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IN THE SUPREME COURT OF PENNSYLVANIA

108 MM 2024

REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, SECRETARY OF THE COMMONWEALTH, *et al.*,

Respondents.

THE SECRETARY OF THE COMMONWEALTH'S RESPONSE TO THE APPLICATION FOR THE EXERCISE OF KING'S BENCH POWER

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INTRODUCTION

For the second consecutive federal election, the RNC has gone to court at the last minute to demand an immediate order blocking an undefined set of county practices it calls "notice and cure." *See also RNC v. Chapman*, 447 MD 2022, 2022 WL 16754061 (Pa. Cmwlth. Sept. 29, 2022), *aff'd by an equally divided court, RNC v. Chapman*, 284 A.3d 207, 208 (Pa. 2022) (denying request for preliminary injunction). Since that suit was dismissed 18 months ago on jurisdictional grounds, the RNC has done nothing, waiting instead to bring this action at the precise moment counties began sending out mail ballots for the 2024 election. The RNC's egregious lack of diligence—along with its filing a suit when it would lead to maximum disruption of the administration of the upcoming election—are more than sufficient bases to reject this application.

But worse, the application throws together a hodgepodge of allegations that grossly misrepresent the facts, conflate distinct concepts (*i.e.*, provisional voting and addressing mail ballot defects), and, in all events, are wrong on the law. Those parts of the application that do not recycle issues from the RNC's unsuccessful 2022 suit are, instead, either the same issues that this Court just agreed to consider in *Genser v. Butler*

County Board of Elections, or the same issues the Court just declined to consider. *See* Order, *Genser v. Butler Cnty. Bd. of Elections*, 26 & 27 WAP 2024 (Pa. Sept. 20, 2024) (granting allocatur only in part). The scatter-shot application is a plain effort to avoid ordinary judicial process.

There is no excuse for the timing of this action or for the RNC's effort to bypass this Court's ordinary processes. The RNC preposterously claims that the actions it challenges are "recent," App. at 1, but they are not. Counties have employed so-called "notice-and-cure" procedures for at least four years; the provisional ballot guidance it challenges dates back to 2020; and the modifications to the Statewide Uniform Registry of Electors (or "SURE") system the RNC challenges are more than six months old and are the same modifications this Court just refused to consider in the RNC's separate petition for allocatur. *See* Order, *Genser v. Butler Cnty. Bd. of Elections*, 26 & 27 WAP 2024 (granting allocatur only in part); *see also* Pet. for Allowance of Appeal at 6-7, *Genser. v. Butler Cnty. Bd. of Elections*, 240 WAL 2024 (Pa. Sept. 8, 2024) (presenting challenge to SURE modifications for this Court's review).

Even if the application were not such an egregious abuse of this Court's processes, there would be no reason to grant it, because none of the RNC's claims have merit.

First, the application claims the Secretary "imposed curing" via updates to the SURE system issued six months ago. This is false. The SURE system is a voting record database and the new SURE ballot status codes developed by the Secretary (in close consultation with the counties) are entirely optional: *no county is required to use them*. *See* A69. Instead, these new codes provide tools for counties that, for instance, wish to notify voters whose mail ballots contained defects so that a voter might address those defects. More generally, ballot status codes are a recordkeeping tool separate from a county's decision to canvass a ballot. Counties have complete discretion on whether and when to assign a code to a ballot. That some of the codes prompt a template email informing the voter of their right to "cast" or "request" a provisional ballot is an accurate statement of federal law, not a "cure." 52 U.S.C. § 21082.

The RNC's similar complaints about the Secretary's guidance relating to provisional ballots are wholly meritless. The RNC falsely claims

that the Secretary changed the substance of his provisional ballot guidance this year, when, in fact, it has remained consistent since 2020. *See Provisional Voting Guidance* v. 1.1 (Oct. 21, 2020).[1] As with the SURE codes, the Secretary's guidance regarding when voters may cast a provisional law comports with federal law. 52 U.S.C. § 21082.

Second, nothing in the Election Code prohibits counties from allowing voters who make minor errors in their mail ballot materials to correct those errors. The RNC's contrary position misrepresents this Court's holding in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), and the Secretary's position in that case. *Pennsylvania Democratic Party* rejected the claim that counties were ***required*** to employ some form of "notice-and-cure" procedures, but it did not say—nor did the Secretary argue—that they are ***prohibited*** from doing so. County boards have primary responsibility for administering elections in Pennsylvania, and in carrying out that responsibility they are authorized to make certain decisions about how to run elections in their county. The RNC's extreme position stands the Election Code and common sense on their

[1] Available at: https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/archived/PA-DOS_ProvisionalBallots_guidance_1.0.pdf.

heads; it claims, for instance, that a county clerk who is handed a ballot by a voter missing a declaration signature *is precluded from pointing out the error to be remedied on the spot*. *See* Hrg. Tr. at 127-29, *RNC v. Chapman*, 447 MD 2022 (Pa. Cmwlth. Sept. 22, 2022), Supp. App. 7-9.[2]

* * *

Ultimately, the RNC implores the Court to view the status quo—not its own demand for an immediate shutdown of an undefined set of county practices—as "threaten[ing] to unleash disuniformity, uncertainty, chaos, and an erosion of public confidence in the imminent 2024 general election." App. at 1. But the RNC levels these threats without any principled basis. Just yesterday, the RNC argued that granting relief (of a more minor nature than that demanded here) in a case that was filed almost six months before Election Day would "threaten[] to unleash

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[2] "THE COURT: Okay. What about -- what about if somebody hands their their ballot in face-to-face? … What if someone just said, Oh, you better put your signature there? Would you say that's a -- an improper cure procedure?"

"[RNC Counsel]: Well, it's improper…. [T]he mailbox isn't going to say to you, Whoa, excuse me; you didn't sign it…. So why does the person who gets -- who hands it to the clerk get that benefit?"

voter confusion, chaos, and an erosion of the public confidence in the integrity of our electoral processes that is essential to the functioning of participatory democracy." Opp. to Am. Pet. for Rev. at 13, *BPEP v. Schmidt*, 283 MD 2024 (Pa. Cmwlth. Ct. Sept. 19, 2024) (cleaned up), Supp. App 24. In the same filing, the RNC argued:

> There simply is not enough time to accord [65 county boards of elections] a full and fair opportunity to litigate this case…. *Indeed, the county boards are currently occupied with the vital and consuming task of administering the 2024 general election over the next many weeks—and requiring them to litigate this case on an expedited basis in the middle of election season would force them to divert limited resources from that task.* It would be both unfair and unworkable to the county boards—as well as to the public and the Commonwealth's voters—to force the county boards to proceed on Petitioners' preferred schedule, particularly when Petitioners should have joined all of the boards more than three months ago.

Id. at 12, Supp. App. 23 (emphasis added).

It cannot be the case that last-minute changes to election procedures are acceptable only when they disenfranchise voters. This Court should not indulge this effort to abuse this Court's jurisdictional powers. The RNC's application should be swiftly denied.

STATEMENT OF THE CASE

The RNC's application implicates—but intentionally muddles—two distinct concepts that have been, and are being, litigated elsewhere: (1) provisional voting under state and federal law, and (2) decisions by county boards of elections to allow voters to address errors the voter may have made that will likely result in their mail ballot being rejected.

I. Provisional Voting in Pennsylvania

The Pennsylvania Election Code provides several ways for Pennsylvania voters to cast a ballot. Any person eligible to vote in Pennsylvania can do so in person at their polling place. 25 P.S. § 3045. Alternatively, voters can cast a ballot by mail. 25 P.S. §§ 3146.1-3146.9 (absentee voting); 25 P.S. §§ 3150.11-3150.17 (no-excuse mail voting). In addition, any individual who believes they are properly registered and eligible, but whose eligibility is in doubt, can cast a provisional ballot in person on Election Day. 25 P.S. § 3050(a.4)(1).

Provisional ballots are a creation of the federal Help America Vote Act ("HAVA"), which Congress passed in response to the problem of eligible voters arriving at a polling place but not being able to submit a ballot because there were questions about their eligibility. *See* 52 U.S.C. § 21082; *see also* H.R. Rep. 107-329 at 38 (2001). HAVA created "a system

for provisional balloting, that is, a system under which a ballot would be submitted on election day but counted if and only if the person was later determined to have been entitled to vote." *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004).

Under HAVA, an individual who signs a written affirmation that they are a registered voter in the jurisdiction and eligible to vote "shall be permitted to cast a provisional ballot." 52 U.S.C. § 21082(a). If it is later determined "that the individual is eligible under State law to vote," their provisional ballot "shall be counted as a vote in that election in accordance with State law." *Id.* § 21082(a)(4).

Two months after HAVA became law, Pennsylvania's General Assembly amended the Election Code to incorporate HAVA's provisional ballot protections for all Pennsylvania voters. Act of Dec. 9, 2002, P.L. 1246, No. 150 (codified in relevant part at 25 P.S. § 3050, as amended). The Election Code reiterates that "[w]hen an elector arrives at the polling place, if there is any doubt about his eligibility to vote, he may cast a provisional ballot." *In re Canvass of Provisional Ballots in 2024 Primary Election*, No. 55 MAP 2024, 2024 WL 4181584, at *3 (Pa. Sept. 13, 2024); *see* 25 P.S. § 3050(a.2), (a.4)(1).

To vote provisionally on Election Day, a voter must sign an affidavit (also signed by two election officials) affirming that they are registered and eligible to vote in the election; fill out and place the ballot in a secrecy envelope; and place the secrecy envelope in a larger envelope that the voter must sign. 25 P.S. § 3050(a.4)(2)-(3); *see also* 52 U.S.C. § 21082(a)(2). Within seven days of Election Day, the relevant county board of elections must determine if the voter "was entitled to vote at the election district in the election." *Id.* § 3050(a.4)(4). There are opportunities to challenge the board's determination, and procedures to adjudicate such a challenge. *Id.* § 3050(a.4)(4)(i)-(vii).

In recent years, Pennsylvania courts have considered with varying levels of thoroughness whether the Election Code prohibits counting a voter's provisional ballot if their fatally flawed mail ballot was timely received by Election Day. *See, e.g.*, *Genser*, 1074 CD 2024, 2024 WL 4051375 (petition for allowance of appeal granted, Nos. 26 & 27 WAP 2024); *In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 (Pa. Cmwlth. 2020) (unreported); *Keohane v. Del. Cnty. Bd. of Election*, 2023-004458 (Del. Cnty. C.C.P. Sept. 21, 2023), A137-141.

As the most recent (and only comprehensive) opinion on this topic explained, "a question about provisional voting and counting provisional ballots" is "distinct from the question whether an elector can cure a defect in a mail-in ballot." *Genser*, 1074 CD 2024, 2024 WL 4051375, at *1. This Court will consider issues regarding when to count provisional ballots in *Genser*. Order, *Genser v. Butler Cnty. Bd. of Elections,* 26 & 27 WAP 2026 (Pa. Sept. 20, 2024).

II. "Notice and Cure"

Separate from the federal law requirements for provisional voting, some counties have developed enfranchising procedures to communicate with a voter who made an obvious error that will cause their mail ballot to be rejected during canvassing and to provide that voter with an opportunity to address the error.

These procedures are not a recent development. Rather, even before Pennsylvania permitted no excuse mail-in voting, counties provided voters with notice of deficient ballot submissions and allowed them to remedy those deficiencies. For example, for "years prior" to the 2020 general election, Montgomery County allowed voters to fix errors that would cause their ballot to be rejected during canvassing. Hrg. Tr. at 56:20-24,

Barnette v. Lawrence, 20-5477 (E.D. Pa. Nov. 4, 2020), Supp. App. 31; *see also Republicans Seek to Sideline Pa. Mail Ballots that Voters Were Allowed to Fix*, Spotlight PA (Nov. 3, 2020), (describing York, Erie and Luzerne County boards of elections' notice-and-cure procedures in 2020).[3]

The RNC has been aware since at least 2020 that some counties instruct voters on how they may fix a defect that is likely to disqualify their ballot. *See* RNC Chair McDaniel and White House Press Secretary McEnany News Conference at 5:00, C-SPAN (Nov. 9, 2020)[4]; *see also* Pet. for Review ¶¶ 65-70, *RNC v. Chapman*, 447 MD 2022 (Pa. Cmwlth. Sept. 1, 2022), Supp. App. 57-58 (alleging that Bucks, Montgomery, and Philadelphia counties have utilized various notice-and-cure procedures since at least 2020).

[3] Available at: https://www.spotlightpa.org/news/2020/11/pennsylvania-mail-ballots-republican-legal-challenge-naked-ballots-fixed-cured/.

[4] Available at: https://www.c-span.org/video/?477968-1/rnc-chair-mcdaniel-white-house-press-secretary-mcenany-news-conference.

Although the goal of these procedures is the same—to prevent an initially deficient ballot submission from resulting in disenfranchisement, and to provide voters an opportunity to cast a timely, fully compliant ballot—the procedures themselves can vary. App. at 10-11.

Issues around so-called "notice-and-cure" practices also have been the subject of repeated litigation in recent years. In 2020, this Court held that counties were not ***required*** to provide voters the opportunity fix defects that will result in a mail ballot being rejected. *Pa. Democratic Party*, 238 A.3d at 373-74.

Then, right before the 2022 general election, the RNC sought a preliminary injunction in Commonwealth Court to enjoin any county from engaging in "notice-and-cure" procedures. Commonwealth Court denied that request for injunctive relief in an order that this Court affirmed. *RNC v. Chapman*, 447 MD 2022, 2022 WL 16754061 (Pa. Cmwlth. Sept. 29, 2022), *aff'd by RNC v. Chapman*, 284 A.3d 207, 208 (Pa. 2022). Several months later—in March 2023—Commonwealth Court dismissed the RNC's petition for review because that court lacked original jurisdiction over a complaint concerning counties' discretionary practices. Memorandum Opinion, *RNC v. Chapman*, 447 MD 2022 (Pa. Cmwlth. Mar. 23,

2023), A156-188. Since that action was dismissed 18 months ago, the RNC has not filed any challenge in any court of common pleas to any county's "notice-and-cure" policy.

Separately, federal courts have rejected arguments that differences in counties' practices for communicating with voters about what is needed to properly return a mail ballot and for allowing voters to fix disqualifying defects violate constitutional guarantees of equal protection. *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 922-23 (M.D. Pa. 2020), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377 (3d Cir. 2020).

III. Mail Ballot Status Codes in the SURE System

The SURE system is the statewide database of voter registration, voting records, and mail ballot processing administered by the Secretary. 25 Pa.C.S. § 1222; Marks Dep. Tr. at 24:3-16, *Center for Coalfield Justice v. Washington Cnty. Bd. of Elections*, 2024-3953 (Wash. Cnty. C.C.P. July 23, 2024), Supp. App. 110. Every mail-ballot package has a unique barcode associated with a single voter. The barcode is linked to a unique entry in the SURE system with the ballot's status. The term "SURE

codes" refers to the mechanism by which county boards of elections assign a status to each mail ballot in SURE.

When a mail-ballot package is returned by the voter to the county board of elections, the county scans the unique barcode into SURE. Counties can then select a code to update the status of that ballot, consistent with their procedures. Assigning certain codes to a mail ballot sends an automatically generated email to the voter, if the voter's email was provided with the application for that ballot. The email is based on a template and varies slightly depending on the code that has been assigned.

To facilitate the effective administration of elections, the Secretary worked closely with the county boards of elections to develop SURE codes that reflect the various reasons why a county board would not count a mail ballot, and to draft the associated email templates received by voters. *See* A96-98; Marks Dep. Tr. at 34:12-35:2, 36:21-37:2, Supp. App. 113.[5]

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[5] The Department first offered the "PEND" codes ahead of the 2024 Primary Election as an option for counties that "offer[] ballot curing." A69; *see id.* A68-A85 (release notes for deployment of changes made to the SURE system in March 2024); Marks Dep. Tr. at 31:6-32:15, 34:9-35:2, Supp. App. 112-113. In response to feedback from the county boards, the Department revised the release notes in August 2024. A86-A101; Marks Dep. Tr. at 75:13-78:10, Supp. App. 123-124.

There are three general categories of SURE codes for returned mail-ballot packages. The first (for which there is only one code) is "RECORD," which designates that a voter's mail-ballot package has been returned in some form and generates an email informing the voter of the same. A77, A99; Marks Dep. Tr. at 94:3-9, Supp. App. 128. The second is "PEND," which is one option for counties that choose to notify voters of obvious but fatal errors and offer those voters an opportunity to address the error (i.e., "notice and cure"). A69, A96-97 (listing PEND codes). PEND codes are completely optional. A69. The third is "CANC," to be applied if the ballot will not be counted due to an error. A97-A98 (listing CANC codes).

The Secretary encourages counties to accurately update a mail ballot's final status in SURE. But counties have complete discretion on *whether and when* to select a PEND or a CANC codes, including after Election Day. Marks Dep. Tr. at 39:4-9, 69:1-4, 83:23-84:1, 88:18-89:15, 96:2-12, Supp. App. 114, 122, 125-128.

SUMMARY OF ARGUMENT

The RNC's request for this Court to exercise immediate jurisdiction over this matter, if granted, would be an improper use of this Court's powers.

1. The RNC could have filed this action months or even years ago. Indeed, it did file a virtually identical action in 2022 challenging counties' "notice-and-cure" practices. That action was dismissed in March of last year. Instead of appealing that dismissal or taking any other action, the RNC waited—for eighteen months—until the precise moment counties began to send out mail ballots for the 2024 general election. Even more outrageously, the RNC demands immediate relief in the form of an order blocking counties from employing the practices they have used for years. The interim relief the RNC seeks would be tantamount to a total victory.

2. To justify its timing, the RNC claims it is challenging modifications that the Secretary made to the SURE system, which the RNC insists have "imposed cure." This is the same challenge that this Court just refused to hear in *Genser*. In any event, the Secretary has not required any county to implement so-called curing procedures, and the RNC's claims to the contrary are false. Individual counties, consistent with their procedures and duties under the Election Code, may select *whether and when* to apply a PEND code or a CANC code (including after

Election Day). And ultimately, these codes are recordkeeping tools entirely separate from a county board's determination of whether to canvass a mail ballot. Nor does the automatic email associated with some of these codes "impose curing"; rather, if the county chooses to select that code, the email simply informs voters of their right to submit a provisional ballot at a polling place, which is mandated by federal law.

3. Nothing in the Election Code prohibits counties from instructing voters how to fix errors that will prevent their mail ballot from being counted. *Pennsylvania Democratic Party* rejected the argument that counties were required to permit notice and cure, but it did not hold that they are precluded from taking any steps to allow voters to fix errors on their ballots, which is fully consistent with the Election Code.

ARGUMENT

I. The Application Seeks to Abuse Judicial Process

This Court possesses a tremendous power to exercise immediate jurisdiction over issues of public importance when doing so is necessary "to avoid the deleterious effects arising from delays incident to the ordinary process of law." *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015). While that power is a critical guardrail for a sound judicial system, it must be "exercised with extreme caution" so that the power is not

abused. *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014). When evaluating whether circumstances truly necessitate this Court's exercise of immediate jurisdiction, the Court must be attentive to protecting "the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system." *Williams*, 129 A.3d at 1206.

Here, the request for this Court to exercise immediate jurisdiction represents a gross abuse of judicial process. This action could have been filed months—if not years—ago. The purported need to bypass the ordinary process of law is entirely of the RNC's design. Exercising jurisdiction and granting any of the RNC's requested relief would severely harm the public and administration of the upcoming election. For these reasons, the RNC's application should be met with a swift and clear rebuke from this Court.

Counties have allowed voters to correct certain disqualifying errors on their mail ballots since November 2020 and, in some cases, before then. The RNC has been aware of this fact, as it filed suit in Commonwealth Court on the eve of the 2022 general election to challenge that practice. Pet. for Review, *RNC v. Chapman*, 447 MD 2022 (Pa. Cmwlth. Sept. 1, 2022), Supp. App. 34-90.

That prior suit was ultimately dismissed in March 2023 on jurisdictional grounds. Memorandum Opinion, *RNC v. Chapman*, 447 MD 2022 (Pa. Cmwlth. Mar. 23, 2023), A156-188. The RNC elected not to appeal that dismissal to this Court. And it did not subsequently challenge any county's specific procedures in common pleas court.

Instead, the RNC waited until eighteen months after their prior action was dismissed to file this action. It chose to file at the *precise moment* that mail ballots are being sent to voters across the Commonwealth. And, lest there be any doubt about its goal, the RNC has asked for an *immediate* order suspending any county actions that might help voters correct errors in their ballots. Such an order would be tantamount to complete relief: even if this Court were to ultimately rule that counties' practices are permissible, they would have little time remaining to notify voters of ballot errors and to allow voters to fix those errors.[6]

The RNC's challenge to the optional SURE codes and associated template emails is equally tardy. The RNC had knowledge of the SURE

[6] The RNC tried the same strategy in 2022, filing its lawsuit on the eve of the election to prevent counties from engaging in so-called "notice and cure." At that time, it attempted to excuse its failure by falsely asserting that it had only recently become aware of the practice. Here, the RNC offers no excuse whatsoever for its total lack of diligence.

modifications by May 7, 2024, as it argued in briefing on that day that the language of the email templates was "improper in multiple respects." Br. in Supp of Mot. to Dismiss at 2 n.2, *Genser v. Butler Cnty Bd. of Elections*, 24-40116 (Butler Cnty. C.C.P. May 7, 2024), Supp. App. 93. Indeed, this Court today rejected the RNC's request that it take up a challenge to the Department's modifications to the SURE codes. Order, *Genser v. Butler Cnty. Bd. of Eletions*, 26 & 27 WAP 2024 (granting allocatur only in part); *see also* Pet. for Allowance of Appeal at 5-6, *Genser. v. Butler Cnty. Bd. of Elections*, 240 WAL 2024 (Pa. Sept. 8, 2024) (presenting challenge to SURE modifications for this Court's review).[7]

The Department and counties have been preparing for this year's presidential election for months. Mail ballots are on the verge of being sent out across the Commonwealth. Counties that allow voters to correct errors on their return envelopes have plans in place to facilitate such efforts and have already devoted resources to ensuring that they are ready to respond as soon as ballots are returned by voters. The RNC's demanded "interim" relief would completely upend those plans and leave

[7] This Court did grant allocator on questions regarding when provisional ballots may be counted. There is no reason to exercise jurisdiction over this application to consider the same questions.

these counties scrambling. And even if the RNC were to ultimately lose on its claims, the damage will have been done: if counties are prohibited, for any length of time, from contacting voters to allow them to fix ballot errors, then fewer voters will have the chance to do so—and more citizens of Pennsylvania will not have their votes counted.

II. The Secretary Has Not "Imposed Curing"

The RNC attempts to justify its delay by alleging that the Secretary has recently imposed on county boards of elections "an obligation to offer curing" through certain SURE codes and the associated automatic emails sent to voters. App. at 24-25. This is false, for multiple reasons: SURE codes are an *optional recordkeeping mechanism* and informing voters of their longstanding state and federal right to fill out a provisional ballot is not a "cure."

In fact, earlier today, the Court declined the RNC's request to take up challenges to these same SURE codes. *See* Order, *Genser v. Butler Cnty. Bd. of Elections*, 26 & 27 WAP 2024 (Pa. Sept. 20, 2024) (declining to grant question 3, which challenged aspects of the SURE system, the Secretary's Guidance, and the ability of voters to submit a provisional

ballot); Pet. for Allowance of Appeal at 6-7, *Genser v. Butler Cnty. Bd. of Elections*, 240 WAL 2024 (Pa. Sept. 8, 2024). It should do so again here.

A. SURE Codes Are an Optional Recordkeeping Mechanism

The RNC's discussion of the SURE system throughout the Application intentionally conflates two processes: a county board's discretion about what status to assign a mail ballot in the SURE system for recordkeeping purposes, and a county board's determination about whether to canvass a mail ballot for vote counting purposes. *Contra, e.g.,* App. at 24. These are legally and procedurally distinct. The Secretary's efforts to refine the ballot status *options* in the SURE system (in close consultation with the counties) does not "impose cure" because it does not force counties to pre-canvass ballots before 7 a.m. on Election Day.

When a mail-ballot package is returned to a county board and scanned into SURE, it receives a "RECORD" code, which designates the mail-ballot package as returned and generates an email informing the voter of the same. A77, A99; Marks Dep. Tr. at 94:3-9, Supp. App. 128. Counties then determine what mail ballot status code to apply and when. If the county chooses to notify voters of obvious but fatal errors and offer those voters an opportunity to address the error (i.e., "notice and cure"),

then it may select a PEND code and the voter will receive the associated email. A69, A96-97 (listing PEND codes). The county may also select a CANC code for a ballot will not be counted due to an error, and the voter will receive the associated email. A97-A98 (listing CANC codes).

The RNC acknowledges, as it must, App. at 14, that PEND codes are *entirely optional*—no county is required to use them. A69. Additionally, although the Secretary encourages all counties to accurately update a mail ballot's final status in SURE for recordkeeping purposes, some counties wait until after Election Day to use any SURE code. County boards of elections have discretion on *whether and when* to apply a PEND code or a CANC codes. Marks Dep. Tr. at 39:4-9, 69:1-4, 83:23-84:1, 88:18-89:15, 96:2-12, Supp. App. 114, 122, 125-128.

And while SURE codes should ultimately *reflect* the final decision by the county board to not count a ballot, that determination is entirely separate and apart from the ballot status assigned in SURE for recordkeeping purposes. Marks Dep. Tr. at 61:21-62:17, 124:8-18, Supp. App. 120, 135. Counties make decisions about what mail ballots to count during the pre-canvass, canvass, and computation of votes. 25 P.S. §§ 3146.8(g), 3154(f). For that reason, using of any one code is not final;

the county board can change the status of the mail ballot and the associated code at any time. *See* A70-A72; Marks Dep. Tr. at 61:21-62:17, Supp. App. 120. The email templates sent to voters reflect this reality—for all errors related to signatures, dates, and secretary envelopes, the voter is merely told that their "ballot *may* not be counted." A96-A98. The final determination of whether to count a mail ballot is made by the county after 7 a.m. on Election Day, consistent with the Election Code.

B. Provisional Voting is Not "Curing"

Next, the RNC insists that the emails associated with use of a SURE code impose mandatory curing because they reference the option for a voter to cast a provisional ballot if their mail ballot is likely to be rejected. But voting by provisional ballot is not a "cure." Every voter in Pennsylvania is entitled to fill out a provisional ballot on Election Day if they believe they are registered and eligible to vote but their eligibility to vote at their polling place is in doubt. Informing voters that they can go to their polling place and *fill out* a provisional ballot, consistent with state and federal law, does not "impose curing." *Contra* App. at 24-25, 44-48, 50-51.

Indeed, when this Court previously addressed the argument that the Election Code requires counties to implement "notice and cure" procedures, it did not mention provisional voting at all. *See Pa. Democratic Party*, 238 A.3d at 372-74. Rather, it referred to "notice and cure" in specific terms as "notify[ing] the elector using the most expeditious means possible and provid[ing] the elector a chance to cure the facial defect" in the elector's ballot. *Id.* at 372. A mail voter does not need to live in a county that has chosen to offer "notice and cure" to exercise the right to cast a provisional ballot at the voter's polling place.

Instead, HAVA permits any voter to fill out and submit a provisional ballot at their polling place if they believe they are registered and eligible to vote but "the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote." 52 U.S.C. § 21082(a); *accord Sandusky Cnty. Democratic Party*, 387 F.3d at 569-70. Consistent with federal law, the Election Code permits any voter to "cast a provisional ballot" "if there is any doubt about his eligibility to vote." *In re Canvass of Provisional Ballots*, No. 55 MAP 2024, 2024 WL 4181584, at

*3; *see also* 25 P.S. § 3050(a.2), (a.4); *Genser v Butler Cnty. Bd. of Elections*, 1074 CD 2024, 2024 WL 4051375, at *16 (Pa. Cmwlth. Sept. 5, 2024).

The RNC claims that the Election Code limits the use of provisional ballots to only a certain "class" of voters, App. 44-45, 50, but state rules for who can fill out a provisional ballot cannot be narrower than what federal law mandates, *see Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 490 (Pa. 2006) (holding that under Pennsylvania's "unitary system of voting," there are "no provisions in our Election Code for separating the elections for federal offices from the elections for state and local offices"). And federal law permits anyone to cast a provisional ballot if their name does not "appear on the official list of eligible voters for the polling place" or if "an election official asserts that the individual is not eligible to vote" at the polling place. 52 U.S.C. § 21082(a); *accord Sandusky Cnty. Democratic Party*, 387 F.3d at 570.

Consistent with state and federal law, the Secretary's longstanding guidance accurately states that provisional ballots "permit the voter to submit a ballot, although the ballot is initially segregated from the regular ballots returned by voters whose eligibility was confirmed at the polls

on Election Day" until the county board can determine "that the voter is eligible and did not already vote in that election." Pa. Dep't of State, *Pennsylvania Provisional Voting Guidance* (Mar. 11, 2024), A103; *see also supra* 4 (noting this guidance dates to 2020). Voters "are entitled to a provisional ballot when their eligibility to vote is uncertain." A103. The Secretary's longstanding position has been that this includes a voter who believes their mail ballot may not be counted and wants to vote at their polling place. *Id.*

Similarly, if a county board of elections selects a PEND or CANC code, the associated automated email will inform the voter that they can go to their polling place on Election Day and "cast" or "request" a provisional ballot. A96-A98. By design, the message does not state that the provisional ballot will be counted. Informing voters of this longstanding federal and state right does not "impose curing" and does not justify the Court exercising its King's Bench authority.

III. The Application's Challenge to Counties' "Notice and Cure" Policies is Meritless

A. The Application Does Not Present Necessary Facts

The RNC requests that this Court enjoin "notice and cure." App. at 57. But "notice and cure" is not a singular concept or a term with any

common understanding. The Secretary is aware that some counties have developed instructions for how and when voters may fix errors that may result in a mail ballot being set aside during canvassing, but he is also aware (as is the RNC, *see* App. at 10-11) that those policies have distinctions. And in its hurry to get to this Court, the RNC has omitted critical details about how counties in fact permit errors to be remedied or the practices it intends to challenge.

Indeed, the possibilities for what "notice and cure" could mean are extensive. As just some examples:

- It could mean an election office immediately alerting a voter who is returning their ballot in person of a potentially disqualifying error and allowing the voter to correct the issue.[8]
- It could mean that a voter who realizes they made a potentially disqualifying error when attempting to return their ballot may contact their election board to have their initial ballot cancelled and a replacement ballot issued—either before or after the voter tried to return the ballot.

[8] In its prior effort to have an undefined set of practices enjoined in the eve of an election, the RNC argued that even this should be treated as an impermissible form of "notice and cure." Hrg. Tr. at 128, *RNC v. Chapman*, 447 MD 2022 (Pa. Cmwlth. Sept. 22, 2022), Supp. App. 8. Under the RNC's apparent view, a voter could not ask for the ballot back if she independently realized her oversight, even if she is standing directly across the counter from a county employee.

- It could mean that if an outgoing mail ballot is returned to the election board as undeliverable, the county will issue a replacement.
- It could mean that someone who spilled something on their ballot asks their county to cancel the initial ballot and issue a replacement.
- It could mean that a voter—either of her own accord or after being contacted by their county board—may remedy a potentially disqualifying error made on their initial ballot.

Despite these possibilities, the RNC has failed to present any facts about existing practices—facts that are essential to this Court's review. Without those facts, there is nothing for this Court to evaluate or to enjoin. Nor, to the extent this Court might have concerns with one county's practices, could the Court determine if distinctions between one county's practices and another county's practices were legally relevant. And because there are no facts against which to apply the RNC's various legal assertions for why whatever it means by "notice and cure" is unlawful, exercising jurisdiction over the application would be uniquely inappropriate and granting any relief would be impossible.

B. Nothing Categorially Prohibits Counties From Instructing Voters How to Remedy Disqualifying Errors

If this Court nevertheless concludes it can evaluate the legality of county practices without any details about what those practices are, it

should conclude that nothing in the Election Code categorically prohibits counties from taking actions to inform voters about how to address an error that will likely result in their mail ballot being rejected.

1. Counties Have Power to Instruct Voters How to Remedy Disqualifying Errors

The Election Code endows county boards of elections with fairly "extensive powers." *Nutter v. Dougherty*, 921 A.2d 44, 60 (Pa. Cmwlth 2007), *aff'd*, 938 A.2d 401 (Pa. 2007). Boards may "make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." 25 P.S. § 2642(f). This authority allows boards to manage election administration elections where the General Assembly has left gaps to fill. *In re Canvassing Observation*, 241 A.3d 339, 346-51 (Pa. 2020).

Rules for instructing voters how to complete a mail ballot or how to correct an initially defective submission constitute "guidance of … elections officers and electors" well within boards of elections' authority. Such rules are no different from the rules counties develop for where voters may return mail ballots—such as, for example, when counties decide

where to place drop boxes for returning a mail ballot. Indeed, as Commonwealth Court previously concluded in an order that this Court affirmed, "County Boards enjoy broad authority under Section 302(f) of the Election Code, 25 P.S. § 2642(f), to implement such procedures at their discretion to ensure that the electoral franchise is protected." *RNC*, 2022 WL 16754061, at *4 (denying RNC's request for a preliminary injunction in advance of the 2022 general election).

This Court's decision in *In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020), confirms that denying the RNC's earlier request for a preliminary injunction was the right result. *In re Canvassing Observation* involved a challenge to the Philadelphia Board of Elections' rules, issued under 25 P.S. § 2642(f), that had required observers to remain "approximately 15-18" "from the first row of … desks" at which canvassing activities were conducted. 241 A.3d at 342. The pertinent section of the Election Code did not address specific distance limitations; it stated only that candidate representatives "shall be permitted to remain in the room" in which the canvassing activities take place. *Id.* at 344 (quoting 25 P.S. § 3146.8 (g)(1.1)).

This Court, after disavowing a Commonwealth Court order that imposed its own distance requirement on observers, "deem[ed] the absence of proximity parameters to reflect the legislature's deliberate choice to leave such matters to the informed discretion of county boards of elections, who are empowered by Section 2642(f) of the Election Code 'to make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of ... elections officers.'" *Id.* at 350 (quoting 25 P.S. § 2642(f) (emphasis added)). Because the Philadelphia Board had "promulgated regulations governing the locations in which authorized representatives were permitted to stand and move about while observing the pre-canvassing and canvassing process," the Supreme Court could "discern no basis for the Commonwealth Court to have invalidated these rules and impose[d] arbitrary distance requirements." *Id.*

The same analysis and conclusion applies with equal force in this case and the RNC has no meaningful response.

The RNC is wrong to suggest (App. at 27) that *unenacted*, *vetoed* legislation that would have statutorily mandated a limited form of notice to voters of disqualifying errors, *see* HB 1300, Session of 2021, § 20, offers

any insight into the correct construction of the Election Code as it is.[9] Simply put, "there is no rule of statutory interpretation which justifies drawing a binding inference from the failure to enact proposed legislation." *Hovatter v. CSX Transportation, Inc.*, 193 A.3d 420, 426 (Pa. Super. 2018). "It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *accord Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 670 (2020) (explaining that failed legislation "offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier [legislature] did adopt."). This Court should reject the RNC's invitation to make such a misstep here.

Likewise, nothing about this Court's decision that the Election Code does not ***require*** county boards to notify voters of disqualifying errors, *Pa. Democratic Party*, 238 A.3d at 374, speaks to—let alone prohibits—counties from adopting practices for doing so under their statutorily conferred authority, *contra* App. at 27-28.

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[9] Indeed, the same 2021 bill would have added a requirement to the Election Code that mail ballots be rejected on the basis that the return-envelope declaration is undated. HB 1300, Session of 2021, § 20.

Nor do counties' practices have any effect on what a voter must do for their ballot to count. *Contra* App. at 28. Counties' practices exist only because certain rules must be followed for a ballot to count. When counties canvass mail ballots, a ballot without a secrecy envelope or with a declaration that is missing a signature or a correct date will not be counted under this Court's precedent. If compliance with rules requiring a voter to use a secrecy envelope or write a date were not required as a condition of canvassing a mail ballot, no county would have any need to instruct voters how to fix those issues.

2. The RNC Does Not Identify Any County Practice that is Inconsistent with the Election Code

Nothing about counties providing voters with instructions for how to remedy a disqualifying error, or to obtain a replacement ballot, is "inconsistent with law." *Contra* App. at 33 (quoting 25 P.S. § 2642(f)).

Section 2642(f) was enacted as part of the original Election Code of 1937. *See* Act of June 3, 1937, P.L. 1333, No. 320, § 302(f). The plain meaning of "inconsistent," as used by the General Assembly in 1937, is "[m]utually repugnant or contradictory; contrary, the one to the other, so that both cannot stand." *Inconsistent*, Black's Law Dictionary (3d ed. 1933); *accord Inconsistent*, Webster's New International Dictionary of the

English Language (2d ed. 1930) ("in respect to logical relations, contradictory or inconsequent"). Thus, a rule is "not inconsistent with" law if it is not "contradictory" to a statute. The United States Supreme Court has applied a similar meaning to the entire phrase "not inconsistent with." *See Comm'r v. Standard Life & Acc. Ins. Co.*, 433 U.S. 148, 159 (1977) (because legislative history dictated National Association of Insurance Commissioners ("NAIC") rules apply "if they are 'not inconsistent' with accrual accounting rules," NAIC rules apply "except when the rules of accrual accounting indicate a contrary result"). In other words, as dictated by the plain meaning of the phrase "not inconsistent with law," unless a Pennsylvania statute categorically *prohibits* addressing errors—such that implementing those procedures would *contradict* or be *repugnant* to the Election Code—counties have discretionary authority to implement "notice-and-cure" rules that guide election officers and voters.

The RNC's various arguments for why anything that might be deemed a "notice-and-cure" procedure is categorically "inconsistent with law" all rely on mistakes about the operation of Pennsylvania law.

First, the RNC is incorrect to assert that "notice-and-cure" procedures necessarily violate 25 P.S. § 3146.8(a), which directs county boards

to store mail ballot envelopes in "sealed or locked containers" until canvassing on Election Day. App. at 33-34. Before ballots are stored, counties boards ***must*** review and process those ballots—including logging them in the SURE system—to prepare the district registers (i.e., the poll books) by Election Day and identify those voters "who have received and voted mail-in ballots." 25 P.S. § 3150.16(b)(1); *accord* 25 P.S. § 3146.6(b)(1) (same requirement for absentee ballots). The only way that the district register at each polling place can identify the voters who have "received and voted" mail ballots is for the county boards to review and sort every submission they receive *before* Election Day.

Nothing in the Election Code mandates that election officials, during this initial processing of mail ballot submissions, must blind themselves if they notice that the ballot-return package has some evident defect that, if left unresolved, would prevent the ballot from being canvassed when that process begins. The decision of some counties to provide voters with notice of and an opportunity to address deficiencies is an unsurprising outgrowth of the county boards' statutory duties to review mail ballots and prepare a district register, and is fully consistent

with the Election Code's storage requirement for non-deficient ballot submissions.

Second, the RNC wrongly argues that an election official's noticing a defect when processing ballots (or assigning a ballot one of the PEND or CANC codes) constitutes "pre-canvassing" or "canvassing" procedures, which cannot start before Election Day. App. at 33-34. This argument, however, ignores the meaning of these statutorily defined terms.

As used in Election Code, pre-canvass means:

> [T]the [1] inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, [2] the removal of such ballots from the envelopes **and** [3] the counting, computing **and** tallying of the votes reflected on the ballots.

25 P.S. § 2602(q.1) (emphasis added). Pre-canvassing, which begins on Election Day, is thus a process comprising inspection *and* opening *and* removal *and* counting *and* computing *and* tallying of ballots. 25 P.S. § 2602(q.1); *see Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 507 A.2d 1, 8 (Pa. 1986) ("Grammatically, this construction is indicated by the dual presence of the conjunctive 'and' in the list."); *see also Bloomsburg Town Ctr., LLC v. Town of Bloomsburg*, 241 A.3d 687 (Pa. Cmwlth. 2020) (The use of "and" in a provision connotes

"a conjunctive rather than a disjunctive list of requirements."). Indeed, pre-canvassing is functionally identical to the "canvassing" that takes place after the polls close, except that votes tabulated during the pre-canvassing cannot be reported before the close of the polls. *Compare* 25 P.S. § 2602(a.1) (defining canvass) *with id.* § 2602(q.1) (defining pre-canvass).

Even though the RNC's Application does not describe the county practices it opposes, there would be no basis to allege that any of the county practices it intends to challenge involve opening ballot envelopes, removing the ballots, and computing the votes reflected on the ballots. The RNC's insistence that *any* review of ballot submissions constitutes pre-canvassing contradicts the plain language of the statutory definition and would make it impossible for boards of election to comply with their duties pursuant to 25 P.S. § 3150.16(b)(1) and § 3146.6(b)(1).

And because no county's "notice-and-cure" policy constitutes pre-canvassing or canvassing, no county is running afoul of the prohibition on reporting results of pre-canvassing before the close of polls. *Contra* App. at 35-36 (citing 25 P.S. § 3146.8(g)(ii)(1.1)).

Third, the RNC assigns far too much importance to the process for permitting voters to belatedly provide—after Election Day—proof of identification omitted from their mail ballot *applications*.[10] Nothing about that process implies that the General Assembly intended to prohibit counties from allowing voters to take any steps, at any point in time, to address an initially deficient mail *ballot submission*. *See* App. at 27-28 (citing 25 P.S. § 3146.8(h)). The *expressio unius* canon of construction on which the RNC implicitly relies has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). "The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand." *Id.*

[10] Mail ballot *applications* must be accompanied by "proof of identification." 25 P.S. § 3146.2b(a) (absentee ballot applications); 25 P.S. § 3150.12b(a) (mail-in ballot applications). Pursuant to § 3146.8(h), "[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified … [i]f the proof of identification is received and verified prior to the sixth calendar day following the election, then the county board of elections shall canvass the absentee ballots and mail-in ballots."

Here, 25 P.S. § 3146.8(h) authorizes voters to provide, *after* Election Day, proof of identification that is required for ballot *applications*. That does not "go hand in hand" with the procedures at issue here, which relate to addressing, *before* polls close on Election Day, initially deficient *ballot submissions*. Moreover, § 3146.8(h) does not contain a group or series of cure provisions. Instead, the provision stands alone, addressing only the deadline for providing proof of identification. Without a "series of terms," there is no "omission [that] bespeaks a negative implication." *Peabody Coal*, 537 U.S. at 168. Thus, even if the RNC were correct that 25 P.S. § 3146.8(h) is properly understood as some sort of "cure" provision (despite its fundamental differences with the sort of procedures that could be at issue in this case), because § 3146.8(h) is not part of any series of similar cure provisions, it could not create any "negative implication" regarding county boards' authority to adopt other cure procedures.

C. The Application Does Not Present Any Meritorious Equal Protection Claim

In the very end, the RNC throws in one more challenge to counties' "notice and cure" practices that already has been rejected.

After the 2020 General Election, the Trump Campaign and certain individual voters filed a federal lawsuit seeking to prohibit the Secretary

from certifying Pennsylvania's results, arguing, among other things, that "it is unconstitutional for Pennsylvania to give counties discretion to adopt a notice-and-cure policy." *See Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 910 (M.D. Pa.) ("*Trump I*"), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377 (3d Cir. 2020) ("*Trump II*"). After realizing that "such a broad claim [wa]s foreclosed" under Third Circuit precedent, plaintiffs then argued that the Commonwealth's "lack of a uniform prohibition against notice-and-cure is unconstitutional." *Id.*

After concluding that plaintiffs lacked standing to sue, the district court addressed the merits of plaintiffs' equal protection claim. *Trump I*, 502 F. Supp. 3d at 914, 916. The court determined that the complaint failed to state a claim as to both the Trump Campaign and the individual-elector plaintiffs. *See id.* at 918-23. As for the individual-elector plaintiffs, the court emphasized that county boards' implementation of notice-and-cure procedures "'imposes no burden' on [the] Individual Plaintiffs' right to vote…. Defendant Counties, by implementing a notice-and-cure procedure, have in fact *lifted* a burden on the right to vote, even if only for those who live in those counties. Expanding the right to vote for some

residents of a state does not burden the rights of others." *Id.* at 919 (emphasis in original). As a result, the court concluded that "it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots." *Id.* at 920.

As for the Trump Campaign's Equal Protection claim, the court added that:

> Many courts … have recognized that counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state…. Requiring that every single county administer elections in exactly the same way would impose untenable burdens on counties, whether because of population, resources, or a myriad of other reasonable considerations.

Id. at 922-23 (cleaned up).

On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the district court's decision to dismiss the plaintiffs' complaint with prejudice. *Trump II*, 830 F. App'x 377. The court held that "[a] violation of the Equal Protection Clause requires more than variation from county to county." *Id.* at 388. "Counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state. Even when boards of elections vary considerably in how they decide to reject ballots, those local differences in implementing statewide

standards do not violate equal protection." *Id.* (internal quotations and citation omitted). "Reasonable county-to-county variation is not discrimination." *Id.*

The RNC's application seeks to rehash the very same argument the Third Circuit already rejected. *See* App. at 29. This Court should not permit them an opportunity to do so.

Nor is it right that differences in how counties communicate to voters about opportunities to submit a compliant ballot create varying standards about how a vote will be counted. *Contra* App. at 29. This Court's precedent requires that, when counties canvass mail ballots, they must reject mail ballots returned without a secrecy envelope or with a declaration that is missing a signature or correct date. Variations in how counties assist their voters in ensuring they return a ballot that complies with all predicates is no more a constitutional problem than would be counties investing differently in educating voters how to complete a ballot, counties investing differently in election staff who are available to field questions from voters, or differences in how convenient it is to return a ballot in one county as compared to another.

Provisions of Pennsylvania law that the RNC cites do not aid its cause. Section 2642(g), which the RNC cites multiple times as creating a requirement for statewide uniformity that would somehow be violated here, *see* App. at 29-31, is in fact a provision that authorizes county boards of elections to educate election officials in how to conduct elections. *See* 25 P.S. § 2642(g).

Similarly, the RNC invokes Article VII, § 6 of the Pennsylvania Constitution on multiple occasions, App. at 29, 31, but that section applies only to "*laws* regulating the holding of elections by the citizens," Pa. Const. Article VII, § 6 (emphasis added). County rules for instructing voters how to complete a ballot, implemented pursuant to 25 P.S. § 2642(f), are plainly not laws, but "rules, regulations [or] instructions." The RNC's understanding of what is required as a matter of uniformity would mean that every time two counties' election procedures differed in any respect, that variation would violate the Pennsylvania Constitution. Such a conclusion is obviously irreconcilable with the delegation of authority to county boards in, for example, 25 P.S. § 2642(g), which the Supreme Court has made clear is perfectly "consistent with the uniformity of voting clause in Article VII, Section 6." *Kuznik*, 902 A.2d at 491.

And at last, there is no issue under Article I, § 5 of Pennsylvania's Constitution, a clause meant to protect the franchise. That some county boards work harder than others to educate their voters and to ensure their voters submit compliant ballots does not make an election unequal. *See, e.g.*, *Trump II*, 830 F. App'x 388.

CONCLUSION

For the reasons above, this Court should deny the application to exercise its King's Bench Power or Extraordinary Jurisdiction.

September 20, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

Dated: September 20, 2024

/s/ *Jacob B. Boyer*
Jacob B. Boyer

CERTIFICATE OF LENGTH

I certify that this brief is 9,214 words. I have relied on Word's word count function to determine the length of this brief.

Dated: September 20, 2024

/s/ *Jacob B. Boyer*
Jacob B. Boyer

Supplemental Appendix

SUPPLEMENTAL APPENDIX TABLE OF CONTENTS

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; National Republican Senatorial Committee; National Republican Congressional Committee; Republican Party of Pennsylvania; David Ball; James D. Bee; Debra A. Biro; Jesse D. Daniel; Gwendolyn Mae Deluca; Ross M. Farber; Connor R. Gallagher; Lynn Marie Kalcevic; Linda S. Kozlovich; William P. Kozlovich; Vallerie Siciliano-Biancaniello; S. Michael Streib, Petitioners	:	
v.	:	No. 447 MD 2022
Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth; Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries; Adams County Board of Elections; Allegheny County Board of Elections; Armstrong County Board of Elections; Beaver County Board of Elections; Bedford County Board of Elections; Berks County Board of Elections; Blair County Board of Elections; Bradford County Board of Elections; Bucks County Board of Elections; Butler County Board of Elections; Cambria County Board of Elections; Cameron County Board of Elections; Carbon County Board of Elections; Centre County Board of Elections; Chester County Board of Elections; Clarion County Board of Elections; Clearfield County Board of Elections; Clinton County Board of Elections; Columbia County Board of Elections; Crawford County Board of Elections; Cumberland County Board of Elections; Dauphin County Board of Elections; Delaware County Board of Elections; Elk County Board of Elections; Erie County Board of Elections; Fayette County Board of Elections; Forest County Board of Elections; Franklin County Board of Elections; Fulton County Board of Elections; Greene County Board of Elections;	:	

Huntingdon County Board of Elections; :
Indiana County Board of Elections; :
Jefferson County Board of Elections; :
Juniata County Board of Elections; :
Lackawanna County Board of Elections; :
Lancaster County Board of Elections; :
Lawrence County Board of Elections; :
Lebanon County Board of Elections; :
Lehigh County Board of Elections; :
Luzerne County Board of Elections; :
Lycoming County Board of Elections; :
McKean County Board of Elections; :
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Monroe County Board of Elections; :
Montgomery County Board of Elections; :
Montour County Board of Elections; :
Northampton County Board of Elections; :
Northumberland County Board of Elections; :
Perry County Board of Elections; :
Philadelphia County Board of Elections; :
Pike County Board of Elections; :
Potter County Board of Elections; :
Schuylkill County Board of Elections; :
Snyder County Board of Elections; :
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Sullivan County Board of Elections; :
Susquehanna County Board of Elections; :
Tioga County Board of Elections; :
Union County Board of Elections; :
Venango County Board of Elections; :
Warren County Board of Elections; :
Wayne County Board of Elections; :
Westmoreland County Board of Elections; :
Wyoming County Board of Elections; and :
York County Board of Elections; :
Respondents :

TRANSCRIPT OF PROCEEDINGS

Before: THE HONORABLE ELLEN CEISLER, Judge

Date: September 22, 2022, 10:03 a.m.

Place: Proceedings held via videoconference

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For - Democratic Senatorial Campaign Committee and Democratic Congressional Campaign Committee, Possible Intervenors-Respondents

Kevin M. Greenberg, Esquire
For - Pennsylvania Democratic Party, Possible Intervenor-Respondent

Clifford B. Levine, Esquire
For - Democratic National Committee and Pennsylvania Democratic Party, Possible Intervenors-Respondents

ALSO PRESENT:

Scott Jones, Information Technology Specialist
Daniel S. Volchok, Esquire
Seth P. Waxman, Esquire
Molly E. Zarefoss, Staff Attorney

start maybe wrapping up and discussing next week and how we can go from here because I honestly want to get a decision made and an opinion out very soon. All right. I want -- whenever I decide this, I feel pretty strongly the Supreme Court is going to take it, and I want them to be able to have a full record.

So the injunction would restore their status quo. The fact is that some parties here have argued that it would disrupt it because of all the training, because of all the procedures, because of all the -- the public interactions; it would -- it would disrupt the status quo.

From my perspective, I'm looking at what the Secretary of State indicates which is that it shouldn't be counted. And so I don't know, or what the law is.

Do you want to, Ms. Gallagher, chime in on number 3, the injunction would -- would restore their status quo? You've heard a lot of arguments that it would cause great disruption in different counties.

MS. GALLAGHER: The only -- if it's not legal, Your Honor, what is being done, all right, that disruption to an illegal process shouldn't matter.

The Secretary of the Commonwealth is very clear, the status quo is there's no right to cure and you don't get -- there's just no right to cure. I mean, she goes on her website and talks about: Take your time; fill your ballot

out; your ballot will be counted.

The disruption to the status quo is what's happening at the board level. And I don't want to get back into discretion versus nondiscretion at this point. We've sort of discussed that greatly.

THE COURT: That would -- that would go to succeeding on the merits. All right. So --

MS. GALLAGHER: Right.

THE COURT: All right.

MS. GALLAGHER: All right. The status quo is disrupted by the curing that -- the notice and curing that's being allowed to go on.

And, again, this concept of, if I can just address it -- you know, there is in *In Re: Canvass 2020* -- and I apologize; I don't have the cite. But it's the one about dating, the date requirement, where Justice Dougherty is very clear shall means shall. And the Supreme -- PA Supreme Court in *Pa. Dems* said there shall be a secrecy envelope.

So the fact in this context that they're not just processing the ballots when they weigh them, all right, so they're -- let's say -- take that --

THE COURT: Ms. Gallagher, this leads us straight to the one -- the one requirement under the injunction that the requested injunction is reasonably suited to abate the offending activity.

So you're basically saying no cure -- no notice and cure should be done anywhere in the state. What particularly are you asking that there shouldn't be notice and cure? We know that you're asking as it relates to the -- the -- the naked ballots or the lack of secrecy envelopes. It's not -- do you -- do you -- do you agree -- do you believe that it relates to those that are returned as non-deliverable? Do you think --

MS. GALLAGHER: Your Honor --

THE COURT: -- that's notice and cure?

MS. GALLAGHER: From -- the first part that I heard of that where it was just a ballot wasn't received, all right, you know, and it --

THE COURT: It was returned back to -- yeah, it was returned back to the board of elections as undeliverable, so that led the board to research --

MS. GALLAGHER: That's different.

THE COURT: All right. So you -- you wouldn't consider that to be a problem?

MS. GALLAGHER: No, because that vote is -- that ballot is never cast, right.

THE COURT: Okay. What about -- what about if somebody hands their -- their ballot in face-to-face? If I went in, Oh, you should sign that -- because I know when I hand mine in that they look on the back and they check it all

out. What if someone just said, Oh, you better put your signature there? Would you say that's a -- an improper cure procedure?

MS. GALLAGHER: Well, it's improper -- Mr. Levine and I and Mr. King discussed this the other day. So as the Secretary has said, right now ballots -- and admonishes on her website, ballots shall be signed and dated. All right.

The problem that arises with what would otherwise be an innocuous clerk accepting the ballot, that the person who happens to hand their ballot in that way instead of dropping it in the mailbox or dropping it in a -- you know, one of the collector boxes doesn't get that same opportunity. And that's really the heart of our -- of our entire case. It goes to election integrity at its utmost level.

Everybody has to be subject to -- within the method of franchise selected, whether it's at the -- you know, vote in person, whatever, it has to be the same rules for everybody. And that's the problem we have here.

So, I mean, I would leave that to -- I'm not punting, but I think that, you know, yeah, so if you hand it to the clerk rather than dropping it in the mailbox, the mailbox isn't going to say to you, Whoa, excuse me; you didn't sign it. The Secretary of the Commonwealth is saying it has to be signed and dated. All right. So why does the person who gets -- who hands it to the clerk get that

benefit? That's the essence of this litigation.

MR. LEVINE: Your Honor --

MS. GALLAGHER: Not opining -- excuse me, Cliff; just one second.

Not opining on whether these things, cures in and of themselves are good or bad. That's the reason we didn't file this lawsuit when the Legislature was grappling with this issue.

And one other address -- issue I'd like to address on that, this concept that the Governor and the Legislature have to work it out for there to be a law, we all recognize that, right, laws have to be signed. But to say that the Legislature has not spoken simply because the Governor vetoed this legislation completely undermines the whole issue of the Elections Clause claim here. All right.

A gubernatorial veto cannot act as basically a -- a default -- or excuse me; an elimination or a vitiation of the rights of solely the Legislature to dictate the time making and -- and manner of elections under Article I, Section 5 or under Section 7 of the PA Constitution.

But heaven forbid if that happened. So does that mean that when a governor vetoes the budget, that the counties can go write their own? Of course not.

The power recognized in the Legislature as recognized by the PA Supreme Court in *Pa. Dems* was clear. We

can all wrestle with the words, but it was clear. A court that cares greatly shouldn't be voter integrity and election integrity and in fact changed the laws of this Commonwealth under *LWV* -- and I was there -- to apply the free and equal Elections Clause for the first time in this Commonwealth's history to redistricting. If it had that power to do it, it would have. And it's not supposition. It didn't do it. It didn't say, We can't because it's discretionary. It said, We won't because it's up to the Legislature.

And the Legislature spoke. It passed legislation that wasn't signed. But it took those steps, clearly indicating it was not giving that discretion to the boards.

THE COURT: All right. So --

MR. LEVINE: Your Honor, if I could address that for a moment?

THE COURT: -- it sounds like that will close it for Ms. Gallagher.

Let me -- let's back up here and -- first of all, I think everybody can agree at this point there really wouldn't be any more factual -- need for a factual hearing at this point. I mean, you have enough of the facts through the counties and through that joint stipulation of the facts of what the counties are doing as well as the law. So this could be decided at this point on the papers and the -- and the law.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BLACK POLITICAL EMPOWERMENT PROJECT, POWER INTERFAITH, MAKE THE ROAD PENNSYLVANIA, ONEPA ACTIVISTS UNITED, NEW PA PROJECT EDUCATION FUND, CASA SAN JOSÉ, PITTSBURGH UNITED, LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, AND COMMON CAUSE PENNSYLVANIA, Petitioners, v. AL SCHMIDT, in his official capacity as Secretary of the Commonwealth, PHILADELPHIA COUNTY BOARD OF ELECTIONS, AND ALLEGHENY COUNTY BOARD OF ELECTIONS, Respondents, REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA, Intervenors.	Case No. 283 MD 2024 Original Jurisdiction

REPUBLICAN INTERVENORS' OPPOSITION TO PETITIONERS' APPLICATION TO FILE AN AMENDED PETITION FOR REVIEW

The Republican National Committee and Republican Party of Pennsylvania (collectively, "Republican Intervenors") oppose, and respectfully request that the Court deny, Petitioners' Application To File An Amended Petition For Review. Republican Intervenors state in support:

1. This Court issued an order on August 30, 2024 that declared unlawful, and enjoined enforcement of, the General Assembly's duly enacted date requirement for mail-in and absentee ballots.

2. On September 2, 2024, Republican Intervenors filed a timely notice of appeal to the Pennsylvania Supreme Court.

3. On Friday, September 13, 2024, the Supreme Court vacated this Court's order because the Court "lacked subject matter jurisdiction to review the matter." Sept. 13, 2024 Order 1 (per curiam). The Supreme Court explained that this Court lacked subject matter jurisdiction for two independent reasons: "given the failure to name the county boards of elections of all 67 counties, **and** because the joinder of Al Schmidt, in his official capacity as Secretary of the Commonwealth, did not suffice to invoke the Commonwealth Court's original jurisdiction." *Id.* (citing 42 Pa. C.S. § 761(a)(1)) (emphasis added). The Supreme Court also denied "[t]he request for extraordinary jurisdiction pursuant to 42 Pa. C.S. § 726." *Id.* at 2.

4. A court should deny leave to amend a pleading "where allowance of an amendment . . . would be a futile exercise." *Carlino v. Whitpain Investors*, 453 A.2d

1385, 1388 (Pa. 1982); *accord Weaver v. Franklin Cnty.*, 918 A.2d 194, 203 (Pa. Commw. Ct. 2007). Leave to amend therefore should be denied whenever the proposed amendment would not "cure" a jurisdictional or other "defect" in a petitioner's suit. *Weaver*, 918 A.2d at 203; *see also Carlino*, 453 A.2d at 1388-89 (affirming denial of leave to amend where amendments would not suffice to establish the jurisdictional requisite of standing).

5. Petitioners' proposed amendments would be futile because they cannot "cure" the Court's lack of subject matter jurisdiction over this case. *Weaver*, 918 A.2d at 203; *see also Carlino*, 453 A.2d at 1388-89.

6. *First*, as the Supreme Court's order makes plain, this Court "lack[s] subject matter jurisdiction to review the matter" on two independent bases: "given the failure to name the county boards of elections of all 67 counties, **and** because the joinder of Al Schmidt, in his official capacity as Secretary of the Commonwealth, did not suffice to invoke the Commonwealth Court's original jurisdiction." Sept. 13, 2024 Order 1 (citing 42 Pa. C.S. § 761(a)(1)) (emphasis added).

7. Petitioners' proposed amendments purport to address only one of those jurisdictional defects. Indeed, Petitioners seek leave only to join the remaining 65 county boards of elections as Respondents, more than three months after Republican Intervenors first raised this pleading failure in the Preliminary Objections filed with their Application for Leave to Intervene on June 7, 2024. *See* Intervenors'

Preliminary Objections 27-31, ¶¶ 70-86, attached as Exhibit A to Application For Leave To Intervene (filed June 7, 2024).

8. Accordingly, Petitioners' proposed amendments at most could cure only their "failure to name the county boards of elections of all 67 counties." Sept. 13, 2024 Order 1. They cannot "cure th[e] defect," *Weaver*, 918 A.2d at 203, that "joinder of [Secretary] Schmidt . . . did not suffice to invoke the Commonwealth Court's original jurisdiction," Sept. 13, 2024 Order 1.

9. "Jurisdiction over the subject matter is conferred solely by the Constitution and laws of the Commonwealth." *Commonwealth v. Locust Twp.*, 968 A.2d 1263, 1268-69 (Pa. 2009). The lone basis of subject matter jurisdiction that Petitioners invoke and this Court purported to exercise is 42 Pa. C.S. § 761(a)(1), which grants this Court original jurisdiction only over civil actions "[a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity." 42 Pa. C.S. § 761(a)(1).

10. As Republican Intervenors have already explained, the Petition fails to invoke the Court's original jurisdiction because Secretary Schmidt is not an indispensable party, and the county boards of elections are local authorities whose joinder does not satisfy Section 761(a)(1)'s jurisdictional requirement. *See* Mem. In Support Of Republican Intervenors' Application For Summary Relief 15-19 (filed June 24, 2024); Intervenor-Appellants Sup. Ct. Br. 11-15 (filed Sept. 3, 2024); *see*

also Republican Nat'l Comm. v. Schmidt, No. 447 MD 2022 slip op. 18-28 (Pa. Comm. Ct. Mar. 23, 2023) (Ceisler, J.) (holding that joinder of all 67 county boards did not invoke the Court's original jurisdiction where the Secretary was not an indispensable party).

11. The Supreme Court agreed, which is why it cited Section 761(a)(1) and separately explained that "joinder of [Secretary] Schmidt . . . did not suffice to invoke" this Court's "original jurisdiction" as an *independent* jurisdictional defect *in addition to* Petitioners' "failure to name the county boards of elections of all 67 counties." Sept. 13, 2024 Order 1.

12. Petitioners' proposed amendments do nothing to fix this independent jurisdictional failing. As this Court has already agreed, the county boards of elections are "clearly local agencies," *Black Political Empowerment Project v. Schmidt*, 2024 WL 4002321, at *21 (Pa. Commw. Ct. Aug. 30, 2024), *vacated on other grounds*, 2024 WL 4181592 (Pa. Sept. 13, 2024), not entities of "the Commonwealth government," 42 Pa. C.S. § 761(a)(1). Their joinder, therefore, does not "suffice to invoke" this Court's jurisdiction under Section 761(a)(1). Sept. 13, 2024 Order 1.

13. Petitioners' suggestion that the Supreme Court "did not reverse" this Court's ruling that the Secretary is "an indispensable party" whose joinder creates "a valid basis for jurisdiction in this Court," Petitioners' Application 4 n.4, is simply

baffling and contravenes the plain text of the Supreme Court's Order. If Petitioners were correct that the only "issue divesting this Court of jurisdiction was non-joinder" of the county boards, *id.*, there would have been *no reason* for the Supreme Court to cite Section 761(a)(1) or to say anything about "joinder of [Secretary] Schmidt," Sept. 13, 2024 Order 1. Petitioners do not even *attempt* to hazard an explanation as to why, under their reading, the Supreme Court included that citation and reference to Secretary Schmidt in its Order. No such explanation is conceivable because Petitioners' reading is wrong.

14. Nor is the Supreme Court's Order ambiguous: The Supreme Court could not have been clearer that this Court lacks jurisdiction on two independent bases. *See* Sept. 13, 2024 Order 1. And the fact that the Supreme Court did not order dismissal of the case creates no ambiguity. In prior cases in which the Supreme Court has reversed this Court's conclusion that it had original jurisdiction under Section 761(a)(1), the Supreme Court has simply "vacated" this Court's "order" without expressly ordering dismissal of the action. *In re Petition for Enforcement of Subpoenas*, 214 A.3d 660, 670 (Pa. 2019) ("The order of the Commonwealth Court is vacated."). After all, there is no reason why the Pennsylvania Supreme Court would not trust this Court to heed jurisdictional rulings and enter the dismissal order itself.

15. Accordingly, the Court should deny Petitioners' Application because it lacks subject matter jurisdiction over the case and Petitioners' proposed amendments do not "cure this defect." *Weaver*, 918 A.2d at 203; *see also Carlino*, 453 A.2d at 1388-89.

16. *Second*, at a minimum, the Court should await the Supreme Court's ruling on Republican Intervenors' Emergency Application For Enforcement And/Or Clarification Of The Court's September 13, 2024 Order, which they filed in the Supreme Court on September 17, 2024.

17. Republican Intervenors filed their Emergency Application because the Court expressed the view at the September 17, 2024 status conference that the Supreme Court's Order is ambiguous with respect to the bases for its holding that this Court lacks subject matter jurisdiction.

18. Republican Intervenors disagree that the Supreme Court's Order is ambiguous. Nonetheless, the Emergency Application asks the Supreme Court, on an expedited basis, to confirm that its Order holds that the Court lacks original jurisdiction under Section 761(a)(1) regardless of any joinder of the remaining 65 county boards of elections.

19. The interests of fundamental fairness and judicial economy warrant the Court awaiting the Supreme Court's forthcoming ruling on Republican Intervenors' Emergency Application before taking any further action in this case.

20. Indeed, any "act taken by a court without proper jurisdiction is null and void." *Commonwealth v. Miller*, 452 A.2d 820, 821 (1982). Thus, any order from the Court in this case—including an order granting leave to file an amended petition or reissuing any injunction against enforcement of the date requirement—would be null, void, and subject to automatic reversal if the Supreme Court's Order holds that this Court lacks, and cannot obtain, original jurisdiction over this matter under Section 761(a)(1).

21. There therefore is no basis to subject the Commonwealth, its taxpayers, its voters, and the parties in this case to expedited proceedings now, under the realistic prospect of impending clarification of, or eventual reversal on, the jurisdictional defect identified in the Supreme Court's Order. To the contrary, the public interest favors awaiting the Supreme Court's ruling on the Emergency Application, which likely will confirm that this Court lacks jurisdiction, as the Order already specifies.

22. Nor would there be any prejudice to any party from awaiting that ruling before conducting any further proceedings in this case. As explained below, it is already too late for the Court to issue relief for the imminent 2024 general election in which millions of Pennsylvanians will cast their votes for President, U.S. Senator, U.S. Representative, and numerous state and local offices. If an amended petition is filed, the case will require significant process for the 65 newly joined county boards,

which are currently engaged in the consuming task of administering the 2024 general election and should not be forced to litigate this case on an expedited schedule in the midst of election season. Moreover, any amended petition will require new factual development due to intervening changes in circumstances.

23. *Third*, Petitioners are incorrect regarding the issues to be resolved, the scope, and the feasible schedule of any further proceedings in this case if the Court eventually obtains subject matter jurisdiction and grants Petitioners leave to file an amended petition.

24. In the first place, if the Court permits Petitioners to file an amended petition, "the facts necessary to decide Petitioners' claims" will *not* be "well-known to the parties" and will be the subject of "legitimate dispute." Petitioners' Application 3 ¶ 10. Republican Intervenors no longer agree that there are "no outstanding questions of fact" in this case if any amended petition is filed. *Id.*

25. Indeed, at the time of the June 10, 2024 status conference, the legal positions and likely factual assertions of Petitioners and the three Respondents—the Secretary, the Allegheny County Board of Elections, and the Philadelphia County Board of Elections—were well known. Accordingly, discovery was not necessary to uncover them. Intervening events and joinder of 65 more county boards of elections, however, would raise undeveloped factual issues that Republican

Intervenors expressly reserve the right to discover and to develop if the Court grants Petitioners leave to file an amended petition.

26. For example, since the date of the June 10, 2024 status conference, the Secretary issued his July 1, 2024 Directive Concerning the Form of Absentee and Mail-in Ballot Materials. *See* https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-Directive-Absentee-Mail-in-Ballot-Materials-v2.0.pdf. That Directive is binding on county boards, *see* 25 P.S. § 2621, and makes compliance with the date requirement easier than ever, *see* Intervenors-Appellants Sup. Ct. Br. 37-39. Indeed, as even the *en banc* majority of this Court agreed, the Directive "eliminates" the most common form of dating error, "a voter writing an incomplete and inaccurate year" in the date field. *Black Political Empowerment Project*, 2024 WL 4002321, at *21.

27. The Directive—and its effect of easing any burdens on voters imposed by the date requirement—thus present new facts that directly bear on Petitioners' claim under the Free and Equal Elections Clause. Because the July 1, 2024 Directive post-dates the prior litigation regarding the date requirement and the "June 10, 2024 status conference," Petitioners' Application 3 ¶ 10, the parties have had no opportunity to develop a complete factual record regarding it. Republican Intervenors expressly reserve the right to discover and develop such a record,

including from newly added county boards and from the results of any upcoming or future elections that will be conducted under the Directive.

28. Republican Intervenors further reserve the right to take discovery and to develop a factual record regarding application of the date requirement in any elections that occur during pendency of any further proceedings in this case, including facts regarding the rate of compliance with the date requirement among mail voters across the Commonwealth.

29. Newly joined county boards, moreover, may desire to develop a factual record regarding the date requirement; the purported burdens the date requirement imposes on Pennsylvania voters; the justifications for the date requirement; the difficulty in implementing any remedial order enjoining enforcement of the date requirement, particularly on the eve of an election; and other issues. Newly joined county boards may also wish to file briefs and present argument to this Court.

30. Petitioners' proposed expedited schedule makes no accommodation of these realities and, thus, risks violating fundamental notions of fairness and due process in this litigation. *See* Petitioners' Application 7-9 ¶ 18.

31. It is no answer to suggest, as Petitioners do, that "[t]here is good reason to think" that newly joined county boards will "not wish to participate substantively in this litigation." *Id.* 6 n.6 & ¶ 16. After all, Commissioner Chew of the Westmoreland County Board of Elections *did* seek to participate substantively in this

litigation and even to raise factual issues, but the Court denied him intervention. *See* Br. In Response To Summary Relief Applications For Proposed Intervenor Doug Chew 61-63 (filed July 9, 2024).

32. Moreover, even though many county boards have not actively participated in prior federal litigation regarding the date requirement, *see* Petitioners' Application 6 n.6, some *have* actively participated and presented factual and legal arguments in those cases, *see, e.g.*, ECF No. 267, No. 1:22-cv-00339, *Pa. State Conf. of NAACP v. Schmidt* (Apr. 21, 2023) (brief of Lancaster County Board of Elections defending the date requirement). Those boards—as well as *all* 65 county boards—have a full and complete right to participate in this case in whatever manner they now deem appropriate if they are joined.

33. Further, as the Supreme Court's Order makes clear, the 65 county boards had no obligation "to seek intervention in this case," Petitioners' Application 6 n.6, in order to preserve their right to full participation in this litigation if eventually joined, including by developing a factual record and presenting factual and legal arguments. Rather, Petitioners had an obligation to join them. *See* Sept. 13, 2024 Order 1. The county boards cannot be penalized with a diminution of their litigation rights or an unreasonable schedule in the middle of election season simply because they did not volunteer to be bound by a judgment in a case in which Petitioners failed to join them.

34. Petitioners, thus, have no one but themselves to blame for any delay in resolving the case to accommodate the rights of newly joined county boards and any party, including Republican Intervenors, who may seek to develop a factual record due to the intervening changes in circumstances. Republican Intervenors are not to blame for any such delay: They have dutifully participated in this litigation on an expedited timeline and specifically raised Petitioners' failure to join the county boards at the outset of the case more than three months ago. Rather than amend their petition then, Petitioners chose to forge ahead—and now must bear the consequences of that choice.

35. *Finally*, this Court should not rush to grant relief (and trample on normal procedural rules) because it cannot grant any remedy now on the eve of the imminent 2024 general election. There simply is not enough time to accord the 65 newly joined county boards a full and fair opportunity to litigate this case, or to permit interested parties to develop the factual record as warranted in light of changed circumstances, in time to complete proceedings and enjoin enforcement of the date requirement for the 2024 general election. Indeed, the county boards are currently occupied with the vital and consuming task of administering the 2024 general election over the next many weeks—and requiring them to litigate this case on an expedited basis in the middle of election season would force them to divert limited resources from that task. It would be both unfair and unworkable to the

county boards—as well as to the public and the Commonwealth's voters—to force the county boards to proceed on Petitioners' preferred schedule, particularly when Petitioners should have joined all of the boards more than three months ago.

36. Moreover, any remedial order issued now for the 2024 general election threatens to unleash "voter confusion," "chaos," *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 504-07 (Pa. 2006), and an erosion of the public "[c]onfidence in the integrity of our electoral processes [that] is essential to the functioning of participatory democracy," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). This Court should not impose those harms on the Commonwealth and its voters.

37. Accordingly, if this Court somehow obtains subject matter jurisdiction (which it cannot) and grants Petitioners leave to amend, it should deny Petitioners' proposed schedule. Instead, after any amended petition is filed and served, the Court should allow all parties to participate in a meet-and-confer to seek agreement on an appropriate schedule for remaining proceedings and, only if necessary, convene a status conference thereafter to set a schedule.

WHEREFORE, the Court should deny Petitioners' Application To File An Amended Petition For Review.

Dated: September 19, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Motion contains 2,942 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Kathleen A. Gallagher
Counsel for Republican Intervenors

CERTIFICATE OF COMPLIANCE

I hereby 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 non-confidential information and documents.

/s/ Kathleen A. Gallagher
Counsel for Republican Intervenors

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

KATHY BARNETTE and CLAY D. BREECE	:	CIVIL ACTION NO. 20-cv-05477
v.	:	
KENNETH E. LAWRENCE, JR., VALERIE A. ARKOOSH and FRANK DEAN	:	HEARING TO SHOW CAUSE

James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
November 4, 2020
Commencing at 9:18 a.m.

BEFORE THE HONORABLE TIMOTHY J. SAVAGE

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I N D E X

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THE WITNESS: If you are.

THE COURT: Are you okay with it on?

THE WITNESS: I am.

THE COURT: All right, fine.

DIRECT EXAMINATION

BY MS. HANGLEY:

Q. Mr. Soltysiak, can you tell me what your job is?

A. I am the chief operating officer for Montgomery County and the chief clerk of the election board.

Q. And does that position involve election responsibilities?

A. Yes, it does.

Q. Broadly, what are those?

A. To oversee generally the administration of the election in Montgomery County.

THE COURT: Pull the microphone a little closer to you. Okay? You can bend it.

BY MS. HANGLEY:

Q. How long have you had that role?

A. Approximately three years.

Q. And you're aware -- how long has the county had the policies described today with regard to curing deficient absentee and mail-in ballots?

A. This policy has been in place years prior to this election.

Q. And can you describe what the county's practice has been

in past elections?
A. When ballots were received into voter services, either -- well, in the past by mail, they would be reviewed by county voter services staff for general completeness of the declarations page.
And in the cases where ballots were observed to be potentially deficient in some way with regard to the declarations, the ballot was returned to the voter by mail.
Q. And what would the voter do with that ballot?
A. They were provided instructions as to what their options were to fill in the deficiency that was identified on the exterior envelope or that they could vote provisionally.
Q. And do you have any reason to believe one way or the other whether the parties, political parties in Montgomery County, were aware of this practice?
A. I believe they were.
Q. And what's the basis for that?
A. That this has been a practice, like I said, years leading up to this election. And it's my understanding that both parties have, over the years, requested information along these lines with regard to ballots that were set aside for potentially not being able to be counted.
Q. And by information along these lines, do you mean the list of ballots set aside?
A. Correct.

Q. And in this election, in the November election, did the Republican party make that request to you?
A. They did.
Q. Do you recall approximately when that was?
A. Some day last week. I apologize on the exact date.
Q. Okay. Was it before Election Day?
A. It was before Election Day, yeah.
Q. And what did you do in response?
A. We supplied the list of voters whose ballots fell into this category to both parties.
Q. And what's your understanding of why the parties -- what the parties did with that information?
A. I understand parties reached out. I don't know exactly how they handled the list or in what manners they reached out, but they were contacting voters to let them know of the deficiency potentially in their ballot and that they can come into the county office building to correct it or that they could vote provisional.
Q. That was going to be my next question.

For every voter who gets this kind of communication, either from the county or from a party, what are the options that a voter has if they've been notified that there's something wrong with their ballot?
A. Well, I can speak to the communication from the county that we made directly to voters. And that is that they can

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; REPUBLICAN PARTY OF PENNSYLVANIA; DAVID BALL; JAMES D. BEE; DEBRA A. BIRO; JESSE D. DANIEL; GWENDOLYN MAE DELUCA; ROSS M. FARBER; CONNOR R. GALLAGHER; LYNN MARIE KALCEVIC; LINDA S. KOZLOVICH; WILLIAM P. KOZLOVICH; VALLERIE SICILIANO-BIANCANIELLO; S. MICHAEL STREIB,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth; JESSICA MATHIS, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries; ADAMS COUNTY BOARD OF ELECTIONS; ALLEGHENY COUNTY BOARD OF ELECTIONS; ARMSTRONG COUNTY BOARD OF ELECTIONS; BEAVER COUNTY BOARD OF ELECTIONS; BEDFORD COUNTY BOARD OF ELECTIONS; BERKS COUNTY BOARD OF ELECTIONS; BLAIR COUNTY BOARD OF ELECTIONS; BRADFORD COUNTY

No. _____ MD 2022

PETITION FOR REVIEW DIRECTED TO COURT'S ORIGINAL JURISDICTION SEEKING DECLARATORY AND INJUNCTIVE RELIEF

Filed on behalf of Petitioners

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BOARD OF ELECTIONS; BUCKS COUNTY BOARD OF ELECTIONS; BUTLER COUNTY BOARD OF ELECTIONS; CAMBRIA COUNTY BOARD OF ELECTIONS; CAMERON COUNTY BOARD OF ELECTIONS; CARBON COUNTY BOARD OF ELECTIONS; CENTRE COUNTY BOARD OF ELECTIONS; CHESTER COUNTY BOARD OF ELECTIONS; CLARION COUNTY BOARD OF ELECTIONS; CLEARFIELD COUNTY BOARD OF ELECTIONS; CLINTON COUNTY BOARD OF ELECTIONS; COLUMBIA COUNTY BOARD OF ELECTIONS; CRAWFORD COUNTY BOARD OF ELECTIONS; CUMBERLAND COUNTY BOARD OF ELECTIONS; DAUPHIN COUNTY BOARD OF ELECTIONS; DELAWARE COUNTY BOARD OF ELECTIONS; ELK COUNTY BOARD OF ELECTIONS; ERIE COUNTY BOARD OF ELECTIONS; FAYETTE COUNTY BOARD OF ELECTIONS; FOREST COUNTY BOARD OF ELECTIONS; FRANKLIN COUNTY BOARD OF ELECTIONS; FULTON COUNTY BOARD OF ELECTIONS; GREENE COUNTY BOARD OF ELECTIONS; HUNTINGDON COUNTY BOARD OF ELECTIONS; INDIANA COUNTY BOARD OF ELECTIONS; JEFFERSON COUNTY BOARD OF ELECTIONS; JUNIATA COUNTY BOARD OF ELECTIONS; LACKAWANNA COUNTY BOARD OF ELECTIONS; LANCASTER

COUNTY BOARD OF ELECTIONS; LAWRENCE COUNTY BOARD OF ELECTIONS; LEBANON COUNTY BOARD OF ELECTIONS; LEHIGH COUNTY BOARD OF ELECTIONS; LUZERNE COUNTY BOARD OF ELECTIONS; LYCOMING COUNTY BOARD OF ELECTIONS; MCKEAN COUNTY BOARD OF ELECTIONS; MERCER COUNTY BOARD OF ELECTIONS; MIFFLIN COUNTY BOARD OF ELECTIONS; MONROE COUNTY BOARD OF ELECTIONS; MONTGOMERY COUNTY BOARD OF ELECTIONS; MONTOUR COUNTY BOARD OF ELECTIONS; NORTHAMPTON COUNTY BOARD OF ELECTIONS; NORTHUMBERLAND COUNTY BOARD OF ELECTIONS; PERRY COUNTY BOARD OF ELECTIONS; PHILADELPHIA COUNTY BOARD OF ELECTIONS; PIKE COUNTY BOARD OF ELECTIONS; POTTER COUNTY BOARD OF ELECTIONS; SCHUYLKILL COUNTY BOARD OF ELECTIONS; SNYDER COUNTY BOARD OF ELECTIONS; SOMERSET COUNTY BOARD OF ELECTIONS; SULLIVAN COUNTY BOARD OF ELECTIONS; SUSQUEHANNA COUNTY BOARD OF ELECTIONS; TIOGA COUNTY BOARD OF ELECTIONS; UNION COUNTY BOARD OF ELECTIONS; VENANGO COUNTY BOARD OF ELECTIONS; WARREN COUNTY BOARD OF ELECTIONS; WAYNE COUNTY BOARD OF ELECTIONS; WESTMORELAND COUNTY

BOARD OF ELECTIONS;
WYOMING COUNTY BOARD OF
ELECTIONS; and YORK COUNTY
BOARD OF ELECTIONS,

Respondents.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

No. _____ MD 2022

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, *et al.*,

Respondents.

NOTICE TO PLEAD

To Respondents:

You are hereby notified to file a written response to the enclosed Petition for Review within thirty (30) days from service hereof or a judgment may be entered against you.

Dated: September 1, 2022

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
Russell D. Giancola
Gallagher Giancola LLC

Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*, Petitioners, v. LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, *et al.*, Respondents.	No. _____ MD 2022

PETITION FOR REVIEW
DIRECTED TO COURT'S ORIGINAL JURISDICTION
SEEKING DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Petitioners support and seek to uphold free and fair elections on behalf of all Pennsylvanians. For that reason, Petitioners bring this suit to ensure that the upcoming 2022 general election and future elections are conducted in accordance with the rules that the General Assembly has prescribed by law. Unfortunately, several County Boards of Elections ("Boards"), acting on their own initiative, are departing from those rules in a crucial area of election administration. The result is a lack of transparency, unequal treatment of otherwise identical ballots based upon the county in which the voter resides, and an erosion of public trust and confidence in the integrity of Pennsylvania's elections at a vital moment in the Nation's and the Commonwealth's history.

2. In 2020, the Pennsylvania Supreme Court unanimously held that "the Election Code provides procedures for casting and counting a vote by mail" but does not provide for a notice and opportunity to cure procedure ("cure procedure") for a voter who fails to comply with the requirements for voting by mail or absentee. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020).

3. The Supreme Court further stated that "[t]o the extent that a voter is at risk of having his or her ballot rejected" due to failure to comply with the Election Code's signature and secrecy ballot requirements for mail-in and absentee ballots, "the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk is one best suited for the Legislature." *Id.*

4. The Supreme Court "express[ed] this agreement particularly in light of the open policy questions attendant to that decision, 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, all of which are best left to the legislative branch of Pennsylvania's government." *Id.*

5. The Legislature has addressed the issue of when Boards may provide notice and an opportunity to cure a non-compliant mail-in or absentee ballot. The Election Code currently provides a cure procedure in only a limited circumstance: "[f]or those absentee ballots or mail-in ballots for which proof of identification has

not been received or could not be verified." 25 P.S. § 3146.8(h). And even in that circumstance, the voter may cure only the lack of proof of identification and not any other defect. *See id.*

6. Earlier this year, the Legislature passed a bill to implement a broad cure procedure, but Governor Wolf vetoed it. Accordingly, lack of verification of identification remains the only circumstance under which Boards are authorized to provide a cure opportunity.

7. Despite the Election Code's plain text and the Supreme Court's clear holding, and the veto by the Governor of the bill enacted by the Legislature to implement a cure procedure, several Boards, without legal authority, have developed and implemented cure procedures for the 2022 general election and beyond.

8. These Boards' development and implementation of cure procedures exceed the Boards' authority under state law and the Election Code. These Boards have, in effect, usurped the exclusive legislative authority of the General Assembly in contravention of the Pennsylvania Supreme Court's holding.

9. Moreover, these Boards' actions purport to regulate the "manner" in which federal elections are conducted, in violation of the General Assembly's plenary delegated authority to "prescribe" the "Manner" of such elections under the Elections Clause of Article 1, Section 4 of the United States Constitution.

10. The untenable consequences of these Boards' usurpation of the General Assembly's legislative and federal constitutional authority are difficult to overstate. For one thing, the Boards that have adopted cure procedures have not all disclosed that fact—let alone the particulars of those procedures—to the public, creating confusion and a lack of transparency in election administration.

11. The selective and varying adoption of cure procedures by some Boards has created an unequal playing field. Depending on the county in which voters reside, some receive notice and an opportunity to cure a ballot defect while others receive no such notice of or opportunity to cure an identical ballot defect. Moreover, the Boards that have adopted cure procedures on their own initiative have not uniformly adopted the *same* procedure. The result is a lack of statewide uniformity in both the existence and—where they do exist—the particulars of cure procedures.

12. The Court should restore transparency, fundamental fairness, and integrity to Pennsylvania's elections by upholding the plain text of the Election Code and the clear holding of the Pennsylvania Supreme Court and declaring that county boards of elections may not adopt cure procedures other than as the General Assembly has expressly provided in the Election Code.

JURISDICTION AND VENUE

13. This Court has original jurisdiction over this Petition for Review under 42 Pa. C.S. § 761(a)(1) because this matter is asserted against Commonwealth officials in their official capacities.

14. Petitioners bring this action pursuant to the Declaratory Judgments Act, which empowers this Court "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." 42 Pa. C.S. § 7541(a). The Declaratory Judgments Act permits "[a]ny person … whose rights, status, or other legal relations are affected by a statute" to "have determined any question of construction or validity arising under the … statute" and to "obtain a declaration of rights, status, or other legal relations thereunder." 42 Pa. C.S. § 7533.

PARTIES

A. Republican Committees

15. The Republican National Committee (the "RNC") is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The RNC manages the Republican Party's business at the national level, including development and promotion of the Party's national platform and fundraising and election strategies; supports Republican candidates for public office at all levels across the country, including those on the ballot in Pennsylvania; and assists state parties throughout the country, including the Republican Party of Pennsylvania, to

educate, mobilize, assist, and turnout voters. The RNC made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters in Pennsylvania in past election cycles and is doing so again in 2022. These efforts include devoting substantial time and resources toward monitoring of the voting and vote counting process in Pennsylvania and to ensure it is conducted lawfully. The RNC makes expenditures to ensure it and its voters understand the rules governing the elections process, including applicable dates, deadlines, and requirements for voting by mail or absentee. These efforts require a uniform application of the law and a clear and transparent understanding of mail voting requirements, including any allowances for notice and opportunity to cure procedures. The RNC has a substantial and particularized interest in ensuring that Pennsylvania administers free and fair elections.

16. The National Republican Congressional Committee (the "NRCC") is the national congressional committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The NRCC's mission is to elect Republican candidates to the U.S. House of Representatives from across the United States, including from Pennsylvania's eighteen congressional districts. The NRCC works to accomplish its mission in Pennsylvania by, among other things, providing direct and indirect financial contributions and support to candidates and other Republican Party

organizations; providing technical and research assistance to Republican candidates and Party organizations; engaging in voter registration, voter education and voter turnout programs; and other Republican party-building activities. The NRCC made significant contributions and expenditures in support of Republican House candidates and in mobilizing and educating voters in Pennsylvania in past election cycles and is doing so again in 2022. These efforts include devoting substantial time and resources toward monitoring of the voting and vote counting process in Pennsylvania and to ensure it is conducted lawfully. The NRCC makes expenditures to ensure it and its voters understand the rules governing the elections process, including applicable dates, deadlines, and requirements for voting by mail or absentee. These efforts require a uniform application of the law and a clear and transparent understanding of mail voting requirements, including any allowances for notice and opportunity to cure procedures. The NRCC has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.

17. The National Republican Senatorial Committee (the "NRSC") is the national senatorial committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The NRSC's mission is to elect Republican candidates to the U.S. Senate from across the United States, including Pennsylvania. The NRSC works to accomplish its mission in Pennsylvania by, among other things, providing direct and

indirect financial contributions and support to candidates and other Republican Party organizations; providing technical and research assistance to Republican candidates and Party organizations; engaging in voter registration, voter education and voter turnout programs; and other Republican party-building activities. The NRSC made significant contributions and expenditures in support of Republican Senate candidates and in mobilizing and educating voters in Pennsylvania in past election cycles and is doing so again in 2022. These efforts include devoting substantial time and resources toward monitoring of the voting and vote counting process in Pennsylvania and to ensure it is conducted lawfully. The NRSC makes expenditures to ensure it and its voters understand the rules governing the elections process, including applicable dates, deadlines, and requirements for voting by mail or absentee. These efforts require a uniform application of the law and a clear and transparent understanding of mail voting requirements, including any allowances for notice and opportunity to cure procedures. The NRSC has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.

18. Petitioner Republican Party of Pennsylvania ("RPP") is a major political party, 25 P.S. § 2831(a), and the "State committee" for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered "State Committee" of the Republican Party as defined by 52 U.S.C. § 30101(15). RPP, on behalf of

itself and its members nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania. It works on an ongoing basis to accomplish this purpose by, among other things, devoting substantial resources toward turning out voters in Pennsylvania and informing them of the legal requirements as adopted by the Legislature for voting. RPP has made significant contributions and expenditures in support of Republican statewide, district, and local candidates in past election cycles and is doing so again in 2022. These efforts include devoting substantial time and resources toward monitoring of the voting and vote counting process in Pennsylvania and to ensure it is conducted lawfully. RPP makes expenditures to ensure it and its voters understand the rules governing the elections process, including applicable dates, deadlines, and requirements for voting by mail or absentee. These efforts require a uniform application of the law and a clear and transparent understanding of mail voting requirements, including any allowances for notice and opportunity to cure procedures. RPP has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.

19. The various approaches taken by the counties regarding cure procedures are not routinely published and thus not readily known to the RPP, RNC, NRSC, or NRCC or even voters themselves. Thus, the ability of the RPP, RNC, NRSC, and the NRCC to educate voters regarding the cure procedures is thwarted.

B. Voter Petitioners

20. Petitioner David Ball resides in Washington County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

21. Petitioner James D. Bee resides in Cambria County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

22. Petitioner Debra A. Biro resides in Northampton County, Pennsylvania is a registered Pennsylvania elector who consistently votes in each election.

23. Petitioner Jesse D. Daniel resides in Indiana County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

24. Petitioner Gwendolyn Mae DeLuca resides in Beaver County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

25. Petitioner Ross M. Farber resides in Westmoreland County, Pennsylvania, and is a registered Pennsylvania elector who consistently votes in each election.

26. Petitioner Connor R. Gallagher resides in Allegheny County, Pennsylvania, and is a registered Pennsylvania elector who consistently votes in each election.

27. Petitioner Lynn Marie Kalcevic resides in Beaver County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

28. Petitioner Linda S. Kozlovich resides in Fayette County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

29. Petitioner William P. Kozlovich resides in Fayette County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

30. Petitioner Vallerie Siciliano-Biancaniello resides in Delaware County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

31. Petitioner S. Michael Streib resides in Butler County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

32. Each of the Voter Petitioners regularly votes in both primary and general elections and intends to vote for candidates in all races on their respective ballots in the upcoming general election, including but not limited to the races for United States Senate, United States House of Representatives, Pennsylvania Senate and Pennsylvania House of Representatives.

33. The implementation of cure procedures by some Boards absent any directive to do so under the Election Code has interfered with Voter Petitioners' right to "equal elections."

34. Moreover, the unauthorized cure procedures implemented by some Boards have had and will have the result of counting votes that should not have been counted due to the voter's failure to comply with signature and secrecy ballot requirements for mail-in and absentee ballots. As a result, the votes validly cast by Voter Petitioners have been and will be canceled out and diluted by the counting of ballots in violation of the Election Code.

35. Petitioners thus find themselves in the same factual setting as existed in 2020 when *Pa. Democratic Party* was filed: an election landscape where Boards throughout the state operate under different rules, particularly with respect to whether to implement cure procedures, and if so, how.

36. Insofar as the Pennsylvania Supreme Court made clear in *Pa. Democratic Party* that the solution to this lack of uniformity could not be resolved by the Court mandating a cure procedure for all counties to follow, and because Governor Wolf vetoed the General Assembly's attempt to implement a uniform cure procedure, Petitioners thus seek the mirror-image form of relief: the Court should enjoin the Boards from using any cure procedures that are not expressly set forth in the Election Code.

C. Respondents

37. Respondent Leigh M. Chapman is the Acting Secretary of the Commonwealth and is sued in her official capacity only. In that capacity, Acting Secretary Chapman must "receive from county boards of elections the returns of primaries and elections," "canvass and compute the votes cast for candidates," proclaim the results of such primaries and elections," and "issue certificates of election to the successful candidates at such elections." *See* 25 P.S. § 2621(f); *see also* 25 P.S. § 3159.

38. Respondent Jessica Mathis is the Director for the Bureau of Election Services and Notaries and is sued in her official capacity only. In that capacity, Director Mathis oversees the Election Services and Voter Registration divisions of the Pennsylvania Department of State. The Bureau of Election Services and Notaries is responsible for planning, developing, and coordinating the statewide implementation of the Election Code. *See* https://www.dos.pa.gov/about-us/Pages/Director-Bureau-of-Elections-and-Notaries.aspx.

39. Each of the 67 County Boards of Elections in Pennsylvania are also named as Respondents. Boards of Elections "have jurisdiction over the conduct of primaries and elections in such count[ies]." *Id.* at § 2641(a). The Boards of Elections' powers are set forth under the Election Code. *See* 25 P.S. § 2642.

FACTUAL ALLEGATIONS

A. Act 77 Requirements for Absentee and Mail-In Ballots.

40. The expanded use of mail-in voting authorized under Act 77 has amply revealed a lack of statewide standards for the canvassing and counting of mail-in ballots.

41. Under the Pennsylvania Election Code, voters casting an absentee or mail-in ballot are required to: (1) place their marked ballots in a sealed envelope ("secrecy envelope"), (2) place the secrecy envelope inside a second envelope, which is marked with a "declaration of the elector" form, (3) "fill out" and "sign the declaration printed on such envelope," and (4) return the ballot by 8:00 p.m. on election day. 25 P.S. § 3146.6(a); § 3150.16(a).

42. If a voter fails to comply with these requirements, the voter's absentee or mail-in ballot must be set aside and not counted. 25 P.S. § 3146.8; *Pa. Democratic Party*, 238 A.3d 345.

B. Providing Any Cure Procedure for Non-Compliant Ballots Is the Exclusive Province of The General Assembly.

43. Just two years ago, the Pennsylvania Democratic Party sought an injunction to *require* Boards of Election to contact electors whose mail-in or absentee ballots contained facial defects and to provide those electors with an opportunity to cure the same. *See Pennsylvania Democratic Party v. Boockvar*, No. 407 MD 2020 (Commw. Ct.).

44. There, citing the Free and Equal Elections Clause, PA. CONST. art. I, § 5, and the Court's "broad authority to craft meaningful remedies," *League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2018), the Pennsylvania Democratic Party argued that the Court should require the Boards of Elections to implement a "notice and opportunity to cure procedure" for mail-in and absentee ballots that voters have filled out incompletely or incorrectly.

45. In that case, the Secretary of the Commonwealth *opposed* the relief sought by the Pennsylvania Democratic Party, arguing that "so long as a voter follows the requisite voting procedures, he or she 'will have equally effective power to select the representative of his or her choice.'" *Pa. Democratic Party*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809). Moreover, the Secretary noted that logistical policy decisions implicated in a cure procedure are more properly addressed by the Legislature, not the Courts. *Id.*

46. The Supreme Court unanimously agreed. It held 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.* It further noted that "although the Election Code provides the procedures for casting and counting a vote by mail [ballot], it does not provide for the 'notice and opportunity to cure' procedure sought by the Petitioner." *Id.*

47. Importantly, the Supreme Court further agreed that "the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk [of a voter having his or her ballot rejected due to minor errors] is one best suited for the Legislature." *Id.* It reasoned that the Legislature was best positioned to resolve the "open policy questions" attendant with a notice and opportunity to cure procedure, 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.*

C. The Election Code Provides Only a Limited Notice and Opportunity to Cure, and Governor Wolf Recently Vetoed an Expansion of Ballot Curing.

48. The General Assembly has addressed cure procedures and has provided only a limited opportunity for voters to cure a non-compliant mail-in or absentee ballot.

49. In particular, the Election Code currently provides a cure procedure in only one circumstance: "[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified." *See* 25 P.S. § 3146.8(h).

50. This procedure provides that if proof of a voter's identification is received and verified prior to the sixth day following the election, the Board shall canvass the absentee or mail-in ballot. *Id.* § 3146.8(h)(2).

51. No other cure procedure exists in the Election Code.

52. After *Pa. Democratic Party* was decided, the Legislature considered and even passed legislation requiring a cure procedure for non-compliant mail-in and absentee ballots. *See* House Bill 1300, Printer's Number 1869, § 1308(g)(2)(iv), (v) (2021).

53. Governor Wolf vetoed House Bill 1300.

54. As a result, the Election Code remains as it existed in 2020 when *Pa. Democratic Party* was decided: without a cure procedure for absentee or mail-in ballots that lack a required signature or secrecy envelope.

55. The Secretary of the Commonwealth has acknowledged this fact, providing in its answer to "Frequently Asked Questions":

> **How do I know if my ballot was accepted or counted?**
> Under current Pennsylvania law, your mail-in ballot can't be opened until Election Day. Therefore, **if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election.** Still, as long as you followed all the instructions and mailed your completed, signed, dated, and sealed in the inner secrecy envelope, ballot by Election Day, you don't have to worry.

Pennsylvania Department of State, *Mail and Absentee Ballot*, *at* https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx (emphasis added).

D. Boards Are Not Free to Create Their Own Cure Procedures.

56. Although *Pa. Democratic Party* answered the question of whether the Court could *require* the Boards to implement a notice and opportunity to cure provision, the answer of whether Boards were free to create their own such policies is equally clear under Pennsylvania law.

57. Under the Election Code, the Boards "shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act." 25 P.S. § 2642.

58. Section 2642 enumerates several duties the Boards must perform. *See id.* § 2642(a)–(p).

59. Notably absent from the list is the development and implementation of cure procedures.

60. In fact, § 2642 makes clear that the Boards lack the authority to implement their own cure procedures.

61. For example, Boards are required to "instruct election officers in their duties … and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and **uniformly** conducted." *Id.* § 2642(g) (emphasis added).

62. Further, the limited rulemaking authority granted to the Boards does not extend to cure procedures.

63. Rather, Boards are authorized only "[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." *Id.* § 2642(f); *accord PG Publ. Co. v. Aichele*, 902 F. Supp. 2d 724, 761 (W.D. Pa. 2012) (holding that § 2642(f) "extends only to the promulgation of rules that are 'not inconsistent with law.'").

64. Cure procedures adopted by Boards are "inconsistent with law" because the Election Code spells out the limited availability of such procedures and does not authorize Boards to expand them. *See, e.g.*, *Pa. Democratic Party*, 238 A.3d at 374.

E. Nevertheless, Some Boards Provide Notice and Opportunities to Cure Defective Absentee or Mail-In Ballots.

65. Publicly available information and investigation have revealed that some Boards allow voters to "cure" noncompliant ballots, following protocols of their own design.

66. For example, in 2020, during the course of an appeal regarding its response to a Right to Know Law request, the Bucks County Board of Elections admitted that it implemented the following "cure" protocol which included sending postcards to the voters and allowing voters to sign and date their ballot envelope:

> Generally speaking, we receive mail-in/absentee ballots during the election season, for those missing a signature or date, we allow them to be "cured." BOE sends a postcard out to voters on ballots needing to be cured. Last year's version is attached. We send those postcards out up to the day before the election. We also send our list of voters with problems to the parties if they request them. We update the list each day to allow the parties to contact them on election day if necessary. To cure ballots, voters travel to BOE and either sign or date their ballots and then resubmit them to the BOE. If a voter is unable to cure the problematic ballot, they can file a provisional ballot at their poll on election day. Any cured mailed-in/absentee ballots received at 8 PM on election day are not accepted.

See Email from Daniel D. Grieser, dated August 1, 2022, and a copy of the postcard used by Bucks County is attached as **Exhibit A**.

67. Bucks County also contacted both political parties and forwarded the list of voters it had sent the postcard to in the event either party wished to reach out to the voters in order to assist them in curing their ballot.

68. Similarly, the Montgomery County Board of Elections implemented its own protocol to contact voters and allow for them to cure ballots in the 2020 General Election.

69. Its protocol included emailing certain voters to alert them of the defect or defects in their absentee or mail-in ballot. Montgomery County Board of Elections workers also attempted to speak to such voters utilizing a script. The Montgomery County Board of Elections then afforded such voters the opportunities that included but were not limited to: coming to the Board of Elections' office to "correct an incomplete declaration;" canceling their absentee or mail-in ballot and replacing it

in person; or canceling their absentee or mail-in ballot and replacing it by email using a form on the Montgomery County Board of Elections website. *See* Montgomery County Right to Know Law Response, attached as **Exhibit B** (October 27, 2020 email from Sarah Batipps (pp. 24-25).

70. Upon information and belief, the Philadelphia Board has implemented its own cure procedure, which includes providing information that voters' mail-in or absentee ballot will not count because it was returned without a signature on the declaration envelope or because the Philadelphia Board determined the ballot lacks a secrecy envelope without opening the declaration envelope. Voters whose ballots would be canceled for these defects were instructed that they could vote by provisional ballot or request a replacement ballot at a satellite election office. *See* Office of Philadelphia City Commissioners, *Cancelled Ballot Notification Information*, *at* https:/www.philadelphiavotes.com/en/home/item/1873-cancelled_ballot_notification_info (as of November 1, 2020), a copy of which is attached as **Exhibit C.**

71. Still other counties have previously opined that curing is not permissible under the Election Code, but nevertheless have agreed to begin implementing cure procedures in future elections.

72. For example, the solicitor for the Northampton County Board of Elections stated that Northampton's solicitor had opined that "we are prohibited

from contacting voters: to cure defective ballots, such as those which are missing the secrecy envelope." *See* **Exhibit D** (October 6, 2020 Amy Cozze email, p. 35).

73. But in conjunction with a stipulated settlement agreement reached in *Bausch v. Lehigh County Board of Elections, et al.* in the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 5:22-cv-02111, the Northampton County Board of Elections agreed that for future elections, it would:

- Include messaging to Northampton County voters emphasizing the importance of providing contact information including a notice on the Northampton County Voter Registration website;

- Provide notice to a voter who returns mail-in ballots and absentee ballots without a secrecy envelope (known as "Naked Ballots"); and

- Provide the names of all voters whose Naked Ballots are discovered prior to 8:00 p.m. on Election Day to the party and/or candidate representative(s) who are on-site during pre-canvassing so that the party representative(s) can notify the voters.

See Northampton County Board of Elections Stipulated Settlement Agreement, attached hereto as **Exhibit E.**

74. The Lehigh County Board of Elections entered into a similar agreement, which included additional obligations:

- Explore in good faith the acquisition of a ballot sorter that has the capability to either weigh return ballots or measure their thickness so that voters can be notified of possible Naked Ballots. If feasible, such a ballot sorter shall be purchased and in operation as soon as possible;

- Explore in good faith the legality of the Office notifying voters if, upon receipt of their ballot, the Office believes (without opening or tampering with the envelope or the ballot) that the voter may have submitted a Naked Ballot. If feasible, this practice shall be implemented in advance of the November 2022 General Election.

See Lehigh County Board of Elections Stipulated Settlement Agreement, attached hereto as **Exhibit F.**

75. The Acting Secretary was a party in the *Bausch* litigation, and upon information and belief, was made aware of the Stipulated Settlement Agreements involving the Northampton and Lehigh Boards, but has taken no action to stop the unauthorized cure procedures.

76. The Stipulated Settlement Agreements involving the Northampton and Lehigh County Boards run afoul not only of Pennsylvania law, but also the Secretary's acknowledgment that "if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election." Pennsylvania Department of State, *Mail and Absentee Ballot*, *at* https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx. The Secretary was a party in the *Bausch* action in which the Stipulated Settlement Agreements were reached, but was not a party to the Stipulated Settlement Agreements.

77. Meanwhile, other Boards do not allow for any notice and opportunity to cure non-compliant ballots.

78. Some Boards are transparent and explicit in their adherence to the Election Code and the Supreme Court's holding in *Pa. Democratic Party*. For example, the Lancaster Board provides on its website, stating in relevant part:

> Once a ballot has been recorded as received by the County, there is not a legal procedure for the County to return it to the voter or for the voter to alter it for any reason.

Lancaster County, *Frequently Asked Questions About Mail-in Ballots*, *at* https://www.co.lancaster.pa.us/1351/FAQs-of-MAIL-IN-BALLOTS.

79. Moreover, communications among the Directors of the Boards of Elections reveal that several other Boards have not provided any opportunity for voters to cure non-compliant absentee or mail-in ballots.

80. For example, the Executive Director of the Franklin County Board of Elections noted in an email:

> I know that voters are not entitled to notice and an opportunity cure minor defects resulting from failure to comply with statutory requirements for vote by mail but I am curious if any counties are planning on reaching out to voters by email, phone or mail whenever a defect is detected.

See **Exhibit G** (October 6, 2020 email from Jean C. Byers, p. 34).

81. Other Boards have not implemented cure protocols, including the Mifflin County Board of Elections, the Wyoming County Board of Elections, and the Allegheny County Board of Elections.

82. Thus, whether voters who cast a non-compliant mail-in ballot will be afforded an opportunity to cure the defect depends entirely on the county in which they reside. In other words, mail-in and absentee ballots with identical defects are receiving unequal treatment based solely on the voter's residency.

83. Moreover, the likelihood of the voter receiving notice of his or her non-compliant ballot depends not only on the voter's county of residence, but also whether that voter is registered with a political party, when the ballot is returned to the Board, and whether "time allows" for some Boards to provide such notice.

84. Further, the permissible methods of cure vary even across those counties which afford voters the opportunity to cure.

85. The result is a lack of transparency, unequal treatment of otherwise identical ballots based upon the county in which the voter resides, and an erosion of public trust and confidence in the integrity of Pennsylvania's elections.

COUNT I

DECLARATORY JUDGMENT THAT UNDER PENNSYLVANIA LAW, THE BOARDS ARE PROHIBITED FROM DEVELOPING AND IMPLEMENTING CURE PROCEDURES NOT EXPRESSLY CREATED BY THE GENERAL ASSEMBLY

86. Petitioners incorporate by reference all preceding paragraphs of this Petition as if fully set forth herein.

87. The Election Code does not set forth a procedure by which Boards are permitted to provide electors with notice and an opportunity to cure their mail-in or absentee ballots that fail to comply with 25 Pa. C.S. §§ 3146.6(a) or 3150.16(a).

88. The Pennsylvania Supreme Court agrees, having already made clear that the Election Code "does not provide for [a] 'notice and opportunity to cure' procedure" outside narrow circumstances and that "the decision to provide a 'notice and opportunity to cure' procedure to alleviate the risk [of minor errors causing a ballot to be rejected] is one best suited for the Legislature." *Pa. Democratic Party*, 238 A.3d at 374.

89. Since *Pa. Democratic Party*, the Legislature has not enacted any law allowing for a cure procedure.

90. The Boards have only limited rulemaking authority under the Election Code.

91. To the extent certain counties have developed and implemented cure procedures, such are "inconsistent with law," and are thus void *ab initio*. *See Bank of New York Mellon v. Johnson*, 121 A.3d 1056, 1060 (Pa. Super. 2015) ("When a prothonotary enters judgment without authority, that judgment is *void ab initio*.").

92. The decision of some Boards to develop and implement their own cure procedures without authorization under the Election Code is unlawful.

WHEREFORE, Petitioners respectfully request this Honorable Court declare that the development and implementation of cure procedures by Boards violates Pennsylvania law and is prohibited.

COUNT II

DECLARATORY JUDGMENT THAT ADOPTION OF ANY CURE PROCEDURES FOR FEDERAL ELECTIONS NOT EXPRESSLY AUTHORIZED BY THE GENERAL ASSEMBLY VIOLATES THE ELECTIONS CLAUSE OF THE UNITED STATES CONSTITUTION

93. Petitioners incorporate by reference all preceding paragraphs of this Petition as if fully set forth herein.

94. The Elections Clause of the United States Constitution directs: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1.

95. Whether, and under what circumstances, to provide voters notice and an opportunity to cure non-compliant mail-in and absentee ballots cast in federal elections are issues of the "Manner" in which such elections are conducted and, thus, are entrusted to the Legislature's exclusive authority. *See id.*; *see also, e.g.*, *Smiley v. Holm*, 285 U.S. 355, 373 (1982).

96. Accordingly, neither Boards nor any other organ or instrumentality of the State government may regulate that question. *See* U.S. CONST. art. I, § 4, cl. 1; *Smiley*, 285 U.S. at 373.

WHEREFORE, Petitioners respectfully request this Honorable Court declare that any adoption or implementation of cure procedures for federal elections other than those expressly authorized by the General Assembly violates the Elections Clause of the United States Constitution.

COUNT III

INJUNCTION PROHIBITING BOARDS FROM DEVELOPING OR IMPLEMENTING CURE PROCEDURES

97. Petitioners incorporate by reference all preceding paragraphs of this Petition as if fully set forth herein.

98. Because the development and implementation by some Boards of cure procedures is inconsistent with Pennsylvania law, and because the Court lacks the power to require Boards to implement a cure procedure, the practice must be enjoined statewide.

99. A party seeking a permanent injunction must establish three elements: "(1) a clear right to relief; (2) that an injunction is necessary to avoid an injury that cannot be compensated by damages; and (3) that a greater injury will result from refusing the injunction." *Mazin v. Bureau of Professionals Occupational Affairs*, 950 A.2d 382, 389 (Pa. Commw. 2008).

100. Petitioners have a clear right to relief: the Election Code provides a cure procedure only with respect to proof of identity, not for defects under 25 Pa. C.S. §§ 3146.6(a) and 3150.16(a). Moreover, the varied approaches taken by the Boards in deciding whether to implement a cure procedure, and if so, the particulars of same, unquestionably prevents voters in Pennsylvania from voting on equal terms.

101. The varied procedures (or absence of same) have materially affected the manner Pennsylvania voters are able to exercise their right to vote by absentee or mail-in ballot.

102. Violations which affect voting rights cannot be compensated by damages. *See Kuznik v. Westmoreland Cty. Bd. of Com'rs*, 902 A.2d 476 (Pa. 2006).

103. The balancing of harms favors granting injunctive relief, as the alternative is to allow the usurpation by some Boards of the exclusive legislative power held by the General Assembly to persist.

WHEREFORE, Petitioners respectfully request this Honorable Court issue a permanent injunction prohibiting the Boards from developing and implementing cure procedures and for the Acting Secretary to take no action inconsistent with such permanent injunction.

Respectfully submitted,

Dated: September 1, 2022

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher
PA I.D. #37950
Russell D. Giancola
PA. I.D. #200058
GALLAGHER GIANCOLA LLC
436 Seventh Avenue, 31st Floor
Pittsburgh, PA 15219
Phone: (412) 717-1900
kag@glawfirm.com
rdg@glawfirm.com

Thomas W. King, III
Thomas E. Breth
DILLON, McCANDLESS, KING,
COULTER & GRAHAM, LLP
128 W. Cunningham St.
Butler, PA 16001
Phone: (724) 283.2200
tking@dmkcg.com
tbreth@dmkcg.com

Counsel for Petitioners

EXHIBIT A

From:	Grieser, Daniel D.
To:	Brian Adrian
Cc:	Jennifer Pepmeyer; Dayoub, Ashley; Kathleen Gallagher
Subject:	RE: Bucks County filings
Date:	Monday, August 1, 2022 11:47:35 AM
Attachments:	image001.png Curing Postcard Side 1.docx Curing Postcard Side 2 - 2021.doc RNC responsive emails.pdf

Brian, we are still working through the emails. Unfortunately, my computer crashed halfway through, so I had to start over.

Below is a summary of our "curing process"

Generally speaking, we receive mail in/absentee ballots during the election season, for those missing a signature or date, we allow them to be "cured." BOE sends a postcard out to voters on ballots needing to be cured. Last year's version is attached. We send those postcards out up to the day before the election. We also send our list of voters with problems to the parties if they request them. We update the list each day to allow the parties to contact them on election day if necessary. To cure ballots, voters travel to BOE and either sign or date their ballots and then resubmit them to the BOE. If a voter is unable to cure the problematic ballot, they can file a provisional ballot at their poll on election day. Any cured mailed-in/absentee ballots received after 8 PM on election day are not accepted.

I have also attached the only emails we have that regard "curing."

The remaining emails I am reviewing are DOS guidance regarding the election in general and our BOE's response, if any. There is several hundred to go through. If you are only concerned about curing, these emails are not particularly helpful. Please clarify is there is something specific you are looking for. If it is easier, I am free for a phone call as well – Dan.

County of Bucks
Board of Elections
55 East Court St
Doylestown PA 18901

OFFICIAL ELECTION MAIL
Authorized by the U.S. Postal Service

County of Bucks
Board of Elections
55 East Court St
Doylestown PA 18901

OFFICIAL ELECTION MAIL
Authorized by the U.S. Postal Service

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OFFICIAL ELECTION MAIL
Authorized by the U.S. Postal Service

NOTICE: YOU FAILED TO SIGN AND/OR DATE YOUR MAILED BALLOT.

PLEASE CONTACT THE BUCKS COUNTY BOARD OF ELECTIONS OFFICE AS SOON AS POSSIBLE TO REMEDY THIS. BALLOTS MUST BE CURED BY 8:00 PM ON ELECTION DAY IN ORDER TO COUNT. IF YOU ARE UNABLE TO CORRECT THIS YOU MAY VOTE BY PROVISIONAL BALLOT AT YOUR POLLING PLACE.

CALL 215-348-6154 FOR MORE INFORMATION
OFFICE HOURS ARE 8:00-5:00, M-F.

NOTICE: YOU FAILED TO SIGN AND/OR DATE YOUR MAILED BALLOT.

PLEASE CONTACT THE BUCKS COUNTY BOARD OF ELECTIONS OFFICE AS SOON AS POSSIBLE TO REMEDY THIS. BALLOTS MUST BE CURED BY 8:00 PM ON ELECTION DAY IN ORDER TO COUNT. IF YOU ARE UNABLE TO CORRECT THIS YOU MAY VOTE BY PROVISIONAL BALLOT AT YOUR POLLING PLACE.

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CALL 215-348-6154 FOR MORE INFORMATION
OFFICE HOURS ARE 8:00-5:00, M-F.

EXHIBIT B

From: Benitz, Caroline
To: Batipps, Sarah; Piening, Sarah; Dean, Francis
Subject: Re: Montgomery County Voter Services
Date: Wednesday, October 28, 2020 9:21:50 AM

Unfortunately I'm not aware of any to refer them to you. Frank or Sarah, do you know a better answer to this question?

From: Batipps, Sarah <SBatipps@montcopa.org>
Sent: Wednesday, October 28, 2020 9:12 AM
To: Benitz, Caroline <cbenitz@montcopa.org>; Piening, Sarah <SPiening2@montcopa.org>
Subject: RE: Montgomery County Voter Services

Right, I have that understanding, the issue is that the person is physically disabled and cannot appear in person to cure the ballot or to cast a provisional vote.

I know that it is not the county issue that the person did not complete the ballot correctly, but are there any community resources/agencies that we could refer them too as far as assistance in getting to the polls?

From: Benitz, Caroline <cbenitz@montcopa.org>
Sent: Wednesday, October 28, 2020 9:09 AM
To: Batipps, Sarah <SBatipps@montcopa.org>; Piening, Sarah <SPiening2@montcopa.org>
Subject: Re: Montgomery County Voter Services

Hi Sarah,
The option would be us mailing them the form, but at this point we all know it wouldn't arrive in time for them to return and get a new ballot sent to them. Please also tell voters they can vote provisionally on election day.

From: Batipps, Sarah <SBatipps@montcopa.org>
Sent: Tuesday, October 27, 2020 5:58 PM
To: Piening, Sarah <SPiening2@montcopa.org>; Benitz, Caroline <cbenitz@montcopa.org>
Subject: FW: Montgomery County Voter Services

Good Evening Ladies

I am reaching out to you as I don't have any other direct contacts in Voters. I am coordinating the call backs to voters who submitted a ballots with errors in an attempt to cure the problem. I am working with Tom Bonner on this, and he sends me the spreadsheet and has provided scripted response to the various issues.

However, we have had a few voters who cannot cure their ballot with the options that we have been directed to provide them:

- Physically coming to HSC to correct an incomplete declaration
- completing a cancellation and replace in person, or
- cancellation and replace by email using the form on voter services website.

Are there any alternatives for those without electronic means of communication and who are disabled and cannot appear in person to cure their ballot?

One Voter in particular has been calling quite distressed about how to proceed, can you help us?

Ballot # 110832073 [redacted]

Thank you,

Sarah Batipps

Sarah Batipps, MSS

Performance and Planning Specialist
Office of Performance and Planning
Department of Health and Human Services
Office: 610-278-3013
Cell: 610-724-8926

Montgomery County
Department of
Health and Human Services
Office of Performance & Planning

From: Applegate, Christina <CApplegate@montcopa.org>
Sent: Tuesday, October 27, 2020 5:48 PM
To: Batipps, Sarah <SBatipps@montcopa.org>
Subject: RE: Montgomery County Voter Services

Can we have someone from voter services call [redacted] with another option? I spoke with her last night and she was very upset because she cannot come to Norristown nor does she have email. She called me several times today crying.

EXHIBIT C

Presidential General Election
11/3/2020
Polls open 7am-8pm.

1 DAYS
20 HRS 45 MINS

Election Calendar

11/ 3/2020
Last day for County Boards of Elections to receive voted mail-in and civilian absentee ballots

11/ 3/2020
GENERAL ELECTION

11/ 3/2020
24-Hour Reporting - Daily Reporting Ends

11/ 4/2020
First day to REGISTER after November election

11/10/2020
Last day for County Boards of Elections to receive voted military and overseas absentee ballots

11/23/2020
Thirty Day Post-Election - Cycle 6 Reporting Period Closes

Read more

Cancelled Ballot Notification Information

Voters who have received a notification that their ballot was cancelled may fall into one of the following three categories:

- CANC – NO SIGNATURE - Voter's ballot was returned without a signature on the declaration envelope
- CANC – VOTE CANCELLED - Voter's ballot was determined to lack a secrecy envelope without opening the declaration envelope
- CANC - UNDELIVERABLE - Voter's ballot was returned by the USPS to the County Board of Elections

Voters whose ballots have been cancelled can vote by provisional ballot on Election Day; alternatively they may request a replacement ballot at a satellite election office through 8:00 PM on Election Day.

Información sobre el Aviso de Boleta Cancelada

Los votantes que hayan recibido un aviso de que su boleta fue cancelada pueden integrar una de las tres categorías siguientes:

- CANCELACIÓN-FALTA DE FIRMA: la boleta del votante se envió sin una firma en el sobre de declaración.
- CANCELACIÓN-VOTO CANCELADO: se determinó, sin abrir el sobre de declaración, que la boleta del votante nocontenía el sobre secreto.
- CANCELACIÓN-IMPOSIBILIDAD DE ENTREGA: USPS devolvió la boleta del votante a la Junta Electoral del Condado.

Los votantes cuyas boletas hayan sido canceladas pueden votar mediante una boleta provisional el Día de la Elección; alternativamente, pueden solicitar una boleta electoral de reemplazo en una oficina electoral satélite hasta las 8:00 p. m. del Día de la Elección.

Tweet

EXHIBIT D

From: Powell, Pamela via PA County Election Directors
To: PA County Election Directors
Subject: [PA County Election Directors] RE: [EXTERNAL]Naked Ballots & No Signature on Declaration Envelope
Date: Tuesday, October 6, 2020 4:29:33 PM

I thought DOS stated something somewhere that we weren't supposed to contact voters regarding the mail-ins/absentees? Anyone else vaguely remembering this?

Kind Regards,

Pam

Pamela Powell
Director of Elections & Voter Registration
Mifflin County
20 North Wayne Street
Lewistown, PA 17044
(717) 248-6571 ext. 5444

From: Amy Cozze via PA County Election Directors
<paelectiondirectors+acozze_at_northamptoncounty.org@gaggle.email>
Sent: Tuesday, October 6, 2020 1:22 PM
To: 'PA County Election Directors' <paelectiondirectors@gaggle.email>
Subject: [PA County Election Directors] RE: [EXTERNAL]Naked Ballots & No Signature on Declaration Envelope

Has anyone attempted to rectify ballots returned that obviously don't have the secrecy envelope included? You can see the timing marks through the return envelope. Our solicitor is of the opinion that we are prohibited from contacting voters to cure this situation – but that being said I have several hundred ballots here that are "naked" and the number is growing....

From: Clearfield County Election Office via PA County Election Directors
<paelectiondirectors+elections_at_clearfieldco.org@gaggle.email>
Sent: Tuesday, October 6, 2020 12:57 PM
To: PA County Election Directors <paelectiondirectors@gaggle.email>

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTHANN BAUSCH, MARCIA DAY DONDIEGO, JUDITH REED, RHODA EMEFA AMEDEKU, DANIEL STROHLER, SHARON STROHLER, BERNARD BOAKYE BOATENG, LORI RIEKER and LISA DANNER, Plaintiffs, v. LEHIGH COUNTY BOARD OF ELECTIONS, NORTHAMPTON COUNTY BOARD OF ELECTIONS and LEIGH M. CHAPMAN, in her capacity as Secretary of the Commonwealth of Pennsylvania Defendants.	JURY TRIAL DEMANDED Civ. No. 5:22-cv-02111

STIPULATED AGREEMENT BETWEEEN AND AMONG PLAINTIFFS, RUTHANN BAUSCH, MARCIA DAY DONDIEGO, JUDITH REED, DANIEL STROHLER, SHARON STROHLER, BERNARD BOAKYE BOATENG AND LORI REIKER, AND DEFENDANT, NORTHAMPTON COUNTY BOARD OF ELECTIONS

AND NOW, come the Plaintiffs, Ruthann Bausch, Marcia Day Dondiego, Judith Reed Daniel Strohler, Sharon Strohler, Bernard Boakye Boateng, and Lori Reiker ("Northampton Plaintiffs"), by and through their attorneys Mobilio Wood, and the Defendant, Northampton County Board of Elections, by and through its attorney Richard Eugene Santee, and hereby submit the instant Stipulated Agreement and aver as follows:

1. Plaintiffs Ruthann Bausch, Marcia Day Dondiego, and Judith Reed are among a group of 23 Democratic Northampton County voters in State Senate District 14 whose timely-submitted mail-in ballots for the May 17, 2022, election will not count because they were not placed in a "secrecy envelope" before being sent to the Election Boards.

2. Plaintiffs Daniel Strohler, Sharon Strohler, Bernard Boakye Boateng, and Lori Reiker, are among a group of 25 Democratic Northampton County voters in State Senate District 14 whose timely-mailed ballots for the May 17, 2022, election will not count because said ballots were mailed to, but not received by the Northampton County Election Office on or before May 17, 2022, at 8:00 p.m.

3. On May 31, 2022, the Northampton Plaintiffs filed a Complaint in the Eastern District of Pennsylvania alleging that the aforementioned impediments to the counting of their votes was unlawful.

4. The Northampton County Board of Elections disputes Northampton Plaintiffs' assertions with respect to the application of the law referenced in Plaintiffs' Complaint.

5. Although the parties disagree on the application of the law in this matter, the parties agree that voting is a fundamental right which all parties strive to safeguard.

6. In furtherance of that objective, and as a full and final resolution of the aforementioned matter, the parties agree as follows:

a. Plaintiffs will immediately seek the dismissal, with prejudice, of the instant litigation.

b. Defendant, Northampton County Board of Elections, will, from this date forward:

a. Include messaging to Northampton County voters emphasizing the importance of providing contact information including a notice on the Northampton County Voter Registration website;

7. The parties also agree that is in the best interests of the Northampton County Board of Elections and Northampton County voters to provide the opportunity of notice to a voter who returns mail-in ballots and absentee ballots without a secrecy envelope (known as "Naked Ballots").

8. In furtherance of that objective, the Northampton County Board of Elections shall do the following:

a. During the pre-canvass which begins on or after 7 a.m. on Election Day, the County shall provide the names of all voters whose Naked Ballots are discovered prior to 8:00 pm on Election Day to the party and/or candidate representative(s) who are on-site during pre-canvassing so that the party representative(s) can notify the voters; and

b. Explore changing the color of the secrecy envelope to something more conspicuous than white, so that the secrecy envelope stands out to the voter and is easily discernable from other materials provided to them with their mail-in ballot.

Date: 6/15/22

Matthew Mobilio

Matthew Mobilio, Esquire
Attorney for Plaintiff

Date: 6/15/22

Richard Eugene Santee, Esquire
Assistant Solicitor, Office of the Solicitor
Attorney for Northampton County
Board of Elections

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTHANN BAUSCH, MARCIA DAY DONDIEGO, JUDITH REED, RHODA EMEFA AMEDEKU, DANIEL STROHLER, SHARON STROHLER, BERNARD BOAKYE BOATENG, LORI RIEKER and LISA DANNER, Plaintiffs, v. LEHIGH COUNTY BOARD OF ELECTIONS, NORTHAMPTON COUNTY BOARD OF ELECTIONS and LEIGH M. CHAPMAN, in her capacity as Secretary of the Commonwealth of Pennsylvania Defendants.	JURY TRIAL DEMANDED Civ. No. 5:22-cv-02111

STIPULATED AGREEMENT BETWEEEN AND AMONG PLAINTIFFS, RHODA EMEFA AMEDEKU AND LISA DANNER, AND DEFENDANT, LEHIGH COUNTY BOARD OF ELECTIONS

AND NOW, come the Plaintiffs, Rhoda Emefa Amedeku and Lisa Danner ("Lehigh Plaintiffs"), by and through their attorneys Mobilio Wood, and the Defendant, Lehigh County Board of Elections, by and through its attorneys Sarah Murray and Lucas Repka, and hereby submit the instant Stipulated Agreement and aver as follows:

1. Plaintiff Rhoda Emefa Amedeku is among a group of 94 Democratic Lehigh County voters in State Senate District 14 whose timely-submitted mail-in ballots for the May 17,

2022, election will not count because it was not placed in a "secrecy envelope" before being sent to the Election Board.

2. Plaintiff Lisa Danner is among a group of 118 Democratic Lehigh County voters in State Senate District 14 whose mailed ballots for the May 17, 2022, election will not count because said ballots were mailed to the Lehigh County Election Office on or before May 17, 2022, but were not received by the Lehigh County Election Office on or before May 17, 2022, at 8:00 p.m.

3. On May 31, 2022, the Lehigh Plaintiffs filed a Complaint in the Eastern District of Pennsylvania alleging that the aforementioned impediments to the counting of their votes was unlawful.

4. Although the parties disagree on the application of the law aforesaid, the parties agree that a more robust voter education system should be established to ensure that Lehigh County voters have every opportunity to have their votes counted.

5. In furtherance of that objective, and as a full and final resolution of the aforementioned matter, the parties agree as follows:

a. Plaintiffs will immediately seek the dismissal, with prejudice, of the instant litigation.

b. Defendant, Lehigh County Board of Elections, will, from this date forward:

a. Include an insert with all outgoing mail-in ballot applications and absentee ballot applications (including permanent voter mailings) emphasizing the importance of providing contact information on the ballot application; and

b. Include messaging on the Lehigh County Voter Registration website emphasizing the importance of providing contact information on the ballot application.

6. The parties also agree that is in the best interests of the Lehigh County Board of Elections and Lehigh County voters to provide notice to a voter who returns a mail-in ballot or an absentee ballot without a secrecy envelope (known as "Naked Ballots").

7. In furtherance of that objective, the Lehigh County Voter Registration Office shall do the following:

a. During the pre-canvass, which begins on or after 7:00 am on Election Day, the Office shall notify all voters whose Naked Ballots are discovered prior to 8:00 pm on Election Day and/or provide the names of such voters to the party and/or candidate representative(s) who are on-site during pre-canvassing so that the voters can be notified;

b. Explore in good faith the acquisition of a ballot sorter that has the capability to either weigh return ballots or measure their thickness so that voters can be notified of possible Naked Ballots. If feasible, such a ballot sorter shall be purchased and in operation as soon as possible;

c. Explore in good faith the legality of the Office notifying voters if, upon receipt of their ballot, the Office believes (without opening or tampering with the envelope or the ballot) that the voter may have submitted a Naked Ballot. If feasible, this practice shall be implemented in advance of the November 2022 General Election; and

d. Explore in good faith changing the color of the secrecy envelope to something more conspicuous than white, so that the secrecy envelope stands out to the voter and is easily discernable from other materials provided to them with their mail-in or absentee ballot.

Date: June 15, 2022

By: _____
Matthew Mobilio, Esquire
Attorney for Plaintiffs

Date: June 15, 2022

By: _____
Sarah M. Murray, Esquire
Deputy County Solicitor
Attorney for Defendant Lehigh County Board of Elections

EXHIBIT G

From: Jean Byers via PA County Election Directors
To: PA County Election Directors
Subject: [PA County Election Directors] Naked Ballots & No Signature on Declaration Envelope
Date: Tuesday, October 6, 2020 12:30:59 PM

I know that voters are not entitled to notice and an opportunity to cure minor defects resulting from failure to comply with statutory requirements for vote by mail but I am curious if any counties are planning on reaching out to voters by email, phone or mail whenever a defect is detected. Thanks!

Jean C. Byers
Deputy Chief Clerk & Open Records Officer
Phone: (717) 261-3810
Fax: (717) 267-3438

YR

466

PROTHONOTARY'S OFFICE-BUTLER CO. ENTERED & FILED

2024 MAY -7 AM 10: 18

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

FAITH GENSER and FRANK MATIS,

Petitioners,

v.

BUTLER COUNTY BOARD OF ELECTIONS,

Respondent.

CIVIL DIVISION

No. 24-40116

BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL

Filed on behalf of:
Proposed Intervenor-Respondents, Republican National Committee and Republican Party of Pennsylvania

Counsel of Record for this Party

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IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

FAITH GENSER and FRANK MATIS,	:	CIVIL DIVISION
Petitioners,	:	No. 24-40116
v.	:	***ELECTION APPEAL***
BUTLER COUNTY BOARD OF ELECTIONS,	:	
Respondent.	:	

BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL

Proposed Intervenor-Respondents, the Republican National Committee and the Republican Party of Pennsylvania (collectively, "Republican Committees"), by and through their undersigned counsel, submit this Brief in Support of their Motion to Dismiss[1] Petitioners Faith Genser ("Petitioner Genser") and Frank Matis' ("Petitioner Matis") (hereinafter collectively referred to as the "Petitioners") Petition for Review in the Nature of a Statutory Appeal (the "Petition").

I. INTRODUCTION

Proposed Intervenor-Respondents support and seek to uphold free, equal, and legally compliant elections on behalf of all Pennsylvanians. For that reason, Proposed Intervenor-Respondents file this Motion to Dismiss the instant appeal which seeks to circumvent and perhaps

[1] The Republican Committees have styled the motion supported by this brief as a Motion to Dismiss based on the Pennsylvania Commonwealth Court's decision in *Schimes v. City of Scranton Non-Uniform Pension Bd.*, No. 1526 C.D. 2018, 2019 Pa. Commw. Unpub. LEXIS 438 at *9 (Pa. Commw. Aug. 1, 2019), which found that "the Pennsylvania Rules of Civil Procedure are not applicable to statutory appeals; thus, preliminary objections, the grounds for which are set forth in Pa. R.C.P. 1028, cannot be used as a vehicle for challenging such an appeal" (*citing Appeal of Borough of Churchill*, 575 A.2d 550, 553 (Pa. 1990)). *See also Barros v. City of Allentown*, No. 1592 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 466 at *7 n. 4 (Pa. Commw. Feb. 17, 2012) ("Because preliminary objections are not permitted in statutory appeals, the common pleas court erred when it dismissed Barros' appeal on the City's preliminary objections. We find this error to be harmless, where the court could have treated the preliminary objections as a motion to dismiss . . . Accordingly, and because the parties are not prejudiced as a result, we will treat our review of the common pleas court's order as though the City filed a motion to dismiss. . .").

overturn the landmark holding of the Pennsylvania Supreme Court in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), by asking this Court to do that which the Pennsylvania Supreme Court unanimously held that it cannot do: force a county board of elections to provide a cure procedure for a legally deficient mail-in ballot. The impact of such relief, if granted, would effectively throw the administration of the upcoming, highly contested General Election into chaos and erode public trust and confidence in the integrity of Pennsylvania's elections at a vital moment in the electoral history of our Nation and the Commonwealth. For these reasons, and those set forth more fully herein, such a result is not only legally untenable, it is simply wrong. Accordingly, Petitioners' Appeal should be dismissed.

II. FACTUAL BACKGROUND

Petitioners appeal from the decision of the Butler County Board of Elections (the "Board") to reject the Petitioners' mail-in ballots that did not contain the required "secrecy envelopes" in the 2024 Primary Election on April 23, 2024 (the "Primary Election") without providing Petitioners with the opportunity to cure their deficiencies by counting their unauthorized provisional ballots.

Each Petitioner cast a mail-in ballot ("the Ballots") for the Primary Election. After doing so, on April 11, 2024, Petitioner Genser received an email from the Secretary of State of the Commonwealth advising her that her mail-in ballot had been rejected due to the lack of a secrecy envelope but that she could cast a provisional ballot on Election Day ("the "Secretary's Curing Notice").[2] Petition at ¶ 11. Similarly, Petitioner Matis learned that the Board of Elections rejected his mail-in ballot prior to Election Day. Petition at ¶ 14.

[2] The Republican Committees contend that the Secretary's Curing Notice is improper in multiple respects. However, as the Secretary is not a party to this Appeal, and because the Court and the legality of the Curing Notice is not relevant to the relief sought, the Republican Committees are not raising a challenge to the same at this juncture. The Republican Committees, however, reserve the right to raise such a challenge at the appropriate time and are prepared to present the basis for that challenge in this matter should the Court request it.

It is unclear at this time how the Board determined that Petitioners' Ballots lacked the required secrecy envelope. Upon information and belief, the Republican Committees believe that upon receipt of all mail-in ballots, the Board weighed the mail-in ballot return envelopes to determine whether they included a secrecy envelope. No other method appears to be available at the time ballots are received, as the Election Code prohibits boards of elections from opening mail-in ballot return envelopes until 7:00 a.m. on Election Day, 25 P.S. § 3146.8(g)(1.1), and requires boards of elections to "keep" (unopened) return envelopes "safely ... in sealed or locked containers" until then. *Id.* at § 3146.8(a). Thus, until the sealed ballot return envelopes are opened on Election Day, there can be no actual determination as to whether or not the secrecy envelope is present. It further appears likely that as part of the 2024 Primary Election, if the Board suspected that a secrecy ballot was missing based on the returned ballot's weight, it included a notation to that effect in the SURE system.

Thereafter, a "Bureau official" contacted Mr. Matis via a telephone call and recommended that Mr. Matis submit a provisional ballot on Election Day, which he did. Petition at ¶ 14. Both Petitioners' Ballots were rejected because they failed to include the inner secrecy envelope, not due to any inaccuracies on the outer return envelope, which contains the voter declaration and is visible to election officials before the return envelope is opened. Petition at ¶ 2. Subsequently, on April 26, 2024, the Board notified Petitioners that their provisional ballots had been rejected. Petition at ¶ 17. As set forth in footnote 3 below, the Board adopted a limited curing policy for the

Primary Election; however, that policy does not contemplate curing by means of a voter casting a provisional ballot.[3]

Under the Pennsylvania Election Code, voters casting an absentee or mail-in ballot are required to: (1) place their marked ballots in a sealed envelope ("secrecy envelope"), (2) place the secrecy envelope inside a second envelope, which is marked with a "declaration of the elector" form (the "Declaration Envelope"), (3) "fill out" and "sign the declaration printed on such envelope," and (4) return the ballot by 8:00 p.m. on Election Day. 25 P.S. § 3146.6(a); § 3150.16(a). If a voter fails to comply with any of these requirements, the voter's absentee or mail-in ballot must be set aside and not counted. 25 P.S. § 3146.8.

It is undisputed that the Petitioners' mail-in ballots did not include the required secrecy envelope in accordance with the Election Code. Petition at ¶ 2. Nonetheless, Petitioners now contend that the Board's refusal to count their provisional ballots violated the Pennsylvania Election Code and the Free and Equal Elections clause of the Pennsylvania Constitution. Petition at ¶ 2. Petitioners' contention is erroneous.

As more fully set forth below, the Petition must be denied.

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[3] In conjunction with the 2024 Primary Election, the Board adopted a Ballot Curing Policy that allows registered voters the opportunity to cure ***certain*** immaterial deficiencies on their mail-in ballot Declaration Envelopes. *See,* https://www.butlercountypa.gov/DocumentCenter/View/8405/Butler-County-Ballot-Curing-Policy-Effective-5223 (the "Curing Policy") (emphasis added). The Curing Policy ***does not provide*** an opportunity to cure a deficiency related to the failure to include a ***secrecy envelope*** with a mail-in ballot. To the contrary, the Curing Policy only defines a "Declaration Envelope" as the larger of the two envelopes that are mailed to each absentee or mail-in elector, which contains a declaration which the voter must sign. The Curing Policy permits the party committees to contact the voter who submitted a Declaration Envelope, and states that the voter is permitted to appear at the bureau to remedy such a Deficiency by means of an attestation. *See,* Curing Policy at § III(C.). It does not authorize casting a provisional ballot as a cure for any Deficiency. *See id.* The Curing Policy also defines "Deficiency" as "a defect on the Declaration Envelope recognized by the Department of State as curable by applicable law, i.e. a lack of signature." It is telling that the Petitioners' deficiencies in their mail-in ballots — the failure to include a secrecy envelope — is not a Deficiency as defined by the Curing Policy because it is not a defect on the Declaration Envelope. Accordingly, a plain reading of the Curing Policy does not permit a voter who casts a mail-in ballot without a secrecy envelope to cure the deficiency via a provisional ballot.

III. LEGAL STANDARD

A Court of Common Pleas can reverse the decision of a county board of elections "only for an abuse of discretion or error of law." *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1070 (Pa. 2020) (citing *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952)); *see also*, 25 P.S. § 3157(b) (confining Court of Common Pleas' review of decision of board of elections to matters involving "fraud or error"). In reviewing the decision of a board of elections, "[i]t is not the function of [the trial] court to substitute its judgment for that of the board's. . . [the trial court is] bound to uphold the decision of the board unless it is in violation of the law." *Lower Saucon Twp. v. Election Bd. of Northampton Cty.*, 27 Pa. D. & C.3d 387, 393 (Northampton C.P. 1983).

IV. ARGUMENT

As the Pennsylvania Supreme Court Held in *Pa. Democratic Party v. Boockvar*, Courts Cannot Force County Boards of Elections to Adopt Notice and Cure Procedures.

Pennsylvania law is clear that "a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope ***must be disqualified***." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020). "[T]he secrecy provision language in § 3150.16(a) [of the Election Code] is ***mandatory*** and the failure to comply with such requisite renders the ballot invalid. *Id.* (emphasis added). In light of the Pennsylvania Supreme Court's holding in *Pa. Democratic Party v. Boockvar*, the Board's rejection of the Ballots without the secrecy envelope was not only proper; it was the only decision the Board could make.

Section 2641(a) of the Election Code, 25 P.S. § 2641, vests county boards of elections with "jurisdiction over the conduct of primaries and elections in such count(ies) in accordance with the provisions of the [Election Code]." *Id.* at § 2641(a). The generalized powers and duties of the county boards of elections are set forth in § 2642 of the Election Code. 25 P.S. § 2642. Those

powers, however, are not without limitation. Indeed, "[t]he duties of a board of elections under the Election Code are ministerial and allow for no exercises of discretion." *In Re Municipal Reapportionment of Township of Haverford*, 873 A.2d 821, 833 n. 18 (Pa. Commw. 2005), appeal denied, 897 A.2d 462 (Pa. 2006). In short, the county boards of elections are required to follow the provisions of the Election Code and attendant case law.

Accordingly, in light of the Pennsylvania Supreme Court's holding in *Pa. Democratic Party v. Boockvar*, there can be no dispute that the Board's refusal to count the Ballots was proper. Petitioners, however, attempt to circumvent the legality of the Board's decision by asserting that they should have been afforded the opportunity to "cure" their defective ballots by casting provisional ballots. Petition at ¶ 6. Petitioners' assertion in this regard likewise fails as a matter of law.

There is no absolute wholesale right to cure a defective mail-in ballot in Pennsylvania. To the contrary, the Election Code only authorizes boards of elections to cure a mail-in ballot in one narrow circumstance, specifically, "[f]or those absentee or mail-in ballots for which proof of identification has not been received or could not be verified." 25 P.S. § 3146.8(b). In that circumstance, the voter may cure only the lack of identification, not any other defect. *Id.*

The lack of a notice and cure procedure for any deficiency in a mail-in ballot beyond the narrow specific authorization in the Election Code was specifically addressed by the Pennsylvania Supreme Court in *Pa. Democratic Party v. Boockvar*. There, citing the Free and Equal Elections Clause, PA. CONST. art. I, § 5, and the Supreme Court's "broad authority to craft meaningful remedies," *League of Women Voters v. Commonwealth,* 178 A.3d 737, 822 (Pa. 2018), the Pennsylvania Democratic Party argued that the Supreme Court should require county boards of elections to implement a "notice and opportunity to cure procedure" for mail-in and absentee

ballots that voters have filled out incompletely or incorrectly. The Supreme Court specifically rejected that request. In doing so, the Supreme Court unanimously held that "the Election Code provides procedures for casting and counting a vote by mail" but does not provide for a notice and opportunity to cure procedure for a voter who fails to comply with the requirements for voting by mail or absentee. *Id.* at 374. The Supreme Court further stated that "[t]o the extent that a voter is at risk of having his or her ballot rejected" due to their failure to comply with the Election Code's signature and secrecy ballot requirements for mail-in and absentee ballots, "the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk is one best suited for the Legislature." *Id.* The Supreme Court "express[ed] this agreement particularly in light of the open policy questions attendant to that decision, 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, all of which are best left to the legislative branch of Pennsylvania's government." *Id.*

The Supreme Court's holding in this regard is well founded as it is settled law that "[t]he power to regulate elections is a legislative one and has been exercised by the General Assembly since the foundation of the government." *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v. Barlow*, 60 Pa. 54 (1869)); *see also, Agre v. Wolf*, 284 F.Supp.3d 591, 620 (E.D. Pa. 2018) (Smith, C.J.) ("The process for crafting procedural regulations is textually committed to state legislatures and to Congress.").

At its core, the Petition effectively seeks to have this Court do that which the Pennsylvania Supreme Court has held it cannot do: rewrite the Election Code to force the Board to provide a cure for a mail-in ballot that does not contain a secrecy envelope. This Court cannot take such unilateral action to rewrite the law, as that would overstep the bounds of its authority. *See Robinson*

Twp. v. Commonwealth, 147 A.3d 536, 583 (Pa. 2016); *Cali v. Phila.*, 177 A.2d 824, 835 (Pa. 1962). "[E]diting a statute" by the Court "would amount to judicial legislation." *State Bd. of Chiropractic Exam'rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971). For the Court to assume "the power to write legislation would upset the delicate balance in our tripartite system of government." *Pap's A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998), rev'd on other grounds, 529 U.S. 277 (2000). Moreover, such a result would directly contradict the well-settled holding of the highest court in the Commonwealth on this exact issue.

Accordingly, the Pennsylvania Supreme Court's unanimous decision in *Pa. Democratic Party v. Boockvar* clearly and unequivocally establishes that the inclusion of a secrecy envelope with a mail-in ballot is mandatory, and the decision of whether or not to permit a party to cure a deficiency with a mail-in ballot must be decided by the Legislature and cannot be judicially mandated by the courts. If the Pennsylvania Supreme Court does not have the authority to require county boards of elections to afford electors the opportunity to cure their defective ballots for, *inter alia*, lack of a secrecy envelope, this Court likewise cannot do so.

V. CONCLUSION

For all of these reasons, Petitioners' Petition for Review in the Nature of a Statutory Appeal should be dismissed.

Dated: May 7, 2024

Respectfully submitted,

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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: May 7, 2024

THE GALLAGHER FIRM, LLC

Kathleen A. Gallagher by T.W. Kyle Jr.

Kathleen A. Gallagher

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the within ***BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL*** has been served on all counsel of record listed below via email this 6th day of May 2024:

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Kathleen A. Gallagher by T.W. Kirsch

Kathleen A. Gallagher

Transcript of Jonathan Marks

Date: July 23, 2024
Case: Center for Coalfield Justice, et al. -v- Washington County Board of Elections

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IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

CENTER FOR COAL FIELD JUSTICE, WASHINGTON BRANCH NAACP, BRUCE JACOBS, JEFFREY MARKS, JUNE DEVAUGHN HYTHON, ERIKA WOROBEC, SANDRA MACIOCE, KENNETH ELLIOT, and DAVID DEAN,

Plaintiffs,

v. : Case No. 2024-3953

WASHINGTON COUNTY BOARD OF ELECTIONS,

Defendant.

Deposition of JONATHAN MARKS
Harrisburg, Pennsylvania
Tuesday, July 23, 2024
10:01 a.m.

Job: 546180
Pages: 1 - 132
Transcribed by: Robert Kreb

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Deposition of JONATHAN MARKS, held at the offices of:

OFFICE OF GENERAL COUNSEL
333 Market Street, 17th Floor
Harrisburg, Pennsylvania 17101
(717) 783-6563

Pursuant to Notice, before KYLAN BARRY, Notary Public in and for PENNSYLVANIA.

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Claudia De Palma - Public interest law
Mimi Mckenzie - Public Interest Law
Marian K. Schneider, Esquire
Kate Steiker-Ginzberg, Esquire
Witold Walczak, Esquire

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C O N T E N T S

E X H I B I T S

(Retained by counsel.)

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P R O C E E D I N G S

THE VIDEOGRAPHER: Here begins media number 1 in the videotaped deposition of Jonathan Marks in the matter of Center for Coalfield Justice et al, v. Washington County Board of Elections in the Court of Common Pleas, Washington County, Pennsylvania, case number 2024-3953.

Today's date is July 23rd, 2024. And the time on the video monitor is 10:11 a.m. the videographer today is Brad Sydorick, representing Planet Depos. This video deposition is taking place at 333 Market Street on the 17th floor in Harrisburg, Pennsylvania, 17101.

Would counsel please voice identify themselves and state whom they represent?

MS. GALLAGHER: Kathleen Gallagher on behalf of the Republican National Committee and for purposes of this deposition, I'll also be asking questions on behalf of the Republican Party of Pennsylvania.

MR. BERARDINELLI: David Berardinelli for the Washington County Board of Elections.

MR. BLACK: And Martin Black from Dechert, LLP for the plaintiffs.

MS. SCHNEIDER: Marian Schneider from the

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ACLU Pennsylvania for Plaintiffs.

MS. MULLEN: Kathleen Mullen, Deputy Chief Counsel, Pennsylvania Department of State for the Witness, Deputy Secretary Marks.

THE VIDEOGRAPHER: The court reporter today is Kylan Barry, representing Planet Depos. The witness will now be sworn.

Whereupon,

JONATHAN MARKS,

being first duly sworn or affirmed to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE REPORTER: Thank you. We may begin.

EXAMINATION BY COUNSEL FOR THE DEFENDANT

BY MS. GALLAGHER:

Q Can you state your name, please?

A Yes. First name is Jonathan, J-O-N-A-T-H-A-N, last name Marks M-A-R-K-S.

Q Mr. Marks, I'm Kathy Gallagher. And we'll be asking you some questions today. Preliminarily, thank you and your counsel for being available for us. We know it was relatively short notice. Hopefully we're not going to get -- take too long, too long today and be to get you through and out of here. Could you tell us, please give us some of your

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educational background?

A So my educational background was actually a adult student, I attended Ashford University remotely in Iowa for two years. My work history since February of 2019, I've been Deputy Secretary for Elections and Commissions. Prior to that I was the commissioner for the Bureau of Commissions Elections and Legislation at the Department of State. That was from 2011 through 2019. Do you need me to go back further than that?

Q I think that would do it.

A All right.

Q And if you could tell us briefly, please, what are your duties now as Deputy Secretary of Elections and Commissions?

A So I oversee the Bureau of Elections, also the Bureau of Campaign Finance and Lobbying Disclosure, as well as the Bureau of notaries and legislation.

Q And with respect to overseeing elections, given February, 2019, you were -- you held your position when Act 77 was enacted in October of that year. Is that correct?

A I did, yes.

Q Okay. Did you have any input Deputy

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Secretary with or work with the General Assembly in the creation of Act 17?
MS. MULLEN: Objection. Go ahead.
A The Department of State did provide input on the legislation through its legislative staff.
Q And could you also tell us please, what you did, if anything, to prepare for today?
A I read a copy of the complaint and the attached appendices, also reviewed some emails the previously sent regarding the SURE status codes.
THE VIDEOGRAPHER: Sorry, I don't mean to interrupt, but I did drop out of the Zoom due to connection error, so I don't know if you want to go off the record.
MS. GALLAGHER: Yeah, let's -- yeah, we want to go on -- we'll wait.
THE VIDEOGRAPHER: All right. One minute. We we're going off the record. The time is 10:14.
(Off the record.)
THE VIDEOGRAPHER: We are back on the record. The time is 10:16.
MS. GALLAGHER: Could you read back the last question, please?
(Playback as requested.)
THE REPORTER: Were you able to hear that?

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MS. GALLAGHER: Yeah.
BY MS. GALLAGHER:
Q And Deputy Secretary Marks, did you meet with -- other than your counsel, did you meet with anyone else prior to today in preparation of your deposition?
A No, just counsel.
Q Okay. I'd like if you would -- with respect to mail-in ballots, could you walk us through the process of from, you know, applicate -- from the voter perspective?
A From the voter's perspective?
Q Uh-huh.
A Okay. So from the voter's perspective the voter must first submit an application to request a mail-in ballot. And -- well, I'll get into the permanent mail-in voter list in a minute. But you submit an application that application, you have to provide identification in the form of either your driver's license number, if you do not have a driver's license number, the last four digits of your social security number.
Submit that application to your county election office. The county election office processes that, and that involves confirming that the

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voter is a registered voter within the county, and also verifying the identify -- identification information provided by the voter. If the identification information checks out, then the county issues a mail ballot to the voter. And that process involves printing out a mailing label, essentially, that has the voter's unique information as well as a unique identifying number that is attached to the mail ballot request and attached likewise to the voter's record.
That is then mailed out to the voter. The voter, once the -- once she receives the ballot, will complete the ballot, insert the ballot in the inner secrecy envelope is the term of art most people use. It's a yellow envelope, seal that envelope, then insert that envelope into the outer declaration envelope on which is the declaration of the voter verifying where they have to affirm that they are qualified to vote in the election, and they must also sign and date the declaration envelope and then return it to the county election office.
If a county -- if a voter is on the permanent mail-in voter list --
Q Could you explain, excuse me. I don't mean --

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A Yeah.
Q -- to interrupt. If you could explain for the record what that means.
A Permanent -- so the statute calls it permanent. It's actually -- we use the term annual when we're describing it because the voter has to submit an application annually. But if the voter does that, they are entitled to receive mail-in ballots for every election in that election cycle up to actually, I believe into February.
And I forget if it's the first Monday or second Monday in February. But they're entitled to receive without having to make any additional request, a mail-in ballot for every election, they're entitled to vote in during that period of time.
Q So once the ballot is sent back in, we've -- you've gotten that far, and I apologize for interrupting you, then what's the process for the ballot?
A So the first thing the county does is they will mark it as received, and we -- our guidance is to date that, to mark the date that it was received, and then they will scan it into the SURE system, the Statewide Uniform Registry of Electors. And at that point, the ballot will be marked as received.

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

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

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

MS. MULLEN: Objection.

Q Or responsibility?

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

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

MS. MULLEN: Objection to vagueness.

MR. BLACK: Objection to form.

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

A That would be the County Board of Elections.

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

A I am, yes.

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

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

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

A That would also be the County Board of Elections.

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

MR. BLACK: Objection to form.

A It is our expectation when we issue guidance that counties will follow that guidance, but it does not have the force and effective law. If that's -- if that's your question. That's my layman's understanding of it.

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

A Yes.

Q Could you tell us please what a directive is?

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

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

MS. MULLEN: Objection.

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

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

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Q And I believe earlier you referred to something commonly referred to as a secrecy envelope.

A Correct.

Q Is that also the design or that envelope also a responsibility of Department of State?

A Yes.

Q With respect to what refer to as the declaration envelope or the outside envelope, I believe you testified that's within the secretary's authority. Does that -- what does that authority extend to with respect to the declaration envelope?

MS. MULLEN: Objection.

THE WITNESS: I'm not sure what you're asking. I mean, it's a --

BY MS. GALLAGHER:

Q Okay. Yeah, that was probably not a good way to ask it. On the -- could you tell us what appears on a declaration envelope?

A So it's the declaration of the voter essentially affirming that they're qualified to vote in the election, and that they haven't cast another ballot in the election. And then under that affirmation or perhaps next to the affirmation, depending on given county's envelope layout is an area for the voter to sign affirming that information

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and also insert a date for when they completed that.
Q And is that -- is the envelope that you've just discussed, the envelope that is mailed to the County Board of Election?
A By the voter --
Q Yes.
A -- yes.
Q The other one I would ask -- so we talked about guidance and directive. What about a regulation, what's a regulation?
A A regulation is essentially a -- it is something that an agency has been authorized to issue. And it usually accompanies a statute that for the Department of State, the best example would be the regulations related to the use of the Statewide Uniform Registry of Electors.
Q When you say -- I want to get that regulation related to the use, I just want to make sure I use your word. What do you mean by that?
A Well, it's -- so -- and those regulations sometimes cover not only the activities of, so in the example of SURE, it's not just activities of the county, but also may include activities related to the -- to SURE of the department and even outside entities that may be requesting information regarding

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or that's contained in the Statewide Uniform Registry of Electors. But it's basically a -- it's rulemaking by an agency as opposed to a statutory requirement.
Q And is there a process that a regulation goes through before it's adopted?
A There is --
MS. MULLEN: Objection.
A Sorry. There is -- there's a drafting process to my knowledge, again, not an attorney, but I believe there's public comment period typically on regulations. And then there's an independent review body that reviews proposed regulations before they're ultimately published.
Q And I think we can go back. We've covered that another way. We were talking about what happens to a ballot, it's received in the County Board of Elections, is where we dropped off. If you could walk us through that again, please.
MS. MULLEN: Objection.
A So once it's received, as I said, our guidance to county says that they date stamp it so that it's clear what date it was received and then they scan it. And that records the ballot as returned in the -- in the SURE system. And then counties must keep those ballots secure until they

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begin pre-canvassing or canvassing the ballots.
You know, in the interim, you know, they may be organizing them, you know, by precinct, for example, to prepare for the pre-canvassing. But generally once they've recorded the ballot, they are required by statute to keep those ballots securely until pre-canvassing begins.
Q And when does the pre-canvass begin?
A It cannot begin earlier than election day 7:00 a.m., I believe, on election day.
Q Okay. What occurs during the pre-canvass?
A Basically, the county election office, or the County Board of Elections will go through all of the ballots that have been submitted by voters, confirm that the information is accurate and complete. They will set aside any ballots that may have a defect at that time, the rest of the ballots ultimately will be approved. And then the outer envelope is opened exposing the secrecy envelope that contains the ballot. Those are ultimately opened and then tabulated by the Board of Elections.
Q And is there a name for the process when they're tabulated?
A Well, it's -- they're tabulated as part of the -- of the pre-canvass or the official canvas.

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Q And when does the official canvass start?
A The official canvass of all of the votes from the election starts on Friday morning, the Friday after election day.
Q Right.
A So the pre-canvass and canvass of mail-in ballots is distinct from the official canvas. I know the term is used a lot, but --
Q That's what I would --
A -- they're different --
Q -- trying to get --
A -- distinct.
Q -- trying to breaking down. Could you tell us what those differences are?
A Well, the pre-canvass and canvass of mail-in ballots applies strictly to ballots cast -- absentee or mail-in ballots cast by voters. The official canvass is actually the process of going through all of the votes cast. Those include election ballots cast at a polling place on election day, as well as mail-in ballots. It includes a little further downstream, the actual, you know, the canvass and tabulation of any military and oversea civilian ballots that may have come in up to seven days after the election.

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In the case of a -- of an absentee or mail-in ballot where the voter's ID could not be verified prior to election day, voters within six days have an opportunity to provide a valid form of ID and have those counted. So that official canvass includes all of those activities. It also includes reconciling all of the records of the counties during the -- during the election. So it's a -- it's a long tedious process to get to the end.

Q Are you familiar with the term provisional ballot?

A I am, yes.

Q And when are provisional ballots processed or canvased?

A Provisional ballots are canvased during the official canvass period.

Q Subsequent -- upon completion of the canvass process, is that what process then begins, or what is the next step in the responsibility of the Board of Elections?

A Once the official canvass has completed, the next step is the process of certifying the official election results.

Q And what does that mean?

A So the County Board of Elections, after it

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is -- it is done, all of the activities that we just talked about, will basically provide an unofficial tabulation of the votes for the election. And at that point, most counties call it their first signing, where they'll sign off, the board will sign off on the official returns, and then that starts a five-day clock within which individuals -- individual voters can request recount, for example, if they -- if they believe that any of the election results are in error for any reason. And then once that five-day clock ends, the county will sign off on the official return.

Q And with respect to the official return, so a voter in Pennsylvania, you did objection to form here, can either vote at the polls on the machine, or by mail-in ballot. Correct? Are they reported differently or are they reported in the same manner?

MS. MULLEN: Objection.

A I'm not sure what you mean by reported.

Q Are the results of the election -- of any election on the -- in the certification process, does the totals, are they broken down by how the voter cast a ballot?

A They are, yes.

Q Okay. Could you -- and how is that?

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A So -- and you can see this on our website, so it'll be broken down by election day votes cast for candidates, votes cast by mail, as well as votes cast by provisional ballot.

Q With respect to mail-in ballots, is there a breakdown of ballots which were -- for this, we'll say, counted and ballots which were not counted for a potential defect or a defect?

MS. MULLEN: Objection.

A Those can be reported by the county election officer. I wouldn't -- I wouldn't say that's necessarily part of the certification of the official results. The certification of the results of the election is the certification of the vote totals, so that would only include vote totals from ballots that were ultimately counted, but the county can report on ballots that were not counted and the reason they were not counted. And the same is true of, you know, whether it's mail ballots or provisional ballots, the county can provide an accounting of why certain ballots were not counted, or the votes on certain ballots were not counted to be very particular.

Q Thank you. I'd like to talk a little bit about the SURE system. For the record, could you

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

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

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

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

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

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

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if you will, within a county.
Q And the county board maintains those?
A Yes.
Q That was not a question, I apologize for the form, but that was posted here.
A Yes. The county board maintains those.
Q Does the information in the SURE system help the county board to do that? Is that the source of information in part for poll book record keeping?
A Yes, because the counties must maintain their official voter roles in the SURE system. Then both the general register, which is the entire voter role for the county, and the district registers within that county are generated from the SURE system.
Q With respect to an individual voter, what information is contained in the SURE system about individual voters?
A Well, I -- obviously the voter's name, their address of registration. There is personal identifying information contained in the SURE system such as the voter's date of birth, identifying information like the voter's driver's license number or the last four digits of their social security number. Their record will also be linked to a

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specific precinct within the county which is then linked to voting district. So, you know, their congressional district, their state senate district, their state house district. So all of that information is contained on a voter's record in the SURE system.
Q Is registration information -- political party registration information contained?
A Yes. Their political party registration, yes.
Q Is the information contained in the SURE system publicly available?
MS. MULLEN: I'm going to object to this line of questioning. We're getting a little farfield from the categories of information that you talked about meeting for this case. So I'll let him answer the question. But, you know, we've talked about time limitations here, and you're going to keep wasting time then.
MS. GALLAGHER: I understood. For purposes of the record, there are allegations or discussions about information gleaned from the SURE system.
THE WITNESS: So I believe your question was, is that information, public information and the

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answer is, some of it is, not all of it. Obviously the personal identifying information, like the driver's license number and the partial social security number are not public records. But a lot of the information is public record.
BY MS. GALLAGHER:
Q And just the last part, would that -- what would that include, just to get through this?
A It would include -- I will probably forget some specific things, but it certainly can include the name of the registered voter, the voter's political party affiliation, their address of registration. Unless for some reason they are a confidential voter whose address cannot be disclosed. It would include vote history showing whether they voted in an election and also includes the method of voting in that election.
Q Okay. Fair enough.
A Includes their precinct as well, and --
Q Does it show votes being recorded for -- let me strike -- let me ask it this way. With respect to the upcoming general election, I'll go backwards to make sure within the prior election, the April, 2024 primary. I cast my mail-in ballot. It's in, assume it's received by my county board,

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Allegheny County. Is that reflected in the SURE system?
A It -- there will be a vote history record that will show that the voter voted, and it will also indicate the method of voting. So if a voter voted by mail ballot, it'll indicate that in the public -- publicly available information.
Q And is that information available in real time or there -- is it sequenced when the information can be made available, if that makes sense?
A It's -- well, I can only speak to the department. The department provides what's called the full voter export, which is actually a list of every valid, you know, registered voter in the Commonwealth. And it includes vote history and all the other information we talked about, that is published once a week.
Q Okay.
A If someone goes to a county board of elections and request public information, I believe the county would be obligated to provide that as quickly as possible.
Q Thank you. And one other question is regard, which has been on -- every time I listen to the news and hear about Pennsylvania's ballots are

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about to go out. When do ballots go out in Pennsylvania, mail ballot?

A Well, the answer is it depends on the individual county. So --

Q Well, the earliest date that they can go out.

MS. MULLEN: Talking about for a general election?

MS. GALLAGHER: General election of November.

A About 50 days. There are some exceptions. Certain military and overseas civilian ballots actually have to go out earlier than that. But generally, it wouldn't be earlier than 50 days before an election depending on when a county has all of its balloting materials printed, it's -- it's going to be the answer to your question about when they go out in an individual county. And sometimes that can vary because of things like litigation or other things that may hold up the process of finalizing the ballot.

Q Is there a date by which they have to go out?

A There is, yes. It is the second Tuesday. It's basically two weeks before election day is the

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absolute latest that counties can begin delivering mail ballots.

Q Okay. And I think we can go on. I'd like to use the -- it would be this document. Yes. We'll mark this as Marks' 1.

Martin, you guys gave (indiscernible) 00:32:22, didn't you?

MS. MULLEN: That's from Ostrander?

MS. GALLAGHER: Excuse me.

MR. BLACK: No, it's fine. She just remarking it Marks' 1.

MS. SCHNEIDER: You're remarking the Ostrander case.

MS. GALLAGHER: I would just -- was going to leave those as Ostrander just to keep it more simple.

MS. SCHNEIDER: Okay.

MS. GALLAGHER: I thought it would be easier.

MS. SCHNEIDER: Thank you.

(Marks' 1 was marked for identification and is attached to the transcript.)

BY MS. GALLAGHER:

Q Showing you what's been marked as your Exhibit 1. Could you take a look at that for us

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

A Yes, I am familiar with this.

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

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

Q And what's a release note?

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

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

A It is not, no.

Q And how is a release note developed?

A A release note is essentially a summary of

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changes that we've made to the SURE system. So it is developed with our election staff in concerts with the IT staff that is developing the changes to the SURE system. But it is really designed to summarize for the counties what is -- what is being changed in the SURE system.

Q Almost a user manual, is that -- is that if --

A I don't know that I would call it a user manual so much as it's -- it's kind of a -- trying to think of a good analogy, it would be almost like a product notification. So for example, if Microsoft make changes to one of its products, they may issue a document that summarizes those changes. That's what this is.

Q Okay.

A It is sometimes accompanied with updated guidance if the process has changed and the guidance that it's been issued previously needs to be changed as a result.

Q Was the March 11th, 2024 release notes, were they accompanied by a guidance?

A It would be referenced here, and I'm not - - we may have updated a job aid that goes through the process of processing absentee and mail-in ballots as

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a result of these changes.
Q Why don't we -- it would be Marks' 2. And I apologize, this was produced in another case, so I just keep it. Marks' 2.
MR. BLACK: Just so we're clear, Marks' 2 is the Pennsylvania Provisional Voting Guidance document.
MS. GALLAGHER: Yeah.
MR. BLACK: Dated March 11th, 2024, version 2.1.
Q Deputy Secretary, Marks' -- Counsel's done a good job of that, but could you identify it for us, please?
A Yes. This is Pennsylvania provisional voting guidance dated March 11th, 2024.
(Marks' 2 was marked for identification and is attached to the transcript.)
Q And we will come back to it, but just for purposes of clarity, because the release notes which you've mark -- which is Marks' 1's updated that same date, it's not -- I just wanted to make sure, are these related to each other at all?
A I don't know that they're directly related to each other, but we did -- we did make changes to this, and this is guidance, the -- as noted on the

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cover. But we did make changes to our guidance on the processing of provisional ballots at the same time that we were deploying these changes to the SURE system.
Q Fair enough. I just wanted to make sure it was not related to the actual release notes. If we could turn back to those, could you tell us --
A The release notes?
Q The release notes, yes. Why were the release notes developed or why were the changes to the SURE system?
A Well, the changes to the SURE system were developed to provide counties with options that best met their needs -- that best met their needs for processing absentee and mail ballots.
Q Could you explain that a little better?
A So we -- the primary change that we are announcing here was the addition of pending status codes. So for example, we talked a while ago about the term cure. So for example, if a county provides voters an opportunity to cure a ballot, they may want to put them into a pending status. And we were -- we were trying to accommodate that process where it would essentially tell the voter, your ballot is in this pending status because you made an error and you

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need to do additional follow up with the County Board of Elections to resolve that.
Q Fair enough. With respect to what the board, putting aside the update and what's contained in the release notes, which we'll get to in a moment, what is the obligation of a county board to input into the SURE system when it receives a mail-in ballot?
MULLEN: Objection.
Q I'm not asking for a legal just to be clear, but from a practical standpoint, what does the SURE system have to reflect?
A The SURE system would at least have to reflect that a ballot was received.
Q And again, not, I'm asking you legal conclusion, I'm sure your counsel will object, received, is there any other information that has to be provided about that information to the best of your knowledge?
MS. MULLEN: Objection.
Q About ballot, excuse me. Other than it was received.
A The date I want you is received.
Q If you could take a look at, in the top left hand corner, there is a -- I'm not sure what

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that says. I believe it says TOP plus amber plus strict.
A In the right hand corner.
Q In the right hand corner.
A Yes.
Q I'm sorry, I'm left-handed always looks backwards. Could you tell us what that means?
A That's a traffic light protocol marking. It's something that the department adopted. The federal government uses it to identify information that may be sensitive in nature. So amber plus strict, is this was intended to be distributed only to county election officials who needed to know this information.
Q And what was the purpose of limiting dissemination, for lack of a better word?
A Well, in -- our release notes, in many cases, go into details about the SURE system that could potentially compromise the security of the system.
Q Fair enough. Who is involved and with respect to the development of the changes to the SURE system that are reflected in the release notes?
A Well, I -- that includes certainly counties provide input. A lot of the changes we make

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to the SURE system are the result of requests made by county election officials. It also involves our own staff in our division of SURE who work with our IT staff to actually define and then ultimately develop the systematic changes to the SURE system.

Q And without asking what they -- what any opinions are, do you also obtain legal opinions during the course of the process?

A If it is necessary to consult our counsel about a change to the SURE system, yes.

Q Okay. And were legal opinions required for this document?

MS. MULLEN: Objection.

Q For the -- excuse, strike that. For the changes to the SURE system.

A I believe -- I believe we did consult with our counsel. The department consulted with counsel regarding the addition of the pending codes to the SURE system.

Q Thank you. If you could turn to page 2 of the document. I apologize to -- first page, following information outlines the changes which will be deployed after the close of business on March 11th, 2024. Do you agree that that's what that portion of the document reads?

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

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

A They were, yes.

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

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

Q What do you mean by disposition of ballot?

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

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

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

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

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

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

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

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

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

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

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

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

A Yes.

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

MS. MULLEN: Objection.

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

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

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correctly, but I believe you testified that when a ballot's received, it's stamped, entered into the SURE system, and then it's supposed to be kept secure, locked for whatever -- until the pre-canvass.

A Correct.

Q Would you agree with me that the pre-canvass is the inspection of ballots?

MS. MULLEN: Objection.

A I -- the pre-canvass might include the inspection of ballots.

Q Can mailing ballots to the best of your knowledge be inspected prior to the pre-canvass?

A I'm not aware of, I mean, I guess, it depends on what you mean by the -- by inspected, but I'm not aware of anything that would preclude a county from looking at the outer envelope on a ballot to make a determination as to, for example, whether it was dated or signed.

Q Let me ask this question then. If the ballot is not -- the declaration envelope does not bear the voter's signature, can that ballot be counted during the final canvas?

MS. MULLEN: Objection.

A If at the time -- if the ballot during the canvass is not signed, the County Board of Elections

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would not be able to -- they would be required to set that ballot aside because it did not contain a signature of the voter.

Q Would this same be true as to a mail-in ballot where the declaration envelope did not bear the date or signature?

A It would, yes.

Q And recently, just to clear this up, has the department issued a directive with respect to assisting voters as to the year, the full year that appears on the declaration envelope?

MS. MULLEN: Objection.

A Yes. If you're -- if you're referring to our updated envelope that the secretary prescribed under the statute, yes, we did update the directive indicating that moving forward county should include the full year in the dating area of the declaration envelope.

Q Thank you. And as we go down, no date, the next one would be no signature. If a ballot -- a mail-in ballot is submitted without a signature at the end of the finals canvas, can that ballot be -- strike that. I apologize, it was an articulate.

If the mail-in ballot is received and the declaration envelope does not contain a signature,

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can that ballot be counted?

A If at the -- if at the time of the canvass the ballot does not contain a signature, then the board would have to set that ballot aside.

Q I believe the next pending is no secrecy envelope.

A Correct.

Q And if a ballot does not contain a secrecy envelope, can that ballot ultimately be counted?

A No.

Q All right. At the time that a ballot is received -- strike that.

Could you describe for us for the record, so it's clear where the secrecy envelope is with respect to a mail ballot

A Where it is when it's returned by the voter?

Q Yes.

A It is enclosed inside the outer declaration.

Q And is the ballot itself then in turn inside the secrecy envelope?

A Yes.

Q Can declaration envelopes be opened or the contents of the envelope determine the declaration

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envelope prior to the pre-canvass?

MS. MULLEN: Objection.

A Can they be determined, yes.

Q Okay. On what basis?

A Well, a lot of counties will use -- they have a whole punch in there that will enable them, you know, and it serves a couple of purposes. One of, of course, is it enables the county to determine whether there's a secrecy envelope inside that declaration envelope. It also helps them on the back end of the process to verify that they've actually removed all the secrecy envelopes from the declaration envelope.

Other counties are able to determine that based on the equipment that they use to process incoming mail ballots. In some cases they can actually weigh the ballot to determine whether it contains a secrecy envelope and the ballot inside the declaration envelope.

Q Would you agree with me, Deputy Secretary Marks that, and again, not asking for a legal conclusion, but it does come out of the -- my question is, practice and that comes out of the election vote. When is the first time that a mail-in ballot that is received can be opened?

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MS. MULLEN: Objection.
A The first time that a ballot can be removed from its secrecy envelope, or?
A I mean, let's -- I want to be very clear. Now, the ballot arrives in the declaration envelope.
A Right.
Q When is the first time under the election code, if you're aware, that that declaration envelope can actually be opened?
A My understanding is that the declaration envelope cannot be opened until the pre-canvass or the canvass of mail-in ballots.
Q Would you agree with me that the opening of the envelope allows the county to board to know on whether or not the -- excuse me, whether or not a secrecy envelope is included?
MR. BLACK: Objection to form.
A I mean, certainly that is one way to determine, it's not the only way, though.
Q Okay. We'll get back to that. But by opening it, that would be the way -- one way to determine it, correct?
A Correct.
Q Okay. And we've agreed that a ballot that does not contain a secrecy envelope or is not

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enclosed in a secrecy envelope to be more precise, cannot at the end of the canvass be counted, correct?
A Correct.
Q Okay. So at the final canvass process, if that -- from what I understood, if the declaration envelope did not contain a signature or a date or the appropriate date, which you say that, that ballot cannot be counted?
MS. MULLEN: Objection,
Q Correct?
A That's correct. If the -- if we're at the end of the canvass and, you know, I'm not sure exactly what you mean by end of canvass, but if --
Q At the tabulation.
A If we're making the ultimate determination at that point, yes, that ballot cannot be counted.
Q Can that termination be made any time to the best of your knowledge prior to the actual board decision during the final canvass process?
MS. MULLEN: Objection.
A Can the determination whether to count the ballot be made prior to?
Q Yes.
A No, not to my knowledge.
Q Is there a difference between a

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determination as to whether a mail-in ballot can be counted and is -- and is in fact counted different? Is there any difference between those two?
MS. MULLEN: Objection.
MR. BLACK: Objection to form of questions.
A I -- I'm not sure exactly what you mean.
Q Okay. So --
A If we're, you know, I think the pre-canvass and the canvass include multiple steps that the County Board of Elections has to go through. But I want to make sure that we're distinguishing that from the intake the counties do prior to the pre-canvass, where they may observe, for example, an error that is made by a voter. And if it is the county's practice to notify those voters and allow them to cure it, then they can do that during that period of time.
Q I'm not even --
A Just separate and distinct from the pre-canvass and canvass.
Q I apologize. My (indiscernible) 00:57:53 coming and I'm not trying to talk with my hands. I wasn't even getting --
A Sorry, I do it too.

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Q No, that's -- I wasn't even trying to get to that. I'm just trying to get to --
A I'm pretty sure I bumped the microphone several times.
Q The actual -- understanding the process, is it -- when the ballot's received, is it your understanding that if a county has decided to, what will refer to as cure, they can at that time make a determination as to whether a ballot as received during that -- will count or not, or is eligible, would you count it?
MS. MULLEN: Objection.
A I think the county is making a determination at that point that there appears to be an error on the ballot that may lead to the ballot not being counted. And as a result, they are providing voters -- impacted voters an opportunity to remedy that error prior, of course, to 8:00 p.m. on election day, the deadline to return the ballot.
Q So you believe that there's a difference between that determination and the determination that is made at the time the board needs to decide whether -- strike that.
Let me ask it this way. Two ballots come into -- let's pick a county, Allegheny, all right, on the

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same day, one has a signature, one does not have a signature. Those ballots at that time are reviewed. One is marked. Does Allegheny County have, and let's say one of your codes, your code is entered pending, no signature.

A Right.

Q All right. Okay. The other one is obviously correct, let's assume it's correct, and it has everything in it gets to the pre-canvass and there is a -- there are secrecy envelopes. There is no contact of the voter that's -- the Allegheny County does not cure. Will the ballot without a signature count?

MS. MULLEN: Objection.

A If -- the ballot would not count, no.

Q And that is as the result of a deficiency, we'll say, or an error on the date that it was submitted?

MS. MULLEN: Objection.

Q Received. Received.

MS. MULLEN: Objection.

A Correct, yes.

Q Okay. So as we go down the list, pending no ID, and we agree that the voter has the chance, I believe it's six days after the election, to provide

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ID to correct that, pending other, what would that mean?

A Pending other would basically capture anything that's not -- and I can't think of a -- an example, perhaps a ballot that came back in the mail damage, for example, might fall into that category. I think the first five categories capture the overwhelming majority of errors or issues with ballots. But pending other there is there in the event that for some other reason that -- and the one that comes to mind is, I'm sure you've gotten mail before that was damaged in the process of mail making, its way through the mail stream. So it might include that.

Q Okay. If we go to the next step, the new response types are available for selection for each of the following ballot labels. If you could just walk us through those, please.

A Absentee ballot label, mail-in ballot label, PA bedridden veteran ballot label, PA email bedridden veteran ballot label, email, military and civilian overseas ballot label, email remote isolated bedridden veteran ballot label. If it helps, I can explain, you know --

Q That would -- please.

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A I mentioned military and overseas civilian voters. They are -- there are special provisions in the election code and also in federal law that allow them to submit a request for a ballot electronically and also receive balloting materials electronically. And we do that by sending a secure email to the voter that contains their -- basically a PDF of their balloting materials along with instructions and an envelope template that they can use to download the ballot, fill it out, and return it to their county election office. And this is just basically saying that these -- that the response types that we've added are available for all these types of voters, if applicable.

Q Deputy Secretary, I have a question, there may be an objection to it for, let me -- try to ask it more slowly giving your counsel time to object if necessary. You testified earlier that you became the deputy secretary in 2019 prior to the enactment of Act 77. Were you in that -- in your current position at the time -- strike that. Are you available or familiar with the case known as Pennsylvania Democratic Party versus Boockvar in 2020?

A I am. If I'm not getting them mixed up, there's a lot of litigation. So I am, I believe I

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know which one you're referring to.

Q Okay.

A Which I -- is that the one that resulted in a Pennsylvania Supreme Court ruling on September 11th, 2020?

Q I believe so.

A Okay.

Q Now I know the page numbers of that opinion by now, but I don't know the date it was actually entered. Do you recall, if you recall, that the -- in that case there was a request by the petitioners for the Court to mandate what's now curing? Do you recall that?

A I do recall that that was -- that was certainly one of the issues addressed in that case.

Q Do you recall what the position of the secretary was in that case with respect to the issue of curing?

MS. MULLEN: Objection again, we're going outside the scope of this deposition.

MS. GALLAGHER: Last question.

A I don't -- I don't recall exactly what the -- what the secretary's opinion. I -- what I recall is what ultimately the PA Supreme Court's opinion is on the matter. And that -- that is what we've been

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operating under since then.
Q Okay. I'd like you to turn to page 3 of Marks' 1. You can get through the rest of this pretty quickly, I believe. I believe that first line there, is the last response types are available in the following areas with the SURE VR system. If you could tell us what that --
A What's in the SURE VR system?
Q Uh-huh.
A Yeah. That -- that's the statewide voter registry.
Q Okay. So record mailings, bulk ballot response. What's a bulk ballot response?
A It's basically a utility that counties can use. So if they're using, you know, a machinery to scan their ballots as they come in, they can actually upload the -- those ballots recorded into the system in bulk as opposed to having to scan them one at a time.
Q Okay. And the next page, page 2, is that just the availability of the various tabs on the absentee and mail-in voting screen, effectively a dropdown menu?
A Yes.
Q Is that what that is?

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A Yes.
Q Okay. And turning to page 5, it says, by current design changing the status reason from the absentee mail-in voting screen ballots tab will not properly update the correspondence tab on the voter record. Could you tell us what that means?
A Yeah, I think you have to read on it will -- it goes on to say if you are using the record mailing screens, it is necessary for you to access the response history tab to clear the previous response before you can proceed to update the new response type.
Q Could you explain for us in practical terms what that means for County Board of Elections?
A Well, it -- it's basically telling them that there's a right way to do this process. If they want to clear a label response type and update it.
Q Okay. If you're aware, why would be there -- why would there be a need to update a label response type?
A Well, either the county initially made a mistake or the county needs to update the disposition of the correspondence, the ballot.
Q And for what reason would, if you know, would a county need to update the correspondence of

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the disposition of a ballot?
A Well, it could happen, you know, during the intake where they notice something about the ballot. It could happen during the pre-canvass or canvass, or even after the canvass, so that the -- so that the county is accurately capturing the disposition of the ballot.
Q And again, I'm -- this is an argumentative, I'm just trying to -- when you say disposition, what does that mean?
A Well, whether it's the interim disposition or final disposition of the ballot, it's basically the status of the ballot. So we talked earlier about ballots that weren't signed. If the county provides notice and cure and wants to notify the voter that that ballot is pending some action from the voter, they would use the pending status. If the voter does not cure that, then ultimately the county will have to update the disposition to cancel no signature to properly record it in the SURE system.
Q Fair enough. At the bottom, additionally, the response type of CANC, I think that's canceled, vote canceled, has been removed as a dropdown selection?
A Correct.

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Q Do you know why that was removed?
A It was -- it was kind of a being used as a catchall, so we removed it.
Q Okay. I'd like to go through -- look at -- turn to page 6 and very quickly if we can go through, I'm not going to ask you for every category, but I'd just like to, so the response type where they say pending, does that -- that's what's reflected in the new changes, is that fair enough to say?
A It is, yes.
Q Okay. On the very first one or the second pending incorrect date to be used when a county offers the opportunity for voters to replace or correct the submission error, and the county has noticed that the voter used the wrong date, a date's missing or incorrect date, and the county offers curing, would this be the correct tab?
A Yes, they could --
Q Okay.
A They could use that response type.
Q And when the county enters it under that ballot scans, under that tab, then what occurs?
A Well, the -- so you'll see in this far right column it refers to the second paragraph email verbiage. So this would be the notice, the

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

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

MS. MULLEN: Objection.

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

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

A Correct.

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

A Well, the department as I mentioned

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earlier ultimately determine the language with input from county election officials as well as other folks within the department state.

Q Do you obtain the consent from each county as to whether -- as to the language that's included?

MS. MULLEN: Objection.

A From each individual county, no. It is a -- it's a uniform system, so we do try to, as we engage with counties, reach consensus if possible among the counties. But that is not possible in all cases.

Q And who made the determination that a voter whose ballot did not have the -- did not bear an incorrect date, I apologize if I do -- could cast a provisional ballot to cure that ballot -- to cure the existing ballot?

MS. MULLEN: Objection.

A Well, I -- again, keeping in mind I'm not a lawyer, it's my understanding that voter is entitled to cast a provisional ballot if they believe they're qualified to vote. And that certainly would apply to somebody who may have submitted their ballot to the county, but knows that that ballot has an error.

Q So let me ask you this hypothetical, you

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may be able to answer, you may be not. Understanding your response, I go into vote in the polls on election day, I'm qualified to vote, I fill up my ballot, it's busy, I walk out and I realized I didn't vote for school board. I recognize I failed to vote for school board. Do I have an opportunity to correct that?

MS. MULLEN: Objection

A Once you've -- once you've inserted the ballot into the -- into the scanner, no. You do have an opportunity to correct that up to that point. You could -- it's called spoiling the ballot. You could receive a replacement ballot, but once you've actually inserted that into the -- into the scanner, which that goes into the secure ballot box, no.

Q Okay. But I just made a mistake. I mean, it was an error and I've realized it. I don't get to correct my error.

A You do up to a certain point. That's what the ballot curing process or the ballot spoiling process is for.

Q Okay. But at the time I hit that button and confirm in the ballots process, I no longer have that right. Would you agree?

A At the time -- you're talking about, at

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the time that you take your ballot and insert it into the scanner?

Q I hand it over to that machine and it's scanned in. I no longer have the opportunity to fix an error.

A Correct.

Q That I recall -- know that I made --

A Correct. Yeah. Up until that point though, you can spoil the ballot and receive a new ballot.

Q If I submit a mail-in ballot, do I have the right to call and find out from -- well, strike that. I'd like to go to the next page. When it says it would be the third block down, cancel email ballot, I don't -- UND batch. What does that mean?

A Undeliverable.

Q Okay.

A This would apply to those military and overseas civilian voters we were talking about earlier. They may have had their balloting materials --

Q Okay.

A -- sent electronically.

Q So it says cancel is that -- is the CANC that means cancel, correct?

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A Correct.
Q Okay. Is that a term of art with respect to a mail ballot?
A I -- cancel, I don't know that it's a term of art. It's a -- it's a term that is used within the SURE system, and it could mean rejecting a ballot. It really depends on the response type. It could also -- you could also cancel, replace for example, which isn't necessarily a rejection, but and I believe that's on the next page, cancel label, cancel replace, maybe it's not.
Q Well, let's go to page 8. Maybe that'll help.
A Anyway, it -- so it's not a term of art so much as it is a technical term that we've been stuck with in the SURE system for many years.
Q Okay. Is it -- can a cancel ballot be counted?
A It would depend on why it's been canceled.
Q Why don't I ask this? Can you tell --
A I mean, I think we have to distinguish here between recording things in the SURE system and the official canvass. The Board of Elections makes the determination as to whether a ballot is counted, whether that's a mail-in ballot or a provisional

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ballot. That is -- the process of recording that activity in the SURE system supports that. But it's not necessarily one and the same.
So, you know, if a county, for example recorded a ballot as canceled in the SURE system, but subsequently the voter was able to correct that, there's nothing that would prevent the county from updating that disposition if necessary.
Q Okay. That's not a discussion but --
A I just -- I just want to make sure that we understand that the process of recording these things in the SURE system and the process of determining whether a ballot is counted or not are not necessarily one and the same thing. It supports that activity, but the County Board of Elections determination is ultimately the determination that matters.
Q Well, we'll get back to that, but let's look at again, cancel incorrect date on page 8 of -- page 8. This cancels the ballot if it is returned to the county with an incorrect date on the ballot envelope. It goes on to say, it should only be used when the county has made a final decision as to the ballot. Let's stop there. What final decision can a -- can the county make at the -- about a mail-in

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ballot at the time they're recording it into -- as received into the SURE system?
A Well, that would mean that after the -- after the pre-canvass or canvass, the county's final determination is that that ballot cannot be counted because of an incorrect date. We are telling them that is the --
Q Final decision. Right.
A And we're telling them that's the code that they -- that's the response type they should record in the SURE system for that ballot.
Q Great. So let's look --
A Whether they do that or not is up to them.
Q But again, that would -- and the record will be what it is. That's the final decision as to that ballot. But if you look at the next block then, your ballot may not be counted because you did not correctly date the declaration on your return envelope -- on your ballot return envelope. If you do not have time to request a new ballot before ballot application deadline date, or if the deadline has passed, you can go to your polling place on election day and cast a provisional ballot.
What I don't understand Deputy Secretary Marks is from your testimony, you've just add that

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canceling correct date is for a final decision on a ballot. So if a final decision has been made, how can a voter then go in and correct that decision?
MS. MULLEN: Objection.
A Well, if it is up -- if it is prior to 8:00 p.m. on election day, it is still possible for the voter to go in and request a provisional ballot.
Q Okay.
A And then that determination on that provisional ballot will be made by the Board of Elections at a later time.
Q So is it your testimony --
A Two different ballots, I mean, it's -- we're talking about the mail-in ballot and the disposition of that versus a provisional ballot that may have been cast by the same voter.
Q Correct. And I'm only referring to the original, not the provisional ballot, but the final disposition of a mail-in ballot. Wouldn't you agree with me that then that final disposition as to that mail-in ballot --
A Right.
Q -- is being made at the time this dropdown option is corrected?
MS. MULLEN: Objection.

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MR. BLACK: Objection to form.
A It is -- what we are telling counties is that that is the code you should use when a final disposition is made or a final determination is made on that ballot.
Q And that would be then cancel incorrect in a non-curing county that did -- where a ballot did not have a date or had the incorrect date, that final decision would then come during the final determination of the canvass -- in the canvass, correct?
MR. BLACK: Objection to form. Asking for the mental impressions of people he's not privy to.
MS. GALLAGHER: I'm sorry, I couldn't hear you.
MR. BLACK: You're asking him to opine on the mental impressions of people that other than himself, it's --
MS. GALLAGHER: I'd be glad to clear it up because we're only asking for process. I'm trying to understand process with respect to the term final decision. But, you know, we can move on. I think I have enough on it.
BY MS. GALLAGHER:
Q So I have a question. If we would go

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down, so this, I understand the third box is the -- the email, the verbiage in the second paragraph of the email that goes to the voter, correct?
A Correct.
Q All right. So, and I believe you testified earlier this was to help with counties who have elected to cure. If you could look at the next line as we go down, used -- it should only be used, and again, we're in canceling correct date. It should only be used when the county has made a final decision to, as to the ballot, or it does not offer the opportunity to cure. Correct?
A Correct.
Q So county does not -- an opportunity to cure, they've made this decision as to the incorrect date, and this is the automatically generated email that goes out to the voter?
A Correct.
Q Okay. So if a county does not offer the opportunity to cure, could you explain why there -- a voter in that county, would receive an email from the Department of State telling them that they had the right -- let me finish, to go to the polling place on election day and cast a provisional ballot?
A Because in our opinion, they do have that

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right.
Q Okay. So it's the opinion -- but would you agree with me, Deputy Secretary Marks, that the casting of that provisional ballot is an attempt to cure a ballot, which under this has been marked canceled and incorrect?
MS. MULLEN: Objection.
A I don't know that I would say this is an attempt to cure the ballot. I think it is a -- it's an attempt by the voter to remedy their canceled ballot during the provisional ballot process --
Q And --
A Because again, we're talking about a --
MS. MULLEN: Let him finish.
A We're talking about a voter here who has been notified late in the process that their ballot is not going to be counted. This voter is qualified. Nobody's raised an issue about the qualifications of the voter. We believe that the voter does have the right to go to their polling place if they are able to on election day and cast a provisional ballot, which will later be reviewed and a determination will be made by the County Board of Elections as to whether that ballot should be counted or not.
Q And you believe that to be correct,

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whether a county offers curing or not?
A Yes.
Q Okay. Would you agree that a non-curing county does not have the obligation to count that provisional ballot?
MS. MULLEN: Objection.
MR. BLACK: Objection. That calls for a legal conclusion.
Q They're a non-curing county, I mean --
A Yeah, I mean --
Q -- testimony as to what that is.
A Yeah, I think the department believes that those ballots can and should be counted. I believe our guidance on provisional ballots says that, but ultimately, going all the way back when we talked about the scope of authority of the Board of Elections, that is ultimately the Board of Elections determination to make.
Q But yet your email tells that voter, that they have a right -- strike it. I think it's -- we'll strike it.
Let's go through -- was consideration made, if, you know, for a non-curing county who has made a final decision about a ballot should not have a corresponding email sent to the voter?

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

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

MS. MULLEN: Objection,

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

Q Correct.

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

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

A I have, yes.

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

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

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

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email that is generated from the SURE system.

Q And how is it generated from the SURE system?

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

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

A Recorded it as received, yes.

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

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

Q Is that --

A -- this email is general.

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

A Record ballot return.

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

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-- this is what a non-curing county would select. Do you know, as you sit here today, the date of this email, I believe from -- at the top, from the Department of State, was Monday, April 15th, 2024. Within that time period, was that directly prior -- shortly prior to the 2024 primary election?

A It was. It was about eight days before the April 23rd primary.

Q Subject, your ballot has been received. If you could go down to the second paragraph. Do you know if Washington County had a noticed and cure policy in place for the April, 2024 primary?

A It is my understanding that they did not for the April, 2024 primary.

Q And it say, please know if Washington County observes an issue with your ballot envelopes, you may receive another email from this account with additional information. Are you aware of what other information the Department of State would be sending to that voter, if any?

MS. MULLEN: Objection.

A Well, the county, it says you may receive another email from this account with additional information.

Q Right.

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A So ultimately it would be the county's decision whether they were going to update the ballot response type, thus kicking off another email to the voter. Or if, let's say that this is -- that Washington County was a county that provides notice and cure, they may actually receive communication directly from the county about the status of their ballot.

Q I'd like you to turn your attention to what we will mark -- what was previously been marked as Marks' 2. And I believe that you had testified this was a guidance which the department issued in March -- on March 11th, with respect to provisional ballot. I'd like you to turn to -- well, if you could identify this document.

A Yes. Just refreshing my memory. Yes. This is Pennsylvania provisional voting guidance issued March 11th, 2024.

Q Okay. I'd like you to look at page 1 at the bottom. Actually, in the middle, using provisional ballots. I believe it states provisional ballots are utilized when a voter believes that they're eligible voter but the poll worker is unable to confirm the voter's eligibility. The next paragraph, voters are entitled to a provisional

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ballot when their eligibility to vote is uncertain.
What does that mean?
A Well, and I mean, it is -- we tried to capture a pretty broad concept in a few words, but it's basically that is your -- the provisional ballot is kind of your last chance. If, you know, whether it's -- and we go on to list the reasons under which or the circumstances under which as -- a voter is entitled to vote by provisional ballot. But it is as the name of it suggest, it is kind of, it's like a -- it's like hitting a provisional drive in golf. You don't know for sure whether you're going to be able to find the first ball you hit, so you hit a provisional in the event that you're not able to find the first ball. In the same case here, if the voter, this is kind of their provisional option for voting, which is subject to a later determination by the County Board of Election. So if a voter believes that they're qualified to vote, that they're eligible to vote but for some reason they cannot cast a ballot in the traditional manner, this is the option that is available to them.
Q Okay. And just if we can go through this quickly, it's the fourth bullet point down. It is, voter was issued an absentee or mail-in ballot, but

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believes they did not successfully vote the ballot.
What does successfully vote mean, if you know?
A That means that the county -- that the voter has information to believe that their ballot is not going to be counted for one reason or another.
Q Would that be the same with the rejected?
A Correct.
MS. MULLEN: Objection.
Q I'm sorry. In the next bullet, the term wasn't clear, the term rejected in the next bullet point. One more question, and then I might just need a few minutes.
MR. BERARDINELLI: Can you reach a good break point, Kathy, can we take a restroom break?
MS. GALLAGHER: Yeah, absolutely. Two minutes.
MS. MULLEN: I'm sorry. Wrong Kathy.
MR. BERARDINELLI: That's all right.
MS. GALLAGHER: We can do that now. I mean, because I only -- I don't have much more, and that would give me a good chance.
THE VIDEOGRAPHER: We're going off the record. The time is 11:47.
(Off the record.)
THE VIDEOGRAPHER: We are back on the

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record. The time is 11:58.
MS. GALLAGHER: Deputy --
MS. MULLEN: I just want to note -- I'm sorry.
MS. GALLAGHER: That's okay.
MS. MULLEN: The deputy secretary will read and sign. Thank you.
BY MS. GALLAGHER:
Q Turn to Ostrander deposition 9 or transcript, Exhibit 9 rather.
A That's okay.
Q Does anybody have one?
Deputy Secretary Marks, could you identify this document or the form rather?
A Yes. This is a meeting invitation that I sent to the county election officials regarding feedback sessions that we were -- that we wanted to hold and talk about the primary and the mail ballot status codes specifically.
(Ostrander's 9, previously marked, is attached to the transcript.
Q And just to be sure, because we had the -- for the record, the mail ballot -- mail ballot status codes, are those the ones we were just discussing from --

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A The ballot response types, yes.
Q -- from the change in the SURE system?
A Correct.
Q And the date of this is, do you agree, May 10th, 2024?
A Yes.
Q And it would have been after the primary - - the 2024 primary, correct?
A It would have been, yes. I don't know if the date of the meeting notice was May 10th. The first -- this was a meeting notice. So the first meeting was held on May 10th.
Q Okay. Did you receive questions, or emails, complaints with respect to the changes to the SURE system and the new response type?
A We did. We did receive feedback from counties both anecdotally and then obviously in this series of feedback sessions as well.
Q Do you recall any of the feedback that you received?
A I'm not going to claim that I'll recall all of it, but, you know, certainly there were -- there were concerns by a number of counties regarding some of the wording and the emails that voters were receiving. So we listened to them, got some feedback

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from them. They were primarily concerned about things that they believe might be misleading to voters under certain circumstances. And they offered some suggestions on how we might change that.

Q And in what way did these -- whoever reported this believed that information might have been misleading?

A Some counties believe that, you know, for example, indicating that the voter may receive an additional communication from the county as I recall, they wanted sort of different message there, or actually not so much different as less words, was certainly one of the -- one of the concerns that was raised by the counties. Other counties had some specific feedback regarding the portion of the message that -- well, I'd have to -- I'd have to go back through to know, but it was -- a lot of it was about how we were saying things in the email messages and county's had suggestions for how that might be changed.

Q With respect to the misleading, would that -- information that you said was discussed, would that have been, if you recall, from a non-curing county who believed that the email --

MS. MULLEN: Let her finish.

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Q That's okay.

A Sorry.

Q Who may have believed that an email that was sent was misleading voters?

A I can't recall whether it was -- whether it was specifically a non-curing county. You know, I think, one example that sticks out is, you know, the email for record ballot returned. Ultimately what counties wanted was just simply a message that says your ballot has been received.

Q Prior to the changes in the SURE systems, was that, at one time, what was -- that that was all that was entered, received?

A I would have to go back to review to recall exactly what may have been said there. But it was probably similar to that. But I can't say for sure exactly what it said back at that point in time.

Q Deputy Secretary Marks, would the department maintain, or does the department maintain records as to the various dropdown options or recording options that were available to the county since the inception of mail of Act 77?

A I'm sure we would have release notes for any of our releases, the changes that we made to the SURE system.

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

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

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

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

MS. MULLEN: Just put something in writing.

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

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

MS. GALLAGHER: With respect to --

MS. MULLEN: -- dropdown menu?

MS. GALLAGHER: -- dropdown menu, yes.

BY MS. GALLAGHER:

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

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

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

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

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

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

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

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

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

A No later than 45 days before the election.

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MR. BLACK: Just so the record is clear, so information meaning what?
MS. GALLAGHER: I was going to get --
MR. BLACK: I'm just going to -- objection there.
Q I was going to -- I was going to go back to that. So when the new, the updated emails?
A Correct.
Q And how will those be distributed to the counties, or how will the counties be made aware of them? Would be another release note?
A It'll be -- it'll be additional release notes, yes.
Q Okay. Does the Department of State maintain or compile information with respect to ballots that are canceled, and the reasons they're canceled, or ballots which are rejected?
MS. MULLEN: Objection.
A Well, there's information contained in the SURE system. So that is available through the SURE system.
MS. GALLAGHER: Okay. I think I may be finished. In case I find that I have something else, I'll reserve the right, but I believe I'm finished.
EXAMINATION BY COUNSEL FOR THE DEFENDANT

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BY MR. BERARDINELLI:
Q Mr. Marks, my name's David Berardinelli, and I just have a couple brief follow ups. I represent the Washington County Board of Elections. As to the new emails that are going to be used for the November general election, is it the department's intent to use an email for the received ballot return, like which was suggested, and I think what you testified to was some of the counties wanted simply your ballot has been received. Will that be an option?
A Yes. I -- based on what, you know, came out of those feedback sessions, I believe we will shorten the text in that email to simply say the ballot's been received and that if the voter wants additional information to reach out to the county election office.
Q Can you get out the, I'm going to call it the SURE release notes if I've got the right term of art.
A Marks' 1?
Q Yeah, please.
A Yes.
Q Page 4, if you don't mind. When a county is inputting information into the system, is this the

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dropdown menu they see, the menu that's pictured on page 4?
A Yes. This is a depiction of the dropdown menu they would -- they would see for status reason.
Q And when they're viewing this screen, it doesn't automatically show them what email will be sent, correct?
A It does not, no.
Q And mine is small, but I think I counted 23 different options that a county could choose. Right?
A I'm not going to disagree. I'd have to count them myself, but yes, it looks like about two dozen.
Q And I used the word options because I think you used that word because this release was about putting six new options for counties to choose from.
A Right.
Q And assume for my counting is correct, that would mean there was 17 prior?
A Yes.
Q And the county, if I understand your testimony, has the discretion which of those 23 it's going to use?

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A Correct.
Q I'm jumping around a little bit, I apologize. But right at the start of your deposition, I think you were talking about the instructions that are sent to a voter, right, mail-in voter? And those instructions are ultimately sent by the County Board of Elections, right?
A Correct.
Q But the Department of State is essentially the author of those instructions?
A Yes. The department prescribes that.
Q And at the top of those instructions, there's language that tells the voter for you -- for your ballot to count, you must follow all these steps. You're aware of that, right?
A That sounds right. If -- I'd have to see a copy to know if that's verbatim, but yes, we do -- we do notify voters that -- to ensure that their ballot is counted, they must do certain things.
Q And I think you may have just answered, but why do you -- why do you have that language on there?
A Well, we want voters to know how to properly complete their balloting materials to ensure that there -- that they will be counted.

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MR. BERARDINELLI: I think that's all I have. I'm going to review, but someone else may have a couple questions.
THE VIDEOGRAPHER: You're going to pass the witness?
MR. BERARDINELLI: Yeah. I will pass the witness and --
THE VIDEOGRAPHER: Should I take the --
MR. BLACK: Yeah, if you don't mind --
THE VIDEOGRAPHER: (indiscernible) 01:49:43
MR. BERARDINELLI: Yeah, I'm loud to -- hopefully you got me.
THE VIDEOGRAPHER: Yeah, no, your volume is great.
MR. BERARDINELLI: Thank you.
EXAMINATION BY COUNSEL FOR THE PLAINTIFF
BY MR. BLACK:
Q Okay. Deputy Secretary Marks, my name's Martin Black, I'm from the Dechert firm, and I represent the plaintiffs. And I also have a few questions for you. Let's just go back and make sure we understand the process from the moment that the ballot comes into the election office. So the mail-in ballot comes into the election office, and the

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election worker looks at the ballot, and I assume can see right away, for instance, if there's a signature missing, correct?
A Correct.
Q And they can see right away if the date's missing, correct?
A Correct.
Q And they can see right away in many cases, if the date is wrong, like the voter has put in his birthdate rather than 2024. Correct?
A I -- yeah, I would think that's certainly the case.
Q Now, I believe the next step is for the election worker to stamp the date on the ballot. Is that what you directing to --
A That is our guidance to stamp the date so there's no question about when the ballot was received.
Q And does the stamp go on the side of the envelope with the signature on it or on the other side, or is it -- varied?
A It varies depending on county practice. I do believe we intentionally left some space on the declaration side of the envelope that the county could use. So it didn't interfere with anything

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else.
Q Okay. At this point, the election worker has seen the ballot. If the signature's missing, they know that the ballot is not countable, correct?
A Correct.
Q And at that point, they go to the SURE system then, or sometime later that day, to enter a code to be correlated with that ballot in the SURE system, correct?
A Correct.
MS. MULLEN: Just objection to the --
MR. BLACK: Asking -- form.
MS. MULLEN: He -- he can't say what each county's going to do, but --
THE WITNESS: Right. Okay. It -- yeah, assuming that a county --
MS. MULLEN: Maybe just --
THE WITNESS: -- once has a notice and cure process, and wants the voter to receive a particular message, they would use it.
BY MR. BLACK:
Q Well, we didn't get there yet. I'm just saying if somebody's in a county, let's say they don't have a notice and cure policy.
A Right.

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Q But the ballot comes in, the election worker sees the ballot, they can immediately see whether the signature is there or not, correct?
A Correct.
Q Okay. And that ballot then has to be recorded in the SURE system, preferably that day, right?
A Correct.
Q And the poll worker, excuse me, the election worker looks into the SURE system and looks at the dropdown menu that you just preferred to with 23 different codes, right?
A Correct.
Q And their job is to pick the best code to reflect the status of that ballot at the time?
MS. GALLAGHER: Objection to form.
MR. BERARDINELLI: Object to the form.
A I would think -- it will depend on the county's practice. If the county does not offer notice and cure, it may be the county's practice to leave it in the, I can never remember this, but record ballot returned status until such time that they enter the final disposition of the ballot.
Q But if they already know that it's missing a signature, then the more accurate code would be one

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of the codes that says signature incorrect. Is that right?
MR. BERARDINELLI: Objection.
MS. GALLAGHER: Objection to form.
MS. MULLEN: Objection; form.
MR. BERARDINELLI: Sorry.
MS. GALAGHER: You can go ahead.
A I mean, if you're asking my personal opinion, what I would do or what I believe is the most accurate code, but it really does depend on the county's practice if they offer notice and cure. If 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.
Q Right. And you understand that's the subject and part of this litigation, correct?
A It is. And it's a -- it's a question of law that the Court's going to answer.
Q Okay.
A And I can't answer that, so.
Q Let's take a look at -- let's mark an exhibit -- guidance exhibit from April 3rd, 2023. Is this Marks' 3, I guess?
A Yes.
(Marks' 3 was marked for identification

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and is attached to the transcript.)
Q Can you tell us what this document is?
A Yes, it's guidance concerning examination of absentee and mail-in ballot return envelopes. This is guidance issued on April 3rd, 2023 to the county election.
Q And on the --
A County Boards of Elections.
Q And on the second page, the first sentence in the background says, the Pennsylvania election code describes processes that a qualified voter follows to apply for, receive complete, and timely return, an absentee or mail-in ballot to their County Board of Election. Do you see that?
A I do. Yes.
Q And then there are various processes in here which are described that the county should follow under DOS guidance, correct?
A Correct.
Q Item 3 says, examination of declaration on mail ballot return envelopes. Do you see that?
A I do. That's on page 3?
Q Yes, that's correct. Yes. And if you look at the fourth paragraph, which starts with, if the voter's declaration on the return envelope is not

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signed or dated or is dated with a date deemed to be incorrect, that ballot return envelope must be set aside and the ballot not counted, correct?
A Correct.
Q And is that an accurate statement of the DOS guidance?
A It is, yes.
Q Okay. The last sentence says, it is important that the ballot return status is promptly and accurately recorded in SURE using the specific response type as to the disposition for each ballot received, correct?
A Correct.
Q And that refers to the 20 -- today 23 codes that are in the SURE system that could be attached to a ballot, right?
A Correct.
Q And it's the DOS guidance that that code should be accurate, correct?
MR. BERARDINELLI: Objection; form.
MS. GALLAGHER: Objection; form. Sorry.
Q Is the DOS's guidance that the code should be accurate or inaccurately recorded in the SURE uniform system designed by the state to record --
A Well, our guidance says accurately

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recorded in SURE so.
Q So you would agree that the counties should be selecting the most accurate code, correct?
MR. BERARDINELLI: Objection; form.
MS. GALLAGHER: Objection; form.
A I would agree that the county should be selecting the most accurate code considering the county's practice as it relates to notice and cure.
Q Well, the codes have statements associated with them that go out to the voters, correct?
A Correct.
Q And some of those statements would inform the voter of the status of their ballot if it's incorrectly dated or is missing the signature, correct?
A Correct.
Q And some of the status codes would not provide that information to the voter, correct?
A Correct.
Q And if the county selects the one that is most accurate, they would be providing information to the voter about the status of the ballot and that it's missing a signature?
MS. GALLAGHER: Objection as to form.
MR. BERARDINELLI: Join.

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MS. GALLAGHER: Calls for a legal conclusion.
A Yeah, I'm not going to be able to answer a legal question, if you're asking me, certainly we encourage counties to provide notice to voters about the disposition of their ballots. But we are -- the current status quo is what the Supreme Court ruled back in 2020, that notice and cures is allowed, but it's not mandatory, so.
Q Did the Supreme Court address, if you know, you may not know, the due process claim at issue in this case? Do you know?
MS. MULLEN: Objection.
MS. GALLAGHER: Objection.
MS. MULLEN: He's not a lawyer.
THE WITNESS: I don't -- yeah, I don't recall that, but okay.
BY MR. BLACK:
Q Are you aware of just -- strike that.
Just mechanically, when the ballot comes in, the election worker sees that there's no signature on the ballot, they need to enter a code and they look at the dropdown menu with the 23 codes. Do you see that? Do you have the codes in front of you, by the way?

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A Yeah, well --
Q I'm sorry.
A I do. Just to be clear, when the county receives it, they're scanning it in and it -- the default, as I understand it, is record ballot return. Whether the county updates the disposition to another ballot response type is going to depend on the county's individual practice as it relates to notice and cure.
Q But you would agree that practice should be as accurate as possible in communicating to the voters?
MR. BERARDINELLI: Object to the form.
MS. MULLEN: Objection. Asked and answered.
MR. BERARDINELLI: Three times.
THE WITNESS: Right. Yeah, I may agree that that is what --
MR. BLACK: That's all we ask for.
THE WITNESS: -- I would do, but as noted, that is a determination for each county to do.
BY MR. BLACK:
Q So it's your view that it's up to the county to determine whether or not to provide accurate information or not to the voters?

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MS. GALLAGHER: Objection to form.
A I think it's our view that the Supreme Court has ruled on this and we are trying to offer county's options under that reality. And 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.
Q I understand that's a -- I'm just asking a simpler question. Is it okay for counties to provide inaccurate information to voters?
MR. BERARDINELLI: Objection.
MS. GALLAGHER: Objection to form.
MS. MULLEN: Objection.
THE WITNESS: I -- again, I think it's accurate based on the county's practice. You know, and I know it sounds like semantics, but I, you know, if I were a county that did not provide notice and cure, I may consciously not look at the outer envelopes during the intake process so that I wouldn't have to deal with that.
But those are all options that each individual county has to consider. And, you know, however I feel about it is irrelevant because we can't mandate that.
BY MR. BLACK:

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Q Is the -- strike that.
Once the canvassing is concluded and the final determinations have been made with respect to whether or not a mail-in ballot is going to be accepted, is the county required to update the code at that point?
MR. BERARDINELLI: Object to the form. Required.
A It is -- it is our expectation that they - - and it is our guidance that they do that so that we, and they have good information contained in the system about the ultimate disposition of the ballot.
Q Let's say a ballot comes in, doesn't have a signature on it and is recorded in the system just simply as received. Okay. Later the ballot goes through canvassing and it's determined that it cannot be counted and the ballot is therefore rejected. Do you understand that?
A Yes.
Q Is the county obligated at that point to update the SURE code to show that the ballot's been rejected and why?
MR. BERARDINELLI: Objection; form. Obligated.
A It is -- it is our guidance that counties

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do that again, so that we have good information. Certainly, we and the county, I would think, want to know how many ballots are being rejected and for what reason because it informs voter education that we may do in the future.

Q Does it also impact the voting records of the state as to whether somebody cast a ballot in that election?

MR. BERARDINELLI: Form.

MS. GALLAGHER: Objection to Form.

A It could impact their vote history depending on whether the county credited them as having voted.

Q Can you explain that?

A Well, it -- the county records vote history in the SURE system. And by method if a county -- if a county, and I -- I'm not aware that this is occurring, but if county consciously determined that a voter who submitted a ballot should not receive vote history in the SURE system, it wouldn't show up on their voter record.

Q So it would -- it would show up as a vote that was received but not counted? I'm not sure what would -- what would show up on the voter record.

A Correct. It would not be clear. I -- it

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would not be an accurate description of the final disposition of the ballot.

Q And so if someone looked to see whether or not the person had voted in the last election, would it show that they voted or didn't vote?

MR. BERARDINELLI: Object to the form.

MS. GALLAGHER: Objection; form.

A It -- I think it would ultimately depend on what the county does --

Q Right.

A -- in terms of vote history. But it wouldn't be clear that the voter's ballot wasn't counted.

Q So I'm just totally ignorant of this. So you'll may have to walk me through it, but if the -- if a ballot -- mail-in ballot comes in, it's missing a signature and is ultimately rejected at the canvass, the original label in the SURE system would've been received, but -- or recorded rather, but if it was ultimately rejected, is there something that would tell the voter that it was rejected --

MS. GALLAGHER: Object to the form.

MR. BERARDINELLI: Join.

Q -- at the end of the day, or not?

MS. MULLEN: Object.

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A I -- after the election the voter would be able to determine whether their ballot was counted or not. And the email notifications, I guess, that would really depend on when the county ultimately recorded the disposition of the ballot. But, you know, I believe the voter has the right to know whether their ballot was counted or not. But how the county handles requests from voters on the disposition of ballots is unfortunately a decision that each county is entitled to make under the current status of the law, as I understand it.

Q So if they don't update the code after the canvass, SURE will have inaccurate information in it; is that right?

MS. GALLAGHER: Objection; form.

MS. MULLEN: Objection.

MR. BERARDINELLI: Join.

THE WITNESS: I -- it would certainly be incomplete information, and I would argue that it's inaccurate. For me as an election administrator, it is important to have good information and good data on this stuff because it informs our decision making. So I would hope that at some point the county would update the final disposition to accurately reflect what the final disposition of the ballot was.

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BY MR. BLACK:

Q Going back to Marks' 1, which is the release note. You were asked some questions about the cancel incorrect date on page 8. Do you recall that?

A I do, yes.

Q The email response that would go out if that code is selected, is stated in the right-hand column, it starts with your mail ballot may not be counted, et cetera. Do you see that?

A I do, yes.

Q It says in the second sentence that if you do not have time to request a new ballot before ballot application deadline, or if deadline has passed, and then it says you can go cast a provisional ballot. Right?

A Right.

Q Under what circumstance would someone be able to request a new ballot after having already sent in a mail-in ballot?

MR. BERARDINELLI: Objection; form.

A If -- so if -- so, the counties that do notice and cure actually have different practices, probably not a surprise to anyone in this room. In some cases, the county will actually cancel the

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original ballot and issue a new ballot to the voter. In other cases, they're asking the voter to perfect their original ballot. So we tried to capture in this language, and keep in mind we are -- we're trying to capture in a message that all counties have to use a variety of different practices in individual counties.

So -- but that might be a circumstance under which the voter becomes aware either from the county or otherwise, that something is wrong with their ballot. They reach out to the -- to the County Board of Elections and the county's practice is to cancel that initial ballot and reissue another one. And that typically happens, you know, two, three weeks before election day when there's still time to facilitate that.

Q Has it struck you at all that the U in SURE uniform is not really uniform?

MR. BERARDINELLI: Yeah, object to the form.

MS. MULLEN: Objection.

A The system is uniform. County practices are not in many cases, and this is one of those cases.

Q So the system is uniform, but it's not

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uniformly used by all the counties?

MR. BERARDINELLI: Objection; form.

MS. GALLAGHER: Objection; form.

MS. MULLEN: Form.

MS. GALLAGHER: That's more than form. That's a (indiscernible) 02:10:00 right.

MS. MULLEN: It's a uniform (indiscernible) 02:10:03 of electors, so.

A No, we -- again, we -- and I think it says it in this release notes or the accompanying email that, you know, our goal here was to provide counties with options that best met their specific practices, acknowledging that their practices are not uniform from county to county, that doesn't necessarily mean that the system isn't but we certainly designed flexibility into this process based on the Supreme Court's ruling in 2020 on the issue of notice and cure.

Q So under the cancel incorrect date code that we were just referring to --

A Correct.

Q -- the guidance is in the second column; is that right?

MR. BERARDINELLI: Object to the form.

Q What is the second column, business

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reason, it says.

A Yeah, it's, we're basically telling counties in this -- in this matrix under what circumstances they'd be -- they would want to select this ballot response type out of the dropdown list.

Q And so they should select cancel incorrect date if the reason in the box on page 8 next to that is --

MS. GALLAGHER: I'm going to --

Q -- true? Is that what the guidance is trying to communicate?

MR. BERARDINELLI: Objection.

MS. MULLEN: Objection.

MS. GALLAGHER: Objection to the form.

THE WITNESS: Yeah, I, I think it speaks for itself. I mean, you know, we're expecting that counties will select this cancellation reason if a final disposition -- if they determine what the final disposition of the ballot is, that is why we added the pending codes. It is if a county uses notice and cure, it is our -- or has a notice and cure process, it is our expectation that they would be using the pending codes as opposed to the cancellation codes. But that may not be the case in every county, depending on the county's practice.

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BY MR. BLACK:

Q And it says here that the cancellation incorrect date, "It should only be used when the county has made a final decision as to the ballot, or it does not offer the opportunity to cure it."

MS. GALLAGHER: I'm going to object to the form.

MR. BLACK: What's the objection? I just read the box -- read the --

MS. GALLAGHER: I don't believe it -- I don't believe it says should be.

MR. BLACK: I read the language --

MS. GALLAGHER: May I --

MR. BLACK: -- in the box. Please stop interrupting my questions.

MS. GALLAGHER: Excuse me. If I -- you believe -- I don't believe it says should.

MR. BERARDINELLI: Why don't we just -- why don't we just --

MS. GALLAGHER: Right. That's what you just said --

MR. BERARDINELLI: Why don't we just re-ask the question, Martin?

BY MR. BLACK:

Q And it says, "It should only be used when

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

A That is correct, yes.

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

MS. MULLEN: Objection to the term guidance.

MR. BLACK: Thank you.

MR. BERARDINELLI: Form.

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

BY MR. BLACK:

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

A Correct.

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

A This is our opinion of when it should be

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used.

Q And that opinion is that it should be used when the county does not offer the opportunity to cure; is that right?

A Correct.

Q Thank you. We haven't asked these questions yet, and I don't expect you to have exact numbers, but just generally, how many -- if you know, how many mail-in ballots were cast in the primary this year?

MR. BERARDINELLI: Objection; form.

Statewide or in Washington?

MR. BLACK: Statewide. Statewide.

THE WITNESS: Boy, that is a -- that is a good question. It's hundreds of thousands, and I don't recall off the top of my head.

BY MR. BLACK:

Q Several hundred thousand?

A Yes.

Q Do you have any sense of the number that were rejected or percentage that were rejected?

A I think it was a little over 1 percent, as I recall. It was certainly thousands of ballots that were rejected ultimately.

Q Do you know how many ballots were rejected

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in no cure counties versus cure counties? Do you study that?

A We looked at it, I can't recall what those numbers look like, no cure versus cure counties.

Q We've seen some data that suggests that curing processes in some counties can cure up to 60, 65 percent of the ballots. Does that seem correct?

A I believe that --

MR. BERARDINELLI: Object to the form.

MS. GALLAGHER: Objection; form.

A I believe that may be the case in Allegheny County, if I'm not mistaken.

Q Just talk a minute about the interaction between the SURE system and the poll books. And forgive me, I understand almost nothing about this. So I know the pulpits are printed. I show up to vote and they say my name's in it because they always have. But if I were to cast a mail-in ballot and show up to vote, what would be in the poll book?

A If -- it would depend on whether the -- your ballot was returned to the county or not. So it's -- and it's going to appear at a different location in the poll book, depending on that factor. So if you requested a ballot but didn't return it, you can actually go into the polling place and the

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poll book will indicate that in one section.

You can actually take your ballot, your unvoted ballot remit that to the local election officials, sign the poll, and then you can vote in the normal manner. If the poll book indicates that you've already returned your ballot then your option is to vote by provisional ballot. So the poll book will indicate that you've already returned your ballot and you're not entitled to vote the traditional manner, would have to by provisional ballot.

Q In an county that uses notice and cure, if they sent a notice out of a defective ballot and that person then shows up at the polling place, can they vote a provisional ballot?

MR. BERARDINELLI: Object to the form.

A If that voter shows up the polling place, and they affirm that they're qualified to vote, and understand that their ballot may not have been correctly submitted, they are entitled to vote by provisional ballot.

Q Do canceled votes versus recorded -- strike that.

In a county that does notice and cure, if a voter sends in a ballot, which is rejected because

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it's missing a signature and they receive the email stating that it was missing the signature, and they show up at the polls, does their name show up in a different part of the poll book than people who recorded properly?

A Yes. If they return their ballot, it is - - those are in a separate section of the poll book. So basically anyone who returned their ballot to the county are kind of segregated from the rest of the voters so that counties can keep -- or local poll workers can keep straight or distinguish between folks who may be able to remit their balloting materials versus those who've already submitted them to the county.

Q Do you know roughly how many counties are currently allowing notice and cure and how many are not?

MR. BERARDINELLI: Object to the form.

MS. MULLEN: Objection. Do you want a time period, primary, general, or?

Q Good point. For the last primary election, do you have any sense of what the rough number of counties that are --

A I don't recall the -- the number of counties. I know it is -- I believe it is at least

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half the -- provide some --

MR. BERARDINELLI: Excuse me. (sneezes)

MR. BLACK: Bless you.

MR. BERARDINELLI: Thank you.

A -- some form of notice and cure.

MR. BERARDINELLI: I'm sorry my sneeze locked out the answer. What was the percentage? I'm sorry.

THE WITNESS: I believe it is -- it is at least half, probably little more than half of the counties that provide some form of notice and cure.

MR. BERARDINELLI: Thank you.

THE WITNESS: Keeping in mind that there are variations in that.

BY MR. BLACK:

Q You mentioned the feedback session that you had with the county election officials.

A Yes.

Q Do you recall whether there were any specific comments by representatives of Washington County?

A I don't recall any comments by the election director.

Q Are there minutes or any record of that conversation?

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A I don't believe so. I think it was a -- it was a webinar. I don't believe that it was recorded. I don't know that there are minutes necessarily. The purpose of those was to give counties kind of an open forum to share with the department, their feedback regarding the ballot response type codes, how it worked out for them in their individual counties, and to get feedback on what changes they might want to see moving forward.

MR. BLACK: Can we just take five minutes off? I'm getting final questions.

MR. BERARDINELLI: Yeah, I might have some brief.

MS. GALLAGHER: I have some too.

THE VIDEOGRAPHER: We're going off the record. The time is 12:43.

(Off the record.)

THE VIDEOGRAPHER: We are back on the record. The time is 12:47.

BY MR. BLACK:

Q Just a couple more questions on new topic. The DOS mail-in ballot tracker, what is that?

A It's basically an online tool that a voter could use to determine, you know, when their ballot was mailed to them, when the county received their

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ballot as returned.

Q Is the information in the ballot tracker available to third parties?

A Well, the information in the ballot tracker will be contained in the mail ballot voter file that we provide to third party requesters.

Q And that's updated every day?

A Yes, as we approach the election, it's updated every day.

Q And if the code entered by a county is record ballot returned, then that's what will show up when the voter goes to look at his ballot status, correct?

A I believe so, yes. I believe it would say ballot returned or ballot received, something like that.

Q And on the other hand, if a county enters one of the canceled codes, it would show canceled to the voter or any third party who has access to the data on the --

A Correct.

Q What happens if the code is pending, do you know what the voter would see?

A I -- as far as I know, they would see the pending code status.

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Q Do the tracker -- does the tracker show the text of the emails or does it just have the code or?

A It just has the code. It's very simple matrix.

MR. BLACK: Thank you for your time. I'll pass the witness.

MS. GALLAGHER: Do you mind if I --

MR. BERARDINELLI: Yeah, if you don't mind, just briefly, I want to talk about the feedback sessions.

RE-EXAMINATION BY COUNSEL FOR THE DEFENDANT BY MR. BERARDINELLI:

Q Okay. You mentioned that you don't recall the director -- elections director for Washington County speaking, testified to that?

A Right.

Q Don't recall has different connotations. So I want to unpack this a little bit. Do you have a recollection one way or the other, whether she spoke or not?

A I don't.

Q Right. How many people spoke on the meeting?

A A lot of counties spoke on the meeting, so

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I can't recall if a specific one Melanie spoke.

Q Right. So if Melanie Ostrander testified under oath that she did speak, you don't have a recollection that's contrary to that?

A Correct.

Q Can we pull out, hopefully for the last time, Marks' Exhibit 1, and you were looking at page 8, and we can stay right there on page 8. Mr. Black was asking you some questions about the cancel incorrect date. I'm going to call it entry on this spreadsheet type document. And the email that is sent, if this code is selected, has language that says, if you do not have time to request a new ballot before, and that would be the application date for that election, right?

A Correct.

Q Do you agree that implicit in that is if that date hasn't passed, that someone reading this is being told that they can request a new ballot?

A Yes.

Q Okay. And in a county that does not permit curing, can they get a new ballot?

A It -- again, it would depend on the county's process exactly. But if it is -- if it is not the county's process to cancel a ballot and

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reissue a ballot if there's an issue with that ballot, then no.

Q And do you know what Washington County's policy was about issuing new ballots in the 2024 primary?

A I do not, no.

Q Let's assume that their policy was that we're non-curing county, we're not going to issue a new ballot if you made an Act 47 -- Act 77 mistake. Assume that for sake of my question. Okay?

A Okay.

Q If that's their policy and a voter got this email, would you agree that the email would be misleading because it would tell a voter that they could request a new ballot?

A I would agree that that would certainly be the county's perspective. That this email as it's written, would be misleading under that circumstance.

Q And that's not some outrageous perspective. Right?

A I don't want to represent it, but, you know, I don't -- I certainly, if you read this and match it up with the county's practice, I can understand why there'd be concern about the language of the message.

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Q And what our goal here is, I think collectively at least, is to make sure voters have accurate information?

A Correct.

Q Can we pull out Marks' 3, the April 3rd, 2023 guidance. And I'm going to ask you some questions about the same section on page 3 that Mr. Black asked you some questions about. So under the heading examination of declaration on mail ballot return envelopes, are we at the same place?

A Yes.

Q Okay. And the first sentence of that indicates that the county boards of elections is responsible for approving ballots to be counted during pre-canvassing and canvassing, right?

A Correct.

Q So this section is talking about conduct during pre-canvassing and canvassing.

A Correct.

Q And pre-canvassing, I think we established doesn't start until 7:00 a.m. on election day, right?

A Correct.

Q And canvassing doesn't start until the Friday after election day?

A Well, canvassing of mail ballots starts at

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8:00 p.m. on election day.
Q 8:00 p.m.
A Pre-canvassing and then canvassing. Then the official canvass of all the votes starts on Friday afterwards.
Q Either way, as far as canvassing goes, the polls are closed.
A Correct. Yes.
Q And then if we look down in the third paragraph, it's talking about when the status code ought to be updated, correct?
A Correct.
Q Okay. And in the second sentence, starting in the second word of the third line, it says, if the board determines that a ballot should not be counted. Do you see that language?
A I do, yes.
Q And that would -- that final determination, whether to count or not count the ballot happens during the canvassing, right?
A Correct.
Q Okay. So I'm canvassing, I say this guy doesn't have a date, we're not going to count him, right?
A Right.

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Q If I go into the SURE system, polls are closed, right? Yes?
A Correct. Yes.
Q Okay. I go into the SURE system, I mark canceled no date. Okay. Is the county voter going to get this email that tells them to go vote a provisional ballot?
A If -- yes. If the email notifications are being sent out, yes.
Q Yeah. If Jane Smith has janesmith@yahoo on file, she's going to get this email, right?
A Right.
Q And this email is telling her after the polls have closed to go try and cast a provisional ballot?
A Correct.
Q Has the department considered adopting a code for use after the canvassing that will simply say your ballot was canceled, for example, because of an incorrect date?
A We -- what we've looked at and based on our feedback during the feedback sessions while we looked at, was adding clear language that if it's -- if it's after election day at the -- the voters receiving a notification that this is essentially the

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final disposition. I don't recall the exact language, but certainly that issue was raised. And what -- what we discussed and what is our intent is to put clear language in there that some of this information would only be applicable up to 8:00 p.m. on election day.
Q And that's going to be in effect for the November, 2024 election?
A That is the intent. Yes.
Q Let me show you what is already marked as -- that was Ostrander Exhibit 10. You and I had some discussions about the ballot instructions, right
A Correct.
(Ostrander's 10, previously marked, is attached to the transcript.
Q And those are the ballot instructions from the primary, correct?
A They are, yes.
Q And can you read the -- not the immediate top line, but the second line of the document into the record.
A "For your ballot to count, you must follow all of these steps."
Q And that was the notice you were talking about that you wanted to provide to people who are

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receiving mail-in ballots?
A Correct.
MR. BERARDINELLI: We couldn't remember the verbiage, so I just wanted to make sure we had it. I think that's all I have. Thanks, Mr. Marks.
MR. BLACK: I have some --
MS. GALLAGHER: Okay.
MR. BLACK: I have some redirect.
MS. GALLAGHER: Well, so I'll wait till you're done. Go ahead.
MR. BLACK: No. No.
MS. GALLAGHER: No, go ahead, Martin.
MR. BLACK: Definitely not. You're on the same side. You guys go, go ahead. You have questions.
RE-EXAMINATION BY COUNSEL FOR THE DEFENDANT
BY MS. GALLAGHER:
Q With respect to (indiscernible) 02:32:18 I cast a mail-in ballot, secrecy envelope signed and dated, gets received, you know, received, marked in, I'm in Allegheny County, they cure. How does my ballot under what your recommendation would be get entered into the SURE system?
A Well, you said secrecy envelope, I'm assuming you meant declaration envelope.

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Q No, everything.
A You wouldn't sign and date that. But --
Q I didn't mean to sign.
A If you're --
Q Everything I had said --
A So you've submitted -- you've submitted your ballot to the Allegheny County Board of Elections.
Q Right.
A And --
Q Contains a secrecy envelope, ballots in a secrecy envelope, declaration envelope is signed and dated.
A Right.
Q Stamped. It gets received.
A Right.
Q How does that get recorded?
A Returned ballot --
Q Recorded.
A -- recorded, yeah.
Q Okay.
THE VIDEOGRAPHER: Counsel, it might be best if you take the mic --
MS. GALLAGHER: Oh, I'm sorry.
THE VIDEOGRAPHER: No, it's okay.

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MS. GALLAGHER: I apologize.
MR. BERARDINELLI: I don't know if it's good or bad.
MS. GALLAGHER: No one has --
MR. BERARDINELLI: I'm the only one that doesn't need the mic.
MS. GALLAGHER: No one has ever accused me of not needing mic.
Q Anyway, during the canvassing process, find out my actual ballot is blank. Is my -- then what gets entered into -- in the SURE system?
A I would expect that a county would select cancel other under that circumstance --
MS. MULLEN: Objection. Objection.
A -- if the ballot was defected.
MS. MULLEN: Hold on. Hold on.
THE WITNESS: Sorry.
MS. MULLEN: You're talking about the voter's actual ballot was blank?
MS. GALLAGHER: Where you fill in, right.
MS. MULLEN: Yeah.
MS. GALLAGHER: Okay.
MS. MULLEN: So they're separated. You would never -- you have secrecy in voting. You --
THE WITNESS: Thank you, Counsel.

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MS. GALLAGHER: No. No, during the canvass.
THE WITNESS: It's an excellent point.
MS. GALLAGHER: During the canvass.
MS. MULLEN: Okay. I'm going to let him --
MS. GALLAGHER: Okay.
MS. MULLEN: Ask your question.
THE WITNESS: No, Counsel is correct. You wouldn't be able to go back and you wouldn't be able to determine whose voter's ballot that was at that point.
MS. GALLAGHER: That's not --
THE WITNESS: -- so you wouldn't be able to update the disposition.
BY MS. GALLAGHER:
Q Okay. That's what I'm trying to figure out. That was what my question was. Would there be a way to go back and update that then?
A No, I -- because you've taken the ballot out of the secrecy envelope, maintaining the secrecy of the ballot, there would be no way to tie it back to the declaration envelope.
Q What I would expect. And what does it -- that it would show that my ballot was received and

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recorded, correct? That the SURE system would received and recorded.
A It would. Correct.
Q Because there's a difference, would you agree then between the count and whether or not the ballot is received in the office, I mean, in the county board?
A Well, I mean, there's a difference between the disposition of the ballot based on the Board of Elections determination during either the pre-canvass or the canvass versus the active recording the ballots status in the SURE system.
Q Is that --
A The two should be connected and that is --
Q Right. That's what I'm trying to understand.
A That's the point of our guidance, but they're two separate and distinct things.
Q Okay. And speaking of separate and distinct things, would you agree that notice and cure are two step -- two separate steps in the curing process?
MS. MULLEN: Objection.
MR. BLACK: Objection to form.
Q So if the voter gets a notice with the

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opportunity to cure, would be --
A I mean, we're kind of having a philosophical discussion now.
Q No, I'm trying ask, is it --
A If you're -- if you're asking me whether notice and cure are two distinct things, there are certainly two steps, I guess, in a process.
Q Right. That's what --
A First, notifying the voter, and secondly, the voter actually curing the ballot.
Q That's what I was asking. And would you agree that, I believe you testified earlier that what the PA Supreme Court refused to mandate were notice and cure procedures?
MR. BLACK: Objection.
MS. MULLEN: Objection.
MR. BLACK: Calls for legal conclusion.
Q I can go back, I can type it.
A I -- my understanding of the Supreme Court's ruling is that it does not mandate that counties provide for notice and cure.
MS. GALLAGHER: Right. That's all I was asking. Nothing further.
RE-EXAMINATION BY COUNSEL FOR THE PLAINTIFF
BY MR. BLACK:

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Q Just one last set of questions here. If we go back to the SURE guidance, the March, 2024 guidance --
MR. BERARDINELLI: Object to the form. It's not guidance.
THE WITNESS: The release notes.
BY MR. BLACK:
Q Point taken. If you take -- if you take a look at the release notes, Marks' 1, you were asked some questions a moment ago about cancel incorrect date code. You recall that?
A Yes.
Q If you look on page 6 and take a look at the pend-other code, you see that one?
MR. BERARDINELLI: Sorry, 6, Martin?
MR. BLACK: Yes.
A Pend other?
Q Yes.
MR. BERARDINELLI: Give me one second please. Thank you.
Q You see that code?
A Yes.
Q And the language associated with the email says, the county has noticed an error with your ballot envelopes, which means your ballot may not be

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counted. Do you see that sentence?
A Yes.
Q And that would be accurate, for instance, if you had a county that looked at the ballots, noticed that the signatures or dates were missing or wrong and then segregated them before the pre-canvass, correct?
MR. BERARDINELLI: Object to the form.
A I don't think that that would be the response type that we would recommend using if there was a signature missing, we would recommend using the pending no signature code on the following page, page 7.
Q The one on page -- let's say you're in a county that doesn't offer cure, then the code on page 7, which says that the county offers you the opportunity to fix your ballot, that wouldn't really be appropriate, right?
A Correct.
Q Okay. But the language in the pend other code, it just says, the county has noticed an error with your ballot envelopes, which means your ballot may not be counted. If you cannot fix the errors in time, you can go to the poll -- your polling place on election day and cast a provisional ballot, correct?

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A Correct.
Q So that language in and of itself would be acceptable if a county wanted to use it to notify a voter who had delivered a ballot without a signature?
MR. BERARDINELLI: Object to the form.
MS. GALLAGHER: Objection.
Q Not required, just acceptable.
MR. BERARDINELLI: Are you talking curing county or non-curing county?
MR. BLACK: I'm just asking him a question about this language. Curing, non-curing, whatever. In my example, it's a non-curing --
MR. BERARDINELLI: Object to form. Because it's ambiguous given the different county --
BY MR. BLACK:
Q In a non-curing in a county, would this language be appropriate to send to a voter who would return to ballot without a signature or an incorrect date?
MR. BERARDINELLI: Objection; form.
Q Not required. Would it be --
MR. BERARDINELLI: Says, fix the errors.
MR. BLACK: You're being argumentative. You're interrupting my question.
A I would -- I would not expect that a non-

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curing county would use any of the pending codes, but I cannot say that it would be inappropriate if the county's process is to replace a ballot under certain circumstances. Again, and it is -- it's all going to come down to what a -- the specific county's practice is. So I -- I can't say that would be inappropriate. I think our expectation when we introduce the pending codes is that they would only be used by counties who offered some variation of notice and cure.

Q And with respect to the cancel codes, it's expected that those would be used for counties that don't offer the opportunity to cure; is that right?

MR. BERARDINELLI: Object to the form.

A I think generally, yes.

MR. BLACK: Okay. Thank you. No further questions.

MR. BERARDINELLI: I'm good.

THE VIDEOGRAPHER: Anything else for the record?

MS. GALLAGHER: You done?

MS. MULLEN: I'm done.

MS. GALLAGHER: All right. No questions.

MR. BERARDINELLI: Thank you, Mr. Marks.

THE VIDEOGRAPHER: This marks the end of the videotaped deposition of Jonathan Marks. We're

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going off the record. The time is 1:07.

(Off the record 1:07 p.m.)

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CERTIFICATE OF COURT REPORTER - NOTARY PUBLIC

I, KYLAN BARRY, the officer Before whom the foregoing proceedings were taken, do hereby certify that any witness(es) in the foregoing proceedings were fully sworn; that the proceedings were recorded by me and thereafter reduced to typewriting by a qualified transcriptionist; that said digital audio recording of said proceedings are a true and accurate record to the best of my knowledge, skills, and ability; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

Kylan Barry

KYLAN BARRY,
NOTARY PUBLIC FOR THE COMMONWEALTH OF PENNSYLVANIA

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CERTIFICATE OF TRANSCRIBER

I, Robert Kreb, do hereby certify that this transcript was prepared from the digital audio recording of the foregoing proceeding; that said transcript is a true and accurate record of the proceedings to the best of my knowledge, skills, and ability; and that I am neither counsel for, related to, nor employed by any of the parties to the case and have no interest, financial or otherwise, in its outcome.

Robert Kreb

ROBERT KREB
7/24/2024