at 1. On that basis, Plaintiffs seek prospective relief for the November 2024 General Election, and request, *inter alia*, that the Court declare the Policy unconstitutional. *Id.* at 30-31.

Fundamentally Plaintiffs have failed to prove that the Policy will be adopted for the upcoming General Election. This is akin to a party prospectively seeking damages for a breach of a contract that the parties have not yet agreed to. The Board has yet to meet to discuss what policy, if any, will be adopted. *See Ostrander Dep.* at 127. Hence, the key fact upon which Plaintiffs’ entire case is predicated remains at issue and denial of Plaintiffs’ Motion for Summary Judgment is warranted.

B. Plaintiffs’ Claim is Not Justiciable.

The Court need not reach Plaintiffs’ Motion for Summary Judgment because Plaintiffs’ Complaint should be dismissed on ripeness and standing grounds.

1. Plaintiffs Claim is Not Ripe as Plaintiffs Have Not Yet Suffered Any Harm With Respect to the 2024 General Election.

As set forth more fully in Intervenor’s Motion, the doctrine of ripeness “mandates the presence of an actual controversy.” *Bayada Nurses, Inc. v. Dep’t of Labor & Industry*, 8 A.3d 866, 874 (Pa. 2010). “Under the ripeness doctrine, ‘[w]here no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained.’” *Carter v. Degraffenreid*, No. 132 M.D. 2021, 2021 WL 4735059, at *6 (Pa. Commw. Oct. 8, 2021) (quoting *Cherry v. City of Philadelphia*, 692 A.2d 1082, 1085 (Pa. 1997)).

The Pennsylvania Supreme Court confirmed in a pair of 2020 election cases that a claim is not ripe—and must be dismissed—where it rests on speculation

regarding future events. *See Disability Rights Pa. v. Boockvar*, 660 Pa. 210, 211 (2020) (Wecht, J., concurring); *Delisle v. Boockvar*, 660 Pa. 253, 254 (2020) (Wecht, J., concurring).

Here, Plaintiffs' claim is predicated on the harm Plaintiffs contend they suffered in the 2024 Primary Election when their defective mail ballots were not counted. *See* Comp. ¶¶ 23, 56-62. Plaintiffs' request for relief, however, is *prospective* because it is predicated on the harm that Plaintiffs allege they will incur in the future, based upon an assumption that the Board will adopt the same Policy for the 2024 General Election. *See* Comp. ¶¶ 10, 15-21, 79-82, 155; Plaintiffs' Brief at 18. Plaintiffs allege, that "[t]he Board has given every indication that it intends to continue its policy ... thus depriving voters of any opportunity to vote by provisional ballot in the upcoming November 5, 2024 general election policy for the general election. *See* Comp. ¶¶ 10, 15-21, 79-82, 155; *see also* Plaintiffs' Brief at 18.

Post discovery, Plaintiffs still cannot establish that the Policy will be in effect for the 2024 General Election. Plaintiffs merely contend, via mischaracterization of the testimony of Director Ostrander, "[i]n keeping with past practice, in the November 2024 general election, the Washington County Board of Elections will **most likely** handle mail in ballots with disqualifying errors on the declaration envelopes on the same way it did for the April 2024 Primary." Plaintiffs' Brief at 18 (emphasis added).

On the basis of that mere speculation, Plaintiffs contend that in the November 2024 General Election “hundreds and potentially thousands of qualified, eligible mail-in voters in Wahington County will once again have their vote cancelled without their knowledge[.]” Plaintiffs’ Brief at 18.

Actual quotation of Director Ostrander’s testimony reveals that the Policy is not in effect for the November 2024 Election:

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

A. I haven’t spoken directly to the Board of Elections in regard to this, but our past practice is that it’s reviewed prior to each election. So we will have a Board of Elections public meeting and the ballot procedures – absentee and mail-in-ballot procedures will be on the agenda”

Q. Has the past practice been that the absentee mail-in ballot practice be the same in the primary and general elections in the same year, calendar year.

A. Past practice in 2023, what was followed in the primary was again **voted** and decided to follow in the general election so based on that it will most likely be the same.”

Ostrander Dep. at 126-127.

Clearly, “past practices” demonstrate that the Board’s curing policy does not automatically continue from a primary election to the corresponding general election. Instead, as occurred in 2023, a public meeting of the Board must occur and a **vote** of the Board must take place for each election in order for any curing or non-curing policy to be adopted.

Thus, until the Board schedules a meeting and adopts, via a formal vote, a policy regarding notice-and-cure procedures for the 2024 General Election, no policy exists and the terms of any such policy and its impact on Plaintiffs is purely speculative.

A cause of action under the Declaratory Judgments Act, 42 Pa. C.S.A. § 7531, et seq., must allege an interest by the party seeking relief, which is direct, substantial, and present, and must demonstrate the existence of an actual controversy related to the invasion or threatened invasion of one's legal rights. *Bowen v. Mount Joy Tp.*, 644 A.2d 818, 821 (Pa. Commw. 1994).

As explained by the Commonwealth Court, “[a] declaratory judgment must not be employed to determine rights in anticipation of events [that] may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.” *Carter*, 2021 WL 4735059, at *6 (quoting *Gulnac by Gulnac v. S. Butler Cty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991)); see also *City of Phila. v. Phila. Transp. Co.*, 171 A.2d 768, 770 (Pa. 1961) (“[A] declaratory judgment must not be employed for the determination of rights in anticipation of an event or events which may never occur, or for the consideration of moot cases **or as a medium for the rendition of advisory opinions.**”) (emphasis added).

Unless and until the Policy is adopted for the 2024 General Election, there is no controversy before this Court and Plaintiffs' claims are, consequently, not justiciable. *See Carter*, 2021 WL 4735059, at *6. Accordingly, Plaintiffs' Motion for Summary Judgment should be denied.

2. Plaintiffs Lack Standing to Maintain This Action.

A party to litigation must establish as a threshold matter that he or she has standing to bring an action.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (citing cases). Because “[s]tanding is a justiciability concern . . . a court must resolve justiciability concerns as a threshold matter before addressing the merits of the case.” *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 481 (Pa. 2021).⁵

Rather than eliminating Plaintiffs' lack of standing, Plaintiffs' Motion for Summary Judgment underscores it. As set forth above, Plaintiffs have failed to prove that the Policy or any notice and cure policy will be in force for the November 2024 election. Ostrander Dep. at 126-127.

The cornerstone of standing in Pennsylvania is that the party “must be negatively impacted in some real and direct fashion.” *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005). Given that the Board has not adopted a policy for the 2024 General Election, any argument that Plaintiffs are negatively

⁵ In the interest of brevity, Intervenor refers the Court to Sections 2 (a)-(c) of their Brief in Support of Motion for Summary Judgment regarding Plaintiffs' lack of standing to maintain this action as if the same were set forth herein in its entirety.

impacted in any fashion, let alone “in some real and direct fashion” by something which does not exist, defies logic.

Until the Board makes a decision at its yet unscheduled public meeting that will occur sometime before the General Election, this case is nothing more than speculative conjecture comprised of many “ifs.” beginning with **if** at some future date the Board adopts a policy for the 2024 General Election, **if** Plaintiffs later submit a ballot with a disqualifying defect, and **if** *Pa. Dems.* is overruled, then Plaintiffs may have a claim. Such allegations of speculative harm that may or may not occur in the future cannot establish that Plaintiffs have standing. *See Ball v. Chapman*, 289 A.3d, 1, 19 (Pa. 2023).

Moreover, Plaintiffs contend that to the extent the Policy is adopted for the November 2024 General Election, “[h]undreds and potentially thousands of qualified, eligible mail-in voters in Wahington County will once again have their vote cancelled without their knowledge, in violation of procedural due process.” Plaintiffs’ Brief at 18. Notably, Plaintiffs do not limit the allegations of potential harm to the Voter Plaintiffs but expand it to “hundreds and potentially thousands” of voters in Washington County. After all, any policy adopted by the Board would apply to all voters in Washington County, not just Voter Plaintiffs. That too deprives Voter Plaintiffs of standing.

“[I]t is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.” *Pittsburgh Palisades Park*, 888 A.2d at 660 (citing *In re Hickson*, 821 A.2d at 1243). It is “hornbook law that a person whose interest is common to that of the public generally, in contradistinction to an interest peculiar to himself, lacks standing.” *Kauffman v. Osser*, 271 A.2d 236, 239 (Pa. 1970). For all of these reasons, Voter Plaintiffs lack standing Plaintiffs’ Motion for Summary Judgement should be denied.

C. Plaintiffs’ Cannot Prove a Procedural Due Process Violation.

Even if Plaintiffs’ claim did not require this Court to adjudicate a nonjusticiable controversy – *which it does* – Plaintiffs’ procedural due process claim fails on the merits under the very framework that they invoke. Indeed, Plaintiffs have failed to prove facts sufficient to establish that the Board has interfered with a constitutionally protected life, liberty, or property interest.

1. Plaintiffs Have Failed to Proffer Facts to Meet the Threshold for a Procedural Due Process Claim Because Plaintiffs Have Not Been Deprived of a Life, Liberty, or Property Interest.

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

constitutionally protected life, liberty, or property interest has been impacted, **the procedural due process analysis ends**. *See Pennsylvania Game Comm'n v. Marich*, 666 A.2d 253, 255–56 (Pa. 1995).⁶

Plaintiffs' due process claim fails at the first step because they have failed to prove facts sufficient to establish that the Board has interfered with a constitutionally protected life, liberty, or property interest. In fact, Plaintiffs take the fact of a deprivation entirely for granted and do so without justification or legal analysis.

Plaintiffs incorrectly assume, without offering any law in support, that there has been a deprivation of a protected right. There are two flaws in Plaintiffs logic. *First*, there has been *no deprivation*. Voter Plaintiffs' deficient mail ballots were not counted in the 2024 Primary Election because they did not comply with the Board's duly enacted Policy. Plaintiff Voters had the right to cast a ballot in the 2024 Primary Election and *did so*. The only reason those ballots were not counted is because Plaintiff Voters failed to follow the instructions for properly casting mail ballots. *Second*, Plaintiffs conflate the right to vote generally, which they repeatedly describe as "fundamental" – a label Intervenor's do not dispute – with a purported right to

⁶ In addition, as explained more fully in Intervenor's Motion, the protections of procedural due process do not extend to legislative actions. *See Small v. Horn*, 722 A.2d 664, 671 (Pa. 1998) ("It is well settled that procedural due process concerns are implicated **only by adjudications**, not by state actions that are legislative in character.") (emphasis added); *see also South Union Tp. v. Com.*, 839 A.2d 1179, 1186-87 (Pa. Commw. 2003) (sustaining preliminary objection to due process claim). Plaintiffs do not address this threshold inquiry in their Motion, though they inherently recognize that they are challenging legislative action. *See* Plaintiffs' Motion at 4 ("Plaintiffs now seek summary judgment from this Court **that this Board's policy violates the Pennsylvania Constitution**[.]") (emphasis added).

notice of defects and to cure a deficient mail ballot, in particular. These “rights” are not the same and Plaintiffs cite no law to suggest otherwise.

As Justice Alito explained: “[w]hen a mail-in ballot is not counted because it was not filled out correctly, **the voter is not denied ‘the right to vote.’ Rather, that individual’s vote is not counted because he or she did not follow the rules for casting a ballot.**” *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissent) (explaining that “[c]asting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules.”) (emphasis added) (quoting *Brnovich v. DNC*, 594 U.S. 647, 669 (2021)); *Pa. State Conf. of NAACP Branches v. Sec. Com. of Pa.*, 97 F.4th 120, 133-34 (3d Cir. 2024) (agreeing with Justice Alito on this point). Thus, a voter does not suffer constitutional harm when their ballot is rejected because they failed to follow the rules for completing or casting it. *See Pa. Dems.*, 238 A.3d at 389 (“So long as the Secretary and the county boards of elections provide electors with adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere—pre-deprivation notice is unnecessary.”) (Wecht, J. concurring).

Moreover, Plaintiffs claim a right to notice of defects in their mail ballots and an opportunity to cure—but Pennsylvania law is clear that ***no such right exists***. *See Pa. Dems.*, 238 A.3d at 374. Thus, by failing to provide notice and an opportunity

to cure, the Policy necessarily did not interfere with any constitutionally protected life, liberty, or property interest.

Fundamental rights and protected interests are not necessarily one and the same. Courts addressing due process claims have found that unfettered voting is not a protected interest. *See Richardson v. Texas Sec'y of State*, 978 F.3d 220, 230 (5th Cir. 2020) (“We have found no court that has held that the right to vote—much less the alleged right to vote by mail—is a property interest[,]” and that the right to vote also “likely . . . does not implicate any state-created liberty interest under the Due Process Clause.”); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) (dismissing procedural due process claim because plaintiff “ha[d] not alleged a constitutionally protected interest.”); *see also Memphis A. Phillip Randolph Inst. v. Hargett*, 482 F. Supp. 3d 673, 691 (M.D. Tenn. 2020), *aff’d* on other grounds sub nom. *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378 (6th Cir. 2020) (“[T]he right to vote is fundamental, but it is not a ‘liberty’ interest for purposes of procedural due process[.]”); *see also Lecky v. Virginia State Bd. of Elections*, 285 F. Supp. 3d 908, 918 (E.D. Va. 2018) (“Put simply, plaintiffs have failed to make a clear showing that mistakes in the administration of an election can give rise to a procedural due process claim.”).

Much like the plaintiffs in *Richardson*, “[b]esides describing the right to vote as fundamental, the plaintiffs have not explained what there is about the right to vote

that makes it a liberty interest.” 879 F.3d at 231. As the Fifth Circuit went on to explain: “it might seem intuitive, as the plaintiffs suggest, that the right to vote is a liberty interest that arises from the Constitution. After all, the right to vote is a fundamental constitutional right. But that helps the plaintiffs with their equal protection claim, not their procedural due process claim.” *Id.* (internal citations omitted); *see also French v. Cnty. of Luzerne*, No. CV 3:23-538, 2023 WL 8374738, at *6 (M.D. Pa. Dec. 4, 2023) (noting “[n]either the Supreme Court, nor the Third Circuit have deemed the right to vote a liberty interest under the Fourteenth Amendment” in dismissing procedural due process challenge because “Plaintiffs have not adequately pled that such an infringement [on voting] implicates procedural due process”).

In support of their claim, Plaintiffs cite a string of cases discussing the procedural due process standard for adequate notice generally. *See* Plaintiffs’ Brief at 20, n. 6. However, Plaintiffs cannot show that the alleged lack of notice of a defective ballot interfered with any legally protected right to cure a defective mail ballot, as no such right exists. As a result, Plaintiffs’ claims relating to the adequacy of the Board’s notice are immaterial.

In essence, what Plaintiffs truly seek is the right to have their vote counted without regard for any ballot-casting rules. In order to function properly, elections must have rules, including ballot-casting rules. The judiciary may not disregard

those rules, rewrite them, or declare them unconstitutional simply because a voter failed to follow them and, accordingly, had his or her ballot rejected. *See, e.g., Ins. Fed’n of Pa., Inc. v. Commonwealth, Ins. Dep’t*, 970 A.2d 1108, 1122 n.15 (Pa. 2009) (“Our role is distinctly not to second-guess the policy choices of the General Assembly.”); *Pa. Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 938 n.31 (Pa. 2017).

Because Plaintiffs cannot establish that the Board interfered with any legally protected life, liberty, or property interest, their procedural due process claim fails and should be dismissed.

2. Even if Plaintiffs Met the Necessary Thresholds, the *Mathews v. Eldridge* Test Demonstrates that the Board’s Procedures were Constitutionally Sufficient.

Even if Plaintiffs had met their threshold burdens for asserting such a claim, Plaintiffs’ reliance on the United States Supreme Court’s balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976) for procedural due process claims is unavailing because the Board’s procedures were constitutionally sufficient.

Plaintiffs cannot rely on *Mathews* to circumvent the Pennsylvania Supreme Court’s unequivocal ruling that county boards of elections in Pennsylvania “are not required to implement a ‘notice and opportunity to cure’ procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly,” and that individual voters do not have a right to cure a defective mail ballot. *Pa. Dems.* at

374. Because Plaintiffs cannot show that the Board interfered with any legally protected right, the balancing of interests under *Mathews* is irrelevant. See *Pennsylvania Game Com'n v. Marich*, 666 A.2d 253, 256 (Pa. 1995) (explaining that courts only “employ the methodology” of *Mathews v. Eldridge* after first determining “that a protected liberty of property right was involved”).

Even if Plaintiffs could show the deprivation of a protected interest a balancing of the *Mathews* factors here demonstrates that the Board’s procedures were constitutionally sufficient. *Id.* at 256, n.7 (the *Mathews* analysis consists of three distinct factors which must be considered: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3), the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail).

i. The First *Mathews* Factor

The first *Mathews* factor concerns the private interest that will be affected by the official action. With respect to the first factor, Plaintiffs refer broadly to the “fundamental right to vote,” but the crux of Plaintiffs’ procedural due process claim is that the Policy denied Voter Plaintiffs notice of and the ability to cure their deficient ballots by casting a provisional ballot. See Plaintiffs’ Brief at 22-24. That

the right to vote is fundamental is not in dispute—but not a single Voter Plaintiff was deprived of the right to vote by any Board action. After all, it is Plaintiffs’ admitted exercise of their right to vote in the 2024 Primary Election that gives rise to the Complaint.

Plaintiffs’ reliance on poetic terms about the fundamental right to vote does not alter this analysis. Again, elections must have rules if they are to function properly, including ballot-casting rules, many of which the General Assembly has empowered county boards of elections to establish and administer. The judiciary may not disregard those rules, rewrite them, or declare them unconstitutional simply because a voter failed to follow them and, accordingly, had their ballot rejected. *See, e.g., Ins. Fed’n of Pa.* 970 A.2d at 1122.

As the Pennsylvania Supreme Court held over a century ago (and recently reaffirmed in *Pa. Dems.*), “[t]he power to regulate elections is legislative.” *Pa. Dems.*, 238 A.3d at 373 (quoting *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914)). Thus, “[w]hile the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate”—including the adoption of ballot-casting rules and the decision whether ballots should be “rejected due to minor errors made in contravention of those requirements”—“to the Legislature.” *Id.* at 374; see also *Ritter*, 142 S. Ct. at 1825. As noted by Justice Wecht stressed in his Concurring Opinion in *Pa. Dems.*, a voter does not suffer constitutional harm when their ballot

is rejected because they failed to follow the rules the General Assembly enacted for completing or casting it. *See* 238 A.3d at 389 (“So long as the Secretary and the county boards of elections provide electors with adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere—pre-deprivation notice is unnecessary.”).

Plaintiffs’ failure to follow instructions for casting mail ballots does not equate to the deprivation of a private interest. Accordingly, the first *Mathews* factor is unavailing for Plaintiffs.

ii. The Second *Mathews* Factor.

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

The second factor of the *Mathews* test asks courts to weigh “the risk of an erroneous deprivation” of a legally protected interest and the potential value “of

additional procedural safeguards[.]” *Mathews*, 424 U.S. at 321. Plaintiffs claim that the Board’s actions guarantee the deprivation of a legally protected interest. Plaintiffs’ Brief at 25. For support, Plaintiffs cite to *Washington v. PA Dep’t of Corr.*, which involved an undisputed property interest of the plaintiff. 306 A.3d 263, 286 (Pa. 2023). In *Washington*, the court was discussing the Department of Corrections’ taking of a prisoner’s money, in which he had a clear property interest. Here, no such “life, liberty, or property” interest has been implicated.

Plaintiffs again make misleading references to “disenfranchisement” and to deprivation of the right to vote, despite the reality that not a single voter was deprived of their fundamental right to vote by the Board’s alleged policy or actions. *See* Plaintiffs’ Brief at 25. Because the Board’s Policy did not implicate any legally protected interest, *see id.*, the risk of those procedures leading to an *erroneous* deprivation of such a right is nonexistent.

iii. The Third *Mathews* Factor.

The final factor of the *Mathews* test considers the Government’s interests and weighs the additional burdens that substitute procedures would place on the Government. *Mathews*, 424 U.S. at 321. As an initial matter, the burden of “substitute procedures” cannot be weighed or analyzed, because there is nothing to weigh them against; as Director Ostrander’s undisputed testimony demonstrates,

there is currently no policy in place for upcoming elections in Washington County. *See Ostrander Dep.* at 126-127.

Likewise, because the Board's procedures did nothing to impact any constitutionally protected interest, "additional procedural safeguards" would provide no value in preventing an erroneous deprivation of such an interest. The Court imposing additional procedures on the Board would impair the Board's interests by usurping the Board's powers, despite clear statutory entitlement to enact such policies.

The Board has a heavy interest in ensuring that elections are conducted in accordance with the law. *See* 25 P.S. § 2642. A court mandated notice and cure procedures would substantially hinder its ability to do so because Plaintiffs' desired curing methods are not consistent with the terms of the Election Code.

As the Supreme Court of Pennsylvania has explained, Pennsylvania law is clear that "a mail-in ballot that is not enclosed in the statutorily mandated secrecy envelope ***must be disqualified.***" *Pa. Dems.*, 238 A.3d at 380 (emphasis added). Additionally, the Election Code clearly states that "[a] provisional ballot shall not be counted if . . . the elector's absentee ballot or mail-in ballot is timely received by a county board of elections." 25 P.S. § 3050(a.4)(5)(ii)(F). Therefore, once a mail-in ballot is received, the Election Code prohibits voting provisionally and provides no exception for curing deficiencies. *Accord In re Allegheny Cty. Provisional Ballots*

in the 2020 Gen. Election, No. 1161 C.D. 2020, 2020 WL 6867946, at *4 (Pa. Commw. Nov. 20, 2020) (describing § 3050(a.4)(5)(ii)(F)’s “shall not be counted” language as “unambiguous” in prohibiting counting provisional ballots cast by a voter whose mail-in ballot was timely received); *but see Keohane v. Del. Cnty. Board of Elec.*, No. 2023-004458 (Com. Pl. 2023) (permitting curing of mail-in-ballot via a provisional ballot). Furthermore, voters who both “receive and vote” via absentee or mail-in ballots “shall not be eligible to vote at a polling place on election day.” 25 P.S. §§ 3146.6(b)(1); 3150.16(b)(1). Thus, imposing notice and cure procedures on the Board would substantially impact its ability to conduct lawful elections.

Based on the foregoing, although there is no reason to apply the *Mathews* test because there has been no deprivation of a protected interest, that test nevertheless weighs in favor of the validity of the Board’s Policy.

D. The Court Cannot Grant Plaintiffs’ Requested Relief Without Defying Pennsylvania Supreme Court Precedent and Striking Down Act 77 in Its Entirety.

1. Plaintiffs Disregard the Pennsylvania Supreme Court’s Controlling Precedent in *Pa. Dems.* Prohibiting Courts from Mandating Notice and Cure Procedures.

The Pennsylvania Supreme Court has clearly held that Pennsylvania voters have no constitutional, statutory, or legal right to notice of a defect in a mail ballot or an opportunity to cure. *See Pa. Dems.*, 238 A.3d at 372-74. To the contrary, the decision whether and in what form to allow notice-and-cure procedures presents

“open policy questions,” including “what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots.” *Id.* at 374. Thus, the question whether to mandate notice and curing resides exclusively with “the Legislature,” not the courts. *Id.*

Nonetheless, Plaintiffs – who devote a mere footnote to halfheartedly address *Pa. Dems.* – seek to have this Court reject Pennsylvania Supreme Court precedent. In that footnote, Plaintiffs seek to end run the Supreme Court’s holding by arguing that *Pa. Dems.* did not explicitly involve a procedural due process claim. *See* Plaintiffs’ Motion at 22, n.9. The flaw in Plaintiffs’ argument, however, is that it misunderstands that the relief Plaintiffs seek – requiring the Board to adopt notice and cure procedures – necessarily requires this Court to ignore the holding in *Pa. Dems.* *See* 238 A.3d at 372-74.

It cannot be said strongly enough or often enough that the Pennsylvania Supreme Court’s decision in *Pa. Dems.* conclusively forecloses Plaintiffs’ claims. The petitioner in *Pa. Dems.* asserted, *inter alia*, that the Pennsylvania Constitution and the Election Code granted voters a right to notice of and the right to cure defective mail ballots. *Id.* at 372-80. The Pennsylvania Supreme Court rejected that assertion—and, in so doing, clarified that only “the Legislature,” not Pennsylvania

courts, may mandate that county boards of elections permit curing of defective mail ballots and the terms of any curing policies. *Id.* at 374.

The petitioner's request in *Pa. Dems.* parallels the relief Plaintiffs seek herein. In *Pa. Dems.*, Petitioner sought "to require [county boards] to contact qualified [voters] whose [mail] ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail and provide them an opportunity to cure those defects." *Id.* at 372. The petitioner argued that the Free and Equal Elections Clause confers a right to cure on mail voters. *See id.*

Notably, the Secretary of the Commonwealth opposed the petitioner's claim. *See id.* at 373. The Secretary noted the Pennsylvania Supreme Court's prior holdings that "the power to regulate elections is legislative," not judicial, and therefore the Free and Equal Elections Clause "cannot create statutory language that the General Assembly chooses not to provide." *Id.* The Secretary also explained that "so long as the voter follows the requisite voting procedures, he or she will have an equally effective power to select the representative of his or her choice," which is all the Clause guarantees. *Id.*

The Pennsylvania Supreme Court rejected the petitioner's claim. *See id.* at 373-74. The court pointed out that there is "**no constitutional or statutory basis**" to require county boards to permit notice and curing of defective mail ballots. *Id.* at 374. It further reasoned that "[w]hile the Pennsylvania Constitution mandates that

elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.” *Id.* Thus, it was left to the Legislature to decide whether to invalidate mail ballots based on “minor errors made in contravention of th[e] requirements” for completing them or to provide a right to cure such errors. *Id.*

The Pennsylvania Supreme Court further noted that its holding was “particularly” appropriate “in light of the open policy questions attendant to that decision, including what the precise contours of the [curing] procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots.” *Id.* Those questions “are best left to the legislative branch of Pennsylvania’s government”—so Pennsylvania courts may not mandate that county boards offer curing or set the parameters of boards’ curing policies. *Id.*

Pa. Dems. makes clear that voters have no *right* to notice of a legally deficient mail ballot and cure the same and, thus, that Pennsylvania courts cannot *order* county boards to adopt notice and cure procedures. *See* 238 A.3d at 373-74; *see also* *Republican Nat’l Comm. v. Schmidt*, No. 447 M.D. 2022, slip op. at 20 (Pa. Commw. Mar. 23, 2023) (Ceisler, J.) (attached as Exhibit D), pp. 20, 25 (noting under the Election Code that responsibility for conduct of primaries and elections rests with county boards and the Secretary’s interests are not essential in determining whether county boards are unlawfully implementing notice and cure procedures).

Accordingly, the Board alone, as the local agency in which the Election Code vests sole and expansive jurisdiction to administer elections in Washington County, is empowered to choose whether or not to adopt notice and cure procedures. *See* 25 Pa. § 2642. That is exactly what it did when, prior to the April 2024 Primary Election, it exercised its legislative authority and duly enacted the Policy. In doing so, the Board acted within the confines of the ruling of the highest court in the Commonwealth in *Pa. Dems.*, as well as the legal position of the Secretary of the Commonwealth in that matter.

Plaintiffs seek to avoid foreclosure of their claims under *Pa. Dems.* by arguing “[t]he Court did not consider a constitutional due process challenge there[.]” Plaintiffs’ Brief at 3. However, Justice Wecht did in fact do so in his “full” concurrence. 238 A.3d at 386. (Wecht, J concurring). In *Pa. Dems.*, the Court upheld the mandatory application of the entire declaration envelope mandate for mail ballots – which encompass the “fill out, date and sign requirements” – without requiring notice of any potential defect or an opportunity to cure. *Id.* at 362-74 (quoting 25 P.S. §§ 3146(a), 3150.15(a) (emphasis added)).

In his concurrence, Justice Wecht addressed the Majority’s holding in that regard and the potential that a voter’s mail ballot will not be counted due to the voter’s failure to comply with declaration mandate. In doing so, Justice Wecht drew a distinction between “ballot defects that are capable of objective assessment” and

those “circumstances in which a ballot’s validity turns on the subjective assessments such as signature mismatches assessed by poll workers with no training or experience in matching signatures.” 238 A.3d at 388.

As to the former, Justice Wecht found that the “[f]or example, the failure to ‘fill out, date and sign the declaration printed on’ the ballot return envelope, as required by 25 P.S. § 3150.16(a) is a deficiency that can be readily observed.” *Id.* From that premise, Justice Wecht stated, “[s]o long as the Secretary and the county boards of elections provide electors with adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere—*pre-deprivation notice is unnecessary.*” *Id.* (emphasis added). Justice Wecht’s explicit rationale to the instant matter negates Plaintiffs’ claim that the Board’s Policy results in a pre-deprivation due process claim.

In order to assist voters with the completing and submitting their mail ballots and to ensure that such ballots are counted, the mail ballot package includes a detailed instruction sheet which explains every action which a voter must take to complete the ballot and the declaration envelope properly, as well as instructions for how to timely return the ballot. *See Ostrander Dep.*, pp. 27-28, 189-192, Ex. 10.

With respect to the Declaration Envelope, the instruction specifically states:

3. ***Sign inside the yellow box and put today’s date on the return envelope.***

- ***Sign your name inside the yellow box.***
- ***Put today's date—not your birthdate.***

If you have an illness or disability that prevents you from signing, make a mark inside the yellow box and have your witness complete the witness section.

Id. (emphasis in the original)

Thus, the exact type of instructions Justice Wecht found would negate a need for pre-deprivation notice are exactly the type of instructions the Board provides to all voters in Washington County. Accordingly, Plaintiffs attempt to avoid the foreclosure of its claims under *Pa. Dems.* fails.

This Court must decline Plaintiffs' request that the Court override Pennsylvania Supreme Court precedent and deny Plaintiffs' Motion for Summary Judgment.

2. Neither The SURE Instruction Nor the Secretary's Guidance Provide Authority for the Relief Plaintiffs Seek.

i. Plaintiffs' Requested Relief Has No Legal Basis.

In lieu of any legal authority requiring this Court to mandate that the Board adopt a notice and cure procedure for the upcoming election, Plaintiffs attempt to craft the same on the basis of non-mandatory instruction and guidance forwarded to the county boards by DOS.

First, Plaintiffs argue that the Board is obligated to select certain “ballot response” codes of the SURE Instruction in order to provide notice to a voter who has submitted a timely but otherwise defective ballot. *See* Plaintiffs’ Brief at 30-31.

Second, Plaintiffs proffer a non-controlling Guidance issued by the Secretary as the basis for their request that the Court require the Board to allow provisional voting to cure a defective mail ballot. *See id.*

Intervenors addressed, at length, the abject lack of support for Plaintiffs’ proffered process. *See* Intervenors Br. at 29-37. Therein, Intervenors presented incontrovertible authority that based upon the allegations of the Complaint and limited discovery, neither the Guidance nor the SURE Instruction provide any authority that would allow, let alone require, this Court to adopt Plaintiffs’ preferred election administration scheme. *See id.*

ii. The SURE System Is Not Controlling.

Rather than posting a supportable legal analysis, Plaintiffs’ Brief contains pages of inflammatory rhetoric. For example, Plaintiffs accuse the Board of “concealing information and misleading voters;” “disenfranchisement,” and miscoding mail-in ballots to “conceal voters’ ballot status.” Plaintiffs’ Brief at 4, 18. Plaintiffs opine regarding alternative ballot response options the Board **could have** selected to record the receipt of mail ballots into SURE in the April 2024 Primary Election. *Id.* at 10-11. Plaintiffs even go as far as to assert that the Board

“affirmatively mislead voters into foregoing their fundamental right to vote.” *Id.* at 23. While such inflammatory rhetoric may provide Organizational Plaintiffs with talking points suitable for a press conference, it does not provide Plaintiffs with a plausible legal theory.

Consistent with the Board’s obligations under the Election Code, and in order to ensure that the poll books are accurate, a county needs to enter into SURE (a) whether a voter was sent a mail ballot, and (b) whether that voter’s ballot was received by the county board of elections. 25 Pa. C.S.A. § 1222; *see also* Marks Dep., p. 35; Ostrander Dep., pp. 204-205. That is all a county board of elections is required to do.

The SURE Instruction merely informs county boards of elections of new codes which the boards *may* use when receiving and logging the return of mail ballots. *See* Ostrander Dep. at 55-59. While the Secretary has authority to promulgate regulations governing SURE, *see* 25 P.S. § 2621, the SURE Instruction is not such a regulation, and therefore is not binding on the county boards of elections. *See* Marks Dep. at 14-15 (acknowledging Secretary’s guidance to boards “does not have the force and effect of law”), 31 (explaining SURE Instruction is not a guidance, directive, or regulation.)

Prior to the issuance of the SURE Instruction, all that was entered into SURE “was [a code] probably similar to [‘received].” *Id.* at 78. Indeed, documents recently

produced by DOS establish that prior SURE options would only result in an auto-generated email that advised a voter that their mail in ballot had been received.

However, Director Ostrander testified that given the Policy in Washington County, none of the DOS auto-emails contained in the SURE Instruction provided true and completely accurate information to a voter. *Id.* at 122-124, 161-166. In essence, the Board determined that the “Record-Ballot Returned” option provided by DOS was the lesser evil. The Board is neither the author nor the sender of such auto-generated emails, and county boards are unable to change the language contained in the email. *See id.*; Ostrander Dep., pp. 78-79; 162-165. Hence, to the extent a voter in Washington county was misled or confused by the auto-generated email, such confusion was not caused by the Board.

In a May 10, 2024 email, Deputy Secretary Marks sent “a meeting invitation” to county elections officials regarding feedback sessions to talk about “the primary and the ballot status codes specifically.” Marks Dep. at 75-78 (explaining “[t]here were concerns by a number of counties regarding some of the wording and the emails the voters were receiving[,]” and that “[t]hey were primarily concerned about things that they believe might be misleading to voters”); JSOF Ex. G. Director Ostrander attended one such feedback session, where she and another county director each voiced their concerns to DOS that, because their counties did not offer notice and curing of defective mail ballots, all the auto-generated emails were inaccurate and

misleading. *See* Ostrander Dep. at 123-125. Deputy Secretary Marks testified that after the feedback sessions, DOS informed the county boards that it intended “to change the wording in the emails.” Marks Dep. at 79-80. He further testified that revised emails would be distributed to the counties no later than 45 days before the November election in additional release notes. *Id.* at 80-81.

Despite these facts, Plaintiffs assert that the Board should be required to select a SURE ballot response option that would advise a voter if the Board had observed a ‘disqualifying defect’ when logging that the receipt of the mail ballot into SURE. Plaintiffs’ Brief at 29. In other words, Plaintiffs seek to use the SURE *options* as a means of *forcing* the Board to provide voters with notice of a potentially defective mail ballot.

Plaintiffs have not cited a single case that requires the Board to select Plaintiffs’ preferred specific ballot option when recording its receipt. Voters in Pennsylvania have no right to cure a defective mail ballot, and the county boards cannot be required to adopt notice-and-cure procedures. *See Pa Dems* at 372. Any argument that a voter is nonetheless entitled to be notified of disqualifying defects in a mail ballot is counterintuitive and legally unfounded. Moreover, to the extent that a voter resides in a county which does not offer a cure procedure, such notification would be misleading.

The Secretary does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely upon the County Boards. *Schmidt*, Exhibit D, p. 20 (“not[ing]” that the Secretary’s “duties and responsibilities” under the Election Code “are limited”); *see also* Marks Dep., pp. 13-14 (acknowledging Boards and the Secretary “have their separate scope[s] of authority [as] outlined in the Pennsylvania Election Code,” and stressing that responsibility of handling and processing mail ballots, as well as whether to permit curing, lies with the Boards). Accordingly, the Secretary’s SURE Instruction **cannot** require county boards to provide notice or an opportunity to cure where no such obligation exists. Such an action would exceed the Secretary’s authority, while simultaneously undermining the Board’s sole authority to determine how it will conduct elections. *See* 25 P.S. § 2642; *Pa. Dems.* at 374. As such, Plaintiffs step one of invoking the SURE Instruction fails.

iii. The Guidance is Not Controlling

The second step in Plaintiffs’ request for relief is to have the Court order the Board to permit voters who cast defective ballots an opportunity to cure the same via provisional voting. Plaintiffs’ Brief at 36. Plaintiffs predicate that request on the “Pennsylvania Provisional Voting Guidance” (the “Guidance”) concerning how to process mail ballots. JSOF, Ex. J.

As previously set forth at length in Intervenor’s Brief, the Guidance is of no moment. *See* Intervenor’s Brief at 34-37. However, it bears repeating that the Guidance is not binding on the Board—as the Secretary’s Director of Elections admitted again in this case. *See* Marks Dep., pp. 14-15 (acknowledging any guidance issued to boards by Secretary “does not have the force and effect of law”).

Likewise, in *Schmidt*, Judge Ceisler of the Commonwealth Court held that any guidance issued by the Secretary is not binding on county boards of elections. In this regard, the Court reasoned, the “Secretary does not have control over the County Boards’ administration of elections, as the General Assembly conferred such authority solely upon the County Boards.” *Id.* at 20 (“not[ing]” that the Secretary’s “duties and responsibilities” under the Election Code “are limited”). Further, “the Secretary has no authority to definitively interpret the provisions of the Election Code.” *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d 1058, 1078 n.6 (Pa. 2020).⁷

iv. The Election Code Does Not Permit the Use of Provisional Voting to Cure a Defective Mail Ballot.

Contrary to the Guidance, the Election Code does not permit a voter to cure an otherwise defective mail ballot by casting a provisional ballot. Simply put, the

⁷ Further, the Guidance is based upon a reading of Section 3050 (a.4) (5) of the Election Code which is simply wrong. This is not the first time the Secretary has issued a legally incorrect Guidance. In 2020, the Secretary issued Guidance advising that boards of elections should count mail ballots timely delivered but without the required secrecy envelope. *See Pa. Dems.* at 376 n.29. Contrary to this Guidance, the Supreme Court held that “naked ballots” were legally infirm and could not be counted. *Id.* at 378. The Secretary withdrew the Guidance.

Election Code's limited authorization of provisional voting does not extend to curing a defect in a mail ballot. For example, provisional voting is permitted when a voter cannot produce required identification at the polling place, *see* 25 P.S. §§ 3050(a.2), or when registration of individual who appears at the polling place cannot be verified. *See* 3050(a.4)(1); *Pa. Dems.*, 238 A.3d at 375 n.28.

Indeed, it was the absence of any such cure procedure that led the Court in *Pa. Dems.* to hold that “there is no statutory or constitutional” provision authorizing use of provisional voting because the voter committed an “error” that requires the voter’s mail ballot to be “rejected.” *Id.* at 373-74.

Further, a provisional ballot that is submitted in an attempt to cure a timely received but otherwise defective mail ballot cannot be counted. The Commonwealth Court was presented with this precise issue in a case deciding whether a voter who submitted a mail ballot that lacked a secret envelope may cure that defect via a provisional ballot. *See In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 (table), 2020 WL 6867946, at *4 (Pa. Commw. Ct. 2020). There, the Court found that the express terms of the Election Code prohibited the ballot from being counted, explaining:

With regard to the small number of provisional ballots cast by a voter whose mail-in ballots were timely received, our analysis is the same. Section 1204(a.4)(5)(ii)(F) plainly provides that a provisional ballot shall not be counted if “the elector's absentee ballot or mail-in ballot is timely received by a county board of elections.” 25 P.S. § 3050(a.4)(5)(ii)(F). Like the language relating to the requisite

signatures, this provision is unambiguous. We are not at liberty to disregard the clear statutory mandate that the provisional ballots to which this language applies must not be counted.

Id. The Court recognized the perception its finding might cause and stated:

Finally, although our decision may be perceived as disenfranchising voters, the Election Code mandates that these deficient ballots **shall not be counted**. This Court emphasizes that it is following and faithfully applying the mandates of our General Assembly and our Supreme Court precedent.

Id. at *5 (emphasis in original). Like the Commonwealth Court, this Court is not at liberty to disregard the clear statutory mandate of the Election Code and Supreme Court precedent. *Id.*

The sole authority for the Guidance and the sole authority upon which Plaintiffs predicate their requested relief is a decision of the Delaware Court of Common Pleas in *Koehane v. Delaware County Board of Election*, No. CV-2023-004458 (Delaware C.P. Sept. 21, 2023) (Comp., Ex. 12).⁸ In *Koehane*, the Delaware County Board had adopted a curing policy which allowed voters to cure certain defects in the mail ballots at issue in that case. That fact alone renders the case completely irrelevant in the instant dispute, where Washington County expressly chose not to allow notice and cure procedures.

Like the Commonwealth Court, this Court is “not at liberty to disregard the clear statutory mandate of the Election Code and Supreme Court precedent.” *In re*

⁸ Intervenor distinguished this case in their Brief in Support of Motion for Summary Judgment at 33-34.

Allegheny Cty., 2020 WL 6867946, at *4. Yet, that is exactly what granting Plaintiffs’ request for relief would require. Moreover, to do so, this Court would also need to overrule *Pa. Dems.*, ignore the holdings of Judge Ceisler in *Schmidt* and the three-member panel of the Commonwealth Court in *In Re Canvass*, and rewrite multiple provisions of the Election Code. Simply put, the Court lacks the authority to do so.

On this basis, the Court should grant deny Plaintiffs’ Motion for Summary Judgment, grant Intervenors’ Motion for Summary Judgment and dismiss the Complaint.

3. Plaintiffs’ Requested Relief Would Necessarily Require Striking Down Act 77 Altogether Due to the Act’s Non-Severability Clause.

If the Court grants Plaintiffs’ requested relief, the Court must, necessarily, declare unconstitutional various provisions of Act 77. In doing so, however, the Court would **inherently strike down Act 77 in its entirety** because “[s]ections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of [Act 77] are **nonseverable** [and] [i]f any provision of [Act 77] or its application to any person or circumstance is held invalid, **the remaining provisions or applications of this act are void.**” Act 77 § 11 (emphasis added). In other words, Plaintiffs’ requested relief would require this Court not just to defy clear Pennsylvania Supreme Court precedent in *Pa. Dems.*, but also strike down landmark election legislation just months before a pivotal General Election.

As Judge Wojcik of the Commonwealth Court explained, “[s]ection 11 of Act 77 contains a ‘poison pill’ that would invalidate all of Act 77’s provisions if this Court determines that any of its provisions are invalid...[t]hus, if the no-excuse mail-in provisions of Act 77 are found to be unconstitutional, all of Act 77’s provisions are void.” *McClinko v. Dep’t of State*, 270 A.3d 1243, 1277-78 (Pa. Commw. 2022) (Wojcik, J., dissenting in part). Justice Brobson likewise noted that “how the nonseverability provision operates in the event of a judicial decision impacting the application of the provisions within its scope” remains an open question. *McLinko v. Dep’t of State*, 279 A.3d 539, 610 (Pa. 2022) (Brobson, J., dissenting). Despite some uncertainties about its application, Act 77’s nonseverability provision is legally valid, particularly given its legislative history.

“[A]s a general matter, nonseverability provisions are constitutionally proper.” *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006). That is especially true where nonseverability provisions legitimately arise from “the concerns and compromises which animate the legislative process.” *Id.* Here, there is considerable evidence that the non-severability provision in Act 77 was an important reason the bill was passed. Both the Democratic sponsor of Act 77 and the Republican Senate Majority Leader described Act 77 as a politically difficult compromise. *See* 2019 Pa. Legislative Journal–Senate 1000, 1002 (Oct. 29, 2019). The non-severability

provision helped reassure legislators that their parts of the bargain would not be discarded by courts while their concessions remained in place.

As the following colloquy on the House floor involving State Government Committee Chair Garth Everett demonstrates:

Mrs. DAVIDSON. Thank you.

My second question has to do with the severability clause. It is my understanding that the bill says that the Supreme Court will have exclusive jurisdiction over challenges to elimination of straight-party voting, absentee voting, and mail-in voting. Then I also understand it also reads that the provisions of the bill will be nonseverable. So is that to mean that if somebody wants to challenge whether or not they were discriminated against because they did not have a ballot in braille, would they be able to – would that be a suit that they could bring to the Supreme Court under the severability clause?

Mr. EVERETT. Thank you, Mr. Speaker.

There is a nonseverability clause, and there is also the section that you mentioned that gives the Supreme Court of Pennsylvania jurisdiction, because the intent of this is that this bill works together, that it not be divided up into parts, and there is also a provision that the desire is, and of course, that could be probably gotten around legally, but that suits be brought within 180 days so that we can settle everything before this would take effect. So those are the provisions that have to do with nonseverability.

Mrs. DAVIDSON. So in effect, if a suit was brought to the Supreme Court of Pennsylvania and they found it to be unconstitutional, it would eliminate the entire bill because it cannot be severed.

Mr. EVERETT. Yes; that would be just in those sections that have been designated as nonseverable.

Mrs. DAVIDSON. All right. Thank you.

2019 Pa. Legislative Journal—House 1740–41 (Oct. 29, 2019). It is thus clear that Act 77’s non-severability provision arises from “the concerns and compromises which animate the legislative process.” *Stilp*, 905 A.2d at 978.

The Policy is predicated upon the Pennsylvania Supreme Court’s holding in *Pa. Dems.* which, in turn, is predicated upon the Pennsylvania Supreme Court’s finding that the lack of notice and cure provisions in Act 77 does not violate the Free and Equal Elections Clause and thus does not require the county boards to implement such procedures. Should the Court grant Plaintiffs’ request and declare the Policy unconstitutional and force the Board to adopt Plaintiffs’ notice and cure procedure, it can only be because the lack of notice and cure procedures in Act 77 constitute a pre-deprivation due process violation. If such an order is entered, the non-severability provisions of Act 77 become immediately effective, and no excuse mail in voting does not exist just months prior to a Presidential election.

To the extent, therefore, that the Court deems the Board’s Policy unconstitutional, it must likewise strike down those provisions of Act 77 which establish the procedures the Board followed in doing so, which are among those that are non-severable. In other words, if the Court grants Plaintiffs’ requested relief, and holds that the lack of notice and cure procedures in Act 77 is unconstitutional, then

all of Act 77 must be invalidated. The Court should, accordingly, decline Plaintiffs' invitation and deny their Motion for Summary Judgment.

E. Plaintiffs' Request for Injunctive Relief is Procedurally and Substantively Improper and Should Be Denied.

Plaintiffs, without actually asserting a count for such relief in their Complaint, request that this Court permanently enjoin the Board "from concealing information and misleading voters about their mail-in ballot status[.]" Comp. at 40, Prayer for Relief. In doing so, Plaintiffs ask this Court to both restrain the Board from carrying out its lawfully enacted Policy as well as mandate compliance with Plaintiffs' preferred election scheme. As the Pennsylvania Supreme Court has stressed, such relief is an "extreme remedy." *McCabe v. Watt*, 73 A. 453, 453 (Pa. 1909).

In order to obtain permanent injunctive relief, a party must establish the following elements relative to their claims: (1) the right to relief is clear; (2) the injunction is necessary to avoid an injury that cannot be compensated by damages; and (3) that greater injury will result if the court does not grant the injunction than if it does. *Doe v. Zappala*, 987 A.2d 190, 193 n.2 (Pa. Commw. 2009).

Plaintiffs have failed to demonstrate facts to support this "extreme remedy." *Accord McCabe*, 73 A. at 453. First, Plaintiffs' right to relief is, to put it mildly, entirely unclear. As explained in section IV.C, *supra*, Plaintiffs' "rights" have not been infringed upon and, consequently, they have no concomitant right to demand that this Court grant such "extreme" relief. *Id.* The second element for a permanent

injunction is immaterial where, as here, Plaintiffs have not incurred an injury because Plaintiffs simply cast deficient ballots and those ballots were not counted pursuant to the mandates of the Election Code and the lawfully enacted Policy. Finally, no greater injury will occur because no injury has occurred in the first place and, as explained in section IV.B.1, *supra*, Plaintiffs' alleged "injury" is prospective in nature, as it assumes facts not in the record regarding the applicability of the Policy for the 2024 General Election.

As such, Plaintiffs' requested relief is inappropriate and deficient and should be denied.

V. CONCLUSION

Based on the foregoing, Intervenors, Republican National Committee and Republican Party of Pennsylvania, respectfully request that the Court deny Plaintiffs' Motion for Summary Judgment, grant Intervenors' Motion for Summary Judgment and dismiss Plaintiffs' Complaint.

Dated: August 2, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

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Republican Party of Pennsylvania*

**Pro hac vice application forthcoming*

**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

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

Dated: August 2, 2024

THE GALLAGHER FIRM, LLC

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the within *INTERVENORS'*
BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT has been provided to all counsel of record listed below via email this
2nd day of August 2024:

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JUNE DEVAUGHN HYTHON, ERIKA :
WOROBEC, SANDRA MACIOCE, :
KENNETH ELLIOTT, and DAVID :
DEAN, :
:
:
Plaintiffs, :
:
:
v. :
:
WASHINGTON COUNTY BOARD :
OF ELECTIONS, :
:
:
Defendant, :
:
:
v. :
:
REPUBLICAN NATIONAL :
COMMITTEE and REPUBLICAN :
PARTY OF PENNSYLVANIA, :
:
:
Intervenors. :

[PROPOSED] ORDER OF COURT

AND NOW, this _____ day of _____ 2024, upon consideration of Intervenor’s Motion for Summary Judgment, it is hereby ORDERED, ADJUDGED, and DECREED that said Motion is GRANTED. Summary judgment is hereby GRANTED in favor of Intervenor, Republican National Committee and

Republican Party of Pennsylvania, and the Plaintiffs' Complaint is hereby
DISMISSED.

BY THE COURT:

Honorable Brandon P. Neuman J.

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