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

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

Plaintiffs,

v.

WASHINGTON COUNTY BOARD OF ELECTIONS,

Defendant.

G.D. No. 24-3953

OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Filed on Behalf of Defendant
Washington County Board of Elections

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Defendant.	:	

WASHINGTON COUNTY BOARD OF ELECTIONS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. Summary of Opposition

Plaintiffs' arguments in favor of summary judgment are fatally flawed, both legally and factually. These flaws not only preclude the Court from entering Summary Judgment for Plaintiffs – they require entry of Summary Judgment in favor of the WBOE.

Legally, in addition to the reasons discussed in the WBOE's own Motion for Summary Judgment and Brief in Support, Plaintiffs' claim is fatally flawed for at least four reasons. *First*, in attempting to assert a procedural due process claim based on the **legislative** decision by the WBOE not to provide "notice and curing" for the 2024 Primary Election, Plaintiffs improperly invite this Court to legislate from the bench. Plaintiffs ask the Court to "require Washington County to go back to its practice of a year ago." Plf's Br., 36. That "practice of a year ago" was a legislatively-adopted policy of the WBOE to permit "notice and curing" for the 2023 election cycle. But the elected officials that comprise the current WBOE **changed** that policy for the 2024 Primary

Election. The WBOE did so in a legislative act that was discussed at three public meetings, including public comment. The new policy was publicly voted on and adopted on April 11, 2024. In demanding that the Court "require Washington County to go back to its practice of a year ago," Plaintiffs are clearly asking the Court to legislate from the bench. They want the Court to substitute Plaintiffs' view of what the election policy in Washington County should be in place of the policy voted on and enacted by the officials whom the Washington County citizens elected to set policy for the County. The Court cannot do that. *See e.g., Pa. Democratic Party v. Boockvar* ("*Pa. Dems.*"), 238 A.3d 345, 373 (Pa. 2020) (noting position that courts cannot "rewrite" election laws "to align with a litigant's notion of good election policy."). The clear impropriety of this is exactly why legislative acts are **not** subject to procedural due process challenges. *E.g., Vega v. Wetzel*, No. 39 M.D. 2022, 303 A.2d 1274 (Table), 2023 WL 4853004, at *3 (Pa.Commw.Ct. 2023). Plaintiffs' claim is fatally flawed as a matter of law.

Second, Plaintiffs try to assert a due process violation based on a "fundamental" right to vote. But they were **not** denied the ability to vote or access to the ballot in any manner. Each Individual Plaintiff applied for and received a mail-in ballot. Each filled out that ballot and returned it to the WBOE. Thus, each voted by mail. But each also failed to follow Act 77's rules – which have been held to be mandatory by the Pennsylvania Supreme Court. Each did so despite being warned that "[**f]or your ballot to count, you must follow all of these steps**" (Jt.Ex. E) (emphasis added). There is no due process violation based on those facts. *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)

The fact that their votes were not counted because of their own errors does not deprive Plaintiffs of any fundamental right to vote, let alone a liberty interest protected by procedural due process. "[A] voter who fails to abide by state rules prescribing how to make a vote effective is not 'den[ied] the right ... to vote' when his ballot is not counted. 'Casting a vote . . . requires compliance with certain rules.'" *Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 133 (3d Cir. 2024) ("*NAACP*") (quoting *Brnovich v. DNC*, 594 U.S. 647, 669 (2021)). "[I]ndividuals are not 'denied' the 'right to vote' if non-complaint ballots are not counted." *Id* at 135; *accord Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) ("When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote.' Rather, that individual's vote is not counted because he or she did not follow the rules for casting a ballot.") (Alito, J., dissenting). As the Pennsylvania Supreme Court, in recounting the position of the Secretary of State, wrote in *Pa. Dems.*, "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[.]" *Pa. Dems.*, 238 A.3d at 373. Here, Plaintiffs simply did not follow the rules. That is not a denial of the right to vote, nor does it give rise to a liberty interest protected by procedural due process. *E.g., Richardson v. Texas Sec. of State*, 978 F.3d 220, 230-33 (5th Cir. 2020). Plaintiffs' claim is again fatally flawed as a matter of law.

Plaintiffs repeatedly, and irresponsibly, use the hot button word "disenfranchised" claiming that the WBOE has "disenfranchised" 259 voters. That word has no place here. This term harkens back to poll taxes and literacy tests designed to intentionally block African Americans from even being able to get to the polls – use of it raises high emotions. It is not justified here. Plaintiffs failed to follow simple, neutral ballot-casting rules that have been upheld by the Pennsylvania Supreme Court. If they were "disenfranchised," that result comes from the General Assembly who created

Act 77's mail-in voting rules and the Pennsylvania Supreme Court who has held them to be mandatory – not the WBOE. Plaintiffs are no more disenfranchised than a voter who shows up to vote at 8:01 p.m. because she had to work late. Each had the ability to vote, but each failed to follow the rules.

Third, when distilled to its foundation – and contrary to how Plaintiffs frame it – this case is **not** about the fundamental right to vote, *i.e.*, about having the ability to participate in the electoral process. It is about a request to be supplied (i) notice of and (ii) an ability to cure a mail-in ballot that does not comply with the rules of voting. This is laid bare by paragraph (c) of Plaintiffs' requested relief. They want the Court to order the WBOE "to provide accurate, timely information to voters about mail-in ballots with declaration envelopes containing disqualifying errors" – **that is notice** – so that voters "have an opportunity to vote a provisional ballot on Election Day" – **that is curing**. It is this narrower request for relief through "notice and curing," not some broader fundamental right to vote that the Court must evaluate for procedural due process purposes. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571 (1972) (defining right at issue to be "whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year," as opposed to a broad right to employment); *Caba v. Weaknecht*, 64 A.3d 39, 53, 59 (Pa.Commw.Ct. 2013) (right at issue for procedural due process purposes was not "constitutional right to bear arms" but rather an "interest in carrying a concealed weapon for self-defense"); *Feliciano v. Pa. Dept. of Corr.*, 250 A.3d 1269, 1279 (Pa.Commw.Ct. 2021) (entitlement to procedural due process is "fact-specific"); *Steele v. Cicchi*, 855 F.3d 494, 508 (3d Cir. 2017) (prison manual did not give rise to protected liberty interest); *Richardson*, 978 F.3d at 232 (examining whether claimed right to vote by mail, as opposed to right to vote in general, was a liberty interest for procedural due process purposes).

There is no Pennsylvania statutory or decisional law to support Plaintiffs' request for "notice and curing," let alone law holding that "notice and curing" is a protected liberty interest for due process purposes. To the contrary, *Pa. Dems.* held that there is "no constitutional or statutory basis" to support a requirement of providing notice and curing for a defective mail-in ballot. *Pa. Dems.,* 238 A.3d at 374 (concluding that boards of election are not required to implement notice and opportunity to cure policies because there is "no constitutional or statutory basis that would countenance . . . having the Boards contact those individuals whose ballots the Boards have reviewed and identified as including 'minor' or 'facial' defects [] and then afford those individuals the opportunity to cure defects[.]"). And the two Federal Circuit Courts of Appeals who have addressed this issue have also found no liberty interests protected by due process in this context. *League of Women Voters v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008); *Richardson*, 978 F.3d at 230-33. So, too, has the lone Federal District Court in Pennsylvania that has addressed the issue. *French v. Cnty. of Luzerne*, No. CV 3:23-538, 2023 WL 8374738, at *6 (M.D. Pa. Dec. 4, 2023) (holding "right to vote" was not a protected liberty interest protected by procedural due process.)

The first step in a procedural due process analysis is to determine if a liberty interest protected by due process is implicated. *E.g., Com. v. Turner*, 80 A.3d 754, 764 (Pa. 2013) (citing *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)); *Pennsylvania Game Com'n v. Marich*, 666 A.2d 253, 256 (Pa. 1995). Plaintiffs' Brief does not even acknowledge this "first step" requirement, let alone explain how the notice and curing relief that they ask this Court to legislatively dictate from the bench constitutes a protected liberty interest. Given this abject failure, no doubt, Plaintiffs' claim is fatally flawed as a matter of law.

And, *fourth*, the "cure" Plaintiffs ask this Court to impose is totally illusory. As Plaintiffs have stipulated:

> 47. If a voter's mail-in ballot is received by the Washington County Board of Elections before the close of the polls and that voter also fills out a provisional ballot, ***the provisional ballot will not be counted by the Board***, even if that mail ballot had disqualifying errors such as a missing signature on the declaration envelope, a missing or incorrect date on the declaration envelope, or a missing secrecy envelope.

Joint Statement of Facts ("JSOF") ¶47 (emphasis added). This stipulated fact is entirely consistent with the terms of the Election Code. 25 P.S. § 3050(a.4)(5)(ii)(F) (a provisional ballot "shall not be counted" in any circumstance where the voter's mail ballot "is timely received by a county board of elections."). The Court, in exercising its equitable powers, should not be complicit in ordering relief that would give a voter the false impression that they can cure a defective mail-in ballot via a provisional ballot when the law – and the factual stipulation entered by Plaintiffs – clearly provide that the provisional ballot will not be counted. Again, Plaintiffs' claim is fatally flawed as a matter of law.

Factually, Plaintiffs repeatedly assert that the staff in Washington County's Elections Office put in an "inaccurate" code," "misused" the SURE system," or "miscoded" in the SURE system. Plf's Br., 1, 3, 18, 22, 25. Those are just words. They are not evidence or the law. And they are **wrong** based on the **actual** record. The code to be inputted is not dictated by any binding law or regulation. Marks Dep., 31-32.[1] Deputy Secretary of State Jonathan Marks repeatedly acknowledged that the WBOE is not required or mandated to use any particular code. Marks Dep., 39-40, 69, 83-84, 88-89, 94. Contrary to Plaintiffs' unsupported assertions, Mr. Marks testified that the code inputted by Washington County's Elections Office was, indeed, appropriate in a

[1] The cited portions of the Marks and Ostrander deposition transcripts are already in the record as Exhibits to the WBOE's Motion for Summary Judgment.

county – like Washington County – that has adopted a policy not to provide "notice and curing." *Id.* Plaintiffs cannot change the **actual** record evidence through semantical word choices like "inaccurate" or "miscoded." And summary judgment cannot be granted to them based on the record here; rather, that record requires entry of Summary Judgment for the WBOE. Plaintiffs' claim is fatally flawed factually.

Most importantly, the code used by the Elections Office – Record-Ballot Returned – was entirely factually accurate. The ballot had been received and recorded. An email sent by the Department of State (DOS) may have been confusing, but the undisputed record, including Paragraph 25 of the JSOF, establishes that the WBOE did not send or write the email. Ostrander Dep., 39, 42, 58, 79, 162-67; *see* JSOF ¶25. Plaintiffs cannot build a procedural process claim *against the WBOE* based on an email that the WBOE *did not send or write*. And, in response to "feedback" from Washington County and other counties, DOS is changing the email for the November election to avoid any potential confusion moving forward. Marks Dep., 76-82. Once again, Plaintiffs' claim is clearly fatally flawed factually.[2]

Plaintiffs also assert that the WBOE acted "secretly" to disqualify ballots. Plf's Br., 23, 25. But the new policy not to provide "notice and curing" for the 2024 Primary Election was discussed at two public WBOE meetings and it was adopted at a public meeting where citizens spoke both

[2] Prior to changes to the auto-generated emails made by DOS in early 2024, the email to voters associated with the "Record-Ballot Returned" code did not have the language giving rise to the alleged confusion of Plaintiffs. *See* Ex. A hereto (excerpts of information from DOS regarding prior SURE System releases). From March 2020-February 2023, the email read, "Your ballot status has been updated to reflect your official ballot has been received timely and recorded." *Id.* From March 2023-February 2024, the email read, "Your ballot status has been updated to reflect your official ballot has been received timely and recorded. Please note: You are no longer permitted to vote at your polling place location now that you have returned your ballot timely." *Id.* In March 2024, DOS changed the email to the version received by certain Plaintiffs and found at Jt.Exs. A-C that indicates, *inter alia*, "If your election office identifies an issue with your ballot envelopes that prevents the ballot from being counted, you may receive another notification," which was not an accurate statement in a non-curing county like Washington County. For the 2024 General Election, however, the language in the email will revert to saying substantively that "your ballot has been received." Marks Dep., 76-82. **Any confusion in the spring of 2024 clearly rests at the feet of DOS, not the WBOE**.

for and against it. JSOF ¶¶ 29-36. After adoption it was discussed at yet a third public meeting, again with public comment. *Id.*, 37-38. The terms of the policy and what would be done with defective ballots were openly discussed in these public meetings – that is the antithesis of "secret." And, ultimately, no formal decision on whether to count or not count a given ballot is made until it is reviewed by the Canvas Board, which is also done at a meeting open to the public. Ostrander Dep., 109-119. Again, Plaintiffs' claim is fatally flawed factually.

In the end, while Plaintiffs' Brief is long on hyperbole, it is woefully short on law or actual record facts that support Plaintiffs' sole claim. As is done below and in the WBOE's own Brief in Support of its Motion for Summary Judgment, when the controlling law is examined and the actual undisputed record considered, not only are Plaintiffs clearly not entitled to Summary Judgment, but Summary Judgment should, to the contrary, be entered for the WBOE.

II. Argument

A. Plaintiffs' Claim Seeking Relief for the 2024 General Election Is Speculative Precluding Both Plaintiffs' Standing and the Court from Exercising Jurisdiction Because the Claim Is Not Ripe

The law on standing and ripeness is set forth in detail in the WBOE's own moving Brief and for brevity it is not repeated in full here. *See* WBOE Br., 17-23. It is clear from that law that the Court cannot hear this case and that Plaintiffs have no standing to bring it, given that what curing or non-curing policy will apply in Washington County for the 2024 General Election is yet to be determined. *E.g., Carter v. Degraffenreid*, No. 132 M.D. 2021, 263 A.3d 1028 (Table), 2021 WL 4735059, at *4-7 (Pa.Commw.Ct. 2021) (dismissing for both lack of standing and ripeness).

Realizing this problem, Plaintiffs argue that the record shows that the WBOE "will most likely handle mail-in ballots with disqualifying errors on the declaration envelopes in the same way it did for the primary" and that "[t]the Board has given every indication that it will employ

the same or similar practice in the upcoming November 5, 2024 General Election." Plf's Br., 18, 32 (both citing Ostrander Dep., 126:14-127:14). But "most likely" and "every indication" are not "will" or "has," and these non-definitive terms establish, as a matter of law, that Plaintiffs claim is speculative and not ripe. Until the WBOE adopts a policy for the 2024 General Election, the claim here is premature and this Court lacks authority to hear it and Plaintiffs lack standing to bring it. *Carter, supra.* This is made clear by the **actual testimony** from Ms. Ostrander instead of Plaintiffs' characterization of her testimony:

> *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.***
> *[]*
> *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*

Ostrander Dep., 126-27 (emphasis added). Ms. Ostrander testified in no uncertain terms that whether to provide or not provide "notice and curing" will be on the agenda, and obviously voted upon, at a public meeting of the WBOE before the November 2024 General Election. That the WBOE in 2023, in two separate votes, kept the same policy for both the primary and general elections does not establish that they will do so again, although they may. But "what may happen" or even what is "highly likely" to happen does not establish standing or ripeness as a matter of law. *Carter,* 2021 WL 4735059 at *4, 7 ("what may happen" even if "extremely" or "highly likely" to happen insufficient as a matter of law for standing or ripeness). The Complaint should be dismissed.

B. <u>Plaintiffs Inaccurately Characterize the Record and Improperly Attempt to Rely on the Complaint's Allegations</u>

As the above excerpt from Ms. Ostrander's **actual** testimony shows, Plaintiffs have engaged in a liberal and truncated reading of the record in describing her testimony. Plaintiffs' reading of Ms. Ostrander's testimony is incomplete and done in a light most favorable to their claim. But on summary judgment, the record cannot be read that way. *E.g., Hartford Fire Ins. Co. v. Davis,* 275 A.3d 507, 511 (Pa.Super.Ct. 2022). And the above example is far from the only instance where Plaintiffs' moving Brief breaks this cardinal rule.

For example, insinuating that Washington County's poll books are somehow inaccurate, Plaintiffs discuss how use of the "CANC" codes are reflected in poll books. Plf's Br. p. 12 (citing Ostrander Dep., 44:7-25). But this testimony was part of a discussion as to what was done in **2023** under the old policy, not what was done in the **2024** Primary Election or what might be done in the **2024** General Election. Ostrander Dep., 32:25-44:25. In a similar vein, (i) Ms. Ostrander testified that the Election Code only requires recording when a mail-in ballot is sent and received and (ii) the record also indicates that all that is needed to have accurate poll books is to indicate

whether a voter applied for a mail-in ballot and whether the WBOE received it – and Washington County's poll books reflect this information. *Id.,* 23-24, 89, 147-49; Marks, Dep., 35, 107-109; *see also* JSOF ¶46 ("On Election Day, the poll books in Washington County indicated only which voters had requested a mail in ballot and whether each such voter's ballot had been received by the Board."). Nothing was wrong with Washington County's poll books, period.

Plaintiffs' willingness to improperly "slant" the record is highlighted by how their Brief characterizes the WBOE's use of the SURE system when compared to the testimony of Deputy Secretary Marks – the government official who has responsibility for overseeing the SURE system. While Plaintiffs refer to the WBOE as using "inaccurate" codes in SURE, "miscoding," and "misusing" the SURE system, Mr. Marks testified (largely in response to questions from counsel for Plaintiffs) that a county "has discretion [as to] which of those 23 codes [offered by SURE] to use," "the County should be selecting the most accurate code *considering the county's practice as it relates to notice and cure*" (emphasis added), and, in relation to which SURE code to pick, "if a county does not wish to notify voters and offer them an opportunity to cure, there's nothing we can do to mandate that." Marks Dep. 83-84, 92. The dichotomy between Plaintiffs' allegations and Marks' testimony cannot be reconciled.

Plaintiffs' case is founded on the assertion that what the WBOE did in entering data into the SURE System was improper and that the WBOE ought to be required to enter "CANC" codes, but Marks' testimony is to the contrary. Because counties can choose not to provide notice and curing, Mr. Marks was clear that counties "may select one of those status reasons if that is consistent with their county's practice" (Marks Dep., 40), "if a county doesn't want [the email associated with CANC codes] sent to the voter, one option they have is to leave that in the ballot return status . . and [based on] the Supreme Court's ruling on notice and cure, that is an option

that is available to the county" (*id*., 68-69), "if the county does not offer notice and cure, it may be the county's practice to leave it in the[] ballot return status" (*id.*, 88), "[w]hether the county updates the disposition to another ballot response type [from Record-Ballot Returned] is going to depend on the county's individual practice as it relates to notice and cure" (*id.*, 94) and "it really does depend on the county's practice if they offer notice and cure[;] [i]f they don't – then they may not be updating the disposition of the ballot at that point, they may be leaving it in the record ballot returned status." (*id*., 89). **Simply, Marks' testimony repeatedly shows that what the WBOE did is not improper**. And this is entirely consistent with the law – because Washington County is permitted not to offer "notice and curing," the WBOE need not tell a voter anything more about his or her mail-in ballot. Plaintiffs cannot win Summary Judgment on this record. To the contrary, this record puts them out of court and requires Summary Judgment for the WBOE.[3]

In a similar vein, in several instances, Plaintiffs cite to allegations in their Complaint as part of the summary judgment record. *E.g.*, Plf's Br., 6, 17, 27-28. But allegations in pleadings are not part of the record on summary judgment and, even though verified, cannot be used to support or oppose summary judgment. *See e.g.*, *DeWeese v. Anchor Hocking Consumer & Indus. Prod. Grp.*, 628 A.2d 421, 424 (Pa.Super.Ct. 1993) ("It is well-settled that a party may not defeat a motion for summary judgment by relying on the allegations of his complaint. Rather, he must present depositions, affidavits, or other acceptable documents that show there is a factual issue for a jury's consideration.") (citing *Brecher v. Cutler,* 578 A.2d 481 (Pa.Super.Ct. 1990)); *Racioppi*

[3] In contrast to this unrebutted testimony from the official in charge of the SURE system, *which testimony Plaintiffs do not cite*, Plaintiffs ask the Court to rely on the SURE County Release Notes (*e.g.,* Plf's Br., 9-10), but these Release Notes are of no legal force (they are not a regulation, not a Directive from DOS, nor even a non-legally enforceable DOS Guidance) and Mr. Marks labeled them a mere "product notification." Marks Dep., 31-32.

v. Progressive Ins. Co., No. 3419 EDA 2015, 2016 WL 2799689, at *3 (Pa. Super. Ct. May 11, 2016) (same).

Plaintiff is forced to rely on slanted and inaccurate readings of the record and improperly rely on the allegations in their Complaint for one simple reason – the record does not support granting Plaintiffs Summary Judgment and, in actuality, requires Summary Judgment to be entered for the WBOE.[4]

C. Plaintiffs Improperly Ask This Court to Usurp the WBOE's Legislative Powers

The law is clear that legislative acts are not subject to procedural due process challenges. *Vega*, 2023 WL 4853004, at *3; *Sutton v. Bickell*, 220 A.3d 1027, 1032 (Pa. 2019); *see Ondek v. Allegheny County Council*, 860 A.2d 644, 649 (Pa.Commw.Ct. 2004). Despite attacking a legislatively-enacted policy on **only** procedural due process grounds, Plaintiffs make no effort to address this law. That alone is fatal to their claim.

The rationale for this law is clear – courts do not have authority to make legislative policy. As the Supreme Court stressed in *Mazur v. Trinity Area Sch. Dist*., 961 A.2d 96, 104 (Pa. 2008):

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

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

[4] On page 17 of their Brief, citing to the Complaint, Plaintiffs argue that a pre-election, pre-canvas request for a list of voters whose mail-in ballots had defects was improperly denied by the WBOE. Not only is this issue not relevant to the claim here which looks forward to the November 2024 General Election, Plaintiffs' characterization is wrong. The statues cited in footnote 5 of Plaintiffs' brief address "official" ballots and require approval or rejection "by the county board." *See* 25 P.S. § 3150.17(a). Ballots are not "official" and approval or rejection "by the county board" does not occur until the canvas after election day. *See* Ostrander Dep., 93-95. Accordingly, the request could not be complied with at the time it was made. *Id. See also, Previte v. Erie County Board of Elections*, No. 814 C.D. 2023, 2024 WL 3587134, at *7 (Pa.Commw.Ct. July 31, 2024) (scanned mail-in ballots are not public records until "removed from the ballot box or voting machine").

Plaintiffs have **not** challenged the WBOE policy on substantive due process grounds or any other substantive constitutional basis. Nor can they, because the new policy was indeed valid under the terms of Act 77 and the Pennsylvania Supreme Court's rulings in *Pa. Dems.* and *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023) ("*Ball*"), as well as the Commonwealth Court's decision in *R.N.C. v. Chapman,* No. 447 M.D. 2022, 2022 WL 16754061, at * 4, *17-18, *21 (Pa.Commw.Ct. 2022) ("*Chapman*"). Plaintiffs have brought only a procedural due process claim. But the clear law cited above precludes Plaintiffs' procedural due process challenge. And Plaintiffs' own allegations and request for relief highlight why this is the law.

Plaintiffs attack the WBOE's legislatively-adopted policy for the 2024 Primary Election not to provide "notice and curing" as "a reflection of politics." Plf's Br., 3. Indeed, it may be, but that makes the point for the WBOE. The WBOE is a political body comprised of officials elected by the residents of Washington County to set *policy* for the County. That political body adopted a new policy not to permit "notice and curing" for the 2024 Primary Election. Plaintiffs disagree with that policy and, indeed, both Organizational Plaintiffs spoke against the policy at public meetings. *See* JSOF ¶37; Ostrander Dep., 200-203. But that disagreement cannot be the basis for a procedural due process claim, because such a claim would force the Court to improperly legislate from the bench.

To highlight this point, in discussing the Elections Office's processing of mail-in ballots in 2023 versus 2024, Plaintiffs argue "[t]he only difference in practice was which drop-down option the election office selected in SURE." Plf's Br., 28. But the legislative adoption of a new policy not to permit notice and curing is what created that "only difference." And reverting to how it was done under the old policy would nullify the valid, legislative act of the 2024 WBOE by replacing the 2024 WBOE's policy for the April 2024 Primary Election with what the 2023 WBOE had

decided to implement. **That would clearly be improper legislating from the bench**. *See Cali v. Phila.*, 177 A.2d 824, 835 (Pa. 1962) ("We are not a Supreme, or even a Superior Legislature, and we have no power to redraw the Constitution or to rewrite Legislative Acts or Charters, desirable as that sometimes would be."); *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."); *In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 721 (Pa. 2018) (The judiciary "may not usurp the province of the legislature by rewriting [statutes] . . . as that is not [the court's] proper role under our constitutionally established tripartite form of governance."); *Heller v. Frankston*, 475 A.2d 1291, 1296 (Pa. 1984) ("Where a legislative scheme is determined to have run afoul of constitutional mandate, it is not the role of this Court to design an alternative scheme which may pass constitutional muster."); *see also, In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004).

But legislating from the bench is *exactly* what Plaintiffs ask this Court to do. In Plaintiffs' own words: "Plaintiffs requested relief is simple: Require Washington County ***to go back to its practice of a year ago*** of inputting accurate codes into the SURE system[.]" Plf's Br., 36. To do so would substantively reinstate the old 2023 notice and curing policy of the WBOE in contravention of the new, legally valid policy adopted by the 2024 WBOE for the April 2024 Primary Election. Further, it would be the Court legislating what Washington County's notice and cure policy will be for the November 2024 General Election – even before the WBOE votes on a policy for that election. What Plaintiffs are asking the Court to do is improper. This is the exact reason why legislative acts are not subject to procedural due process challenges. *See Vega*, 2023 WL 4853004, at *3 (quoting *Sutton*, 220 A.3d at 1032). Plaintiffs' request for Summary Judgment should be denied, and Summary Judgment should be entered for the WBOE.

D. Getting Notice of a Defective Mail-in Ballot and an Opportunity to Cure it Is Not a Liberty Interest Protected by Procedural Due Process

1. Plaintiffs' Purported Right to "Notice and Cure" Is Not a Liberty Interest Protected by Procedural Due Process

Plaintiffs attempt to couch their claim as impacting the "fundamental" right to vote. But, as Plaintiffs' own requested relief shows, their claim is founded on a much narrower interest – a claimed right to receive notice of a defective mail-in ballot and a chance to cure via a provisional ballot. *E.g.,* Plf's Br., 36 (requesting that the Court order Washington County to input codes into the SURE system that will provide a voter notice of a mail-in ballot defect so that the voter may vote by provisional ballot on Election Day), 1-2 (discussing SURE codes "depriv[ing]voters of information they need to correct or challenge the rejection of their ballots."), 5 (requesting the WBOE be ordered to, *inter alia,* "shar[e] ballot-status information with inquiring voters."). In this regard, Plaintiffs' Summary Judgment Motion in Paragraph 2, asks if "due process of law require[s] Washington County (the "County") to input accurate codes reflecting ballot status into the state's [SURE system]." *See also* Plf's Br., 1. Plaintiffs have defined the purported "interest" at issue – it is not the right to vote, generally. Rather, it is a claimed right to receive notice of a mail-in ballot defect and a chance to cure it by filing a provisional ballot. It is this narrower interest that must be analyzed in the Court's procedural due process analysis. *See Roth,* 408 U.S. at 571 (defining right at issue to be "whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year," as opposed to a broad right to employment); *Caba,* 64 A.3d at 53, 59 (right at issue for procedural due process purposes was not "constitutional right to bear arms" but rather an "interest in carrying a concealed weapon for self-defense"); *Feliciano,* 250 A.3d at 1269 (entitlement to procedural due process is "fact-specific"); *Steele,* 855 F.3d at 508 (prison manual did not give rise to protected liberty

interest); *Richardson*, 978 F.3d 232 (evaluating whether the right to vote by mail is a protected liberty interest). Thus, in order to make out a procedural due process claim, Plaintiffs must first establish that getting notice of a defective mail-in ballot and a chance to cure it is a liberty interest protected by procedural due process. **It is not**.

In the "first step" of a procedural due process analysis, the Court must determine whether Plaintiffs have a protected "life, liberty or property interest" with which the WBOE has interfered, *i.e.,* whether due process applies in the first place, and only if it does should the Court then move on to determining what process is due. *E.g., Turner*, 80 A.3d at 764; *Marich*, 666 A.2d at 256 (explaining that courts only "employ the methodology" of *Mathews* after first determining "that a protected liberty or property right was involved"). If the court determines that no constitutionally protected liberty or property interest has been impacted, **the procedural due process analysis ends**. *See Marich*, 666 A.2d at 255–56.

Plaintiffs' Brief does not discuss this critical first step, let alone analyze whether the "notice and cure" they seek is a protected liberty interest. To the contrary, the only "discussion" on this issue is the conclusory assertion on page 21 of Plaintiffs' Brief that, because voting is a fundamental right, it is "a protected interest" subject to due process. The authority cited for this "protected interest" conclusion is *Washington v. Pa. Dept. of Corr.*, 306 A.3d 263, 289 (Pa. 2023), but *Washington* did not involve voting at all – it is a prisoners' rights case dealing with commissary funds. Contrary to Plaintiffs' conclusory assertion, no Pennsylvania Court has **ever** held that voting is a protected liberty interest for due process purposes, let alone held that a claimed entitlement to "notice and cure" for defective mail-in ballots is a protected interest.

As to the broader proposition that voting in general is a protected liberty interest, two Federal Courts of Appeals have held that voting is not a protected liberty interest for procedural

due process purposes even though it is a fundamental right for other constitutional purposes. *Richardson*, 978 F.3d at 230-33; *Brunner*, 548 F.3d at 479 ("That Ohio's voting system impinges on the fundamental right to vote does not, however, implicate procedural due process . . . the League has not alleged a constitutionally protected interest."). And the only Federal Court sitting in **Pennsylvania** to have addressed this issue agreed. *French,* 2023 WL 8374738, at *6. As the Fifth Circuit emphasized, "[f]or procedural due process, the question is not whether the plaintiff asserts a *fundamental right*, but instead whether the right they assert is a *liberty interest*." *Richardson*, 548 F.3d at 231(emphasis in original).

As to the narrower proposition – which is the appropriate proposition for analysis here based on Plaintiffs allegations and requested relief (*id.* at 232; *Roth,* 408 U.S. at 571; *Caba,* 64 A.3d at 53, 59; *Feliciano,* 250 A.3d at 1269; *Steele,* 855 F.3d at 508) – *Pa. Dems.* forecloses building a due process claim on an asserted "right" to "notice and curing" for a defective mail-in ballot. *Pa. Dems*. expressly held that neither the Pennsylvania Constitution nor any Pennsylvania statute provide authority on which a court could order a county to provide "notice and curing." *Pa. Dems.*, 238 A.3d at 372-74. Thus, **Plaintiffs seek to enforce a right that the Pennsylvania Supreme Court has held does not exist**. That ends this case – Plaintiffs cannot survive the "first step" of the required procedural due process analysis.

Given the clear holding of *Pa. Dems* and its detrimental impact on the relief Plaintiffs seek, Plaintiffs urge the Court to ignore *Pa. Dems*. They argue that *Pa. Dems* "did not consider whether voters are entitled to procedural due process protections." Plf's Br., p. 22 n. 9.[5] But the Court must

[5] The concurring opinion of Justice Wecht did consider this issue stating that "[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." *Pa. Dems.*, 238 A.3d at 389 (Wecht, J concurring).

confront *Pa. Dems* as part of the first step of a due process analysis, *i.e.,* whether Plaintiffs have a protected "life, liberty or property interest" with which the WBOE has interfered. Plaintiffs cannot avoid this first step inquiry simply by stating in broad, conclusory fashion that voting is a fundamental right. *See Roth,* 408 U.S. at 571 (defining right at issue to be "whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year," as opposed to a broad right to employment); *Caba,* 64 A.3d at 53, 59 (right at issue for procedural due process purposes was not "constitutional right to bear arms" but rather an "interest in carrying a concealed weapon for self-defense"); *Feliciano,* 250 A.3d at 1269 (entitlement to procedural due process is "fact-specific"); *Steele,* 855 F.3d at 508 (prison manual did not give rise to protected liberty interest). But that is all they do. Contrary to this bald conclusion, *Pa. Dems,* holds that Plaintiffs have no right to "notice and cure." Without this right, they have no protected interest on which to build their procedural due process challenge. To find for Plaintiffs, the Court would, in substance, be required to overrule *Pa. Dems.* (which obviously the Court lacks authority to do,) as well as to rewrite Act 77 to include a provision requiring "notice and curing" (which the Court also lacks authority to do). ***Pa. Dems*. ends this case**.

2. Plaintiffs' Authority Is Non-Controlling, Inapposite, or Both

Plaintiffs cite four Pennsylvania cases mentioning that the right to vote is "fundamental" or using a similar adjective: *Applewhite v. Com.*, 54 A.3d 1 (Pa. 2012), *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs,* 902 A.2d 476 (Pa. 2006), *Appeal of Norwood*, 116 A.2d 552 (Pa. 1955), and *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.3d 538 (Pa. 1964). None of these cases is a procedural due process case. None holds that voting in general, let alone receiving notice of a defective mail-in ballot and a chance to cure it, is a protectible liberty interest subject to a procedural due process analysis. These cases are, thus, inapposite as to the critical "first step" of a

procedural due process analysis – *i.e.,* determining whether due process applies in the first place. *E.g., Turner*, 80 A.3d at 764.

Applewhite involved a challenge to Pennsylvania's voter ID law that was not being "implemented according to its terms." *Id.* at 3. The law itself instituted a pre-requisite to being eligible to vote – having a certain type of identification. Because it involved a law that determined voter eligibility (as opposed to whether a given vote complies with statutory rules), the "fundamental" right to vote was implicated. Nothing in the present case is analogous. Neither Act 77, nor the WBOE's policy adhering to Act 77's terms, prevents anyone from being eligible to vote. *Applewhite* is inapposite and its soundbite use of the term "fundamental" has no application to Plaintiffs' procedural due process challenge.

The same is true of *Kuznik*, 902 A.2d 476, which involved a challenge to the purchase of electronic voting systems. While the court used the term "fundamental," the case has nothing to do with actual voting, let alone mail-in voting, mail-in voting rules, or failure to comply with such rules. *Kuznik* has no bearing on Plaintiffs' procedural due process claim.

Appeal of Norwood, 116 A.2d 552 (Pa. 1955) is equally unavailing. *Norwood* dealt with the question whether a clear vote for a candidate on a paper ballot should be counted or not.[6] 116 A.2d at 554-55. *Norwood* did not concern a voter who clearly failed to comply with the applicable voting rules or with a situation where such a failure resulted in an invalid ballot per an express ruling of the Pennsylvania Supreme Court. To the contrary, the *Norwood* court noted that the markings on the ballots complied with the Election Code. *Norwood,* 116 A.2d at 554. *Norwood,*

[6] *Norwood* involved a voter making an "x" over a check mark in the proper place on the ballot. *Norwood*, 116 A.2d at 553.

thus, involved a vote that was valid under applicable law – such is not the case here, regardless of whether the *Norwood* court described voting as "the most treasured prerogative of citizenship."

The same goes for *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538 (Pa. 1964). *Perles* involved valid absentee ballots that were co-mingled with challenged absentee ballots precluding a determination of "which votes, if any, were cast illegally." *Id.* at 540. The Supreme Court refused to throw out all of the ballots because some of them were admittedly valid (as had been determined before the co-mingling). *Id. Perles* is about making sure that *valid* ballots are counted. *Id. Perles* has no application to a vote that is *invalid* as a matter of law such as those at issue in the case before the Court.

Simply, the Pennsylvania precedent cited by Plaintiffs, regardless of whether it refers to the right to vote as "fundamental," has no impact on the issues presently before the Court. This is particularly true since the pertinent interest at issue for procedural due process is *not* the general right to vote but Plaintiffs' asserted right to be supplied (i) notice of a mail-in ballot that does not comply with the rules of voting and (ii) a chance to fix the ballot via a provisional ballot. *See Roth,* 408 U.S. at 571 (defining right at issue to be "whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year," as opposed to a broad right to employment); *Caba,* 64 A.3d at 53, 59; *Feliciano,* 250 A.3d at 1269; *Steele,* 855 F.3d at 508; *Richardson*, 978 F.3d at 232.

Plaintiffs' citation to four federal trial court cases in footnote 8 and on page 25 of their Brief (*Zessar v. Helander,* 2006 WL 642646 (N.D.Ill. 2006), *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F.Supp.3d 158, 228 (M.D.N.C 2020), *Frederick v. Lawson*, 481 F.Supp.3d 774, 794 (S.D.Ind. 2020), and *Self Advoc. Sols. N.D. v. Jaeger*, 464 F.Supp.3d 1039, 1053 (D.N.D. 2020)) fares no better. First, each of these cases was decided *before*

Richardson, wherein the Fifth Circuit, in specifically addressing mail-in ballot regulations and following the lead of the Sixth Circuit in *Brunner,* 548 F.3d at 479, held that voting, although a fundamental right for other constitutional purposes, is not a protected liberty interest for procedural due process purposes. 548 F.3d at 231 ("For procedural due process, the question is not whether the plaintiff asserts a *fundamental right*, but instead whether the right they assert is a *liberty interest*.") (emphasis in original). Plaintiffs' Complaint cites no authority on this critical issue that post-dates *Richardson.* Second, *Richardson,* in detailed, compelling fashion, explains why the holdings in the cases cited by Plaintiffs (and similar) cases are legally infirm. 978 F.3d at 230-33. This infirmity arises from engrafting the U.S. Supreme Court's "reasoning concerning property interests onto a claimed liberty interest without providing any authority justifying that extension." *Id.* at 233. The Court should follow *Richardson*'s correct and legally sound analysis. Third, as explained immediately below, the cases are easily distinguished. And, additionally, rather than these courts sitting in other states, the Court should be persuaded by the decision of the lone Federal Court sitting in **Pennsylvania** that has addressed this issue – *French*, 2023 WL 8374738, at *6, which, agreeing with *Brunner*, found that the "right to vote" is **not** a liberty interest protected by procedural due process. *Id.*

Zessar involved an absentee ballot that was erroneously disqualified under a subjective signature matching requirement. 2006 WL 642646 at *1. In contrast, Plaintiffs' *objective* failures to comply with Act 77's mail-in voting requirements are not erroneous. Also, contrary to the instructions sent by the WBOE to mail-in voters notifying them that their ballot will not be counted if they fail to comply with Act 77's Requirements (Jt.Ex. E), it does not appear that voters in Illinois were provided such notice about any need for a signature match, as the case is silent on this. Further, Illinois had no procedure for challenging the invalidity decision prior to the

certification of the election results (*id.* at *1) – in contrast, 25 P.S. § 3157 gives a Pennsylvania voter a direct appeal to common pleas court and an opportunity for a full hearing. Recognizing this lack of process, Illinois ultimately adopted a new law that provides for a challenge and hearing before the election results become official, rendering *Zessar* moot. *See Zessar v. Keith*, 536 F.3d 788 (7th Cir. 2008).

Democracy N. Carolina, 476 F.Supp.3d 158, *Lawson*, 481 F.Supp.3d 774, and *Jaeger*, 464 F.Supp.3d 1039 – in addition to being wrong based on *Richardson* – are also distinguishable. First, each case was a state-wide challenge to a voting regulation made during the Covid-19 pandemic. In none of the states at issue was there clear, binding precedent from the state's highest court holding the underlying election regulation valid. In contrast, here we have the Pennsylvania Supreme Court's decisions in *Pa. Dems* and *Ball.* Second, unlike the clear and *objective* mail-in voter regulations at issue here (*i.e.,* signature and date requirements), the cited cases (*Lawson* and *Jaeger*) concerned *subjective* "signature matching" requirements, as did *Zessar*. Third, unlike the warning offered here to voters that "[f]or your ballot to count, you must follow all of these steps," no such notice that a ballot might be rejected for lack of signature match was provided in *Lawson* or *Jaeger*. 481 F.Supp.3d at 781; 464 F.Supp.3d at 1044. Finally, and most importantly, none of these courts engaged in the detailed legal analysis employed by the Fifth Circuit in *Richardson* – each of these cases relies on *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D.Ariz. 1990), which *Richardson* distinguishes in detail, notes no Circuit Court of Appeals has ever agreed with, and determines was incorrectly decided. *Richardson*, 978 F.3d at 232-33.

These non-persuasive, non-binding, federal trial court opinions cannot create a procedural due process right to "notice and curing" that is not recognized by Pennsylvania law. This is particularly true given (i) that multiple Federal Courts of Appeals, as well as the U.S. District Court

for the Middle District of Pennsylvania in *French, supra.*, have held that even the broader right to vote is not a liberty interest for procedural due process purposes, and (ii) most importantly, because the Pennsylvania Supreme Court's holding in *Pa. Dems.* forecloses any such right. Accordingly, Plaintiffs' request for Summary Judgment must be denied and Summary Judgment entered in the WBOE's favor.

E. <u>Given that Plaintiffs Seek Equitable Relief from the Court, That the Requested Relief Is Illusory and Itself Will Mislead Voters Must Be Considered by the Court</u>

A court sitting in equity must be cognizant of whether or not the relief it is asked to provide is meaningful. *See generally, Williams Twp. Bd. of Supervisors v. Williams Twp. Emergency Co*., 986 A.2d 914, 921 (Pa.Commw.Ct. 2009). For obvious reasons, a court sitting in equity should refrain from entering relief that is ultimately illusory. *See generally*, *id.* These guiding principles require denial of Plaintiffs' request for Summary Judgment and entry of Summary Judgment in favor of the WBOE.

The Parties have stipulated:

> 47. If a voter's mail-in ballot is received by the Washington County Board of Elections before the close of the polls and that voter also fills out a provisional ballot, ***the provisional ballot will not be counted by the Board***, even if that mail ballot had disqualifying errors such as a missing signature on the declaration envelope, a missing or incorrect date on the declaration envelope, or a missing secrecy envelope.

JSOF ¶47 (emphasis added). This is entirely consistent with the express terms of the Election Code. 25 P.S. § 3050(a.4)(5)(ii)(F) (a provisional ballot "shall not be counted" in any circumstance where the voter's mail ballot "is timely received by a county board of elections."). And, consistent with the above Stipulation, relying on the express terms of the Election Code, the Commonwealth Court has *already* found that a provisional ballot filed in an effort to cure a defective mail-in ballot cannot be counted. *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).

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

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

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

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

2020 WL 6867946, at *5 (emphasis in original). Simply, provisional ballots are not a failsafe for errors made in mail-in voting.

All the reasons why, as a matter of law, such a provisional ballot cannot be counted are discussed at pages 29 to 35 of the WBOE's moving Brief, which is incorporated by reference. In short, the Election Code (i) authorizes the use of provisional ballots only in limited circumstances; (ii) allows use of a provisional ballot as to mail-in voting in only one single, limited circumstance – not applicable here – where a voter has applied for, but not timely returned, a mail-in ballot and is not in possession of his or her mail-in ballot so it can be formally spoiled (25 P.S. § 3150.16(b)(2)); (iii) has no provision permitting use of a provisional ballot to cure a defective mail-in ballot; and (iv) expressly precludes counting a voter's provisional ballot if the voter's mail-in

ballot is received by the WBOE before 8 p.m. on Election Day (25 P.S. § 3050(a.4)(5)(ii)(F)). Like the Commonwealth Court, this Court is "not at liberty to disregard the clear statutory mandate that the provisional ballots to which this language applies must not be counted." *In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election,* 2020 WL 6867946, at *4.

In the face of this authority, in footnote 14 of their Brief, Plaintiffs encourage the Court to enter their requested relief in the form of telling voters that they can file a provisional ballot if their mail-in ballot is defective, but posit that, in doing so, the Court need not consider if such a provisional ballot will **actually count** in an election. Plf's Br., 30 n. 14 ("the issue of whether provisional votes by those voters should count is not within the scope of Plaintiffs' lawsuit and does not need to be decided by this Court."). Because the express terms of the Election Code dictate that such a vote cannot be counted, it is no wonder why Plaintiffs take this position.

But the Court most certainly *should* consider whether or not the provisional ballots will be counted – and Plaintiffs have stipulated they will not be counted – in evaluating the equitable relief the Court is being asked to enter. *See, Carrol v. Ringgold Ed. Assoc.*, 680 A.2d 1137, 1144 (Pa. 1996) ("A court of common pleas sitting in equity [] has an obligation to balance the equities implicated in the ambit of the controversy[.]") (citations omitted); *Borough of Green Tree v. Bd. of Prop. Ass & App. of Allegheny Cty.*, 328 A.2d 819, 826 (Pa. 1974) ("[O]nce equity properly has jurisdiction, it may, in the interests of avoiding multiple actions, dispose of all issues in the suit."); *Williams Twp. Bd. of Supervisors*, 986 A.2d at 921 ("Courts sitting in equity hold broad powers to grant relief that will result in an equitable resolution of a dispute."). The Court, in exercising its equitable powers, should not be complicit in ordering relief that would give a voter the false impression that they can cure a defective mail-in ballot via a provisional ballot when the law – and

the factual stipulation entered by Plaintiffs – clearly provide that the provisional ballot will not be counted. Such relief would be illusory.

As an apparent back-up plan, Plaintiffs cite to an unreported opinion from the Court of Common Pleas of Delaware County and to non-binding Guidance issued by the Secretary of State to support the relief they seek concerning provisional ballots. Plf's Br., 23-24. This "authority" and its lack of support for the proffered position, **particularly in a non-curing county like Washington County**, is already addressed in the WBOE's moving Brief at pages 29-35; however, that discussion merits some repeating here.

The only Pennsylvania legal authority cited by Plaintiffs to support the purported ability to file a provisional ballot to cure a defective mail-in ballot is *Keohane v. Delaware County Board of Election*, No. CV-2023-004458 (Del.Cnty.Ct.Comm.Pl. 2023). *Keohane* is unpersuasive and inapposite. Initially, Judge Whelan believed there is "ambiguity" between 25 P.S. § 3050(a.4)(5) subclauses (i) and (ii)(F), but no such ambiguity exists or can exist. This is because subclause (i) has an **express exception** ("*Except as provided in subclause (ii)*") that makes it inapplicable if subclause (ii) applies – and subclause (ii)(F) clearly applies here because any mail-in ballots that Plaintiffs desire to cure will have been received by the Elections Office before 8 p.m. on Election Day. As an exception to its rule, Section 3050(a.4)(5)(ii)(F) *per se* **cannot** conflict with Section 3050(a.4)(5)(i). Moreover, Judge Whelan concluded that subclause (i) provides a right to cure a mail-in ballot defect by provisional ballot, but that, too, is incorrect, under the plain language of the Election Code – the scope of subclauses 25 P.S. § 3050(a.4)(4)(i) and (5)(i) is much more limited and those subclauses apply only to "an individual who claims to be properly registered and eligible to vote at the election district but whose name does not appear on the district register and whose registration cannot be determined by the inspectors of election or the county election

board." 25 P.S. § 3050(a.4)(4)(i). Thus, Judge Whelan's conclusion was not only incorrect, but irreconcilable with the plain terms of the Election Code. And *Keohane* is at odds with the Commonwealth Court's decision in *In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election,* 2020 WL 6867946, at *4. Here, the opinion of a three-judge panel of the Commonwealth Court should be given greater weight than the opinion of a single Court of Common Pleas judge. Most importantly, Judge Whelan's decision concerned Delaware County, which **permits** curing of defective mail-in ballots. But here the WBOE's present policy **does not permit** curing. A decision allowing the use of a provisional ballot to cure a defective mail-in ballot in a "curing" county has no bearing or weight in a "non-curing" county. *Keohane* is clearly inapposite.

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

Most importantly, history shows why the Secretary's Guidances are not legally binding or enforceable – **they are often wrong**. For example, in 2020, the Secretary issued a Guidance advising that boards of election should count "naked ballots" (mail-in ballots without the required secrecy envelope). *Pa. Dems.,* 238 A.3d at 376 n. 29. Contrary to this Guidance, the Supreme Court in *Pa. Dems* held that "naked ballots" were legally infirm and could not be counted. *Id.* at 374-80. The Secretary's Guidance in that instance was wrong and provided incorrect information

to county boards of election. The current Guidance – given the plain language of 25 P.S. § 3050(a.4)(5) subclauses (i) and (ii)(F) – is equally as wrong, particularly for a county like Washington, whose duly elected officials voted **not** to permit notice and curing.

So, in the end, Plaintiffs ask this Court to enter an order that would be illusory and which would itself mislead Washington County voters. For obvious reasons, the Court should decline to do so.

F. Even If the Court Does Weigh the *Mathews* Factors, Summary Judgment Cannot Be Entered for Plaintiffs

Because Plaintiffs cannot show that the Board interfered with any liberty interest protected by due process, the Court should not even get to the balancing of interests under *Mathews*. *E.g., Marich*, 666 A.2d at 256 (explaining that courts only "employ the methodology" of *Mathews v. Eldridge* after first determining "that a protected liberty of property right was involved").

Additionally, as set forth in detail in the WBOE's own moving Brief, the *Anderson*/*Burdick* framework, not the *Mathews* test, is the appropriate standard to use in evaluating the challenged policy. WBOE Br., 35-39. But even if Plaintiffs could show the deprivation of a protected interest – which they cannot – and even if the Court applies the *Mathews* test – which it should not – a balancing of the *Mathews* factors nonetheless demonstrates that the WBOE's policy and other protections provided to voters are constitutionally sufficient. *See generally, Marich*, at 256, n.7 (listing three *Mathews* factors).

With respect to the first *Mathews* factor (the private interest that will be affected by the official action), Plaintiffs refer broadly to the "fundamental right to vote" (Plf's Br., 22-24), but that is far too broad a categorization given Plaintiffs' actual complaints and the relief they seek. *See supra.,* 16-19. As discussed above, the crux of Plaintiffs' procedural due process claim is that the WBOE interfered with Plaintiffs' ability to get notice that their mail-in ballots were defective

and to cure their deficient ballots by casting a provisional ballot. But Plaintiffs have no "constitutional or statutory" right to such notice and curing. *Pa. Dems.*, 238 A.3d at 374. When properly distilled to what Plaintiffs actually complain about and what relief they seek, the first *Mathews* factor has no weight because Plaintiffs build their case on a purportedly protected interest that the Pennsylvania Supreme Court has held does not exist. *See Richardson*, 978 F.3d at 232 ("It would 'stretch [] the concept too far to suggest that a person is deprived of liberty' when the Court has said that he has no right to the object of his alleged liberty interest.") (quoting *Roth,* 408 U.S. at 572).

Further, as Justice Wecht wrote in his concurring opinion in *Pa. Dems,* "[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." 238 A.3d at 389 (Wecht, J concurring). The Parties agree that instructions satisfying this standard are provided to voters who receive a mail-in ballot in Washington County. *See* Jt.Ex. E.

As to the second *Mathews* factor (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), because there is no right for a voter to receive notice and a chance to cure, there cannot be a risk of an erroneous deprivation of any protected interest, and additional procedural safeguards would be of little to no value. The WBOE's policy adopted for the April 2024 Primary Election is compliant with the Pennsylvania Supreme Court's holding in *Pa. Dems.* and the Election Code. Upon receipt of a mail-in ballot, the WBOE is only required to enter the ballot into the SURE system to show that it has been received. *See* Ostrander Dep., 23-24, 89, 147-49; Marks, Dep., 35, 107-109. This is exactly what the WBOE did. Ostrander Dep., 179-180. As a non-curing county,

the WBOE has no obligation to provide the voter any additional information. *See generally, Pa. Dems.*, 238 A.3d at 372-74. And if a voter is concerned that his or her ballot might be disqualified, the voter can attend the public canvas (or an organization can attend on his or her behalf), challenge any ballot disqualification, and ultimately appeal to this Court under 25 P.S. § 3157.

Finally, as to the third factor (the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail), the Court imposing additional procedures on the WBOE that are contrary to its valid, legislative choices would directly impair the WBOE's interests. Doing so would usurp the WBOE's legislative power and discretion, despite the WBOE's clear legal authority to enact the "notice and cure" policy that it, as a political body comprised of elected officials, sees fit to enact for Washington County.

Certainly, summary judgment for Plaintiffs cannot be granted based on the above analysis.

III. Conclusion

Plaintiffs were not denied the right to vote; rather, they failed to follow Act 77's mail-in voting rules. Once they failed to do so, *Pa. Dems* tells us that they have no right to (i) notice of their error – and lacking a right to notice, the WBOE is not obligated to tell them anything – and (ii) a chance to fix it, including fix it via a provisional ballot. And even if they did vote provisionally, the plain language of the Election Code precludes counting a provisional ballot when a voter's mail-in ballot has already been received by the WBOE. Nothing the WBOE did was wrong, and nothing Plaintiffs seek is legally appropriate. Plaintiffs' claim fails on a multitude of levels, both procedural and substantive.

At bottom, Plaintiffs disagree with the WBOE's adoption of a policy not to provide notice and curing, but lack standing and ripeness, as well as a valid substantive basis to challenge that

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

Finding for Plaintiffs here would require the Court to improperly legislate from the bench – rewriting the legislatively-adopted policy of the WBOE. It also would require the Court to endorse a right to "notice and curing" that is not found in Act 77, nor found anywhere else in the Election Code, nor in any Pennsylvania decisional law. And, in substance, finding for Plaintiffs requires this Court to overrule *Pa. Dems*. because the Court would be mandating "notice and curing" where *Pa. Dems.* held that no "constitutional or statutory" authority to enter such a mandate exists. The Court should decline all of Plaintiffs' invitations to extend this Court's authority beyond its proper limits. Plaintiffs' request for Summary Judgment should be denied and the Court should enter Summary Judgment in the WBOE's favor.

Dated: August 2, 2024

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Washington County Board of Elections

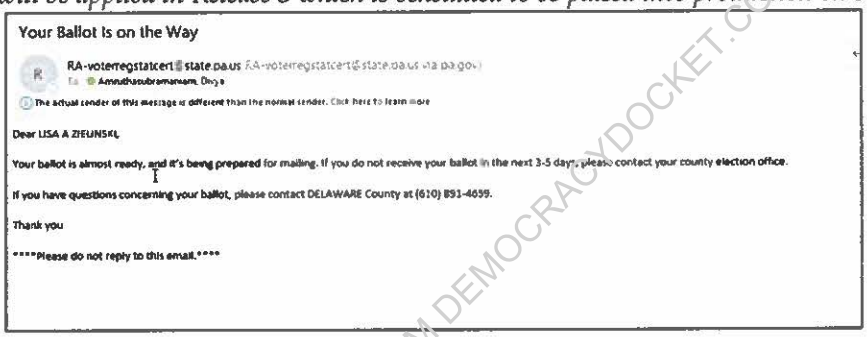
EXHIBIT A

Email Notifications

If a voter provides their email address on their absentee or mail-in ballot application, the voter will receive email notifications when the processes below are completed.

- Application is submitted to SURE VR for processing (existing email)
- Application is processed by the county election office (existing email)
- Ballot Label is printed and confirmed in SURE VR (new email)
- Ballot Label is received at the county election office and is scanned into **Record Mailings** as Record-Ballot Returned (new email)

The below email notification will be sent to the voter when the ballot is confirmed.
Please note: County election officials have asked for the '3-5 day' reference in this email to be modified. This change will be applied in Release 3 which is scheduled to be placed into production on February 28, 2020.


Your Ballot Is on the Way

RA-voterregstatcert@state.pa.us RA-voterregstatcert@state.pa.us via pa.gov
To: Annuthasubramaniam, Divya

The actual sender of this message is different than the normal sender. Click here to learn more.

Dear LISA A ZIELINSKI,

Your ballot is almost ready, and it's being prepared for mailing. If you do not receive your ballot in the next 3-5 days, please contact your county election office.

If you have questions concerning your ballot, please contact DELAWARE County at (610) 891-4659.

Thank you

****Please do not reply to this email.****

The below email notification will be sent to the voter when the ballot is recorded.


Your Ballot Has Been Received

RA-voterregstatcert@state.pa.us RA-voterregstatcert@state.pa.us via pa.gov
To: Annuthasubramaniam, Divya

The actual sender of this message is different than the normal sender. Click here to learn more.

Dear LISA A ZIELINSKI,

Your ballot has been received by DELAWARE County on 12/30/2019.

Your Ballot Status: RECORD - BALLOT RETURNED

If you have questions about your ballot, please contact DELAWARE County at (610) 891-4659.

Thank you

****Please do not reply to this email.****

Response Type	Response to Voter
CANC – EMAIL BALLOT UND BATCH	Your ballot status has been updated to cancelled because your emailed balloting materials have been returned as undeliverable.
CANC – EMAIL BALLOT UNDELIVERABLE	Your ballot status has been updated to cancelled because your emailed balloting materials have been returned as undeliverable.
CANCEL – LABEL CANCELLED	Your ballot status has been updated to cancelled because your original ballot has been misplaced or damaged and it was necessary to create a new ballot, or it was necessary to generate a second ballot for you for other reasons.
CANC – NO ID	Your ballot status has been updated to cancelled because the required ID was not provided.
CANC – NO SIGNATURE	Your ballot status has been updated to cancelled because we could not obtain your required signature.
CANC – REPLACED	Your ballot status has been updated to cancelled because a replacement ballot has been issued.
CANC – RETURNED AFTER DEADLINE	Your ballot status has been updated to cancelled because it was returned after the deadline.
CANC – UNDELIVERABLE	Your ballot status has been updated to cancelled because it was returned as undeliverable by the United States Postal Service (USPS).
CANC – VOTE CANCELLED	Your ballot status has been updated to cancelled because it cannot be counted due to voting at the polling place.
CANC – VOTE CHALLENGED	Your ballot status has been updated to cancelled because of a successful challenge.
RECORD – BALLOT RETURNED	Your ballot status has been updated to reflect your official ballot has been received timely and recorded.

CANC – NO SIGNATURE	Your ballot status has been updated to cancelled because you did not sign the declaration on your ballot envelope.
CANC – REPLACED	Your ballot status has been updated to cancelled because a replacement ballot has been issued.
CANC – RETURNED AFTER DEADLINE	Your ballot status has been updated to cancelled because it was returned after the deadline.
CANC – UNDELIVERABLE	Your ballot status has been updated to cancelled because it was returned as undeliverable by the United States Postal Service (USPS).
CANC – VOTE CANCELLED	Your ballot status has been updated to cancelled because your ballot had a missing or invalid envelope.
CANC – VOTE CHALLENGED	Your ballot status has been updated to cancelled because of a successful challenge.
RECORD – BALLOT RETURNED	Your ballot status has been updated to reflect your official ballot has been received timely and recorded. Please note: You are no longer permitted to vote at your polling place location now that you have returned your ballot timely.

Below is the template of the email generated as part of this change:

Subject Line: Your Ballot Has Been Received

Email Body:

Dear [%@ApplicantName],

Your ballot has been received by [%@CountyName] County on [%@DateRecorded].

Your Ballot Status: [%@ResponseType]

If you have questions about your ballot, please contact [%@CountyName] County at [%@CountyContact].

Thank you

****Please do not reply to this email.****

CERTIFICATION

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

Dated: August 2, 2024

David Berardinelli
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Washington County Board of Elections

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2024, a true and correct copy of the foregoing *Opposition to Plaintiffs' Motion For Summary Judgement* was served by email on the following:

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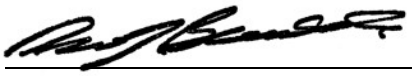
Counsel for Plaintiffs

Dated: August 2, 2024



David Berardinelli

Counsel for Defendant
Washington County Board of Elections